

MERTHYR TYDFIL CBC v C**QUEEN'S BENCH DIVISION**

Hickinbottom J.: January 21, 2010

[2010] EWHC 62 (QB); [2010] P.I.Q.R. P9

☞ Child abuse; Children; Conflict of interest; Duty of care; Local authorities; Parents; Psychiatric harm; Third parties

- H1 *Appeal—personal injuries—sexual abuse—duty of care of council to parent of abused child—psychiatric injury to parent—whether duty of care owed by council to claimant parent—application to strike out—summary judgment—whether good prospects of success at trial.*
- H2 The claimant had two young children (A born in 1996 and B in 1998) whom she claimed in 2002 were abused by the child of a neighbour, D, who was born in 1994. She reported the abuse to the NSPCC which passed on the complaint to the defendant. The defendant advised her to keep her child indoors. In August 2004 the claimant's children were once again abused by D and the claimant reported the incident to the defendant. A meeting then took place between the defendant and the claimant at which the defendant denied the claimant had previously reported the abuse and refused to report it to the NSPCC. Following this meeting in August 2004 the claimant suffered psychiatric symptoms. D was later removed from her family and placed with foster parents. The claimant then claimed damages for personal injury caused by the negligence of the defendant.
- H3 The defendant applied to strike out the action under CPR r.3.4(2)(a) or to seek summary judgment under CPR r.24.2 on the basis that the Particulars of Claim disclosed no reasonable cause of action and the claim had no real prospect of success. The judge at first instance dismissed the application and the defendant appealed.
- H4 The defendant contended as its central submissions that (a) in law it owed no duty of care to the claimant, as such a duty of care owed to the parent would potentially conflict with that owed to the claimant. (b) The claimant was a third party and so did not fall within the parameters of those third parties to whom a duty can be owed. Reliance was placed on *JD v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151.
- H5 **Held**, dismissing the appeal; the defendant did owe a duty of care to the claimant. First, the defendant's construction of *JD v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151 within this appeal was in error. That case held that an authority, which owed a duty of care to children, did not owe a duty of care to those suspected of abusing those children (whether they were parents or not). That situation did not pertain in the present case. Further, it did not lay down any general principle that where an authority owed a duty to a child it cannot, as a matter of

law, owe a duty to the parents of that child. (*W v Essex CC* [2001] 2 A.C. 592 and s.17(1) of the Children Act 1989 considered).

H6 Secondly, it was wrong to assert that the defendant owed no duty of care to the claimant as she was a “third party” and so did not fall within the parameters of third parties to whom a duty can be owed. The concept of “third parties” is based on the premise that the scope and content of the duty of care owed to the primary victim and third party are the same. In this case, the duty of care asserted by the claimant was not merely parasitic upon the duty owed by the defendant to her children (A and B), but also that she was owed a distinct duty of care from that owed to her children. (*A v Essex CC* applied, *JD v East Berkshire Community Health NHS Trust* distinguished).

H7 Thirdly and in any event, the defendant’s analysis of *JD v East Berkshire Community Health NHS Trust* was not sound. The issue in that case was whether, in all the circumstances of the case, it was just, fair and reasonable to impose a duty of care as contended for. On a proper construction, the opinions of the House of Lords do not suggest there were two entirely discrete grounds for the refusal to find a duty of care, which existed as a matter of law. Rather there was consideration of one ground of which the potential of conflict of interest and the fact that the parents were “third parties” were merely factors in determining that ground. Accordingly, in the present case, based on a number of facts, there was a real prospect of the claimant proving that it was fair, just and reasonable that the defendant owed her a duty of care.

H8 In considering whether to strike out the case under CPR r.3.4(2) or to give summary judgment under r.24.2, the judge exercised his discretion in favour of the case proceeding to trial, based on real prospects of success and there being reasonable grounds for her to proceed. He was correct to do so and the appeal should be dismissed.

H9 **Cases judicially considered:**

Caparo Industries Plc v Dickman [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568 HL
JD v East Berkshire Community Health NHS Trust [2003] EWCA Civ 1151; [2004] Q.B. 558; [2004] 2 W.L.R. 58

H10 **Cases referred to in judgment:**

A v Essex CC [2003] EWCA Civ 1848; [2004] 1 W.L.R. 1881
Barrett v Enfield LBC [2001] 2 A.C. 550; [1999] 3 W.L.R. 79; [1999] P.I.Q.R. P272 HL
Lambert v Cardiff CC [2007] EWHC 869 (QB); [2007] 3 F.C.R. 148; (2007) 97 B.M.L.R. 101
Lawrence v Pembrokeshire CC [2007] EWCA Civ 446; [2007] 1 W.L.R. 2991; [2007] 2 F.L.R. 705
Sullivan v Moody 207 C.L.R. 562
W v Essex CC [2001] 2 A.C. 592; [2000] 2 W.L.R. 601; [2000] 2 All E.R. 237 HL
X (Minors) v Bedfordshire CC [1995] 2 A.C. 633; [1995] 3 W.L.R. 152; [1995] 3 All E.R. 353 HL

H11 **Legislation judicially considered:** Children Act 1989

H12 **Appeal** by the defendant against the decision of H.H. Judge Jarman QC dismissing an application to strike out the claim under CPR r.3.4(2)(a) and summary judgment under CPR r.24.2.

JUDGMENT

HICKINBOTTOM J.:

- 1 The claimant, C, has two children, A born in 1996 and B born in 1998. They have at all material times lived as a family at addresses within the area for which the defendant local authority (the Council) is obliged to provide social services.
- 2 In these proceedings, the claimant seeks damages for personal injury in the form of a psychiatric condition which she alleges was caused by the negligence of the Council in failing properly to deal with reports made by C in relation to sexual abuse of A and B by another child.
- 3 The claimant relies upon the following factual basis for her claim which of course will be subject to proof if the claim proceeds. In 2002, C became aware that her children had been the subject of inappropriate sexual behaviour by a neighbour's child, D, who was born in 1994. In August 2002 she reported the abuse to the NSPCC who passed on the complaint to the Council. Direct contact between C and the Council followed, and the Council advised her to keep her children indoors. C followed that advice but, over time, as the child D did not appear to be playing outdoors, C allowed A and B to play outside.
- 4 In August 2004, D abused A and B again and, on August 24, 2004, the claimant reported that abuse direct to the Council. That same day, at a meeting between the claimant and Council representatives, those representatives denied that the claimant had ever reported an incident in 2002, and refused to contact the NSPCC regarding the 2002 incident and report. Following the meeting, the Council allocated a social worker, Ms Sian McDermott, to the claimant and her family. That person was also the social worker allocated to D's family.
- 5 Following the August 2004 meeting, C suffered psychiatric symptoms. She relies upon three reports of a consultant psychiatrist, Dr Webster, which describe the claimant as suffering:

“... irrational guilt feelings that she has been unable to protect her children and [that] she felt tormented by uncertainty about how she could protect them in the future.” (October 11, 2007 report at para.2.)

In Dr Webster's opinion, she suffered “an acute anxiety attack triggered by her experience of the Social Services disbelieving she had previously reported abuse in 2002” (April 18, 2007 report, conclusion(ii)), and that experience:

“... along with her intense distress at the knowledge that her children had been subjected to further abusive incidents, caused her to suffer a psychiatric illness in the form of a panic disorder with agoraphobia (DSM IV 300.21)” (October 11, 2007 report at para.4.)

- 6 D was later removed from her family by the Council, and placed with foster parents.
- 7 However, C was unhappy and concerned about the way in which her complaints in respect of D's abuse of her children had been dealt with by the Council, and

pursued an internal complaint. Mr Leighton Rees, Head of Children and Families at the Council, responded to the complaint by letter of February 21, 2005, as follows:

“... [W]ith regard to the referral from the NSPCC I can confirm that we did receive this referral as a telephone call. This referral was placed on the file of the other child [i.e. D]. This was a mistake on our part as it should also have been recorded on a file for [A] and [B]. It is for this reason that we were unable to find the referral two years later. It also meant that we did not offer your family [a] service to support them following the incident, which would have been good practice, and I apologise about this.

The record also show that this referral was investigated at the time. However what is not on the file is a written copy of the referral from NSPCC ... [I]f we did not receive the report we should have taken further steps to obtain another copy, and if we did we should not have mislaid it, so either way we need to improve the way in which we handle documents. Furthermore when you identified that we did not have a copy from the NSPCC we did not take sufficient steps to obtain a copy from them.

With regard to the allocation of Sian McDermott as a social worker I would accept that there would have been potential for conflict of interest as Sian was allocated to both families. I therefore apologise for this, and would like to reassure you that from now on, in a similar situation, unless there is a very good reason we will allocate a different social worker to each family ...

To summarise we have several lessons to learn. In 2002 our response was to the other family only without thinking about what services were offered to [A] and [B]. In 2004 we had improved in some ways as we responded to yourself as a family and I understand that via Sian you have been offered keep safe work ... and, although [A] chose not to continue with this, [B] did. However we still could have offered a better service in 2004, in particular when we chose to allocate the same social worker, a decision which in retrospect caused you some difficulties. Also we need to improve the way in which we obtain and store reports for our files as we should have ensured we had a copy of the NSPCC report on file.”

8 In this action, supported by the evidence of Dr Webster, C claims her psychiatric illness was caused by the negligence of the Council. In para.13 of her Particulars of Claim, 10 particulars of negligence are identified to the effect that the Council failed properly to respond to and deal with the 2002 and 2004 complaints, and failed to take adequate steps to prevent the abuse of A and B by D in 2004.

9 Proceedings were issued on August 6, 2007. On July 9, 2009, the Council applied to strike out the claim pursuant to CPR r.3.4(2)(a) or alternatively for summary judgment for the defendant pursuant to CPR r.24.2, on the basis that the Particulars of Claim disclosed no reasonable ground for pursuing the claim and the claimant had no real prospect of success in the claim. Both limbs of the application were based on the premise that the Council owed no duty of care to the claimant because “where child care decisions are being taken, no common law duty of care should be owed to the parents”, that being a quote from Lord Phillips of Worth Matravers M.R. in the consolidated appeals in the Court of Appeal in *JD v East Berkshire Community Health NHS Trust* sub nom. *MAK v Dewsbury Health Care NHS Trust* and *RK v Oldham NHS Trust* [2003] EWCA Civ 1151; [2004] Q.B. 558 at [86]. For convenience, I shall refer to that case as simply *JD v East Berkshire*.

- 10 In *JD v East Berkshire*, parents brought actions in negligence against a social services department and various healthcare professionals claiming damages for psychiatric harm allegedly caused by allegations that the parents themselves had abused their own children. Those allegations ultimately proved to be false. The Court of Appeal held that, in the circumstances, the Council owed no duty of care to those parents, a decision upheld by the House of Lords ([2005] UKHL 23; [2005] 2 A.C. 373). In this claim, in its application of July 9, 2009, the Council submitted that they owed no duty of care to C “pursuant to inescapable analogy with [*JD v East Berkshire*]”.
- 11 The application came before H.H. Judge Jarman QC on September 17, 2009. He refused the application, and an appeal against that ruling is now made with the permission of Kitchen J. I should say for the sake of completeness that a two-day trial of the action has been set down for hearing in Cardiff on March 10, 2010.
- 12 Generally, as identified in *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 at 617H–618B per Lord Bridge, a common law duty of care is owed when three criteria are satisfied, namely:
- (i) it was foreseeable that the claimant would suffer damage if the defendant acted as alleged;
 - (ii) there is a relationship of sufficient proximity between the parties; and
 - (iii) it is fair, just and reasonable to impose a duty of care on the defendant in all the circumstances.
- 13 Mr White conceded before Judge Jarman and me that the question of whether or not it was reasonably foreseeable that C would suffer psychiatric damages if the Council had acted as C alleges they did act in relation to the 2002 and 2004 complaints is reasonably arguable and is not suitable for summary determination. That concession was properly made. However, he submitted that the second and third limbs of the *Caparo* test are not even arguably met: it is not arguable that there was sufficient proximity between C and the Council, nor is it arguable that it is fair, just and reasonable to impose a duty of care on the Council towards the claimant in all of the circumstances of this case. As Mr White pointed out (*Skeleton in Support of the Application* at para.7), and as stressed in *JD v East Berkshire*, there is considerable overlap between limbs (ii) and (iii) of *Caparo*, with the concept of proximity going to whether it is fair, just and reasonable in all the circumstances for the law to impose a duty of care. He therefore understandably concentrated upon whether, as a matter of law, it would be fair, just and reasonable that a duty of care should be imposed upon the Council to C in the circumstances of this case. He contended that a submission that a duty of care exists in these circumstances stands no real prospect of success and, given the inability of the claimant to show a duty of care was owed, the Particulars of Claim disclose no reasonable ground for pursuing the claim.
- 14 Mr White relied upon two main grounds to make good that submission. However, before I consider those, to clear the decks I shall deal first with two further points upon which he relied which can be dealt with shortly.
- 15 First, although this application had to be contested on the basis that the claimant could make good her factual allegations, he submitted that the claim in respect of the alleged failure of the Council properly to deal with the 2002 complaint was unsound, because the NSPCC Request for Service resulting from that complaint, which purportedly sets out the details of the assessment requested, refers only to

D and his family members as subjects of the request for service, A and B being referred to as merely “significant others”. The claim insofar as it related to the 2002 complaint was, he submitted, premised upon a request by the claimant for assistance for her children: and that premise was unsustainable in the light of this report.

- 16 I do not consider that that submission has force. The Council’s letter of February 25, 2005, to which I have already referred, on its face accepts that, as the failure of the Council to put the 2002 incident report on a file for A and B meant that, “[the Council] did not offer [C’s] family [a] service to support them following the incident, which would have been good practice”. From that, the Council themselves appear to have accepted that the 2002 report ought to have triggered some action on their part in respect of A and B. That is sufficient for this application to proceed on the basis that the claimant may be able to make good the facts upon which her claim is made insofar as it relates to the 2002 report.
- 17 Secondly, in relation to both substantive issues (with which I deal below), Mr White submitted that the judge applied the wrong legal test, by allowing the case to proceed to trial because it was “arguable”, the correct test under CPR r.24.2 being whether the claim had a real prospect of success. Had the judge applied the correct test, the argument went, he would not have allowed the claim to proceed.
- 18 I do not accept that the judge adopted the wrong test. In relation to the “third party” issue, he considered the claimant’s case on that issue to be “arguable at least” and “reasonably arguable” (at [16] and [17]). On the “conflict of interest” issue, he considered there was a “reasonable argument” that a duty could be owed (at [14]). The test under CPR r.24.2 is “real prospect of success”. A “prospect of success” merely means a chance of success: the additional word “real” means that the court will ignore a fanciful chance, and require the claimant to have a case that is more than merely arguable. The judge clearly had that test in mind. He not only considered whether the claimant had a “reasonable arguable” case—something more substantial than merely arguable—but, in [6] of his judgment, he referred specifically to the fact that the application was made under both rr.3.4(2)(a) and 24.2. Although he appears there to say there that the “no reasonable prospect of success” test was that for the former rather than the latter, I have no doubt that in substance he applied the correct test when applying r.24.2.
- 19 That brings me to the two substantive grounds relied upon by Mr White on behalf of the Council, namely that, even if the claimant were to satisfy the court as to the factual basis of the claim upon which she relies, as a matter of law the claimant is not owed a duty of care because (i) the owing of a duty of care to a parent and/or reporter would potentially conflict with the duty of care which the Council owes to the children A and B and (ii) the claimant is a third party and does not fall within the narrow parameters of those third parties to whom a duty can be owed. He submitted that those are two discrete grounds, either of which is sufficient for the defendant to succeed on the application in this case and each of which derives as a matter of law from *JD v East Berkshire* which is binding on this court. I will deal with the grounds in turn, before making some comments spanning both.
- 20 First, Mr White submitted that the duty of care owed to children by the Council is paramount, and therefore as a matter of principle and as a matter of law no duty of care can be imposed upon an authority in respect of a parent, reporter or anyone else where there is any potential conflict between such a duty of care and that owed to relevant children. It is the *potential* for such a conflict that is relevant and triggers

the immunity, rather than whether, with the benefit of hindsight, a conflict in fact arises. Mr White submitted that there will always be a potential conflict of interest between a parent and his/her child because social workers involved with the family may, as a response to concerns about a child, be required (for example) to offer a child therapeutic intervention or consider taking child protection proceedings and/or taking proceedings to take a child into care, and the taking of those decisions in the child's interest would be hampered if the social worker had also to be concerned at all about the parent. The same applies to the potential conflict between a reporter and a child, whether the reporter is a parent or not. Although the submission concentrated on cases in which there is at least a suspicion that the relevant child had been abused by someone, rationally the force of that submission cannot be restricted to cases in which the child has been or may have been abused. If the social services are involved in a family with children, it is all but inevitable that there will be some potential concern for the children. Indeed, Mr White did not resile from putting the proposition that, where a Council owed a duty of care to any child, they did not and could not owe any duty of care to that child's parents because there would always be the potential for a conflict of interest.

- 21 However, "people may be subject to a number of duties, at least provided that they are not irreconcilable" (*Sullivan v Moody* 207 C.L.R. 562 at [60], approved in *Lawrence v Pembrokehire CC* [2007] EWCA Civ 446; [2007] 1 W.L.R. 2991 at [51]), and there is considerable authority to the effect that, even where a local authority do owe a duty of care to a child, they are not immune from also owing a duty of care to that child's parents. In *A v Essex CC* [2003] EWCA Civ 1848; [2004] 1 W.L.R. 1881, an adopted boy caused injury to his adoptive family by his bad behaviour, causing physical and psychiatric injury to both parents and throwing an iron at their natural child. The authority were aware before the placement that the boy had a history of aggression towards family members. They were also aware that the adoptive father was mentally fragile. The Court of Appeal held that the relevant local authority owed the adoptive parents a duty of care in relation to the information provided to those parents about the placed child, despite that same authority owing a duty of care to the parents' natural children who were at threat from that child. In *Lambert v Cardiff CC* [2007] EWHC 869; [2007] 3 F.C.R. 148; (2007) 97 B.M.L.R. 101, a child made allegations of sexual abuse against her foster father who (with the foster mother) suffered psychiatric harm as a result. On the basis of *A v Essex CC*, the authority conceded in that case that they owed the foster parents a duty of care, although the scope of that duty was in issue.

- 22 Such a duty of care to parents may be owed even where a child to whom the authority owe a duty of care has been abused or is suspected of having been abused. In *W v Essex CC* [2001] 2 A.C. 592, the claimants were prospective foster parents who received assurances from social services that they would not receive a foster child who was a sexual abuser. In fact, the placed child had a history of abusing children, and he proceeded to abuse the foster parents' own children. The House of Lords held that it was arguable that a duty of care was owed by the authority to the foster parents in these circumstances, and certainly the authority were not immune from a negligence suit as a matter of law by virtue of any "conflict" of duties. Whether the claim was justiciable was dependent upon an investigation of the full facts. The parents' appeal against the strike out of their claim was consequently allowed.

- 23 In these cases, the courts have drawn the distinction between decisions relating to policy and those relating to operational matters considered in *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633. Where an authority's decision concerns policy, it is not generally justiciable: the courts are not equipped to enter upon an assessment of such policy matters, and will not do so (*X (Minors)* at 737F–737G). The position is different in relation to matters concerning operation, as opposed to policy, the distinction being said to be between (a) taking care in exercising a statutory discretion whether or not to do an act, and (b) having decided to do that act, taking care in the manner in which you do it (*X (Minors)* at 735H). Therefore, in *A v Essex CC*, it was held that the authority owed the parents a duty of care, not in respect of their decision as to the extent of the information which should be given, but in respect of the passing on of such information as the authority decided should be given to the parents. In *W v Essex CC*, the duty of care arose from the assurance the prospective foster parents received from the authority that they would not receive a foster child who was a sexual abuser. In each of these cases, a duty of care was found to be owed to the parents in circumstances in which there had been engagement between the authority and the parents, and the scope of that duty of care was limited to the operational (as opposed to the policy) field. As I have indicated, in *Lambert v Cardiff CC* the fact that the authority owed a duty of care to the prospective foster parents was conceded, the issue being the precise scope of that duty.
- 24 I do not accept the proposition advocated by Mr White that *JD v East Berkshire* radically altered the law in this regard, by holding that an authority which owed a duty of care to children could not in any circumstances owe a duty of care to that child's parents because of the potential for conflict.
- 25 First, that contention appears to me to cut against the obligation of a local authority, so far as consistent with their duty to safeguard the welfare of children who are in need, "to promote the upbringing of such children by their families" (s.17(1) of the Children Act 1989).
- 26 Secondly, had that been the intention of the House of Lords in *JD v East Berkshire*—and had it been their intention effectively to overrule cases such as *W v Essex CC*—one would have expected their Lordships to have said so in clear terms. They markedly did not.
- 27 In any event, although their Lordships refer to "potential conflict" in the context of parents who are suspected of abusing their own children, it is clear that they regarded the fact that they were being asked to hold that those responsible for the protection of children owed a duty of care to the suspected perpetrators as being vital. Although perhaps rightly described as "potential" conflict (because the parents were only suspected of the abuse—in the event, wrongly), on the facts of *JD v East Berkshire*, the conflict was stark. As Lord Nicholls indicated (at [71]–[72]), "in the ordinary course the interests of parent and child are congruent", but where the suspected source of the abuse is from a parent himself/herself, then "the child is at risk from his primary and natural protector within the privacy of his home". Lord Nicholls here stresses that, far from presuming a conflict between the interests of parents and children (as the submission of Mr White presupposes), as between a child and parents, the law presumes consonancy of interests: or, as has been said, at least interests that are not so dissonant that healthcare and social worker professionals should proceed without properly engaging with parents, e.g. by fully consulting and informing them (*JD v East Berkshire* per Lord Bingham at [44]:

Lord Bingham dissented, but not in relation to this issue). As Lord Nicholls said (at [85]):

“The best interests of a child and his parent normally march hand-in-hand. But when considering whether something does not feel ‘quite right’, a doctor [or I would add, a social worker] must be able to act single-mindedly in the interests of the child. He ought not to have in the back of his mind an awareness that if his doubts about intentional injury or sexual abuse prove unfounded he may be exposed to claims by a distressed parent.”

What *JD v East Berkshire* held was that the usual consonancy of interests between parents and children is displaced, as a matter of law, where the parent is suspected of abusing the child. It does not hold that, whenever there is any bare potential for some future conflict of interest between a child and his/her parents, then an authority is immune from owing any duty of care to the parents and from any negligence suit at the hands of the parents. The duty of care owed by an authority to a child is not “paramount” in that sense.

- 28 In *JD v East Berkshire*, that the suspected perpetrator of the abuse was a parent was therefore the essence of the case (see, e.g. Lord Nicholls at [76]): and Lord Phillips M.R. in the Court of Appeal made the comment relied upon by the Council, that “where child care decisions are being taken, no common law duty of care should be owed to the parents” (see [9] above), in that context.
- 29 In short, although *JD v East Berkshire* held that an authority which owed a duty of care to children did not owe a duty of care to those who are suspected of abusing those children (whether parents or not), it did not lay down any general principle that, where an authority owe a duty of care to a child (even where there is a suspicion that that child has been abused), it cannot as a matter of law at the same time owe a duty of care to parents of that child. I reject that as a discrete ground for finding that, as a matter of law, the Council in this case owed no duty of care to the claimant.
- 30 The second discrete ground relied upon by Mr White in support of the Council’s contention that they owed no duty of care to the claimant, is that C was a “third party” and did not fall within the narrow parameters of those third parties to whom a duty can be owed.
- 31 Parts of the opinions in *JD v East Berkshire* consider in some detail the repugnance of the law for “granting remedies to third parties for the effects of injuries to other people”, notably the opinion of Lord Rodger (the quotation coming from that opinion at [105]). However, a “third party” case is one in which the “third party” (say, a parent) claims the same duty of care as is owed to the primary victim (say, a child). Where a child is negligently killed in an accident or where a doctor negligently fails to diagnose a child’s illness and, as a result, the child’s understandably distraught parents suffer psychiatric harm as a result, those parents cannot recover damages because (it is usually said) there is insufficient proximity or directness to give rise to a duty of care being owed to them as well as to the child. The content of the duty of care relied upon in that case by the parents would be the same as that owed by the tortfeasor to the child, and the parents would be true “third parties” in the sense that they would be legal on-lookers of the primary victim. In those circumstances, the law regards the parents as unconnected with the event that was precipitated by the negligence and causative of the harm: and the law refuses to allow a claim, except in narrow exceptional circumstances such

as where a parent witnesses his or her child suffering traumatic injuries as a result of the negligence. It is common ground that those narrow third party exceptions are not applicable in this case.

- 32 The concept of “third parties” is therefore based on the premise that the scope and content of the duty of care owed to the primary victim and the third party are the same. Outside the narrow exceptions, a third party is not allowed to hang onto the coat tails of the duty of care owed to the primary victim.
- 33 However, in the instant case, the duty of care asserted by the claimant against the Council is not merely parasitic upon the duty owed by the Council to her children, A and B—she does not rely upon the same duty of care that is owed by the Council to those children. She alleges that, as a result of the all of the relevant circumstances in this case (including the fact that she was the children’s parent responsible for their safety, and that she engaged with the Council directly in, for example, reporting the abuse in both 2002 and 2004, meeting with the Council in 2004 and having a social worker assigned to her and her family), the Council owed her a distinct duty of care from that which they owed to A and B. Just as in *A v Essex CC* it was found that the authority owed the parents a duty of care in relation to the provision of information different from the scope of the duty they owed to the children, in this case the duty of care asserted by C is distinct from the duty owed by the Council to the children. It has a different basis and is of different scope. In other words, C is not a true “third party” at all. Mr White’s ground founded upon the proposition that she is therefore fails.
- 34 That deals with the second discrete ground relied upon by Mr White. However, in my judgment, it also betrays a more fundamental defect in the Council’s case on this application. As I have indicated, that case is based on the premise that the House of Lords in *JD v East Berkshire* held that a duty of care was not owed by the local authority and healthcare professionals in that case on two discrete grounds, namely (i) that a duty of care to a parent would necessarily be in conflict with the (paramount) duty of care they owe to the relevant children, and (ii) as a third party, a parent is not in a sufficiently proximate relationship to a local authority to trigger a duty of care. He submitted that those grounds were discrete and independent, so that either was sufficient to dispose of the claim in the defendants’ favour both in the case of *JD v East Berkshire* and the instant case.
- 35 I do not consider that analysis sound. In reality, although their Lordships in *JD v East Berkshire* stressed different facets (in particular Lord Nicholls stressing the conflict aspect, and Lord Rodger the “third party” aspect), the issue being considered in D was whether, in all of the circumstances of that case, it was fair, just and reasonable to impose on the local authority a duty of care owed to parents who were suspected of abusing their own children. The House of Lords, taking into account all of the circumstances (including both aspects stressed by Lord Nicholls and Lord Rodger respectively), found that it was not. On a full reading of the case, the opinions do not suggest that there were two entirely discrete grounds for the refusal to find that a duty of care existed as a matter of law, but rather consideration of one ground in respect of which the potential for conflict of interest and the fact that, in that case, the parents were true “third parties” in the sense I have described were factors in determining that ground, namely that it would not be fair, just and reasonable for a duty of care to be imposed.
- 36 The same question arises in the case before me: in all of the circumstances of this case, is there a real prospect of the claimant showing that it is fair, just and

reasonable that the Council owed her duty of care? Judge Jarman thought that there was such a prospect. I agree. In coming to that conclusion, I have particularly taken into account the following:

- (i) The claimant is the parent of the children, A and B, whom she suspected had been abused by another child. She (C) was not suspected of any abuse. In those circumstances, as *JD v East Berkshire* stresses, her interests and the interests of the children are consonant. Whilst of course matters may conceivably have proceeded so that there could possibly have arisen a conflict of interest between mother and children—if, for example, as a result of the alleged failings of the Council, C had been unable to cope with looking after her children, triggering the Council having to consider steps protective of the children—there was not in this case the same potential for conflict as there was in *JD v East Berkshire* where the circumstances were extreme. Whilst the potential for conflict of duties is a matter which has to be taken into account as a circumstance that may contribute to it being unfair, unjust or unreasonable to impose a duty of care, the fact that there is some conceivable potential for such a conflict in the future is insufficient to make an authority immune from a suit in negligence at the hands of a parent. Potential conflict is not a trump card in relation to whether a duty of care is owed. It is simply one factor which the court must take into account.
- (ii) Indeed, as the mother of the children, as well as the natural love and affection between a parent and child, C was in a particular position of responsibility towards them—from the evidence, a responsibility which appears to have lain heavily upon her—which she sought to share with the Council. Far from being a suspected abuser of the children, she reported suspected abuse by another. Those circumstances are very different from *JD v East Berkshire*.
- (iii) Further, the claimant asserts that the Council owed her a different duty of care from that which they owe to her children. That duty of care arises because of her engagement with the Council: in reporting the incidents of abuse in both 2002 and 2004, and meeting with the Council in August 2004 when the Council denied the earlier report had ever been made. This is not a case where the asserted duty of care by a parent is merely parasitic upon the duty of care an authority may owe a child. Again, this is a crucial difference from *JD v East Berkshire*, where there had been no engagement between the (suspected) parents and the relevant authority/healthcare professionals, and the parents did seek to latch onto the duty of care owed by the Council to the primary victims, i.e. the children. The duty of care which the claimant asserts is different in nature and scope from the duty owed by the Council to the children.
- (iv) The alleged failings of the Council are not of a policy nature. For example, it is alleged that they failed to open a file on A and B in 2002. In 2004, without proper investigation, they simply denied that C had ever made a report in 2002. They assigned the same social worker to C and her family as was assigned to D and his family. If proved, these are all failings which are operational in character.
- (v) The claimant relies upon failings by the Council of commission as well as omission. For example, the claimant relies upon the Council's denial that

the 2002 report was ever made—which Dr Webster appears to consider of particular importance so far as causation is concerned.

- (v) For the reasons I have given, I do not consider that the Council’s analysis of *JD v East Berkshire* to be correct. In any event, again for the reasons I have given, whilst *JD v East Berkshire* is instructive, the case before me is clearly distinguishable from *D*. The cases are not “inescapably analogous”, as the Council claim.
- (vi) Mr White submitted that it is not in the public interest for this case to proceed, given that the defendant is a public body and the claimant publicly funded. Certainly, where a claim has no real prospect of success, it is no kindness to the claimant (or, of course, to the defendant) to allow it to proceed. However, where there is a real prospect of success, the claim should be allowed to proceed. Further, in assessing such prospects, it is noteworthy that this area of the law is developing. In those circumstances, it has been said that the court should be cautious in holding that a case should be struck out: because development of the law should be considered “on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of strike out” (*Barrett v Enfield LBC* [2001] 2 A.C. 550 at 557 per Lord Brown-Wilkinson).

- 37 In considering whether to strike out a case under CPR r.3.4(2) or giving summary judgment to a defendant under r.24.2, a discretion resides in the judge at first instance. Judge Jarman exercised that discretion in favour of the claim proceeding to trial. In my judgment, that was not only a conclusion to which he was entitled to come, it was a conclusion that was correct. Although judges are properly restrained in giving views on the merits on an application to strike out or for summary judgment over and above any opinion necessary for the purposes of determining the application, I consider it obvious that the claimant faces a number of challenges in pursuing this claim to trial. However, for the reasons I have given, I am firmly of the view that she has a real prospect of success and that there are reasonable grounds for her to proceed.
- 38 I consequently dismiss this appeal. I shall hear submissions in relation to both costs, and directions for the progress of the claim to trial.