

Liability In Higher Education In New Zealand: Cases For Courses?

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Abstract

'Once upon a time, if Bloggs didn't turn up to give his lecture, you cut your losses and went to the pub ... But nowadays, if you are Mr or Ms MBA student and someone messes up your timetable you get very shirty indeed'.ⁱ

William Blake defined education as: 'One of the few things a person is willing to pay for and not get'. The sentiment underlying this definition has long gone. Educators are now being confronted by an emergent new breed of litigious student. This paper examines the potential for liability of universities and polytechnics in tort, contract and under consumer legislation.

Introduction

While all levels of education continue to feel the impact of consumerism, nowhere is it more clearly seen than in the area of higher education.ⁱⁱ The new consumerist student has the potential, it is suggested, to lead to a redefinition of the relationship between student and university and to an adjustment of the reverence previously accorded by student to academic. Education policy pursued over the last two decades has resulted in a perception of institutions of higher education, such as universities, polytechnics and colleges of education, as part of a 'service industry' in which educational services are provided or purchased by student customers or clients.

Gaining a tertiary qualification has now become an extremely costly business. It has been estimated that, in the United Kingdom, the average cost of a degree to a student is 10,000 pounds sterling (approximately \$NZ25,000).ⁱⁱⁱ A survey by Barclays Bank (in the U.K.) in 1996 showed that the average debt of final year students in 1996 was up 32% from 1995. Research of the Policy Studies Institute based on interviews with 1971 students and 73 institutions showed that the average student in the 1995/6 academic year earned 3615 pounds and spent 5091 pounds. In New Zealand the average cost to a student of tuition for full-time study for 1996 at a university or polytechnic was \$2,760 and \$2,414 respectively. This figure is rising. Other major expenses of university students were estimated at \$5,974; and typical (average) weekly living expenses (which included transport, food and accommodation) were \$350.^{iv} Students are forced to work long hours

outside their study times, and to supplement that income with student loans, credit, savings and delayed payment of bills.^v

It is therefore a reality that students now have a considerable financial stake in higher education. Students (and in many cases their parents) make great financial sacrifices in order to pursue a course of study and their expectations are high. While obviously there must be responsibility on the part of the student to participate in the process of learning, the increased cost of education has spawned a new breed of litigious student. In a setting where economically so much rests upon the acquisition of qualifications there is a great responsibility on providers to be scrupulous in what they provide and how they provide it. Granted it is difficult to sustain a student's argument that they should have passed if they have clearly not demonstrated a certain level of competency (and there will always be the student who will argue tenaciously in this regard), but it is quite a different matter where it can be shown that the actions of the institution and its academic or administrative staff fall short of adherence to a perceived standard.

The trend towards involving the courts relates to the delivery of education at all levels. Since 1970 in both the United Kingdom and the United States there have been a number of actions against school authorities in what has been termed 'educational malpractice'. In a number of the cases students have argued that their educational institution failed in some way to fulfil their educational expectations and that this was due to an alleged failure to detect learning difficulties and provide adequate remedial action. While the American courts have consistently shown reluctance to recognise such a tort, the situation in the United Kingdom is not so certain. Recently the House of Lords considered appeals relating to decisions to strike out the actions of three Plaintiffs against their local education authorities. In a landmark decision Lord Browne-Wilkinson stated:^{vi}

In my judgement a school which accepts a pupil assumes responsibility not only for his physical well being but also for his educational needs. The education of a pupil is the very purpose for which a child goes to school. The head teacher, being responsible for the school, himself comes under a duty of care to exercise the reasonable skills of a headmaster in relation to such educational needs.

While there are obvious differences in the provision of compulsory education to that of higher education, the decision is perhaps significant in that it shows a new willingness on the part of the courts to question the decisions made by educators.

Universities in the United Kingdom have in recent years found themselves confronting allegations by students in a wide variety of matters relating to the provision of higher education. In most instances either legal action has been threatened but averted, or the matter has been settled out of court. There are therefore few cases appearing in the law reports.

The complaints are wide ranging. One student threatened legal action over damage to her car after driving over a university car park barrier; a county court awarded damages of 13,000 pounds to students at the University of East Anglia who sued the university when it turned off the

heating in the summer term to undertake maintenance work; and the student union at Westminster University claims that students are considering taking legal action against the university for compensation for their financial loss due to extra course work they had to do to make up for the disruption to their courses caused by a building project on the Harrow campus.^{vii} Of special concern are the increasing number of complaints that relate to the quality of courses and the exercise of academic judgement. There is a growing list of threatened cases such as that reported in the *Sunday Times* on 9 February 1997 that three former students are suing their university, a former polytechnic, in London. They are claiming compensation for loss of future earnings on the basis that the failure of the university to provide satisfactory courses has damaged their job prospects.^{viii} The idea has not escaped New Zealand.

Current New Zealand Actions

At the time of writing this paper there are, in New Zealand, two actions, one actually commenced and one threatened, by aggrieved groups of students.^{ix}

1. The case of the environmentally unfriendly environmental degree *Grant, Woolley, Staines and Grant v Victoria University of Wellington.*

This action is being taken by four students in respect of a course of study leading to a degree of Master of Arts (Applied) in Environmental Studies. The students were variously enrolled in the course between 1991 and 1995. Their allegations are essentially as follows:

The first is breach of contract based on the agreement formed when the university accepted the students' applications for enrolment. The terms of the contract were provided by the Prospectus entitled 'Environmental Studies', and the Practicum Guide. Both of these provided information on the aims and objectives of the course, the course content, the quality of the course, the resources to be devoted to the course and the type of employment which graduates of the course could expect to undertake. It is argued that the contract also includes terms implied from the conduct of the defendant and from custom - that the course would provide the plaintiffs with a thorough knowledge and understanding of environmental issues and that it would be of reasonable masters degree standard. This is in addition to the express terms.

The allegations of breaches of the above terms are essentially that the course was not of a reasonable Masters Degree level and was inadequately planned, under-resourced and lacked proper supervision.

The second cause of action is negligent misrepresentation and the particulars are the same as above. The basis of this claim is that the plaintiffs relied on the representations expressed as terms of the contract and that the Defendants knew of that reliance. The Defendants owed a duty of care to the plaintiffs in relation to the truth of those representations and they were in breach of that duty of care particularly in that the representations were misleading.

Economic loss is claimed by the Plaintiffs in respect of wasted expenditure on university fees, loss of employment opportunities, loss of opportunity to undertake another course of study, loss of future earnings as potential employers learn of the inadequacies of the course, and the cost of training requirements to make up deficiencies of the course. The Plaintiffs have, in addition, claimed damages for frustration, annoyance and distress. Plaintiff Claire Woolley was quoted in the Sunday Star-Times newspaper^x as saying their action was the result of ‘four years of the most unbelievable anguish’.

The university made an application to strike out the action on the basis that no cause of action exists. This view rests on the proposition that the university/student relationship is fully prescribed by legislation within which principles of academic freedom are incorporated. It is, therefore, subject to public law accountability mechanisms only. The relevant statutory provisions upon which the university relies are contained in Sections 160 and 161 of the Education Act 1989.

Section 160 provides:

160. Object - The object of the provisions of this Act relating to institutions is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability.

Section 161 begins by stating:

(1) It is declared to be the intention of Parliament in enacting the provisions of this Act relating to institutions that academic freedom and the autonomy of institutions is to be preserved and enhanced.^{xi}

Subsection (2) defines ‘academic freedom’ for the purposes of the section as including the freedom of the institution and its staff to regulate the subject matter of courses taught at the institution, and to teach and assess students in the manner they consider best promotes learning.^{xii} However exercise of academic freedom must be consistent with the maintenance of the highest ethical standards and the need for public scrutiny to ensure the maintenance of those standards and the need for accountability.^{xiii}

In the university’s submission it is argued that accountability is provided through domestic channels and complaint to the Ombudsman^{xiv} and that the courts have no part to play in disputes. In dismissing this argument Ellis J. said:^{xv}

In my view the University and the Ombudsman have jurisdiction in ‘in house’ issues and matters properly determinable by the Courts such as contract, tort, and judicial review remain within the Court’s jurisdiction.

Secondly, the university relied upon the policy arguments frequently used to negate a duty of care in the education malpractice cases.^{xvi} Of the latter, the argument that to allow such an action could ‘open the floodgates’ was advanced most strongly by the university. Ellis J. in his judgment said he had considered the American jurisprudence but declined to deal with it further. In conclusion he said:^{xvii}

In my opinion, this case is one which will test the boundaries of the Court’s and the University’s jurisdiction. For that to be properly determined, the facts must be carefully considered, and that can only be done at trial. I consider that the defendant University has failed to show that the plaintiffs do not have a reasonably arguable case, let alone a possible chance of success.

It is important to note that the students in the above case were prevented from arguing for statutory liability under the Consumer Guarantees Act 1993 as the contract for educational services was formed prior to its inception. In addition, they were statute barred from using the misleading and deceptive conduct and false representation provisions of the Fair Trading Act 1978 as by virtue of Section 43(5) any civil action must be commenced within three years of the conduct complained of.

2. The case of the Aoraki Polytechnic naturopathy degree - the degree course you’ve got when you haven’t got a degree course.

It has been reported that fifteen students have instigated legal action against Aoraki Polytechnic in Timaru in the South Island of New Zealand. Legal aid has been granted to enable the students to pursue their claim and their pleadings were to be filed within six weeks of the time of writing.^{xviii} The students’ grievances relate to a naturopathy degree course in which they were enrolled. Despite the polytechnic’s assurances to the students at the time of enrolment that accreditation of the course by the New Zealand Qualifications Authority^{xix} was merely a formality, the course failed to win degree status. Because the action is based largely on the representations made by the polytechnic relating to the nature of the course and the imminent degree status, compensation is apparently to be sought under the Fair Trading Act 1987.

It is of interest to note a similar action being threatened by a student who had given up paid employment to study for the BA(Hons) degree in conservation which was advertised as involving Lambeth College, South Bank University and the City and Guilds School. After three years of study it was revealed that the course had never been put forward for validation by South Bank University. The principal of Lambeth College admitted that it had inadvertently given students ‘too firm an idea’ that the validation was complete.^{xx}

The message which emerges clearly from all of these matters is an increasing trend towards students no longer ‘suffering in silence’ and arguably a shift in the balance of power in the student/institution relationship. It may be that, though a trickle at present, these cases herald an

end to the immunity of those engaged in the provision of higher education from dissatisfied customers. Other professions such as law and medicine^{xxi} have long been exposed to the threat of litigation. Now academic institutions may be forced to recognise the shift from the perception of higher education as a privilege to a contractual right with all the legal duties and obligations which that entails.

Causes For Complaint

An examination of the New Zealand complaints shows that they relate largely to two areas though there are inevitable overlaps. Complaints in the United States and the United Kingdom also involve a third area that relates to the exercise of academic judgement.

1. There are those complaints concerning representations made by an institution to a prospective student in respect of the courses, resources and facilities being offered, and of the student's chances of success. This includes things which the student may have been led to believe will be the probable effect of the attainment of the qualifications in respect of employment opportunities.

The provision of higher education has become an extremely competitive environment. Though students may still compete in some cases for places in certain institutions, more commonly institutions compete to secure the enrolment of students from within the country and from overseas. Institutions have an increasing reliance on the overseas student dollar. In his paper in which he discusses what happens when a dissatisfied foreign student sues his or her university in the United Kingdom, Peter Kaye considers the possible repercussions from false encouragement given to an overseas student to apply for and accept a place at a particular institution:

Imagine the complaint, say, of a Malaysian student, that he only applied to a particular law department because the overseas admissions officer, on a visit to Kuala Lumpur, assured him that if he went to that university he would be accommodated on campus, and that instead he had been provided with a changing hut on the local beach^{xxii}

2. Then there are those complaints which concern the quality and fitness for purpose of the course provided; not only that it did not match up to that promised but also that the administration, teaching and supervision provided by the institution was not of an appropriate expected quality and was not executed with reasonable skill and care. In this area fall the complaints relating to organisational and procedural matters such as cancellation of classes and also those which relate to the calibre and performance of academic staff.

3. There are also many actions and threatened actions abroad which relate to accusations of bad academic judgement in relation to assessment. This is the type of case where a student may argue that he or she was disadvantaged by the marking and grading of examinations, assignments or dissertations. It is in this area that the courts have struggled with the desirability and viability of judicial re-evaluation of professional opinion.^{xxiii}

It is the intention of this paper to explore the potential for liability both at common law, in tort and contract and under consumer protection legislation. The ultimate purpose of such an examination is not to raise alarm but to draw attention to the risk and to consider its minimalisation.

The same complaint may give rise to several different causes of action, for example, false representation and breach of contractual and/or tortious duty. An allegation that the course was not as promised may logically be coupled with an allegation that the administration of the course was deficient or that the academic staff failed to deliver. Whatever the problem, it will arise either from events which took place before the student's enrolment or from matters occurring during the course of study. The distinction may in many cases become blurred, as, for example, in the Victoria University case. There the course was held out to be at 'Masters degree level' and the students allege that for a variety of reasons this was not the case. The complaint relates, therefore, to both the pre-enrolment representations and the quality and fitness for purpose of the course itself.

Telling It Like It Is: Pre-enrolment Representations

Tertiary institutions are nowadays engaged in the business of selling an education product. Most are actively marketing their product both nationally and internationally. Information about the courses and resources offered is widely distributed through a variety of media to attract students. This may be through brochures, prospectuses, calendars and department handbooks; or it may be verbal through telephone inquiries, education fairs, school visits, radio and television advertising. Where a representation made turns out to be wrong this will inevitably be at cost to the student. This may be considerable. For example, in the case of the students at Aoraki Polytechnic some of them had expended up to \$20,000 for three years of study. Though potentially actionable in negligence, the most likely cause of action in such a case in New Zealand is under the Fair Trading Act 1986.

The Fair Trading Act 1986

Section 9 of this Act has as its equivalent S.52 of the Australian Trade Practices Act 1974. It has, as one commentator said, all the brevity of the Ten Commandments:^{xxiv}

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive

In the Act 'trade' is defined as:

any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services .

The definition of business includes any undertaking whether it is carried on for gain or reward or not. In the current climate the sensible view would seem to be that expressed by Considine (1993)^{xxv}:

In any case, given the increasing attention being given to full fee paying international students, can a serious argument be mounted that universities do not engage in trade and commerce?

In his discussion of the wide range of opportunities where the possibility of a university engaging in deceptive and misleading conduct exists Considine quotes Belcher J., International Students Officer at Queen Mary College, London who said: 'In my experience, second-hand car salesmen are models of good practice when contrasted with the representatives of some U.K. universities and polytechnics'^{xxvi} This was in the early days of overseas recruitment of students so it may be hoped that over-zealousness has been dampened by the passage of time. However, the significant financial pressures under which such institutions operate are ever increasing.

The provisions of the Act apply to conduct outside New Zealand by any person carrying on business within New Zealand to the extent that it relates to the supply of services within New Zealand.^{xxvii} Presumably this would also mean that the provision of distance learning where the material is supplied by an institution within New Zealand is covered by the Act.

The far reaching applicability of the misleading and deceptive conduct provision coupled with the drive to get the big student dollar has the ability to lead to an increase in student actions under this legislation. *The Times Higher Education Supplement* tells of a situation where a publicity brochure for a British College of Further Education containing false claims that it ran courses leading to an MBA accredited by Nottingham Trent University^{xxviii} was circulated widely in India. It is hard to imagine that this incident would be alone. Class sizes may be a bone of contention. Institutions must be careful not to succumb to the temptation to increase numbers in contradiction to their representations to potential students.

Under S.43 a person may recover damages if they have suffered loss or damage by conduct of another person which amounts to a contravention of Section 9. The issues of causation and reliance are of primary importance. In order to recover a person must show not only that the loss which he or she suffered was actually caused by the Defendant's conduct, but also that their actions were in reliance on what was said. The effect of this in educational terms is that in order to

succeed a student would be required to show that their enrolment in that specific course was directly in reliance upon what they were told or were lead to believe, and that this was the cause of their loss. It is easy to conceive of a vast number of reasons why a student may enrol in a particular course and it may be difficult to convince a court that it was due to particular reliance on that which they were told by the institution. On the other hand, Australian courts have decided that it need not be total reliance, that it is sufficient if the reliance plays a part as one of the persuasive factors^{xxxix}.

There are indications that an institution may also be held liable under Section 9 if it allows a student to enrol knowing they have a false expectation from a particular course. A recent New Zealand case, *Heiber v Barfoot & Thompson*^{xxx} supports the view that the test is whether the conduct gives rise to a reasonable expectation that some fact exists. In that case the Plaintiff purchased a valuable property on the Auckland waterfront upon the allure of the 'magnificent sea and city views'. These were referred to in the brochure and the purchaser and agent discussed the magnificence as they gazed out the window of the property. It was later revealed that at the time of purchase it was known to the real estate agent that the local yacht club had planning permission to resite the clubhouse in such a way which would quite severely impair those views, but he said nothing. There appears to be very little difference between this and the situation where there is not an actual representation which is untrue or misleading but where an institution enrolls a student doubting their prospect of success, suspecting that the course will not meet their expressed needs, or knowing that they have inadequate resources to cope with language support of an overseas student.

It is enough to be able to show that the conduct had a tendency to mislead and the Australian courts have held that the test is, as far as is possible, objective.^{xxxi} The question which must be asked therefore is: 'would the conduct have been likely to deceive the "reasonable person?"' - in the words of one judge: 'those not particularly intelligent or well-informed, but perhaps of somewhat less than average intelligence and background knowledge. Although the test is not the effect on a person who is, for example, quite unusually stupid'.^{xxxii} What is clear in this context is the necessity for accuracy in translation of promotional material used to recruit students overseas to ensure that misunderstanding is avoided. There should be a reasonable expectation of those accepted for enrolment in a course that they will be able to fulfil the standard required.

Contract

A contract may be simply defined as a legally binding agreement. In order for a contract to be formed there must be an offer by one party and an acceptance of that offer, and there must be consideration. Though there has in the past been much judicial debate in relation to the nature of the relationship between university and student^{xxxiii} it would now be hard to argue that when a student applies to enrol in a course and that enrolment is accepted there is not a contract formed. Courts both in Britain and the United States have essentially upheld the existence of a contract, and the concern has been ascertaining the source of the terms of such contract.^{xxxiv} The U.K. court

in *Sammy v Birkbeck College*^{xxxv} held that a contract existed. Wade, in 1969 argued that: ‘The legal relationship of a university with its members is much more suitably governed by the ordinary law of contract and by ordinary contractual remedies.’^{xxxvi} In 1995 in the case of *Joobeen v University of Stirling* the Outer House in Scotland declined an Application for Judicial Review by a student who was prevented by the University of Stirling from completing a diploma course in Japanese studies. That Court held that it would be improper to grant judicial review as the relationship was contractual.^{xxxvii} In the United States in the case of *Gupta v New Britain General Hospital*^{xxxviii} the Court said:^{xxxix}

There are, however, at least two situations wherein courts will entertain a cause of action for institutional breach of a contract for educational services. The first would be exemplified by showing that the educational program failed in some fundamental respect, as by not offering any of the course necessary to obtain certification in any particular field ... The second would arise if the educational institution failed to fulfil a specific contractual promise.

The English Court of Appeal in *Moran v University College of Salford (No.2)*^{xl} took the view that a contract was formed when the student accepted an unconditional offer of a place. This view may cause problems in a number of areas, for example when the student receives the full course information and rules and regulations of the institute at a later date and they wish to reconsider. It would also leave the institution at risk of breach of contract should they find it necessary to cancel the course due to lack of numbers. A more realistic view may be that the contract is formed on the student’s actual enrolment.

There is consideration in the form of the student’s promise to pay the course fees and the university in turn promising to teach the course as set out in the brochure, calendar or prospectus. Upon enrolment it would be usual for an institution to provide students in a course with a handbook setting out details of the course together with terms of acceptance by the institution. The extent to which terms of the contract are provided by these documents and are implied by custom and practice is unclear. In New Zealand the court will be faced with this issue when the Victoria University case goes to substantive trial. It is likely to take into account not only the ordinary and technical meaning of the language used, but also all the circumstances surrounding the students’ enrolment including the conduct of the parties. The students allege breach of contractual terms in that the provision of resources such as supervision, a range of optional study papers, study space and computer equipment, was inadequate. Their argument is that it was implied in the contract that the course would provide them with a thorough knowledge and understanding of environmental issues to a Masters degree level.

The court will be required to examine the extent to which academic freedom preserves the ability of an institution to vary the terms of the agreement formed on enrolment as it thinks fit, in light of circumstances as they arise, and the resources available at any point during a student’s term of study. It is difficult to imagine that such an argument would be sustained in the current

consumerist environment. Once a contract is formed for the supply of any service or product the parties must perform those terms save their mutual agreement to vary those terms in any way. The better argument must be that academic freedom in this context relates to the prior planning and resourcing of courses and to the exercise of academic judgement in the manner of delivery and assessment of a course. It would be hard to sustain an argument on this basis in defence of poor teaching, supervision or assessment.

The United Kingdom cases in which breach of contract have been alleged have largely been concerned with the jurisdiction in disputes relating to the university's 'visitor'.^{xli} There are conflicting views as to whether the contract made between a student and a university is governed by the common law and therefore outside the jurisdiction of the visitor or whether it is a domestic matter of the institution over which the visitor has exclusive jurisdiction. This discussion is largely irrelevant in New Zealand^{xlii} as, like the new universities in England, there is no provision within their legislation for the appointment of a visitor.^{xliii}

Though it is difficult to predict the attitude the New Zealand courts are likely to adopt in relation to a breach of contract action, there is strong indication from overseas that it would have more chance of success than one which relies on a recognition of a breach of a general duty of care.^{xliv}

In the United States students have sued universities for the failure to complete programmes or degrees due to their termination by the institution. In *Behrend v State*^{xlv} the university terminated its architecture degree programme because of difficulty in maintaining accreditation. While holding that a university should not be powerless to discontinue certain programmes, the court said that it must ensure that the students enrolled in the programme must be accepted with their course credits for transfer to another suitable university programme. Failure in this may render the university liable to compensate the students for their loss. It is not uncommon for universities and polytechnics to discontinue courses. Such action is obviously of detriment to the students and it seems equitable that in many cases the institution should be liable to make provision for them.

The Consumer Guarantees Act 1993

It is important to consider the impact of the Consumer Guarantees Act 1993 on the provision of education services.^{xlvi} Because of its relatively recent inception^{xlvii} the full breadth of its application is yet to be felt. It was passed with the clear legislative intention to cover all services including those of a professional nature. In response to the many submissions which suggested that certain services should be exempt the Select Committee said:

We believe that the Bill should act as an umbrella for all services and there should be no exceptions allowed ... Excluding particular services would detract from the present comprehensive character of the Bill.^{xlviii}

The Act provides in Section 28 that:

... where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill;

and in Section 29 it provides:

... where services are supplied to a consumer there is a guarantee that the service, and any product resulting from the service, will be -

- (a) Reasonably fit for any particular purpose; and
- (b) Of such a nature and quality that it can reasonably be expected to achieve any particular result, -

that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that -

- (c) The consumer does not rely on the supplier's skill or judgement; or
- (d) It is unreasonable for the consumer to rely on the supplier's skill or judgement.

There is some confusion arising from 'consumer' being defined in the Act in terms of the type of goods or services being supplied.

'Consumer' means a person who:

- S 2(1)(a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption;

However, in line with the professed intention there is nothing which would eliminate educational services. The services must have been supplied by a person 'in trade', and the definition of 'trade' is sufficiently wide to encompass education providers. As the Act draws on the Australian Trade Practices Act 1974,^{xlix} help in its application may be derived from the Australian courts. They have held that 'trade' is not necessarily restricted to business conducted for profit.¹

What amounts to a lack of 'reasonable skill and care' is liable to be problematic in the education context though there is no reason to suggest that courts would not adopt the common law approach of measuring the duty in relation to the standard appropriate to the profession.^{li} It would be appropriate to take into account standards used by other institutions teaching similar

courses. Clear examples of a breach of the Section 28 guarantee may be where there is inadequate or poor teaching or supervision of a course, where there was unjustifiable cancellation or changes of classes, failure in the attendance of lecturers, or incomplete coverage of the course.

In relation to a course of study at a tertiary institution the application of Section 29 is more specific especially in respect of vocational degrees and diplomas. This section could lead to the result that a university, for example when enrolling a student on a medical or law degree course, is giving an implied guarantee that they would, on completion, be able to progress to practise as a doctor or lawyer. There are, however, obvious fundamental differences in the education scenario to the general type of provision of services such as repairing a car, building a fence or making spectacles. In education a successful outcome inevitably depends to a large extent on the motivation and aptitude of the student. There is a defence for the institution in the argument that the aggrieved student was deficient in this regard. On the other hand, this may be difficult when the student has passed stringent entry requirements and has not been advised during the course of study that they are not up to scratch. In the absence of any action at the time it may not be easy for a university to counter a student's action for breach of the Section 29 guarantee. A lack of diligence may be shown by evidence that they did not submit assignments or attend class. This makes the keeping of accurate records essential.

Reliance is important under Section 29. The guarantee will clearly not apply when it can be shown that the consumer did not rely on the supplier's skill and judgement, or such reliance would have been unreasonable.^{lii} It is hard to see how an argument of non-reliance would assist an institution. A student enrolls in a course offered by a particular university or polytechnic in the absolute reliance that the institution is in a position to offer tuition and resources which in most cases would otherwise be unavailable to the student. On the other hand it does place a strong burden on institutions to ensure that the student is accurately counselled as to their expectations of the course. Here there is an obvious cross-over with the misleading and deceptive conduct provision contained in Section 9 of the Fair Trading Act 1986. To unwittingly lead a student to false expectations may in fact result in a contravention of both statutory provisions. Undoubtedly these are all matters which will, I suggest, inevitably exercise judicial minds.

The statutory remedies for breach of the Section 28 and 29 guarantees are largely contained in Section 32 and go further than simply cancellation and/or damages contained in the previous law governing breach of contract.^{liii} There are two provisions of importance here. Where the failure may be remedied the consumer must give the supplier the option of doing so. In the education context this could mean the institution having the option of providing extra tuition, supervision or whatever if that would have the effect of remedying the defect. It may be, however, that a student may opt to cancel the contract on the argument that either the failure cannot be remedied or is a failure of substantial character. A failure is of substantial character where:

- (a) The services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; ...^{liv}

A provision most likely to be invoked by a unhappy student is in Section 32(c) which provides that, in addition to cancellation, a consumer may obtain damages from the supplier for consequential loss. In the case of tertiary education there will generally be a substantial cost to the student arising from a course which is badly delivered. There will be losses such as time wasted, unfulfilled job expectations and loss of opportunity to undertake alternative courses of study. There will also be the less tangible losses due to anxiety and distress.^{lv}

In relation to the supply of services there is also a guarantee, under Section 31, that the price will be reasonable. Today, the funding of tertiary education is a moving carpet upon which all institutions are learning to dance. It is a reality that students enrolled in courses will face yearly increases in their fees. The issue arises whether institutions, by virtue of the statutory guarantee, are bound to ensure reasonable fees to a student for the entire course of their three, four or more years of study. Even if a student enters into a contract by year or semester, it may be that the right of an institution to increase fees is questionable especially in the situation where the student has no realistic alternative for completing a course of study.

Of importance to any discussion of managing the risk potential under the Act is Section 43 which prohibits contracting out of liability under statutory guarantees unless in relation to a business contract. It is not available, therefore, to an institution to contain within its prospectus a form of disclaimer. In fact to do so may amount to an offence under Section 13(1) of the Fair Trading Act which prohibits false representations in relation to the exclusion of a guarantee.

Liability In The Tort Of Negligence

The principles governing liability in the tort of negligence are derived from the famous words of Lord Atkin of the House of Lords in the case of the snail in the ginger beer bottle, *Donoghue v Stevenson*:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.^{lvi}

Any action in the tort of negligence has its justification in those words. In 1964 the House of Lords in *Hedley Byrne v Heller & Partners*^{lvii} extended the principle to apply to negligent words uttered irrespective of contract and to liability for economic loss rather than personal injury or loss to property. The principles underlying any liability here is thus equally applicable to careless words and careless acts. There are a number of situations which may give rise to an action by a student in the tort of negligence. It may be invoked, as an alternative to an action under the Fair Trading Act in respect of alleged wrong or misleading representations before their enrolment. The same cause of action may apply, as an alternative to an action under the guarantee contained in Section 28 of the Consumer Guarantees Act, where there is an allegation of careless teaching or administration of a course. Thirdly, the allegation may arise in respect of evaluation or put simply, the failure to exercise skill and care in assessing student work.

Negligent Words

The test for liability for careless words is that as formulated in *Hedley Byrne*^{lviii} that a special relationship which gives rise to a duty of care is one where the speaker or representor makes such representation in the knowledge that it is going to be relied upon by the receiver. Lord Morris of Borth-y-Gest stated that a duty of care arises when.^{lix}

... in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, such person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

The essential elements for an action for negligent words are first, that the person giving the advice or the utterer of the words is in possession of some expert knowledge or expertise. Secondly, the advice must be given in circumstances which show that the giver knows or ought to know that the recipient will use the advice in making a serious decision, thus creating a special relationship between the giver and the recipient. And thirdly, the advice must have been relied on in such a way and loss incurred when the advice turns out to have been carelessly given or unsound. These elements have been discussed and affirmed in many cases since *Hedley Byrne*: by the High Court of Australia in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*; *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979*; and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)*^{lx}. In the latter case, in confirming the above line of authority which shows that mere foreseeability alone is insufficient to create a duty of care Brennan CJ said:^{lxi}

But, in every case, it is necessary for the plaintiff to allege and prove that the defendant knew or ought reasonably to have known that the information or advice would be communicated to the plaintiff, either individually or as a member of an unidentified class, that the information or advice would be so communicated for a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind that the plaintiff does enter into and that it would be very likely that the plaintiff would enter into such a transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice be unsound.

The application of these principles to the education scenario is seen clearly in the Statement of Claim in the case of *Grant, Woolley, Staines and Grant v Victoria University*.^{lxii} Though its application to the counselling or advising a student prior to enrolment is obvious, a Court would need to decide when advice is careless. Unlike the misleading and deceptive conduct

provisions of the Fair Trading Act, there must be contained in the allegations evidence of information supplied in disregard for its accuracy, a falling below a required standard of care. Here it would seem that a court need not be concerned with the difficult question of the proper standard of care to be exercised by either those acting as professionals or in an administrative capacity. It should be relatively straightforward to determine whether in fact wrong or careless information was supplied. It does not take a great deal of imagination to see that particulars supplied relating to a particular course are either accurate or they are not. Where an institution is supplying information which is designed to influence or persuade students in making an investment in their future, the duty must go beyond the moral and ethical to a legal duty. It is essential that enrolment and promotional materials be clear and unambiguous. Importantly, those employees of the institution who are involved in the enrolment process must have clear instructions in relation to the information they convey. The principle of vicarious liability means that the institution itself is liable for words uttered in the course of employment by any of their office staff and administrative officers as well as academic staff.

Careless teaching and assessment

It has long been accepted in New Zealand and Australia, that the correct approach to determining whether a duty of care is owed in a novel case is the two stage inquiry of *Anns v Merton London Borough Council*.^{lxiii} This is, in the first stage, limiting the ‘reasonable foreseeability’ concept of *Donoghue v Stevenson*^{lxiv} to the requirement that there be a sufficient relationship of proximity. The second stage, if the first gives rise to a prima facie duty of care, then asks the question as to whether there are any policy reasons which may negate such duty.^{lxv}

An application of the first stage of the test to ask the question: ‘do tertiary institutions owe a duty of care to their students?’ would clearly be answered in the affirmative. The American courts’ reluctance to recognise a duty of care in relation to teaching in the compulsory sector is based first upon the second stage, considerations of policy, and secondly upon difficulties with establishing causation.^{lxvi} It is arguable that many of the policy arguments which negated a general duty do not arise in respect of tertiary education. The viewpoint that possible liability would put impossible constraints on teaching may be overridden by the argument that imposing a duty of care can only have a positive effect on the organisation of the administration and the teaching of courses and resources. The high cost of tertiary education nowadays has led to greater community expectations, and rightly so. Litigation will never be an ‘easy option’ for financially strapped students, rendering it unlikely that to allow a duty would ‘open the floodgates’. In the words of one commentator:^{lxvii}

Educational negligence cases would often involve difficulties associated with proving the causal link between the teaching and a failure to learn, and usually there would be considerable difficulty in proving any significant economic loss following from the poor teaching. This substantial risk of losing the case, when

combined with the expense of conducting legal proceedings and the difficulty of obtaining legal aid, will act as a deterrent to many would-be litigants.

The American cases, while of interest, do not establish a binding precedent for New Zealand or Australian courts. Perhaps of far greater relevance is the attitude of the House of Lords in failing to dismiss the Plaintiffs' action in *X(Minors) v Bedfordshire County Council*.^{lxviii} This is reflected definitively in the words of Lord Browne-Wilkinson.^{lxix} It is essentially that when an educational institution accepts a student's enrolment, it accepts a duty to take care in the provision of education to that student. This argument becomes even more compelling in relation to the student who enrolls in tertiary education as is the case, by choice, rather than by statutory compulsion.

It is much more difficult in the primary and secondary education scenario to establish the cause of a failure to learn when a child's schooling covers many years during which time a child passes through the hands of a great many teachers. Although a degree course at a university or polytechnic will generally cover a minimum of three years during which time a student may have many lecturers, it is suggested that the course or part of the course covered by individual lecturers is more clearly defined.

It is also recognised that there are a multitude of environmental factors which have the potential to affect a child's ability to learn over which a child's school has no control. Though it may not be overlooked in the context of higher education, the line of causation is arguably much clearer. In any event, problems with establishing causation have seldom in the past been held to prevent other actions in negligence from proceeding.

It may be different, however, where there are considerations which relate to judicial inquiry into matters of academic judgement. In the American education cases referred to earlier, the courts have adhered steadfastly to the view that the courts are not an appropriate forum in which to test pedagogical methods. There are many grievances today which relate to bad academic judgement. Where the investment in education is great, the need to be assured of high income yielding employment is proportionate. Students are undertaking, at great cost to themselves, courses of study in the expectation of a certain standard of living for the future. It is easy in such a climate for the pressure on the student to get good grades or, at the very least to graduate, to translate to a duty of the institution to ensure that outcome. Gary Slapper cites the example of Simon Zekaria^{lxx} in his case taken against the University of Cambridge. Mr Zekaria sat an English literature paper in June 1994 as part of his GCSE examinations. He received a D grade from the Midland Examining Group (now the Cambridge Group). Following two re-marks of his paper which both confirmed the D grade he instituted an action in breach of contract and negligence in which he alleged that the paper was not marked with reasonable skill and care. Though the case was struck out by a Master as being unsustainable in both contract and tort, it is important as it perhaps shows a new willingness of the student to shift the responsibility of failure to the institution not only in terms of careless teaching but in the assessment process.

Where it is relatively easy for a court to examine evidence and determine the existence and breach of a duty of care in relation to administrative and procedural matters it will always be extremely difficult for a court to assess the validity of academic judgement. It could be strongly argued that in most cases for the courts to engage in such re-evaluation is inappropriate and dangerous. Weighed against this is the argument that where members of other professions such as doctors and lawyers have been subject to such examination and accountability in the exercise of their profession that academic judgement should also be subject to such scrutiny. While academics do not fulfil all the criteria commonly regarded to govern professional status - such as autonomy and a professional overseeing body other than their employer - there can be no doubt that academics are regarded by members of the public as professionals. It is a reality of a tertiary institution also that lecturers will in most cases also be members of their own specialist subject profession. However they be categorised, academic members of an institution hold themselves out as possessing special skills and knowledge and students are entitled to rely on this. Having established that reliance the question then becomes that of the degree to which the courts may re-open the evaluation of student work. The test for a professional standard of care was established by McNair J in the case of *Bolam v Friern Management Committee*.^{lxxi}

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

The application of this principle to the assessment scenario may have the result that in the absence of any evidence of breaches of rules of natural justice such as fairness and lack of bias, the courts would be justified in a reluctance to interfere with the professional judgement exercised by the academic. Slapper refers to the most recent judicial opinion on the matter given by Sedley J in *R v Higher Education Funding Council, ex parte Institute of Dental Surgery*.^{lxxii} This was an application for judicial review of the decision of the Universities Funding Council relating to the assessment of the institute at Level 2 of research quality for the purposes of determining funding. After noting that a court can only impugn the exercise of academic judgement where there are grounds for doubting the basis for such judgement, he stated:^{lxxiii}

This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiner's meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of the candidate's written papers is something more than an informed exercise of academic judgement. Where evidence shows that something extraneous has entered into the process of academic judgement, one of two results may follow depending on the nature of the fault: either the decision will fall without more, or the court may require reasons to be given, so that the decision can either be seen to be sound or (absent reasons) be inferred to be flawed. But purely academic

judgements, in our view, will as a rule, not be in the class of case ... where the nature and impact of the decision itself call for reasons as a routine aspect of procedural fairness.

The pitfalls encountered by courts who have questioned, in absence of the above factors, grades awarded in examination papers is well illustrated by Davies' citing of the case of *State ex rel. Nelson v Lincoln Medical College*.^{lxxiv} In that case in an American court expert witnesses awarded grades ranging from 57% to 94% for the same piece of work.

The Future

No person involved in the administration or academic side of tertiary education can doubt that students now have higher expectations. Even to the layperson who casually examines the education news supplements in daily newspapers it must be evident that students show an increased willingness to litigate in support of those expectations. An American study conducted by the College of Education at the University of Texas^{lxxv} echoed this conclusion. The report showed that academic affairs were considered to be in high probability of litigation within the next ten years and quoted Gehring (1991) who predicts: 'With the average age of students increasing, a lowered age of majority, and economically hard times, the amount of litigation brought against administrators and institutions will continue to increase'. This would also seem to be the trend in the United Kingdom as reported in the *Times* Newspaper: 'The Birmingham-based law firm Martineau Johnson has about 60 educational institutions as clients. Its education department has seen its workload soar by 500 per cent in four years. Simon Arrowsmith, head of the department, said: "There is a growing awareness among students of their 'rights' and an increased willingness to litigate."^{lxxvi} There is no doubt that the status of students has changed from being that of a subordinate in the general purpose of the pursuit of higher learning to a consumer of services and the effects of this shift are yet to be manifested.

There are many indications that tertiary education is under pressure. Funding constraints mean that institutions are having to take even greater measures to balance the budget; increased numbers in lectures and tutorials,^{lxxvii} ever increasing demands on lecturer time, more emphasis on the drive to attract students both nationally and internationally. All of these factors have the potential to effect the quality of the education provided.

What form litigation may take is open to conjecture. The many reported cases of litigation in the context of higher education in the United Kingdom have been largely limited to applications in public law which concern adherence to principles of natural justice in the making of academic decisions. Such a case was *R v Manchester Metropolitan University, ex p Nolan*^{lxxviii} in which the court quashed a decision of the Common Professional Examination Board of the university to fail a student on the basis of attempting to gain academic advantage in an examination. It emphasised that such a decision should only be made having considered all relevant material particularly statements in mitigation. In noting that in such decisions the courts

have been determined to ensure decisions are made with consistency and fairness, Davies advances the view:

The new consumerist student may push for this principle to be expanded to ensure that the academic decision making process is as transparent as possible and that systems are in place to maximise fairness and consistency.^{lxxxix}

One commentator refers to the United Kingdom 'Charter for Higher Education' in which the Department of Education states that 'Universities and colleges are more and more aware of the need to deliver high-quality services, responding to the needs and demands of customers'.^{lxxx} He says:^{lxxxi}

This may be a statement very much intended to encourage students to take up their 'rights' as customers in order to push universities further down the road of seeing themselves as part of a much larger consumer society. Such a move is likely in turn to be away from the impression of universities given in the case law as highly autonomous protectors of the nation's search for knowledge and the transmission of such knowledge, and raises the question of how much longer the courts can exclude students from the protections they would receive in law as consumers of virtually any other product or service.

Upon enrolling on a course of study, students' aims are relatively simple. They are admitted with some reasonable expectation of receiving a professional standard of tuition and support for the course as represented without being misled as to its status. Above all, they want to pass and to graduate. This paper has considered the type of complaints and actions of which we are likely to see more. If the predictions are correct, academics are in an unenviable position. Faced with the increasing demands of research and administration it is easy to lose sight of the roles of teaching and assessment. An item which appeared in the *Times Higher Educational Supplement* on 26 July 1996 entitled 'Couldn't teach a dog to sit' quotes a student as saying: 'Students also feel cheated by lecturers' poor attendance records. Several times I had tutorials or lectures cancelled because the lecturer was making a radio appearance, teaching overseas or off trying to get research backing'.^{lxxxii}

As well as being supplied with quality courses, it is important that students be given clear, accurate and unambiguous advice and information relating to the course in which they are enrolling. It is also important that institutions determine their policy based on their primary objective of running the courses in a manner with quality no less than that offered. It is important that students are considered to be an essential part of the functioning of the university or polytechnic and that their teaching assumes priority. Students may now have a powerful tool in current consumer legislation for ensuring that that priority is maintained.

Keywords

Education tertiary higher
liability contract tort
negligence consumer

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Endnotes

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- i David Palfreyman, Bursar, New College, Oxford, United Kingdom as quoted in Peter Kingston, 'Dons in the Doc', *The Guardian* 13 February 1996 at p.3
- ii At the time of writing the Minister of Education has stated an intention to issue a Green Paper which introduces a market model to tertiary institutions by deregulating the tertiary sector with public and private providers competing equally for funding - *The Dominion*, Wellington, August 12 1997, 10. This is in line with intentions announced by the Australian and United Kingdom governments.

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- iii G Slapper 'Judging the Educators: forensic evaluation of academic judgement' (1997) *Education and the Law*, Vol.9, No.1, 5-12
 - iv These figures are quoted from a Student Income and Expenditure Survey Research Report prepared by CM Research for NZUSA/APSU in October 1996
 - v G. Slapper (1997) 'Judging the Educators: forensic evaluation of academic judgement' *Education and the Law*, Vol.9, No.1, 5-12
 - vi *X(Minors) v Bedfordshire County Council* [1995] 2 A.C. 633, 766 per Lord Browne-Wilkinson
 - vii 'Complaints Cost Hard Cash' *The Times Higher Education Supplement*, London, United Kingdom, July 12 1996,2; and 'Universities Count the Cost as Students Resort to Legal Action', *The Times*, London, United Kingdom, 7 October 1996, 7
 - viii 'Students sue over course failures' *The Sunday Times*, London, U.K, February 9, 1997,1
 - ix Settlement of a third action was reported in the *Evening Post*, Wellington, 17 September 1997. An Auckland Polytechnic has paid out \$139,000 to a group of students who had been enrolled in a certificate course in television and video operations. They complained that the course did not provide what was promised. They received refunds of course fees plus a small amount of damages.
 - x Students Court New Protest Methods, *Sunday Star-Times*, May 18, 1997, p.C3
 - xi Section 161 Education Act 1989
 - xii S.161(2)(c) and (d)
 - xiii S.161(3) (a) and (b)
 - xiv The Ombudsman was given jurisdiction to inquire into complaints by S.50(4) of the Education Amendment Act 1990.
 - xv *Grant, Woolley, Staines & Grant v Victoria University of Wellington* Unreported, 13 November 1997, High Court, Wellington Registry, CP 312/96, at p.9 per Ellis J.
 - xvi Notably the American cases of *Donohue v Copiague Union Free School District* 95 Misc2d.1, 408 N.Y.S. 2d.584 (1977); *Peter W. v San Francisco Unified School District* 60 Cal.App. 3d.814, 131 Cal. Rptr. 854 (1976); and *Hoffman v Board of Educators of the City of New York* 64 App.Div.2d.369,410, N.Y.S. 2d 99 (1978) where the courts placed strong emphasis on a wide range of economic, preventative, social, moral and administrative considerations.
 - xvii At p.13.
 - xviii Aoraki Students Gain Legal Aid. *New Zealand Education Review*, July 16, 1997; Troubled Aoraki Course to End. *New Zealand Education Review*, July 30, 1997
 - xix N.Z.Q.A. was established under Part XX of the Education Act 1989 and by virtue of S.259 is charged with granting accreditation to an institution as provider of approved courses.
 - xx 'Conservation Degree Never Existed', *The Times Higher Education Supplement*, 12 July 1996,3
 - xxi Less common in New Zealand due to the immunity provided by our system of Accident Compensation
 - xxii P Kaye 'Colleges in Court' (1993) SJ 816

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- xxiii Complaints which relate to human rights, discrimination, harassment, campus safety, defamation and breach of privacy are all possibilities within the student/institution relationship. It is not intended in this paper to canvas this minefield.
 - xxiv B Keene. 'Transactions: Silence and Fair Trading' (1996) NZLJ 260.
 - xxv D Considine. 'The Loose Cannon Syndrome: University as Business and Students as Consumers' (1994) 37 AULR 36
 - xxvi Quoted in D Walker. 'Hard Sell Recruiting by British Universities Assailed' (1985) 30 CHE 39
 - xxvii Section 3
 - xxviii July 12, 1996, 3
 - xxix *Gould v Vaggelas* (1985) 157 CLR 215,236; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988)ATPR 40-850
 - xxx Unreported, 19 June 1996, High Court, Auckland Registry, AP 174/95.
 - xxxi *Re Credit Tribunal: General Motors Acceptance* (1977) 14 ALR 257 per Mason J.
 - xxxii McDonalds Systems of Australia Pty Ltd v McWilliams Wines Pty Ltd (1979) ATPR 40, at p.108
 - xxxiii For a discussion see M Davies 'Universities, academics and professional negligence', (1996) 12 *Professional Negligence* 102 and D. Farrington, *The Law of Higher Education*, Butterworths, London, 1994
 - xxxiv See TA Schweitzer, "'Academic Challenge" cases: Should Judicial Review Extend to Academic Evaluations of Students?' (1992) 267 *The American University Law Review* 268.
 - xxxv [1994] ELR 184
 - xxxvi HWR Wade 'Judicial Control of Universities' (1969) 85 LQR 468.
 - xxxvii *Joobeen v University of Stirling* (1995) SLT 120
 - xxxviii 687 A. 2d 111 (Conn 1996).
 - xxxix 687 A. 2d 111 (Conn 1996), at p. 120.
 - xl *The Times*, London, U.K., 23 November 1993
 - xli Universities in the U.K. (excluding Scotland) established by Royal Charter have a 'visitor' as the guardian of the university's internal rules and as such they have jurisdiction to decide internal disputes.
 - xlii Originally the Governor-General was the visitor of universities such as Victoria and Massey but this provision was repealed by S.50(4) of the Education Amendment Act 1980.
 - xliii The Further and Higher Education Act 1992 (U.K.).
 - xliv *Wong v University of Toronto* (1991) 79 DLR (4th) 652
 - xlv 379 N.E. 2d 617 (Oh. 1978)
 - xlvi See the paper presented by the writer at the Australia and New Zealand Education Law Association Conference in Melbourne, Australia, October 1995, 'Guarantees for ABC's'
 - xlvii It came in to force on 1 April 1994
 - xlviii W. Kyd, (1993) 536 NZPD 16567
 - xlix S.28 is mirror of S.74(1) in that Act
 - l *Larmer v Power Machinery Property Ltd* (1977) ATDR 40-021; also the New Zealand

case of *Hay v Chambers* (1991) NZBLR 102,200

- li The approach as stated by Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 WLR 358
- lii ss.29(c) and (d)
- liii Common law and the Contractual Remedies Act 1979
- liv S.36
- lv Although by virtue of S.14, Accident Rehabilitation and Compensation Insurance Act 1992 proceedings are prohibited for damages for personal injury, nervous stress would seem to be excluded from the prohibition.
- lvi [1932] All ER 1, per Lord Atkin.
- lvii [1964] AC 465
- lviii [1964] AC 465
- lix [1964] AC 465 at p.471.
- lx (1968) 122 CLR 556; (1986) 162 340; (1997) 142 ALR 750 respectively.
- lxi (1997) 142 ALR 750, at p. 757.
- lxii Unreported, 13 November 1997, High Court, Wellington Registry, CP 312/96. Refer p.5 above.
- lxiii [1978] AC 728.
- lxiv [1932] All ER 1.
- lxv This approach has been affirmed in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 and more recently in *Rowan v Attorney-General* Unreported, 10 April 1997, High Court, Auckland Registry, CP 2754/89.
- lxvi See n. 16, *Peter W. v San Francisco Unified School District; Donohue v Copiague Union Free School District; Hoffman v Board of Educators of the City of New York*.
- lxvii A Hopkins 'Liability for Careless Teaching: Should Australians Follow the Americans or the British?' (1996) 34,4 *Journal of Educational Administration* 39, at p. 53.
- lxviii [1995] 3 All ER 353 (HL)
- lxix At p. 766 and set out on page 4 above.
- lxx This case was reported in the *Daily Telegraph*, London, U.K., 6 August 1996
- lxxi [1957] 2 All ER 118, 122
- lxxii [1994]1 All ER 651
- lxxiii at p.670
- lxxiv 81 Neb 533, 116 NW 294, cited by Davies n.25 at p.107
- lxxv RK Elleven, DB Lumsden & CK Kern 'Student legal issues confronting metropolitan colleges and universities: a 10-year look ahead' (1997) 9 *Education and the Law*, 41.
- lxxvi Universities count the cost as students resort to legal action. *The Times*, London, U.K. 7 October 1996, 7. It must be noted that this and other quotations herein are from lawyers with their own commercial interests in mind.
- lxxvii There have been recent media reports (March 1998) that overcrowding in certain first year lectures at Victoria University, Wellington has led to students being asked to leave for safety reasons.

lxxviii *Independent*, London, U.K., 14 July 1993

lxxix Davies at p.106

lxxx Introduction by John Patten, Secretary of State for Education

lxxxi Davies at p.109

lxxxii Anna Tobin, *Times Higher Education Supplement*, London, U.K., 26 July 1996, at p.11