

## **Policy Issues a Key to the Determination of Educational Negligence**

*Phelps v Hillingdon Borough Council [1999] 1 SRR 500*

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The final quarter of the twentieth century has seen the arrival of the claim for educational malpractice, or educational negligence, by students who have failed to learn. Generally speaking, the claim has been that the professional behaviour of teachers, or educational psychologists and/or other providers of educational services has breached the duty of care to educate, with the consequence that the student-plaintiff failed to learn, and that this was an injury compensable in tort. However, the superior courts in the USA, Canada and England which have considered such claims have ultimately rejected them. The decision of the English Court of Appeal in *Phelps v Hillingdon Borough Council* [1999] 1 WLR 500 is consonant with the earlier decisions.

### **Facts**

From the time the plaintiff in this case was about seven years old, and enrolled in infant school, there was considerable concern about, what is described, at p 503 in the judgment, as her 'lack of educational progress'. She was seen by an educational psychologist and subsequently referred to a child guidance clinic, where she was seen by a psychiatrist and a psychiatric social worker. She was also given individual psychotherapy. When she entered junior school yet another educational psychologist confirmed that she was experiencing learning difficulties and the remedial teacher advised that she be given appropriate materials and tasks to encourage her. Her parents were not happy with the work of the child guidance clinic, but did not seek help elsewhere. The Court said that the reports from the child guidance clinic showed that the plaintiff's under-performance in literacy skill was not attributed to dyslexia but rather to emotional and behavioural problems arising from family relationships, and that this influenced the thinking of the education professionals who subsequently dealt with the plaintiff. The Court noted that, although the professionals in the child guidance clinic were not being alleged to be negligent, the plaintiff's case implied that their diagnosis was wrong to the extent that the plaintiff's problems were attributed to emotional factors and not to dyslexia.

In 1985 the plaintiff entered a large comprehensive school, and, like all the other new arrivals, was given a reading test which again indicated her lack of educational progress. Subsequently, she was given special needs training in English and mathematics, and was referred to the school educational psychology service. She was tested but was not identified as dyslexic. Her parents were concerned that she should have been placed in a special school, but the school authorities did not consider this appropriate. The school care committee continued to monitor her progress, and she was subsequently placed in the foundation course designed to develop practical and business skills. However, her educational progress in later years was not helped by absences from school for various reasons. In February 1990 her parents referred her to the Dyslexia Institute, which identified her as a dyslexic. The plaintiff left school in April 1990 and commenced work. She also undertook further remedial tuition to mitigate the effects of her dyslexia.

### **At first instance**

The plaintiff's claim was that the educational psychologist, who had not diagnosed dyslexia in 1985 or subsequently, had been negligent, and that she had not been taught by the school in a multi-sensory and structured approach which would have enabled her to develop improved literacy skills. It was also claimed that the education authority was vicariously liable for the educational psychologist's tort. On the other hand, the defendants claimed that the educational psychologist did not owe the plaintiff a duty of care, and that she had not been negligent. Further, they claimed causation had not been established because it had not been shown that the school would have taught the plaintiff differently had dyslexia been diagnosed, and in any event it was not proved that different teaching strategies would have made a measurable improvement. The plaintiff also claimed that the teachers had been negligent in not using different teaching strategies.

The judge at first instance found that the educational psychologist was under a duty of care to the plaintiff and the failure to diagnose dyslexia was a breach of this duty of care. This decision was appealed. However, the judge did not find the teachers negligent, because, although they were under a duty of care, they could rely on the information provided by the psychologist. There was no appeal against this finding.

### **The decision in the appeal**

The appeal was allowed and the decision of the lower court was reversed. The leading judgment was delivered by Stuart-Smith LJ, with whom Otton LJ, who delivered a shorter judgment, and Tuckey, LJ agreed. Firstly, the Court of Appeal held that dyslexia was not an injury but a congenital condition, and failure to lessen its effects was not an injury compensable by damages for negligence in tort. However, if responsibility had been taken to protect the plaintiff from the kind of loss sustained, damages for economic loss might be able to be recovered. Secondly, the Court of Appeal held that, as a matter of policy, it

would be unjust, unfair and unreasonable to impose a duty of care on an educational psychologist employed by an educational authority unless the psychologist had voluntarily assumed a personal responsibility for the child, which had not happened in the circumstances of this case. Further, the Court of Appeal held that the plaintiff had not established negligence on the part of the educational psychologist nor that her literacy problems were caused by the failure to diagnose dyslexia.

After reviewing the facts and the decision in the judgment at first instance, Stuart-Smith LJ specifically noted the received definitions of dyslexia and stated, at p 509, that it is 'a constitutional or congenital condition, not a defect, illness or injury'. Further, it was noted, at p 510, that there was some evidence that the multi-sensory and structured teaching strategies, appropriate for teaching dyslexic children, were used in the special needs teaching provided by the school.

The issues in the appeal were clearly defined. What was the nature of the damage claimed and could it be compensated in a claim for damages in tort? Was the educational psychologist under a duty of care to the plaintiff? If the answers to these questions were in the affirmative, was the finding of a breach of duty by the psychologist correct? If the answer to this question is in the affirmative, then was the finding that the educational psychologist's negligence caused the damage correct? And finally, there was the issue of the quantum of damage.

### **The nature of the damage**

In dealing with the question of the nature of the damage claimed, which was fundamental to the appeal, because it had to be established that the educational psychologist owed the plaintiff a duty of care to prevent this kind of damage, Stuart-Smith LJ examined at some length several leading negligence English cases relating to the nature of damage and the kind of compensation which can be obtained. The conclusion, at p 513, was that dyslexia was not an injury and that failure to lessen its effects could not be an injury. However, it was also noted that damages for economic loss could be recoverable where there had been an assumption of responsibility to protect the plaintiff from the kind of loss sustained. Further, the Court said that an educational psychologist who was privately consulted by parents about a child's lack of progress could be liable in contract for failing to take reasonable care with a diagnosis. However, Stuart-Smith LJ also considered that the issue of causation would be a difficult one.

### **The duty of care**

The judgment then turned to the questions of whether a duty of care existed and whether the educational psychologist assumed such a duty of care. The submission on behalf of the plaintiff had apparently been based on the decision of the House of Lords in *X (Minors) v*

*Bedfordshire County Council* [1995] 2 AC 633, where the claim against the education authority directly was not allowed, but it had been said that a claim against an individual educational psychologist or teacher might succeed. Stuart-Smith, LJ examined the leading American decisions and a Canadian decision on claims of educational malpractice. It was noted, at pp 515-516, that in all of these decisions the courts agreed that failure in educational achievement could not be characterised as an injury within tort law. Further it was said, at p 516, that the decision in *X (Minors)* had led to 'a proliferation of claims' of which the first to succeed was the plaintiff's claim in this case. If this was correct, the consequence was that the immunity of the local education authority against direct claims, supported by the House of Lords for 'powerful policy reasons will be completely circumvented'. This was a 'matter for very great concern'.

Stuart-Smith LJ then determined that in this case, unlike *X (Minors)*, the court had evidence before it of the circumstances of the plaintiff's claim, and he examined in some detail the judgment at first instance. The Court pointed out that the judge at first instance did not ask the question of whether the psychologist had voluntarily undertaken the responsibility to advise the plaintiff through her parents. Stuart-Smith LJ said, at p 519, that the educational psychologist's duty was to advise the school and the local education authority, and the fact that the parents were told about the advice concerning their child did not constitute the undertaking of such a responsibility to the plaintiff. It was also said that if an educational psychologist employed by a local education authority consulted privately, outside her employment, then the local education authority would not be vicariously liable. The conclusion, at p 521, was that the same strong policy reasons which had led the House of Lords not to impose a duty of care on a local education authority also meant that 'it would not be fair, just or reasonable' to impose such a duty on an educational psychologist unless the latter had undertaken a 'personal responsibility to the plaintiff', and the plaintiff had to prove this.

### **The policy reasons**

Stuart-Smith LJ discussed the policy reasons for the decision at some length. Firstly, there was the serious risk of vexatious claims being brought against teachers or educational psychologists many years after decisions were taken, and the associated difficulties of proving them. These claims would result in a waste of resources by a local education authority which has the task of providing free education for all. Secondly, it was noted, at p 522, that the work of the local education authority and its employees required the involvement of parents who had a duty to see that the child received 'efficient full-time education'. In this case the parents, under the *Education Act 1981*, had powers to seek a review of a local education authority's decisions in respect of their child. Thirdly, the parents' failure to challenge decisions did not mean that they were relying on the

educational psychologist's advice in a way which created a duty of care on her part towards the child.

The fourth policy issue was that the decisions made involved taking account of the views of many professionals involved in the delivery of educational services. On the one hand it would be 'invidious to single out one' and on the other if they are all sued then the immunity of the local education authority is circumvented. The fifth were the difficulties raised by the question of causation. The sixth was that the public education system was set up to provide public education generally and to approach that task defensively, by instituting extensive testing, would lead to a waste of resources.

In the light of these policy grounds, Stuart-Smith LJ found that no duty of care existed. The Court explained, at p 523, that it found the reasoning of the American courts, which had extended the immunity in educational malpractice suits to cover individual employees of education authorities, persuasive. Moreover, in English jurisprudence the same conclusion would be reached in one of two ways. The first way was by holding that, when an employee as part of his or her duties, merely gives advice about a child to the local education authority, and the parents are told of this advice and the decisions of the local authority, there is no undertaking of a responsibility which raises a duty of care on the part of the employee. The second way was that it was not fair, just and reasonable to place such a responsibility on one of a number of professional employees who are merely performing their duties to the local education authority.

### **Breach of duty and causation**

With regard to the issue of whether, had there been a duty of care, that duty of care had been breached, Stuart-Smith LJ reviewed the evidence, given at first instance, of the actions taken to test and assess the plaintiff's educational progress, and determined that too high a standard of duty had been imposed upon the educational psychologist.

As to the issue of causation, it was noted that there had been much evidence about the nature of the special needs teaching the plaintiff received and whether she would have been differently taught had dyslexia been diagnosed. However, the judge at first instance had not analysed this evidence, but had considered that the plaintiff was not taught as a dyslexic because there was no diagnosis of dyslexia. Stuart-Smith LJ said that the plaintiff had to show, on the balance of probability, that the school would have taught her differently if her dyslexia had been diagnosed, and that if different teaching strategies had been used, they would have made a real difference to her. Although Stuart-Smith LJ found that the judge at first instance was entitled to conclude that different teaching strategies would have been used, the conclusion, at p 526, was that it was not possible to say, on the balance of probability, that different teaching would have made 'a measurable difference', and that it was not possible to say what effect emotional factors had on her. It was noted

that it might be possible to do this if there were no emotional factors and a child was not given appropriate teaching. The remaining issue, that of the quantum of damages, was not discussed by Stuart-Smith LJ.

Otton LJ agreed with the analysis of fact and law presented by Stuart-Smith LJ and chose only to emphasise some issues. It was noted that it was open to the court to find that the educational psychologist had not assumed responsibility for the plaintiff, and with regard to the issue of causation, said that two questions arose. Would the plaintiff have been treated differently if dyslexia had been diagnosed? If she had been treated differently, what would the outcome have been? With regard to the first question, Otton LJ, like Stuart-Smith LJ, was satisfied that the judge at first instance was justified in finding she would have been taught differently, but Otton LJ also noted, at p 529, that if evidence as to the common practice in the teaching of dyslexic children in the mid-1980s had been accepted, the conclusion would have been that the defendants had not been negligent in providing for the plaintiff's education. As to the second question, Otton LJ found, at p 529, that, given the nature of dyslexia as a congenital condition, the plaintiff had not proved that there was a deficit resulting from the failure to diagnose dyslexia or that such a deficit would not exist if the education had been appropriate. Finally, on the matter of how the judge at first instance had decided on the quantum of damages, Otton LJ pointed out that there was no history of employment and the future was speculative. The conclusion, at p 530, was that 'formidable difficulties' in proving causation faced a plaintiff with a congenital condition, insofar as future earning capacity was concerned.

The *Weekly Law Report* notes that leave to appeal was refused.

## **Conclusion**

*Phelps v Hillingdon Borough Council*, a decision of the English Court of Appeal, is a judgment which may well be taken note of in Australian courts. It canvasses several significant issues in claims for compensation for educational negligence. One important feature of the judgment is the strong reliance upon policy grounds to reject the claim that failure to learn is compensable in tort. The Court of Appeal seems clearly to have been reluctant to offer encouragement to claims of compensation for failure to learn. In adopting this attitude, this decision is consonant with the approaches adopted by other superior courts in the United States of America and Canada. A second feature is the attitude of the Court towards the nature of the role and responsibilities of public education authorities, although it should be noted that this was determined in the light of the provisions of the English education legislation. However, this decision of the Court of Appeal indicates an unwillingness to recognise a statutory duty of care on the part of the local education authorities, and an equal unwillingness to allow the absence of such a statutory duty of care on the part of the educational authority to be circumvented by the imposition of a duty of care upon individual providers of educational services for the

educational authority, thus giving rise to vicarious liability on the part of the educational authority. However, it is possible that such a duty of care on the part of individual providers of educational services may be found to exist where there is clear evidence that such a duty was individually undertaken by those providers outside the scope of their employment by the educational authority. A third important feature is the clear recognition of the difficulties of proving causation between the breach of a duty of care and the injury claimed, even if there is found to be a duty of care in the provision of educational services. This difficulty relates, of course, to the complexity of the factors which affect the educational process over time. A fourth feature is the unequivocal decision that a lack of educational progress which arises from a congenital condition is not an injury within the scope of tort law.

Nevertheless, it also remains clear from the judgment that negligence is always a question of fact, and that each decision is made according to the factual circumstances of the case. The decision does not rule out the possibility that where a duty of care is assumed by an individual provider of educational services to protect an individual from a certain type of damage, and breach of that duty and causation of the particular damage can be shown, then an action for educational negligence might lie. The relatively brief discussion on the quantum of damage, however, suggests that even if negligence were found, quantifying damage could still prove to be difficult.