

The Role of Public Policy in Determining an Educator's Duty of Care

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Abstract

Recent cases in Australia have reassessed the role of public policy in the determination of the duty of care in a case in negligence. Public policy has always loomed large as a consideration in educational negligence cases in the United States and in the United Kingdom, and is frequently cited as an obstacle to educational negligence cases in Australia. This paper considers the role of public policy in educational negligence cases, considering the reluctance of the courts to extend the duty of care to schools and universities for negligent teaching. It considers the Australian position in the light of recent High Court and House of Lords decisions, and the consistently significant role of public policy in decisions in the United States.

Duty of Care in Educational Negligence Cases

Many cases in negligence against schools have failed because the plaintiff has not established that a duty of care is owed. This is counter-intuitive to the layperson; if schools and universities are established to teach students, and they fail to do so, there must have been some dereliction of a duty owed to the student. This attitude is shared by more experienced commentators; Mr Justice Kirby has said that '[t]here is no reason of principle why the negligence action should be confined to physical injuries. ... why should the loss not be borne by those who have caused it? It is just not possible, either in legal theory or commonsense, to hold the line at liability for physical injury' (Kirby, 1983).

Nevertheless, the courts have shown great reluctance to extend to teachers and academics the duty attributed to other professionals. Many commentators regard this as an anomalous exception; attempts for recognition as professionals by teachers, in particular, lead to claims that, as professionals, teachers should be vulnerable to the same claims in professional negligence. Similarly, 'if the academic can be viewed as a professional, those functions which he or she ultimately delivers could result in a professional negligence type claim against the institution' (Davies, 1996:102). The reasons for denying the existence of the duty of care, however, are complex, and the debate has moved on somewhat from the identification of the defendant as a professional. Logically, what is it about intellectual harm which prevents the court from finding that a duty of care is owed where this is the damage being claimed?

Clearly, where an established category of duty of care exists, there need be no further enquiry. In the case of a student, it could be asserted that the professional/client relationship exists, but such an assertion would be vulnerable to the difficulties exposed by the number of cases which

have failed to establish a duty of care in the teacher student relationship. These cases, which will be considered in the course of this paper, would suggest that such a category is unlikely to be held to exist.

The Concept of Duty of Care

To succeed in a case in negligence, it is necessary to establish that the defendant (in this case, the school or university) owes a duty of care to the plaintiff (the student) to prevent the harm complained of (intellectual harm). Where there have been cases of that type establishing that a duty exists, the precedent alone is enough to establish the existence of a duty. Where there is no established precedent, in cases involving claims for recovery for physical harm through positive conduct, the question of duty of care is not problematic. Foreseeability of harm is a sufficient criterion. However, if the case involves anything other than physical damage to person or property, foreseeability is not 'capable of keeping the law within reasonable limits' (Doyle *et al.*, 1999: 31). For those cases, according to *Perre v Apand Pty Ltd* (1999) 164 ALR 606, foreseeability is a necessary but not sufficient prerequisite to the establishment of a duty of care (at 609-10 (Gleeson CJ), 614 (Gaudron J), 682 (Kirby J)).

Thus, in a case of economic loss, or the even more vague 'intellectual harm' which may be said to be caused by negligent teaching, and which is more likely to have been by word rather than by act, some further control mechanism is needed. Without such a control, liability is likely to extend too widely. The educational process is primarily mediated by words, and a cautionary factor is attracted when the negligence is in the form of the written or spoken word occasioning economic loss. In *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241 a finance company lent money on the basis of accounts audited by the defendant. The debtor went into receivership and the auditors were, unsuccessfully, sued in negligence. The decision of the High Court makes it clear that, in these cases, the plea of reasonable foreseeability is insufficient as a sole criterion to establish duty of care.¹

Placing Restraints on the Breadth of the Duty of Care

However, there are other considerations which are influential in restraining the breadth of a duty of care. These factors were considered in *Perre v Apand* (1999) 164 ALR 606, a case in which the plaintiffs were affected by a quarantine activated by the negligent importation of bacterial wilt onto a nearby potato-growing property. The plaintiffs were not infected with bacterial wilt, but suffered economic loss through an inability to export their produce to other states. Gleeson CJ (at 609-10) indicated the grounds for limiting the range of those to whom a duty of care is owed. Firstly, 'bearing in mind the expansive application which has been given to the concept of reasonable foreseeability in relation to physical injury to person or property, a duty to avoid any reasonably foreseeable financial harm needs to be constrained by 'some intelligible limits to keep the law of negligence within the bounds of common sense and practicality''.²

Secondly, the operation of the law of negligence in the context of foreseeable economic loss may interfere with freedoms, controls and limitations established both by common law and statute which may be informed by specific policy limitations. Thirdly, in cases where the loss

occurs in a commercial setting, the third party may suffer financial harm as a result of conduct which is regulated by a contract between others, where the contract governs or limits recovery (*Perre v Apand Pty Ltd* (1999) 164 ALR 606, 610 (Gleeson CJ)). Whereas this does not prevent recovery in tort in relation to the action governed by the contract, there are other circumstances in which the liability of the third party in contract will act as a 'countervailing factor' which may justify the decision of a court to deny liability by denying that a duty of care exists (Stapleton, 1995: 303; Stapleton, 1998: 65). In some situations the countervailing factor arises because the defendant is a peripheral party, and the plaintiff could have taken action *in tort* against a causally principal party. In those circumstances, the student could sue the other organisation in tort, but may choose to sue the university instead or as well. However, another countervailing factor which may influence the court in deciding whether a duty of care is owed in negligence is the existence of a *contract* with the other body. In particular, where a contract does exist with another body, the plaintiff may have been in a position to protect him or herself by negotiating a contractual term.

Gleeson CJ also cited the lack of precision in the concept of financial or economic loss, compared with physical injury, which is readily identifiable. He said '[t]he law of tort is a blunt instrument for providing a remedy for many kinds of harm which may be suffered as a consequence of someone else's carelessness, and which are capable of being described as financial' (*Perre v Apand Pty Ltd* (1999) 164 ALR 606, 610 (Gleeson CJ)). This is not always the case; in some cases financial loss will not be difficult to estimate. However, where the financial loss is as a result of a student's failure to learn, it is not likely to be an easy task.

Mechanisms for Restraining the Breadth of Duty

The courts have used various mechanisms to restrict the concept of foreseeability. For many years in Australia the concept of proximity was the primary method of constraint. Proximity involves the concept of 'nearness' or 'closeness', which may be physical, circumstantial or causal nearness. In *Hill v Van Erp* (1997) 188 CLR 159, in which a solicitor was found liable in negligence for failing to protect the interests of a (non-client) beneficiary of a will, the High Court finally conceded that proximity was not as useful as had been suggested as a guide to the determination of a duty of care in any particular case (at 175-9 (Dawson J), 188-90 (Toohey J), 210-211 (McHugh J), 237-9 (Gummow J)). Rather, the correct approach in Australia, as summarised by Toohey J at 189, is as follows: '[a]ttention is focused on established categories in which a duty of care has been held to exist; analogies are then drawn and policy considerations examined in order to determine whether the law should recognise a further category, whether that be seen as a new one or an extension of an old one'.

The demise of proximity, and in particular three point test of foreseeability, proximity and policy used in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617-618 (Lord Bridge of Harwich), was reiterated in *Perre v Apand* (1999) 164 ALR 606. Gleeson CJ, in particular, said (at 610) that 'the concepts of proximity and fairness are not susceptible of any such precise definition as would be necessary to give them utility as practical tests'.³ The concept of proximity in particular was attacked by Gaudron J (at 614-5), who said 'the notion of proximity can serve no purpose beyond signifying that it is necessary to identify a factor or factors of special significance

in addition to the foreseeability of harm before the law will impose liability for the negligent infliction of economic loss'. McHugh J (at 624-5) cited Dawson J in *Hill v Van Erp* (1997) 188 CLR 159, 176-7, saying that proximity was 'neither a necessary nor a sufficient criterion for the existence of a duty of care. Furthermore, proximity in the sense of nearness or closeness is hardly a useful concept in most cases of pure economic loss'. Hayne J said (at 698) that 'to search ... for a single unifying principle lying behind what is described as a relationship of proximity is ... to search for something that is not to be found'.

The usefulness of the term 'proximity' may be open to question, but the factors enumerated as significant to a relationship of proximity in Australia have repeatedly been found to be important, and the members of the High Court in *Perre* who took issue with the concept of proximity then faced the task of identifying matters which should be relevant. A number of factors were identified. Gleeson J (at 611-2) specified knowledge of a reliant and therefore vulnerable party, physical propinquity, the degree of foreseeability and the control over the relevant activity by the defendant. McHugh J (at 632) identified vulnerability and knowledge of an ascertainable class. Gaudron J (at 613), whilst considering that pure economic loss did not have a governing principle applicable in all cases, identified (at 615) known reliance or the assumption of responsibility as a category leading to a duty of care. She also identified a second category - protection of legal rights. Where one person is in a position to control the exercise or enjoyment by another of a legal right, the dependence of the other on the person with control would be a special factor leading to a relationship of neighbourhood (at 617). Hayne J (at 699) considered policy matters to be important, particularly the avoidance of indeterminate liability.

The Approach in a Novel Claim

In more settled areas of the law of negligence, particularly where the case involves ordinary physical injury caused by an act of the defendant, reasonable foreseeability of injury will be enough to establish that a duty of care is owed. In a novel category of case policy considerations will bear more weight. This was a feature of cases in which proximity was cited as the relevant test – public policy was a legitimate proximity consideration.⁴ Although the High Court of Australia departed from the proximity taxonomy in *Hill v Van Erp* (1997) 188 CLR 159, the court will still take account of public policy considerations.

The two stage test adopted in *Anns v Merton LBC* [1978] AC 728,⁵ which required consideration of, firstly, proximity, and secondly, public policy, was held by Gibbs J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 441⁶ to be inappropriate in a situation where a duty of care had already been recognised, and by Lord Brandon in *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785, 815⁷ to be inappropriate in a situation where a duty of care had been repeatedly held not to exist. However, in a novel category of case, policy considerations would become critical. Like the other 'proximity' factors, the identity and relative importance of policy considerations are likely to vary from situation to situation.

The considerations relevant to establishing whether a duty of care is owed, particularly the concept of proximity and the role of public policy factors, has been a point of difference between Australian and English authorities. In England, the two stage *Anns* test is said to have resulted in or

facilitated ‘the unchecked expansion of the law of negligence, turning it, as one commentator graphically noted, into an ‘all devouring negligence monster consuming all other torts, contractual and statutory duties, and equitable principles’ (Balkin *et al.*, 1996: 207, citing Manning, 1993:85). In response to these concerns, courts in the United Kingdom have turned to the incremental approach advocated by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 and later adopted by the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398. By this approach, the question of whether a duty of care is owed is resolved by reference to established categories of negligence. ‘In this way, new categories of duty of care will not be created overnight by some ‘massive extension of a prima facie duty of care restrained only by indefinable considerations of policy’, but will take place in an orderly and incremental fashion’ (Balkin *et al.*, 1996: 207, quoting Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481). Where a novel category of duty is proposed the court must identify with some degree of precision a factor in addition to reasonable foreseeability of loss. Without that, no duty exists. (Balkin *et al.*, 1996: 207, quoting Brennan J in *Hawkins v Clayton* (1988) 164 CLR 539, 556)

In *Perre v Apand Pty Ltd* (1999) 164 ALR 606 all members of the High Court of Australia referred to the incremental approach; McHugh J said at 624 that ‘neither proximity nor the categories approach or any synthesis of them has gained the support of a majority of Justices of this Court. Indeed, since the fall of proximity, the Court has not made any authoritative statement as to what is to be the correct approach for determining the duty of care question’. He concluded (at 630) that the incremental approach was the most satisfactory approach.⁸ Other members were less explicit. Gleeson CJ (at 611) referred to the incremental approach, and agreed with the reasons of Gummow J for deciding that a duty of care existed in the circumstances of the case. Gummow J, however (at 659), citing McCarthy J in *Ward v McMaster* [1988] IR 337, 347, considered that the ‘making of a new precedent will not be determined merely by seeking the comfort of an earlier decision of which the case at bar may be seen as an incremental development, with an analogy to an established category. Such a proposition, ... ‘suffers from a temporal defect - that rights should be determined by the accident of birth’. Kirby J (at 685) adopted the *Caparo* three stage approach.

Consideration of questions of policy was evident in all reasoning. However, judicial approaches differed, insofar as some were prepared to state a general test, which included a reference to global ‘policy considerations’, whilst some refused to state a test which included reference to policy, but referred to policy matters in their decisions. McHugh J (at 630) said that the law should develop incrementally, by reference to established categories, and that the reasons for upholding or denying a duty should be regarded as principles in analogous cases. Those reasons would reflect policy considerations recognised by the court as relevant. Those policy considerations could, in some cases, be so decisive in determining duty that they could be applied as rules or principles in other cases. Kirby J, by his adoption of the *Caparo* approach (at 676), expressly accepted the inclusion of policy considerations – or matters which would determine whether it was fair, just and reasonable to impose liability.

Callinan J’s review of precedent frequently referred to policy considerations, and his conclusion indicated that he considered it to be an important factor. He said (at 716):

[t]he cases subsequent to [*Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529] in this country show that all judges are united in their opinions that, for policy reasons, there is a need for a control mechanism to limit the availability of relief for pure economic loss so that commerce, providers of services, courts and society generally will not have to bear the burden and uncertainty of incalculable claims by a mass of people whose identity or very existence may be unknown to the defendant. It is not surprising, having regard to the different factual situations in which pure economic loss has been suffered and will no doubt be suffered in the future, and the frank judicial acknowledgments that have been made of the relevance of public policy and social issues, that the principles governing or controlling the mechanisms to limit liability have not always been stated identically.

In contrast, Hayne J did not mention 'policy', and eschewed references to 'fairness' or 'reasonableness' as obscuring the reasons for the determination of whether or not liability existed (at 699). However, he did make reference (at 699) to 'additional considerations that may have to be taken into account'. In *Perre* the two matters which were considered relevant were indeterminacy of liability and 'whether the liability is consistent with basic assumptions about the economy in which the conduct takes place'.

Gummow J did not specifically mention policy considerations, but did refer (at 660) to 'control mechanisms' which would militate against a finding that a duty of care was owed where, for instance, such a finding would result in indeterminate liability to a large class of plaintiffs.

Gaudron J accepted policy considerations by implication, by referring to two policy considerations in her judgment (at 615-6). Whilst Gleeson CJ did not consider it specifically, it was an apparent consideration in his reference (at 611) to 'convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope'⁹ and to the reference (at 612) to the apprehension of indeterminate liability.

Thus, a majority of the High Court in *Perre v Apand* recognised the role of policy in limiting the reach of foreseeability in a novel case.

Policy Considerations in Education Cases

In the United States, where cases of 'educational malpractice' have been common, questions of public policy, the statutory context, the viability of alternative remedies, and the type of injury involved are considered to be relevant to the determination of whether a duty of care exists. The considerations of policy enumerated in the United States' cases were initially employed in the Court of Appeal in the United Kingdom in *Phelps v Hillingdon London Borough Council* [1999] 1 WLR 500 to deny that a local education authority owes a duty of care.

Obviously, decisions in the United States' jurisdictions are persuasive only in Australia, but policy considerations which impress courts of one jurisdiction may be as influential in each other jurisdiction. A number of cases in the non-tertiary context in the United States elaborated on

the public policy grounds which would be relevant to a case involving a student alleging educational malpractice in the form of a generalised 'failure to learn'. Two of the earliest are particularly influential in their consideration of this point.

In *Peter W v San Francisco Unified School District* 131 Cal Rptr 854 (1976) the Californian Court of Appeal, First Appellate District denied relief to the applicant largely on policy grounds. Peter W was an eighteen-year-old graduate of a high school operated by the defendant. He had been in the school system operated by the defendant for twelve years. Upon graduation, he had little or no ability to read or write. The court noted (at 859) that the concept of duty of care was 'not immutable' but that amongst the things which remained constant an awareness of public policy considerations was 'most important' in this case. The court cited the following factors:

- The social utility of the defendant's conduct, compared with the risks involved in that conduct;
- The workability of the rule of care, especially with regard to the practicality of means of prevention;
- The relative ability of the parties to bear the financial burden of the injury, and the capacity to spread the loss;
- The body of statutes and judicial precedents governing the relationship;
- The prophylactic effect of a rule of liability;
- Any legislative or regulatory restrictions on the conduct of the defendant;
- Moral imperatives;
- The policy of preventing further harm;
- The extent of the burden to the defendant and the consequences to the community of imposing a duty;
- The availability, cost and prevalence of insurance for the risk involved.
- 'Administrative factors' such as the possibility of feigned claims and difficulties of proof of injury;
- The prospect of limitless liability for the same injury.¹⁰

In another case from the United States, *Donohue v Copiague Union Free School District* 418 NYS 2d 375 (1979) the plaintiff alleged that, despite being a High School graduate, he lacked even a rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications to obtain employment. He attributed his failure to the failure of the educational authority through its employees to perform their duties and obligations. The Court considered the question to be one of public policy - should the claim, as a matter of public policy, be entertained. The Court held that it should not. Jasen J (with whom Cooke CJ, Jones and Fuchsberg JJ concurred) located these public policy considerations within the context of the Constitutional and statutory provisions in the State. He said (at 378):

[t]o entertain a cause of action for ‘educational malpractice’ would require the courts not merely to make judgments as to the validity of broad educational policies - a course we have unalteringly eschewed in the past - but more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and State in school administrative agencies.

Wachtler J concurred in a separate opinion with which Gabrielli J agreed. He stated slightly wider public policy grounds; in particular he said that the cause of action would have to be reasonably manageable within the legal system. He considered (at 379) that questions of proximate cause would cause so much difficulty as to make the cause of action unmanageable.

In the United Kingdom, the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 and the Court of Appeal in *Phelps v Hillingdon London Borough Council* [1999] 1 WLR 500 confirmed the role of public policy in a case of this nature. The American cases were cited in the House of Lords in *X*, and Stuart-Smith LJ in the Court of Appeal in *Phelps* quoted them with approval. He cited the refusal of the House of Lords in *X* to impose a duty of care on the local education authority for policy reasons, and extended those policy reasons to deny that an employee of the educational authority would owe a duty of care to the student. He summarised these policy reasons (at 522-3) as follows:

1. There is a serious risk of vexatious claims, which may be brought years after the event, and in relation to which documents and witnesses may be difficult to find.
2. Scarce resources would be diverted from the provision of free education in order to fight these cases.
3. The decisions of the authority in the exercise of its discretion (in this case, in the measures to be taken for the benefit of a poorly performing student) are made in close consultation with the parents of the child, and the parents are in a position to appeal decisions they consider erroneous. Thus, alternative procedures are available for resolution of the dispute, both under statute and in administrative law.
4. These alternative options are more appropriate than a claim for damages, since they can be completed at the time of the grievance, when evidence is fresh.
5. The question of causation presents enormous difficulties.
6. The public education system is established at the taxpayers’ expense for the benefit of the public generally. The possibility of litigation may result in teachers and education authorities engaging in defensive practices, such as over-testing, which will result in a waste of resources.

The judgment went on to say (at 523):

I find the reasoning of the American courts, which have extended the immunity in educational malpractice suits to cover the individual servants or agents of the

education authority, persuasive, though I think in our jurisprudence we should reach the same result by holding that there is no assumption of responsibility giving rise to a duty of care in the mere performance by the servant or agent of his or her duty to the local education authority ... Alternatively, it can be put on the basis that it is not fair, just and reasonable to single out one of a number of professionals for the imposition of such a duty in the absence of a clear assumption of responsibility.

Phelps was the subject of an appeal to the House of Lords, which reversed the decision of the Court of Appeal.¹¹ However, of the range of issues considered in these cases the policy issue was a key one, adding to the persuasive weight of the judicial pronouncements on the matter. In particular, the policy context in which the vicarious liability claim arose was recognised and taken into account. For instance, Lord Slynn recognised that the imposition of a duty of care may interfere with the performance of duties by the local education authority, and that a statute may indicate that Parliament intended that courts should not substitute their views for the views of ministers or officials - that the matter may be a non-justiciable exercise of a statutory discretion. Referring to the United States' decisions he noted the difference in the legislative and administrative environment and the lack of unanimity in the decisions. He said (at 791) that there was no justification for blanket immunity of persons employed to carry out professional services.

Lord Nicholls made some references to policy matters. He alluded (at 804) to the possibility of gold-digging actions brought by discontented parents, potentially years after the event, and that the limited resources of education authorities and the time of teaching staff would be diverted from teaching and into defending claims without legal merit. Schools would have to prepare and keep full records, in order to be able to defend allegations of negligence, brought years later. He did not consider that these fears provided 'sufficient reason for treating work in the classroom as territory which the courts must never enter... Denial of the existence of a cause of action is seldom, if ever, the appropriate response to fear of its abuse ' (at 804).

Lord Clyde made direct reference to considerations of policy as part of the test of fairness. He noted that even where sound policy reasons can be put forward for excluding a claim that is not necessarily sufficient for it to be excluded. In the case of *Phelps* he said (at 809)

[i]t does not seem to me that there is any wider interest of the law which would require that no remedy in damages be available. I am not persuaded that the recognition of a liability upon employees of the education authority for damages for negligence in education would lead to a flood of claims, or even vexatious claims, which would overwhelm the school authorities, nor that it would add burdens and distractions to the already intensive life of teachers. Nor should it inspire some particularly defensive attitude on the performance of their professional responsibilities.

Thus, although the House of Lords reversed the decision of the Court of Appeal, it did not deny the influence of policy factors in the determination of the duty of care, merely assigned less weight to the factors enumerated.

Higher Education Cases - The Approach in the United States

In the higher education context, where cases have been brought in negligence, the policy considerations are not identical but the result has consistently favoured the institution. These cases did not involve the general claim of a 'failure to learn'; two of the most useful involve negligence of the institution allegedly resulting in damage to a person other than the student; that is, damage by the student as a result of the negligent teaching of the institution. Cases in this context have largely been confined to the United States, but they do provide some insight into the way in which courts will approach these questions. *Swidryk v St Michael's Medical Centre* 493 A 2d 641 (N J Super L, 1985) involved educational malpractice, and so gave rise to the difficulty in establishing that a duty of care was owed.

In that case a physician who was undergoing the first year of his residency at the defendant hospital found himself the subject of a medical malpractice claim. He brought a suit against the director of medical education at the hospital. The Superior Court of New Jersey, hearing the director's motion for summary judgment against the plaintiff on the ground, *inter alia*, that the complaint did not state a cognisable tort or contract, granted the motion. Significantly, the court found that the same public policy considerations which would bar the claim in tort would also bar the claim in contract.

The defendant was running a graduate school medical program. Unlike earlier cases, which involved, as Newman JSC says, either high school students who had not acquired basic academic skills, or grade school students who were improperly placed in special education programs, this case did not involve public education, and did not involve compulsory education. However, Newman SJC said (at 644) that 'the same public policy considerations control the issue of whether to recognise the tort of educational malpractice in New Jersey in the factual context presented'.

The Court then went on to state public policy issues which are relevant to the University context. It started out with the proposition, (at 644) supported by authority, that '[a]s a general rule courts will not interfere with purely academic decisions of a university'.¹² The Court would not sit in judgment on the day-to-day decisions of the graduate medical education program. Again, the court considered the statutory and regulatory contexts in which the program operated; the development of programs and the accreditation, licensing, examination and admission requirements were heavily regulated by the state board of medical examiners, the board of higher education and the Advisory Graduate Medical Education Council of New Jersey. The Court said (at 645) that '[i]t would be against public policy for the court to usurp these functions and inquire into the day to day operation of a graduate medical education program'.

The court was also concerned about the repercussions of allowing such a claim from the point of view of the workability of the system of court administration. It said (at 645):

From the standpoint of court administration, it is also unwise to recognise a claim for educational malpractice where an individual physician is attempting to defend against a malpractice claim. To allow a physician to file suit for educational malpractice against his school and residence program each time he is sued for malpractice would call for a malpractice trial within a malpractice case. Creation

of the tort of educational malpractice in this context would substantially increase the amount of time which a medical malpractice case takes to try now as well as have the potential to confuse the jury in its consideration of the underlying issues.

The second case involving an educational malpractice suit due to third party damage, *Moore v Vanderloo* 386 NW 2d 108 (1986), was decided in the Supreme Court of Iowa. The defendant was the Palmer College of Chiropractic, from which Dr Lance Vanderloo had received a diploma. The plaintiff, Linda Moore had suffered a stroke after undergoing a cervical manipulation. At the time of the treatment Moore was thirty-five years old and taking an oral contraceptive. She also smoked one to one and one-half packets of cigarettes each day.

An action was brought against Vanderloo and Palmer for, *inter alia*, negligence; and against the manufacturer in product liability. The action against Vanderloo was settled prior to trial. The district court dismissed the action against Palmer in negligence for failure to state a case. The manufacturer appealed this ruling. The Supreme Court of Iowa upheld the ruling of the district court.

The basis of the part of the claim against Palmer which dealt with negligence was that Palmer should be held liable for failure to teach Vanderloo certain risks created by manipulation techniques. The court considered that the public policy considerations which had prevented recovery in the series of cases decided in educational malpractice in other jurisdictions applied to the case of a client of a former student. In particular, the court referred to the lack of a satisfactory standard of care against which to measure an educator's conduct, the inherent uncertainty in determining the cause and nature of any damage, the burden on educational institutions of a flood of claims, the impropriety of interfering with the internal operations and daily workings of the educational institution, and the impropriety of interference with legislatively defined standards of competency. These public policy considerations prevented the court from finding that a duty of care was owed.

The court considered that in the higher education field the impropriety of interference with internal operations is a matter of some significance. Referring to the case of *Regents of the University of Michigan v Ewing* 474 US 214, 106 S Ct 507, 88 L Ed 2d 523, (1985) the court reproduced the comment that '[w]hen judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty's professional judgment'.

Policy Considerations in the Higher Education Context

With respect to the original list of policy considerations applicable to cases in the non-university context, then, courts have specifically noted the workability of the rule of care, the prospect of limitless liability for the same injury, the burden on the defendant as a consequence of the imposition of liability, difficulties in proof of injury, and the statutory and regulatory context in which the activities of the institution were carried out. The persuasiveness of these policy considerations is likely to differ in detail and degree, but they are otherwise clearly considerations in the tertiary context.

In relation to the other public policy factors limiting liability of non-tertiary institutions, there is little reason in principle to suppose that they would not be as relevant to universities. Some differences arise; reference to the body of statutes and judicial precedents governing the relationship will be less helpful in the university context than in the non-tertiary context. University statutes are overwhelmingly mechanical and have little to say about teaching. However, the university statute will be relevant to the question of membership of the body corporate, which is significant in other ways not relevant to the school.

There is, however, a body of rules imposed by the central government in the United Kingdom¹³ and in Australia attacks on the standing of universities have prompted government intervention. The federal, state and territory governments have sought to agree on national protocols for approving higher education institutions 'to set up a national accreditation and quality standard consistent across the two levels of government'.¹⁴ The proposals set down processes for admitting entrants into the market, and a quality assurance scheme for ongoing monitoring. The title 'university' would be protected through business names and associations legislation and through the corporations law, and 'through legislation with consistent criteria and procedures. ... There would be a common definition of an Australian university, common criteria for assessment of applications for university status and core elements for evaluating claims'. In addition, there is strong regulation at disciplinary level in some fields, such as medicine, law, engineering, accounting and other vocational degrees which may well cause a court to question the propriety of interference in prescribed standards.

In the United States, the court in *Swidryk v St Michael's Medical Centre* 493 A 2d 641 (1985) the court considered the statutory and regulatory contexts in which the program operated; the development of programs and the accreditation, licensing, examination and admission requirements were heavily regulated by the state board of medical examiners, the board of higher education and the Advisory Graduate Medical Education Council of New Jersey. The Court said (at 645) that '[i]t would be against public policy for the court to usurp these functions and inquire into the day to day operation of a graduate medical education program'.¹⁵

University rules may provide alternative methods of dispute resolution and these, according to *Phelps*, might constitute a valid policy reason for refusing to erect an additional recovery mechanism. Internal mechanisms may culminate in the jurisdiction of the visitor, whose role will not be considered here.¹⁶ In addition, internal and external ombudsmen may afford a more appropriate avenue of complaint.¹⁷ In some cases administrative law remedies also appear to be more appropriate mechanisms for relief. The applicability of these mechanisms is a matter of some detail and will not be considered here.

Bayley-Jones v University of Newcastle (1990) 22 NSWLR 424 is authority for the proposition that the visitor is required to consider whether a wrong complained of was one for which the courts would award compensatory damages, and if it is determined that this is the case, the visitor is required to award such damages. In particular, Allen J considered that the commission of the tort of negligence by the university by failure to consider legal advice and the failure to obtain further legal advice as to the effect of the regulations of the university when making a decision to terminate the PhD candidature of the applicant were matters within the exclusive

province of the visitor. Allen J considered (at 435) that '[t]hese are matters into which it is undesirable that the court intrudes. Its jurisdiction is supervisory'. This policy consideration seems to be a mixture of an unwillingness to intervene in the internal governance of the university and the maintenance of its standards, and an unwillingness to intervene where there is a more appropriate course of action available to the student.

More problematically, there is a strong tradition of self-regulation in all three countries which the courts have shown themselves unwilling to question. Cass R Sunstein, writing in the American context, says that '[t]he law has rarely been at odds with academic freedom', (Sunstein, 1996: 93) and although that thesis relates to the regulation of campus speech codes the same could also be said of negligent speech in an academic setting. Again in the United States, in *Moore v Vanderloo* 386 NW 2d 108 (1986) the court noted that '[i]t has been recognised that academic freedom thrives on the autonomous decision-making by the academy itself. ... In essence, plaintiffs are asking this court to pass judgment on the curriculum of [the College]. We decline to do so'. Of course, some distinction must be made between the type of speech being impugned. Statements of an administrative character do not attract the arguments of academic freedom applicable to statements made in the course of education. Viewed as an essential component of the commitment to a liberal education, academic freedom must be protected.

Part of the point of liberal politics is to encourage a certain set of characteristics - activity rather than passivity; curiosity; a capacity to form, scrutinize and follow a plan of life with diverse features; an ability to discuss and evaluate competing conceptions of the good; interest in and empathetic understanding of other people as well as in oneself; and others. These are the characteristics of liberal citizenship. (Sunstein, 1996: 95)

The law must show good reason before it interferes with the production of these values in citizens, and before it passes judgment on statements made in the course of aiming for this ideal. Although it is unlikely that the law of negligence could be directly invoked against such free-speech acts, the threat of suit amounts to a 'chilling effect' on the ardour of academics for unrestricted speech.

Sir Gerard Brennan, in his capacity as chancellor of the University of Technology, Sydney, drew parallel conclusions with legislative attempts to curb the opportunities for free speech by amendments to the *Higher Education Funding Act* 1988 (Cth) which would impose government control on university policy relating to membership of student unions.

[Universities'] duty ... to offer informed criticism within their respective domains cannot be compromised without impairing the vigour of Australian society. ... If universities cease to be the venue for discourse and dissent, the next generation will be supine in the face of authority and our democracy will be a hollow incantation. (Jacobsen, 1999: 3)

He suggested a more outward-looking role for universities:

In a free and democratic society, there are but four bastions of independent thought that can usefully submit a value, an attitude or a policy to critical examination. They are the courts, the churches, the media and the universities. Each is independent of the others, but the duty of all to offer informed criticism within their respective domains cannot be compromised without impairing the vigour of Australian society. (Brennan, 1999:40)

The public policy consideration which suggests that imposing liability in negligence upon publicly funded schools would result in 'defensive' teaching practices would also apply to the extension of liability to universities for a generalised 'failure to teach'. The potential for liability in tort could result in reduced innovation in teaching, insipid and unchallenging teaching, and pressure to reduce academic standards. It could also result in unwillingness by universities to allow academics to speak out in public, since the university could suffer the legal consequences.

Another variation in the type of policy considerations which may be relevant may arise in relation to the 'moral imperatives' listed by the Californian court in *Peter W v San Francisco Unified School District* 131 Cal Rptr 854 (1976). Whereas a non-tertiary student is almost invariably a minor, and by his or her youth and inexperience is vulnerable, even to the effects of his or her own decisions, students at a university are usually considered to be adult¹⁸ and capable of making and suffering by their own decisions. In that sense, at least, the university would not be charged with a duty as onerous as that imposed upon the school. (Lorence, 1991: 343). The Court of Appeal in *Phelps* also considered a variant of this policy consideration, when Stuart-Smith LJ pointed out that the exercise of the discretion of the local education authority involved the close participation of the student's parents. The progress of a university student through a course is typically largely autonomous, and the process of learning is based on the student's own participation. This inevitably leads to difficulties in establishing causation, but also leads to questions about the propriety of shifting responsibility for failure to learn from the student to the university or individual academic.

Conclusion

Recent cases confirm the role of public policy in determining whether a duty of care exists in a novel case. The policy considerations relevant to a case involving a primary or secondary school student's failure to learn are not likely to be entirely analogous with those relevant in the university context. The statutory environment and the applicability of alternative dispute resolution procedures differ in each case. However, there is no blanket protection for universities or schools on public policy grounds for negligent teaching. In particular, policy matters cited as insurmountable obstacles in the United States jurisdictions are likely to be assigned less weight in the United Kingdom, and probably in Australia.

Keywords

Duty of care, educational negligence, public policy.

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Endnotes

1. At 352 (Brennan CJ), 254 (Dawson J), Toohey and Gaudron JJ by implication, 271-2, 281 (McHugh J).
2. Citing *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 633 (Lord Oliver of Aylmerton).
3. See also attacks on the Caparo tests at 625-6 (McHugh J), 698 (Hayne J).
4. *Bryan v Maloney* (1995) 182 CLR 609, 617-8 (Mason CJ, Deane and Gaudron JJ) citing *Caltex Oil (Australia) Pty. Ltd. v The Dredge 'Willemstad'* (1976) 136 CLR 529, 575 (Stephen J).
5. In *Anns* the House of Lords permitted recovery of damages for pure economic loss arising as a result of defects in building construction. The Council was sued on the basis of the inspection prior to building.
6. In *Heyman* the plaintiffs sought to recover from the local council loss suffered as a result of subsidence of their house due to inadequate footings. The plaintiffs argued that the council had failed to exercise its statutory powers of inspection of building works. The High Court rejected this argument, holding that the plaintiffs could not recover loss from the council.

7. In *Aliakmon* the House of Lords accepted that the seller of goods which had been dispatched for delivery and had been damaged in the course of loading due to negligence could recover damages, even though the risk of loss had passed to the buyers on the conclusion of the contract.
8. See also 698 (*Hayne*), 717 (*Callinan*) and 614 and thereafter by implication (*Gaudron*).
9. Citing *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617-618 (Lord Bridge).
10. In this summary of the passage from Peter W Rattigan J is quoting largely from *Raymond v Paradise Unified School District 31 Cal Reprtr 847* (Ct App, 1963) and *Rowland v Christian 69 Cal.2d 108, 70 Cal.Rptr.97, 443 P 2d 561* (1968).
11. Four cases were heard together by the House of Lords: *Phelps v Hillingdon London Borough Council*, *Anderton v Clwyd County Council*; *G (A minor) v Bromley London Borough Council*; and *Jarvis v Hampshire County Council*; reported together at [2000] 3 WLR 776. *Jarvis* involved a claim that a student with dyslexia should have been placed in a Special Unit expert in teaching dyslexic children and that to put him in schools for children with moderate learning difficulties was wrong and that the decision led to a deterioration of his behaviour which resulted in his being in prison for robbery. *Anderton* involved a severely dyslexic student placed in local state primary and secondary schools. She claimed she was bullied and suffered psychological damage. *G* involved a student with Duchenne Muscular Dystrophy, which involves progressive muscle wasting. The essence of his claim was that the school in which he was placed failed to provide a proper education, particularly failing to provide computer technology and suitable training to enable him to communicate and to cope educationally and socially. He suffered damage in the form of a lack of educational progress, social deprivation and psychiatric injury consisting of clinical depression.
12. Citing *Maas v Corporation of Gonzaga University*, 27 Wash App 397, 618 P 2d 106, 109 (1980).
13. In the United Kingdom the title 'university' may be lawfully acquired through the grant of a Royal Charter or an amendment to an existing charter, through a private Act of Parliament, or through the mechanisms for change of name set out in the Further and Higher Education Acts 1992, where the discretion of the Privy Council is limited to having regard to the need to avoid names which are or may be confusing (s.77 Further and Higher Education Act 1992 (UK), s.49 Further and Higher Education (Scotland) Act 1992 (UK)). It may also be possible to apply for registration of a name containing the word 'university' through the Business Names Act 1985 (UK).
14. Dorothy Illing, 'Rules mean unis must measure up', *The Australian* (Melbourne), 29 March 2000, 35.
15. See also *Moore v Vanderloo* 386 NW 2d 108, 115 (1986), where the court said 'we refuse to interfere with legislatively defined standards of competency'.
16. In some universities the institution of the 'visitor' exists to provide final and exclusive adjudication of matters internal to the governance of the university. In many universities, however, it never existed, and in some states it has been abolished or has had its role attenuated by statute.
17. For an example of the operation of the ombudsman's office, see Matthew Spencer, 'Ombudsman in Degree Probe', *The Australian* (Melbourne), 10 March 1999, 41.
18. In a social sense, at least. In Australia, most would also be legally adult. See Age of Majority Act 1977 (Vic); Minors (Property and Contracts) Act 1970 (NSW); Law Reform Act 1995 (Qld); Age of Majority (Reduction) Act 1971 (SA); Age of Majority Act 1972 (WA); Age of Majority Act 1973 (Tas); Age of Majority Act 1974 (ACT); Age of Majority Act 1974 (NT).