

**Student Misinformed By Guidance Counsellor
Sues for Negligent Misrepresentation:
Sain v Cedar Rapids Community School District
626 NW 2d115 (Iowa 2001)**

Fred Smith¹, McInnes Wilson Lawyers, Brisbane, Australia

Introduction

It is generally accepted that school authorities and teachers owe a duty of care to the children under their control. Typically this duty manifests itself in cases involving students not being properly supervised or being bullied and so on. The decision in *Sain v Cedar Rapids Community School District*² demonstrates the emerging trend of expansion of the duty of care owed by those involved in the provision of educational services. This case hinges on whether the duty of care owed by school counsellors to students falls within the same category as a person in the profession of supplying information to others such as, financial planners, accountants and lawyers. While the decision is not binding in Australia, it is useful on two counts. Firstly, it provides an insight into the likely standard expected of student counsellors and secondly, it provides a timely warning to school authorities of the need to ensure that staff are trained and capable of performing their job competently.

Facts

The plaintiff, Sain, attended Jefferson High School during his junior and senior years. He was a member of the university basketball team and maintained aspirations of receiving a scholarship to play basketball for a major college. By all accounts he was an exceptional basketball player and had already been selected to play in the all-state basketball team.

Bowen was Sain's guidance counsellor at Jefferson. He was generally familiar with the high school credits and course requirements imposed by the National Collegiate Athletic Association (NCAA) for incoming student-athletes to be eligible to compete in sports as a freshman at those Division I institutions which maintain membership in the NCAA. One rule requires students to complete three years of English courses approved by the NCAA as well as core courses in maths, science and the social sciences.

During Sain's second trimester, he became dissatisfied with his 'English Literature' course and sought advice from Bowen to determine if he could drop it and add another English course. Bowen suggested he transfer into a different English course entitled 'Technical Communications'. It was a course being offered by the school for the first time and Sain maintains that Bowen told him it would be approved by the NCAA as a core English course.³

The school failed to include the 'Technical Communications' course on the list of classes submitted to the NCAA for approval. During the final trimester of high school, Sain was offered and accepted a full five-year basketball scholarship at Northern Illinois University beginning in the fall semester of 1996. The full ride athletic scholarship was conditional upon Sain agreeing to enrol at Northern Illinois University and participate in intercollegiate sports as a member of the university men's basketball team – a team competing in Division I of the NCAA.

Sain graduated from Jefferson High School in the spring of 1996. Shortly after graduation, he received a letter from the NCAA advising that his 'Technical Communications' course did not satisfy the core English requirements. This meant only two of the three English courses taken by Sain had been accepted by the NCAA and he fell short on the core English requirements to participate in Division I basketball as a freshman. Sain and the Northern Illinois University's request for a waiver from the NCAA was denied and Sain lost his scholarship. As a result, Sain was unable to attend Northern Illinois University during the 1996-1997 school year and compete in basketball for the school.

Sain sued the school for Bowen's negligent misrepresentations.

Litigation

At first instance, the court found in favour of the defendant school authority because claims for negligent misrepresentation are limited to commercial or business transactions only.

On appeal, the court reversed the decision and found in favour of Sain.

The court observed that the characteristics which exist when a person is found to be in the business of supplying information to others also exist in the case of a high school counsellor. In the leading judgment, Cady J said:

The counsellor and student have a relationship which extends beyond a relationship found in an arm's length transaction. It is advisory in nature and not adversarial. The school counsellor does not act for his or her own benefit, but provides information for the benefit of students. Furthermore, in matters that involve matriculation from high school to college, a high school counsellor clearly assumes an advisory role, is aware of the use for the information, and knows the student is relying upon the information provided. Additionally, the counsellor is paid by the school system to provide such advice, and has an indirect financial interest in providing the information.

Considering the rationale which supports the imposition of a duty of care on a person in the business or profession of supplying information, we discern no reason why a high school counsellor should not fall within the category as a person in the profession of supplying information to others to support the imposition of a duty of reasonable care in the manner he or she provides information to students. We should not confine the tort to traditional commercial

transactions when the rationale for the tort allows it to be applied beyond those factual circumstances which originally give rise to the tort.

While the court confirmed the position that the tort of negligent misrepresentation must be confined to situations where people are involved in the business or profession of supplying information to others, they found on these facts that the school and school counsellor fell within that category.

Discussion

The provision of education services is now a profession in its own right. Many parents make great sacrifices to afford the privilege of having their children educated at certain schools, it is compulsory that teachers entering the profession are degree qualified and it is not uncommon for administrators to have the credentials and experience that would see them slip comfortably into a job at the big end of town.

In this environment, it naturally follows that standards expected of these people will increase. The question for schools then is how can they be sure they are discharging their duties. Some suggestions might include:

1. School authorities must ensure that staff are properly qualified to perform their particular job. For example, it is not acceptable to have an English teacher filling in as the school counsellor on an ad hoc basis while a suitable replacement is found. Especially when you consider that the future of the next generation depends on them.
2. Like other professional organisations, schools must ensure that staff receive ongoing training so as to avoid situations where they are not up-to-date with issues that directly impact on the way they discharge their duties in the work place. This case in point is a classic example.
3. The extension of this argument is that teachers, as professionals, must also bear some responsibility for self-improvement and keeping themselves up-to-date with information relevant to their work. Discharging this duty might, as with other professionals, involve expenditure of ones own time and money. This, being one of the unfortunate burdens associated with the professional tag.
4. Guidance counsellors should focus more on the provision of information and not advice which might, in certain circumstances, be highly restrictive. The emphasis should be on the student receiving all the relevant information so that they are in a position to make an informed decision.
5. As with any business, it is crucial to have cross-checking mechanisms which might come in the form of an independent audit body. This would help to eliminate risk by ensuring that policies, manuals and action plans developed by the school are being adhered to by all staff.

Educators might initially seek to resist these types of changes on the basis that they fall outside the ambit of what they are strictly trained to do. This might have once been true but in the current environment it is not. As the provision of educational services becomes more professional

and specialised, market expectations will increase and they must be satisfied. Not only will schools be offering superior services but also, they will be minimising the potential risks, public humiliation and costs associated with any protracted litigation.

Endnotes

1. B. Int.Bus, LL.B (Hons), Solicitor, McInnes Wilson Lawyers, Brisbane.
2. 626 N.W.2d 115 (Iowa 2001) – *Sain's case*.
3. At trial, Bowen and the school district denied Sain was told the course would be approved by the NCAA.