Case Note

CARTY v LONDON BOROUGH OF CROYDON

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I Context

The law regulating schools, those who work in them, and those who deal with them, involves increasingly detailed statutory and regulatory prescription. Matters such as special needs education, suspension and exclusion and child protection are now commonly regulated in specific detail, rather than merely by the imposition of general principles (whether by statute or the general law) alone.

Those dissatisfied with the manner in which such statutory duties and powers are exercised may consider public law remedies, either by explicit statutory appeal or by judicial review seeking remedies such as injunctions or declarations. Normally, such proceedings seek orders which will change behaviour in the future. Where the claimant's objective is however to recover financial compensation for past breaches, the law is uncertain, evolving and complex.

One recent commentator, acting in a judicial capacity, stated:

> Whether the law will impose a tortious duty of care in respect of the exercise of statutory powers or the performance of statutory duties by public authorities is a notoriously difficult question.[1]

Two years earlier, Lord Steyn had observed in the House of Lords:[2]

> There are, however, a few remarks that I would wish to make about negligence and statutory duties and powers. This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary.

Where damages are sought as compensation for past breaches, English law does not recognise a claim for damages for breach of a public law right as such. A claimant must in those circumstances satisfy the Court that the statute in question confers on the claimant a private law cause of action (to recover damages).

In England, in the context of actions for damages for compensation for alleged breach of statutory duty by local authorities for those employed or engaged by them in relation to special educational needs students, the House of Lords determined in *Phelps v Hillingdon Borough*

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Council[3] that Parliament did not intend that there should be a remedy by way of damages for breach of statutory duty in such circumstances.

This then raises the issue of whether on common law negligence principles liability can be established.

II The Case Under Discussion

In *Carty v London Borough of Croydon*[4] the Court of Appeal (Dame Butler-Sloss P, Mummery and Dyson LJJ.) has:

- clarified important issues of principle;
- considered whether an educational employer can be liable for the negligence of an educational officer, as distinct from a school administrator, a teacher or a consultant such as a psychologist; and
- applied the principles where it was necessary to consider whether there had been a breach of duty compensable at common law (in circumstances where there had indeed been a failure to comply with regulatory requirements imposed on the educational officer).

III The Essential Facts

The claimant (Leon Carty) appears to have been born in 1978. A number of physical and developmental problems became apparent when he was 'very young'. He was referred to the defendant's school psychological service which reported in October 1982 that he was behind in language development, that his speech was poor, and his behaviour towards his peers was often aggressive. By the end of 1985, after various placements, it was considered by an educational psychologist employed by the defendant that there should be a statutory assessment pursuant to the *Education Act 1981*. By October 1986 Mr McCormack, the education officer employed by the defendant whose later conduct became the subject of the case, believed on the basis of an assessment obtained that the claimant was suffering learning and language difficulties and emotional and behavioural problems.

In early 1987, following exclusion from another school, the claimant was moved to St. Nicholas School. In July 1987, a statement of special educational needs was produced. He remained at that school until about November 1988. By September of that year it became apparent that his placement there was 'breaking down' because of his emotional and behavioural problems and the disruption caused by these to others and the interference with his own ability to learn.

Accordingly, in November 1988, he was placed at Sir Cyril Burt School, which catered for children with emotional and behavioural difficulties, and he remained there until October 1993.

IV The Issues Before the Court of Appeal

Dyson LJ noted that the case as originally pleaded was eventually abandoned by counsel for the claimant and that after completion of the evidence the case was refined so as to reduce it to six allegations of negligence, all of which were dismissed by the trial judge.

Only two of these allegations were appealed. These were:

- failure to reassess and amend the statement of special educational needs (in or about 1988); and

- allowing the claimant to remain at Sir Cyril Burt School from June 1991 until 11 October 1993 (particularly in the context of a failure to comply with a regulatory requirement to carry out in the 12 months' period from May 1991 a formal reassessment of the claimant).

V Legal Issues Relating to Common Law Liability – Dyson LJ

After noting that it was common ground that no claim for damages for breach of statutory duty could lie even if it could be shown that there had been such a breach, as the law was settled on that point (see above), Dyson LJ turned to a discussion of the general approach to the liability of public authorities in negligence. He observed that this issue had been the subject of much case law at the highest level in recent years and cited, at paragraph 20 of his judgment, a number of such cases in educational and non-educational settings.

Dyson LJ noted firstly that certain decisions are 'simply not justiciable at all' instancing cases where 'the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess'.

He then turned to the question of decisions which, even if justiciable, involved the exercise of a statutory discretion, noting several statements in the authorities to the effect that in such cases no claim will lie in negligence unless what was done was so unreasonable that it fell outside the ambit of the discretion. At paragraphs 25 and 26, Dyson LJ noted that discretion was a word applied to many different types of decision-making, and also that there are in fact many instances where a public body exercises discretion and yet the choices made are suitable to judicial resolution. He observed:

> It seems to me that, rather than focus on the elusive question of whether the decision at issue involved the exercise of discretion, it is preferable to consider the substance of the decision. In the field of special education, there is a spectrum at one end of which lie decisions which are heavily influenced by policy and which come close to being non-justiciable. In relation to such decisions, the court is unlikely to find negligence proved unless they are ones which no reasonable education authority could have made. At the other end of the spectrum are decisions involving pure professional judgment and expertise in relation to individual children such as, for example, whether a child is dyslexic or suffering from some other learning difficulty. In relation to these decisions, the court will only find negligence on the part of the person who made the decision (for which the authority may be vicariously liable) if he or she failed to act in accordance with a practice accepted at the time as proper by a responsible body of persons of the same profession or skill.

and:

> But it should always be borne in mind, even in relation to decisions made at the operational level, that the tasks involved and the circumstances in which people have to work in this areas are difficult and sensitive.

His Lordship observed that in his view, once the decision had been made that the decision was justiciable, there should then be an application of 'the classic three stages' test, namely, foreseeability of damage, proximity, and whether the situation is one in which it is fair, just and reasonable that the law should impose a duty of care.

After noting that in cases such as these the primary focus will commonly be on the alleged vicarious liability of the educational employer for the alleged negligence of professionals employed by them, he observed that, in determining whether it is just and reasonable to recognise

a duty of care, such a (common law) duty of care is not excluded merely because the advice is given pursuant to the exercise of statutory powers. This is especially so where the other remedies laid down by the statute do not provide sufficient redress (e.g., financial compensation) for loss already caused.

He then noted judicial authority to the effect that the law may well impose a duty of care upon professional employees of an educational authority in the sense that a failure to exercise their particular skill or profession may result in liability (to both them and their employer) where it can be foreseen that the plaintiff will be injured if duty, skill and care are not exercised and where an injury or damage can be shown to have been so caused.

A *Education Officers*

Dyson LJ noted this was the first case in which the Court of Appeal had been required to decide whether an education officer could owe a common law duty of care to children with special education needs.

Senior Counsel for the employer submitted that the making and reviewing of a statement of special educational needs was an exclusively statutory process, breach of which is not actionable in private law. He added that there were good policy reasons for not recognising the existence of common law duty of care.

Dyson LJ, after observing that 'whether there can be a common law duty of care where there is no private law right to claim damages for breach of statutory duty does not admit of a blanket answer', noted that there may be aspects of the role of an educational officer which involved consultation or advice in respect of policy matters. He stated that an educational officer may in the performance of these statutory functions, enter into relationships with, or assume responsibilities towards, a child and that a duty of care may then be owed as a result. To determine whether such a duty is owed, one should apply the three stage test set out above.

He then turned to consideration of submissions by Senior Counsel as to why the Court should hold that education officers do not owe a duty of care to the children whose educational interests they are employed to serve. It was submitted that an education officer is not a 'professional person', as distinct from teachers and psychologists. Dyson LJ held that education officers who perform the statutory functions of local educational authorities are professional persons for whose negligence authorities may be vicariously liable (just as with education psychologists and teachers), noting that the phrase 'professional person' is not a term of art. He observed that:

> The tasks undertaken by an education officer can only be performed effectively by someone who has the appropriate skill and expertise. In my judgment, this conclusion is not undermined by the fact that there is no formal education officer qualification and no professional body responsible for the regulation and discipline of education officers.

He observed that the suggested analogy with administrators and civil servants was unconvincing and that the closer analogy was with a social worker.

VI Other Court Members on Liability Issues

Mummery LJ, while substantially agreeing with Dyson LJ, added some comments of his own on the discussion of the circumstances in which a common law duty of care is owed by an educational officer to a child with special education needs. He observed that the correct approach to determining whether a common law duty of care is owed by a person such as an education

officer is to consider 'the substance of the act or omission in question' and then (similarly to Dyson LJ) to determine whether it is justiciable at all, and if so, whether it is fair, just and reasonable to impose a duty of care on a person in that situation. He referred to an important distinction namely:

> On the one hand, there are the established grounds of liability in private law for advice negligently given, or not given, by an individual possessing professional skills. The duty of care may arise out of a special relationship, which may exist in a statutory as well as in a non-statutory setting. The duty is owed to the other person in the relationship, who claims to have suffered non-physical damage and loss as a result of the negligent exercise of those skills. On the other hand, the courts have firmly rejected the notion that, in a case where, as here, it is accepted that there is no cause of action for breach of statutory duty, it is sufficient for the purposes of establishing common law liability in negligence to show that an employee of a public authority, such as an education officer, has not performed, or has not properly exercised, relevant statutory obligations and discretions of the public authority.[5]

and:

> The common law duty of care in relation to specific advice given or not given by Mr McCormack to the London Borough of Croydon about Leon Carty and in relation to his specific decisions, acts and omissions concerning Leon arose not from the terms of the 1981 Act, but from the fact that Mr McCormack (a) acted as a person with special skills and relevant experience in operating in the statutory framework established to cater for special educational needs; (b) actually undertook specific educational responsibilities towards Leon Carty; and (c) did so in the course of the particular relationship entered into by him with Leon Carty, (d) who was a child with special educational needs.
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> If such a duty is breached, then, subject to issues of causation, remoteness and proof of damage, the local education authority is vicariously liable for the breach. If, as here, there is no breach of the common law duty, then the local education authority is not vicariously liable.[6]

On the facts, Mummery LJ held that he agreed with Dyson LJ that the appeal should be dismissed and that although Mr McCormack owed a common law duty of care to Leon Carty, the trial Judge was right in holding that no breach of that duty occurred when Mr McCormack failed to reassess Leon's educational needs and failed to amend the statements of needs to name an appropriate school after the breakdown of the St Nicholas' school placement, or when, without making annual reviews and assessments he allowed Leon to remain at Sir Cyril Burt School from June 1991 until July 1993.

The President merely stated that she agreed that the appeal should be dismissed.

VII Decision on Grounds of Appeal

A *The First Ground of Appeal*

The first ground of appeal was that the failure to reassess and amend the statement of special educational needs after the breakdown of St. Nicholas' placement should have resulted in vicarious liability for negligence being imposed on the employer. The trial judge had held:

> The criticisms of the failure during this period to implement the statutory procedures are justifiable. They should have been implemented as a matter of course, and it is no or no

> sufficient answer for the defendants to plead that they put the practical interests of the children first, and paperwork second. Had an interested party at that time (most obviously in this case the claimant's mother) demanded the production of a new or amended statement, and had the defendants failed to respond, she might well have had a good case to compel compliance with the procedure by means of judicial review.
>
> However, on the basis of the law as I find it to be, such failures do not in themselves give rise to a private law remedy in damages. It is necessary to examine the way the defendants (and especially Mr McCormack) dealt with the claimant's education during the material period to ascertain whether negligence has been established.[7]

Dyson LJ held that the decision made by Mr McCormack to transfer the claimant to Sir Cyril Burt School was taken after 'a careful assessment of his needs, with the benefit of, and in accordance with, expert advice obtained from relevant professionals (the teachers, the educational psychologist and medical officer)'. Accordingly, he held that the implied conclusion of the Judge that that decision was not negligent was 'unassailable' and thus rejected the first ground of appeal.

B *The Second Ground of Appeal*

This related to the conduct of permitting the claimant to remain at Sir Cyril Burt School from June 1991 until he left in October 1993. Substantial reliance was placed by the claimant on the failure to comply with Regulation 9 of the *Education (Special Educational Needs) Regulation 1993* reading as follows:

> Where an education authority maintain a statement in respect of a child whose educational needs have not been assessed since before he attained the age of 12 years and 6 months then, during the period of 12 months beginning with the day on which he attains the age of 13 years and 6 months, the authority shall re-assess those needs.

He agreed that Mr McCormack should have carried out such a formal reassessment but that the real question was whether there was a breach of duty in failing to arrange for the claimant to be moved from the school before October 1993.

It had earlier been observed by the Judge that, even in relation to decisions made at the operational level, the tasks involved and the circumstances in which people have to work in such areas are difficult and sensitive. In applying those principles to this particular conduct, Dyson LJ observed that the courts should pay close attention to the complexity and delicacy of the decisions that education officers and educational psychologists have to make and 'should not find negligence too readily'. He suggested this was particularly important where, as in the present case, the decision involved a judgment as to whether special education provision that should be made for a child and the school at which it should be provided. He held, taking these considerations into account and having regard to the evidence, that the Judge was right to find that the decision to keep the claimant at Sir Cyril Burt School was not negligent.

VIII Conclusion

Particularly for readers of this journal engaged in educational administration, or advice to educational administrators, this (19 page) judgment of the English Court of Appeal is a most useful source for clarifying the development of English law on a topic on which there is so little Australian authority. In its clear distinction between the roles of public and private law,

the emphasis in each context in which the law was considered of consideration of fundamental principle, and the specific ruling in respect of education officers, this judgment is of considerable assistance.

Endnotes

1. Andrew Simmonds QC in *Neil Martin v The Commissioners of Her Majesty's Revenue and Customs* [2006] EWHC 2425 (ch), para 72. The cases cited in this paper are available at <www.bailii.org>.
2. *Gorringe v Calderdale Metropolitan Borough Council* (2004) 1 WLR 1057, 1059.
3. P*helps v Hillingdon Borough Council* (2001) 2AC 619.
4. *Carty v London Borough of Croydon* [2005] All ER (D) 276 (Jan); [2005] EWCA Civ 19; [2005] 1 FCR(UK) 554; [2005] 2 All ER 517; [2005] 1 WLR 2312. The case is available at <www.bailii.org/ew/cases/EWCA/Civ/2005/19.html>, and paragraph references in this note are to that report.
5. Ibid para 84.
6. Ibid para 85.
7. Ibid paras 57-58.