

Educational Malpractice: Legal Cases and Educators' Views

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The notion of being negligently and legally liable for poor teaching that results in the failure of students being able to achieve expected educational outcomes is an unimaginable prospect. However, there is an emerging trend of legal proceedings being brought against teachers, blaming them for low scores in literacy, numeracy or even the failure to pass an examination. The duty implied on educators to ensure the educational well-being of their students and the breach of such duty is what is commonly termed in the literature “educational malpractice” or “educational negligence.”

In this article, several cases relating to educational malpractice that took place in the U.S., the U.K., and Australia are reviewed, and the cases demonstrate that the courts are beginning to show a willingness to extend the tort of negligence to students' intellectual harm. The author then conducted a small-scale investigation to ascertain the views of school principals regarding this issue, with very interesting results.

For educators, the notion of being negligently and legally liable for poor teaching that results in the failure of students being able to achieve expected educational outcomes is an unimaginable prospect, but two of the principals in the research study conducted in Australia by Stewart (1996) revealed that this was precisely the type of threat that they had received. Although no legal action of this nature has in fact taken place in Australia, Harbord and Crafter (2000) noted that, in other parts of the world, there is an emerging trend of legal proceedings being brought against teachers, blaming them for low scores in literacy, numeracy or even the failure to pass an examination. The duty implied on educators

to ensure the educational well-being of their students and the breach of such duty is what is commonly termed in the literature “educational malpractice” or “educational negligence.” In fact, a case of educational negligence has been successfully brought to the courts in England, and this will be discussed later on in this article.

Educational Malpractice in the U.S. and England

The first case of educational malpractice in the U.S. was heard in 1976 (*Peter W v. San Francisco Unified School District*, 1976) where the student sued the school authority for failing to discharge its duties by providing adequate instruction, guidance, or supervision in basic skills such as reading and writing. The Court categorically concluded that there was no general duty of care owed by educators to students in respect of educational outcomes. The next U.S. case was *Donohue v. Copiague Union Free School District* (1979) (hereafter as “Donohue”) where a similar allegation to the earlier case was made. While the claim against the school district was unsuccessful due to policy considerations, the Court of Appeals of New York noted that a suit for “educational malpractice” could be made to fit the traditional negligence principles. They also made the comment that “if doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators” (Donohue, p. 443). This comment understandably caused consternation among educators.

A third case, which had a significant effect on the meaning of “educational malpractice,” was that of *Hoffman v. Board of Education* (1979). In contrast to the earlier two cases, the student in this case alleged specific incidents of negligence. The negligent act of the school authority involved the incorrect assessment of his IQ level and failure to reassess him two years after the first assessment, as recommended by the clinical psychologist. As a result, he was placed with the intellectually impaired, causing him emotional and intellectual injury, and his ability to obtain employment was greatly reduced. The Court agreed that this was a case that could be classified as one of “educational malpractice,” but in line with the earlier cases, the claim was rejected because it was precluded by public policy considerations. The public policy considerations taken into account by the judges

included: putting the courts into an improper position of interfering with the day-to-day policies that are entrusted to a school authority; a flood of cases inundating the courts; and the placing of undue burden upon the limited resources of schools.

In England, the expression “educational negligence” rather than “educational malpractice” is used, and the first of such cases, *X v. Bedfordshire County Council* (1995) (hereafter as “*X v. Bedfordshire*”), was heard by the House of Lords (the highest court of appeal in the country) in 1995, 19 years after the first U.S. case. *X v. Bedfordshire* was a consolidation of five appeals¹ involving allegations that the Local Education Authorities (LEAs) had caused injury to the plaintiffs by breaches of statutory duty under the Education Acts. Although the House of Lords held that damages were not available for breaches of statutory duty under the legislation, the House nevertheless laid down the principle that, in an appropriate case, there was scope for argument as to the liability of the LEAs for the negligence of their servants or agents. Lord Browne-Wilkinson said this in *X v. Bedfordshire*:

In my judgement a school which accepts a pupil assumes responsibility not only for his physical well-being but also for his educational needs. The education of the pupil is the very purpose for which the child goes to school. The head teacher, being responsible for the school, himself comes under a duty of care to exercise the reasonable skills of a headmaster in relation to such educational needs. If it comes to the attention of the headmaster that a pupil is under-performing, he does owe a duty to take such steps as a reasonable teacher would consider appropriate to try to deal with such under-performance. To hold that, in such circumstances, the head teacher could properly ignore the matter and make no attempt to deal with it would fly in the face, not only of society's expectations of what a school will provide, but also of the fine traditions of the teaching profession itself. (p. 766B)

The judgment in *X v. Bedfordshire* led to speculation as to when and how claims of educational negligence can be brought and as to what the appropriate level for the standard of care and extent of the duty of care for these cases are (Berman, Burkill, Russell, & Rabinowicz, 2001). Traditionally, the English courts, like their counterparts in the U.S., have protected the LEAs from liability because they are seen as public authorities that are bringing positive benefits to the community and therefore should not be subject to wider claims than those faced by

private bodies (Greenwold, 2000). As a result, public bodies have enjoyed a blanket legal immunity even if a few individuals have been negligently harmed by them. However, Greenwold observed that parents and pupils are increasingly seen as “consumers” of public services and have equivalent rights to those found in all commercial transactions. The effect of this social change is that the courts will no longer allow “policy” considerations to prevent an otherwise valid claim against the LEAs, thus destroying the virtual blanket immunity enjoyed by the LEAs. This trend was confirmed in the appeal cases of *Phelps v. Mayor Etc. of The London Borough of Hillingdon Anderton and Clwyd County Council* and *In Re G (A Minor) v. Hampshire County Council* (2000) (hereafter as “Phelps”). The facts of the first appeal case (which is representative of the other three cases) will be described. But in order to allow the reader without a legal background to fully understand the case, the law of negligence is briefly explained.

Negligence

Negligence is classified under the law of torts and it is generally accepted as the most wide-ranging among the numerous torts. To be successful in a claim against the defendant for the tort of negligence, a plaintiff must establish every one of the following four elements:

- Duty of care
- The standard of care
- Foreseeability of harm
- Causation

Duty of Care

The element of duty of care is a threshold requirement, in that, before a lawyer advises a plaintiff to proceed with a negligence claim, the lawyer must be satisfied that a duty of care exists. A duty usually arises out of some relationship or proximity, and in determining who is owed a duty of care, the oft-cited words of Lord Atkin in *Donoghue v. Stevenson* (1932) provide the answer:

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

Who, then, in law, is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

For schools, the English case of *Williams v. Eady* (1893) established the principle that a duty of care exists between a teacher or school and a student whenever the former has care or custody of the student. In this case, Lord Esher stated that “the schoolmaster was bound to take such care of his boys as a careful father would take of his boys.” However, while establishing a duty of care for physical injury is not difficult, imposing a duty for claims of non-physical injury, as seen in the case of Phelps below, may prove to be more challenging.

The Standard of Care

The standard of care required of teachers can be inferred from Lord Esher’s comment above. Clearly, the standard required of teachers is that of a careful parent. In other words, while a child is at school, “each teacher acts in loco parentis [*in place of the parents*] and has to adopt the standards which would be expected of the reasonable caring parent” (Wenham, 1999, p. 366; bracket added).

Foreseeability of Harm

A defence that is available to a defendant in a negligence suit is that the accident is “not foreseeable by any reasonably competent and prudent school or teacher” (Palfreyman, 2001, p. 232). The word “foreseeable” is used objectively. Lord Wright, in the English case of *Wray v. Essex County Council* (1936), made that clear when he said the mere fact that one did not foresee the harm would not be an excuse if it was something that a reasonable person in the same circumstances would have foreseen.

Causation

Causation is probably the most difficult element for a plaintiff to prove. On the evidence before him, a judge has to determine whether it is logical and reasonable to infer that what the teacher did or should not

have done in his or her performance of duty caused the injury that the student complains of — the notion of causal connection. In other words, was the teacher's negligence the cause of the injury?

With some background knowledge of the law of negligence, we will now look at the case of Phelps and analyze how the law of negligence might possibly extend to educational outcomes.

The Case of Phelps

Ms. Phelps had dyslexia. The school in which Phelps was a pupil employed an educational psychologist who did not diagnose her dyslexia but instead reported that the testing revealed no specific weaknesses. After leaving school, she obtained a job but was subsequently dismissed because she had difficulties with anything requiring literacy. Ms. Phelps claimed that because of the failure of the school, she failed to receive the necessary educational provision for her dyslexia and did not learn to read and write as well as she could have done. She sued the LEA in the High Court, and the Court held that the LEA was vicariously liable for the psychologist's negligence. The LEA was ordered to pay compensation to Ms. Phelps. On appeal, the Court of Appeal felt that the function of the psychologist was to provide information to the LEA and thus there was no direct duty owed to the child. The first requirement (that is, duty of care owed to the plaintiff) for bringing a negligence case was not satisfied. The Court was also concerned that "the immunity of the LEA from suit granted for powerful policy reasons will be completely circumvented" if an individual psychologist or teacher can be sued and the employer held vicariously liable (Lord Justice Stuart-Smith, Court of Appeal, *Phelps v. London Borough of Hillingdon*, 1998, paragraph 54). For these reasons, the High Court's ruling was reversed, and Ms. Phelps then appealed to the House of Lords.

The House of Lords (which consisted of a panel of seven Law Lords) disagreed with the Court of Appeal and instead concurred with the principle laid down by Lord Browne-Wilkinson in *X v. Bedfordshire*. The House held unanimously that claims for education negligence could be brought against the psychologist and the LEA. The Law Lords were of the view that the educational psychologist owed a direct duty of care to Ms. Phelps because the psychologist was specifically asked to give advice on the child's needs and was to recommend suitable educational provision for that child. It was also clear that Ms. Phelps' parents and

teachers would follow that advice. There was therefore no reason why the LEA, as the employer of the psychologist, could not be vicariously liable for the breach of duty of care by the educational psychologist. The Court of Appeal's decision was overturned and damages of almost £50,000 were awarded to Ms. Phelps (Phelps, 2000).

The House of Lords recognized the difficulties of the teaching profession and the dedication, professionalism, and standards exhibited by those involved in the education service, and acknowledged that the courts should not find negligence too readily. At the same time, though, the House of Lords pointed out that "the fact that some claims may be without foundation or exaggerated does not mean that valid claims should necessarily be excluded" (Lord Slynn in Phelps, 2000, p. 11). The implications of this outcome for educators and LEAs in England is that education authorities and other professionals working in the education service do indeed owe a legal duty of care to all their pupils. "While claims based merely on allegations of poor-quality teaching would fail, claimants would receive compensation if they could point to specific errors caused by incompetence" (Greenwold, 2000, p. 246).

Lawyers and educators in England would probably agree that the case of Phelps has indeed marked a legal revolution. However, one commentator noted that, while the Phelps case did endorse the duty of care in the education context, in practice, it is unlikely that actions for educational negligence will become widespread. The difficulty of establishing the breach of duty of care in the context of education, and the causal link between such breach and the consequential loss to the child, would limit such cases to exceptional situations. Nevertheless, the commentator's statement is very compelling:

though such actions are likely to be exceptional, the very possibility of an educational negligence action may, however, in itself operate to promote the highest possible professional standards among professional educationists. (Meredith, 2000, p. 142)

"Should Australians follow the Americans or the British?" Hopkins' (1996) view is similar to that of Meredith (2000) in that the threat of litigation may not necessarily operate as a disincentive to good teaching. Rather, "it could lead to greater professionalism among teachers, as they are made aware they might have to account for, and justify on educational grounds, what they are doing in the classroom. Better, not worse, teaching might result" (Hopkins, 1996, p. 54).

It is true that the teaching profession is demanding and pressurizing as it is, without adding to teachers the fear of a negligence action for poor teaching. Nevertheless, Hopkins (1996) correctly argues that this does not exempt school authorities from the responsibility of putting in place systems for all students (including students with learning disabilities) to pursue their right to a sound education. In surveying the international trends and relative developments in Australia, Justice R. Atkinson of the Supreme Court of Queensland was of the view that educational authorities will not:

be able to rely on the policy reasons used in the United States to avoid liability for negligence in the provision of education. If such negligence can be isolated as a cause of measurably inferior outcomes for students, then it seems to me that educators and educational authorities are likely to be held liable in much the same way that they have been held liable for physical injuries to children under their care and control. (Atkinson, 2002, p. 14)

Less than a decade after Justice Atkinson's statement, cases were indeed filed in a court in Victoria, Australia. In the first case, a mother alleged that her 12-year-old son, who was not able to read properly at the end of primary school, was not taught properly by the school. She claimed that the school had failed to address her son's literacy problem despite promising to do so and that her son's literacy improved only after having private tuition (Rood & Leung, 2006).

Another Victorian case was brought by a father, who claimed that his Grade 12 twin boys did not achieve the academic results that were expected to be attained by an elite private school. The father claimed that, in light of the appalling Grade 12 results, the fees paid were excessive and unnecessary. He sued the school for the repayment of up to \$400,000 in fees paid from kindergarten to Year 12 (Hudson, 2008). This case is still in progress. In the author's opinion, if the father of the twins cannot identify specific incidents that culminated in the twins' inability to perform academically, it is unlikely that he will succeed. Nevertheless, both cases reinforced the point made by judges and academics that parents are increasingly demanding a high level of professionalism in the delivery of education.

It is seen in the cases discussed above that there is a trend toward litigation in the education sector for loss suffered due to unsatisfactory educational outcomes. In an Asian society, where there is still a strong

culture of respect for the authority of teachers, and where the situation is relatively less litigious than Western countries, it is interesting to find out if parents similarly expect a high level of professionalism in the delivery of education and whether such expectations might lead to the sorts of legal tussles that have emerged internationally. To find out, the author took an opportunistic approach to investigate this issue by inviting principals who took part in the law workshops conducted by the author in Singapore to participate in interviews. The principals were asked whether such expectations were evident in their experience. The following section explores this issue.

Interviews with Principals

The education system in Singapore is recognized as one of the best in the world, and not surprisingly so, since it has no natural resources, it is intellectual prowess that ensures economic success. However, as people become more educated, they have correspondingly higher demands and expectations. In interviewing these school principals, some initial insight was gained into the relevance of educational malpractice in a predominantly Asian culture.

Semi-structured in-depth interviews were conducted with nine school principals in Singapore to obtain an indication of their perspectives on the issue of educational malpractice. The study was exploratory and was not intended to represent the views of all school leaders in the country. Interviewees were given a brief overview of the trends overseas, where litigation has arisen against schools for poor teaching, and then asked to comment on whether similar issues might possibly arise in Singapore and the potential implications for schools.

The Road to Professionalism?

It is an accepted fact that schools owe students a duty of care. Generally, this duty of care refers to taking responsibility for the students' physical well-being while they are in school, and negligence in doing so may result in liability. Arguably, the same duty of care should include looking after the educational needs of students as well. The question put to the participants was whether they perceived a possibility of legal claims by parents on the basis that their children did not achieve expected

educational outcomes due to poor teaching. One principal's response provided a useful backdrop to the answers of the other participants:

... in the past if we hear of our child not really learning very much because the teacher was so called lousy, we probably, aiyah, you know, and then we try to support our child in different ways. We are not so quick to go to the principal to say this ...²

Most of the participants agreed that they were increasingly on the receiving end of parents' concerns about their children's academic achievement. However, they felt that, where poor teaching was alleged, parents would at most make a complaint, but would not threaten any legal action. These were some of the comments:

Poor teaching? Complaints lah, they are usually complaints, not legal.

I think nobody gets sued for bad teaching here.

There were cases where I have complaints about teachers' teaching, you know — not professional enough, inadequate teaching, and so on lah. So that's mainly that. In the years to come, you may have more complaints. But to the extent of legal action, I don't think so. Not so much about poor teaching.

One view appears to be that the Asian culture will not lean toward litigation, even if there are complaints about educational malpractice. However, there was a contrary view expressed by some of the other principals. One made the comment that "If there is a complaint, then it might actually end up in litigation." Another principal said this:

My sense is that in ten years' time, with a more demanding public, with people with higher expectations of schools, I think we need to be ready for that very thing about poor teaching. I send my child to your school, your school claims that you are going to develop this, that and the other and my child hasn't attained that. Most parents would nowadays just say, well, my child doesn't have the ability and all that.

This comment is reminiscent of the Victorian case referred to above, where parents may challenge the school for not maximizing the potential

of their children and ensuring that their grades are at the level expected by the parents.

But establishing poor teaching is difficult, as poor teaching is a subjective issue, especially when coupled with parental expectations, realistic or otherwise. As pointed out by these principals:

Like I said, it's a relative expectation ... I mean some are very interesting and er ... interesting perceptions of how effective teaching should be, like you know, using red ink to circle thing or using a yellow pen to circle thing, or using a certain kind of mechanical pencil ...

You can't say poor teaching. Poor teaching, not to your expectation. Whose expectation, isn't it?

One principal was quite dismissive:

If you think teaching not to your expectation, the right thing you get out. You don't stay in this school. First of all, education is free. You pay nothing you know. We don't demand anything you know. When you pay a hefty sum in a private school, yes, you might do that. You choose to come in, you have free education, what else you want?

Thus, there is a suggestion here that a higher standard of teaching can reasonably be expected by parents who send their children to private schools. This may be an erroneous view, as the consequential loss to a child due to educational malpractice cannot be justified in monetary terms. If the standard referred to is related to improved facilities or extracurricular activities, then the statement is probably correct. However, if it refers to the professional standard of teachers, it is misguided. Teachers in State schools should be of some high standards as those in private schools, and this is especially true of a system in which the vast majority of the country's leaders are educated in the state system.

One principal highlighted an interesting aspect on the question of "poor teaching." She was of the view that, with Singapore's Ministry of Education's method of evaluating teachers' performance,³ complaints of poor teaching should decrease since the so called "poor" teachers should be removed from the system:

Now we have a process of getting rid of "poor" teachers, you know. Now we have this, shall we say, our new appraisal system, and

this appraisal system will weed out all the teachers who are not performing, the D grade, the E grade, and so on. They will slowly go, you see. I think complaints about poor teaching will decrease lah.

One might take a contrary stance. Paradoxically, while the intent may be to define teacher performance as objectively as possible in order to weed out poor teachers (and reward the good ones), such measures of performance may provide a clear indication that very minimum standards (for example, a D grade) are tolerated. Thus, defining standards can actually backfire, especially if the data becomes available to those outside the domain of evaluator and the evaluated.

Some Implications

A few themes emerged from the findings. First, in an Asian country like Singapore, parents' expectations of teachers' performance are becoming higher, whereas, in the past, it would have been deemed disrespectful to even hint at criticism of teachers. One principal gave the example of a parent who threatened to sue the school for a teacher's "incompetent" marking. It seems that school leaders may now need to deal with higher parental expectations in such a way that incidents do not escalate into legal encounters. This leads to the second implication.

If parents were to succeed in arguing that schools have a duty of care to ensure certain expectations of educational outcomes, parents would still be required to show that the school has failed to take reasonable care to do so. Reasonable care in this case might include various professional measures, such as professional development courses, performance appraisal of teachers (and hence dealing with underperformance of teachers appropriately), a checking system to ensure that the curricula are taught to acceptable standards, and a scheme to identify and address learning difficulties (Butler & Mathews, 2007).

The third implication is that, in a system where teachers are appraised by their supervisors and graded according to their performance, there is a belief that poor-quality teachers should gradually be weeded out. However, this belief does not address the issue of what constitutes "weak" or "incompetent." Further, this is an oversimplified view that overlooks the context of increasing demands from all quarters on the profession and a job that is no longer confined to providing instruction

in the classroom. In the context, therefore, of a multidimensional remit, how does one evaluate performance and give relative weightings to the various dimensions? Assessing teachers' performance convincingly, therefore, is fraught with difficulty.

A related implication is that educational malpractice may not be confined to poor teaching. Oddly, in some cases, teachers may be accused of teaching too much and causing undue stress to students by imposing unreasonable demands on them. Although only a minority, from the interviews, it became clear that there are parents who request teachers not to stress their children. As one principal commented:

Parent who will say that, "Oh, it's ok, I don't want my child to be the top student, you know, I don't want to stress him out. Just let him be."

An important implication of the notion of educational malpractice is the effect it can potentially have on independent schools. Since education in independent schools is provided pursuant to a contract between parents and the schools, it can be argued that the schools have an implied duty of care under the contract, rather than the negligence principles referred to earlier, to provide the educational services with reasonable skill and care. The Victorian case mentioned above is such a case in point. The father in that case was of the view that the results attained by his twins were not commensurate with the high fees charged by the school and hence the educational services provided were not up to a standard reasonably expected.

There are also numerous implications for universities: for example, the representations and claims made during the marketing process and the expectations reasonably anticipated by the students as a result of the representations and claims; academic judgments of the university teachers, whether negligently made; and the grievance procedures of students, and whether disciplinary decisions made were fair. This area is beyond the scope of this article, but it serves to explain that the implications of the increasing incidence of claims regarding educational malpractice are far-reaching.

Conclusion

This article has shown that although it may not be an immediate concern to school leaders, the notion of "educational malpractice" should probably

be treated more seriously than it currently is. Those principals in Singapore who are dismissive of any suggestion that it could happen in their system may be in for a rude shock. Cases in the U.S. and the U.K. have shown that courts are willing to extend the tort of negligence to find school authorities liable for intellectual harm due to identifiable mistakes. These cases also show that there is expanding interest in the nature of “professionalism”: what rights do parents have for guaranteeing the expected educational “experience” for their children? This question goes to the heart of what a professional is, in much the same way as one thinks about the non-negotiable expectations of professional groups, such as doctors, lawyers and accountants. As one ponders on this issue, one may come to the conclusion that it may not be long before a push is made for teachers’ legal duty of care to go beyond the protection of students from physical injury to a legal duty for the students’ intellectual development. So long as reasonable legal principles are established, it may not be a bad outcome for the future of children.

Notes

1. *PI and Others (Minors) (Appellants) v. Bedfordshire County Council (Respondents), In Re M (A Minor) (1994) and another (A.P.) (Appellant), In Re E (A Minor) (1994) (A.P.) (Respondent), Christmas (A.P.) (Respondent) v. Hampshire County Council (Appellants), Keating (A.P.) (Original Respondent And Cross-Appellant) v. Mayor etc. Of The London Borough Of Bromley (Original Appellants And Cross-Respondents).*
2. All the quotations in this section are reproduced verbatim, and the use of “Singlish” (the Singapore vernacular) such as “lah” and “aiyah” was retained to maintain the texture and authenticity of the responses.
3. Under the “Enhanced Performance Management System,” teachers are “ranked” from grades A to E. An “E” grade means the teacher is performing below satisfactory level and will be monitored closely. If no improvement is shown over a prescribed period of time, the “E grade” teacher will be dismissed.

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