Educational Negligence – Comparative Cases and Trends

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Introduction

For many decades, the relationship between education and the law mainly concerned children's rights to be educated\(^1\) and to be safe. However, in the 1970s, questions began to be asked as to whether there was a cause of action for 'negligent education'. The first educational negligence case was brought in the United States in 1976, and since then much has been written about this emerging area of education law. The seminal case of \(X\) (minors) \textit{v} Bedfordshire County Council,\(^2\) in 1995, paved the way for educational negligence claims to be a viable cause of action in England, and in 2000 the case of \textit{Phelps v London Borough of Hillingdon} (\textit{Phelps})\(^3\) saw the award of damages by the House of Lords for the breach of professional duty of care of educators. This paper explores the cases in this area in four jurisdictions – United States, England, Canada and Australia – and then examines whether the trend is set for the recognition of educational negligence.

The tort of negligence, as it relates to physical injury and emotional injury suffered in schools (such as that arising from bullying and sexual assault) is well recognised by the courts. Indeed, cases have escalated to the extent that, in many jurisdictions, and in particular, the United States, England, Australia and Canada, education law communities\(^4\) have emerged to deal with them. While there is a willingness by the courts to recognise that schools owe a duty of care to students to keep them safe from physical and emotional injury, cases have demonstrated that there is a general reluctance to impose a similar duty of care in relation to educational negligence.

A quick review of negligence cases affecting schools and educational authorities reveals claims such as inadequate supervision resulting in physical injury; failure to prevent bullying; and exposing students to unnecessary risks of injury (including risks of sexual assault). In most cases, the allegation of a breach of duty of care does not involve a breach of a duty to educate. Educational negligence thus forms a novel type of negligence claims.

Negligence claims under the law of tort require plaintiffs to show: (1) a duty of care, recognised by law, to the plaintiff; (2) the failure of the defendant to conform to the required standard of care; (3) that the plaintiff suffered injury; and (4) that the defendant's breach of duty was the proximate cause of it.\(^5\) The same requirements are necessary for educational negligence claims. In the next section, educational negligence claims in four jurisdictions are surveyed.

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\(^1\) See the landmark case of \textit{Brown v Board of Education of Topeka} (1954) 374 US 483 where the United States Supreme Court struck down racially segregated public schools and upheld the 'separate but equal' principle. It since led to every State in the US having some form of laws to ensure compulsory education. The UK, Canada and Australia similarly have legislation that ensures that children are required by law to have an education.

\(^2\) \textit{X (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and other appeals} [1995] 3 All ER 353.


Overview of Educational Negligence Cases

Cases in the United States

The first case in the United States was heard in 1976 (Peter W v San Francisco Unified School District)\(^6\) where the student, whose intelligence was average or slightly above average, and who attended school regularly for twelve years, was only able to read at fifth grade level when he graduated. He sued the school authority for inadequate or incompetent teachers and for promoting him to a higher level each year despite his lack of progress. The Californian Court of Appeal concluded that there was no general duty of care owed by educators to students in respect of educational outcomes because ‘classroom methodology affords no readily acceptable standards of care, or cause, or injury’.\(^7\) In addition, public policy demands that such claims should fail:

‘Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their education objectives; ... they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections ... and in survey upon survey. To hold them to an actionable ‘duty of care,’ in the discharge of their academic functions, would expose them to the tort claims -- real or imagined -- of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation ... The ultimate consequences, in terms of public time and money, would burden them -- and society -- beyond calculation.’\(^8\)

Public policy considerations, therefore, include 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 an undue burden upon the limited resources of schools.

The next United States case was Donohue v Copiague Union Free School District (1979)\(^9\) where a similar allegation was made. In this case, the student claimed that his low literacy level even prevented him from completing applications for employment. 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. The Court of Appeals 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’.\(^10\)

A third case that arose, which had a significant effect on the meaning of ‘educational malpractice’, was that of Hoffman v Board of Education (1979).\(^11\) In contrast to the earlier two cases, the student 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 spent twelve years in education facilities for ‘mentally retarded children’, resulting in emotional and intellectual injury, and a much reduced ability to obtain employment. 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.

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\(^6\) Peter W v San Francisco Unified School District, 131 Cal Rptr 854 (Cal Ct App 1976).
\(^7\) Ibid, at pp 860–861.
\(^8\) Ibid, at pp 59.
\(^9\) Donohue v Copiague Union Free School District, 391 NE 2d 1352 (NY 1979).
\(^10\) Ibid at p 391.
A string of similar cases followed in the 1970s and 80s. In the case of Hunter v Board of Education of Montgomery County (1981), it was found that the student was allowed to progress to a higher grade each year without being able to read; yet the court concluded that, ‘The problem of education is simply too fraught with unanswered questions for the courts to constitute themselves as a proper forum for resolution of those questions’. One of the questions was: how does one measure educational injuries? In DSW v Fairbanks North Star Borough School District (1981), and Torres v Little Flower (1984), the claims were rejected for the same public policy reasons given by the earlier seminal cases. In Smith v Alameda County Services Agency (1979), the claim was dismissed by the courts for the lack of a satisfactory standard of care by which to evaluate an educator. In Moore v Vanderloo (1986), the cause of action was denied because of, inter alia, the potential it presents for a flood of litigation against schools.

These cases saw the difficulties presented, especially on grounds of public policy, to potentially valid educational negligence claims. Nevertheless, despite the setbacks for those seeking redress, the 1990s saw further attempts to revisit educational negligence claims. In Poe v Hamilton (1990), the student was unable to graduate on time because she failed a psychology course. She argued that the teacher’s conduct was reckless and the proximate cause of her failing the course, since the teacher failed to follow the guidelines and requirements of the school board. Her claim was rejected, because she could not prove her case and also because public policy again precluded a cause of action for educational malpractice. In 1999, the case of Bell v Board of Education of the City of West Haven, a claim for negligence in ‘imposing a duty, standard[s] of care, and reasonable conduct… are difficult, if not impossible, to apply in the academic environment’.

The 1990s also saw claims brought against universities. In Ross v Creighton University (1992), the student alleged that the university had admitted and enrolled him when they knew he was not academically qualified and thereafter failed to provide the tutoring services to enable him to receive a meaningful education. The United States Court of Appeal for the Seventh Circuit considered the cases in this area and followed the now familiar reasoning, stating ‘the overwhelming majority of states that have considered [an educational malpractice] claim have rejected it.’ In another

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14 Ibid at p 685.
16 Torres v Little Flower, 474 NE 2d 223 (NY 1984).
17 Smith v Alameda County Services Agency, 153 Cal Rptr 712 (Cal Ct App 1979).
case against a university, that of Andre v Pace University (1996), two students sued a private university for misrepresenting the nature of a computer programming course, for breach of contract and fiduciary duty, and for deceptive acts and practices. The trial judge gave judgment in favour of the students, but on appeal the appellate court reversed the decision and held that the students’ claims were simply reformulations of educational malpractice claims that were not actionable. Although in both cases the courts recognised that it might be possible to succeed in a breach of contract claim for misrepresentations, they stopped short of recognising a duty to provide an effective level of instruction.24

A notable exception to typical educational malpractice litigation in the United States is the case of BM v State (1982). In this case, the Supreme Court of Montana held that school authorities owed a child a duty of care to test and place him or her in an appropriate special education program by virtue of state statute. As this duty arose from the Montana Constitution and the relevant statute, a common law duty of care did not find its place in the courts. An opportunity arose for the courts to establish a duty of care for misdiagnosis and misplacement of a child under the head of educational malpractice in the case of Snow v State of New York.26 Donald Snow was diagnosed as ‘mentally retarded’ and placed in a school for the severely mentally retarded, when, in actual fact, he was hearing impaired. However, the court, in giving judgment to the plaintiff, chose to classify the claim under the head of medical negligence instead.

In a recent study conducted by some United States legal scholars, it was found that very few negligence cases against school districts that reached the courts actually succeeded. In cases that did succeed, the United States courts have held districts liable for specific injuries, such as student physical injuries resulting from lack of supervision or improper maintenance of equipment. Arguably, these types of injury are not as damaging as harm that may be suffered by a student from educational negligence, yet public policy continually prevents claims for educational negligence from succeeding. The public policy concern of the United States courts revolves around finding a workable standard of care against which to measure an educator’s conduct, the difficulty in proving or disproving the proximate cause of the injury, and in measuring such injury. It was also felt that recognition of educational malpractice actions would be a blatant interference of the courts in the regulation of educational programs or pedagogical methods.

While these concerns seem reasonable and justifiable, what is puzzling is the courts’ reluctance to impose liability on specific incidents of negligence, such as in the case of Hoffman v Board of Education discussed earlier. In Hoffman, the defendant had a duty to correctly place a normally intelligent student suffering from a speech defect, but had failed to follow its own recommendations to retest him after initially labelling him as ‘retarded’. The resulting injury could be linked to the defendant’s breach of its standard of care and thus the proximate cause, and the other pre-requisites for the tort of negligence are not difficult to establish. In the English case of Phelps v

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23 Andre v Pace University, 655 NY S 2d 777 (NY App Div 1996).


25 BM v State, 649 P 2d 425 (Mont 1982).


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27 Suzanne E Eckes, Janet R Decker and Emily N Richardson, ‘trends in Court Opinions Involving Negligence in K-12 Schools: Considerations for Teachers and Administrators’ (2012), 275 West’s Education Law Reporter, 505. In this study, the authors examined negligence cases reported in the ‘Torts’ chapter in the Yearbook of Education Law over a three year period (2009–2011).
London Borough of Hillingdon (2000)\textsuperscript{28} (Phelps), the House of Lords had to address precisely this issue, and this now takes us to a survey of English cases.

Cases in the United Kingdom

The first educational negligence case, \textit{X (minors) v Bedfordshire County Council},\textsuperscript{29} was heard by the English Court of Appeal and the House of Lords in 1995. This case was a consolidation appeal of five separate claims brought by students against the local education authorities (LEAs) for negligence, three of which related to educational negligence in failing to address their special learning needs. The first two of these three cases involved misdiagnosis by an educational psychologist employed by the LEA, while the third case concerned the failure of the LEA to assess the student's educational capacity and place him in an appropriate school. The alleged negligence resulted in the students' personal and intellectual development being impaired and reducing their employment prospects.

Although both appeal courts concurred that no common law duty of care in relation to the exercise of statutory discretion conferred by the Education Acts could be found to exist, they held that a cause of action could be established for the negligent performance of professional services provided by the LEA. Lord Brown-Wilkinson said: 'For myself, I do not believe that it is either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence'.\textsuperscript{30} Since 'the education of the pupil is the very purpose for which the child goes to school',\textsuperscript{31} a school assumes responsibility for a pupil's physical as well as educational needs. Thus, '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'.\textsuperscript{32} However, as the House of Lords was only determining if there was a cause of action, no judgment was made as to whether there was indeed negligence.\textsuperscript{33} Nevertheless, this case laid down the principle that, in an appropriate case, there is scope for argument as to the liability of the LEA for the negligence of their servants or agents. This meant that, unlike in the United States, the English courts will no longer allow 'policy' considerations to prevent an otherwise valid claim against the LEA, thus destroying the virtual blanket immunity enjoyed by education authorities and departments.

Indeed, in the case of Phelps,\textsuperscript{34} the House of Lords was not convinced that there were 'sufficient grounds to exclude [educational malpractice] claims on grounds of public policy alone'. Although the Law Lords confirmed that it was not Parliament's intention to provide a remedy by way of damages for breach of statutory duties, it did not preclude an action in private law if the necessary conditions were met. Here, the House of Lords took a cautious approach in considering whether the LEA could be vicariously liable for the educational negligence of an education officer and used the \textit{Bolam} test as the appropriate professional standard:

'I am very conscious of the need to be cautious in recognising such a duty of care where so much is discretionary in these as in other areas of social policy. As has been said, it is obviously important that those engaged in the provision of educational services under the statutes should not be hampered by the imposition of such a vicarious liability. I do not, however, see that to

\begin{footnotesize}
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\item[\textsuperscript{28}] See note 2 above.
\item[\textsuperscript{29}] See note 1 above.
\item[\textsuperscript{30}] Ibid at p 736ff.
\item[\textsuperscript{31}] Ibid at p 396.
\item[\textsuperscript{32}] Ibid.
\item[\textsuperscript{33}] The case was either settled later or not pursued further by the plaintiffs.
\item[\textsuperscript{34}] In this case, the plaintiff had a congenital disability called ‘dyslexia’, which was not in dispute. The issue in question was whether the court could award damages to a negligent failure on the part of the education authority to identify and respond appropriately to such a condition. The trial judge awarded damages but the Court of Appeal overturned that decision on policy reasons. On further appeal, the House of Lords reinstated the damages awarded and provided useful dicta about educational negligence and the award of damages.
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recognise the existence of the duties necessarily leads or is likely to lead to that result. The recognition of the duty of care does not of itself impose unreasonably high standards. The courts have long recognised that there is no negligence if a doctor "exercises the ordinary skill of an ordinary competent man exercising that particular art"; [A doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view": Bolam v Friern Hospital Management Committee [1957].35 The difficulties of the tasks involved and of the circumstances under which people have to work in this area must also be borne fully in mind. The professionalism, dedication and standards of those engaged in the provision of educational services are such that cases of liability for negligence will be exceptional.36

The House of Lords was not suggesting opening the door to claims based on poor teaching. Rather, it was allowing the law to 'provide a remedy in damages when there is manifest incompetence or negligence comprising specific, identifiable mistakes'.37 The Court was also not limiting such a duty of care only to children with special educational needs:

'The law would be in an extraordinary state if, in carrying out their teaching responsibilities, teachers owed duties to some of their pupils but not others... The principal objection raised to this conclusion is the spectre of a rash of 'gold-digging' actions brought on behalf of under-achieving children by discontented parents... and the time of teaching staff will be diverted away from teaching and defending unmeritorious legal claims... I am not persuaded by these fears. I do not think they provide sufficient reason for treating work in the classroom as territory which the courts must never enter. "Never" is an unattractive absolute in this context."

The possibility of opening the floodgates did not eventuate, as not many cases were brought after Phelps, and of those that were, most were not successful.39 The later English judgments have consistently shown that, although the first hurdle of establishing a duty of care to educate is recognised, it is not easy to establish a breach of professional standards or to prove causation. Thus, while the English courts are more prepared to 'accept and remediate'40 sound educational negligence claims, the chances of success are not considerable. Apart from the evidential difficulties and the lapse of time faced by the plaintiff, in order to succeed in such claims, the plaintiff needs to establish:

'(i) a breach of duty that cannot be answered by Bolam considerations,'41 (ii) that, but for the breach of duty, he or she would have been taught differently and (iii) that the different teaching would have made a material difference. These are significant hurdles to overcome'.42

Outside the special needs context, liability for educational negligence will probably only be imposed in cases of specific and manifestly negligent mistakes, like teaching the wrong syllabus. In an unreported case, a teacher in a school failed to teach the correct syllabus and

35 Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, 586–587, per McNair J.
38 Ibid.
40 Ibid at p 35.
41 The Bolam test is outlined below.
prepared the students only for two of the three exams.44 As the case was settled out of court, no dicta were available.

In the more recent case of Abramova v Oxford Institute of Legal Practice (2011)44 (Abramova), the plaintiffs brought a case against the providers of a Legal Practice Course alleging that the institute was negligent (i) in failing to provide her with more specific feedback on her failed examinations; and (ii) in allowing a mock examination to be marked by fellow students rather than by a teaching staff member. The court gave judgment to the defendant. On the evidence, it was shown that feedback and assistance were available to the plaintiff but she did not take full advantage of it. As for peer marking of mock examinations, expert evidence showed that such a practice was supported by academic research and is deemed to be of the standard of 'a competent man exercising that particular art'45 – the Bolam test. On the question of causation, even if a breach of duty had been established, the court was of the view that there was no realistic chance that the plaintiff would have passed the course. She had difficulties in passing five papers initially and failed three on a resit. This suggested a fundamental problem, which was confirmed in her failing the New York Bar examinations subsequently.46

One can see from the case of Abramova how a claim for 'negligent teaching' can be framed.47 Dicta in Phelps indicated that such a claim, in principle, is sustainable. Although the cases brought so far dealt mainly with special education, the door may be slowly opening to allegations of 'negligent teaching' because parents are becoming more knowledgeable about classroom practice as schools now probably communicate more widely.48 It will be interesting to see how this area of litigation will further develop in England.

Cases in Canada

The position in Canada is very similar to the United States, in that the courts are reluctant to recognise educational malpractice as a tort. The public policy considerations that influence the courts’ decisions are very much the same: (1) no duty of care; (2) opening the floodgates to educational malpractice lawsuits; (3) courts not being the appropriate body to interfere in the affairs of schools and school boards; and (4) undue burden on a school’s limited resources.49 However, while most of the courts have rejected educational malpractice claims, two courts have been prepared to set conditions or circumstances where the imposition of liability may be possible.

In Torres v Little Flower Children’s Services (1984),50 student who was placed under the care of the social services department and child care agency after being abandoned by his mother sued the department and agency for educational malpractice, alleging that he remained functionally illiterate, despite having received public education. His claim was dismissed in the lower courts and he appealed to the Court of Appeals. In trying to distinguish his case from Hoffman and Donohue,51 the plaintiff argued that he was not asking the courts to evaluate the different educational approaches, but rather to enforce duties imposed on the defendants under statute and common law.

47 The defendant institute relied on Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1888 to argue that the plaintiff’s claim rested on the exercise of academic judgment, which was not justiciable. The judge rejected that argument and held that the claim was one of 'negligent teaching'.
48 This observation is made from the author's interaction with her children's schools and with speaking with parents and school principals.
50 Torres v Little Flower Children's Services 474 NE 2d 223 (NY 1984).
51 See earlier discussion on United States cases.
By a majority, the Court of Appeals dismissed the appeal by stating that statutory duty is not subject to review and that public policy objections to the court's involvement in decisions pertaining to educational matters prevail.

In Hicks v Etobicoke (City) Board of Education (1988)52 (Hicks), the plaintiff alleged a failure to provide a 'proper education and corrective action', but the court rejected the claim by simply holding that the tort of educational malpractice was not actionable in Canada. In the next case of Wong v University of Toronto (1992),53 the complaint arose from the resignation of a doctoral student's supervisor. The plaintiff student brought an action in contract and tort. After reviewing the decision in Hicks, the court held that the plaintiff had no cause of action against the defendants in tort. The case of Gould v Regina East School Division No 77 (1997)54 (Gould), however, interestingly saw the Court acknowledging the possibility that the tort of educational negligence might exist under the right combination of circumstances.55 The plaintiff here brought an action against the Board of Education and the teacher for educational negligence, as well as a breach of the Education Act. The allegation was that the plaintiff had been subjected to 'unsatisfactory, inappropriate and objectionable behaviour'56 by the teacher, including, inter alia, the neglect or refusal to address concerns from the plaintiff over adequate instruction of the curriculum. The court reviewed a number of decisions in the United States and, once again, rejected the tort of educational malpractice based on the now familiar public policy considerations.

However, the court went on to say that if the conduct was 'sufficiently egregious and offensive to community standards of acceptable fair play', it might support a cause of action for educational malpractice.57 Unfortunately, the court did not give any guidance as to what type of conduct would satisfy this exception.

Soon after Gould, the British Columbia Provincial Court had to consider another educational malpractice claim. In Haynes (Guardian ad litem of) v Lieres (1997)58 (Haynes), the plaintiff received a 'C' grade in his French immersion social studies subject, because the teacher failed to teach 30% of the required curriculum. The claim was couched in the traditional tort claim of negligence to avoid sections 112(1) and (2) of the School Act, which precludes actions against employees of school boards, unless the subject matter related to 'dishonesty, gross negligence or malicious or wilful misconduct'.59 The plaintiff also argued that the negligent act occurred from an operational decision, rather than a policy decision, so hence the claim was not based on educational malpractice. The court dismissed the claim and concluded that 'the inadequate implementation of the educational programme in whole or in part cannot on public policy grounds constitute a basis for individual tortious liability against a teacher'.60 It went on the say that the 'courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality'.61 Thus, this case appears to exclude any possibility of such claims from

53 Wong v University of Toronto (1992), 4 Admin LR 2d 95, 1992 Carswell Ont 916 (Ont CA).
56 See above n 49, note 1 at para. 8.
57 Ibid at para 47.
58 Haynes (Guardian ad litem of) v Lieres (March 10, 1997), Doc Vancouver 965025 (BC Prov C).
59 School Act, SBC 1989, c 61.
succeeding. However, as the decision did not refer to the case of Gould, one could argue that there may be circumstances that could arise to support a claim for educational malpractice in Canada.¹⁶² But, for this to happen, a subsequent court may need to spell out what these circumstances might be.

Cases in Australia

Over twenty years ago, Justice Kirby had this to say about the professional responsibilities of teachers:

'...if teachers claim full membership in the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents...we will see whether the teacher’s legal duty of care goes beyond protecting pupils from physical injury in the playground and the science laboratory to what is perhaps the more relevant and usually more profound professional injury that can result from...incompetent...teaching.'¹⁶³

Indeed, in a research study on ‘School Principals and the Law’, conducted in the early 1990s in Queensland,¹⁶⁴ two of the principals in the study revealed that they had received threats of litigation for poor teaching that allegedly resulted in the failure of students to achieve expected educational outcomes; and in surveying the international trends and the developments in Australia, Justice R. Atkinson of the Supreme Court of Queensland, in 2002, concluded 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.'¹⁶⁵

Although no reported cases of this nature have actually taken place in Australia, four years after Justice Atkinson’s statement, lawyers for Brighton Grammar School in Melbourne settled a complaint made by a parent to the Victorian Civil and Administrative Tribunal that her child had not been taught to read properly at the school.¹⁶⁶ In 2008, a case was filed in a Victorian court by a father who claimed that his Year 12 twin boys did not achieve the academic results that were expected to be attained in that same elite private school. The father claimed that, in light of the appalling Year 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 12.¹⁶⁷ Both cases were settled upon payment of an undisclosed sum of money.

In 2009, parents of four children who were sued for outstanding school fees counterclaimed against

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¹⁶² In fact, in a later case, McKay v CDI Career Development Institutes Ltd, 64 BCLR (3d) 386, 1999 Caswell BC 656, 30 CPC (4th) 101, [1999] BC No 561 (BC SC) [In Chambers], March 11, 1999, although the claim failed due to some procedural matters, the Court indicated that even though claims for educational malpractice have been rejected by courts both in the United States and Canada, there appeared to be some situations where a court might accept educational malpractice claims (relying to Gould).


the school, claiming to have paid more than $200,000 in fees and that the school had failed to ‘address or correct’ problems with their daughter’s academic work, ultimately leading to her underperforming in the 2006 Higher School Certificate.69 The magistrate dismissed the counterclaim and ordered the parents to pay the outstanding fees, as they had failed to provide sufficient evidence that the school had breached its duty of care.69

Although the parents were not successful in this case, it nevertheless demonstrates the expanding interest in the nature of professionalism and accountability of the teaching profession, possibly in much the same way that one thinks about the expectations of professional groups, such as doctors, lawyers and accountants. This is especially so for fee paying parents, who naturally expect value for money.

In the recent case of Weir v Geelong Grammar School (2012),70 a student and her mother brought a claim against the school, alleging that it had failed to provide the academic support the student needed, and, as a result, she was not able to study law at the University of Sydney.71 Deputy President Lulham, who presided over the case, dismissed the claims, stating a distinction between an obligation to ‘cause the student to achieve a result . . . from providing the student with the opportunity and resources to attempt to achieve a result’. He confirmed the view of Federal Magistrate Neville in Yee Tak On v Dr Linda Hurt (ANU College) (2012) who said:

‘... it is not uncommon that courses in educational institutions . . . are not delivered to the absolute, highest quality. Such is the reality of most human endeavour. However, it is one thing for educational courses, to be, among other things, of varying quality; it is quite another for the delivery of a course to provide a base, in law, for a dissatisfied student to claim the relief sought.’72

A case that was brought in the Federal Court of Australia was that of Beau Abela v State of Victoria (2011),73 where the student, as an adult, alleged that the Education Department failed to teach him properly by allowing him to pass through the system, even though he failed to meet the required academic levels. He claimed he was unable to read or write properly and that the school ignored his father’s repeated concerns about his obvious learning difficulties.74 Unfortunately, due to the plaintiff’s unexplained delay in proceeding with the trial, his application for an adjournment was not granted and no judgment is available for comment.

The cases above show that there are no authoritative dicta in Australia endorsing educational malpractice or negligence claims. The general consensus is that, while there is a duty to educate, establishing a breach of that duty will be difficult. The question is how long will this position be sustainable? It is to this question we will now turn.

The Future of Educational Negligence Litigation

The educational negligence claims to date can be described as ‘inadequate education’ claims (e.g., students alleging that schools failed to teach them to read and write properly, thus leaving them functionally illiterate) and ‘professional error’ claims (e.g., schools that failed to diagnose a learning difficulty or misdiagnosing a learning difficulty and

70 Weir v Geelong Grammar School (Civil Claims) [2012] VCAT 1736.
71 The claims were couched in terms of breach of contract, misrepresentation and supplying services not fit for purpose in breach of the State’s Fair Trading Act.
72 Yee Tak On v Dr Linda Hurt (ANU College) [2012] FMCA 391, at para 21.
73 Beau Abela v State of Victoria, VID1102/2011, filed on 7 October 2011.
placing students in the wrong class). The courts in the United States and Canada are generally reluctant to recognise claims for policy, administrative and economic considerations, but, as seen above, the House of Lords in Phelps did consider the possibility of educational negligence claims against teachers. However, the perennial difficulty for the success of such claims, even if policy considerations are put aside, is that of establishing a workable standard of care and proving causation, two of the basic elements of the tort of negligence. The question then is: what is a teacher’s professional standard of care with regard to his or her duty to educate?

As we have seen, the House of Lords has established the Bolam test as the requisite standard for a professional; that is, a person is not negligent if he or she is acting in accordance with the accepted practice of the relevant professional body. The dissenting judge, Judge Davidson, in Hunter v Board of Education of Montgomery County (1981) expressed a similar sentiment by stating that educators are professionals and thereby owe a duty of care to their students, the appropriate standard of care being one that is based on customary conduct. Judge Suozzi, in Donohue v Copiague Union Free School District (1979), in dissent, referred to the New York educational regulations and was of the view that the school had violated professional and statutory standards of conduct by failing to properly evaluate the plaintiff’s progress. The problem with Judge Davidson’s argument is the apparent lack of custom and general agreement as to what constitutes the accepted standard of care, but his approach in referring to statutes and regulations may be one way of measuring customary or acceptable professional behaviour.

Indeed, one is increasingly seeing the professional standard of teachers being brought under scrutiny. For example, in the United States, federal legislation such as the Individuals with Disabilities Education Improvement Act (2005) actually prohibits the use of scientifically rejected practices in special education and imposes a duty of care in education. This arguably opens the door to a ‘malpractice tort based on the integrity of educational practices’. In Australia, as noted by Mawdsley and Cumming, many states have brought the Bolam standard under statute law:

‘A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.’

As to what the standard might be, reference can now be made to the National Professional Standards for Teachers published by the Australian Institute for Teaching and School Leadership in 2011. The Standards are grouped into three domains of teaching: Professional Knowledge, Professional Practice and Professional Engagement.

In England, a new Teachers’ Standard 2012 has been introduced to assist school principals in

80 See section on ‘Cases In the United Kingdom’ above
82 Donohue v Copiague Union Free School District, 391 NE 2d 1352 (NY 1979), 883–884.
83 Individuals with Disabilities Education Improvement Act, Pub L No 108–446, 118 Stat 2647 (2005).
84 Brian J Gorman, Catherine J Wynne, Christopher J Morse and James T Todd, ‘Psychology and Law in the Classroom: How the Use of Clinical Fads in the Classroom may Awaken the Educational Malpractice Claim’ (2011) 1 Brigham Young University Education and Law Journal, 29–50, 30.
85 Mawdsley and Cumming, above n 22, 35.
86 Civil Liability Act 2003 (Qld); Civil Liability Act 2002 (Tasmania); Civil Liability Act 2002 (New South Wales).
performance appraisals and pay progression. The Standard is divided into two parts: teaching and personal and professional conduct. Similarly in Canada, standards of practice are defined and mandated by the profession itself. For example, the Ontario College of Teachers prescribes a framework of principles that describes the knowledge, skills, and values in the teaching profession and, thus, provides the elements for the duty of care for the professional teacher. In the United States, the setting of professional standards can be seen in the amendments and developments in the 1965 Elementary and Secondary Education Act and the No Child Left Behind legislation, where states are required to develop state educational standards and to track the achievement of all students toward these standards.

Connors argues that while educators have successfully defended all suits in the new tort of ‘educational malpractice’, ‘sooner or later one will be won by the plaintiff’. Indeed, in the case of Phelps in 2001, the House of Lords ruled in favour of the plaintiff for educational negligence and provided useful dicta about the nature of such claims and the award of damages. In 1991, Jamieson wrote, ‘...courts that have decided educational malpractice claims have relied on incomplete and biased public policy analyses generated in the late 1970s. They have not acknowledged the current realities of the educational and legal professions. With the growing sophistication of educators, the possibility of serious injury resulting from a lack of education, and the vulnerability of children, the time is ripe for recognition of educational malpractice.’

This is arguably the real issue here. Educational negligence affects children’s lives and the consequences arising from that are lifelong. Could it be argued, then, that the accountability movement in education is setting the stage for the recognition of educational malpractice? One can argue that these standards should confirm the teacher’s duty to deliver the correct curriculum and to appropriately assess and evaluate student learning. The courts have often stated that they are not in the position to prescribe education standards. However, the setting of teachers’ standards by the profession itself in the above jurisdictions arguably removes the first hurdle – that there is no professional duty of care – in the tort of educational negligence. In other words, the move towards specificity and objective standards is facilitating attempts to develop more certainty about where blame can be attributed.

Interestingly, while the majority of cases so far have shown that courts are rejecting educational malpractice claims, the accountability movement in education may be unintentionally opening the door wider to such claims. In the United States, an evaluation system called Value-Added Modeling (VAM) is used to calculate ‘the value a teacher adds to the education of a student through the use of multiple years of a student’s test score data’. VAM relies on complex statistical techniques to calculate and differentiate teacher effectiveness using data on student growth as a significant factor.
designed to separate non-educational factors, such as family backgrounds, and aims to isolate and measure the effects of teachers and schools. In short, the object of VAM data is to differentiate the most effective teachers from the least effective ones.92 Similarly, in addition to setting standards, federal legislation also requires states to implement various yearly assessments to gauge student progress and give parents 'a more complete longitudinal picture of student achievement'.93

In 2008, Mawdsley and Cumming asked pertinent questions in relation to the development of standards: 'what will happen in schools when teachers are identified as not meeting the core performance standards . . . could parents seek an injunction to have their child removed from or not placed in such a classroom?"94 In arguing for a new education malpractice claim, Hutt and Tang95 opined that the success of such a claim lies not in a particular teacher's decision about pedagogy, but rather 'the decision by school officials to continue assigning students to teachers whom the district's own data reveal to be continually ineffective'. In other words, the negligence or malpractice here lies in the fact that school authorities are deliberately allowing under-performing teachers to remain in the classroom.

In Australia, the National Assessment Program – Literacy and Numeracy (NAPLAN) was introduced in 2008 in all Australian schools. Every year, all students in Years 3, 5, 7 and 9 are assessed on the same days using national tests in Reading, Writing, Language Conventions (Spelling, Grammar and Punctuation) and Numeracy.96 The NAPLAN test sets the National Minimum Standards representing minimum performance standards in literacy and numeracy for a given year level, below which students are deemed to have difficulty progressing satisfactorily at school. The results can be used by teachers to identify students who require greater challenges or additional support. This is arguably another step towards setting standards and increasing the accountability function of schools. Will schools be liable for educational negligence if a student is continually promoted to the next grade despite not being able to meet the required standard of the previous grade? The case of Beau Abela v State of Victoria (2011) discussed above raises that very issue.

**Professionalising Teaching**

"... [it] would seem reasonable to assert that if the school principal and teachers specify certain educational goals and objectives to be achieved, that they may be held accountable for the achievement of these goals and objectives."97

It is not disputed that schools owe students a duty of care from physical injury while under their supervision. The argument has since moved to the question of whether teachers, as professionals who

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92 Todd DeMitchell, Terri DeMitchell and Gagnon, above n 85, 266.
94 Mawdsley and Cumming, above n 24, 37.
95 Hutt and Tang, above n 91, 31.
96 Australian Curriculum, Assessment and Reporting Authority, 'National Assessment Program – Literacy and Numeracy' at www.naplan.edu.au/.
possess the relevant training and specialised knowledge and skill, should be held accountable if they demonstrate an unreasonable lack of skill. For example, comparable professional groups, such as medical practitioners and architects, are legally accountable for their practice. In most developed countries, teachers are required to complete a program of study and training, and possess the requisite degree and certification or registration by the professional body before they are allowed to teach. Proponents of educational negligence claims therefore argue that, since teachers hold themselves out to the public as having the skill or knowledge beyond the ordinary person, and have gained the trust of the public as professionals, they should face legal liability should they fail to meet the appropriate standards.98

The main obstacles to educational negligence litigation are the familiar public policy arguments: (1) 'duty of care' in the discharge of academic functions would burden society in terms of time and money, (2) difficulty in identifying the factors that affect a student’s performance, and (3) opening the floodgates to frivolous lawsuits.99 The second point suggests that, unlike lawyers and medical doctors, who are able to cater to the specific needs of their clients, teachers, who face a class of thirty students, can only apply a 'one size fits all' approach.100 In addition, unlike other professional and client relationships, the process of education requires not only extensive co-operation between the teacher and the student but also significant effort on the part of the student in order for him or her to achieve the desired educational goals.101 Thus, the difficulty in establishing a standard of care by which a court can measure the teacher's conduct necessarily precludes the recognition of causes of action for educational malpractice.

But this is about individual teachers. There is a more important issue where institutions deliberately continue to employ teachers whom they know have failed to meet prescribed standards and can reasonably be predicted to continue doing so. Under these circumstances, should the familiar obstacles remain? After all, many education systems now claim to be competent in evaluating teacher levels of performance through defined criteria and are able to describe in precise terms each teacher's level of performance ability at a given point of time. Thus, for those employing and managing the work of teachers, there is a degree of risk in continuing to assign responsibility to those who are defined as incompetent or unsatisfactory.

So we have seen the widespread setting of educational standards in various jurisdictions. Does that solve the courts' dilemma when faced with an allegation of negligent teaching? Even if a Bolam standard is applied to a particular case, wouldn’t it be argued that it is a theoretical standard of care and there is not equivalent to a legal duty of care? Assuming there is a legal duty of care and the court is able to rely on expert evidence to find that a teacher’s conduct has fallen below an accepted professional level, can the student prove causation?

Case law in England has shown that remedy in damages should be allowed for educational malpractice where 'there is manifest incompetence or negligence comprising specific, identifiable mistakes'.102 Such claims can be classified as 'professional error' claims and are distinguished from inadequate education claims. An example of

98 See for example, Laurie S Janieson, 'Educational Malpractice: A Lesson in Professional Accountability', (1991) 32, 4(4) Boston College Law Review, 899–965, 904 and Justine Kirby, 'Legal and Social Responsibilities of Teachers.' Address at the Education Center for Whyalla and Region, South Australia, 1982 at 15, where he said, ‘... [If teachers claim full membership in the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents... we will see whether the teacher's legal duty of care goes beyond protecting pupils from physical injury in the playground and the science laboratory to what is perhaps the more relevant and usually more profound professional injury that can result from... incompetent... teaching.'

99 Mawdsley and Cumming, above n 24, 27.

100 Ibid.


103 Thompson, above n 75, 98.
professional error is seen in the Canadian case of *Haynes v Lleres*\(^\text{104}\) referred to above, where the teacher admitted to deliberately omitting to teach 30 per cent of the course content, resulting in the student receiving only a 'C' grade. Yet the court concluded that '[t]he inadequate implementation of the educational programme in whole or in part cannot on public policy grounds constitute a basis for individual tortious liability against a teacher.'\(^\text{105}\) Applying the English legal principles, the first question that should be asked in this case is (i) whether the breach of duty can be answered by the Bolam considerations – the answer would be 'no', as a reasonable teacher in the same position would have taught the correct syllabus; (ii) whether, but for the breach of duty, the student would have been taught differently – the answer would be 'yes'; and (iii) whether teaching the full syllabus would have made a material difference – the answer in all likelihood would be 'yes', since the student was able to achieve a 'C' grade, despite not knowing 30 per cent of the curriculum. This case is a good example of how, outside the special needs context, liability for educational negligence could be imposed, since there is clearly a specific and manifestly negligent mistake made.

Inadequate education claims, on the other hand, are much more difficult to prove. A failure to learn cannot be categorically linked to a failure to teach. To overcome this difficulty, Hutt & Tang argue that in the same way no school will retain a teacher who is a sex predator, teachers should be dismissed if found to be ineffective. Their argument is based on the availability of the advanced data system (VAM referred to above) which can provide unbiased estimates of teachers' causal impacts on test scores.\(^\text{106}\) This in turn should allow the courts to calculate the extent to which the school proximately caused the student's inability to achieve the appropriate grade.

To date, there are no decided cases in Australia for educational negligence. For years, academics and even judges have alluded to the possibility of such claims in Australia.\(^\text{107}\) But where claims are made, they are generally based on misleading and deceptive conduct or false representation, rather than common law negligence.\(^\text{108}\) Nevertheless these cases provide some insight into similar issues and trends that arise in cases of negligence in other jurisdictions.

There is no doubt that the hurdles for proving inadequate education are difficult to overcome. Even if there is a similar system in Australia, such as the VAM in the United States, there are significant policy issues to consider if the tort of educational negligence is recognised. Such a system may result in defensive practices by teachers where they: (1) teach only what is required for testing; (2) avoid teaching weak students; (3) avoid collaboration with colleagues in order to boost their

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\(^{104}\) Haynes (Guardian ad litem) v Lleres (March 10, 1997), Doc Vancouver 969025 (BC Prov Ct).

\(^{105}\) Ibid.


\(^{108}\) We saw this in the section on 'Australian Cases' where parents were unhappy with the school's inability to help their children attain a certain level of academic results despite the payment of excessive school fees. See also Joan Squech and Lisa Goldacre, 'School Prospectuses and the Potential Liability of Private Schools under Section 52 of the Trade Practices Act 1974 (Cth) (2009) 14(1) International Journal of Law & Education, 39–50, where the authors examine the scope and application of section 52 of the Trade Practices Act 1974 (Cth) to school prospectuses, and discuss the potential liability of a private school for statements made in a school prospectus.
own position in the ‘ranking’ of teachers.\textsuperscript{109} It should also be remembered that it is stressful and time-consuming for any professional person to respond to an allegation of negligence. Thus, while it is true that school authorities and teachers should be accountable to students for a failure to provide competent teaching, one needs to identify the correct defendant and be able to prove causation. This is where the legal position in England seems to be on the right track: damages for educational negligence should only be allowed if the school authority or teacher’s negligent act or omission is specific, identifiable and manifest.

There has been a discourse for some time about the need to professionalise teaching, because, while we refer to the ‘teaching profession’, it is questionable whether teachers could be equated with, say, the legal, medical, architectural and other professions, where minimum standards are defined and where constant and highly regulated upgrading are non-negotiable requirements. It may be useful, therefore, at some stage to draw some parallels and distinctions between teaching and related fields of endeavour in order to evaluate the chances of claims for malpractice eventually succeeding. On the other hand, perhaps the word ‘profession’ in the schools context is a misnomer. Some may argue that attempts to equate teaching with the obvious professions are misguided. If, though, the claim to be a profession persists, then the chances of the right claims meeting success will probably be elevated.

Conclusion

This paper has reviewed the cases concerning educational malpractice in the United States, England, Canada and Australia. The cases have demonstrated an initial reluctance to recognise a duty to educate on policy grounds, and even if there were such a duty, and a claimant alleged that the system had ‘failed’ him or her, there is still the need to prove that the teacher, institution or education authority provided significantly deficient and incompetent services and was lacking in reasonable skill and care. Assuming this were proven, there is a further hurdle to cross: to prove that, had the claimant been taught differently, there would have been a measurable difference in the claimant’s educational ability – the question of causation. Even where claims have been successful,\textsuperscript{110} it should be noted that the courts are cautious in awarding damages. The House of Lords in Phelps agreed with the trial judge (Garland J) that, though loss of future earnings should be acknowledged, the uncertainties in establishing a causal connection between the alleged negligence and the alleged loss are so great that any award given must necessarily be modest.

One might argue that claims may become more possible if there are legislative standards set for the education system. The Teachers’ Standard in England, the Value-Added Modelling evaluation system in the United States, and the National Professional Standards for Teachers in Australia all aim to raise the standard of teaching, and some even link these standards to performance pay. However, this could arguably lead to defensive practices by teachers, such as ticking boxes and gathering evidence of ‘good teaching’, which detracts from ensuring effective pedagogy and improving learning outcomes for students. Nevertheless, when the profession and employers provide the measures, it makes it easier for the courts to establish that standards have not been achieved.

Ramsay\textsuperscript{111} has acknowledged that school authorities and teachers should not be guarantors of the success of their students, but he has argued that there is a duty to ensure the attainment of basic skills to enable students to survive in the world. Failure to do so should lead to accountability. Applying the legal principles in Phelps, such an

\textsuperscript{109} Todd DeMitchell, Terri DeMitchell and Gagnon, above n 85, 300–301.

\textsuperscript{110} The case of Phelps in England and a few cases subsequent to that, for example, Devon County Council v Stuart Clarke [2005] EWCA Civ 266 where Phelps was followed and DN (By His Father and Litigation Friend) R v London Borough of Greenwich [2004] EWCA Civ 1659 where negligence and causation were found.

assertion is only feasible if a claimant is able to identify a professional error rather than simply alleging inadequate education. As observed by Lord Nicholls:

‘A style of teaching which suits one child, or most children in a class, may not be as effective with another child and so on. Suffice to say the existence of a duty of care owed by teachers to their pupils should not be regarded as furnishing a basis on which generalised “educational malpractice” claims can be mounted.’¹¹²


Many have argued that in the age of professional accountability, there should be judicial recognition of educational malpractice or negligence. Indeed, case law in England has awarded damages where professional errors have caused personal injury. Proponents of educational negligence suggest that the time is now ripe for courts to consider claims for inadequate teaching. However, unless and until the courts are able to set a practicable and workable standard to measure an educator’s conduct, the difficult question of causation remains a significant hurdle to cross, and educational negligence or malpractice for inadequate teaching will remain out of reach as a basis for redress.