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COMPENSATION CULTURE IN EDUCATION: FACING THE LITTLE DEVILS!

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Introduction

If there is a subject that exemplifies the growth of the compensation culture in this country it has to be education. It is as if we now only breed generations of scholars, and if any of them fail their examinations, it must be somebody else's fault, not theirs. To be fair, this may be something of a cynical view because many claims made against education professionals do have some merit and are therefore successful. Take, for example, Dyslexia., with today's understanding of the subject, a pupil is entitled to expect that educational establishments and the professionals employed by them to detect the (now well publicised) warning signs of dyslexia at an early stage so that appropriate teaching is given. There is no reason for a person suffering with dyslexia to be unnecessarily disadvantaged at school. I will deal with Dyslexia in more detail below.

There are, however, a number of claims that are, shall we say, speculative. We are, for instance, seeing an increase in claims where pupils do not get the expected GCSE grades and then make claims against their schools alleging that negligent teaching was the cause. As a result damages are sought on the basis that the pupil, having to settle for a degree course at an "inferior" university, will be disadvantaged on the job market. The courts are keen to ensure that the floodgates are not opened to claims against educational professionals. In the House of Lords decision in Phelps (see below) their Lordships commented that this would not happen as teachers, like other professionals, have to be judged according to the standards of their profession (the Bolam test). This sets a fairly high threshold for liability and should offer a sufficient safeguard to the profession according to their Lordships.

What it does not do is set a safeguard against speculative claims where those insurers who insure educational establishments have to take a view on the commercial realities of defending marginal claims which are funded by the Legal Services Commission. Very often, despite the seriousness of the allegations, the courts are reluctant to order excessive damages and so insurers are left with a substantial piece of litigation where a relatively small amount of money is at issue but where, because of public funding, there is no prospect of making a costs recovery at the end of the day. It is here where we see the real impact of the compensation culture. Before I deal with the implications for insurers I will set out some of the areas where we are seeing the major growth in the compensation culture. I will be concentrating more on professional liabilities because that is where most of the important developments have occurred over the past decade, but I will then comment on how those decisions are nevertheless having an impact on both professional and public liability insurers.

Types of Claims

The main types of claims for compensation brought against educational establishments are:

1. Bullying

It is now well recognised that a school is under a duty to take reasonable care for the health and safety of the pupils in its charge (see Van Oppen v Clerk to Bedford Charity Trustees [1990] 1 WLR 235). The scope of this duty was summed up by Auld LJ in the Court of Appeal decision in Gower v London Borough of Bromley [1999] ELR 356, at p 359 as follows:

"A Headteacher and teachers have a duty to take such care of pupils in their charge as a careful parent would in like circumstances, including a duty to take positive steps to protect their well being"

It is now common for schools to have disciplinary policies and procedures to combat bullying, and there is clearly a duty on schools to ensure that pupils are not bullied whilst in school. However, in the case of Bradford-Smart v West Sussex County Council [2002] EWCA Civ 07 the Court of Appeal was called upon to determine the extent to which a school was duty bound to protect a pupil from bullying outside school. Leah Bradford-Smart was a pupil at Ifield Middle School, a school maintained by the defendant, between 1990 and 1993. It was accepted that whilst threats had been made to Leah by other pupils on the way to school, the teachers, when notified, took steps to ensure that Leah was not bullied at school. Indeed, she performed well as a result of protective steps taken by the teachers. Unfortunately, Leah was bullied whilst travelling to and from school and whilst living on a local housing estate by neighbours. The Court of Appeal held that in general a school did not owe a duty to its pupils to police their activities once they had left school. There are exceptions to this where, for example, bullying occurs immediately outside the school gates at the end of the day, or on a school trip. A school may also be under a duty to discipline a pupil who bullies another pupil outside school where the latter's school performance is adversely affected as a result. The Court of Appeal accepted that there may be situations where a school should take such steps as are within its power to combat bullying, even when outside school but that "those occasions will be few and far between."

Bullying claims can cover both the "health and safety" duty of care owed by a school and its "educational" duty so that damages may be sought for physical or psychiatric injury and for under achievement and consequent economic loss. In such a case both Public Liability and Professional Liability policies may be triggered.

2. Abuse

A subject which continually stirs the emotions is abuse of minors by those who are entrusted with their care. This is an area which has seen a large number of claims by former pupils arising from abuse alleged to have been carried out many years ago. As the issue is so sensitive, it is not seen to be a product of the new litigation culture, but rather the product of a more open society where people are now more prepared to talk about a subject which was once brushed under the carpet. In general, this is not an area where "speculative" claims are made.

The problem for claimants pursuing these types of claims is that invariably the offender has no money to satisfy an award of damages. As a result, claimants target employers on the basis that they are vicariously liable for the wrongful acts of their employees. It has long been established that an employer is liable for the torts of an employee which are committed in the course of the employee's employment, even though the employer is himself free from blame. The issue that had been frequently considered by the courts was the meaning of the phrase course of employment. Employers often sought to avoid liability on the basis that an errant employee had been acting outside the scope of employment when the tort occurred (on a frolic of his own).

The matter came for consideration in the context of sexual abuse of a mentally disabled pupil by a headmaster in the case of Trotman v North Yorkshire County Council [1999] LGR 584. In short, the Court of Appeal held that an employer could not be held vicariously liable for the actions of an employee who was guilty of sexual abuse of a pupil because this was an act of self gratification and could not be regarded as in any way connected to the employment.

The decision was overturned by the House of Lords in Lister v Hesley Hall Ltd [2001] UKHL 22. Here the defendant company owned and managed a residential care home for children with emotional and behavioural difficulties who were sent to the school by local authorities. Mr and Mrs Grain were employed as warden and housekeeper to the boys. The warden was responsible for supervising the boys when they were not at school and his duties included making sure that they went to bed at night, got up in the morning, and got to and from school. The warden sexually abused the claimants between 1979 and 1982. In 1997 the boys made claims for personal injuries against the employers.

Their Lordships reviewed at length the origin of the principle of vicarious liability and found unanimously that the defendants were vicariously liable for the sexual abuse committed by the warden. The primary grounds for the finding were as follows:

- When considering the scope of employment, a broad approach should be adopted: the courts should be reluctant to dissect an employee's duties.
- The nature of the duty of care should be considered. The employers duty here was to take care of the boys, and they delegated that duty to the warden. He breached his duty to them to ensure their safety by sexually abusing them.

- Mere opportunity to commit the wrong is not sufficient to establish liability: the employer is only liable if the risk is one which is inherent in the nature of the business.

- In considering all of the facts, the ***close connection test*** should be applied. The origin of vicarious liability was traced back to the first edition of Salmond on Torts (1907) where the definition of course of employment was first set out. A wrongful act was said to be within the course of employment if it is either (a) a wrongful act authorised by the employer, or (b) a wrongful and unauthorised mode of doing some act authorised by the employer. However, their Lordships pointed out that the courts had frequently overlooked the fact that in addition to this test, Salmond had gone on to say that "a master....is liable even for acts which he has not authorised, provided they are ***so connected*** with acts he has authorised...." The warden's duties, his contact with the boys, and the opportunity which his position gave him, when taken together, created a sufficient connection between his acts of abuse and the work he was employed to do.

This judgment clearly opens the way for claims directly against schools or local authorities for abuse by staff, particularly residential schools. Whilst the employee may not be entitled to an indemnity under any insurance policy because his actions were deliberate and malicious, the employer may nevertheless be entitled to cover.

3. Wrongful exclusion

Wrongful exclusion cases usually attempt to challenge the decisions of school governors on the grounds of procedural irregularities. Typical allegations are that the panel was biased, or that the tribunal took into account matters that were not known to the pupil and his advisers. Typically such decisions are challenged by Judicial Review in respect of state schools, or by way of an injunction to re-instate the pupil pending the determination of a breach of contract claim in the context of private schools. Such claims also include a Human Rights element in the sense that a pupil is entitled to a fair trial and principles of fairness will be implied in disciplinary procedures by the courts.

The aim of such claims are to get the pupils re-instated although, in respect of independent schools, damages may be claimed for breach of contract. Typically, however, the damages are limited to the costs of finding an alternative school for the pupil (new school uniform etc) and at this stage there are no reports of significant damages being awarded in wrongful exclusion cases.

4. School trips

As mentioned above, there is an obligation on the part of schools to look after the well being of pupils whilst they are at school. The duty does not extend beyond the school gates, save in exceptional circumstances, one of those being school trips. It does not take much to appreciate that when taking a class on a school trip, the school owes a duty to ensure the safety of pupils, so far as is reasonable, and that the pupils should not be exposed to hazards. The courts maintain, however, that the standard to apply

where a pupil's well being is concerned is that of a reasonably careful parent. In Chittock v Woodbridge School [2002] EWCA Civ 915 , two 17 year old boys were were allowed to join a school ski-ing trip for 12 to 19 year olds on the understanding, as agreed with their parents, that they would be allowed to ski whilst unsupervised. On two occasions the teacher in charge discovered that the boys had skied off-piste. The first occasion was by accident but the second was deliberate. After the second occasion the teacher reprimanded the boys and demanded their assurance that they would not ski off-piste again. The boys duly obliged. One of the boys, the claimant, was subsequently injured in an accident when skiing on piste and he took a bend too fast. He sued the school.

The trial judge held that the school was liable because after the second deliberate incident of skiing off-piste, the teacher should have taken his ski pass away. The Court of Appeal overturned the decision saying that there were a range of options open to the teacher when sanctioning the boys (as there would have been had they been with their parents). Obtaining an assurance that they would not ski off-piste again and giving them a severe reprimand was not outside the range of reasonable responses in the circumstances. The court also took into account the experience of the skiers and the fact that they were allowed to ski unsupervised.

5. Failure to educate

Schools and colleges in both the public and private sectors are seeing increasing numbers of claims for professional negligence. The cause of action is different in respect of both. State schools usually find themselves being accused of breach of their statutory duty to educate children, attached to which usually is a claim for damages. Independent schools are governed by a different regime. Their relationship with the pupils usually governed by the contract between the school and the parents. Any dispute about the quality of teaching or a decision of the school is usually brought in a breach of contract action.

However, the common thread is an allegation of breach of duty in tort on the part of the teaching professional. The courts have held that teaching professionals (including teachers and educational psychologists) owe a tortious duty of care to pupils, and there is no difference owed to pupils whether at an independent or state school. The standard of care owed by teachers is the same as that of any other professional person as outlined in the case of Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 (the Bolam test). In that case it was held that where you have a situation which involves the use of some special skill or competence, the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A teacher will not be guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of teachers skilled in that particular art. In other words, a teacher owes a duty to each pupil to use the reasonable skill and care of a professional person exercising that particular skill.

The standard has to be judged objectively (hence the use of experts to advise on reasonable practice), but there is no duty to educate a child to the best possible standards. Once a breach of duty has been established, the courts will look at the extent to which any loss has been caused to the pupil as a result. As mentioned above the typical type of claim is for disadvantage on the job market. Traditionally, claims for damages in negligence could only be brought where the claimant was able to establish that he had sustained either damage to his property or a personal injury as a result. However, the courts are now willing to impose a duty on professionals in respect of pure economic loss where the damage is foreseeable and proximate and it is just and reasonable to recognise a duty of care (Caparo Industries v Dickman [1990] 2 A.C. 605). Education professionals are now, therefore, being sued for pure financial losses such of loss of future earning power.

These types of cases are becoming more and more common with the typical allegation being that due to inadequate teaching or teaching facilities, the student performed poorly in the relevant examination and got a poor grade as a result. This then leads to a claim for loss of future earnings as a result of the disadvantage on the job market. A recent case involving Rycotewood college in Oxfordshire had slightly different slant. There the students complained that they secured their HND qualifications which were in fact useless. The course in question was in Vehicle Restoration and Conservation Technology. The judge accepted the claim that the course did not provide sufficient practical content, so that despite obtaining their qualification the students in question could not secure jobs because they did not have the practical experience that the college prospectus promised. The judge found in favour of the students, with damages to be assessed but damages are unlikely to be substantial because the market for vehicle restorers is not particularly buoyant.

The failure to educate claims which have given rise to the most publicity have been those where Dyslexia or some other Special Educational need has been not identified and treated properly. The main authority in this area is the House of Lords decision in Phelps v Hillingdon Borough Council (2000) 3 W.L.R. 776. Their Lordships held that Hillingdon, the local authority, was vicariously liable for the failure of an educational psychologist to diagnose that Pamela Phelps suffered from dyslexia whilst in school in the mid 1980s. Pamela suffered from a serious lack of progress in school and so the local education authority appointed Mrs Melling, an educational psychologist, to report on her condition. Mrs Melling failed to detect in October 1985 and on a subsequent occasion that Pamela was suffering from dyslexia and so was not given teaching according to her needs. She left school with a reading age of a 7 year old and, not surprisingly, could not find a job.

Expert evidence was called that Mrs Melling had not carried out certain basic tests that would have revealed the condition. The House of Lords upheld the trial Judge's finding that "This was more than an error of judgement: it was a failure to exercise the degree and skill to be expected of an ordinary competent member of her profession". It was argued for Mrs Melling that no duty of care was in fact owed to Pamela because she had been appointed to prepare a report for the school and Hillingdon on Pamela's educational

requirements. However, the House of Lords was more than happy to find that where an educational psychologist is called in to advise in relation to the assessment and future provision for a specific child, and it is clear that the parents acting for the child and the teachers will follow that advice, a duty of care arises. Her relationship with the child and what she was doing created the necessary nexus and duty. Lord Slynn went on to say:

> "The result of a failure by an educational psychologist to take care may be that the child suffers emotional or psychological harm. There can be no doubt that if foreseeability and causation are established, psychological injury may constitute damage for the purpose of the common law."

Their Lordships went on to hold that the local authority was also vicariously liable for the negligent acts of Mrs Melling who was one of its employees. In doing so they upheld the finding of the trial judge that Pamela was entitled to damages for future loss of earnings and cost of tuition totalling £99,000.

In reaching their decision their Lordships reviewed a number of authorities on liabilities of teachers and confirmed that teachers owe a duty to exercise the reasonable skills of their calling in teaching and otherwise responding to the educational needs of their pupils. However, the judgement lead to some controversy by holding that the failure to diagnose and "treat" dyslexia could amount to a personal injury. The judgement itself dealt with a number of linked cases in addition to that of Mrs Phelps. In particular it was asked to make a finding in one of the associated cases as to whether the failure to diagnose dyslexia could amount to a personal injury claim for pre-action discovery purposes. Their Lordships held that although dyslexia in itself did not constitute a physical or psychiatric injury, psychological damage and a failure to diagnose and mitigate the adverse consequences of a congenital defect was capable of being "personal injuries to a person".

Although this finding was made in the context of an application for pre-action disclosure, it has subsequently been followed by the Court of Appeal in David Robinson v St Helens Metropolitan Borough Council when it confirmed that Phelps quite clearly stated 'that emotional and psychological damage resulting in failure by appropriate teaching to ameliorate the congenital condition of dyslexia is a personal injury although it falls short of psychiatric injury in the recognised form." Mr Robinson nevertheless failed in his claim because the Council was able to mount a valid limitation defence.

It is the finding that failure to diagnose dyslexia gives rise to a personal injury which is likely to have the greatest impact on public liability insurers. Although dyslexia claims arise from allegations of professional negligence against teachers or educational psychologists employed by schools or colleges, many professional indemnity policies will either have exclusions against claims for personal injuries, or they will have a retroactive date so that claims relating to losses incurred before that date will not be covered.

Public liability policies are generally written on an occurrence basis and are triggered by personal injury claims. Although personal injury claims have a limitation period of three years, in the case of minors, that limitation period does not start to run until they reach the age of 18. Consequently, pupils have until they are 21 in order to bring claims. The courts also have a general discretion to extend limitation periods in personal injury cases where it can be established from cogent medical evidence that a breach of duty such as a failure to detect dyslexia has had a serious effect on a claimant's health or enjoyment of life and employability. It is still possible, therefore, for historic claims to be made arising from a failure to diagnose dyslexia in the 1980s when the problem was first recognised by schools and local authorities.

The courts are, however, prepared to limit the liabilities of schools where pupils suffer from learning difficulties. In Leinnard v Slough Borough Council [2002] EWHC 398 (QB) , the pupil in question was an intelligent child who did well at school when he concentrated. However, he was not consistent in his work, was regularly late for school, never did his homework, and was massively disorganised. He also had emotional problems at home. It subsequently transpired that he suffered with a condition that was highly unusual, if not unique. A mixture of Psychiatrists and Psychologists could not agree on what his condition was, but it was believed that he probably suffered from a rare condition called autistic spectrum disorder.

The trial judge went through all of the pupil's school reports, some of which were quite positive. He held that the teachers had acted in a way that reasonable teachers would have acted when faced with the pupil in question: he did perform well in some subjects and it was not obvious that he was suffering from a learning difficulty which required intervention. The unusual nature of the condition meant it was not obvious that some exceptional response was required and so the teachers were not negligent.

Summary

It is certainly true that we are seeing an increase in claims against educational establishments. Some of the claims have merit but there is also a trend towards speculative claims. claimants are now able to pursue bullying and failure to educate claims either as personal injury claims or as claims for pure economic loss. If the claim is historic, then it may be more beneficial from a limitation perspective if the claim is pursued as a personal injury action. If the matters complained of are more recent, then it may be more beneficial for a pure economic loss claim to made for loss of future earning potential. Legal Aid is still available for professional negligence claims against teachers, but it is no longer available for personal injury claims where no win no fee arrangements have to be entered into. Consequently, a claimant is able to chose which course is preferable depending on his particular circumstances.

Schools, colleges, and local education authorities usually have professional indemnity, officers liability, and public liability policies available to them. The wording of each has to be considered carefully to see which responds, or if more than one, in what proportions.