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# Trends in Educational Negligence Claims



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## Overview

- + Mental health claims & the duty of care
- + The impact of Covid and strike action on teaching
- + Schools and SENDIST (Special Educational Needs & Disability Tribunal)
- + Students as consumers
- + Freedom of Speech
- + Sexual Harassment and Misconduct
- + Cyber Security

## Mental Health & the Duty of Care

- + *Natasha Abraham v University of Bristol*
- + Physics Undergraduate who matriculated in Autumn 2016
- + Long standing social anxiety
- + Required to take interviews as part of an assessment
- + Died by suicide on 30 April 2018

## Abrahart v University of Bristol

- + Claim brought by Ms Abrahart's Estate alleged that the University was negligent and in breach of the provisions of the Equality Act 2010.
  - In breach of the Equality Act 2010 because it required Natasha to participate in the interview process.
  - It was aware of the significant impact on her mental health.



- + Claim under The Equality Act succeeded
- + Failure to make reasonable adjustments to the requirement for oral assessments / interviews
- + Held to be indirect discrimination
- + Discrimination arising from a disability
- + Failure to make reasonable adjustments

## The University's Duty of Care

- + Natasha's Estate alleged that:
  - The University owed a duty of care to Ms Abraham to safeguard her mental health and breached that duty.
  - Required her to undertake oral assessments when it knew that she was unable to do so.



## The University's Duty of Care....continued

- + Claimant alleged that the University owed a duty of care to “*take reasonable care for the wellbeing, health and safety of its students*”.
- + “*To take reasonable steps to avoid and not to cause injury, including psychiatric injury.*”
- + A novel argument:
  - Claimant faced difficulties
  - Duties of care in tort must be based on existing precedent
  - This was an omissions case, not a case involving the affliction of an injury
  - Generally no liability for failure to prevent harm



## University's Duty of Care....continued

- + University not *in loco parentis*
- + Cases relied upon by the Claimant were fact-specific and involved particular relationships and obvious assumptions of responsibility.
- + Claimant was protected by the Equality Act 2010.
  - Not fair to impose a duty in tort.



## A Rise in Claims relating to Mental Health?

- + Every case will turn on its own facts.
- + Chance that cases will test the boundaries of where duty lies.
- + What about cases which do not involve The Equality Act?



## Establishing a Statutory Duty of Care

- + Political pressure
- + Petition before Parliament to demand a statutory duty of care
- + Government response:

*“Higher education providers do have a general duty of care to deliver educational and pastoral services to the standard of an ordinarily competent institution and, in carrying out these services, they are expected to act reasonably to protect the health, safety and welfare of their students. This can be summed up as providers owing a duty of care not to cause harm to their students through the University’s own actions.”*

- + Universities UK:

*“We believe that the current statutory framework for this is proportionate and practical, commensurate with our role in education settings.”*

- + Working with the Government to introduce a set of interim measures.

## Establishing a Statutory Duty of Care....continued

- + Difficulties in establishing a general statutory duty of care
  - Size
  - Diversity
  - Dispersal of student populations
- + Doubts as to whether a compliance-led approach will drive cultural changes.
- + Could make Universities reluctant to provide inclusive learning and opportunities to Students with mental health difficulties.
- + Government does not support introduction of statutory duty of care.

## What steps should Universities take?

- + 1. Ensure that Student wellbeing and mental health is a strategic priority and is allocated to appropriate resources.
- + 2. Commit to the University Mental Health Charter.
- + 3. Adopt Universities UK Suicide – safer Universities guidance.
- + 4. Create an action plan for identifying risks early, with appropriate pastoral care.
- + 5. Review and update Student policies and procedures
  - Disciplinary policies
  - Fitness to practice policy
  - Process for delivery of academic results

# Impact of Covid and Strike Action on Teaching



## Covid- and strike-related claims

+ Pandemic & Strikes = a flood of claims??



## Has the flood been averted?

- + Universities handling claims proactively
- + Impact of strikes is reducing
- + Improvements in handling Covid impact on teaching
- + OIA helped by publishing guidance

### But...

- + Claimant firms say they are ready to bring thousands of claims
- + Student Group Claim
  - Supported by specialist group litigation firms
  - 4,500 claims signed up
  - Claims that figure could be 100,000 Claimants against 100 Universities

## Has the flood been averted?....continued

- + Application for Group Litigation Order
  - 924 Students against UCL
  - 2,000 Students waiting to join
- + If granted, this could open the floodgates to these claims.
- + Latest industrial action relates to the boycott of marking assessments.
- + Higher values?



# Schools & SENDIST

## SENDIST Appeals

- + Claims higher than ever
- + Waiting times are lengthy – up to 1 year for hearings to be listed
- + EHC appeals – up to 95% of appeals are upheld (suggests large numbers of children are not receiving adequate education provision)
- + What steps are being taken to resolve this?

Students as Consumers



## Students as Consumers

- + Concept brought in by The Consumer Rights Act 2015 and 2015 guidance from Competition & Markets Authority
- + Increased theme in claims brought by Students
- + Limited authorities but note *Oxford University Innovation Ltd v Oxford Nanoimaging Ltd* [2022] EWHC 3200
  - Undergraduate and post-graduate Students are to be treated as consumers
  - Allows protection under Unfair Terms Consumer Contracts Regulations 1999

## Freedom of Speech



## Freedom of Speech

- + Universities not doing enough to uphold freedom of speech and academic freedom?
- + Public bodies must comply with European Convention on Human Rights (ECHR) , specifically article 10
  - 1) Everyone has the right to freedom of expression.



2) *“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the impartiality and authority of the judiciary.”*

## Freedom of Speech....continued

- + S.23 Education (No.2) Act 1986

- + Public Sector Equality Duty codified in The Equality Act 2010:

*“A public authority must...have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act...”*

- + Universities now subject to The Higher Education (Freedom of Speech) Act 2023

*“The governing body of a registered higher education provider must take steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to achieve the objective in subsection (2).”*

## Freedom of Speech....continued

- + Little difference in application or meaning in the 1986 Act
- + Significant differences in enforcement
- + Claimants can bring civil claims against institutions for breaches which cause a loss
- + Potential Defendants include individual Colleges & Universities such as Oxford, Cambridge and Durham; and even Students' Unions
- + Must suffer a "loss"
- + Must first make a complaint
- + Office for Students has a duty to promote the importance of freedom of speech and academic freedom



# Sexual Harassment & Misconduct



## Sexual Harassment & Misconduct

- + OIA issued guidance in 2022
- + Number of claims has increased – *AB v XYZ*
- + OfS Consultation seeking views on how to regulate harassment and sexual misconduct affecting students
- + Consultation closed on 4 May 2023. Watch this space...

# Cyber Security



## Cyber Security

- + January 2023 – BBC report on leaks of confidential documents from 14 schools
- + No coincidence
  - Lots of sensitive data is held
  - Schools often do not have the money to meet ransom demands
- + Government report April 2023
- + Harris Federation attack