
The provision of educational services to children with disabilities

The article by DCI-Australia Advisory Panel member Moira Rayner in the last edition of ACRN¹ mentioned a recent decision by the English House of Lords. Four people with disabilities were seeking damages from local educational authorities for failing to provide appropriate educational services to them when they were children.² DCI-Australia President Danny Sandor takes a closer look at the case.

The judgment suggests that English courts are shifting away from using public policy grounds to oust a duty of care, an important trend which might be felt in Australia.³ Two members of the Court⁴ specifically observed that the decision “should not be regarded as a basis for the mounting of generalised ‘educational malpractice’ claims.

Three claimants with dyslexia alleged that the authorities had negligently failed to diagnose their conditions. Lower courts had dismissed their claims on the ground that the professionals and the educational authorities did not owe the children a duty of care.

The House of Lords found instead for the children saying:

“Where an educational psychologist was specifically asked to advise as to the assessment of and future provision for a child and it was clear that the child’s parents and teachers would follow that advice a duty of care arose [and] that the local education authority was prima facie vicariously liable for a breach of that duty...”

The fourth claimant is a 16 year old who suffers from muscular dystrophy. His special education needs assessment emphasised the need for him to have access to a computer and to be trained in how to use it.

“The all-important thing as the disease takes hold is to preserve, so far as possible, his means of communication.”

He contended that the local education authority had negligently and in breach of duty failed to provide the equipment and training. He said that its failure

had resulted in “lack of educational progress, social deprivation and psychiatric injury consisting of clinical depression.”

The educational authority tried to prevent the proceedings going forward but the Court of Appeal concluded that he should be allowed to pursue his claim. The appeal to the House of Lords was brought by the educational authority and was dismissed.

Without deciding the merits of the case, the House of Lords found that the Court of Appeal was correct to decide that the facts could give rise to a valid claim and that he should not be excluded from trying to make out a case for damages. The outcome of the trial (if the case doesn’t settle) will be watched with interest.

So what does the decision mean for Australian law? Ian Malkin, Senior Lecturer in Law who teaches and researches on torts at the University of Melbourne, proffers this view:

“The changes in the composition of the High Court of Australia in recent years has led to different approaches being taken with respect to duty of care issues than had existed when Justice Deane and Chief Justice Mason for example were on the bench.

It is hard to predict what today’s Court might decide if it were presented with a case similar to that which arose in the United Kingdom, especially in the light of the fact that in recent cases where duty has been at issue, the judges on the High Court have not demonstrated a uniform approach to those issues. That said, the High Court justices may seek guidance from the House of Lords reasoning, incorporating it in their individual approaches to the duty questions.

Interestingly, particularly for cases concerning children and young people, is that several members of the High Court recently noted that one of the “salient features” relevant to whether or not a duty of care exists is the affected individual’s vulnerability to risk or harm as a result of the defendant’s activities.”

1 “The State of Children’s Rights in the UK” Australian Children’s Rights News No. 26, p.1

2 Phelps v Hillingdon London Borough Council [2000] 3 WLR 776.

3 Another example from the English House of Lords is Barrett v Enfield London Borough Council [1999] 3 All ER 193 - damages arising from foster placements.

4 Lord Nicholls of Birkenhead with whom Lord Jauncey of Tullichette agreed.