EDUCATION AND THE LAW:
PROTECTING THE EDUCATIONAL WELL-BEING OF STUDENTS

Introduction

Thirty years ago, I was a young secondary school teacher with an honours degree in English language and literature studying for a degree in Education. The range of subjects offered reflected the then current trends in educational thinking – history, philosophy and sociology of education and modern developments in secondary education. Contemporary political and social debate considered topics such as student empowerment and education as a method of social mobility – remember Paulo Freire, Ivan Illich, Postman and Weingartner. No-one at all that I recall gave much thought to the legal liability of teachers or educational authorities to students. Nor was it discussed in staff rooms or in the wider community. How times have changed!

How did this happen? What is the current position as to the legal liability of educational authorities to students and what are the trends for the future? In thirty years time, what will be the legal developments being discussed?

In the latter part of the nineteenth century, when the Australian colonies introduced legislation providing for free, secular and compulsory education, the law had little to say about the rights or wellbeing of the students, other than their right to an education,[1] which could perhaps be more accurately described as a duty to be educated, or at least to go to school. The latter half of the twentieth century saw a significant change to the way that the rights of children within compulsory public schooling were viewed. Focus shifted from the right to an education, which was now

considered uncontroversial, and moved to the rights of the children to physical and emotional wellbeing.

Whilst excessive physical punishment of a pupil had always been considered a criminal offence, in the 1970s and 1980s, disapproval of harsh discipline swelled to levels where the continuation of such practices became untenable. We have now seen the abolition of physical behaviour management techniques, like caning, together with cruder psychological techniques like the dunce's cap.

The next area of educational development in which the law played a part was the greater willingness on the part of courts to recognize that schools owed a duty to take reasonable care in keeping students safe from physical injury. In this area, English judges initially expressed an unwillingness to hold schools and educational authorities liable. Reflecting the attitudes of the 1930s, one judge summed up to a jury at the end of a trial, saying:

> "[I]f boys were kept in cotton wool some of them would choke themselves with it. They would manage to have accidents. We always did, members of the jury – we did not always have actions at law afterwards."[2]

This attitude was firmly rejected in Australian law in the oft-cited case of *Commonwealth v Introvigne*.[3] In that case, a school student was injured whilst swinging from a flagpole in the school grounds, at a time when most of the staff were attending a meeting called to inform them of the sudden death of the school principal.

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1 A. Knott, "Teachers and the Rights of the Child" in Jane Edwards et al (eds), *Australian Schools and the Law* (North Ryde: LBC Information Services, 1997), 153.

2 *Hudson v Governors of Rotherham Grammar School*, Yorkshire Post, 24 and 25 March 1938 per Hilbery J, qtd in A. Kohn "An Outline of the Law of Negligence as it Applies to School Accident Cases" in Jane Edwards et al (eds), *Australian Schools and the Law* (North Ryde: LBC Information Services, 1997), 119.

3 (1982) 150 CLR 258.

The High Court held that a school has a non-delegable duty to take all reasonable care to provide an adequate system to ensure that no child is exposed to unnecessary risk of injury.[4] Included in the obligations of the school was the need to recognize the "mischievous propensities"[5] of children. Other Australian cases have held that the duty extends to accidents that occur before and after school hours[6] and on school excursions.[7]

More controversially, as recently as last month, the High Court considered whether a school could be liable for sexual assaults committed upon students by a teacher. On 4 and 5 September of this year, the High Court heard a joint appeal in two Queensland cases and a New South Wales case.[8] All three cases involved a situation where a teacher had committed sexual or other assaults on students and the students sued the school authorities seeking damages. In the NSW Court of Appeal the question of whether the school could be vicariously liable was not resolved.[9] The Queensland Court of Appeal held that a school is not vicariously liable for a sexual assault committed by a teacher because such an assault "is an independent personal act not connected with or incidental in any way to work the employee is expressly authorised to perform."[10]

Both Courts of Appeal nevertheless held, following *Commonwealth v Introvigne*, that a school owes a direct and personal, non-delegable duty to take reasonable steps for

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4 See (1982) 150 CLR 258 at 274-275 per Mason and Murphy JJ.
5 (1982) 150 CLR 258 at 274-275 per Mason and Murphy JJ.
6 *Geyer v Downs* (1977) 138 CLR 91.
7 *Munro v Anglican Church of Australia*, Unreported, NSW Sup Ct, CA 14 May 1987.
8 *Lepore v New South Wales* [2001] NSWCA 112 and *Rich v State of Queensland*; *Samin v State of Queensland* [2001] QCA 295.
9 [2001] NSWCA 112 at [39]-[40] per Mason P.
10 [2001] QCA 295 at [6] per McPherson JA; at [24] per Thomas JA.

the safety of students.[11] At this point, however, the courts of NSW and Queensland parted. The NSW Court of Appeal held that the existence of a non-delegable duty meant that the school authority would be liable when a teacher, to whom the responsibility for the student's safety had been delegated, injured a student by an intentional act.[12] The Queensland Court of Appeal held that, since the duty is non-delegable it cannot be discharged by appointing another person to take responsibility. However, in order to show a breach of the duty it would be necessary to plead and prove specific incidents of negligence or specific steps the school authority ought to have taken but did not take.[13] The argument that a school authority is absolutely liable for any injury sustained by a student was rejected.

As I have said, this issue of law is now before the High Court. It is interesting to note that counsel sought to resurrect arguments about vicarious liability and it may be that the case will ultimately be decided on slightly different legal territory to that which was traversed in the courts of appeal. The result of this case is, of course, the subject of considerable anticipation.

Educational well-being of students

While the extent and limits of a school's duty in relation to the physical safety of students continue to be tested and established, an area of education law which is yet to be aired in the Australian courts is the duty of a school in relation to the educational well-being of its students. Responsibility for the academic care of students may be

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11 [2001] QCA 295 per McPherson JA at [9]; per Thomas JA at [29]; per Williams JA at [37]; [2001] NSWCA 112 per Mason P at [30].

12 [2001] NSWCA 112 at [54]-[55] per Mason P with whom Davies AJA agreed; Heydon JA dissenting.

13 [2001] QCA 295 at [13] per McPherson JA; at [30] per Thomas JA; at [38]-[39] per Williams JA.

thought a natural incident of the obligations owed by a school since education is the primary reason that schooling is compulsory. As far back as 1984, Justice Kirby, now a member of the High Court, noted that it was anomalous that schools do not owe a legal duty for the intellectual development of a student "despite the fact that this intellectual advancement is the primary professional duty assumed by teachers and educationalists."[14]

The debate over whether a school should owe a duty of care in this context will take place in a different legal environment to that which existed during the years when responsibility for physical safety was progressing through the courts. In the 1980s and early 1990s, a principal goal of legal reformers was "access to justice". Since that time, the success of plaintiffs exercising their "access to justice" has led to a backlash against large payouts and fears that Australia is heading towards an "American" style litigation culture. Most recently, the crisis in the insurance industry has caused a crescendo of opposition to any further intrusion of lawyers into people's lives.

Not only has any enthusiasm for the law's intrusion into more areas of life waned, enthusiasm for the concept of proximity, once regarded as the touchstone of liability in negligence cases, has dissipated leaving a range of judicial views on the proper test for establishing a duty of care.

Against this background a number of questions are being asked about the whether the professional duties of educators can be translated into legal duties. Should a student be able to sue a school for failing to provide a sound education? Can a student sue a

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[14] The Hon Mr Justice Kirby, "Legal Responsibility and Private Schools" (1984) 14 *Independent Education* 16 at 19 cited in I.M. Ramsay & A.R. Shorten, *Education and the Law* (Sydney:

school for failing to diagnose a learning disability and to provide treatment? Can a student sue a school for not providing appropriate educational programs or facilities? These questions are the subject of the rest of this paper. I intend to review the issues involved in answering them, in the light of international developments, and to make some comments about possible developments in the applicable Australian law.

Educational malpractice

A commonly-used phrase in the literature on this topic is "educational malpractice". This phrase refers to some want of due care and skill on the part of an educational authority which makes it liable to be sued in negligence. One author has listed a range of examples where a school authority might be liable for negligence in teaching:[15]

> It has been variously suggested that the failure to teach a novel prescribed in the English curriculum (an event that has apparently occurred in one state on at least two occasions), the careless or incorrect assessment of a student's performance in tests and examinations, the incorrect classification or placement of a student, the improper diagnosis or improper treatment of a learning disability, or the failure to develop and implement a remedial program for a student known not to be achieving the appropriate level of competence, would seem to be the type of teacher behaviour that an Australian court might reasonably accept as the basis for an action framed in terms of educational negligence.

Educational negligence

The term "educational negligence" has similar connotations to terms such as "medical negligence", "accounting negligence", and other kinds of "professional negligence". The question that is being asked is whether teachers ought to be held liable as professionals, alongside doctors, lawyers, accountants, architects, engineers and others, for the quality of their professional services. It is a question of considerable

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Butterworths, 1996), 296.

importance not only because schools play such a fundamental role in our society as a means of educating our young people and preparing them for the world but also because teachers and students alike need to know their legal rights and responsibilities.

US Cases

The first US case in which educational malpractice was pleaded is *Peter W v San Francisco Unified School District*[16] which was decided in 1976. The plaintiff, Peter W, had completed twelve years of schooling and received a high school diploma but was functionally illiterate. Tests showed that Peter's intelligence was average to slightly above average. He had attended school regularly and had not been a serious discipline problem. Peter sued the school authority alleging that it had failed to use reasonable care in the discharge of its duties, and had failed to provide adequate instruction, guidance or supervision in basic skills such as reading and writing. He sought general damages based on his inability to gain meaningful employment, and special damages for the cost of compensatory tutoring to address his literacy problems. This case therefore squarely raised the issue of whether the school owed a duty to exercise reasonable care and skill in the provision of educational services.

The Court of Appeal of California started out by noting that, in the United States, the existence of a duty of care "is initially to be dictated or precluded by considerations of

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15 Peter Williams, "Suing for Negligent Teaching: An Australian Perspective" (1996) *25 Journal of Law and Education*: 281 at 295.

16 131 Cal. Rptr. 854 (Cal. Ct. App. 1976)

public policy."[17] The court then applied policy considerations and, after quoting from then current educational texts on literacy[18], concluded:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might – and commonly does – have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.[19]

The court consequently concluded that there was no general duty of care owed by education providers towards students in relation to educational outcomes. A significant factor of the *Peter W* case was that the plaintiff alleged no specific acts of negligence, but rather a general failure to ensure he achieved an acceptable literacy level. This factor takes on additional significance in the light of later cases.

The next US case was *Donohue v Copiague Union Free School District*,[20] decided in 1979, where the plaintiff's claim was in similar terms to the claim in Peter W. The plaintiff, Edward Donohue, alleged that, after graduating from High School, he lacked the rudimentary ability to comprehend written English to a level sufficient to allow him to complete applications for employment. He alleged that his low literacy level was due to the failure of the school authority to perform its duty to educate him. The Court of Appeals of New York first noted that a suit for "educational malpractice" could be made to fit within the strictures of traditional negligence principles. "If

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17 131 Cal. Rptr. 854 at 859 (Cal. Ct. App. 1976).

18 Gagne, Conditions of Learning (1965); Schubert & Jorgerson, Improving the Reading Program (1968); Flesch, Why Johnny Can't Read (1965).

19 131 Cal. Rptr. 854 at 860-861 (Cal. Ct. App. 1976).

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."[21] Nevertheless, the court found that policy considerations precluded the claim, because a tort of educational malpractice would require the court to improperly interfere in the day-to-day policies that are entrusted to the school authority.[22]

The majority of the court stated that, absent this policy exclusion, it would be difficult but not impossible to establish the elements of breach of duty and causation in an educational malpractice case.[23] By contrast, Wachtler J, in a concurring opinion, stated that the practical problems raised by a cause of action in educational malpractice were so formidable that the cause of action would not be sustainable at all in a New York court. He noted that: "Factors such as the student's attitude, motivation, temperament, past experience and home environment all play an essential and immeasurable role in learning."[24] As in *Peter W.*, it was significant that no individual or specific acts of negligence were pleaded by the plaintiff.

Shortly after *Donohue*, the Court of Appeals of New York dealt with another educational malpractice case, *Hoffman v Board of Education*.[25] In contrast to the earlier cases, the plaintiff alleged specific incidents of negligence. Upon entering kindergarten, Daniel Hoffman had been assessed by a clinical psychologist who determined that he had an IQ of 74 and recommended that he be placed in a class for

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20 391 N.E.2d 1352 (N.Y. 1979).
21 391 N.E.2d 1352 at 1353 (N.Y. 1979).
22 391 N.E.2d 1352 at 1354 (N.Y. 1979).
23 391 N.E.2d 1352 at 1353 (N.Y. 1979).
24 391 N.E.2d 1352 at 1355 (N.Y. 1979).
25 400 N.E.2d 317 (N.Y. 1979).

children with what was then called retarded mental development, with a re-evaluation of his IQ within two years. The psychologist made this recommendation because he was uncertain as to the reliability of the IQ result he had measured. Daniel spent twelve years in education facilities for "mentally retarded children" before his IQ was re-assessed. The results of the re-assessment showed he had an IQ of 94. As a result he was excluded from the occupational training centre in which he had been placed. Daniel alleged that the school authority was negligent in its original assessment, and in failing to re-assess him within two years as recommended by the clinical psychologist. He claimed damages on the basis that his placement into a class for children with intellectual impairment had caused him emotional and intellectual injury and reduced his ability to obtain employment. He was successful at trial. The Court of Appeals, however, classified the case as one of "educational malpractice" and followed its decision earlier that year in *Donohue* to hold that such a claim was precluded by public policy.

The *Hoffman* decision was highly significant because it extended the meaning of "educational malpractice" beyond provision of an inadequate education, to include cases of professional failure in assessment of a student's learning ability. Both types of negligence were included in the class of actions excluded for reasons of public policy. This decision has been followed in a number of cases in the United States.[26]

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[26] This reasoning was followed by the Supreme Court of Alaska in *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554 (Alaska 1981), where a school authority initially failed to ascertain that two students had dyslexia and once that was discovered, failed to provide adequate educational programmes for the disability. Their claim was held to be barred for the same public policy reasons given by the Court of Appeals of New York. Similarly, in *Torres v. Little Flower*, 474 N.E.2d 223 (N.Y. 1984) and *Smith v. Alameda County Services Agency*, 153 Cal. Rptr. 712 (Cal. Ct. App. 1979), suits for negligence for failure to provide an appropriate education for children with learning difficulties were dismissed by the courts. See also *Doe v. Town of Framingham*, 965 F. Supp. 226 (D. Mass. 1997); *Blane v. Alabama College Inc.*, 585 So.2d 866 (Alaska 1991); *Wickerstrom v. North Idaho College*, 725 P.2d 155 (Idaho 1986); *Brantley v. District of Columbia*, 640 A.2d 181

A case that stands apart from these is *Snow v State of New York*.[27] In that case, Donald Snow was diagnosed as "mentally retarded" with an IQ of 24 when he was three years old. He was placed into an institution for severely mentally retarded patients, and remained institutionalized until he was twelve. It was then determined that Donald was not intellectually impaired but hearing impaired and he sued claiming he had suffered mentally and physically as a result of the misdiagnosis. The State argued that the claim was really one for educational malpractice and was therefore precluded on grounds of public policy. However, the court examined the nature of the treatment the plaintiff had received in the institutions to which he was admitted and classified the case as one of medical negligence.[28] Consequently, the court found the plaintiff was entitled to recover damages for the misdiagnosis.

To summarize, it can be seen that two types of cases have emerged in the US.[29] The first is one where the allegation is of inadequate instruction in the classroom leading to a failure to attain normal literacy levels. In such a case, the school authority owes no duty of care to the student and an action for damages is unsustainable. The second type of case is where a student with a specific learning disability has been misdiagnosed and therefore given no treatment, or incorrect treatment for the condition. In these cases, as in the first type, US courts have rigorously excluded a

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(D.C. 1994); *Rich v. Kentucky Country Day Inc.*, 793 S.W.2d 832 (Ky. Ct. App. 1990). A significant exception to this rule exists in Montana, where an independent cause of action for negligent misdiagnosis and misplacement of a special education student is derived from the Montana Constitution, Article X, Section 1: *B.M. by Burger v. Montana*, 649 P.2d 425 (Mont. 1982); *B.M. by Burger v. Montana*, 649 P.2d 425 (Mont. 1982).

27 469 N.Y.S.2d 959 (N.Y. App. Div. 1983).

28 469 N.Y.S.2d 959 at 964 (N.Y. App. Div. 1983).

29 See B Thompson, "In a Class Apart? Educational Negligence Claims Against Teachers" (1985) 1 *Queensland Institute of Technology Law Journal* 85 at 95-99.

duty of care unless the misdiagnosis can be said to have been medical and not educational malpractice.

Canadian Cases

The early Canadian cases on educational malpractice followed the US line in rejecting the tort of educational malpractice for reasons of policy. For example, in *Hicks v Etobicoke (City) Board of Education*,[30] the plaintiff and his mother claimed that the school board had breached its duty of care by failing to provide proper education and corrective instruction to the plaintiff, as required by the relevant legislation. The court reviewed the US authorities and agreed that a tort of "educational malpractice" was precluded by policy considerations.[31] The court cited comments by La Forest J in the Canadian Supreme Court that: "The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality."[32]

A line of more recent Canadian authority has again called attention to the tort of educational malpractice, re-opening the way for the potential success of such a claim. In *Gould v Regina (East) School Division No. 77*,[33] decided in 1997, the plaintiffs, 7 year old Jacklynne and her parents, brought a claim against the school board arising out of the conduct of a particular teacher. The pleadings alleged the teacher had spoken too loudly, made demeaning comments, subjected students to ridicule, displayed a bullying and intimidating manner, and failed to fulfil the learning needs of the students. The Saskatchewan Court of Queen's Bench considered that insufficient particulars had been pleaded to establish assault or intentional infliction of mental

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30 [1988] O.J. No. 1900 (Q.L.) (Ont. D. C.).
31 [1988] O.J. No. 1900 (Q.L.) (Ont. D. C.), at 7-8.
32 *R v Jones* [1986] 2 SCR 284 at 304.
33 [1997] 3 WWR 117.

suffering,[34] and moved to consider whether the pleadings could be sustained as an instance of "educational malpractice". The court concluded by dismissing the claim as disclosing no reasonable cause of action but made the following comments:[35]

> "It is surely not the function of the courts to establish standards of conduct for teachers in their classrooms, and to supervise the maintenance of such standards. Only if the conduct is sufficiently egregious and offensive to community standards of acceptable fair play should the courts even consider entertaining any type of claim in the nature of educational malpractice."

Hence, this court did not rule out the possible success of a claim for educational malpractice and, in the words of one commentator, left "the door ajar".[36] The possibility of a successful claim would remain if the conduct were "sufficiently egregious and offensive to community standards".

The point was revisited shortly afterwards by the Provincial Court of British Columbia in *Haynes (Guardian ad litem of) v Lleres*.[37] In that case, the plaintiff, who had received a "C" grade in his social studies course, brought an action alleging gross negligence on the part of his teacher for failing to teach a large component of the curriculum. The defendant moved to strike out the claim for failure to disclose a cause of action. The plaintiff claimed that his cause of action was not one for educational malpractice, but rather based on "traditional tort analysis". Nevertheless, the court concluded that the claim was in substance one for "educational malpractice or negligent instruction" and proceeded to hold that the cause of action was unsustainable for reasons of policy, following the US line of authority, and the earlier Canadian line. Unfortunately, the court did not mention *Gould* and consequently did

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34 [1997] 3 WWR 117 at 123 per Matheson J.

35 [1997] 3 WWR 117 at 129 per Matheson J.

36 Jacqueline Lord, "The Tort of Educational Malpractice: A Door Stuck Ajar" (2000) 10 *Education and Law Journal*: 209 at 210.

not provide any guidance as to how that decision might fit within the state of the law.[38]

The unsettled state of the law in Canada was noted by Blair J of the Supreme Court of British Columbia in *McKay v CDI Career Development Institutes Ltd*.[39] In that case, the plaintiff sought to bring a class action against a private institution that offered a course in computing, alleging the institution had not fulfilled its promises of increased employment prospects. Blair J declined to dismiss those parts of the cause of action which relied on educational malpractice, holding that "although educational malpractice has not been accepted as a cause of action in Canada, there might be a situation in which the court might consider such a cause of action."[40] His Honour then concluded, in relation to the principal issue in the hearing, that the cause of action pleaded could not be heard as a class action because "each individual would have to establish the grounds for his or her claim based on their own individual experience with [the defendant]."[41] This ruling draws attention to the significant hurdle in a cause of action for educational malpractice in demonstrating the elements of causation and damage. Causation and damage will often be difficult to prove, and it is these limitations, rather than a blanket rejection of the duty of care, that will constitute the most serious obstacles.

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37 [1997] B.C.J. No. 1202 (Q.L.) (B.C. Provincial Ct).

38 See the discussion of this case in Jacqueline Lord, "Tort of Educational Malpractice Considered Again by Canadian Courts" (1999) 9 *Education and Law Journal*: 445 at 446-448.

39 (1999) 64 BCLR (3d) 386.

40 (1999) 64 BCLR (3d) 386 at 392.

41 (1999) 64 BCLR (3d) 386 at 399.

This point was made in the case, *Re Indian Residential Schools*,[42] decided by Nation J of the Alberta Court of Queen's Bench. The plaintiffs in that case brought an action on a wide variety of bases, including educational malpractice. The allegations arose out of the compulsory education of First Nations students in Indian Residential Schools. The court declined to strike out the claim in educational malpractice, as it was not unarguable and was also inextricably linked to the other claims brought by the plaintiffs. However, the court sounded a note of caution in relation to educational malpractice:[43]

> "Judicial reluctance to accept claims of educational malpractice has been founded on a number of considerations, including public policy; difficulties in establishing proximate cause and standards of care; the burden such litigation would place on the school system; and judicial reluctance to interfere with the formulation or implementation of educational policy."

These types of considerations are especially forceful in the situation where the allegation by the plaintiff is one of a general failure to ensure that students attain sufficient academic standards. However, as in the US, Canadian plaintiffs have brought actions where the allegation is not simply failure to provide adequate education, but failure to diagnose or adequately adjust for students with special needs.

R. (L.) v British Columbia[44] involved a class action by students and their families against a residential facility established to educate hearing impaired children from Kindergarten to Grade 12. The plaintiffs alleged, inter alia, that they had failed to

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42 (2000) 97 ACWS (3d) 890.

43 (2000) 97 ACWS (3d) 890 at [55], quoting from *R. (L.) v British Columbia* (1998) 65 BCLR (3d) 382, affirmed (2000) DLR (4th) 639.

44 (1998) 65 BCLR (3d) 382, affirmed (2000) DLR (4th) 639.

receive a proper education while studying at the school. The Chambers Judge dismissed the claim on the basis that, for reasons of policy, "educational malpractice" was not a viable cause of action.[45] The judge expressed the view that the educational policies relevant to children with disabilities were especially difficult to measure and should not be subject to judicial review.[46]

In the British Columbia Court of Appeal,[47] the focus of the plaintiffs' grievances was on the failure of the school to teach the students a functional language such as American Sign Language.[48] The appellate court, concerned only with whether the cause of action could be sustained as a matter of law, was not willing to rule out the possibility of a successful claim.[49] However, Mackenzie JA stated that:[50]

> "[T]he plaintiffs will face a formidable task against heavy authority in attempting to establish this case as a exception to the general rule. The issues will be hotly contested on duty of care and policy considerations as well as standard of care."

In similar fashion to the court in *McKay v CDI*, Mackenzie JA held that the claim was not suitable for determination as part of a class action. A complicating factor in *R. (L.)* was that the plaintiffs also sought to join the educational malpractice claim with allegations of sexual abuse. Mackenzie JA considered that if this were done the "proceedings could become completely unmanageable".[51] Of further significance, in the light of the English authorities considered below, is that the Court of Appeal did

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45 (1998) 65 BCLR (3d) 382 at 399.
46 (1998) 65 BCLR (3d) 382 at 399-400.
47 (2000) DLR (4th) 639.
48 (2000) DLR (4th) 639 at 651.
49 (2000) DLR (4th) 639 at 653.
50 (2000) DLR (4th) 639 at 654.
51 (2000) DLR (4th) 639 at 654.

not appear to place any significance on the disability of the students and failure to address their unique educational problems.

The final notable Canadian authority is *Concerned Parents for Children with Learning Disabilities Inc. v Prince Albert (Various Boards of Education)*.[52] In this case, the plaintiffs were six children of average or above average intelligence who were each diagnosed with a learning disability. The students were placed in a special educational program, which was discontinued after its first year. The plaintiffs alleged that the local school boards had subsequently failed to provide educational services "appropriate to the needs and circumstances of a child with a learning disability."[53] Perhaps mindful of the lack of judicial enthusiasm for claims of "educational malpractice", the plaintiffs avoided couching their claim in terms of negligence or breach of contract. Instead, the claim alleged a breach of certain statutes and of the equality guarantee in s15(1) of the *Canadian Charter of Rights and Freedoms*. The Charter argument was ultimately successful. The Saskatchewan Court of Queen's Bench held that the right to appropriate educational services for students with learning disabilities was constitutionally protected.[54] Since this decision was grounded in the Canadian Charter, its relevance in Australia is limited although a similar conclusion might be reached by the application of State or Federal anti-discrimination statutes.

In summary, the Canadian courts have not been enthusiastic about recognition of the tort of educational malpractice. The most that can be said is that there has been no categorical rejection of the cause of action, as there has been in the US courts. It is

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52 (1998) ACWS (3d) 41.
53 (1998) ACWS (3d) 41 at [4].

also significant that the Canadian courts have not tended to distinguish between allegations of general educational inadequacy and allegations of specific failure to diagnose or treat learning disorders. English courts over the last few years have dealt exclusively with cases that involve the latter type of claim

English Cases

In 1995, the House of Lords considered its first case of "educational malpractice", although it should be noted that this phrase is not used by the English judges. The case, known as *X v Bedfordshire County Council*,[55] was a consolidation of five appeals, all of which involved allegations that a state authority had injured the plaintiffs in the carrying out of functions imposed on the authority by statute. Three of the appeals alleged a school authority had been negligent in providing educational services.[56]

In the first of these, known as the *Dorset Case*, the plaintiff's parents asked that the plaintiff be assessed for dyslexia when he was around eight years old in 1985. The county council's psychology service assessed the plaintiff and advised that he did not suffer from any specific learning disability. The plaintiff's parents continued to correspond with the county council as a result of the plaintiff's severe and complex learning difficulties and in 1987 the council made a statement of special educational needs under the Education Act 1981. A council psychologist then issued a statement identifying the local primary school which the plaintiff was attending as the appropriate school for him. The plaintiff's parents initially accepted this advice but

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54 (1998) ACWS (3d) 41 at [48].

55 [1995] 3 All ER 353.

56 *E v Dorset County Council (Dorset Case)*, *Christmas v Hampshire County Council (Hampshire Case)*, and *Keating v Bromley London Borough Council (Bromley Case)*.

several months later realized the advice was wrong and moved the plaintiff to a private school where his problems were addressed and his dyslexia fully diagnosed and treated. The plaintiff alleged the council was in breach of its statutory duty and common law duty of care in failing to diagnose and address his special education needs, and he claimed damages to cover the private school fees.

In the *Hampshire Case*, the plaintiff, Mark Christmas, had attended a local primary school and showed severe behavioural problems and learning difficulties, particularly in learning to read. Mark's parents expressed their concern to the principal who advised them that Mark had no special learning difficulty and that his problems would be resolved if he exercised greater self-discipline and practised his reading. In 1984, the principal referred Mark to the Mid-Hampshire Teachers' Centre, stating that his achievement did not match his ability. The Advisory Teacher at the Centre was of the opinion that Mark had no serious handicap and would improve with regular practice. After he completed his primary education, Mark's parents sent him to a private school specialising in remedial problems. In 1989, he was assessed as having a "severe specific learning difficulty" commonly know as dyslexia. He sued the school authority alleging that it owed him a duty to use reasonable care and skill in the assessment of his educational needs and problems. He alleged that the failure to diagnose his learning difficulty resulted in a limiting of his potential and restriction of his vocational opportunities, and claimed damages in compensation.

In the *Bromley Case*, the plaintiff, Richard Keating, had spent his school-years either not attending a school or attending a mixture of mainstream and special schools. At age 21, Richard issued proceedings against the school authority alleging failures to

provide him with a place at a reasonably appropriate school and at times a place in any school. In the pleadings it was alleged that the school had breached its common law duty of care by failing to make proper inquires into the plaintiff's educational capacity. He claimed damages for impairment of his personal and intellectual development, and to recover the cost of private tuition provided by his parents.

The House of Lords was not asked to decide on the merits of the cases but merely whether the claims should be struck out for failing to disclose a cause of action. In relation to the claims for breach of statutory duty, the House held that the court could not interfere with the exercise of statutory discretions. However, in relation to the common law claims, the House held that once the statutory authority undertook to provide services it was subject to the same rules and came under the same duty of care as any private organization or individual offering the service. Lord Browne Wilkinson stated, in relation to the *Hampshire Case*:[57]

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

The decision thus recognized that a claim for negligence against a school authority in the failure to identify and address the educational needs of students could be the subject of a valid action.

Following this decision, the House of Lords again considered educational negligence in a joint hearing of *Phelps v London Borough of Hillingdon*, *Anderton v Clwyd County Council*, *Jarvis v Hampshire County Council*, and *Re G (a minor)*.[58] The first three of these cases involved students who suffered dyslexia, and who had been incorrectly diagnosed and therefore not provided with remedial assistance. The Court of Appeal in *Phelps* had denied a duty of care because the psychologists who made the assessment had not assumed any responsibility towards the plaintiff for the advice given to the school authority. In the House of Lords, Lord Slynn of Hadley begun by stating what he considered to be the fundamental starting point:[59]

> "[I]t is long and well-established, now elementary, that persons exercising a particular skill or profession may owe a duty of care in the performance to people who it can be foreseen will be injured if due skill and care are not exercised, and if injury or damage can be shown to have been caused by the lack of care…. A doctor, an accountant and an engineer are plainly such a person. So in my view is an educational psychologist or psychiatrist or a teacher including a teacher in a specialized area, such as a teacher concerned with children having special educational needs. So may be an education officer performing the functions of a local education authority in regard to children with special educational needs."

The House of Lords reversed the Court of Appeal's finding that there was no assumption of liability and re-instated the £45,000 damages payment awarded by the trial judge.

The English cases then have recognized liability for teachers or educational psychologists who are entrusted with diagnosing, assessing and treating students with special needs. However, the scope of liability is relatively small and does not extend into the type of situation seen in the early US cases *Peter W* and *Donohue*.

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57 [1995] 3 All ER 353 at 395.

58 Cited as *Phelps v London Borough of Hillingdon* [2000] 4 All ER 504.

Application to Tort Law of Australia

Is there a common law duty in Australia that requires educators to exercise due care in the provision of educational services? US cases very quickly disposed of the suggestion that a student could sue a school for unspecified acts of negligence in failing to ensure that a student was literate upon graduation. The Canadian cases have been highly unsympathetic to such claims, but have stopped short of precluding them altogether. It may be that it is unlikely a claim of this nature would succeed in Australia. Even if the duty of care is recognized at the theoretical level, the practical difficulty in proving that it was poor teaching, and not some other factor, that led to the illiteracy may be insurmountable.

The cases heard by the House of Lords suggest that a duty of care could be owed by educators in relation to the educational needs of students, in certain circumstances. There seems to be no reason in principle why a specialist in assessing the educational needs of children should not be held to professional standards under the law of negligence. A duty of care in relation to special needs students seems to be only a small step from the duty of care that is applied to doctors and other health care professionals.

The foreseeability of injury to a student with special needs who is incorrectly diagnosed is not difficult to establish. It takes little imagination to foresee that a student with special needs who is not properly treated will experience severe learning

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[59] [2000] 4 All ER 504 at 517.

deficiencies including illiteracy. The damage flowing from this injury, in areas such as reduction in employment prospects, is equally foreseeable.

The principles of negligence law are aimed at ensuring that people are held accountable for their errors and that those who are injured thereby are compensated for their loss. In theory, negligence law is intended to create a greater sense of responsibility on the part of people who have a special relationship of control over others, and to encourage greater care and skill. These considerations appear to apply in the education context. The damage suffered by a student who is denied proper educational facilities or programs can be long-term or permanent. It includes a significant reduction in employment prospects and the consequent loss of financial stability. If it can be shown that this loss is the result of negligent provision of services by educators it might be said that compensation is appropriate. Further, it has been suggested that the threat of litigation would force the development of more effective procedures for the identification and treatment of students with specific learning disabilities. It has also been suggested that legal liability would engender a greater sense of professionalism among educators, and generally increase the standards of educational services.[60] The status of teachers as professionals is arguably diminished if they are not responsible for the quality of their services.

Against these considerations there are a range of policy issues said to militate against the recognition of a general duty of care upon educators in relation to provision of educational services. First, it is argued that the nature of the educational process

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[60] See Dan Riley "Educational Malpractice" in Jane Edwards et al (eds) *Australian Schools and the Law* (North Ryde: LBC Information Services, 1997), 121 at 126; Justice M.D. Kirby "Legal and Social Responsibility of Teachers", address at the Education Centre for Whyalla

places it outside the scope of meaningful intervention by the law. The education of an individual is influenced by such a broad range of factors that a shortfall in an educational outcome, such as illiteracy, could never be definitively attributed to one cause, such as poor teaching.[61] This would not appear to exclude the viability of a claim if a single determining factor could be identified, such as a failure to diagnose dyslexia.

Second, it is argued that the sheer number of people affected by educational decisions would make the imposition of liability impractical as it would "open the floodgates" to masses of educational claims.[62] This argument is the same as the argument raised at the prospect of almost any extension of the duty of care. It seems particularly difficult to maintain in the context of educational negligence where, as has been seen, the problems in establishing a breach of duty and causation are sufficient to reduce the risk of indeterminate liability.

Third, there is a suggestion that the intrusion of legal practitioners into the sphere of education would stifle innovation in education and limit the educational experience of students. As we have seen the present scope of educational malpractice is so limited that this effect, at least at present, appears unlikely. The scope of educational negligence, on the English approach, would only apply to failure to recognize and cater for special educational needs.

Australia and Disability Discrimination Cases

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and Region, South Australia, 22 March 1982 cited in I.M. Ramsey & A.R. Shorten, *Education and the Law* (Sydney: Butterworths, 1996), 296.

61 *Peter W v. San Francisco Unified School District*, 131 Cal. Rptr. 854 at 860-861 (Cal. Ct. App. 1976).

Outside the law of tort, there is another field in Australia which has great potential to confer a right on students with special educational needs to provision of appropriate educational services. In Australia, the cases relating to provision of educational services have taken place on very different legal ground and with a significantly different philosophy. The courts and tribunals in Australia responsible for administering anti-discrimination legislation have dealt with several cases in which disabled students have alleged that discrimination in schools has caused, or will cause, adverse educational outcomes. However, unlike many of the US, English and Canadian cases the Australian complainants have argued that the best place for disabled students to be educated is in mainstream schools, and not in special educational facilities.

One such case, *L v Minister for Education for the State of Queensland*,[63] was heard by the Anti-Discrimination Tribunal of Queensland. The complainant was a seven year old girl, who suffered from an impairment which had a severe impact on her intellectual development, her ability to communicate, her motor skills and her capacity to care for herself. Before starting primary school, the complainant was ascertained as having level six support needs, the highest level on a scale from one to six. In her first year of primary school, she spent two days a week at a Special Development Unit and three days a week at a State primary school. The following year, she began attending the State primary school five days a week. In the whole of this period, the complainant experienced frequent problems in the State school, including a lack of ability to concentrate, failure to return to class after breaks, limited vocabulary and hygiene problems. Her class teachers had no qualifications for

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62 See *Goss v. Lopez* 419 US 565 at 600 n22 (1975).

63 (1996) EOC 92-787.

teaching disabled students, however, they had the assistance of a teacher aide for twenty hours per week. The complainant's opportunities for inclusion in the classroom became increasingly limited and she spent most of the day in a withdrawal area at the back of the classroom, working on an Individual Education Program. The complainant was re-assessed by a guidance officer who recommended that she be placed into a special school. The complainant's mother declined the offer of a special school placement, and the Department of Education suspended the complainant's enrolment and recommended that the suspension remain in place until she was placed into a special school.

The complainant contended that the suspension and proposed exclusion from a mainstream school constituted direct discrimination within the meaning of s10(1) of the Anti-Discrimination Act 1991 (Qld). She argued she was being treated less favourably than a child without an impairment would be treated in similar circumstances. Experts called by the complainant gave evidence that a mainstream school was the most appropriate setting for a disabled student to be educated. In particular, evidence was led that disabled children developed language and social skills best through interaction with non-disabled peers.

The education authority argued that the complainant was not being treated less favourably than a non-disabled student who displayed the same behavioural problems. In the alternative, the education authority argued that differential treatment was permissible under s44 of the Anti-Discrimination Act because the provision of special services in a mainstream school would impose unjustifiable hardship. It was also argued that the complainant's suspension from the school was specifically authorised

by the Education (General Provisions) Act 1989 (Qld) and was therefore lawful in accordance with s106 of the Anti-Discrimination Act.

The Tribunal found that the exclusion of the complainant from a mainstream school constituted discrimination within the meaning of s10(1). The behavioural problems exhibited by the complainant were characteristic of her impairment and could not be divorced from it. The complainant had therefore been treated less favourably than a student without the impairment because her exclusion had the effect of closing an educational opportunity that would not have been closed to a student without the impairment. However, the Tribunal found that the discrimination was not unlawful because the provision of special services by teachers without appropriate qualification, in a situation where the classroom was disrupted, imposed an unjustifiable hardship on the education authority. It was also held that the suspension was specifically authorised by the Education (General Provisions) Act 1989, s24, in that the principal had formed the opinion that the complainant had been guilty of "disobedience, misconduct or other conduct prejudicial to the good order and discipline" of the school. Since the action was authorised by statute, it was quarantined from the effect of the Anti-Discrimination Act by virtue of s106 of that Act.

A similar case was heard by the Queensland Anti-Discrimination Tribunal the following year. In *P v Director-General, Department of Education*,[64] the complainant alleged that he was the subject of discrimination on the basis of the impairment Down Syndrome. The complainant had been attending a mainstream school but as the result

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64 [1997] QADT 11.

of a reduction in funding, the school authority formed the opinion that he should be placed into a special school. The complainant had exhibited some misbehaviour in the mainstream school including throwing chairs and objects, screaming out, throwing himself on desks, pulling other students' hair, spitting on the floor, hitting other students and running away to other classrooms. The complainant's mother was dissatisfied with a placement in a special school and brought a complaint on his behalf. The complaint, as in *L*, was that the complainant had had educational options closed to him that would not have been closed to a student without the impairment.

The school authority argued that a student without an impairment who exhibited such behaviour would be asked to leave the school, and that therefore, the complainant had not been treated less favourably on account of his disability. It was argued on behalf of the complainant that aspects of his behaviour which arose from his impairment should not be relied upon for the purposes of the comparison. The Tribunal conducted a lengthy discussion of the extent to which characteristics associated with the complainant's impairment could be taken into account in deciding whether he had been treated less favourably than a student "in circumstances that are the same or not materially different."

Different lines of reasoning had arisen in Australia in relation to this question. One line argued that a complainant with an impairment must be compared to a notional person without the impairment who nevertheless exhibited one or more of the characteristics associated with the impairment.[65] The Tribunal in *P*, however, adopted

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[65] *The City of Perth & Ors v DL (Representing the Members of People Living with AIDS (WA) Inc & Ors)* (1996) EOC 90-796 at 78, 869 per Ipp J, at 78, 891 per Scott J (interpreting ss66K and 66A of the Equal Opportunity Act 1984 (WA); *Boehringer Ingelheim Pty Ltd v Redropp* [1984] 2 NSWLR 13.

a different line of reasoning holding, in effect, that behaviour associated with the impairment could not be considered in determining whether the complainant was "in circumstances that are the same or not materially different" to other students.[66] The Tribunal quoted from *Commonwealth of Australia v Human Rights and Equal Opportunities Commission*[67] where Wilcox J stated:[68]

> "It would fatally frustrate the purpose of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment […] could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act."

The Tribunal stated that this approach was more consistent with the scope and purpose of the Act which had as its goal the protection or enforcement of human rights.

The school authority also argued that the complainant had not been treated less favourably because he had been offered the most appropriate educational opportunities for a student of his ability. The Tribunal did not accept this argument and adopted comments from *Dalla Costa v The ACT Department of Health*:[69]

> "The emphasis must be on the maintenance of an appropriate degree of choice on the part of parents and, where appropriate, the child, and the rejection of policies that are, per se, exclusionary…. Unless the respondent can demonstrate that an exception provided by the Act applies, the concept of "separate but equal" – where separation is not a matter of choice – is no more tenable in relation to the concept of discrimination under the Discrimination Act than the United States Supreme Court found it to be under the US Constitution in Brown v Board of Education [citation omitted] in relation to racially segregated schools…"

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66 See also *X v McHugh, Auditor-General for Tasmania* (1994) EOC 92-623.
67 (1993) 119 ALR 133.
68 (1993) 119 ALR 133 at 150-151. See also Black CJ at 136 and Lockhart J at 147.
69 (1994) EOC 92-633 at 77,370.

The Tribunal therefore concluded that the exclusion of the complainant from a mainstream school constituted direct discrimination under s10(1) of the Anti-Discrimination Act. However, as in *L*, the Tribunal then turned to consider whether the school authority could avail itself of the exemption under s44 which is invoked when the provision of special services of facilities "would impose unjustifiable hardship on the educational authority." The Tribunal concluded that the provision of such services to the complainant in a mainstream school would impose unjustifiable hardship on the school authority, especially when the effect on teachers and other students at the school was taken into account. Consequently, the discrimination was not unlawful.

The Anti-Discrimination Tribunal of Queensland has therefore approached the question of discrimination on the grounds of disability with a two stage process. The first stage is to decide whether the complainant has been treated less favourably than a person without the disability would be treated in the same or similar circumstances (Anti-Discrimination Act 1991 (Qld), s 10(1)). At this stage of the process, behaviour that is associated with the disability is treated as part of the disability, so that less favourable treatment on account of the behaviour is treated as discrimination on account of the disability. The next stage is to consider whether, despite the existence of discrimination, the less favourable treatment is subject to an exemption such as the ones provided for in ss44 or 106 of the Act. If the school authority can establish such an exemption, the discrimination will not be unlawful.

The concept of "unjustifiable hardship" was considered in the context of the Disability Discrimination Act 1992 (Cth) in *Hills Grammar School v Human Rights and Equal Opportunity Commission*.[70] In that case, the complainant was an eight year old girl with spina bifida, whose application for enrolment at a private school was refused on the ground that the school did not "have adequate resources to look after her in the manner that she requires and in a way that is suitable for her." The Commission made a finding of unlawful discrimination, holding that the school had not made out the exemption of "unjustifiable hardship" under the Disability Discrimination Act. Commissioner Innes reviewed the facilities at the school and concluded that it would not have imposed "unjustifiable hardship" to accept the complainant as a student because the existing facilities had all the necessary disabled access. The school made an application to the Federal Court for judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth), and the application was dismissed. Tamberlin J of the Federal Court could find no error in the method used by the Commissioner in determining the complaint and therefore dismissed the appeal.

Any thought that a similar approach might be applied consistently throughout Australia was recently dismissed when the Full Court of the Federal Court adopted a different line of reasoning for disability discrimination cases in *Purvis v State of New South Wales*.[71]

A complaint alleging contravention of s22 of the Disability Discrimination Act 1992 (Cth), which is framed in similar but not identical terms to the Anti-Discrimination

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[70] [2000] FCA 658.

Act, was originally heard by the Human Rights and Equal Opportunity Commission. At the time of the alleged discrimination, the complainant was a 12 year old boy, Daniel, who had sustained severe brain damage at the age of 7 months. Daniel's guardians had enrolled him at a primary school for the 1997 year after discussions with the principal. Daniel's brain injury had caused an intellectual disability which manifested itself in his behaviour including physically and verbally abusive actions. Towards the end of the school year, the school authority decided it would be in Daniel's best interests if he were moved to the special education unit of the local high school. Daniel's guardians objected to this course and stated that they intended to re-enrol him at the primary school. In response, the principal of the primary school indicated that he would have to exclude Daniel from the school.

The Commission followed three earlier cases[72] and found that the complainant had been discriminated against because: "To discriminate against a person suffering from a mental disorder because of the behaviour of that person which directly results from that mental disorder, is to discriminate against that person because of the mental disorder."[73] On appeal, however, Emmett J of the Federal Court found that this interpretation of the Disability Discrimination Act constituted an error of law that vitiated the decision of the Commission.

The case then proceeded on appeal to the Full Court of the Federal Court, which agreed with that approach. The Full Court stated that the correct approach for the case at hand was to make a comparison between "the treatment of the complainant

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71 *Purvis v State of New South Wales (Department of Education & Training)* [2002] FCAFC 106.

72 *X v McHugh, Auditor-General for Tasmania* (1994) EOC 92-623; *L v Minister for Education* (1996) EOC 92-787; *Y v Australia Post* (1997) EOC 92-865.

with the particular brain damage in question and a person without that brain damage but in like circumstances. This means that like conduct is to be assumed in both cases."[74]

It was argued before the Full Court on behalf of the complainant that any harsh effects of a finding of discrimination under the Act could be ameliorated by the school authority if it sought the benefit of an exemption under s55 of the Disability Discrimination Act, or argued that the enrolment of the student would cause unjustifiable hardship in accordance with s22(4), which is in similar terms to the Anti-Discrimination Act 1991 (Qld), s44. However, the court rejected these contentions. The court considered that s22(4) could have no application once a student was enrolled at a school, and that the process of deciding whether a school was eligible for a discretionary exemption under s55 would cause unnecessary "time, expense and staff disruption".[75] The Full Court was concerned that a discretionary judgment about the placement of a student would be made by a court or tribunal, "which does not have the responsibility for managing the student."[76] This conclusion is reminiscent of the concern by US and Canadian courts that they ought not to interfere in the policy decisions of education providers.

It is clear from an analysis of these cases, that anti-discrimination legislation is a fertile field for litigation over the provision of educational services. The definition of an "impairment" in the Queensland Anti-Discrimination Act, s4 includes "a condition or malfunction that results in the person learning more slowly than a person without

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73 Quoting *Y v Australia Post* (1997) EOC 92-865 at 77-068.

74 *Purvis v State of New South Wales (Department of Education & Training)* [2002] FCAFC 106 at [29].

75 At [27].

the condition or malfunction". This would no doubt cover a learning disability such as dyslexia. A feature necessary to extend anti-discrimination legislation into the field that might otherwise be covered by educational malpractice would be a finding that the failure to provide special services for a learning disabled student constituted less favourable treatment. It could be argued that if failure to provide wheelchair access for a physically disabled person constitutes less favourable treatment, then failure to provide an appropriate course of education for a learning disabled student also constitutes less favourable treatment.

Conclusion

I suspect that in thirty years time, an experienced lawyer will be able to chart the development of the law in Australia with regard to educational negligence, discrimination in the provision of educational services and liability for educational outcomes. At present, we can but survey the international trends and local developments to try to determine where these developments might lead. For my own part, I do not think that educational authorities will 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. For the members of the ANZELA these will be fascinating times.

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[76] At [27].