Examining Educational Negligence Claims
(as in an actual exam!)

Attention please classroom!

For many years now, negligence claims against Accountants, Solicitors and Construction Professionals have formed the core subjects on the Professional Indemnity Insurance curriculum. Recently we have seen an increase in negligence claims being pursued against Educational Providers, such that they appear to be becoming a more prominent topic within the Professional Indemnity market.

As this is a relatively new area, there is a lot to be learnt with little case law authority by way of guidance.

With the above in mind, take the test below and see whether you are already an A* pupil or need to listen more in class and do some revision. Mark yourself 1 point for each correct answer you get. There is a maximum of 8 points to aim for (there may be more than one correct answer per question)!

Q1 - Why the increase?

What are some of the reasons for an increase in Educational Negligence Claims?

a) Litigation is increasingly becoming part of our general culture.
b) Easy Access to the Special Educational Needs (SEN) and Disability Tribunal for Parents.
c) Increased cost pressures on Local Authorities.
d) Specialised firms are now specifically advertising for parents who may have encountered problems with their child’s School.

As with most types of litigation you can always blame a burgeoning ‘claims culture’. Parents are paying high tuition fees for independent Schools and expectations for grades are rising. If grades are not achieved, perhaps the school can be blamed by parents who are “paying for results”.

Where a parent is seeking to pursue a claim in relation to alleged disability or failure to make reasonable adjustments, their claim will proceed through the Special Educational Needs & Disability Tribunal. This is a parent friendly Tribunal and there is no cost to the parent for pursuing a claim. It is easy, cheap and usually relatively quick for a parent to pursue a claim using this route. Costs and complicated Pre-Action Protocols and Civil Procedure Rules are not a hurdle for parents to overcome in this forum.

Additionally, Local Authorities have been under significant cost pressures recently. Educational Providers work hard to provide high quality teaching and a safe, happy and suitable environment for all pupils whatever their individual needs may be. However, cuts to funding make this harder to achieve and occasionally mistakes arise due to these additional pressures. More errors means more claims.

At present, we are not aware of any firm that is specifically advertising in carefully selected newspaper/magazine publications for parents who may have encountered problems with their child’s School and may require legal assistance. There are some firms out there who do exactly this type of thing for different types of claims though. We expect it is in the pipeline for Educational Negligence Claims.

So, A, B & C are the correct answers – one point for each.

Q2 – Can you spot the examples?

What are some of the main examples of Educational Negligence Claims?
Examining Educational Negligence Claims

a) A University’s alleged failure to properly prepare a pupil for an examination;
b) A Local Authority’s alleged failure to identify and diagnose dyslexia and failure to thereafter provide extra support to the pupil.
c) Failure to comply with/acting in breach of the Equality Act 2010.

Failure to adequately prepare a pupil for an examination was the exact premise of the (in)famous case of Siddiqui v University of Oxford. Mr Siddiqui claimed that he had suffered a loss of around £1 million (in lost life earnings) due to the alleged substandard tuition received during the Modern History Degree course at Oxford University. Mr Siddiqui graduated with an Upper Second Class degree but argued that he would have obtained a First and pursued a career at the Bar had it not been for the alleged substandard tuition. Mr Justice Foskett ruled that the University could not be held responsible. The claim was accordingly dismissed.

Phelps v Hillingdon London Borough Council is the paradigm case demonstrating that local authorities can be vicariously liable for the negligent actions of its Schools. The case involved a number of pupils whose dyslexia was not identified by the school and accordingly extra support was not provided. It was held that a local authority can be liable for a School’s failure to provide appropriate special educational needs support to those pupils who the local authority had a duty to educate.

A School’s failure to make reasonable adjustments for disabled pupils or alleged discrimination and/or unfavourable treatment of a pupil with a disability under the definition contained in the Equality Act 2010 (the Act), is a very common thread of Educational Negligence Claims. In order to pursue such a claim there are a number of hurdles which a claimant will have to clear to be successful. First, they will have to demonstrate the pupil is classified as being disabled in accordance with the definition in the Act. The Act is not completely clear on what constitutes a disability and this can be a grey area. For instance, questions can be raised as to whether or not ADHD is classified as being a disability. The Scottish case of JC V Gordonstoun Schools Limited held that ADHD did not constitute a disability for the purposes of the Act. However, there may well be claims in the future where a pupil with ADHD is disabled for the purposes of the Act.

So if you said all three award yourself 3 points!

Q3 – Define it!

You could have probably guessed this next question… what is the definition of “Disabled” under the Equality Act 2010?

a) A person has a disability if (a) they have a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities;
b) A person has a disability if (a) they have a physical or mental impairment, and (b) the impairment has an adverse effect on the person’s ability to carry out normal day-to-day activities.

In order to be classified as being disabled under the Act it is not enough to demonstrate that a person has a physical or mental impairment. A Claimant must also demonstrate that the physical or mental impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Substantial means it must be more than minor or trivial and long-term means it must effect the Claimant for more than a 12 month period.

The reason why ADHD was not held to be a disability in the case of JV V Gordonstoun (as referred to above) was because it was determined that although ADHD was a mental impairment, on the particular facts, the ADHD did not have a substantial and long-term adverse effect on the pupils ability to carry out normal day-to-day activities. This demonstrates how part (b) of the definition can be a difficult obstacle for Claimants who are seeking to bring a claim under the Act.

1 point to anyone who answered A.

Q4 – Prevention better than cure?

Can Educational Providers protect themselves from these types of claims?

a) Yes
b) No

A is the correct answer - as with the majority of Professional Negligence claims, there are always
Examining Educational Negligence Claims

measures each particular profession can take in order to guard against claims. Prevention is better than cure!

Awareness, clear policies and consistent application of such policies are of crucial importance in preventing these types of claim. In particular, Special Educational Needs and Disabilities Policies which are fully complied with help protect against claims arising out of Disability Discrimination. A clear complaints policy which sets out a procedure for complaints and which is drawn to the attention of parents/pupils will encourage Claimants to follow an internal route directly with the Education Provider prior to (or instead of) issuing a formal claim at the Court or Tribunal. A policy in respect of Grades, and/or Reports could also help protect against claims pursued in respect of alleged under-marking or unfair reports of a student’s performance.

Compliance with the relevant legislation is a straightforward way of avoiding liability (if not claims!).

There is an array of relevant legislation and regulations governing this area which all Educational Providers should be aware of. Some of the key statutes are; the Equality Act 2010; Children and Families Act 2014; The Education Act 2011; and the Educational (Independent School Standards) Regulations 2014. Keeping up to date with changes in legislation and ensuring compliance is important.

Ensuring that clear records of a pupil’s performance, disabilities and/or any reasonable adjustments required is also vital. Being able to evidence the reasons why certain decisions were made assists in defending against any formal claim which may be pursued. Schools should keep notes, just like their pupils!

Conclusion

Growth in this area is happening and will continue. Building awareness will assist in preventing or at least defending these types of claims. In the circumstances where claims are pursued, Beale & Company can assist. Please do not hesitate to get in touch.

Top of the class?

Finally, just for anyone who was keeping score:

0-2: Detention!
3-4: Must try harder.
5-6: Good effort.
7-8: A* Student.

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