‘DO YOU EVEN CARE?’ UNIVERSITIES AND THEIR DUTY OF CARE TO STUDENTS

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There can be little doubt that the UK is in the grip of a crisis in mental health, not least amongst the young, with higher education being one area of highly-publicised concern. A House of Commons Library Research Briefing published on 30 May 2023 reviewed the research and noted that a 2022 survey by mental health charity Student Minds found that 57% of respondents self-reported a mental health issue and 27% said they had a diagnosed mental health condition. According to research by the National Institute for Health and Care Excellence, in a 2019 survey of 21,000 students from over 140 universities in the UK, 42.3% stated that they had had a serious personal, emotional, behavioural, or mental health problem for which they needed professional help; 26.6% reported a pre-existing mental health diagnosis; and 56.5% reported some thoughts of self-harm; 1.7% reported that they often or always had suicidal thoughts. Even allowing for the imprecision of the data gathered by such polls, these statistics are startling.

That said, it is perhaps not surprising that (often pre-existing) mental health issues come to the fore given some of the inherent characteristics of the typical university experience: leaving home for the first time, away from familiar sources of social support, with academic and increasingly substantial financial pressures. Mental health among students is declining, at the same time as the resources available to the NHS for addressing such problems are stretched ever more thinly. The number of students suffering serious mental health issues is substantial, and there have been a number of tragic deaths by suicide. It is not surprising in those circumstances that parents and loved ones of those students have wondered whether Universities provide adequate support for a section of society that is foreseeably susceptible to mental health problems.

In *Abrahart v University of Bristol* [2022] 5 WLUK 260, HHJ Ralton found that the University had failed to take steps to make adjustments to its requirement for oral and in-person assessments, the requirement for those adjustments being necessary in view of Ms Abrahart’s severe social anxiety disorder. The effect of that failure was considered to have contributed to Ms Abrahart’s death by suicide. However, HHJ Ralton found that the University owed no relevant duty of care. Ms Abrahart’s parents did, however, succeed in a claim under the Equality Act 2010 (‘the EqA’).

Shortly before Christmas, an appeal was heard by the High Court and judgment is currently awaited. In this article, we consider the County Court decision, the issues the High Court is considering and the potential implications of the decision in the appeal.

Background

In 2018, following a period of severe mental health difficulties whilst studying at the University of Bristol, Natasha Abrahart tragically took her own life. Ms Abrahart's parents ('the Claimants') sued the University for disability discrimination under the Equality Act 2010 ('the Act'), alleging that the University had failed to make reasonable adjustments for Natasha's disability of severe depression and anxiety. The Claimants also brought a claim in negligence, alleging that the University was under a general duty to take reasonable care for the wellbeing, health and safety of its students. In particular, it was alleged that there was a duty to take reasonable steps to prevent and not to cause injury, including psychiatric injury and harm.

HHJ Ralton found that at the beginning of Ms Abrahart's second year, university staff knew that she had a mental health impairment that was sufficient to constitute a disability under the EqA. In particular, Ms Abrahart had severe difficulties in coping with in-person oral assessments, and the University's requirement that Ms Abrahart participate in such assessments put Ms Abrahart at a substantial disadvantage for which the University ought to have made adjustments. HHJ Ralton accepted that Ms Abrahart suffered continuously and seriously for a period of about six months and awarded the Claimants £50,000 for Ms Abrahart's pain, suffering, loss of amenity and injury to feelings.

However, HHJ Ralton dismissed the claim in negligence, on the basis that there was no relevant duty of care. There was no legislation or previous case law that established the existence of such a duty in these circumstances, and HHJ Ralton was not prepared to find that such a duty existed as a matter of first principles. It would not be fair, just and reasonable to impose such a duty on the University in these circumstances because Ms Abrahart, as a disabled student, was already afforded legal protection under the Act. More generally, unlike the position in respect of (say) schoolchildren or prisoners, students are adults attending University voluntarily, and are never in the care or control of the University, such that it was not reasonable to expect the University to have general duties of care to protect students' wellbeing.

That said, had such a duty of care existed, the University would have been in breach (and therefore negligent) by continuing to require Ms Abrahart to attend various oral assessments and marking her down if she did not (or if she did but performed poorly).

Issues to be considered on appeal

The judgment of HHJ Ralton was widely publicised at the time in both the mainstream and legal press, as was the Claimants' appeal in respect of HHJ Ralton's finding that there was no duty of care. It has been somewhat less widely reported that the University also appealed the finding of discrimination. Both appeals received permission to proceed and the Equality and Human Rights Commission was granted permission to intervene, which highlights the wider importance of the High Court's decision.

Mr Justice Linden heard the appeal between 11 & 13 December 2023.

Comment

The factual findings made by HHJ Ralton are not the subject of the appeal, and at least on

the face of it his decision in respect of the EqA appears persuasive. Of course, in order to succeed under the EqA students will first have to establish that they were subject to a disability, and that their university either knew or ought to have known about the disability. The Claimants succeeded in establishing both those aspects of the case, but other students will not have the benefit of the protection afforded by the EqA.

In choosing to seek permission to appeal the finding of discrimination, the University made a statement explaining its reasoning for doing so, no doubt because of the fear of adverse publicity. It was stated that *"this appeal is not against the Abrahart family, nor are we disputing the specific circumstances of Natasha's death. We remain deeply sorry for their loss and we are not contesting the damages awarded by the judge"*. The University then explained the wider importance of the appeal: *"In appealing, we are seeking absolute clarity for the higher education sector around the application of the Equality Act when staff do not know a student has a disability, or when it has yet to be diagnosed"*. It is not entirely clear whether such clarity will be obtained from the University's appeal, given that the Judge found as a matter of fact that staff did know about her disability. Indeed, the University's statement goes on to note factual aspects of the case that would tend to suggest that there was substantial knowledge (*"academic and administrative staff assisted Natasha with a referral to both the NHS and our Disability Services"*). It will be interesting to see how the University seeks to argue this element of the appeal, as well as what the Judge makes of it.

Perhaps somewhat ironically, given the wider importance attached to the need for a duty of care in negligence, it was the existence of relevant duties owed to Ms Abrahart under the EqA that was a key part, perhaps even the most important part, of HHJ Ralton's reasoning that there was no duty of care owed to Ms Abrahart in tort. Of course, this means that a large proportion of students will not be protected in a similar way.

Questions of whether a duty of care arises in tort are largely fact-specific, and on the one hand it might be said that if a duty of care was not owed to Ms Abrahart on the facts of this case, the circumstances in which a duty of care might be held to arise are difficult to understand in the abstract. Given the importance attached to protection under the EqA, those suffering mental health issues of some kind, albeit falling short of the definition of disability under the EqA, might be potential candidates for the existence of such a duty of care. Where such mental health issues tip over the threshold into disability, *Abrahart* would tend to suggest that no duty of care would exist. However, that would potentially leave universities and students in a very uncertain position as to when they might owe a duty of care, given that the boundary between what is, and is not, sufficient to meet the definition of disability is difficult to ascertain, particularly where the university will not be in possession of all the facts known to the student. This is ultimately a logical extension of the reason why no such duty of care has been held to exist to date, ie universities cannot have the same knowledge, care and control over students as (say) a school in respect of a child in compulsory education.

Whilst the trend in duties of care is almost inevitably one of expansion, that tends to be very gradual, as courts are understandably slow to impose duties of care in new circumstances. The absence of supporting authority or legislation was something which HHJ Ralton relied on in his judgment, albeit the High Court at the appeal stage may feel less constrained in that regard.

It is worth highlighting the recent County Court decision in *Feder and McCamish v The Royal Welsh College of Music and Drama* (Unreported, 5 October 2023), in which it was held that the defendant College owed various relevant duties of care to students who reported sexual assault by another student and suffered harm as a result of the College's failings in how those reports were handled. At 160 pages long it is not an easy decision to summarise, but it contains a very helpful analysis of the potential ways in which a duty of care might be found to have arisen. In the event, the duties of care upheld in the case were founded on established principles, based on other materially similar factual circumstances, including in particular in schools, albeit the Judge said that he would, if it had been necessary, have found that a duty exists as a development of the existing law that was *"incremental, small and based on close analogies [to other cases where a duty had been held to exist]... "*. The College's liability was made out on various key failures including failure to treat the reports of sexual misconduct properly and failing to effectively action proper investigations or disciplinary processes.

The facts of *Abrahart* are of course very different, and indeed the Judge in *Feder* said that he found little assistance from the first instance decision in *Abrahart*. He noted that the mere fact that the University provided welfare and support services was not sufficient to create a duty of care, and this begged the question of for what an institution is assuming responsibility, when it offers a service or acts in a particular way. So, for example, if the University had offered an assessment service to determine whether exceptions should be made to the ordinary arrangements for interview-based examinations, Ms Abrahart had used the service and relied on it, but the assessment was incompetent, that would fall squarely within the sort of situation that was typical of situations where a duty was found on the basis of an assumption of responsibility (ie similar to that between an employer and employee or solicitor and client. However, on the facts in *Abrahart* there was no duty of care *"because the College did not offer to keep her safe holistically and she did not rely on that happening"*.

Away from the process of litigation, there has been substantial political discussion regarding the creation of a statutory duty of care, not least as a consequence of campaigns by those (including the parents of Ms Abrahart) whose friends and relatives have died by suicide whilst attending universities. A petition calling for a debate in parliament in 2023 reached 128,000 signatures and resulted in a debate taking place in June 2023, with the government's position being that it was taking steps to address the way in which universities dealt with student mental health (including through the University Mental Health Charter Programme) and that no additional statutory duty was necessary.

It seems likely that political momentum will regather pace in the event that the Court does not find the existence of the sort of general duty of care for which the Claimants contend. We rather suspect that even if the Court were to find the existence of a duty of care on the facts, it is likely to be relatively limited in scope and to leave open a number of questions as to the existence and scope of any duty of care in related (but different) circumstances. If so, that may not be sufficient to satisfy those who wish for universities to have a more generalised duty of care, backed by legislation.

Whether imposed by common law or by statute, any extension of a duty of care to students beyond those that benefit form the protection of the EqA is likely to carry considerable implications, given the substantially larger number of students who might obtain protection, as well as factors such as the substantially longer limitation period.

We will provide a further update to this article following the High Court decision.

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