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EDUCATIONAL NEGLIGENCE: AN AUSTRALIAN PERSPECTIVE

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ABSTRACT

This paper examines the issue of whether teachers in Australian schools could be sued for the negligent or careless performance of tasks associated with teaching. It briefly discusses the context within which the notion of 'educational negligence' has arisen in Australia, and it refers in passing to the stance adopted by American courts when confronted with claims in 'educational malpractice'. It then examines in detail the case of *E (a minor) v Dorset County Council* [1994] 4 All ER 640, a decision of the Court of Appeal in England, in which it was decided that claims based in negligence and alleging a failure on the part of teachers to identify and meet the special education needs of certain students with learning disabilities were not unarguable under principles of negligence law. It then summaries developments in negligence law in Australia and examines how an Australian court might respond to a claim similar to that confronted by the English Court of Appeal. The conclusion is that in principle there would seem to be no reason why Australian courts would adopt a stance different to that of the Court of Appeal in England.

EDUCATIONAL NEGLIGENCE: AN AUSTRALIAN PERSPECTIVE

Peter Williams*

I. Introduction

During the 1970s an important issue for those involved in the practice of education was raised when an American court was asked to determine whether a student should receive financial compensation because of the alleged negligent way in which the school district and its teachers had provided for his education.¹ Since that time American courts have stood resolute: they have consistently refused to accept that educational malpractice represents an actionable claim under American legal principles.²

However, the Court of Appeal in England has taken a very different view. In 1994 the Court of Appeal decided that claims based in negligence and alleging a failure on the part of the education system both to identify and to meet the special education needs of certain students with learning disabilities, were not unarguable under principles of English law.³

There has been a tendency, in Australia at least, to view many American court decisions on various issues as 'wild frontier stuff': brash, disrespectful of the past, and going where no other would dare. Most English court decisions, on the other hand, have been viewed as made of 'sterner stuff': cautious, conservative and terribly, terribly sensible. 'Educational

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¹ *Peter W. v San Francisco Unified School District* (1976) 131 Cal Rptr 854.

² See, e.g., *Donoghue v Copiague Union Free School District* (1979) 418 NYS2d 375; *D.S.W. (and L.A.H.) v Fairbanks North Star Borough School District* (1981) 628 Pd 554; *Hunter v Board of Education* (1982) 439 A2d 582; *Cavello v Sherburne-Earlville Central School District* (1985) 494 NYS2d 466; *Hoffman v Board of Education* (1979) 400 NE2d 317.

³ *E (a minor) v Dorset County Council & Other Appeals* [1994] 4 All ER 640. The Court of Appeal examined the question in a consolidated interlocutory application entitled *E (A Minor) v Dorset County Council, Christmas v Hampshire County Council, Keating v Bromley London Borough Council*. The respective education authorities had applied to have all three claims struck out as disclosing no reasonable cause of action. At first instance, the applications were granted but the student plaintiffs appealed to the Court of Appeal against this striking out. The Court allowed the appeal on the ground that because of the nature of the questions posed by the cases, a striking out order was inappropriate. The relevant rules of court concerning striking out orders provided that claims should not be struck out as disclosing no reasonable cause of action "save in clear and obvious cases, where the legal basis of the claim is unarguable, or almost incontestably bad": at 649-650.

negligence', as some Australian commentators have termed it,⁴ or 'educational malpractice' to use the American term, may well be the issue to turn this perspective on its head.

This paper will discuss, from an Australian perspective, the context of, and the legal framework for, suing in educational negligence. It will also examine the decision of the English Court of Appeal. It will then explore some of the issues an Australian court could face when confronted with a claim in educational negligence.

II. Educational Negligence in Australia: Its Context and Legal Framework

A. The Context

The idea that teachers in Australia should be held legally accountable for the way they teach is a relatively recent proposition. It is also somewhat ironic given what many would argue is the *raison d'être* of our education system: the intellectual advancement of students. It is a notion, however, that is hardly surprising when one considers the context within which it has developed.

(i) *the legalisation of Australian education*

Arguments about whether Australian courts should recognise educational negligence as a cause of action are taking place within the context of the legalisation of education, a process that without a doubt has begun in Australia.⁵ More than ever before educational decision making and practices are being challenged by those who feel disaffected or disadvantaged by the education system. It is the law that is increasingly providing both the grounds upon which such challenges can be made and the remedies that many complainants seek. For example, recent legislation at both the state and federal level makes it unlawful for an education authority, through its teachers, to discriminate against a person in the provision of educational services on a number of grounds, including impairment, sex, race and so on. That same legislation also provides that the person discriminated against can seek various remedies,

⁴ Most Australian commentators who have examined the issue of whether the principles of negligence law can be applied to tasks associated with teaching use the label 'educational negligence' when indicating the cause of action upon which a student might rely. 'Educational negligence' has been defined as occurring when a student suffers harm as a result of incompetent or negligent teaching. See I Ramsay "Educational Negligence and the Legalisation of Education" (1988) 11 *UNSW Law Journal* 184.

⁵ See, e.g., Ramsay, note 4; H Sungaila and G Swafford "Out of the Classroom, Into the Courts: The Legalisation of Australian Education and its Implications for Educational Research" (1988) 15 *Australian Educational Researcher* 29.

including damages.⁶ Such legislation clearly puts traditional classroom practices and beliefs under the legal microscope.

There does appear to be a general accountability movement across Australia which is resulting in an increasing number of professions being held legally accountable for what they do.⁷ If professional persons such as lawyers, doctors and nurses can be held legally liable for the careless performance of their respective professional callings, then, so the argument goes, why should the same principles not apply to members of the teaching profession? There also appears to be a new suing mentality evident in Australian society, reflecting, it seems, an increased awareness of legal rights and a greater willingness to pursue those rights. In 1994 there was wide media coverage across Australia of a case in which the parents of students attending a private school took action against the school for financial compensation in the Western Australian Small Claims Tribunal. The parents claimed that because the school had not lived up to assurances contained in the school's prospectus, it was liable to pay compensation to them. They claimed specifically that the school had failed to stop bullying of their sons.⁸ In a more recent case in 1995, a student at a government school sued the school's principal for defamation after the principal had taken disciplinary action against the student for alleged vandalism in the school.⁹ The outcome in both decisions is not of great importance; what is significant is that in two very different scenarios litigation was pursued where traditionally it has never been contemplated.

Of course, there is already a body of law that has held teachers legally liable for what they have done in educational settings.¹⁰ Where a student has been physically injured because of

⁶ See, e.g., *Equal Opportunity Act 1984* (WA); *Anti-discrimination Act 1977* (NSW); *Disability Discrimination Act 1992* (Cth). There have also been significant court decisions which have held that traditional practices of schooling offended the provisions of anti-discrimination legislation. In *Haines v Leves* (1987) 7 NSWLR 442, the Court of Appeal for the state of New South Wales found that the availability of different curriculum offerings in single sex secondary schools offended certain provisions of the *Anti-discrimination Act 1977* (NSW).

⁷ See, generally, K Tronc & D Sleigh *Australian Teachers and the Law* Sydney, Butterworths, 1989; Ramsay, note 4.

⁸ The Small Claims Tribunal is a tribunal established under the *Small Claims Tribunal Act 1974* (WA) with jurisdiction to conciliate, and if necessary arbitrate, disputes between a consumer and a trader (eg., a provider of services) involving a claim for money not exceeding \$6000.00. The case was settled, with the school agreeing, without admitting liability, to pay \$6,000.00 to the parents.

⁹ *Beatson v Tharenou* (Queensland Magistrate's Court, unreported, 1995, No 5 of 1993). The claim was for \$20,000.00 damages. The case was argued in court but the student lost the case.

¹⁰ See, generally, P Heffey "The Duty of Schools and Teachers to Protect Pupils from Injury" (1986) 11 *Monash Law Review* 1; G Lowe "The Liability of Teachers and School Authorities for Injuries Suffered by Students" (1983) 13 *University of Queensland Law Journal* 28; D Stewart "Compensating Students for Injuries Incurred in School Accidents" (1994) 6 *Education And The Law* 143; P Williams "Accidents in Schools: Teachers are not Always Liable!" (1989) 15 *Unicorn* 231.

inadequate supervision during recess,¹¹ during class,¹² or during a school excursion,¹³ the injured student has relied upon principles of negligence law to obtain financial compensation for physical injury. In other settings, because the law of negligence is concerned primarily with compensating a person who is injured as a result of the conduct of another on the 'highway of life', courts have not hesitated to apply traditional principles of negligence law to novel situations in order to provide compensation to a person.¹⁴ For example, it is a principle of negligence law that a hospital owes to its patients a duty to ensure that reasonable care is taken for their physical well-being, a duty that is separate and apart from the duty owed to patients by employees of the hospital such as nurses.¹⁵ When the top of a flagpole in a school's quadrangle fell and struck a student on the head, the Australian High Court likened the duty owed by the education authority to that owed by a hospital to its patients and concluded that for similar policy reasons an education authority should be subject to the same obligation of care.¹⁶ The point is simply this: as principles of negligence law have been moulded and shaped to provide compensation to students who have suffered physical injury while at school, it seems inevitable that courts in Australia will be asked to mould those same principles around a claim for compensation by a student who has been the victim of careless or incompetent teaching practices.

The proposition that teachers in Australia could be held legally liable for the way they go about the task of teaching cannot be viewed in isolation. It arises within the context of the role the law has played in education in the past. It also arises within the framework of the legalisation of education currently developing in Australia. In essence, it is a reflection of the community's changing demands and expectations with respect to the outcomes of education and with respect to those who carry a major responsibility for them.

(ii) the American experience - a potted history

¹¹ E.g., *Evans v Minister for Education* [1984] Aust Torts Rpts ¶80-670.

¹² E.g., *Miller v State of South Australia & Baldock* (1980) 24 SASR 416

¹³ E.g., *Giliauskas v Minister for Education* (Supreme Court of Western Australia, unreported, 1969, No G65 of 1967).

¹⁴ See, generally, J Fleming *The Law of Torts* (8th ed) Sydney, Law Book Co, 1992.

¹⁵ Id at 373. See, generally, A Khan and J Hackett, "Vicarious and Non-Delegable Tortious Liability of Teachers' Employers in Australia" *Journal of Law & Education* (in press); W Whippy "A Hospital's Personal and Non-delegable Duty to Care for Its Patients - Novel Doctrine or Vicarious Liability Disguised?" (1989) 63 *Australian Law Journal* 182.

¹⁶ *Commonwealth of Australia v Introvigne* (1982) 56 ALJR 749. See also *Watson v Haines* [1987] Aust Torts Rpts ¶80-094 where the New South Wales Court of Appeal applied the same principles when a student suffered quadriplegia after a football scrum in which he was involved collapsed. For a discussion of the non-delegable duty of care owed by an education authority, see Khan and Hackett, note 15.

Suing for the negligent performance of teaching duties has its origins firmly in the American experience. The cases most often identified by Australian commentators as indicative of claims based in educational malpractice include *Peter W.*, *Donoghue* and *Hoffman*. It has been suggested that, in broad terms, the response of American courts to claims in educational malpractice can be placed into three categories:

- a preparedness to accept all educational malpractice claims (as evidenced by the dissenting judgment of Suozzi J in *Donoghue*),
- a willingness to recognise educational malpractice claims only upon proof of specific conduct causing harm (as evidenced by the lower courts' views in *Hoffman*), and
- a refusal to recognise educational malpractice claims at all (as evidenced by the court's decision in *Peter W.*).¹⁷

Much has been written about these and other cases, and the issues raised by the notion of educational malpractice have been well explored by writers from various countries.¹⁸ Suffice it to say that the net result of the American experience has been summarised thus:

In a virtually unbroken line of decisions in response to liability suits brought on behalf of non handicapped students..., courts have consistently rejected various theories of educational malpractice based largely on public policy....[F]rom 1979 to the present, virtually all relevant reported court decisions have rejected damages liability of school districts for negligently evaluating and/or placing a student who may have disabilities. In most cases, the courts followed the public policy rationale of precedents involving students in regular education without regard for the statutory specifications and vulnerable status specific to students with disabilities....Courts have been no more receptive to damage claims of improper educational services for students with disabilities. The line of case law in this category is solidly against plaintiffs.¹⁹

¹⁷ B Thompson "In a Class Apart? 'Educational Negligence' Claims against Teachers" (1985) 1 *Queensland Institute of Technology Law Journal* 85. In her detailed analysis of the American cases, Thompson saw them as falling into one of two categories: those involving 'inadequate education' claims (as in *Peter W.*) or those involving 'professional error' claims (as in *Hoffman*): at 95-99.

¹⁸ One of the earliest and most detailed analyses of educational malpractice as a possible cause of action of which the writer is aware is J Elson "A Common Law Remedy for the Educational harms Caused by Incompetent or Careless Teaching" (1978) 73 *Northwestern University Law Review* 641. In addition, see, e.g., E Butler "Educational Malpractice Update" (1985) 14 *Capital University Law Review* 609; R Fossey and P Zirkel "Educational Malpractice and Students with Disabilities: 'Special' Cases of Liability?" (1994) 23 *Journal of Law & Education* 25; K Wilkins "Educational Malpractice: A Cause of Action in Need of a Call for Action" (1988) 22 *Valparaiso University Law Review* 427. For a Canadian perspective on the notion of educational malpractice, see W Foster "Educational Malpractice: A Tort for the Untaught?" (1985) 19 *University of British Columbia Law Review* 161. For analyses of the topic by Australian commentators, see, e.g., J Nelson "A New Dimension to Accountability? Educational Negligence Claims against Teachers" (1987) 31 *Australian Journal of Education* 219; Ramsay, note 4; Thompson, note 17.

¹⁹ Fossey and Zirkel, note 18 at 27, 34.

The policy reasons relied on by American courts are varied. Some courts have felt that if educational malpractice was recognised as a legitimate claim, courts would be dragged into reviewing not only broad educational policy but also the day-to-day implementation of that policy, something that they are neither qualified nor authorised to do.²⁰ Other courts have argued that if they agreed to the student's claim the floodgates of litigation would open, and education authorities would then have to direct scarce financial resources to paying out compensation rather than spending those resources on schools.²¹ Some have also taken the view that it is simply impossible for a student who claims that he/she has failed to learn because of negligent teaching to prove, for example, that it was the teacher's actions alone that caused the student's failure to learn.²²

B. A Legal Framework

Suing for educational negligence requires the identification of an appropriate legal basis upon which to hold an education authority and/or its teachers legally liable for a student's injury. Just as some American cases have put forward various theories as a basis for educational malpractice claims,²³ so too in Australia, consumer law and the law relating to misrepresentation have been some of the areas which have been proposed as providing a legal framework for claims in educational negligence.²⁴

An educational negligence claim based on principles of consumer law raises interesting issues particularly for private schools. When parents choose to send their child to a private school, the relationship between the parents and the school is governed by contract law, and depending upon a variety of factors, by consumer protection legislation. If those parents allege that their child has failed to learn because of poor teaching for example, or that the school has failed to provide appropriate educational services for their learning disabled child,

²⁰ See, e.g., *Hoffman*.

²¹ See, e.g., *Peter W.*

²² *Ibid.*

²³ See, e.g., Fossey and Zirkel, note 18; Butler, note 18; Wilkins, note 18.

²⁴ See, e.g., C Alexander *Some Comments on the Law as it applies to Independent Schools* (unpublished, n.d.); Ramsay, note 4; P Whalley "Educational Malpractice: American Trends and Implications for Australian Schools" (1986) 12 *Unicorn* 203.

they could attempt to argue that the school was in breach of its contractual obligations, or that it failed to comply with duties imposed on it by consumer protection laws.²⁵

However, it is most often negligence law which has been put forward as the appropriate framework upon which a student could rely to launch a claim in educational negligence.

One of the options a person has when injured by another person's carelessness is to sue that person for monetary compensation under the law of negligence. When a student is injured and alleges that the injury was caused by the action or inaction of a particular teacher, the student has that same option.²⁶ Where a student wishes to claim compensation by relying on negligence law because, in the student's view, the education system and its teachers were negligent in teaching him/her for example, or were negligent in identifying, and meeting, his/her special education needs in view of his/her learning disability, the student must establish the usual elements of a negligence claim. Thus, the student will have to establish to the satisfaction of the court that

- the student was owed a duty of care by certain education professionals,
- those education professionals failed to live up to the appropriate standard of care by not doing what was required in the circumstances, and
- as a result, the student suffered injury of a type recognised as compensable under principles of negligence law.

²⁵ While there are considerable problems with any argument suggesting that a contract exists between public, or government-run, schools and students attending those schools, a contract clearly exists between a private school and parents who send their children to that private school. According to media reports, the basis of the claim in the case in which parents sought compensation from a school because of alleged bullying in the school was that the school had not provided what it had advertised in a school prospectus. See note 8 and accompanying text. The status of a prospectus is an interesting question under principles of contract law, and the use by a private school of a prospectus advertising its achievements, standards, facilities and ethos can have significant implications for the school. The contents of a prospectus could amount to terms of the contract between the school and parents, or they could constitute representations made to parents prior to the formation of a contract, effectively inducing parents to enter into the contract with the school in reliance on what is said in the prospectus. See Alexander, note 24.

Consumer protection legislation at both the state and federal levels imply into contracts for services certain warranties, including a warranty that the service will be rendered with due care and skill. See, e.g., section 74 of the *Trade Practices Act 1974* (Cth); section 40 of the *Fair Trading Act 1987* (WA). The term 'services' is defined to include any rights, benefits, privileges or facilities that are provided under a contract for or in relation to "the provision of, or the use or enjoyment of facilities for...instruction". See, e.g., section 4(1) of the *Trade Practices Act 1974* (Cth); section 5 (1) of the *Fair Trading Act 1987* (WA). So that where parents have contracted with a private school for the provision of education for their children, the private school is obliged to deliver that education with due care and skill. While the application of the *Trade Practices Act* (Cth) is generally restricted to corporations, state legislation, such as the *Fair Trading Act 1987* (WA), is not so restricted. See, generally, Ramsay, note 4 at 194-196.

²⁶ It will invariably be the teacher's employer who ultimately pays the compensation bill should the student be successful with the claim. See, generally, Fleming, note 14 at 366-385.

III. Educational Negligence: The English Response

In 1994 the Court of Appeal in England was asked a question with far-reaching implications: are claims based in negligence and alleging a failure on the part of the education system to identify and meet the special education needs of certain students with learning disabilities unarguable and bad at law pursuant to English principles of law? The Court concluded that the claims were not bad at law.²⁷

The hearing before the Court of Appeal involved three separate cases.

E v Dorset County Council

E was a child with special education needs. In 1985 when he was nearly 8 years old, his parents consulted the county council's psychology service about his problems, which they believed to be caused by dyslexia. They were advised that he did not suffer from a specific learning difficulty. There were exchanges between E's parents and the county council because of E's severe and complex learning difficulties. In July 1987, after following prescribed statutory procedures, the county council identified the local primary school he was attending as the appropriate school for him. An educational psychologist employed by the county council advised E's school and his parents on his specific problems and the means by which his condition could be relieved. Until September 1987 E's parents accepted this advice and in reliance on it left him at the local school he was then attending. In September 1987 E's parents, having realised that the psychologist's advice was negligent and wrong, placed him at a private school where all his problems and needs were addressed and his condition fully diagnosed and treated. He spent some time at that private school and his parents met its fees.

E's parents then pursued certain review mechanisms within the education system. Their primary complaint was that processes and procedures employed in relation to their child had addressed only his literacy difficulties and not his numeracy difficulties. As a result of these reviews, a school that could meet E's literacy and numeracy needs was eventually identified, and E attended that school without further complaint.

The claim was for £30,000 representing the expenses to which E's parents were put by placing him in a fee-paying school that could meet his educational needs. E alleged that the county council had acted in breach of its common law duty of care owed to him in, *inter alia*,

- failing to recognise his condition,

²⁷ E (a minor).

- failing to make proper provision for his special education needs,
- advising his parents that the provision for his needs at the local school he was attending was adequate when it was not,
- wrongly advising his parents to leave him at that local school,
- failing to inquire adequately into the true extent of his special education needs and his specific learning difficulties,
- advising his parents that he did not suffer from a specific learning difficulty,
- failing to inquire whether adequate facilities existed to help him, and
- failing to diagnose his specific learning difficulties and advise his parents of their extent.

Christmas v Hampshire County Council

From 5-11 years of age (1978-1984), Mark Christmas attended a local Church of England primary school. He showed severe behavioural problems and learning difficulties and had particular difficulty learning to read. His symptoms were consistent with dyslexia. His parents expressed their concern to the headmaster and other members of the teaching staff on numerous occasions and asked for advice and further investigation into Mark's condition. The headmaster advised that Mark had no special learning difficulty and that his problems would be resolved if he exercised greater self-discipline and practiced his reading.

In June 1984 the headmaster referred Mark to a Teachers' Centre for an assessment of his learning difficulties, and the advisory teacher reported that Mark had no serious handicaps and that his problems could be remedied by a good deal of regular practice. In 1985 Mark's parents sent him to a private school specialising in remedial problems. Several years later he was assessed as significantly underachieving in literacy, especially in terms of his spelling skills and accuracy, and as suffering a severe specific learning disability commonly known as dyslexia. He left school in 1990.

In 1992 Mark initiated legal proceedings, alleging that the Hampshire County Council, its servants and agents were in breach of their duty to use reasonable care and skill in the assessment of his educational needs and problems. Mark argued that the headmaster was in breach of this duty in failing to refer him to the county council for a formal assessment of his educational needs and to an educational psychologist experienced in the diagnosis of specific learning difficulties. He also argued that the advisory teacher was in breach of this duty in failing to ascertain that he had a specific learning disability, failing to assess his learning difficulty, failing to diagnose his dyslexia, and failing to refer him or recommend his parents to refer him to an educational psychologist. His claim for damages was in the light of his restricted vocational opportunities and prospects as well as diminished earning capacity.

Keating v Bromley London Borough Council

Richard Keating attended school very irregularly. Aged about 5-6 years, he attended a local primary school but between the ages of 6-8 years he was not registered at and did not attend any school. From the ages of 8 to 14 years he attended special schools until the particular special school he was attending at the time closed down. Aged 14-15 years, he was not registered at, nor did he attend, any school, but from then on he did attend an ordinary secondary school until he was about 16 years of age. At the age of 21 years, he initiated legal proceedings against Bromley London Borough Council, claiming that the borough was in breach of its common law duty to take reasonable care in making proper inquiries into or assessments of his educational capacity and in placing him in an appropriate school. He alleged that as a result he was deprived of any reasonable education, that he suffered impairment of his personal and intellectual development and that he suffered distress. He claimed damages with respect to the cost of private tuition provided by his parents over a 10 year period.

IV. Some Fundamental Issues

The English Court of Appeal's decision, which has been termed a landmark decision,²⁸ does not say that teachers who teach carelessly are legally accountable; neither does it say that teachers or school psychologists who fail to diagnose a learning disability or who fail to develop and implement an appropriate remedial strategy for students with learning disabilities are legally accountable. Rather, the decision simply says that a legal claim based in negligence and alleging a failure on the part of the education system and its teachers to identify, and respond to, the educational needs of students with learning disabilities is not untenable in the English courts.²⁹

²⁸ Case Survey (1994) 6 *Education And The Law* 243. For a detailed analysis of the Court's decision, see J Holloway "The Rights of Individuals who Receive a Defective Education" (1994) 6 *Education And The Law* 207, where the decision has been described as "potentially revolutionary in holding that a teacher may owe a duty of care to a pupil to recognise learning difficulties and take appropriate action....The possibility of a claim in negligence must be seen by plaintiffs as a ray of hope and by local educational authorities as a chink in their armour": at 217.

²⁹ The main argument put forward by all three students involved claims alleging breach of a common law duty imposed under principles of negligence law. However, it was also argued in both *E* and *Keating* at first instance that the relevant education authorities were in breach of statutory duties imposed on them by various provisions in education legislation. The Court of Appeal examined in detail the legislative provisions relied upon by the students, as well as past case law that had examined the tort of breach of statutory duty. However, the Court concluded that there was no indication that Parliament had intended that any complaint by parents or children of breach of the duties created by the legislative provisions be enforceable by a private law action for damages or injunction. The Court therefore dismissed the appeals by the two students against the orders of the lower court striking out the claims for breach of statutory duty: *E (a minor)*, at 650-656. For a discussion of the tort of breach of statutory duty, see Fleming, note 14 at 188-190.

A. Establishing Negligence

A right to appeal against the Court of Appeal's decision has been granted, and it will be the House of Lords, the highest, and some would argue the most influential, court in the English legal system that will hear the appeal if it is pursued. If the House of Lords upholds the decision of the Court of Appeal, the troubles then begin for students such as E, Mark Christmas and Richard Keating. While they will not have to convince the courts that claims in negligence should not be struck out as being unarguable under English law, they will have to produce evidence to satisfy the elements of a negligence action.

(i) *duty of care*

Can it be said that a teacher or school psychologist or an advisory teacher owes a student a duty of care in relation to tasks associated with teaching? It was argued for the students that

as trained and skilled professionals [teachers]...owe a duty to detect and react appropriately to gross deviations from normality in a pupil's learning performance or behaviour in circumstances where an ordinarily competent teacher would do so.³⁰

In examining this question the Court of Appeal applied the tests developed by past court decisions to determine whether one person owes another a duty of care³¹ and concluded that

...a school teacher's duty to exercise reasonable skill and care to safeguard the pupil from injury includes a duty to be aware of symptoms which...a reasonably skilled and careful teacher would regard as symptoms of dyslexia, or more generally, of a need for specialist advice.³²

In response to the argument that when an advisory teacher is asked by an education authority to advise and report on a particular student's educational problems and needs, that advisory teacher only owes a duty of care to the authority and not to the student, the Court argued that considerations of fairness and justice support the proposition that the advisory teacher also owes a duty of care to the student. The Court suggested, for example, that

³⁰ *E (a minor)*, at 657.

³¹ The approach taken by English courts in determining whether a duty of care arises is to apply three tests: first, whether the defendant would foresee injury to the plaintiff if the defendant was to act carelessly in relation to the plaintiff; second, whether there was proximity between the plaintiff and defendant; and third, whether it is just and reasonable that the law should impose a duty on the defendant in the circumstances. See, e.g., *Anns v Merton London Borough* [1977] 2 All ER 492; *Caparo Industries v Dickinson* [1990] 2 AC 605. For a detailed discussion of the development of negligence law in relation to school settings in England, see A Khan "Liability of Teachers and Schools for Negligence in England" (1991) 20 *Journal of Law & Education* 537.

³² *E (a minor)*, at 669.

[i]t is uncomfortable to think of the...educational psychologist...being constrained by an awareness that he could be held liable in damages if he was negligent towards his employer but was immune if he was negligent towards the child.³³

It felt that there was no difference between the situation where a doctor or specialist is engaged to report and advise on treatment in the best interests of a child, in which case that doctor or specialist owes the child a duty to advise and report with reasonable care, and the situation where an educational psychologist, for example, is reporting and advising on a student's learning disability.³⁴

(ii) standard of care

One of the elements of a negligence action that has to be established is that the defendant failed to adopt the appropriate standard of care in the circumstances. A question for the Court of Appeal was how to define the standard of care of a classroom teacher or an advisory teacher or educational psychologist when assessing and reporting on a student with a learning disability. Should the standard of care be defined by reference to what a reasonable parent would do, as it is usually defined in cases involving physical injury to students? Or should it be defined by reference to what a reasonable teacher would do? If so, what precisely is it that such a teacher would do when evaluating a student with a learning disability? Is professional practice in relation to the evaluation, placement and remedial teaching of students with dyslexia, for example, sufficiently defined so that it is possible to identify an appropriate course of action that should be taken in such circumstances?

The Court accepted that teachers cannot rectify "inequalities of endowment between one pupil and another" and that they have no duty "to ensure that any pupil achieves his full potential".³⁵ However the Court accepted that the standard of care required would be higher than the reasonable parent standard because "the teacher may have or reasonably be expected to have specialist knowledge by reason of his wider experience and professional qualifications".³⁶ In other words, in assessing, reporting on and advising on the needs of learning disabled students, a classroom teacher or advisory teacher or educational psychologist will be expected to do what a reasonably competent similar professional would do in the circumstances because he/she is engaged in a skilled calling.

³³ Id at 667.

³⁴ Id at 669.

³⁵ Id at 657.

³⁶ Id at 669.

(iii) *injury/damage*

In a negligence claim the student will have to prove that the actions of the teacher caused injury or loss. In cases involving the doing of a negligent act, the most common form of injury is damage or injury to person or property, or it may encompass psychological injury. In some cases, however, the doing of a negligent act will result in economic loss only, and in England courts have tended to take the view that there should be no recovery for damage or injury in the form of pure economic loss caused by negligent acts.³⁷ In a misdiagnosis or mistreatment of a learning disability case, what is the nature of the injury or loss suffered?

The Court of Appeal acknowledged that the students' claims that they had suffered "upset" and "distress" were not the types of damage that are compensable under negligence law. However, in commenting on the view that dyslexia is a neurological dysfunction and is congenital and that therefore students could not recover for an existing congenital defect, the Court was prepared to consider that if a student could show that the "adverse consequences" of the dyslexia could have been but weren't mitigated by early diagnosis and provision of appropriate educational services and treatment, with resulting detriment to levels of educational attainment and employability, then the student could recover compensation.³⁸ The lawyers for the students contended that adverse consequences could include increased learning difficulties and behavioural disorders, and even identifiable mental illness.³⁹ The form of injury or loss in this case, it was proposed, was physical injury.⁴⁰

One of the members in the Court of Appeal doubted that a student without a learning disability could recover compensation on the basis of a claim that with better teaching he/she could have achieved higher academic standards, or improved examination results, or a more highly paid career. It was felt that in such a situation a student would not be able to establish any measurable injury other than economic loss, a form of loss not recoverable under English negligence principles.⁴¹ In other words, a claim based on an allegation that a teacher failed in

³⁷ See, e.g., *Murphy v Brentwood District Council* [1990] 2 All ER 908; Holloway, note 28 at 216. See, generally, Fleming, note 14 at 177-185.

³⁸ *E (a minor)*, at 658.

³⁹ *Id* at 660.

⁴⁰ Of course, the students would also need to establish on the evidence that the actions of the teachers concerned caused the injury or loss and that the injury or loss was of a type which was reasonably foreseeable. See, generally, Fleming, note 14 at 191-224.

⁴¹ *E (a minor)*, at 670 per Evans LJ. The scenario envisaged by Evans LJ has some similarity to the situation that confronted the court in *Peter W.* But Holloway, note 28 at 216, has argued that the comments are merely obiter dicta, since the case before the Court of Appeal involved a claim by a student suffering from congenital psychological damage which was not properly treated or which was caused as a result of misdiagnosis by expert advisers employed by the defendant.

his/her general duty to educate students would be unlikely to succeed under principles of English law.

V. Suing for Educational Negligence: An Australian Perspective

The decision of the English Court of Appeal in *E (a minor)* is an unprecedented decision. It is the antithesis of the direction American courts have ultimately taken in response to claims alleging educational malpractice, and it points the direction for courts in England when confronted with a claim alleging negligence in the recognition, assessment and treatment of a particular student's learning disability. It also puts Australian courts, as well as Australian education, on notice. It is true that in similar cases Australian courts are no longer obliged to come to the same conclusion as English courts.⁴² And it is not at all certain that an Australian court in a similar case would accept the reasoning put forward by the Court of Appeal. What is without doubt, however, is that there is a significant court decision which accepts the proposition that in principle there is no reason why negligence law should not be applied to education professionals who carelessly carry out tasks associated with teaching.

In 1983 a student sat his final secondary school examinations, his responses were marked, and his results notified to him and to the academic institution to which he had sought enrolment for the following year. Unfortunately his marks had been incorrectly calculated in a particular subject, with the result that a lower score than he actually earned was recorded. He missed out on a place at the academic institution to which he had sought entry. He initiated legal action, alleging a breach of the duty of care owed to him to exercise reasonable care, skill, diligence and competence in the conduct of the examination, the assessment of his papers, the calculation of his aggregate mark, and the notification thereof. The case was settled out of court.⁴³

A claim based in educational negligence has not yet been comprehensively examined or answered by an Australian court. However, the suggestion that a teacher could be sued for the negligent way he/she has gone about tasks associated with teaching has attracted

⁴² See, generally, R Vermeesch & K Lindgren *Business Law of Australia* (7th ed) Sydney, Law Book Co, 1992, 69-83.

⁴³ B Boer "Legal Rights and Obligations of Teachers" in R Chisholm (ed) *Teachers, Schools & the Law in New South Wales*, University of NSW Press, 1987, 20-21. More recently there has been national media coverage concerning a secondary school in coastal New South Wales where all students in the final English examination were notified of results that fell within the lowest 20 percentile range for the state; in all other subjects attempted by those same students, the marks indicated that the students fell within the top 20 percentile for the state. The thrust of much of the media coverage was that the situation involved a case of negligence in teaching the English curriculum.

considerable debate and discussion in Australia.⁴⁴ It has been argued that in principle and in practice there is no reason why negligent teaching, at least in its most blatant form, should not attract legal consequences. It has variously been 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),⁴⁵ 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.⁴⁶

It has also been noted that the policy considerations American courts have proffered as justification for their decisions in cases of educational malpractice would not necessarily hold sway in an Australian court. It has been argued, for example, that the changing legal climate in Australia where professional negligence claims are being increasingly litigated in the courts may well mean that the public interest is better served by Australian courts recognising claims in educational negligence.⁴⁷ Time and cost factors associated with court action in Australia are also more likely to dissuade speculative litigation, and so it would be unlikely that the judicial system would find itself swamped by cases based in educational negligence.⁴⁸ Certainly, some of the broader policy concerns raised by the American courts must also ultimately be addressed by Australian courts confronted with an educational negligence claim. Questions about whether courts have the necessary expertise to adjudicate educational negligence claims, and whether recognition of educational negligence would have a positive rather than a negative effect on the overall implementation of education programs,

⁴⁴ E.g., E Ackroyd "Teachers Beware! The Law is just around the Corner" (1986) 12 *Unicorn* 34; Boer, note 43; M Kirby *Legal and Social Responsibilities of Teachers* (unpublished, 1982); Nelson, note 18; Ramsay, note 4; Thompson, note 17; P Williams "Students at School: The Rights to Physical and Intellectual Well-being" (1992) 7 *Curriculum And Teaching* 81.

⁴⁵ C Williams & K Dillon *Brought to Book: Censorship & School Libraries in Australia* Melbourne, D W Thorpe & ALIA Press, 1993, 32.

⁴⁶ E.g., Ramsay, note 4; Thompson, note 17.

⁴⁷ See, generally, Thompson, note 17. Thompson places the policy objections raised by American courts into four broad categories: social and moral considerations, administrative considerations, economic considerations, and preventative considerations. While she sees some difficulties with some of these considerations, she concludes that the refusal to recognise a general duty to educate seems justified. On the other hand, she argues that the policy objections are not persuasive when applied to professional error claims: at 101.

⁴⁸ E.g., Whalley, note 24 at 205-206. Under the current scheme of court costs, for example, the principle of 'the loser pays' applies, unlike the American system where each party pays his/her own costs.

are significant issues in a country where the tradition has been to leave education to the better judgment of the educators.⁴⁹

How might an Australian court respond to a claim in educational negligence by a student such as Mark Christmas or E?

A. Establishing a Duty of Care in an Educational Negligence case

In the 1990s the High Court of Australia continues to explore the boundaries of the 'neighbour' test first propounded by England's House of Lords in 1932 as the basis for the existence of the duty of care owed by a defendant to a plaintiff under principles of negligence.⁵⁰ In essence, the High Court takes the view that a defendant will owe a duty of care to a plaintiff where there is a reasonably foreseeable risk of injury to the plaintiff as a result of the defendant's acts or omissions, but provided there is also a relationship of proximity between the plaintiff and the defendant.⁵¹ The requirement of a relationship of proximity is seen as "a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care" and calls into play considerations of policy.⁵²

⁴⁹ See, e.g., Ramsay, note 4 at 208-217. Ramsay points out, for example, that recognition of legal liability in a case of educational negligence can have a significant economic impact for education authorities in that it can require them to take out additional insurance cover and to divert financial resources to the development and implementation of injury prevention measures, which may or may not lead to improved teaching standards. He also argues, on the other hand, that in a sense recognition of educational negligence complements the values underpinning the system of compulsory education in Australia: at 214-215.

⁵⁰ In the famous case of *Donoghue v Stevenson* [1932] AC 562, at 580, Lord Atkin stated the duty of care test as follows:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

⁵¹ E.g., *Sutherland Shire Council v Heyman* (1985) 59 ALJR 564; *Jaensch v Coffey* (1984) 155 CLR 549; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Gala v Preston* (1991) 172 CLR 243. In *Sutherland Shire Council* at 595, Deane J defined proximity in the following terms:

The requirement of proximity...involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of a causal connection or relationship between the particular act or course of conduct and the loss or injury sustained.

⁵² *Jaensch*, at 441. For an examination of the developing law in Australia with respect to the duty of care in tort, see, e.g., S Quinlan and D Gardiner "New Developments with Respect to the Duty of Care in Tort" (1988) 62 *Australian Law Journal* 347; generally, Fleming, note 14 at 135-190.

Cases involving damage in the form of physical injury to the person or property of a plaintiff caused by some act of the defendant fall into a category of cases in which Australian courts have readily accepted that the requirement of proximity is satisfied. Thus, in an education context, where students at school suffer physical injury during recess for example, or while on school-sanctioned excursions, courts have concluded that a duty to take reasonable care for the physical well-being of those students was owed by the teacher because the student-teacher relationship was in existence.⁵³ The student-teacher relationship constitutes a relationship of proximity, primarily on the basis of the physical or geographical closeness between teacher and student. In cases where students have suffered physical injury because an education authority has not taken steps to ensure that reasonable care is taken for the students' physical well-being, courts have found liability on the basis of a breach of a non-delegable duty of care owed by the education authority, a duty separate and apart from that personal duty owed to students by teachers.⁵⁴ In these circumstances the relationship between the education authority and student is primarily a relationship of circumstantial proximity, arising out of the overriding relationship between an education authority and students entrusted to it. Policy reasons for the imposition of liability in such cases include the recognition that "the immaturity and inexperience of ...pupils and their propensity for mischief suggest that there should be a special responsibility on a school authority to care for their safety".⁵⁵

Cases involving damage in the form of economic loss rather than physical injury, on the other hand, fall into a novel category of cases in which Australian courts tread most cautiously. In these cases, the requirement of proximity together with policy considerations play a vital role in determining whether a duty of care is established. Recently the High Court has noted that "the policy considerations which are legitimately taken into account in determining whether sufficient proximity exists in a novel category will be influenced by the courts' assessment of community standards and demands".⁵⁶ Such policy considerations include, for example, the law's concern to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class".⁵⁷ The Court also noted that the effect of such policy considerations is that

⁵³ See notes 11-13 and accompanying text. See also *Geyer v Downs* (1978) 52 ALJR 142, a decision of the High Court of Australia in which it was established that the duty owed by a teacher to take reasonable care for the physical well-being of students arises whenever and wherever the student-teacher relationship is in existence.

⁵⁴ See notes 15-16 and accompanying text.

⁵⁵ *Commonwealth of Australia*, at 755. See also A Khan and P Williams "The Liability in Negligence of Teachers and Schools in Australia" (1993) 5 *Education And The Law* 155.

⁵⁶ *Bryan v Maloney* (1995) 69 ALJR 375, at 377.

⁵⁷ *Id.*

the categories of case in which the requisite relationship of proximity with respect to mere economic loss is to be found are properly seen as special. Commonly, but not necessarily, they will involve an identified element of known reliance (or dependence) or the assumption of responsibility or a combination of the two.⁵⁸

In cases involving the giving of negligent advice or information where the damage suffered was pure economic loss, the element of reliance has played a vital role in establishing the requirement of proximity. Thus, where a land developer purchased land in reliance on a certificate issued by a local government authority to the effect that the land was not affected by road widening proposals but then suffered financial loss on his investment because the land was indeed subject to such proposals, the High Court concluded that a duty of care was owed.⁵⁹

But when the economic loss results from a negligent act or omission outside the realm of negligent advice, the difficulty in establishing proximity is very real because of the likely absence of reliance. Nonetheless, there have been several decisions of the High Court in which it has been concluded that the necessary requirement of proximity was satisfied. In one case, the plaintiff recovered compensatory damages for damage in the form of economic loss when the defendant ruptured oil pipes in which the plaintiff had no proprietary interest but which the plaintiff used to transport oil. The High Court accepted that a duty of care was owed by the defendants to the plaintiff primarily on the basis that where a defendant has the knowledge, or means of knowledge, that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a result of the defendant's actions, the required element of proximity exists.⁶⁰ In another case, defendant

⁵⁸ Id.

⁵⁹ *Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 55 ALJR 713. The approach adopted by the High Court was expressed by Mason J at 723 in the following broad terms:

[W]henever a person gives information or advice to another upon a serious matter in circumstances where the speaker realises, or ought to realise, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to act on that information or advice, the speaker comes under a duty to exercise reasonable care in the provision of the information or advice he chooses to give.

The Court noted that no distinction could be drawn between the giving of advice and the giving of information, and it argued that there was no reason to exclude from liability those who give negligent information or advice in the course of discharging governmental or administrative functions: at 723.

Cf *San Sebastian Pty Ltd v Minister Administering the Environmental Planning & Assessment Act 1979* (1986) 162 CLR 340, where a state planning authority was held not liable to a developer for 'study documents' in the absence of specific representations necessary to establish the existence of a duty of care.

⁶⁰ *Caltex Oil v The Willemstad* (1979) 136 CLR 529.

solicitors who had retained the executed will of a long-standing client for safekeeping but who had not contacted the plaintiff executor/principal beneficiary to inform him of their client's death until five years after the client's death were held liable for the economic loss suffered by the plaintiff when a house, the principal asset of the estate, had fallen into disrepair. The Court saw the case as one in which the respective elements of reliance and assumption of responsibility combined with foreseeability of a real risk of economic loss to give the professional relationship of solicitor and client the character of a relationship of proximity with respect to the economic loss. The relationship of proximity extended, in the Court's view, to the client's legal personal representative and principal beneficiary of the client's estate.⁶¹

In a very recent case where a builder had installed inadequate footings in a house he was building with the result that some years afterwards the fabric of the house was seriously damaged leading to a diminution in value of the house for the eventual owner (not being the builder's client), the High Court very cautiously concluded that the builder did owe a duty of care to that eventual owner.⁶² The Court argued that the relationship between the appellant, the eventual owner of the house, and the respondent builder was marked by proximity in a number of respects and that the relationship of proximity was not extinguished by either lapse of time or change of ownership. The relationship of proximity was seen as existing because, for example, the house itself was seen as a "connecting link" between the eventual owner of the house and the builder, and because "the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between builder and first owner, marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss".⁶³ The Court also argued that policy considerations supported, rather than militated against, recognition of a duty of care in the circumstances. It noted, for example, that

where the particular kind of economic loss is that sustained by an owner of the house on the occasion when the inadequacy of the footings first becomes manifest, there is no basis for thinking that recognition of a relevant relationship between builder and the owner would be more likely to give rise to liability 'in an indeterminate amount...to an indeterminate class' than does recognition of such an element of proximity in the relationship between builder and first owner.⁶⁴

⁶¹ *Hawkins v Clayton* (1988) 164 CLR 539.

⁶² *Bryan*.

⁶³ *Id* at 382.

⁶⁴ *Id* at 381.

One of the significant features of the cases before the English Court of Appeal was that the parents of the students had continually raised their concerns about their child's learning and behavioural problems with various people either in or connected with the schools their children attended. Both E and Mark Christmas in particular had been identified by parents and/or education professionals as in need of assessment, evaluation and assistance in their learning. In effect, each of the plaintiffs had been singled out from the classes of which they were members and had then been specifically and individually dealt with by education professionals in ways that were allegedly negligent. Each of the plaintiffs had sought the professional guidance and advice of specific education professionals, and in each case specific education professionals had assumed a responsibility for each student's problems. It was claimed by E and by Mark Christmas in particular that as a consequence of these negligent acts, they had suffered physical injury for which they were seeking compensatory damages.

In similar circumstances, it would be difficult for an Australian court to conclude that no duty of care was owed. There would be a foreseeable risk of injury to the particular student if an educational professional such as an advisory teacher or educational psychologist was to act carelessly in relation to the student. There would also be a relationship of proximity between the particular student and specific education professional because the student had been singled out and then dealt with in an individual way. And it would seem that policy considerations would support, rather than militate against, recognition of a duty of care in such circumstances. Dealing with one student in a specific and individualised way, rather than as a member of a whole class of children in a general way, is unlikely to result in liability in an indeterminate amount to an indeterminate class. Compensatory damages flowing from physical injury are recoverable under principles of negligence law, and so a court could apply the normal principles of assessment of damages to a claim for financial compensation, with respect to loss of future earnings for example and the cost of remedial teaching.

An issue for a student wishing to sue for educational negligence in an Australian court will be classifying or defining the injury or damage he or she has suffered. The English Court of Appeal accepted the in-principle argument that the form of injury suffered by the students was physical injury consequent upon the doing of an act. The Court was obviously conscious of the general position in England that there is no recovery for damage or injury in the form of pure economic loss caused by negligent acts.⁶⁵ However, it would seem that an Australian court is not similarly constrained. Where the form of injury suffered by a learning disabled student is economic loss flowing from an incorrect assessment or inappropriate treatment of

⁶⁵ See note 37 and accompanying text.

the student's learning problems for example, an Australian court would undoubtedly tread most cautiously before concluding that a duty of care existed, but such a conclusion does seem to be open to a court in this jurisdiction. Certainly, policy considerations would play a pivotal role in establishing the required relationship of proximity, as they have done in previous cases,⁶⁶ but injury in the form of economic loss is not a bar to suing in negligence in Australia. It would be possible to accept that a relationship of proximity existed. By singling out the student for special testing and assessment because of a professional perception that the student might have a particular learning disability, or in subjecting one particular student, and not others, to a specific leaning regime geared to the student's assessed needs, is there not an undeniable assumption of responsibility by the education professionals with respect to the student and a clear reliance by the student on the skills and knowledge of such persons? And how might a court define relevant policy considerations? It would seem difficult to envisage such a situation giving rise to liability in an indeterminate amount to an indeterminate class. And if policy considerations should fundamentally be concerned with community standards and demands, it would not make sense to adopt a stance that leaves the teaching profession immune from liability for educational negligence when underpinning the phenomenon of the legalisation of Australian education is the community's expectation that teaching, like other professions, must be called to account for the careless performance of their skilled calling.

Defining the type of injury or damage suffered by a student as a result of a misdiagnosis or mistreatment of a learning disability raises interesting issues. In *E (a minor)*, the Court of Appeal accepted that "upset" and "distress" did not amount to injury, and an Australian court would undoubtedly take the same view. Is 'diminished intellectual capacity' or a 'worsening retardation in the learning process' a form of physical or psychological injury as defined under principles of negligence law? Clearly, expert psychological and medical evidence would be called into play not only to assist in establishing the existence of physical or psychological injury or damage but also to define it. Responding to the argument that the plaintiff students in *E (a minor)* had not suffered injury for which compensatory damages could be awarded, the Court of Appeal was not prepared to agree that learning difficulties and behavioural problems did not amount to physical or psychological injury.⁶⁷

If the type of damage suffered cannot be classified as physical injury, can it be classified as economic loss? In cases of economic loss as a result of the doing of an act, the plaintiff has suffered no physical injury to the person or property but is financially worse off as a result of

⁶⁶ See notes 56-64 and accompany text.

⁶⁷ *E (a minor)*, at 660.

the defendant's actions. In *Bryan* ⁶⁸ the High Court classified the damage as economic loss in the form of a diminution in the value of the house. In *Caltex Oil* ⁶⁹ the economic loss was the expenditure incurred in arranging alternative means of transporting oil. In *Hawkins* ⁷⁰ the economic loss was in the form of waste of an asset and costs incurred in repairing a house. In such cases, the economic loss was in a form that was concrete and calculable and identifiable.⁷¹ Does a student who uses a system of free compulsory education suffer economic loss if he or she is individually and specifically misdiagnosed as not suffering from a learning disability? Diminution in the value of a free education is hardly a concrete and calculable form of damage or injury. Assuming it can be said that it is the student who incurs it, could it be argued that expenditure in arranging alternative treatment for his/her learning disability by a private tutor constitutes damage in the form of economic loss? Applying the reasoning adopted in *Caltex Oil*, the need for private tuition in such circumstances flows directly from the fact that the student was singled out and received careless treatment at the hands of education professionals who had the knowledge, or the means of knowledge, that the student would suffer financial loss as a consequence of careless diagnosis or treatment of the student's learning disability.⁷²

There have been cases in which Australian courts have acknowledged that reliance by one person on the advice or information provided by another can give rise to a duty of care and that economic loss as a result of the giving of negligent advice or information is recoverable under Australian legal principles.⁷³ In the light of these cases it has been suggested that an action in negligent advice might lie against education professionals, for example, who advise

⁶⁸ Note 62, at 380. Other members of the Court, however, felt that it was difficult to define the type of damage as other than physical damage to property: at 391, per Brennan J.

⁶⁹ Note 60.

⁷⁰ Note 61.

⁷¹ See, generally, Fleming, note 14 at 177-186.

⁷² See, e.g., Thompson, note 17 at 106-107. A court, having found for a plaintiff, must also assess the quantum of damages. In *E (a minor)*, Evans LJ noted that one of the heads of damages being sought by two of the students was special damages representing the cost of education in private schools. He saw that as a difficulty since the fees were paid by the parents, not by the students, but he also thought that such a difficulty could be overcome: at 671.

⁷³ See note 59 and accompanying text. The giving of advice can extend, it seems, to the handing out of application forms. In *Buksh v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 24 ALD 433, the Federal Court of Australia took the view that when the Department of Immigration handed to a person an incorrect form after having invited certain non-residents to submit applications in order to clarify their resident status, the Department fell under a duty to take reasonable care that the forms distributed were the correct forms. Recently, it has also been reported that a school counsellor was being sued by a student who failed to obtain a place at university because the school counsellor had incorrectly advised the student about the prerequisites for admission to university. The outcome of this case is not known. See N Milne *Professional Liability of Teachers* (unpublished, 1989).

parents that their child's progress at school is satisfactory when it is not, and that in reliance on that advice, parents choose not to arrange additional private tutoring for their child.⁷⁴ In such a case, it would seem that the economic loss would be a loss suffered by the parents and that it would be in the form of expenses incurred in obtaining and paying for additional private tuition once the child's problem is addressed.

B. Defining the Standard of Care in an Educational Negligence case

One of the matters that confronted the Court of Appeal in *E (a minor)* was how to describe the standard of care of education professionals when identifying and responding to the needs of a learning disabled student. In cases involving physical injury to students at school, the traditional approach of English courts, and indeed of some Australian courts, has been to describe the standard of care by reference to what a "reasonable father" or "reasonable parent" would have done in the circumstances.⁷⁵ More recently, however, the Australian High Court has moved away from the "reasonable parent" standard and has stated its preference for a standard of care described in terms of what a "reasonable teacher" would do in similar circumstances.⁷⁶

In *E (a minor)* the Court of Appeal did not hesitate to describe the standard of care of teachers as one consistent with their skilled calling, requiring them to show reasonable care and skill befitting their professional experience and qualifications. Such a standard puts teachers on the same footing as other professionals whom the law expects to carry out their tasks in a way that reasonably careful and competent members of their profession would do. In carrying out a task or in dealing with a client, a professional person has some discretion about how best to tackle the task or how best to respond to the client's needs. It is only when that professional person takes a course of action that no reasonably careful professional person would take in similar circumstances that the law would say the professional person has fallen below the required standard of care.⁷⁷

⁷⁴ E.g., Ramsay, note 4 at 196-198; P Williams "Legal Dimensions to the Teaching Process: A Discussion Paper" in *PEN 83* Newtown NSW, Primary English Teaching Association, 1991; Thompson, note 17 at 107. Thompson has suggested, for example, that it might be possible to argue that misclassification of a student, when notified to parents of the student, takes the form of negligent advice given in a situation where the teacher knows, or ought to know, that the parents were reliant on the teacher's skill and experience: at 107.

⁷⁵ It was argued, for example, that because teachers stood *in loco parentis*, teachers were required to do what a reasonable parent would do when looking after children. See, e.g., *Williams v Eady* (1893) 10 TLR 41; *Kretschmar v The State of Queensland* [1989] Aust Torts Repts ¶ 80-272; *Miller*. See also Khan, note 31; Khan and Williams, note 55.

⁷⁶ See, e.g., Geyer; *Commonwealth of Australia*.

⁷⁷ Holloway, note 28 at 215; Ramsay, note 4 at 103.

While the question of whether teaching is a profession is a divisive one,⁷⁸ there is no reason to suggest that the Australian High Court would disagree with the views expressed by the Court of Appeal. The reasonable teacher standard adopted by the Australian High Court in relation to physical injury cases in effect constitutes an acknowledgment that teaching is different from parenting, and it reflects a standard of care definable by reference to the occupational expectations, experiences, skills and qualifications of those who teach in schools.⁷⁹ Establishing that a particular advisory teacher or school psychologist, in dealing with a learning disabled student, did not do what a reasonably competent and similarly skilled teacher or psychologist would have done in the circumstances would simply require evidence of how the particular advisory teacher's peers, or school psychologist's peers, would have dealt with the student. And how such a peer would have acted could be determined by evidence from experts, as well as by an analysis of relevant school-based administrative procedures, legislative regulations and, perhaps, professional associations' codes of practice.⁸⁰

C. Summary

Should an Australian student take heart from the English decision in *E (a minor)* and attempt to sue for the tort of educational negligence, an initial issue for an Australian court will be to determine the existence of a duty of care owed by particular education professionals to the student. Cases before the High Court of Australia indicate that proximity, together with its inherent notions of policy, are crucial in determining that a duty of care is owed. These same cases indicate that while policy considerations require the drawing of a distinction between damage in the form of physical injury to the person and damage in the form of economic loss, classifying the damage as economic loss is not a bar to suing under principles of Australian negligence law. In addition, the High Court, it would appear, has already intimated its acceptance of the proposition that teachers in fulfilling their occupational duties are required to do more than the reasonable parent or, indeed, the reasonable man. It is therefore unlikely to be perturbed by the argument that in diagnosing and treating learning disabled students, teachers must comply with a standard of care consistent with their skilled calling.

Policy considerations will play a vital role in an Australian court's determination of whether a particular student should be able to recover damages on the basis of a claim in educational negligence. In a number of recent cases the High Court has been concerned to ensure that acceptance of a claim for damages in novel situations does not lead to the imposition of liability in an indeterminate amount to an indeterminate class. To this end, and having regard

⁷⁸ See, e.g., Thompson, note 17 at 102-103.

⁷⁹ See, e.g., Ramsay, note 4 at 101-105.

⁸⁰ Thompson, note 17 at 103.

to some of the control devices it sees as being inherent in the notion of proximity, the High Court has decided that in some situations involving economic loss, a duty of care can be established. In view of these recent expositions on the duty of care by the Australian High Court, it seems reasonable to suggest that a claim in educational negligence and involving a case with some similarity to that of *E (a minor)* would be arguable before an Australian court.

VI. Conclusion

During the past decade there has been considerable discussion in Australia about whether teachers should be held legally liable for negligent teaching. Since the 1970s various attempts have been made in the American courts to hold teachers legally accountable for the way they have gone about tasks associated with teaching in schools, but the courts in that country continue to refuse to accept educational malpractice as the basis of a claim for compensation. In contrast, the English Court of Appeal has recently decided that claims based in negligence and alleging a failure on the part of teachers to identify and respond to the needs of certain learning disabled students were not unarguable under principles of English law.

In Australia the legalisation of education has arrived. The law is playing an increasingly active role in education, and the momentum is unlikely to stop. Throughout Australia the law already accepts that students who suffer physical injury because of the negligent supervision in schools can sue for financial compensation. It may well be that in the not too distant future it will also accept that where a teacher or an advisory teacher or an educational psychologist fails to identify and meet the educational needs of a student with a learning disability, the student may seek to recover compensatory damages through the courts. Of course, such a student would be confronted with a number of hurdles, not the least of which would involve proving what the student asserts. But unlike his/her American counterpart, the Australian student would appear to have every reason to be optimistic of success.

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