Judging the educators: The forensic evaluation of academic judgment

Journal Item

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JUDGING THE EDUCATORS: FORENSIC EVALUATION OF ACADEMIC JUDGEMENT

There has recently been a significant spate of cases of educational institutions being sued by dissatisfied students.[1] For decades we have had an established arena of professional negligence litigation into which physicians and even lawyers have been dragged as defendants (and sometimes ruined), but where, hitherto, teachers and lecturers have hardly ever been summoned. Increasingly, academic judgement is a justiciable issue. Additionally, lawyers are being increasingly brought into the educational arena's domestic hearings. Eversheds, the national firm of solicitors with a leading education practice, has a wide experience of such disputes. That firm has observed[2] that, apart from any growth in trial work, there has been a definite increase in "semi-formal complaint" where students instruct lawyers to pursue grievances against institutions, and to represent them at hearings.

In 1996, Simon Zekaria issued a writ against the Chancellor, Master and Scholars of the University of Cambridge alleging breach of contract and negligence.[3] Mr Zekaria had studied for his GCSE examinations at University College School in London, but had received a low grade from the Midland Examining Group (now the Cambridge group) for the English Literature paper he sat in June 1994. He and his teachers were expecting a high grade, and the paper was re-marked by the Board on application by the School but a D grade was confirmed. The disagreement continued to the point of a third marking of the paper in June 1995 but the

writ claims that this too was unsatisfactory. The writ alleges that the examinations board was cursory and superficial, and says that, as a result, Mr Zekaria was deprived of the opportunity to study English at his first choice of university.

A central claim of the Zekaria case that will have to be determined by the court is whether, on the balance of probabilities, it is true that the candidates papers were not marked fairly and with reasonable skill and care.[4]

This area of law is governed by one of the most famous principles in English law: the duty of a person to exercise reasonable care towards his "neighbour". This rule became lapidary in a famous case in 1932 in which a woman successfully sued a manufacturer of ginger beer, having suffered illness after she drank from a bottle containing a decomposing snail. The House of Lords decided that ,whether or not we have contracts with them,[5] we owe our neighbours, people who are likely to be affected by our acts and omissions, a duty to take reasonable care. The manufacturing process of the ginger beer company had fallen below such a standard.

Lord Atkin famously noted in *Donoghue v Stevenson*[6] in 1932 that:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."[7]

Since that time the law of civil negligence has expanded dramatically in its application to social

affairs. In *Hedley Byrne v Heller & Partners*[8] in 1964, the House of Lords extended the duty of care to make pure economic loss recoverable (ie where financial loss was not consequential upon physical injury or damage to property). The courts have, with relative ease, been able to define the standard of care required from people doing everyday things like driving a car or attacking a door handle to a door. A greater challenge, however, has come from the need to formulate with precision the standard required from experts like doctors and engineers. The requirement is made not only by the common law but also by statute. Section 13(1) of the Supply of Goods and Services Act 1982 requires that in a contract fro the supply of a service a contract term be implied to the effect that the service be carried out with "reasonable care and skill".[9] Experts are required to exercise a degree of care and skill that is reasonable in their profession. A professional will not be negligent simply because a small body of experts in the same field do not endorse the defendant's method of work.

An early case dealing with the level of professional standards required by law was *Lanphier v Phipos* in 1838[10]. In that case, involving an allegation of poor treatment by a doctor, Chief Justice Tindal said that:

> "Every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and

competent degree of skill..."[11]

The application of that principle to those engaged in the processes of education and examining is clear in that a single band of skill is described. This principle was further detailed and confirmed in *Bolam v Frien Hospital Management Committee*[12] in 1957, in which McNair J., expressed a formula which has become adopted as the modern benchmark for the standard of skill required of experts. The case concerned the conduct of a doctor performing electro-convulsive therapy, but the formula has been recognised as the one to be used in respect of other fields of expertise.[13] McNair J., said that in the ordinary case which does not involve any special care or skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do. In the ordinary case the relevant standard is that of "the ordinary man", that is, "the man on the top of the Clapham omnibus".[14] But, McNair J., went on:

> "where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not posses the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."[15]

Particular difficulties will arise if the judiciary has to cultivate a detailed development the law of negligence in relation to the delivery of education. One challenge will come from the rule that although deviation from proper practice generates liability, the nature of "proper practice" is affected by time and place. As Tony Weir, one leading authority in the field, has observed: "one cannot demand from a garage in the West Highlands of Scotland the same standard of expedition and professional competence which can be hoped for in the metropolis".[16]

One case (actually about ear-piercing) is instructive on the point that the courts accept there can be a sliding-scale of lawful standards within the boundaries of professionalism. In *Philips v. William Whiteley*[17] in 1937, a woman became ill after what she alleged was negligently-performed ear-piercing carried out by a man who worked for a London jewellers. The jewellers to whom Mrs Philips went, Whiteleys, did not employ anyone competent to pierce ears but sub-contracted with a man, Mr Couzens, from another jewellers to do the operation. Mr Couzens arrived at Whiteleys on the appointed day. He asked for a glass of water into which he put lysol, a disinfectant. He used this to disinfect his fingers and the instrument he used to pierce Mrs Philips' ears. He also gave evidence that he had disinfected the instrument in a flame before packing it into his back when leaving for Whiteleys.

Two days later, and in accordance with a plan made weeks earlier, Mrs Philips went into hospital for a major operation to remove her gall bladder. During her stay her ears troubled her, and then she suffered a very bad neck infection which required surgery to open and drain a very painful abscess.

Mrs. Philips alleged negligence against Mr Couzens, and thus Whiteleys who were legally responsible for his work, in that he failed to render sterile the piercing instrument that he used. In his judgement, finding for the defendants, Goddard J. said that while it was admitted that Mr Couzens did not use the same precautions of procuring an aseptic condition of his instruments as a doctor or a surgeon would use, he could not be called upon to use that degree of care:

> "Whiteleys have to see that whoever they employ for the operation uses the standard of care and skill that may be expected from a jeweller, and, of course, if the operation is negligently performed - if, for instance, a wholly unsuitable instrument were used, so that the ear was badly torn, or something of that sort happened - undoubtedly they would be liable. So, too, if they did not take that degree of care to see that the instruments were clean which one would expect a person of the training and the standing of a jeweller to use. To say, however, that a jeweller warrants or undertakes that he will use instruments which have the degree of surgical cleanliness that a surgeon brings about when he is going to perform a serious operation, or indeed any operation, is, I think, putting the matter too high....*I do not think that a jeweller holds himself out as a surgeon or professes that he is going to conduct the operation of piercing a lady's ears by means of aseptic surgery*, about which it is not to be supposed that he knows anything."[18] [emphasis added].

It is quite possible that this principle could apply to pedagogic and examination matters. Will the standards to be expected of academics and examiners depend upon the level of their experience and qualifications? There is now, for example, an intense and intensifying commercial competition between GCSE and A-level examination boards to recruit more examination centres. It is foreseeable that sooner or later an examination board might be tempted or pressured into cutting some of its overhead costs by reducing the number of examiners for each thousand of its scripts (thus increasing the workload and strain on any given examiner) or try to reduce its operating costs by reducing the number of senior, richly-experienced, and highly-qualified examiners. Looking at the law as expressed in *Philips*, it is a moot point whether such reduced standards on the part of an examination board would have a significant legal implication; but, in any event, the possibility of an increased legal jeopardy cannot be discounted.

The cases of alleged medical negligence show that the courts have experienced great difficulty in evaluating the conduct of specialists in an esoteric field. Some educational litigation revolves around points of alleged organisational or procedural negligence (in which the courts are experienced arbiters) but many grievances from pupils and students today concern accusations of bad academic judgement in relation to grades for assignments, dissertations, examinations, and degree classification. As and when the courts have to judge the quality of academic opinion the issues will be possibly even more vexed than those concerning the clinical judgement and performance of physicians.

A science like medicine (*pace* those who emphasise the art of medical practice) can at least, in

many cases, demonstrate conclusively that there are good and bad ways of doing things. Thus, it is better to inquire about allergy before prescribing an antibiotic; it is better to lie a patient on his back than on his front when performing cardio-pulmonary resuscitation, and so forth. When one turns from Medicine to Economics, History, Theology, or Sociology it can immediately be seen that good theories and basic assumptions within the subjects are not so conclusively demonstrable in the same way. If the courts are struggling to make decisive and fair judgements in medical cases, they will perhaps become involved in some awfully fraught, even hopeless wrangles on scholarly matters of a more nebulous or political nature.[19] The true peril of this quagmire can be appreciated when one remembers that even on current medical cases where the standard practice of a significant body of practitioners can be established, the courts have still not demurred from ruling that such a group of doctors was wrong. Thus in *Newell v Goldburg*[20] it was held that by 1985 a doctor who did not warn a vasectomy patient of the risk of natural restoration (of the surgically severed vas), and thus the risk of pregnancy, could not be considered as acting reasonably or responsibly, despite the fact that many doctors did not, at the time of the case, give such warnings.

Conversely, it was held by the Court of appeal in *Defreitas v O'Brien and Another*[21] that notwithstanding evidence that a relatively small body of surgeons who regularly performed a certain operation would apparently have operated in the circumstances which arose in this case, it was still open to the judge to find that such a small percentage of surgeons constituted a "responsible" body of practitioners.[22]

As Davies has very clearly shown[23], the English courts have tended to resolve that, provided

institutions follow the rules of natural justice in the way they examine or deal with appeals, they may retain autonomy in respect of their academic judgements. The position is best encapsulated in the perspicacious judgement of Mr Justice Sedley in *R v Higher Education Funding Council, ex parte Institute of Dental Surgery*[24]. He noted that the court can only query an evaluation made of student work by academics where there are grounds for doubting the basis of such an evaluation. He stated:

> "We would hold that where what is sought to be impugned is on the evidence *no more* than an informed exercise of academic judgement, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of the candidate's written papers something more than an informed exercise of academic judgement. Where evidence shows that something extraneous has entered into the process of academic judgement, one of two results may follow depending on the nature of the fault: either the decision will fall without more, or the court may require reasons to be given, so that the decision can either be seen to be sound or (absent reasons) be inferred to be flawed. But purely academic judgements, in our view, will as a rule, not be in the class of case...where the nature and impact of the decision itself call for reasons as a routine aspect of procedural fairness."[25]

Furthermore, as Davies has argued,[26] each subject has its own specialist language, rather than

one for any academic profession as a whole, and "divisions between subject disciplines may be seen as constituting individual professions within academia". The clearer the existence of such specialism, the more difficult the task of judicial re-evaluation of professional opinion. Another Divisional Court judicial review decision, *R v Manchester Metropolitan University, ex parte Nolan*[27] also recognised the sovereignty of the examination board on matters of pure academic opinion. When courts in other jurisdictions have occasionally succumbed to re-evaluating student work with the help of experts for both the complainant student and the examination board the mission has usually begotten more problems than it has solved. In one case cited by Davies[28], for example, the American court decided that an academic decision was `arbitrary and capricious'

having heard evidence from both sides about the grades awarded to examination papers. In court, however, the experts attributed widely disparate marks to the same piece of work - grades ranging from 57 per cent to 94 per cent.

Two factors seem to be involved in the steady rise in legal actions involving educational issues. The first is the general context of society becoming more rights-conscious and litigious. This is the age of the Charter and a profusion of media legal advice columns and programmes. Charters have also been issued by the Department for Education and, by Universities themselves to assist

in the competition to recruit good students.

The second is the growing personal financial stake in education contributed by students and their parents. Many students now work long hours to fund their studies, or are supported by parents who make great financial sacrifices. It has been estimated that the average cost of a degree to a student today is over £10,000. According to a recent survey by Barclays Bank, the average debt of finalists in 1996 was up 32 per cent on last year. Another recent piece of research by the Policy Studies Institute (based on interviews with 1,971 students at 73 institutions) found that the average student received £3,615 income in the 1995/6 academic year and spent £5,091.[29]. The shortfall was funded by student loans, commercial credit, savings, and delayed payment of bills. The study also found that half of all students questioned worked in employment for 10 hours per week. Mature students were in a worse position than seven years ago and were generally finding it very difficult to make ends meet. In such a setting, student dissatisfaction with course quality or with exam results is more clearly foreseeable than it was twenty years ago.

Litigation against universities is not just confined to actions for negligence or breach of contract. In 1996, a ten year campaign by a former Bristol University student ended when his case was rejected in the Court of Appeal. In 1986, Francis Foecke was originally awarded a first-class degree in mathematics. He had not been regarded by his tutors as an especially bright student and yet, although he took 13 finals papers (an unprecedented number), he gained first-class results in all. An inquiry was ordered after the discovery that his answers exactly mirrored the model answers prepared by the examiner, including some errors, and Mr Foecke first-class

degree was withdrawn. Mr Foecke, who spent £50,000 pursuing various legal cases including a libel action against the university, has now indicated he may take the matter to the European courts.[30]

Another recent litigation development with potentially significant consequences in the realm of education is the legal action of two former pupils who are suing their schools for having given them a poor education.[31] The claims are based upon the reports of governmental inspectors which `failed' certain schools in a national survey. One case concerns an 18-year-old girl who left school three years ago with no GCSEs. The other case involves an 18-year-old boy who received poor grades despite being expected by some to do very well. The litigants are suing for the cost of tuition and maintenance while they study to re-take exams, and for loss of earnings due to delayed entry on to the jobs market. If successful, the case could constitute precedent for children in similar positions at all schools failed by government inspectors.

During the last twenty years the volume of litigation against doctors, and health authorities has grown significantly. There are currently about 20,000 claims outstanding against the NHS. About 2,500 have a value in excess of £100,000. As a result the cost of medical insurance for doctors has soared and the art of "defensive medicine" has burgeoned, whereby practitioners are encouraged to quickly resort to a procedure which will leave them least open to legal attack even if such a procedure is drastic and not necessarily in the best interests of a patient. The proportion of babies delivered by Caesarian, for example, has quadrupled since 1977.[32]

The immunity from court actions enjoyed by lecturers and examiners has resulted from social axiom rather than legal rule, but student indulgence or reverence of lecturers is not what it used to be. If educational litigation goes through as exponential a growth as medical litigation then we might well see educators having to take out legal insurance and practices like "defensive grading" and "defensive lecturing". Whether these will be conducive to the public good is a matter of debate.

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NOTES

1. See, for example, *The Times Higher Education Supplement*, 12 July, 1996; *The Independent* 22 August, 1996; *Law Society Gazette*, 25 September 1996, p.12; *The Independent*, 2 December,

1996; *The Times*, 31 July, 1996; *The Guardian* (Higher Education), 13 February, 1996; *The Times*, 7 October, 1996.

2. Report, collated by Nottingham office, January 23, 1997. The firm acts for over 20 universities and over 200 further education colleges.

3. *Daily Telegraph*, August 6, 1996

4. The law can also be called upon by examiners accused of being unduly generous to the candidates whose papers they mark. Five senior English examiners alleged to have favoured public school A-level candidates in the way scripts were graded have threatened legal action (for defamation) against the Schools Curriculum Assessment Authority (SCAA). A routine check by the SCAA of the marking of English examinations set by a board whose candidates are drawn mainly from the public school sector, found that some candidates had their original marks raised by the board by two grades in line with their school's predictions. See *The Observer* 12 January, 1997.

5. *Donoghue v Stevenson* [1932] All ER 1, *Per* Lord Atkin at 19C.

6. [1932] All ER 1

7. *Ibid.,* at p. 11

8. [1964] AC 465

9. This provision applies to universities and probably schools by default. Section 14(2) of the 1982 Act allows the Secretary of State to make orders excluding certain service providers from the scope of s 13; hitherto, however, no Statutory Instrument has been enacted to exclude educational services.

10. [1835-42] All ER 421 (1838)

11. *Ibid.*, at 422

12. [1957] 2 All ER 118

13. see *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635

14. [1957] 2 All ER 118 at 122

15. *Ibid.*

16. *A Casebook on Tort*, 8th ed., 1996, p. 173, London: Sweet and Maxwell

17. [1938] 1 All ER 566

18. [1938] 566 at 568G-569D

19. One reply to this point would be that the courts have always been involved in deciding matters of a social and political nature even if they have sometimes not been self-conscious of this role, or have not been explicit about it. See: *The Politics of the Judiciary*, JAC Griffith, 1995, London: Fontana; *Sourcebook on the English Legal System*, G. Slapper and D. Kelly, chapter 1, 1996, London: Cavendish Publishing.

20. [1995] 6 Med LR 371

21. [1993] 4 Med LR 281

22. *Ibid.,* at 297 col. 1, and 298 col. 1

23. Mark R Davies, *Universities, academics and professional negligence*, Professional Negligence, Vol. 12, No.4, 1996 102-115.

24. [1994] 1 ALL ER 651

25. *Ibid.*, at 670

26. *Op. cit.* at p. 103

27. 14 July 1993, *The Independent*

28. *State ex rel. Nelson v Lincoln Medical College* 81 Neb 533, 116 NW 294 (1908); cited by Davies, *op. cit.* at p.107.

29. *Student Finances: Income Expenditure and Take-Up of Student Loans*, Claire Callender and Elaine Kempson, 1996, London: Policy Studies Institute.

30. *Times Higher Educational Supplement* 2 August, 1996

31. *The Observer, The Sunday Times,* 1 December, 1996

32. *The Guardian,* Clare Dyer, 16 September, 1996