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Foreign Developments

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LIABILITY OF TEACHERS AND SCHOOLS FOR NEGLIGENCE IN ENGLAND

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Under common law both in England and the U.S.A., a teacher or school is under no automatic legal liability merely because a pupil in school, or under a teacher's control suffers injury.[1] When a pupil is injured, the law demands proof of negligence on the part of the teacher or school on order to hold the teacher or school liable.[2] Negligence, in this context, means that (i) a duty of care is owed to the pupil, (ii) there is breach of duty, and (iii) the breach of duty directly results in the injury or damage suffered by the pupil.[3] The standard of care expected of a teacher was explained by Lord Esher in *Williams v. Eady*:[4]

> [t]he schoolmaster was bound to take such care of his boys as a careful father would take of his boys and there could be no better definition of the duty of the schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to mischievous acts and their propensity to meddle with anything that came in their way.[5]

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1. Harman, J., in Cooke v. Kent County Council, 82 L1.L. Rep. 823 (1949), made the statement, which is true even today, that "the notion which has grown up that whenever anybody suffers injury he must necessarily be able to get compensation from somebody else must not be encouraged." The widespread use of insurance against personal injury by the insured may have modified that statement somehow. However, it remains true in other injury cases: one must prove the legal requirements of negligence in the law of torts before being successful.

2. A school or owners of the school or education authority may be held liable for the negligence of a teacher in their employ under the principle of "vicarious liability."

3. A teacher is considered by the law as being *in loco parentis,* a term that describes the standard of care that the law demands from a teacher, i.e. the standard of a reasonably careful parent. *See* ADAMS, LAW AND TEACHER TODAY; HART, THE HEAD'S LEGAL GUIDE; EDUCATION LAW (with 1989 supplement), (Nice ed.).

4. 10 T.L.R. 41 (C.A. 1983). *See also* Ward v. Hertfordshire County Council, 1 All E.R. 535 (1970); Martin v. Middlesborough Corp., 66 L.G.R. 580 (1965), Rickets v. Erith Borough Council, 42 L.G.R. 471 ( ); Prince v. Gregory, 1 W.L.R. 177 (1959); Clark v. Monmouthshire County Council and Others, 118 J.P. 244 (1954); Rich v. London County Council, 2 All. E.R. 376 (1953); Rawthorne v. Ottley, 3 All E.R. 902 (1937); Langham v. Wellingborough Sch. Governors and Fryer, 96 J.P. 236 (1932); Jackson v. London County Council and Chappell, 28 T.L.R. ____; *Black v. Kent County Council,* The Times (London), May 23, 1983); *Mays v. Essex County Council,* The Times (London), October 11, 1975; *Smith v. Hale,* The Times (London), October 27, 1956.

5. On the general principles of negligence *see,* CLARK & LINDSELL, TORTS; SALMOND & HEUSTON,

Of course, the reasonably prudent parent may have a much smaller family than a teacher normally has to look after and take care of. Therefore, the test must be different, and applied in relation to the parent with a much bigger family, analogous to a classroom situation. As was said in *Lyes v. Middlesex County Council,*[6]

> [t]he test of the reasonably prudent parent must be applied not in relation to the parent at home but in relation to the parent applying his mind to school life. School life, happily differed from home life in the sense that there was more noise and more skylarking and the reasonable parent being mindful of such considerations would judge the glass [1/8" sheet glass through which the plaintiff-pupil's hand and wrist had gone through, while trying to push open the door, when another pupil mischievously had stopped the door with his foot] to be too thin.[7]

Injury at a playground/in sports

The duty of care extends to school games and sport or playground. However, in the rough and tumble of a game, certain risks must be taken. Nevertheless, a certain amount of supervision, discipline, and enforcement of the rule of the game must be maintained. The standard of supervision in the playground must relate to foreseeable accidents. Only in a mythical school will pupils be supervised at every second in sport or playground. If such did happen, it would be "a place too awful to contemplate."[8] It must be recognised that sports and games organized in or by schools can offer potential hazards and dangers. Therefore, it is the duty of teachers and schools to make sure (i) proper control is kept over the pupils, and (ii) the rules of the game are properly adhered to. If a teacher supervising or refereeing games permits continued use of dangerous or illegal play, he or she is likely to be found negligent. Furthermore, if the teacher-supervisor knows, or ought to have known, that the pupil has some physical disability which either requires special treatment or makes the pupil unfit for the game or sport, and the teacher does not

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TORTS; WINFIELD & JOLEWICK, TORTS; CHARLESWORTH & PEARCY, NEGLIGENCE; Brown, *Injuries at School,* 114 S.J. 216 (1970); KHAN, 5 LIT 102 (1986); Watson, *Liability for Injuries at School,* 10 L.J. 363 (1960); Watson, *Accidents to Schoolchildren,* 97 S.J. 55 (1953).

6. 61 L.G.R. 443 (1962).

7. *See Nicholson v. Westmorland County Council,* THE TIMES (London), October 25, 1962, in which the Master of the Rolls (President of the Court of Appeal), in a case in which a little girl had been scalded by the defendant teacher's cup of tea, said that "the standard of care was that of a reasonably careful parent looking after a family of twenty."

8. *See* for some cases in connection with playground injuries, Butt v. Cambridge and Isle of Ely County Council, 119 NEW L.J. 1118 (1969); Jeffery v. London County Council, 52 L.G.R. 521 (1953); Beaumont v. Surrey County Council, 112 S.J. 704 (1968). For a case where a five-year old child left a playground unattended (she was released five minutes early) and the school was held negligent, *see* Barnes (An Infant) v. Hampshire County Council, 1 W.L.R. ____ (1969).

take necessary precautions, he or she could be found liable.[9] Another recently re-established principle in games at school is that in a physically demanding game, a teacher may commit a breach of duty of care when he or she participates in a game, instead of merely demonstrating the skills of the game; or when he or she supports only one side or team in the game and has, during the course of the games, any intentional physical contact with a pupil which injures the pupil.[10]

Some recent developments in the general law of negligence

There have been some recent developments in negligence case law in England, including one case in the Court of Appeal on school liability. Before analyzing the school case, it may be useful to examine the recent case law which has clarified or expanded the law of negligence.

As had been decided in *Donoghue (or M'Alister) v. Stephenson,*[11] a relationship of "proximity" between the plaintiff and defendant must be shown. The House of Lords[12] in *Peabody Donation Fund (Governors) v. Sir Lindsay Parkinson & Co. Ltd.,*[13] said that, although "proximity must exist before any duty of care can arise," the scope of the duty must depend on all the circumstances of the case.[14]

Thus, in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so. The Court of Appeal in *Richards v. West Lindsey Dist. Council and Others,*[15] has recently elaborated that there can be "more than one possible interpretation of the general tenor of the *Peabody* decision. It shows equally clearly that there is room for more than one reasonable view as to what is just and reasonable in [some] cases."[16]

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9. *See* Moore v. Hampshire County Council, 80 L.G.R. 481 (1982), where a pupil with a congenital hip defect was injured when she was allowed to take part in physical education and succeeded in claiming damages.

10. Affutu Nartey v. Clarke and Another, THE TIMES (London), February 9, 1984. This case concerns a game of rugby football where a 15-year-old schoolboy was injured by a teacher in his 20's. At one point in the game the teacher caught the collar of the pupil's shirt, swinging him around, as a result of which the pupil fell heavily, thereby injuring himself. Damages were awarded to the pupil, the court holding the teacher and the school liable for negligence.

11. A.C. 562 (1932).

12. The House of Lords is the highest court in Britain.

13. A.C. 210 (1985). *See* Richardson v. West Lindsay District Council, 1 All E.R. 296 (1990); Smith v. Litterwoods Org. Ltd., A.C. 241 (1987); Investors in Industry Commercial Properties Ltd. v. South Befordshire D.C., Q.B. 1034 (1986).

14. As per Lord Keith of Kinkel.

15. 1 All E.R. 296 (1990).

16. *See also* Caparo Indus. plc v. Dickman, 2 W.L.R. 798 (1989); *House of Lords,* THE TIMES, February 12, 1990, *followed in* Regina v. Derbyshire County Council, ex parte Noble, THE TIMES,

Duty of care requires foreseeablity. However, reasonable foreseeability, although necessary, is not a sufficient condition for existence of a duty of care.[17]

Proximity does not mean simple physcial proximity. It can apply when a person commits a careless act against a person in his care, with the knowledge that the person in his care would be directly affected by his careless act. This relationship of proximity sometimes may be inferred (i) from the existence of a special relationship,[18] or (ii) because the parties' relationship is equivalent to contact,[19] or (iii) from voluntary assumption of responsibility.[20] However, "the content of the requirement of proximity, whatever the language is used, is not, capable of precise definition. The approach will vary according to the particular facts of the case . . . but the focus of the inquiry is on the closeness and directness of the relationship between the parties. In determining this, foreseeability must play an important part. . . ."[21] In "proximity" or "neighborhood," once again the courts have said that the situation should be such that it can be considered as fair, just, and reasonable. In *Caparo Indus. plc. v. Dickinson,*[22] the House of Lords has said that:

> Concepts of proximity and fairness are not susceptible of any such precise definition as would give them utility as practical test but are little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope.[23]

February 21, 1990; Spartan Steel & Alloy Ltd. v. Martin & Co. Contractors Ltd., 3 All E.R. 557 (1972).

17. Yuen Kun-yea v. Attorney-General of Hong Kong, A.C. 175 (1988); Hill v. Chief Constable of West Yorkshire, A.C. 53 (1989), *followed in Caparo,* THE TIMES, February 20, 1990. Lord Keith of Kinkel, *in* Yuen Kun-yen v. Attorney-General of Hong Kong, said, "Foreseeability of harm is a necessary ingredient of [proximity], but it is not the only one. Otherwise there would be liability in negligence on the part of the one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning."

18. Hedley Byrne & Co. Ltd. v. Heller and Partner Ltd., A.C. 465 (1964).

19. Candlewood Navigation Corp. v. Mitsui Osk Lines Ltd., A.C. 1 (1986); Junior Books Ltd. v. Veitchi Co. Ltd., 3 All E.R. 201 (1982).

20. Muirhead v. Industrial Tank Specialities Ltd., Q.B. 507 (1986); Yuen Kun-yeu v. Attorney-General of Hong Kong, A.C. 175 (1988); Simaan General Contracting Co. v. Pilkington Glass Ltd., (No. 2), Q.B. 758 (1988); Greater Nottingham Co-op Society Ltd. v. Cementation Piling and Foundations Ltd., Q.B. 71 (1989).

21. Bingham L.J. *in* Caparo Indus. plc v. Dickman, 2 W.L.R. 798 (1989); for the House of Lords decision, *see* THE TIMES, February 12, 1990. *See also* McLoughin v. O'Brian 1 A.C. 410 (1983).

22. The Times, February 12, 1990. On proximity, *see also* Muirhead v. Industrial Tank Speciality Ltd. (No. 2), O.B.D. 758 (1988); Greater Nottingham Co-op Society Ltd. v. Cementation Piling and Foundation Ltd. O.B. 71 (1989); Siman Gen. Contracting Co. v. Pilkington Glass Ltd. (No. 2), Q.B. 758 (1988); Reid v. Rush and Tompkins Group plc, 3 All E.R. 228 (1989).

23. As per Lord Bridge. This appears to be in line with the American courts, perception of the duty of care, *e.g.,* Weintraub, C.J., in Goldberg v. Housing Auth. of Newark 38 N.J. 578 (1962),

Thus there are three requirements necessary to establish a duty of care: (i) foreseeability of harm, (ii) proximity, and (iii) that the duty is just and reasonable. However, new and novel situations arise frequently, and the common law courts must find ways and means of saying either that a duty of care exists or that it does not exist. Traditionally, the existence of duty of care was confirmed in different specific situations, each exhibiting its own particular characteristics. The modern approach appears to seek a single general principle which may be appropriate and may be applied in all circumstances to determine the existence of a duty of care.[24] But the recent criticism of this approach by some courts, on the ground of the inability of any single general principle to provide a practical test which could be applied to every situation, makes this modern approach suspect. The more recent trend appears to be that, while recognizing the importance of the underlying general principles common to the whole field of negligence, the judge deciding a case should attach greater significance to the more traditional categorization of distinct and recognizable situations as guides to the existence, the scope, and the limits — or the varied duties of care — which the law should impose.[25] This is the approach which was followed in the most recent House of Lords decision. This is the trend now because the courts wish to limit the categories of plaintiffs who should succeed in the tort of negligence, without Parliamentary intervention.[26] The higher courts in England in recent years have tended to restrict the expansion of negligence liability.[27] What had been said by Justice Brennan in

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said, "Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of parties, the nature of risk, and the public interest in the proposed solution."

24. *See* Lord Wilberforce *in* Anns v. Merton London Borough Council, A.C. 728 (1977), at 751-52.

25. Caparo Industries plc v. Dickman, (London), February 12, 1990. The House, in allowing the appeal from the Court of Appeal, decided that auditors of a public company's accounts, in carrying out the audit, owed no duty of care to shareholders individually or to members of the public who rely upon the audited accounts when deciding whether to buy shares in that company. What Cordozo, C.J., had stated in the American case *Ultramares v. Touche,* 255 N.Y. 170, 174 N.E. 441 (1931), still has a lot of truth in some of the recent English cases: Liablity should not be extended "in an indeterminate amount for an indeterminate time to an indeterminate class." *See also* Smith v. Eric S. Bush, 2 W.L.R. 790, (1989); Hill v. Chief Constable of West Yorkshire, A.C. 53 (1989); Rowling v. Takaro Properties Ltd., A.C. 473, (1988); Bank Financiere de la Cite S.A. v. Westgate Insurance Co. Ltd., 3 W.L.R. 25 (1989); Clough v. West Yorkshire Police Authority, 1 All E.R. 431 (1990).

26. Parliamentary intervention is unlikely for many years to come.

27. There are some notable examples, *e.g.,* Caparo Indus. plc v. Dickman, Q.B. 653 (1989), in which, by a majority of two to one, the Court of Appeal decided that the auditor of a public company owes a duty of care to individual shareholders to carry out his audit of the company using reasonable care and skill; that there is sufficient proximity between a shareholder, even if holding one share, and the auditor, arising out of the close and direct relationship between the auditor of the company and a shareholder; and that it was just and reasonable to impose a duty of care on the auditor. This decision was reversed by the House of Lords unanimously on February 8, 1990.

the Australian High Court in *Sutherland Shire Council v. Heyman*[28] has settled into the English highest court in 1990:

> [i]t is preferable that the law should develop novel categories of negligence incrementally and by analogy with established categories rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable considerations which ought to negate or to reduce or limit the scope of the duty or the class of persons to whom it is owed.

Let us now examine the application of these principles to a novel situation which arose in a recent English case.

A Novel Claim

In *Van Oppen v. Clerk and the Bedford Charity Trustees*[29] the plaintiff, 16 1/2 years old, was a pupil at Bedford School.[30] While playing rugby football in a senior league game within the school he sustained serious injury to the cervical spine, causing an incomplete tetraplegia. The plaintiff and the defendant had agreed to the general and special damages subject to liability. The only question that the court had to answer was whether there was negligence on the part of the school. The plaintiff claimed that the school, which was, or ought to have been, aware of the risk of serious injury to players of rugby football and of the serious risk of injury from unorthodox tackling, particularly from the front, was negligent in: (i) failing to take reasonable care for the plaintiff's safety on the rugby field by failing to coach or instruct the plaintiff in proper tackling techniques and, in particular, in the technique of head-on tackle; (ii) failing to advise the plaintiff's father (a) of the inherent risk of serious injury in the game of rugby, (b) of the consequent need for personal accident insurance for the plaintiff, and (c) that the school had not arranged such insurance; and (iii) failing to ensure that the plaintiff was insured against accidental injury at the time of his accident. The claims under (ii) and (iii) above were entirely novel.

It may be mentioned here that in the year previous to the accident the school had received a report from the school medical officer's association recommending that schools take out accident insurance for pupils playing rugby football. The school was still considering what type of insurance to obtain and how best to obtain it when the accident took place.

The trial judge, while conceding that the "case breaks a new ground," dismissed the plaintiff's claim. The High Court found: the school was able to prove that it was not negligent in its coaching or teaching of rugby foot-

28. A.L.R. 1 (1985).
29. 1 All E.R. 273 (1989).
30. The school was run and administered by the Charity.

ball; the injuries were the result of an accident rather than negligence on anyone's part. More importantly, the court decided that there is no general duty, arising simply from the relationship between a school and its pupils, requiring the school to insure its pupils against accidental injury. A school is under no duty to advise a parent of the dangers of rugby football or of the need for personal accident insurance. Because the school was *in loco parentis* it could not be expected to do more than a reasonable parent would do. A parent is under no legal duty to insure his or her children against personal injury even if he or she was advised to do so.

> The duties imposed on the school must bear a fair and reasonable relationship to the activities carried out at the school. The school's activities are not designed, nor are they intended . . . to promote or protect the pupil's economic welfare. A duty to insure is not a necessary adjunct to its primary undertaking to educate . . . .

However, if the school had assumed responsibility for a particular area of a child's economic welfare over and above a "prudent parent's" duty, an additional duty could have been imposed so that the school would have to act with reasonable care in that sphere.

The court decided that, although the plaintiff and the defendant were in a relationship of "proximity," in view of the recent judicial developments in higher courts in England (particularly the *Peabodys* case),[31] it would not be just and reasonable to impose an obligation on the school to insure pupils against risks of personal injury while playing rugby football.

The court also rejected the plaintiff's contention that even if it was decided that there was no duty to insure, the school was nevertheless under a duty to warn the plaintiff's parents of the risks or dangers involved in playing rugby and of the advisability to obtain insurance against those risks or dangers. The court did accept the contention that, in certain circumstances, a duty to warn can arise, giving as an example a situation of a chemistry teacher allowing a pupil to conduct experiments at home, in which case the school would be under a legal obligation to give advice on safety precautions. However, it was held that, in this case at issue there was no duty to warn. The case was dismissed.

The Court of Appeal

On appeal, the Court of Appeal unanimously confirmed the High Court's judgement. All three Lord Justices of Appeal held that the proximity which exists between a school and a pupil does not give rise to a general duty on the part of the school to have regard for the pupil's

31. Discussed above.

economic welfare. They decided that it would not be just and reasonable to impose such a duty on a school.

After analyzing previous dicta, the Court of Appeal confirmed the following principles of law relating to negligence:

1) A pure omission, which could be failure to speak or act, by A resulting in economic loss to B can give rise to a liability in negligence by A to B, provided there has been voluntary assumption of responsiblity by A. There must also be reliance on that assumption by B.

2) The courts, in exceptional cases of pure economic loss, may find the existence of a duty of care and thus regard the defendant in law as having assumed a responsibility or duty for the plaintiff.

3) An existing relationship (*e.g.*, school and pupil, master and servant, auditor of the company and its share-holders) does not of itself mean that the test of proximity giving rise to a duty of care is satisfied.

4) The courts must decide whether a duty of care should be held to exist in a set of given circumstances, based on a question of policy, by reference to the principles to be deduced from the previously decided cases in higher courts.

Applying the law to the facts, the Court of Appeal was in no doubt that there was no general duty of care on the part of the school to have regard for the economic welfare of its pupils. It is neither just nor reasonable to impose on the school a greater duty than that which rests on a parent. The Court held that the school was not negligent to the pupil, nor negligent in not getting insurance for injury to pupils. The school did not voluntarily assume any responsibility to advise parents for the need for personal accident insurance for boys who played rugby football.

While there was proximity between the school and its pupils, the scope of the duty of care was not such as to give rise to a successful claim for negligence. "This is clearly not the kind of case where proximity can be regarded as a synonym for duty of care. The school was not negligent even assuming the duty of care was owed." Therefore the appeal was dismissed.

Conclusions

The common law of England, in view of the developments so far, places certain duties of care on schools and teachers. A school is under a duty of reasonable care for the health and welfare of the pupils in its charge. The standard of care is that of the reasonably careful parent, subject only to such qualifications as may result from the conditions of school life and the numbers of pupils involved. However, the proximity between a pupil and his school does not give rise to a general duty on the part of the school to have regard for the pupil's economic welfare because it is not just and

reasonable to impose such a wide duty on schools. If the school undertakes the specific responsibility for certain events, eventualities or matters, a duty of care may arise. Where a school holds itself out as having certain expertise, *e.g.*, to advise on or deal with insurance, and the pupil or parents justifiably rely on such advice, the school owes a duty of care.

A relationship of school and pupil, despite the existence of proximity, does not give rise to a general duty of the school to have regard for the pupil's economic welfare; and, according to the English Court of Appeal, it would not be just or reasonable to impose such a duty on the school. Therefore, where a pupil is injured during a school game, and neither he nor the school was insured against such injuries to pupils, the law does not impose a duty on the school to inform the pupil's parents of the risk of injury while playing sports or to advise the parents of the need to take out personal accident insurance or to take out such insurance itself for the pupils.

The outcome of the Court of Appeals' decision in *Van Oppen* appears to be harsh when one considers the plight of the pupil who was seriously injured. The lawyers representing the plaintiff and the defendant had both agreed to the amount of compensation in case the courts were to decide that the defendant school was negligent. The amounts of agreed damages were: pain and suffering and loss of amenity, L38,000; future losses including loss of earnings and handicap on the labour market and cost of future assistance, L58,295; special damages, L2,330. Total damages were L98,625. Compared to the amounts of compensation awarded in the U.S.A., the sums may not look large. But in England, in view of the injuries suffered by the plaintiff, the amounts are reasonable. The plaintiff got nothing.

The British higher courts seem to be suffering from the notion that the law of negligence has gone far enough in this century to give a wide definition to the duty of care, and that the time has come to consolidate the position. Without any legislative guidance, courts may take into account policy matters only to a certain extent. In this process, a step-by-step approach must be followed. The proximity principle, which gives rise to the duty of care, must be applied to varied sets of circumstances, thereby giving the courts discretion to decide whether, on matter of principle or policy, such circumstances should be considered as giving rise to the duty of care. The courts in recent years have tended to imply duty of care only in limited sets of circumstances. Similarly, foreseeability of harm, though a necessary ingredient, is not the only one. Other factors may negate foreseeability. The question whether a duty of care should be imposed in a new set of facts, according to the highest court in the United Kingdom, should be answered by considering all the circumstances, including whether it is appropriate that a duty of care should be imposed. Lord

Keith of Kinkel said in a recent case that the highest court in the U.K. (the House of Lords) considered "that question to be of an intensely pragmatic character, well suited for gradual development but requiring most careful analysis."[32]

There does not appear to be any universal rule as to when proximity exists. Lord Keith of Kinkel, in another recent case, said:

> [t]he true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity . . . must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case.[33]

Lord Keith of Kinkel in a third recent case said:

> [i]t has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between the plaintiff and the defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present. The nature of the ingredient will be found to vary in a number of different categories of decided cases.[34]

The House of Lords in the most recent case, *Caparo Indus. plc. v. Dickman*[35] has once again emphasized that any single general principle is unable to provide a practical test which could be applied to every situation. Lord Bridge said that concepts of proximity and fairness are not susceptible to any such precise definition that would give them utility as practical tests; rather, they are little more than convenient labels to attach to the features of different specific situations which, upon a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope.

Thus, the law governing the decision of policy matters in negligence presently rests in the hands of a few superior court judges. They decide in what circumstances a duty of care is to be imposed, usually after the event.

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32. Rowling v. Takaro Properties Ltd., A.C. 473 (1988).

33. Peabody Donation Fund (Governors) v. Sir Lindsay Parkinson & Co. Ltd., A.C. 210 (1985).

34. Hill v. Chief Constable of West Yorkshire, A.C. 53 (1989).

35. THE TIMES (London), February 12, 1990. *See also* Mariola Marine Corp. v. Lloyd's Register of Shipping, THE TIMES, February 21, 1990.

FREEDOM OF SPEECH IN ENGLISH UNIVERSITIES, POLYTECHNICS AND COLLEGES

*A.N. KHAN**

The Education (No. 2) Act, 1986 in England contained an unusual measure in providing a safeguard in relation to freedom of speech.[1] Under section 43 of this statute, every university, polytechnic and college in England is enjoined to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the educational institution and for visiting speakers.[2] The statutory duty imposed on these institutions[3] includes the duty to ensure, so far as reasonably practicable, that the use of any premises of the educational institution is not denied to any individual or body of persons on any grounds connected with either a) the beliefs or views of that individual or any member of that body, or b) the policy or objectives of that body.[4] Every educational institution covered by the statute is obliged, with a view to facilitate the discharge of the duty imposed by sections 43 of the Act on that institution, to issue and keep up to date a code of practice. This code must set out, first, the procedures to be followed by members, students, and employees of the educational institution in connection with the organization a) of meetings held on premises of the institution, and b) of any other specified class of activities. Secondly, the code of practice should set out the conduct required of members, students and employees.[5]

All institutions must take reasonable steps, including disciplinary measures, to secure compliance with the requirements of the code of practice.[6]

In the Divisional Court of the English Queen's Bench Division of the

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1. There had been problems at some educational institutions when radicals of one political opinion or another interfered with, and even succeeded in stopping, public meetings, when they disagreed either with the views of the speaker or the topic of the talk.
2. Section § 43(1).
3. These provisions of course deal only with post-secondary educational institutions.
4. *Supra* note 2, § 43(2).
5. *Id.* § 43(3).
6. *Id.* § 43(4). For the full text of Section 43, *see infra* note 13.

High Court of Justice, a very interesting and intriguing point of law came up for the first time.[7] *Regina v. University of Liverpool ex parte Caesar-Gordon,*[8] the point on judicial review was what steps a university is obliged by statutory law to take in order to ensure freedom of speech and what considerations it should or should not take into account in making a decision whether to grant permission for a talk by a visitor.

The facts of the case were that the University of Liverpool had made a code of pactice, in keeping with that of all the other English universities,[9] and it purported to act under the provisions of the code and statute whenever an application for holding a meeting was made.

The University of Liverpool Conservative Association made an application to the university authorities for permission to hold a meeting on a given date in order that a member of the South African Embassy might

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7. However, *see* Duncan v. Jones, 1 K.B. 218 (1936), an old case dealing with freedom of speech connected with the duty of a police officer to prevent threatened breaches of the peace if the meeting the police officer tried to stop were held.

8. 3 W.L.R. 667 (1990).

9. The Liverpool University Code of Practice contained the following relevant provisions:

1. Purpose of the Code of Practice

. . . any individual or body of persons shall be free, within the law, to hold meetings or engage in such other activities of the type set out in Appendix II on the premises of the university, regardless of the beliefs, views, policies or objectives of that individual or body.

This code sets out: (a) the procedures to be followed by members, students and employees of the university in connection with the organisation of any public or private meeting or activity which is to be held or take place on university premises; (b) the conduct required in connection with any such meeting or activity; and (c) steps which the university must take to secure compliance with the requirements of the Code including, where appropriate, disciplinary measures. All members, student and employees of the university shall be under a duty to assist the university in securing freedom of speech within the law in the university and promoting the principle set out above.

2. Procedures for the organisation of meetings and activities involving the use of university premises.

. . . f) the registrar or his appointed officer will grant permission provided that he is satisfied that: (i) all reasonable steps can or will be taken to prevent any infringement of the law; and (ii) such conditions as he may reasonably require will be complied with. If the registrar or his appointed officer withholds permission, he will explain in writing to the applicant the reasons for his decision.

g) The conditions referred to in (f)(ii) above may include requirements that: (i) admission tickets be issued . . .

h) The registrar or his appointed officer has discretion to lay down further conditions, if appropriate, after consultation with the police and the organising body. Thus he may, for example, require the designated meeting or activity to be declared public (which would permit a police presence); he may also arrange for employees of the university or (where appropriate) of the Guild of Undergraduates to be responsible for all security arrangements connected with the meeting or activity and appoint a member of staff as "controlling officer" for the occasion. If not satisfied that adequate arrangements can be made to maintain good order, he may refuse or withdraw permission for the meeting or activity. Such a step will normally only be taken after the police have been consulted.

address the meeting. Provisional permission was granted subject to special conditions, e.g., "co-operation of the City police outside the building." After discussions between the university senior assistant registrar, the university security personnel, and the city police officers, the university registrar wrote to the applicant, informing him that permission to hold the meeting had been withdrawn.[10] The applicant was told of his right to appeal to the vice-chancellor. The applicant's appeal was dismissed by the vice-chancellor because of the danger of a demonstration of major proportion outside and near the university[11] if the meeting were allowed to take place.

Another similar application on a later occasion resulted in imposition of conditions, the variance of the conditions by the vice-chancellor, and the cancellation of the permission after the city police's advice that there was a great risk of public disorder outside but near the university if the meeting were permitted to take place.

The applicant[12] sought relief from the courts, contending that in the performance of its duty imposed by section 43 of the 1986 Act,[13] a univer-

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10. The Registrar wrote, "Having made extensive inquiries and having considered such conditions which might be imposed, I am satisfied that in the circumstances of this case it is not reasonably practicable to make adequate arrangements to ensure that good order will be maintained."

11. Namely in Toxeth, a predominantly black-residence area adjacent to the university premises, resentful feelings against the white minority rule in South Africa were prevalent, such that demonstrations were likely to occur if the meetings were allowed to take place within the university premises.

12. The Chairman of the University of Liverpool Conservative Association.

13. The full text of section 43 is as follows:

(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.

(2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground concerned with — (*a*) the beliefs or views of that individual or any member of that body; or (*b*) the policy or objectives of that body.

(3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out — (*a*) the procedures to be followed by members, students and employees of the establishment in connection with the organisation — (i) of meetings which are to be held on premises of the establishment and which fall within any class of meeting specified in the code; and (ii) of other activities which are to take place on those premises and which fall within any of the activity so specified; and (*b*) the conduct required of such persons in connection with any such meeting or activity; and dealing with such other matters as the governing body considers appropriate.

(4) Every individual and body of persons concerned in the government of any such establishment shall take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure that the requirements of the code of practice for the establishment, issued under subsection (3) above, are complied with.

sity cannot take into account any risk of public disorder which might occur (other than the risks within the university private precincts or otherwise affecting its private property and disorder there occasioned by members of the general public, over whom the university has no legal control) save and unless and to the extent that such public disorder gives rise to a risk of disorder in the university precincts.

The defendant university's counsel contended that it would have been artificial and irresponsible for the university to ignore threatened disorder outside its precincts, that the university could not divorce itself from the risk of disorder affecting property not its own and persons not its members. However, the two-judge court unanimously rejected this submission, saying that the contention only explains the reasoning of the university, not the meaning of section 43, and that a university must comply with statutory provisions. The court, construing the statute, decided that in discharging its duty under section 43, an educational institution:

> is not enjoined or entitled to take into account threats of "public order" outside the confines of the university by persons not within its control. Were it otherwise, the purpose of the section to ensure freedom of speech could be defeated since the university might feel obliged to cancel a meeting in Liverpool on the threat of public violence as far away as, for example, London which it could not possibly have any power to prevent.

The court understood the reasons for which the university withdrew its permission to hold the two meetings, and said that no possible criticism could attach to the well-meaning attitudes adopted by the university, because the statutory provisions were new and not without difficulties. However, according to the court, the university acted ultra vires. Had the university confined its reasons for its denial of permission for the meetings to take place to the risks of disorder on university premises and among university members, its decision would have been upheld.

"Where . . . the threat was of public disorder without the university, then, unless the threat was posed by members of the university, the matter [is] entirely for the police." And, in such circumstances, it should be left to the police, in consultation with the university or the organizers of the meetings, to consider whether such a meeting ought—in the public interest, on the grounds of an apprehended breach of the peace—to be forbidden or cancelled.

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(5) The establishments to which this section applies are (*a*) any university; (*b*) any establishment which is maintained by a local education authority and . . . [requiring] an instrument of government; and (*c*) any establishment of further education designated . . . as an establishment [substantially dependent for its maintenance on assistance] from local education authority or a grant [from the government].

Conculsion

Freedom of speech is a sine qua non of a free and democratic society. However, as in the case in many democratic countries, it is not an unlimited freedom. Freedom of speech, in the interest of many considerations, can be and has been curtailed, limited or denied. The Conservative government of Britain did not like the actions of some perceived left-wing radicals in disrupting meetings.[14] The answer was section 43 of the 1986 legislation, which apparently equally affects left- and right-wing sections of the educational community. The High Court has given the provision a meaning which somewhat narrows the discretion that an educational establishment may have in putting restrictions or conditions on permission given for the holding of meetings by university personnel on university premises.

14. There being no written constitution in Great Britain and no bill of rights in the British Constitution, freedom of speech, like all other fundamental freedoms, rests on common law, as elaborated or restricted by ordinary statutory law.