

Duty of Care in the Further and Higher Education Sectors



Issues of negligence and duty of care are increasingly in the public eye. This paper seeks to clarify how these legal principles are of relevance to the Further and Higher Education sectors.

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The intervention of legislation in the affairs of Further and Higher Education Institutions is steadily increasing to the extent that Parliament and the Courts are now applying to these institutions the same principles of law as are generally applied to any large employer or property owner. One area which has a particular impact on the entire education sector is the law of duty of care.

This briefing paper seeks to describe:

- The basic principles and tests to be applied in assessing whether or not a duty of care exists;
- The relationships in Further Education (FE) and Higher Education (HE) Institutions that may give rise to a duty of care.

This paper also seeks to give guidance on:

- How duty of care impacts on these institutions.

What is Duty of Care?

Duty of care is the obligation to exercise a level of care towards an individual, as is reasonable in all the circumstances, to avoid injury to that individual or his property.

Duty of care is therefore based upon the relationship of the parties, the negligent act or omission and the reasonable foreseeability of loss to that individual.

A negligent act is an unintentional but careless act which results in loss. Only a negligent act will be regarded as having breached a duty of care. Liability for breach of a duty of care very much depends on the public policy at the time the case is heard.

In the FE and HE system duties of care will govern relations with a wide variety of groups including, but not limited to, employees, students and even visitors.

Differences in the UK Jurisdictions

In Scotland this area of the law is called Delict while in England, Wales and Northern Ireland it is called the law of Tort. Delict and tort differ from the law of contract. Contracts generally specify the duties on each of the parties and the remedy if these duties are breached. Upon entering into a contract, the parties obtain specific rights and certain duties. In delict or tort these duties exist through the nature of the parties relationship regardless of the contractual obligations.

In both jurisdictions, delict and tort attempt to strike a balance between the individual's wrongful conduct and compensating the victim for his loss.

Much of the law in this area has been developed by the Courts, however, there are now a number of statutory rules which apply in particular, to employment, disability discrimination, health and safety, data protection and occupier's liability to name but a few. A FE and HE Institution is subject to both the general rules on negligence and to specific rules relating to education, property ownership and employment.

The development of the law surrounding duty of care has been similar in the different jurisdictions but there are a number of differences between them, for example, the law of defamation in Scotland in comparison to libel and slander in England, and the law of nuisance. However, many of the general principles and the law of negligence are now more or less the same. Therefore any relevant case law or decisions of any of the UK courts will generally be applicable to all FE and HE Institutions, regardless of where they are situated.

Basic Principles

The authority for duty of care is the leading Scottish case of *Donoghue v Stevenson 1932 SC (HL) 31*. The principles laid down by the Court in this case still form the basis for establishing a duty of care under Scots and English law.

The general principles for duty of care were highlighted in this case as:

- Does a duty of care exist?
This depends on the relationship between the parties, as a duty of care is not owed to the world at large, but only to those who have a sufficiently proximate relationship. The courts have found that there is no liability if the relationship between the parties is too remote.
- Is there a breach of that duty?
Liability will only arise if the action breaches the duty of care and causes a loss or harm to the individual which would have been reasonably foreseeable in all the facts and circumstances of the case.
- Did the breach cause damage or loss to an individual's person or property?
When *Donoghue* was decided it was thought that duty of care would only be applicable to physical injury and damage to property, however this has now been extended, in some circumstances, to where there is only pure economic loss.

Does a Duty of care exist?

The first issue which must be addressed is whether or not there is a relationship between the parties which would establish a duty of care. In any FE and HE Institution there are a number of relationships in existence which may give rise to a duty of care. For example:

- Students
- Employees
- Governing Bodies of Professions
- Visitors

Students

There has been considerable debate in FE and HE on whether or not the relationship between the institution and the student is contractual. It has been said by some that there are two possible contractual relationships, that of the applicant and the matriculated student.

For an institution to have responsibility under tort or delict if it breaches its duty of care, it is irrelevant whether or not there is a contractual relationship, as liability will arise where there is a sufficiently close relationship between the parties. For example, if a prospective student visits the campus and suffers a loss to his property, the institution would owe that person a duty of care if the harm was reasonably foreseeable under occupier's liability legislation and the common law duty of care.

There also exists a duty of care from the institution to its matriculated students and possibly even vice versa. This duty of care applies regardless of whether the student is full time, part time or even a distance learner.

Some of the examples of where a duty of care will be applicable are as follows:

- Duty to provide safe, adequate and properly maintained equipment. This would include IT facilities, laboratory equipment, desks, chairs and so forth. In relation to the use of IT equipment, there is an argument that this duty would extend past the physical state of the equipment to a student's use of the IT system, in particular, the internet and e-mail facilities. It is therefore very important that an institution has a comprehensive internet and e-mail acceptable use policy in place which sets out the conditions of use. This policy should be widely publicised to raise awareness of the conditions of use and copies should be made available to all users. It is also important that the policy is enforced and its compliance monitored. This issue is dealt with in further detail below.
- Obligations under the occupiers liability legislation and health and safety law in relation to halls of residence, lecture theatres, libraries, sports facilities and other property owned or in the institutions' control. The institution is under numerous obligations to make sure that all of its property is safe and maintained properly. This duty covers both the physical buildings and the equipment, furniture, machinery and objects within them. This is discussed at length later in the paper.
- The duty to take reasonable care for the health and safety of students engaged in practical study or research. This would include warning or protecting them against foreseeable dangers. An example would be where a student is injured after accepting instructions from a member of staff. An institution would be vicariously liable if the staff member was acting within the course of his employment.
- Related to the above point, an institution may find itself liable for any injury or loss to students who study abroad or undertake work placements as part of their course.
- The duty to appoint reasonably learned, skilled and competent persons to instruct the students. However, claims regarding the poor quality of education received have so far been resisted by the Courts.
- General duty to the public to refuse students the opportunity to proceed with studies or to graduate or qualify if they have not proved their competence. It is thought that this duty would be interpreted quite narrowly, otherwise a duty could be said to be owed to the world at large.
- Duty to provide accurate references and assessments. This will be discussed later in the paper.

Student's Obligations to the Institution

Although the duty to take reasonable care will generally lie with the institution there are some instances where the student himself will owe an obligation to the institution. An example of this is in relation to use of the institution's IT facilities, as briefly discussed above.

The issues for any FE and HE Institution in this respect are in relation to breach of the criminal law, copyright infringement, defamation, discrimination and breach of the Data Protection Act 1998, to name but a few. In these particular cases the user, whether it be a student or even an employee, should be individually liable but there may be instances where some or all of the liability will transfer to the institution.

Criminal liability will generally attach to the individual user and not the institution. However, particular areas for concern for an FE and HE Institution and for potential liability are data protection, the use or creation of pornographic material and copyright infringement, as in these cases the institution may find it is liable for the student's action. If the user is an employee, the institution may be vicariously liable for his acts, if they were carried out in the course of his employment.

The difficulty for the institution arises where it could be described as the publisher of any offensive material. If a student has placed obscene material on a website, he personally would be liable. However, if the institution gave consent to the use of the equipment it may also find itself liable as a publisher of the material. In the case of *Godfrey v Demon Internet Limited QBD [1999] 4 All ER 342* it was found that placing an HTML link to a site containing obscene material constituted publishing.

Another issue for students is confidentiality. This is particularly important in respect of any intellectual property rights which the institution may be seeking to protect and could be a very important issue for postgraduate or research students. Generally an agreement will be made with these students to ensure a contractual obligation for confidentiality and this will provide for remedies under breach of contract rather than tort or delict, if that confidentiality is breached.

Therefore, the general rule is that liability will normally fall on the individual involved in any of the above activities and not the institution, if that individual is acting of his own free will and not on the instruction of an employee of the institution. However, it should be pointed out that there is one group of students who may be treated differently by the law on the basis of their age.

Legal Position of Students Aged 16-18

The legal position of 16 -18 year olds is particularly important for FE Institutions who offer continuing education services, sixth form colleges and vocational qualifications to 16 or 17 year old school leavers. The law treats 16 –18 year olds differently dependent upon where they live in the UK.

In Scotland the Age of Legal Capacity (Scotland) Act 1991 states that those over the age of 16 have legal capacity, whereby they are able to perform judicial acts such as entering contracts and raising and defending actions in their own name.

In Scotland children are liable for their actions if they have a sufficient understanding of them and can appreciate that their actions were legally wrong. Adults are presumed to have accepted this responsibility and the presumption applies with increasing force to children as they reach the age of 16. However, in limited circumstances the law in Scotland does make some exceptions for 16 and 17 year olds where their actions have been as a result of inexperience and lack of intelligence. Therefore, in most cases in Scotland, if a 16 year-old commits a delict by breaching a duty of care he is responsible for his actions and can be held accountable by the courts.

In England and Wales this area is governed by the Family Law Reform Act 1969. This Act reduced the age of majority (adulthood) from 21 to 18. For a FE institution this essentially means that it has an 'in loco parentis' role for a student until they reach adulthood.

The phrase 'in loco parentis' puts an obligation of responsibility on a parent, guardian or legal custodian for a child in their care. This notion is now becoming outdated by the development of the common law and statute.

If the law of 'in loco parentis' is applied, the standard that the institution will be judged under in these circumstances is that of a 'reasonable prudent parent' judged not in his own home but in that of an institution.

The case of *Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112* dealt with the issue of medical consent and the notion of parental responsibility. The judgement of Lord Scarman is relevant in the context of this discussion as he said that a child who has sufficient intelligence and understanding to appreciate what a course of action involves, may give a valid consent to that course of action. This is consistent with the rule of the common law that a child can enter into contracts or take actions which are ordinarily taken by someone of their age and experience. Lord Scarman also went on to say that the rights of a parent exist primarily because of the parent's duties to the child, but when the child gets older, the duties and hence the rights of the parent towards the child diminish.

It is clear that in some circumstances a FE institution owes a duty of care towards all of the students at the institution, however, the question is whether or not there is a higher standard of care required for a 16 or 17 year old. The presumption must be that the FE institution should take all precautions for the safety and wellbeing of such a student but the overriding principle would appear to be the intelligence, experience and understanding of the student himself in his decision to take certain actions.

In conclusion it would appear that a FE institution has to be cautious when dealing with students in this age bracket. However it should be remembered that these students are also accountable for their actions and should they, for example, breach the email and internet policy by down loading pornography or breach the institution's health and safety policy they can be held accountable, except where the institution was made aware of their behavior and failed to stop them. It should be pointed out that the law on consent and parental responsibility is in a state of flux and the courts may interpret the law differently in the future.

Discipline of Students

Where an institution believes and can prove that a student has broken campus rules, such as the IT acceptable use policy, then it is unlikely that it will take court action against that student for a breach of his duty of care to the institution. It is much more likely that the student will find himself or herself disciplined internally by procedures set down in the student handbook which should be part of his contract with the institution. It is therefore necessary that an institution sets down policies for the behaviour of students within the institution's property and acceptable use of its' equipment, and that these are effectively communicated to the student populace.

This point is also important in relation to 16 and 17 year-old students. An institution must be aware when drafting such a student contract or handbook that it's terms will be understood and will not be seen to be unfair or taking advantage of the inexperience of the student. Such a contract could be set aside on the grounds of unreasonableness.

There may be more serious offences, such as cheating in examinations, racial/sexual harassment or wilful fire-raising which damages the institution's property. This may result in a student being expelled from the institution or criminal or civil proceedings being taken against him. Again the institution should have policies in place which stipulate procedure for such an event or it could find itself being sued by the expelled student.

Employers

FE and HE Institutions employ large numbers of people in various types of roles, particularly academic, administrative, technical, maintenance and cleaning. Generally any liability or issues about duty of care will be included in the employment contract which determines the relationship between employee and employer, although there are some exceptions to this rule, for example Professors with tenure.

In parallel with the employment contract there are numerous common law and statutory duties of care which exist and cannot be derogated from. Some examples of the law in question are:

- Employment legislation including the Sex Discrimination Act 1975, Equal Pay Act 1980, Employment Relations Act 1999, Disability Discrimination Act 1995 and so forth. These all contain a number of obligations and duties on an employer and an employee of which there are too many to mention specifically in this paper.
- The duty of care owed by an employer to the employee under health and safety law, for example the Health and Safety at Work Act 1974, is 'non delegable' and the employer will always be liable. This is particularly important to FE and HE Institutions that 'lend' staff to other institutions while the staff remain on the institution's payroll.
- The employer also has a number of common law duties which have been interpreted by the Courts to include protecting staff from bullying and even preventing them from stress caused by over work.

Vicarious Liability

The general rule in delict or tort is that an employer will be vicariously liable for the actions of an employee undertaken in the course of his employment. There are a number of issues which have to firstly be considered before the employer takes responsibility.

- Is the person an employee? In this instance the element of control is important, as is the duration of the employment, intention of the parties, how payment is made to the employee and the arrangements for termination.
- If the person is found to be an employee then the next question is whether the employer is liable for his actions. The Court will consider if the actions of the employee were within the course of his employment. This has been found to extend beyond the duties stipulated in the employment contract. In a FE or HE Institution this could include, for example, a lecturer's teaching out of hours. However, if an employee is undertaking work which is outwith the realms of his employment or using the employer's equipment for his own purposes then the employer will generally not be liable. Finally, an employer will not normally be liable for the delicts or torts of an independent contractor, although there are some exceptions to this rule.

In the case of *Phelps v London Borough of Hillingdon* [2000] 3 WLR 776 the Court supported the basic notion of vicarious liability for the actions of employees once the duty of care has been established. This case concerned the alleged breach of a duty of care by an educational psychologist in failing to exercise due skill and care in the performance of her duties. Here the local authority was not held vicariously liable on the grounds of public policy. However, the Court did say that the local authority could be held vicariously liable in other circumstances for the loss suffered.

The law is therefore recognising the duty of care for professional negligence and some commentators have suggested that this duty could extend to FE and HE functions such as careers advice, counselling, lecturing and so on.

Employee's Obligations

As well as the employer having obligations to the employee, employees often owe a duty of care to their employers. Examples of this include:

- Obligation not to breach IT policy. An Acceptable Use Policy will generally be contained in the employee's contract of employment. This issue has already been discussed in relation to students.
- Confidentiality in relation to the institution's business and Intellectual Property.
- Standard of professionalism and quality of service to students and the institution, although it has already been pointed out that it is very difficult to establish a suitable standard and the Courts are reluctant to become involved in claims of educational malpractice.
- Duty to co-operate in the institutions' health and safety policy and to take responsibility for their own and their colleagues health and safety. This will be discussed in further detail later in the paper.
- The careful preparation of references and assessments in order to avoid claims of negligent misrepresentation. The author of such references should ensure the accuracy of any information given on behalf of an institution, either about a student or an employee. If the statement was inaccurate and was relied upon, then there could be liability for either the employee, if acting outwith the course of his employment, or vicarious liability for the institution to both the subject of the reference and the recipient. This duty also extends to any oral statements; for example, those used at career fairs.

Governing Bodies of Professions

FE and HE Institutions are not under the direct control of any of the professional governing bodies, but many professions grant exemptions from their entrance examinations to those that have studied the particular subjects at a FE or HE Institution and have acquired a certain standard of knowledge.

Therefore, institutions should ensure that in these professional fields, their teaching standard is such that their graduates will be accepted by the relevant professional body. Professions cannot control the quality of teaching directly but they can exert some authority by withdrawing the recognition of degree passes for those who have not met the requisite standard of learning. The institution could be said to owe a duty to these professional bodies to ensure that the quality of teaching is appropriate.

Visitors

For visitors, the issue of whether a duty of care exists is slightly more difficult and the existence of the duty will depend on the facts and circumstances of each case.

One issue, which may be relevant in a duty of care to visitors, is access to the property of an institution. Students, not surprisingly, will have a right of access to their rooms in the Halls of Residence, lecture theatres, laboratories and so forth. Likewise, employees will have a right of access to the property in order to undertake their duties. However, members of the public, unless permitted access for a specific purpose, will have no general right of access.

If a visitor is invited onto the institution's premises then a common duty of care will be owed by the institution to the visitor. This is to ensure that the visitor will be reasonably safe in the premises for the purposes for which he has been invited or permitted.

One issue which may arise here, is the visitor who doesn't have permission for access, namely the trespasser. Trespass is a civil wrong and not generally a criminal offence; therefore the institution would have to take action under civil law to remove a trespasser. However, even if someone is trespassing, the institution owes a duty to him or her not to injure them or to act with reckless disregard of their presence. This duty is also contained in occupier's liability legislation and the health and safety provisions.

Occupier's Liability

The Occupiers' Liability Act 1984 applies in England and Wales and states that an occupier of land has a duty to take all reasonable and practical steps to warn potential trespassers of any danger or to take all reasonable steps to exclude them from the property. What a reasonable step is will depend upon the facts of that case.

The influence of this area of law was seen recently in the case of *Charlotte Alexander v King Edward School Bath Governors* [2000] 7CL 393 where the claimant established that she was owed a duty of care under the Occupier's Liability Act 1957 and this had been broken by teachers failing to stop unruly behaviour after a hockey match. Obviously this case applied to the school education system but the principles are the same and can be applied in the tertiary education system.

In contrast the Occupiers' Liability (Scotland) Act 1960 provides that an occupier will automatically owe a duty to everyone who enters the land, although the duty will vary in accordance with the nature of their access to the property.

Occupiers' Liability also applies to students and members of staff. In relation to their personal property, the duty can fall if they have been warned and accepted the risk. In this instance the loss will not be recoverable from the institution.

The exclusion of liability for injury is much more difficult to achieve. Section 2 of the Occupiers' Liability Act 1980 and the Occupiers' Liability (Scotland) Act 1960 imposes a high standard of care. If a person accepts the risk of accidental harm, which would normally be subject to an action for negligence, the institutions' liability will depend upon whether or not he fully accepted the risk in light of all of the circumstances.

Fires are another exception if they are caused by negligence, as the occupier will be liable and may also have a duty of care to persons on adjoining land or on the highway. Fencing may also sometimes be necessary under the legislation if there is a danger to passers-by.

Health and Safety Law

Another area of law which has a particular bearing on an institution's responsibilities is the Health and Safety at Work Act etc 1974 (HASAW) which has reformed most of the legislation in this area and has been amended to comply with the various European decisions and directives. The equivalent legislation in Northern Ireland is the Health and Safety at Work (Northern Ireland) Order 1978.

The HASAW Act allows the Health and Safety Executive to bring criminal proceedings against any organisation or person for breaches of the Act. This Act does not affect the common law duty of care that exists in relation to health and safety.

The HASAW imposes duties on an employer to maintain plant and systems to ensure they are safe, make arrangements for ensuring safety and absence of risks in the transportation, use or handling of materials, provide suitable levels of training, supervision and awareness of health and safety issues, maintain the place of work and means of access in order that they are safe and without risks and finally provide and maintain the working environment in order that the facilities are safe and adequate for welfare of the employees. These duties also extend to others on the premises concerned.

Therefore, an institution will also owe these duties to the students, contractors and members of the public. It is recommended that all institutions take proper risk assessments and control and monitor compliance with the law.

Finally the HASAW Act also imposes duties on employees and others to take responsibility for their own health and safety and for others that may be affected by their acts or omissions. Therefore an

element of contributory negligence could be implied where a person has failed to comply with instructions or interfered with anything provided for his health and safety.

Remoteness

Not all relationships with the institution will result in liability. It may be that the Court finds that the relationship between the parties is too remote. This could possibly apply to previous students or the parents of students who do not have a sufficiently proximate relationship with the institution in all the circumstances.

Breach of a Duty of Care

Generally the rules for establishing a breach of a duty of care are:

- The act or omission was negligent;
- The act or omission was voluntary;
- The act or omission must have as its foreseeable and natural consequence harm to another individual.

Assessing the breach involves the use of the “reasonable man test” in which the Court assesses if a duty of care is owed by one individual to another, whether the harm was reasonably foreseeable on the facts and circumstances of the case in question and the actual harm which occurred.

Remedies for a Breach of a Duty of Care

Remedies for anyone who has suffered loss in the commission of a delict or tort are either a claim for damages or an action to stop their wrongful conduct by seeking an interdict in the civil courts in Scotland or an injunction in the courts of England, Wales and Northern Ireland.

Not all harm will result in payment of damages or interdict/injunction. Certain losses can be regarded by the courts as too remote to give rise to a claim. Generally damages will only become payable if the harm suffered was a direct result of the wrongful conduct.

Sometimes there doesn't even have to be physical harm to the person or property as the Courts now recognise a pure economic loss in certain restricted circumstances where the individual's only loss is financial and there is no associated harm to the individual's person or property. This is particularly relevant to negligent misstatements in references, although it must be noted that the law has traditionally held the economic interests of an individual to be less worthy of protection than either his physical or property interests.

Conclusion

The existence of a duty of care has been recognised in an ever-widening set of circumstances. Donoghue is seen as establishing a general duty to take reasonable care to avoid foreseeable physical injury to a person or damage to property. Other cases have gone further and the law is fast affecting the education sphere.

In the case of a FE and HE Institution, the Court would look at whether or not the conduct was below the standard which would have been employed by another institution acting in the same circumstances. If the institution's act or omission does not fall below the standard of the 'reasonable institution' then it will not have acted negligently and therefore not breached its duty of care.

There are a number of precautionary measures that can be undertaken by FE and HE Institutions. These include establishing a student – institution contract which formally sets out each parties obligations and duties. Also regularly monitoring the student and employee compliance of the policies and procedures and undertaking regular quality assurance programmes to ensure quality of service should also be considered. These will not guarantee censure from liability but they will seek to restrict any potential claims and may highlight some areas of special attention.

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