Risk and Impact of the Educational Malpractice and Negligence in the Delivery of Higher Education

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ABSTRACT

Educational malpractice and negligence are unexplored territory insofar as civil tort liability in Malaysia is concerned. Professional liability for substandard work has been widely recognised with precedents passed from one case to another but professional liability in respect of substandard delivery of higher education by lecturers and educational service providers are merely illusive. Lecturers' legal liability for damage suffered by students because of incompetent or careless teaching is, however, possible if references are made to a few number of decided case law involving teachers and schools in other Commonwealth countries and the US included. Educational negligence is a topic needed to be thoroughly considered as this area of professional liability has emerged as a movement towards accountability for educational outcomes. This discussion paper is an attempt to explore the possibility of negligence suit by students as a result of incompetence and breach of care of lecturers in delivering a proper lecturing standard expected from a reasonable lecturer.

Keywords: *duty of care, education negligence, malpractice, professional liability*

Introduction

The notion of educational malpractice is not common in Malaysia. The term educational malpractice itself should be defined as the alleged failure to impart knowledge or to teach practical skills or an educational system that has failed to provide the plaintiff with the academic skills necessary to undertake the most basic tasks involved in coping with adult life (Pettingill, 2006). Educational malpractice has not been recognised so far as a recognised civil cause of action in countries such as Canada and the United States when the court cited policy reasons as their basis in allowing further actions by the students but care needs to be taken that public

universities such as UiTM itself are not enjoying any privilege or immune from being sued by their own students. Negligence and breach of contract could also be possibly used by the students as an avenue to bring claims against the university.

Education negligence can be divided into two types. First, claims involving an imputation of inadequate education resulting from professional negligence in the aspects of content, process and delivery of tertiary courses in which allegations of a substandard result or incompetence to meet the expected standards as required by the profession. Second, education negligence involving specific and identifiable negligent acts, omissions or statements causing provable economic loss in the form of lost opportunity for employment, loss of wages, additional course fees, etc (Katter, 2002). This paper centres around both categories mentioned above, with specific attention made on the failure of a lecturer in providing a proper lecturing standard expected from a reasonable lecturer although possible claims by the students could also be related to matters such as claims regarding administrative or procedural issues and claims by students who have been dismissed from programs or who have disputed academic decisions of the university.

In other words, breach of professional duty of a lecturer is being considered here in respect of one competency to grasp the fundamental requirement of the subject being taught and the ability to conform to the standard expected from his or her professional capacity. An important point that should be considered too is the nature of vicarious liability imposed upon the university for the negligence nature of its lecturer. Apart from common law liability, one shall not disregard the possibility of liability imposed by the statutes although legislations such as the University and College Act 1971, Accreditation Act 1996, National Higher Educational Act 1996 are very loose and no specific provisions are made pertaining to the issue of substandard teaching by the lecturers. Since statutes related to provision of higher education in Malaysia do not serve a right for students to sue for improper teaching, a common law right to sue based on the tort of negligence could be the most appropriate avenue.

Principle Governing a Lecturer's Tortuous Liability

A professional person can be referred to as a person who possesses a high degree of knowledge and skill in relation to a field or discipline and who applies the knowledge and skill as a vocation (The 'Letric Law Library, n.d.). UiTM's lecturers specifically, are professionals. In reference to the classification of scheme of services provided by the Public Service Department of Malaysia, UiTM lecturers are put under the classification of

'professional and management' together with language teachers, medical lecturers, clinical lecturers and other public university lecturers. Since university lecturers are considered professionals, the nature of professional liability related to other professionals such as lawyers, doctors, dentists, engineers, architects, surveyors is similar to the one governing the university lecturers. With this in mind, one shall dig further into the foundation of professional liability to clients. Students are considered as clients insofar as any public university in Malaysia is concerned.

The foundation of professional liability to clients can be traced back in the year 1963 in a case law mostly quoted in any tort law textbooks, *Hedley Byrne & Co. v. Heller & Partners,* 1963. In the above case, a Bank was sued for erroneous information relating to the financial standing of a customer. The precedent or legal principle laid down by the honorable Lord Morris in Hedley was, "If someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on that skill, a duty of care will arise". It shall be noted that duty of care will only be imposed by law upon a professional if the professionals have held himself out as being in possession of skill relevant to the field of advice. It is obvious from the precedents laid down from *Hedley* that a lecturer as a professional shall impart knowledge to students relevant to skills and knowledge one acquired that qualified one to be appointed as a lecturer and failure will result in a breach of care.

The foundation of professional liability to clients for substandard work could best be illustrated from precedents derived from the case law of *Lim Poh Choo v. Camden and Islington Area Health Authority,* 1980. In the above, a health authority was sued for mistake in relation to a surgery which resulted in injury to the brain of the patient and the court held that prima facie liability exists for causing injury to clients. Basically, if there is no issue with regards to policy, liability in negligence exists for substandard work which results in injury to clients, damage to clients and pure economic loss or pure financial loss. Policy reasons, however, as mentioned in the early part of this paper, have been the deciding factor for US judges in the following case law of *Peter W. v. San Francisco Unified School District,* 1976, the plaintiff sued for damages after he graduated from high school claiming that his literacy skills were so poor that his income earning capacity was substantially reduced. The court refused to allow further action by the plaintiff by citing policy reasons and one of these reasons was, with so many different educational theories with varying philosophical bases, it is not possible to devise an appropriate standard against which the teacher's instruction can be judged in order to determine whether it was negligent. After Peter, cases involving education malpractice in the US have been decided with similar reasons

in favour of the educators and Canadian civil courts had also been led to follow the path taken by the US jurisprudence in deciding cases involving education malpractice.

It is clear that there is a reluctance on the part of the court in the US and Canada to impose a duty of care to education providers with both countries jurisprudence have heavily relied on the policy considerations originated from the American case law of Peter quoted above, as a reason to nullify any possibility of claims relating to the quality of the education provided. Hopkins (1996) comments that one out of the six policy reasons laid down in the American case law of Peter was purely a legal issue if the same facts of case is to be considered in a civil court of Australia jurisprudence. So what is this purely legal issue that set a distinction between a court of law of the Americans and the Australians? It follows that, Hopkins (1996) is making a point on the possible tendency of the Australian judiciary to consider Peter's case from a pure negligence law point of view.

Stages in Negligence

This paper will now consider the issue of duty, breach, injury and causation as a requirement in the law of negligence in sustaining a judgment against the lecturers or the universities in general. First, the plaintiff, in this case, the student must prove that the lecturers or the universities owe a duty of care towards him. This means, the student is obliged to prove that the lecturer owes him a duty to educate the student with proper education and knowledge necessary and in level with the standard required by the course taken. Second, if the court decides that there is in fact a valid duty owed to the student by the lecturers, the student must further prove to the court that the lecturers have failed to carry out that duty. Third, the court will consider the issue of causation and injury. Has the student suffered some kind of pecuniary damage or injury and is it caused by the carelessness of the lecturers themselves? Nervous shock is possible insofar as physical injury is concerned (Newnham, 2000). Fourth, and the last requirement for there is to be a cause of action in the tort of negligence, is about the factor of remoteness. The student must again prove to the court that the pecuniary damage or injury he has suffered is something foreseeable from the carelessness conduct of the lecturer when delivering substandard education. If these entire four requirements are met, the lecturers or the universities can both be held legally liable under the tort of negligence.

In a negligence action, where a person owes another a duty of care, the court will determine liability by looking at the evidence, and then meas-

uring the defendant's conduct against a standard of care set by the courts. Various factors may be taken into account in determining whether the standard has been met and the traditional standard of care set by the courts is the standard of care expected of the reasonable man. Where people hold themselves out as capable of providing special services, such as lawyers and doctors, they must exercise the higher degree of skill which is usual with people professing that skill. A doctor will be liable for negligence if he or she failed to diagnose a disease which the reasonable doctor should have diagnosed (Hopkins, 1996)

Claims for pure economic loss are normally not being allowed in the tort of negligence unless there is a physical injury happens concurrently. The question now is could substandard level of teaching leads to physical injury? Should the court allows claim for pure economic loss from substandard level of teaching and would it not lead to the problem of floodgate? What are the possibilities of types of injuries that could be proven by the student as a result of breach by the lecturers? There could be a few. A student might be able to show injury by proving she or he is unemployed due to lack of education or proper knowledge that was not given by the lecturers and this puts the student into incompetitive position in relation to students from other universities taking similar course.

Interesting development in Malaysia and other commonwealth jurisprudence with regards to pure economic loss can be seen nowadays where damages are allowed where plaintiff has suffered only economic loss without having to prove the existence of any physical damage or injury and this is clearly shown in the case of *Sutherland Shire Council v. Heyman,* 1985 which involves the negligence act of local governments (Leong & Hanmore, 2004). In Malaysia itself, reference should be made to the case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors,* 2006, where after considering the issue of public policy and the local circumstances, the federal court judges finally agreed that claims for economic loss should be allowed.

With regards to the issue of opening the floodgate of litigation if claims are allowed for loss which is purely economic, one shall fully understand the reasoning underlying the principles in *Hedley Byrne & Co. v. Heller & Partners,* 1963. Liability for misstatements or substandard work to clients which results in a pure economic loss is possible if it is not excluded as a result of floodgate problem. There is no floodgate problem if there is a close proximity in terms of special relationship that exists between the plaintiff and the defendant. In other words, both plaintiff and defendant can be readily identified. In situation involving lecturers and students, there is no such doubt that both the wrongdoer and claimant can be readily identified based on the close relationship which occurs

throughout the semester.

Specific and Identifiable Negligent Acts

The next category of educational negligence is termed as specific negligent acts or omissions. In the context of a university, specific negligent acts might happen as a result of incompetence involving error in marking exam or test papers, the setting of exam questions on content outside the course content, availability of course materials or failure to provide adequate consultation with lecturers. Misleading statements or inaccurate statements made to an existing student might give rise to a potential liability as well. What can be termed as inaccurate statements? These includes statements in relation qualifications and experience of lecturers, availability of academic assistance in the course, size of classes, details of assessment methods and grading in the course (Thompson, 1985). These statements are considered not accurate and are carelessly made, if the maker himself had not taken reasonable care in ascertaining the accuracy of the statement he made. Liability for erroneous advice as illustrated above exists even though the consequence of damage is of purely economic in nature. However, it is not sufficient if the statement is made in a business context, if the maker of the statement did not hold himself out to have expertise in the area as shown in the case of *Mutual Life and Citizens Assurance Co Ltd v. Evatt,* 1968. In Evatt's case, it was held that the defendant was an insurance company and as such, although it gave advice in a business context, did not hold itself out as having special skill as a financial adviser. Thus, no liability was incurred for merely supplying a report on the affairs of a subsidiary to a policy holder at his request.

Minimising the Risk of Potential Litigation

Consider the following scenarios and ask yourself-could it be a liability for substandard level of teaching if:

i. a lecturer allocates most of his or her time in class talking about his hobbies?
ii. a biology lecturer uses out-of-date microscopes in his laboratory? or
iii. a computer science lecturer with limited high end computers?

Should a disclaimer notice being put on each of our syllabus? Do we really behave to such extent? What can be done to minimise the risk of lecturers committing various acts of negligence which could eventually lead to litigation? Basically, the following risk reduction activities could be adopted or might have already been implemented by the university.

One could be very cynical on this discussion paper since one could possibly argue that potential litigations by students are highly impossible taking into consideration factors such as the element of respect that exists between lecturers and students, element of sympathy to lecturers and litigation culture which might not be initiated and it is not a norm in countries such as Malaysia. However, one shall also consider that a greater awareness of student rights through media coverage and a changed perception of universities by students have led to litigation against universities where defects in the provision of services have occurred. Universities are no longer a holy sanctuary but are perceived by students as a business organisation providing professional services for a fee.

Audit procedures on the contents of syllabus, preparation of exam questions, methods of handling lectures in class have been actively being implemented in the university either by a team of internal or external auditors. Such action could be reasonably taken as a good risk reduction activity conduct by the university. Secondly, the university could seriously consider insurance in the form of professional malpractice insurance which can be tailored made to suit the profession of lecturers. Insofar as professional liability insurance is concerned, the insurance industry has not made it readily available for a policy covering potential legal liability of lecturer. If the Malaysian Bar Council has decided to make it compulsory for all practising lawyers to compulsory subscribe to professional liability insurance, why not a lecturer who is undoubtedly a professional be required to do the same thing by the Ministry of Higher Education? Notice of disclaimer could also be a defense in negligence but such defense is sometimes be superfluous and useless if the provider of the information is the only source of such information and as a result, a proper notice of disclaimer by the university will not eventually protect the university itself.

Conclusion

This paper acknowledges the existence of two potential groups of education negligence which are, claims involving allegation of inadequate education emanating from professional negligence in delivery of tertiary courses as a result of incompetent lecturers and claims by disgruntled students as a result of specific and identifiable negligent acts, omissions or negligent statements causing provable damages in the form of economic loss. For the first group of education negligence, the American, Canada and English common law have refused in allowing claims, citing reasons of policy and unrecognised type of injuries. However, for the second group, trend has been gradually developed by the British common law that the court should provide a remedy in damages when there is a

prima facie prove of incompetence or negligence comprising specific and identifiable acts of negligence by the lecturers. Reduction of risk in educational negligence or malpractice is, however, possible with the introduction of thorough auditing procedures by internal and external auditors and the implementation of professional malpractice liability insurance scheme. Confining the risk of substandard level of teaching by lecturers in the delivery of tertiary educations is, however, meaningless if the university itself keeps acquiring lecturers with certificate's background inconsistent with the course he or she has been assigned to teach. The legal consequences, although it has not yet happened in Malaysia, are substantial providing a cause of action to students for litigation not only against the lecturers but the university itself as a joint wrongdoer.

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