

Copping Out or Copying? Do Cheats Prosper? An Exploration of the Legal Issues Relating to Students' Challenging Academic Decisions

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'I was thrown out of college for cheating on the metaphysics exam; I looked into the soul of the boy next to me' Woody Allen¹

Abstract

Within a tertiary institution, academics and academic boards make many decisions which concern individual students directly. For example, whether a student should receive a passing grade, or whether a student should be admitted to or excluded from a course, either on the basis of academic performance or conduct. Lecturers are confronted with situations where they suspect academic misconduct. This may take the form of cheating in examinations, or copying or plagiarism in written assessments. In the current higher education climate, characterised by competition and personal cost, students are under great pressure not only to pass but also to get good grades. Decisions made by lecturers and institutions will have a serious impact on the aspirations of the students. This paper explores the relationship between the university or polytechnic, and its students, in this context. It considers the legal responsibilities of an institution in matters of academic judgment and academic discipline and the possibility of a student's challenge of any decision. It does so against a background of the attitudes adopted by courts in the United States and the United Kingdom in their consideration of such actions by students.

Introduction

There are many decisions made within the higher education context which may be subject to challenge by a student. They fit broadly into two categories. First there are decisions which involve academic judgment, and relate to the grade to be given for a particular piece of work, whether to pass or fail a student on academic grounds, or whether to exclude a student from a course or a programme for insufficient progress. Secondly, there are two types of disciplinary decisions. One relates to conduct unconnected with academic achievement, for example, in relation to a student's behaviour towards other students or university property. *Glynn v Keele University*², the case of the 'naked sunbather' is an example of this class. A student, Simon Glynn, was seen sunbathing nude on campus. He was excluded from residence and fined 10 pounds by the University Vice-Chancellor. He challenged this penalty. Although the court upheld the Vice-Chancellor's decision,

it affirmed Simon Glynn's right to a fair hearing. A leading US authority in the area is *Dixon v Alabama State Board of Education*³ in which five students who had been expelled from Alabama State University for taking part in civil rights demonstrations during the 1960s successfully challenged that decision. The courts made it clear in these and subsequent cases that the students' right to natural justice, or 'due process' as it is termed in the U.S., is of fundamental importance in any disciplinary action taken by an institution. In this respect there is essentially no difference between disciplinary matters within a tertiary institution and within any other organisation, such as a sporting body, or in employment.

The second type of disciplinary decision relates to allegations of academic misconduct, such as cheating in assessments or plagiarism in written work. The philosophy underpinning university disciplinary action in this context was well elucidated in the *1974 Annan Report on the University of Essex*: 'There are actions, such as cheating in examinations ... which destroy ... the relationship between teachers and students on which good teaching depends. They are not crimes but they cannot be tolerated because they destroy the *raison d'être* of a university'.⁴

All of these areas have attracted much debate particularly concerning the desirability of intervention by the courts. Initially, discussion centred upon the application of public law and was concerned with whether a court could assume jurisdiction in a student's application for judicial review of an institution's decision. In the consumerist culture of tertiary education today the debate is now turning to the extent to which a court may entertain an action in private law, particularly for breach of contract by a student aggrieved with an institution's decision. The decision of Ellis J. in *Grant, Woolley, Staines & Grant v Victoria University of Wellington*⁵ affirms that there are circumstances when a New Zealand court may be prepared to entertain actions by students against tertiary institutions. The object of this paper is to consider the likelihood of such intervention, in both public law and private law, in the context of the different types of decisions made by a tertiary institution.

The Sources of the Institution's Decision-Making Powers

In New Zealand all universities and polytechnics are public bodies and are incorporated as tertiary institutions under the provisions of the *Education Act 1989 (NZ)*. That Act confers a general power on the Council of a tertiary institution to provide courses of study or training, to admit students and prescribe fees.⁶ In addition, institutions are given the power to promulgate their own subordinate legislation, concerning the good governance and discipline of the institution, and generally take the form of university regulations.

Together with relevant statutes, the institution's regulations are obviously the starting point for any decision-making concerning students. They determine the jurisdiction of any internal bodies, their *modus operandi* and the extent of their powers in relation to students' rights. An action in public or private law would necessarily be centred upon those regulations. Any decision must be within the jurisdiction conferred on the body concerned by those regulations and the internal procedure must have been executed in strict compliance with them. Failure in this regard may, in public law terms, amount to a breach of natural justice, and in private law, to a breach of contract.

In respect of the regulations, consideration must be given to whether the appeal procedures have been exhausted. In the United Kingdom and prior to 1989 in New Zealand, the central issue was generally whether universities were subject to the jurisdiction of the courts or whether a student's rights were restricted to the jurisdiction of the University Visitor. A University Visitor is an objective person empowered to settle disputes and correct abuses within a university. In most New Zealand universities the Governor-General assumed the role of Visitor until 1989 when the position ceased to exist. By Section 50(4) of the *Education Amendment Act 1990* the jurisdiction of the Ombudsman was extended to include inquiry into student complaints. However, power of the Ombudsman is different from that of the Visitor in that it extends to recommendation only and it is unable to grant remedies. Case notes of the Ombudsman disclose that involvement in student complaints has been negligible.⁷ The Visitor still exists in the older chartered universities in the United Kingdom but the new universities constituted under the *Further and Higher Education Act 1992* and the *Education Reform Act 1988* do not have a Visitor. The discussion relating to the jurisdiction of the visitor in relation to the courts is still relevant however in those and New Zealand tertiary institutions in any consideration of whether a student's right of complaint may be limited to internal procedures provided for in the regulations, and in New Zealand, to the Ombudsman.

Academic Freedom

At first glance, there is an argument that the principle of academic freedom protects academic decision-making from court intervention. The exercise of academic judgment is preserved by Parts XIII to XX of the *Education Act 1989 (NZ)*, inserted by the *Education Amendment Act 1990 (NZ)*. The relevant provisions relate to academic freedom generally and define the principle as including the freedom of an institution and its staff to teach and assess students in the manner they consider best promotes learning.⁸ Section 160 provides:

The object of the provisions of this Act relating to institutions is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability.

The exercise of academic freedom however, as guaranteed by s.161(1), is subject to 'the need for maintenance by institutions of the highest ethical standards'⁹, and the need for 'accountability by institutions'¹⁰. While institutions such as universities and polytechnics in New Zealand are granted the freedom to exercise academic judgment, it is not without the constraints of accountability. It is nowhere specified how such accountability is to be implemented. While English and American courts have traditionally shown deference to academic judgment and it is likely that New Zealand courts would follow suit, academic freedom must necessarily be considered in light of that accountability. In the *Victoria University* case¹¹ Ellis J. dismissed the university's argument that it was protected by academic freedom from allegations of breach of contract and negligent misrepresentation made by students in respect of one of its courses. It is entirely probable then, that academic freedom will not protect an institution where it is shown that

there were factors influencing a particular decision other than those of professional academic nature.

Judicial Review and Academic Judgment

Within public law, judicial review is the means by which courts may potentially control the actions of public bodies. The role of judicial review is generally expressed as being supervisory in that it serves to ensure that a public body has acted in accordance with the procedural requirements of its regulations, and the rules of fairness and natural justice. All universities and polytechnics in New Zealand are public bodies, incorporated under the *Education Act 1989* (NZ) to perform a public function and are subject to judicial review. What natural justice means in this context is that the decision making body within the institution must be properly constituted in accordance with the regulations and that body must act *intra vires* or within its powers granted by the regulations. The student must be given adequate notice of the matters to be raised against him or her. This having been done a student must be given an adequate opportunity to put his or her case. The legitimate expectation of the person concerned must be taken into account, for example, in the case of academic judgment, an expectation of a student gained from a prospectus, that they will be allowed to proceed to the next year of a course having achieved a certain grade. The decision making body must act without bias. The body must give reasons for its decision, on the basis that the person may then be in a position to determine whether to accept it, or to appeal against it.

At issue in many student applications for judicial review is the extent to which these principles may be rigidly enforced in the context of the academic and disciplinary decisions made in tertiary institutions.

There now seems to be little doubt that, by virtue of s.3(b) of the *New Zealand Bill of Rights Act 1990*, the provision of tertiary education is subject to the rights contained in that Act.¹² Section 27 specifically spells out the right to justice in these terms:

Right to justice - (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or public authority has the right to apply, in accordance with law, for judicial review of that determination ...

Clearly a decision relating to academic judgment or discipline made by a tertiary institution affects the rights of a student. A decision whether they are to be excluded from a course because of lack of progress for example, or by way of discipline for cheating or plagiarism, has a substantial impact on their right to education.

Ellis J. in the students' action against Victoria University in Wellington recently affirmed the approach taken in *Norrie v Senate of the University of Auckland*¹³. At that time the Visitor was still in existence so at issue was the jurisdiction of the courts in relation to that of the University Visitor. The Court of Appeal affirmed that a university decision may be subject to the scrutiny of

the courts. In deciding that Holland J. in the High Court had erred in declining jurisdiction, Woodhouse P (delivering the majority decision) said¹⁴:

It is easy enough to understand why it has been held that non-justiciable 'in-house' issues ought to be left as a matter of course to the domestic tribunal either because they could not sensibly be turned into suitable problems for adjudication by the Courts or simply as a matter of discretion. The picture conjured up by Diplock L.J. in *Thorne's* case of judges invited to reassess the actual marking of exam papers may seem a good enough example of that - at least in the absence of fraud or malice on the part of the examiner or something of the sort. But even so, and particularly in relation to issues of any significance, I have great difficulty in understanding why it should be thought that wherever the Visitor is able to act the actual jurisdiction of the Courts has been ousted.

In the later case, the proceedings there were based on allegations of breach of contract and negligence on the part of the university the importance here lies in the words of Ellis J.:¹⁵

In my view the University and the Ombudsman have jurisdiction in 'in house' issues and matters properly determinable by the Court such as contract, tort, and judicial review remain within the Court's jurisdiction.

The U.S. Experience - Academic Judgment vs Academic Discipline

In the United States, on the many occasions when courts have considered actions by students in respect of adverse academic decisions, their primary concern has been to make a distinction between decisions relating to academic judgment and those relating to academic discipline. Of note are two cases decided by the U.S. Supreme Court: *The Board of Curators of the University of Missouri v Horowitz*¹⁶ and *The Regents of the University of Michigan v Ewing*¹⁷. Both these cases were initiated by students who had been excluded from their programmes of university study because of continued poor academic performance. The students had exhausted internal assessment and appeal procedures before filing suit. Essentially the issue before the courts was whether it could review academic decisions on grounds that the body had not adhered to due process or natural justice.

In *Horowitz* the student was enrolled in the medical faculty. She had been experiencing academic difficulty from her second year, and was dismissed after her sixth year. The Supreme Court held that the decision to dismiss the student rested on the academic judgment of those concerned that she did not have the necessary clinical ability to perform adequately as a doctor and was not making sufficient progress towards that goal. While the making of this decision required adherence to due process, it was different from that made in a disciplinary matter and as such did not require the full hearing procedure to ensure that adherence. The Court said: 'A school is an academic institution, not a courtroom or administrative hearing room'.¹⁸

In *Ewing* the applicant student was enrolled in a programme whereby students attained both a bachelor's degree and a degree in medicine. His progress was considerably slower than that

prescribed in the six year programme and the decision was made that he be excluded after the sixth year. The Supreme Court held that the decision to dismiss Ewing had been based on his entire academic record and the university had followed the published procedures. Such academic judgment, the Court said, may only attract judicial interference when it can be shown that the person or body responsible did not actually exercise professional judgment in that it acted arbitrarily or capriciously. The courts have in general since *Ewing* adhered to this view. In an analysis of judicial responses in respect of similar student actions since *Horowitz* and *Ewing* commentators in the U.S. in 1996 concluded that:

... the lower courts in the fifty-nine cases since *Horowitz* and *Ewing* deferred to the expertise of educators when dealing with academic decisions. In the five instances where the lower courts ruled in favour of the students, the institutions appeared to be unfair. The courts will not interfere if, as required in *Horowitz*, students have notice of the academic rules, and as required in *Ewing*, post-secondary policies, processes, and practices are not substantial departures from accepted academic norms.¹⁹

United Kingdom

Courts in the United Kingdom have adopted a similar view. They have been prepared to impugn the exercise of academic judgment only where there was clearly a failure to comply with procedures ensuring natural justice or there were grounds for doubting the basis for the judgment. Such was the case in *R v Board of Governors of Sheffield Hallam University and others, ex parte Rowlett*²⁰. R was a student in the second year of a physical education teacher training course at Sheffield Hallam University. She was expelled pursuant to the university's 'Procedure for the Expulsion of Students for Academic Reasons' under the ground of 'failure to adhere to the professional standards specified for training purposes'. Her challenge to expulsion was granted on the basis that the university had failed to comply with the requirement of adequate prior warning.

A further example of the courts' approach can be found in *R v Higher Education Funding Council, ex part Institution of Dental Surgery*²¹:

This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiner's meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of the candidate's written papers is something more than an informed exercise of academic judgment. Where evidence shows that something extraneous has entered into the process of academic judgment, one of two results may follow depending on the nature of the fault: either the decision will fall without more, or the court may require reasons to be given, so that the decision can either be seen to be sound or (absent reasons) be inferred to be flawed. But purely academic judgments, in our view, will as a rule not be in the class of case ... where the nature and impact of the decision itself call for reasons as a routine aspect of procedural fairness' (per Sedley J.).

Contract Law and Academic Judgment

When Wade wrote in 1969²² that the legal relationship of a university with its members was much more suitably governed by the ordinary law of contract and by ordinary contractual remedies, much of the academic community was dumbfounded. Now, this proposition seems beyond argument.²³ That the enforcement of student's rights is entirely a matter for the law of contract was the approach taken by the High Court of Ireland in *Rajah v The Royal College of Surgeons in Ireland*²⁴. It concerned an application for judicial review made by a medical student who had been declined readmission as she had failed an examination at both the first sitting and the repeat sitting. The University Regulations provided that a student who had failed an examination had no automatic right to repeat the year. They provided for a procedure whereby a body called the Student Progress Committee could consider a student's academic record and any mitigating factors. A decision of that Committee could be appealed to an appeals' committee appointed by the Academic Board which then ratified any recommendation. The application for judicial review was on the basis that the Academic Board had acted *ultra vires* in readmitting other students whose exam results were inferior to those of the applicant. Further she argued that the Academic Board had not supplied her with reasons for its decision. Keane J. held that when the student had enrolled she had entered into a contract which contained her agreement express or implied to be bound by the university regulations which included the appeals procedure. He therefore stated that it was not a public law issue and accordingly the court had no jurisdiction to grant judicial review. He added that even if it was he did not believe that the decision not to readmit the applicant in this case was one which necessitated the giving of reasons.

In holding that the student/institution relationship at least in the 'new' universities is entirely contractual, the courts have highlighted that university regulations are central to that agreement. The Court of Appeal refused a student's claim in respect of such a university in *Thirunayagam v London Guildhall University*²⁵ on the basis that what was being asked for was effectively a mandatory injunction to compel the university to award the Plaintiff a first class honours degree. Hirst L.J. said however: 'If the university departed from their own rules in any respect, that might - I emphasise might; I am not saying would - have been a ground for an application for judicial review'.²⁶

The recent English case of *Clark v University of Lincolnshire & Humberside*²⁷ provides support for the view that public law and private law rights may be co-existent and not exclusive of each other.²⁸ The Plaintiff, Clark, was a student at the University of Lincolnshire & Humberside. For her final examination for a degree in humanities she had chosen to do a paper and presentation on 'A Streetcar Named Desire'. She did the work on computer and failed to keep a backup file. On the last day before the due date she lost the file from the hard disk and instead submitted some notes copied from a commentary on the work. The examiner gave her a mark of zero, originally on the grounds of plagiarism. The university later abandoned this initial assessment. The Academic Appeals' Board accepted that she had not set out to deceive and sent the paper back to the Board of Examiners for remarking. The Board gave it a mark of zero and confirmed that they treated this as a failure and not a matter of plagiarism. The student instituted a claim against the university in contract. The university applied to have the proceedings struck out on the basis that the claim in

contract was not justiciable as the relationship between student and university as a public body meant that a dispute was more properly covered in public law. They argued further that to pursue a civil claim in contract and rather than the public law remedy of judicial review was an abuse of process in that it circumvented the three month limitation period for judicial review. The Court of Appeal held that where a student had a claim in contract which could be brought more appropriately by judicial review proceedings, the court would not strike out the claim merely because of the procedure which had been adopted.

Concerning the appropriateness of a court's adjudication in matters of academic judgment Sedley LJ held:

The arrangement between a fee-paying student and ULH is such a contract: see *Herring v Templeman* [1973] 3 All ER 569, at 584-585. Like many other contracts it contains its own binding procedures for dispute resolution, principally in the form of student regulations. Unlike other contracts, however, disputes suitable for adjudication under its procedures may be unsuitable for adjudication in the courts. This is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and depth, but on which any judgment of the courts would be jejune and inappropriate. This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class. It is a class which undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an aegrotat is justified.²⁹

Woolf MR did not discount judicial intervention entirely however. He said:

While the courts will intervene where there is no visitor this should normally happen after the student has made use of the domestic procedures for resolving the dispute. If it is not possible to resolve the dispute internally, and there is no visitor, then the courts may have no alternative but to become involved. If they do so, the preferable procedure would usually be by way of judicial review. If, on the other hand, the proceedings are based on contract between the student and the university, then they do not have to be brought by way of judicial review.³⁰

New Zealand

The current New Zealand approach was stated by Ellis J. in the *Victoria University* case:³¹

I think it is beyond argument that the relationship between the student (who is a member of the university: s163) and the University is partly based on contract and partly based on the [Education] Act itself ... It is therefore on the basis of contract, tort or judicial review that a student may seek redress against the University ... The Court will not adjudicate on matters which impinge on academic freedom and independence, but they will entertain an action brought by a student based on tort or his or her contract with the University which does not so impinge.

However experience shows that while students may seek a remedy for breach of contract, they are unlikely to be successful in persuading a court to intervene in matters of academic judgment unless they can show that there was a substantial departure from regulations.

Do different principles apply to the treatment of academic disciplinary decisions?

Academic Misconduct - Do cheats prosper?

When I consider life, 'tis all a cheat. Yet fooled with hope men favour the deceit
John Dryden (1631-1700)³²

Academic misconduct by students includes any student conduct contrary to the rules and conditions prescribed by institutions for the assessment of student performance and which calls into question the quality of the assessment.³³

These days lecturers are frequently confronted with situations where they suspect cheating has occurred. Methods of cheating are becoming increasingly sophisticated. When a student is caught 'red-handed' by an invigilator in an examination with notes written on shirtsleeves, erasers or the like, or is seen copying work from another, there is little difficulty with proof. However, it is more difficult where plagiarism is suspected, in an assignment which shows a remarkable similarity to another, or when the marker suspects passages are not the student's own work.

While human nature is such that cheating in some form or other has in all probability existed since the first assessments were set, there are many factors at work in the education environment today which may lend themselves to the desire to cheat.

Society places a huge value on academic achievement. Academic success is measured in terms of external rather than internal rewards, on assessment results and grades. The environment in education is increasingly competitive. In New Zealand it begins with Seventh form Bursary results dictating which universities and courses a student may pursue, and progresses from there with acceptance into specialist courses like law and medicine, honours courses and postgraduate courses being dependent on academic results. There is intense competition for jobs in many professions with acceptance depending upon the grades a person receives in their university studies. Education is no longer seen by most as the pursuit of higher knowledge but rather as a means to an end, providing access to better paying jobs and higher societal status.

Coupled with that is the fact that tertiary education has become an extremely costly business. Students are forced to work long hours in the paid workforce which depletes their study time. They supplement their income with student loans and bank overdrafts. Students now have a considerable financial stake in higher education and the pressure is on them to succeed. The time spent in paid employment while studying also means that they are pressured to complete course work. One view is that for students, plagiarism is a way of trying to cope with shortage of time.³⁴

A threat to the integrity of higher education is posed by websites with names like 'The Evil House of Cheat', 'Genius Papers', 'School Sucks' and 'Studentgoldmine', as well as all the information generally available on the internet. This type of cheating has attracted much publicity recently. It is highlighted in the media with headlines such as: *'Internet cheats at Vic risk*

expulsion' and '*Students turn to online cheating*'³⁵. In the latter article a lecturer at George Mason University in Washington DC refers to some students as 'patchwork plagiarists' - students who copy and paste together passages from articles they have found on the internet and turn in the work as their own. Encouraging students to search the internet in their research may give the appearance of assisting in their cheating. This possibility was seen in the recent article headed 'US professors admit 'cheating' was their fault' in *The Times Higher Education Supplement*³⁶. There it was reported that a Visiting Professor at Dartmouth College in the United States had given out a web address and encouraged his students to use it to help them solve a programming problem. Disciplinary proceedings had begun against 63 students before officials determined that it was the professor's fault that their answers were largely identical. In another situation dozens of students on one computer science course handed in assignments which were similar. They had all surfed the net and stolen bits from the same research papers. The technology that facilitates plagiarism is now however being used to counter the problem and there is available plagiarism-finding software such as 'Essay Verification Engine (EVE)' which universities are being encouraged to use.³⁷

An American commentator expresses the view that law schools in the U.S. are failing their students in neglecting to teach them explicitly what plagiarism is and how to avoid it. In the results of a survey published in 1999, she found 'an alarming institutional indifference to plagiarism and a disgraceful disparity in law schools' definitions of and punishments for plagiarism'.³⁸ While most law schools admitted that discussions about cheating would reflect negatively on their reputation, the researcher concluded that the biggest cause of the failure to teach about plagiarism was not cowardice or avarice, but ignorance. She said:

They also assume that students are ethical, moral and hardworking. Unfortunately this idealism clashes with the 1992 study of more than 6,000 students from 'elite' undergraduate schools: 60% having admitted having cheated once, and 12% even characterised themselves as 'regular cheaters'.³⁹

Institutional Action

It matters whether the guy who built the bridge cheated his way through engineering school. I'd worry about that.

Unfettered by the notion that academic judgment is the sole preserve of the academic community, the considerations which relate to any disciplinary action are clearer. In simple terms, rigorous adherence must be paid to disciplinary procedures and to principles of natural justice. Any action taken by the institution pursuant to the regulations must demonstrate both substantive correctness and procedural correctness.

Substantive Correctness

The allegations against a student must be proven as a question of fact. Any allegation of cheating is one of dishonesty, the standard of proof is beyond reasonable doubt. There may be issues relating to the credibility of the student or any witnesses. In contrast with matters of academic judgment it

seems that principles of natural justice dictate that there be a hearing where the student is given a proper opportunity to present their case. A student must be able to bring his or her own witnesses and question other witnesses. While an early Privy Council decision⁴⁰ held that while fairness required that the student be given a fair opportunity to challenge the evidence put forward by the university, it did not follow that failure to inform the student that he was entitled to cross examine amounted to a breach of natural justice, it is likely that today a court would require a higher standard.

Support for this view may be seen in *R v Manchester Metropolitan University; ex parte Nolan*⁴¹. Nolan was a student at the Manchester Metropolitan University and was taking the Common Professional Examination of the Inns of Court and the Law Society. He took into the end of year examinations some closely written pages of notes which were noticed by the invigilators. Action was taken against him under two sets of disciplinary procedures and rules. Under the University Student Regulations and Procedures, the Faculty Disciplinary Committee conducted an oral hearing at which Nolan was present and was represented. That committee found that Nolan was guilty of attempting to gain an unfair advantage but that there were mitigating circumstances in terms of Nolan's mental state. They asked the CPE Board of Examiners to determine the appropriate academic action or penalty. The Board, after making one decision, then reconvening and rescinding it, finally decided that Nolan should be deemed to have failed the entire set of examinations and not be permitted to retake them. The crucial medical evidence and testimonials which had been before the Disciplinary Committee had not been before the Board of Examiners, neither had the minutes of the Committee hearing. The applicant was not allowed to be present. The court quashed the decision of the Board of Examiners on the basis that it had failed to take into account the full evidence in mitigation which had been placed before and accepted by the Disciplinary Committee at the original hearing. As it was incumbent upon it to take such material into account, failure to do so nullified the decision.

Natural justice also dictates that the disciplinary body conducting the hearing is impartial and that there is no real danger of bias. If a disciplinary allegation arises out of some direct contact with a member of the staff, for example an examiner or invigilator, then that person should not be a member of the disciplinary body. The issue of bias was raised in *Nolan's* case as the Board of Examiners which made the penalty decision was chaired by one of the chief invigilators at the original examination, with both the other chief invigilator and Nolan's personal tutor also taking part. The court held that as there was a full hearing at which the material facts were found prior to the Board of Examiners' meeting and decision, there was no denial of justice so as to render the decision invalid on those grounds. Essentially, it took the view that what amounts to unacceptable bias in a domestic or academic body must be determined in each case according to the framework in which it operates.

The argument of bias was raised recently in *R v Cambridge University; ex parte Beg*⁴². The facts were that Beg had submitted an independent essay in partial fulfilment of his requirements for a Master of Philosophy in Finance at the University of Cambridge. One of the examiners felt that it contained plagiarism. There was a hearing conducted by the court of discipline at which Beg agreed that there was plagiarism in the marked essay but contended that it was not the essay submitted by him but there had been a substitution by Mr K, his supervisor. He appealed from the court of

discipline to the Septemviri. The Septemviri rejected Beg's evidence and exonerated Mr K from 'those disgraceful and manifestly untrue allegations'. Beg applied for judicial review on the basis that he had been denied a fair trial as the chair of the Septemviri and the university advocate were both members of the department of law and mixed socially and professionally. Also, he argued, there were no student members of the Septemviri. Thirdly, he argued that he had been penalised because of the nature of his defence which involved an attack on the integrity of a lecturer at the university. He contended that there had been a breach of natural justice as guaranteed to him by Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Sullivan J. of the Queen's Bench Division dismissed the application, holding that there was no evidence of bias or lack of independence or impartiality on the part of the Septemviri. In relation to its composition he said⁴³:

All are very distinguished academics. In the 'village' atmosphere of the university I see no reason why such very senior 'villagers' should be unconsciously biased against a student member of the university as opposed to a lecturer at the university; all are members of the same village community.

Beg further argued that the penalty was disproportionately severe but the court held that the disciplinary body was in the best position to judge what was an appropriate sanction and it would only interfere if the penalty imposed was manifestly unreasonable. It is clear that a student must have strong factual evidence to support any argument of bias in order to persuade a court to overturn a decision of a disciplinary committee of such high standing. The odds, it would seem, are considerably stacked against the student. In practice however, there will be obvious circumstances where it would be wise for a member of the disciplinary body to stand down and it is to be hoped that this would happen. Examples could be where there is a degree of animosity between a member of the disciplinary body and the student concerned, or where the member is personally involved with the student.

Procedural Correctness

Many challenges to decisions of disciplinary committees are based upon breaches of procedure. It is one thing for an institution to have a clear published procedure to be followed in respect of allegations of academic misconduct, and another for them to be religiously applied. Frequently, lecturers may make decisions 'on the hoof' failing to appreciate the ramifications. While generally the principles of natural justice apply equally, the United States courts have seen a clear distinction between procedural requirements in decision making in respect of academic deficiencies of students, as in *Horowitz* and *Ewing* on the one hand, and taking disciplinary action in the case of misconduct, on the other. In the words of one commentator: 'The rationale for this distinction is the widely-held belief that misbehaviour is a very different matter from failure to attain a standard of excellence in studies'.⁴⁴ The effect is that the standard required of the decision making body is even higher, and it is suggested that in every case the student must be given the opportunity for a hearing.

Other Potential for Liability

There are other potential causes of action which are beyond the realm of this paper. The U.S. case of *Napolitano v The Trustees of Princeton University*⁴⁵ provides an illustration of the number of fronts on which a particularly aggrieved student may mount an attack. A student in her final year of study was penalised for plagiarism by the university withholding her degree for a year. She took action for breach of contract, breach of constitutional rights, defamation, privacy, and intentional infliction of emotional harm. In New Zealand, any particular circumstances could also lend themselves to action under the *Human Rights Act 1993* or the *Privacy Act 1993*. As mentioned above, action in the tort of defamation is also a possibility.

While American courts have consistently declined to recognise an action in 'educational malpractice' this is not now the case in the U.K. The decision of the House of Lords in *X (Minors) v Bedfordshire County Council*⁴⁶ arguably opened the door here for an action in educational negligence. In this context such action would be based on the premise that the university owed a duty of care and was careless in the procedure adopted or decision made, such carelessness resulting in the student's loss.

The persistence of an aggrieved student may be limitless:

Litigation against universities is not just confined to actions for negligence or breach of contract. In 1996, a 10-year campaign by a former Bristol University Student ended when his case was rejected by the Court of Appeal. In 1986, Francis Foecke was originally awarded a first-class degree in mathematics. He had not been regarded by his tutors as an especially bright student and yet, although he took 13 finals papers (an unprecedented number), he gained first-class results in all. An inquiry was ordered after the discovery that his answers exactly mirrored the model answers prepared by the examiner, including some errors, and Mr Foecke's first-class degree was withdrawn. Mr Foecke, who spent 50,000 pound sterling pursuing various legal cases including a libel action against the university, has now indicated he may take the matter to the European Courts.⁴⁷

Conclusion

So, what lessons may be learnt from overseas experience?

Certainly, the potential exists for a student to take action against their university or polytechnic in respect of any decision, either relating to academic judgment or discipline. In the current higher education climate students are ready to pull out all the stops to ensure they achieve a good qualification. However, from the dearth of New Zealand case law it may be assumed that hitherto student action is more a perceived threat than a reality. Be that as it may, simple principles of justice and fair play mean that tertiary institutions must take great care.

Most New Zealand universities and polytechnics now have detailed academic grievance procedures. The starting point in any situation is always those procedures. It is likely that a court could require that these procedures be exhausted before they accept jurisdiction. They are overlaid with considerations of natural justice as set out above, in terms of s.27 of the *New Zealand Bill of*

Rights Act 1990. Where institutions have sound and clear procedures which ensure adherence to principles of natural justice, and they follow these procedures strictly and ensure that the charges are proved in substance, it is unlikely that a student's action will succeed.⁴⁸ While there are differences between decisions involving academic judgment which are frequently subjective in their nature, and decisions involving academic discipline, they have the principle of natural justice in common. However, where a student has fallen short of the requirements prescribed in the institution's regulations for achieving a certain grade or continuing with a course of study, it is likely that a hearing may only be required where there are mitigating factors the student wishes to place before the decision-making body. Regulations should spell out in detail what a student may do in the eventuality of their performance on a course or in an assessment being impaired due to extraneous factors and these regulations should be strictly adhered to. If there is to be a right of appeal, the conditions upon which that right may be exercised should be specified in the regulations. Further, in the absence of any factors such as bias or malice having been shown, the courts have shown a reluctance to allow successful challenges of academic judgment.

It has been argued by some commentators that United Kingdom courts are becoming more prepared to intervene in private law. Kaye⁴⁹ supports his argument by citing the case of *Madekwe v London Guildhall University*⁵⁰. There Schiemann LJ said that the point of the student's claim was not requiring the court to assess the merits of his exam papers which clearly the court could not do, but rather that his disadvantage was caused by his having been given the wrong information by the university. That, the judge said, was more properly a claim in breach of contract, negligence and misrepresentation, and he adjourned the case for the Plaintiff to amend his statement of claim.

The consequences of any academic or disciplinary decision to a student are extremely serious. Denial of the ability to pursue a certain qualification or career may go to the heart of his or her life's expectations. It is inevitable that academic cheating will occur. Just as inevitable is that, if New Zealand is to follow overseas trends, universities and polytechnics will at some time find themselves confronted by actions for judicial review, breach of contract, education negligence or whatever. This possibility serves to emphasise the need for institutions to establish appropriate contractual, substantive and procedural platforms, to render their operation more even-handed and consistent and to ensure that all internal procedures and those involved with them understand and embrace the principles of natural justice.

Keywords

Higher education law, student misbehaviour and discipline, UK, US, NZ.

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Endnotes

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3. 294 F.Ed 150 (5th Cir.1961)
4. Quoted by Farrington, D.J. (1998) *The Law of Higher Education*. Butterworths, London.
5. Unreported Judgment, High Court at Wellington, 30 November 1997, CP 312/96
6. s.193 Education Act 1989
7. See Kos, J.S. (1999) View from the Bottom of the Cliff: Enforcement of Legal Rights Between Student and University. *ANZJLE* 4(2): 18
8. Education Act 1989 s.161(2)
9. s.161(3)(a)
10. s.161(3)(b)
11. n.5
12. It has been suggested that a similar view would be adopted in respect of the newly enacted Human Rights Act 1998 in the U.K. See Kaye, T. (1999) Academic judgement, the University Visitor and the Human Rights Act 1998. *Education and the Law*, 11(3): 165-186.
13. [1984] 1 NZLR 129
14. n.15 at p.134
15. *Grant, Woolley, Staines & Grant v Victoria University of Wellington*, Unreported Judgment, 13 November 1997, High Court, Wellington Registry, CP 312/96, at p.9
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17. 474 U.S. 214, 106 S.Ct.507, 88 L.Ed.2d 523 (1985)
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28. see Kos, J.S. (1999) *ANZJLE*, 4(2): 18-37.
29. [2000] 3 All ER 752, at 756.
30. [2000] 3 All ER 752, at 760.
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39. n.38 at p.237
40. *Fernando v University of Ceylon* [1960] 1 WLR 233
41. [1994] E.L.R. 380
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45. 453 A.2d 263 (*NJ Super.Ct., App. Div. 1982*)
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47. *The Times Higher Educational Supplement*, 2 August 1996, discussed in Slapper, G. (1997) Judging the educators: forensic evaluation of academic judgement. *Education and the Law*, 9(1): 5-12.
48. Recent U.S. suits where this may be seen to be the case are *Kim v Board of Trustees of University of Alabama*, Unreported judgment (11th Cir.1999); *Willett v City University of New York Law School* (2nd Cir. 1999) both at [1999] *School Law Reporter*, 42(1): 13; and *Than v University of Texas Medical School at Houston* 188 F.3d 633 [137 *Educ. L. Rep* 915] (5th Cir.1999)
49. Kaye, T (1999) Academic Judgement, the university Visitor and the Human Rights Act 1998. *Education and the Law*, 11(3): 165-186.
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