

OPINION

BEHAVIOUR DISORDERS AND TEACHER NEGLIGENCE

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The purpose of this paper is to examine the legal implications of the continuing rise in the number of school children diagnosed with behaviour disorders. Not only are teachers now subject to a dense grid of legal regulation, they are also increasingly vulnerable to actions in tort. It will be argued here that as more and more children are labelled 'disordered', the duty of care become more onerous, and hence harder for teachers to meet. As a consequence, teachers are more likely to face claims of negligence. It is concluded that while the schooling system needs to retain a healthy scepticism about each new pathologising disorder that seeks special status for its sufferers, it also needs to provide greater training and resources for teachers regarding disorder management. It is also concluded that recent changes to negligence law regarding the issue of 'reasonable foreseeability' within breach of duty of care may not be as significant as might have been hoped by the teaching community. Indeed, the elevated standard of care required by the increasing numbers of disordered pupils, places teachers in an ever more difficult legal position.

I THE LEGAL AND PSYCHOLOGICAL LANDSCAPE OF CONTEMPORARY EDUCATION

Teaching is an inherently complex business, and getting more complex. Teachers are now engaged in a very different job to their predecessors. The modern profession is exceptionally tightly regulated, teachers are monitored and assessed, their knowledge tested and measured, and their abilities recorded and ranked. Furthermore, they are no longer simply responsible for the effective transmission of given curricular information within an acceptably pastoral learning environment. Teachers are now expected to be de-facto therapists. Whereas once significant conduct or learning difficulties would be the trigger for either expulsion or removal to a special school, teachers now, with the guidance of experts, have been recruited into the ongoing management of 'problem' students.

This management demands significant ongoing input from school staff, in that it requires a working knowledge of a lot of discipline areas, from pedagogy to psychology, from counselling to child welfare, and (increasingly) from paediatrics to pharmacology. It also necessitates a constant process of keeping up with developments and 'discoveries' within a discipline area. It is not enough for teachers to know that certain forms of misbehaviour have now been pathologised as Conduct Disorder (CD), it also helps to be aware of some of its nosological subdivisions — such as Attention Deficit Hyperactivity Disorder (ADHD), or Oppositional Defiance Disorder (ODD)

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— as well as how to recognise them, what to do with them, and how to organise your classroom practices accordingly.¹

The psychologisation of modern education is by no means the only complicating factor facing teachers. The contemporary school is now the focus of a complex and far-reaching array of legislation, most of which impacts directly on the daily professional lives of teachers. Leaving aside all the laws, regulations and rules relating to the physical environment, resourcing, scheduling, financing and the curriculum, there are now bodies of law concerning a range of issues that also impact upon schools, and the way teachers do their job. In the area of student misbehaviour, in a post-corporal punishment environment, there are now a number of laws and protocols determining how and when teachers may respond to misconduct, ranging from confiscation and detention, all the way to suspension and exclusion. Teachers are also faced with a broad range of state-mandated responsibilities to report various form of child abuse and neglect. Whereas teachers in New South Wales are required to report all suspicions regarding issues of child safety, teachers in Queensland are not required to report physical abuse, emotional abuse, or the neglect of pupils, but are required to report suspected sexual abuse, although only if committed by a school employee.² There are, however, some policy-based reporting obligations.³

The education system is now also subject to the mandates of various state and federal anti-discrimination acts. Schools, and all their staff, are required to provide a learning environment that provides for equal opportunity for students, irrespective — wherever possible — of differences that may impact on their physical, intellectual, social or emotional success. Of increasing importance, behaviour disorders of the type already mentioned are covered by federal anti-discrimination legislation.⁴ Consequently, teachers are now legally required to take extra account, within their pedagogic and classroom-management practices, of the increasing amount of ‘special needs’ children in their care,⁵ children whose numbers correlate directly with the growing catalogue of disorders emerging from within the psy-disciplines.

So whereas given sets of behaviour were once dealt with by an experienced teacher as a matter of course, allocating these behaviours the medical imprimatur of an objective ‘disorder’ has rendered them open to legal scrutiny, intervention and consequence. To complicate matters further, research has shown that such categorisation of children is not a purely administrative process. It also has ongoing effects relating both to institutional practice, and to the processes of identity formation.⁶ That is, the labelling of children as ‘disordered’ often exacerbates classroom difficulties, as it can provide a ready template for (mis)conduct.

While all these issues are of importance, the main legal concern expressed by the majority of teachers involves their perceived vulnerability to suits in negligence.⁷ Dealing, as they do, with a sector of society still involved in the process of improving their physical, intellectual and critical abilities, the susceptibility of this group to injury means that teachers are more likely than most to be sued. Sub-disciplines such as physical and outdoor education have always had to be particularly cautious in the organisation of their material, however, it has been argued that fear of litigation now has a significant role to play in curriculum design.⁸ Indeed, fear of litigation has reached the point where Britain’s largest teaching union, the NASUWT, has instructed its members not to lead or participate in school trips, as all too often their member ‘faced spurious legal action from parents unable to accept that there was such a thing as a genuine accident’.⁹

Largely through a focus on the context of Queensland policy and legislation, the purpose of this paper is to examine the relationship between this vulnerability of teachers to actions in negligence, and the exponential rise in behaviour disorders within the school. The argument here is twofold: first, as more and more children are labelled ‘special needs’, the greater will be the

duty of care held by teachers for each of these children. As such, without greater resources and training, and smaller class sizes, it will be ever harder to meet the augmented requirements of satisfactory duty of care within classrooms, and more teachers will find themselves taken to court. Second, as a corollary of the first, for any given school accident, simply placing the label of 'disordered' on a plaintiff means a greater duty of care, a higher legal bar to clear, and hence a greater likelihood the teacher will be found liable.

It should be noted here that very often actions in negligence are taken against the school authorities for vicarious liability, rather than directly against specific teachers — after all, education departments have significantly deeper pockets for the payment of damages than do their employees. This does not render the issues raised in this paper moot, since even though a finding of negligence against a teacher may not be financially crippling, professionally, the individual's career may not recover from the judgment.

II THE RISE AND RISE OF BEHAVIOUR DISORDERS

The concerns over this issue would be relatively trivial if there were just a few disordered children within the education system. However, with the rise of the inclusive school — that is, institutions where special needs students are to be given full access to, and involvement in, the daily life of the classroom — the teacher is now placed at the centre of diagnosis and treatment of a plethora of learning and conduct disorders. Teachers are now expected to be able to intervene upon a wide range of educational differences, differences which are no longer either below the threshold of intervention or simply part of the human condition, but instead are now objective pathologies to be identified, categorised and normalised. Furthermore, this appears to be part of an ongoing and exponentially-increasing process.¹⁰ Within the realm of educational difference/handicap, there were only two classifications prior to 1890 (*idiot* and *imbecile*). This had swelled to eight by 1913 (including divisions such as *moral imbecile*, and *mental defective*) and on to twelve in 1945 (with *severely subnormal*, *maladjusted*, and *delicate*). Currently, the list of such differences is enormous — in excess of three hundred¹¹ — each with its own treatment, prognosis and educational implications.

The most visible, diagnosed, and discussed disorder is undoubtedly ADHD. In the United States, this disorder is diagnosed for between 6 to 9 percent of the school population,¹² although advocates claim the actual number of those with the disorder is as high as 15 to 18 percent. The diagnosis is now equally popular in Australia. Between 1991 and 1998, the number of prescriptions written for the disorder increased by 2400 percent, and by 2002 the number of children estimated to be on such prescription drugs was at least 50,000.¹³ These figures have continued to increase, and as previously stated, ADHD is simply one disorder among a large and ever growing wave of pathological categories of difference.

There are two possible accounts of the rise of behaviour disorders, each painting a very different picture. The first, and most familiar, presents a triumphalist account of the huge strides made by psychology in uncovering the truth of the human mind. This branch of knowledge is presented as objective, benevolent and teleological, gradually unmasking the facts of the natural world, with the individual psychological researchers merely perceptive but neutral observers to whom these truths are passed. As such, behaviour disorders like ADHD have always existed — as have the hundreds of others, with hundreds of others likely to follow — however they have simply remained unrecognised. Within this account, the psy-disciplines have expanded to the extent they have, as a result of their success at understanding the mysteries of the human mind.

This paper offers a different account of the rise of psychology, one which ties its success not to the ontological validity of the categories it ‘discovers’, but rather one which is based upon the role that psychology can play in the effective administration of given populations. There is a body of historical work which contends that modern society came to be governed through the amassing of information, information which allowed for the sub-division of social body into manageable units. This process of differentiation occurred across the full spectrum of human conduct, from the creation of various new categories of pauper, to the production of an array of types of criminal, each of which could be treated differently, and all with the ultimate goal of producing a normalised population.¹⁴

It is argued here that the success of psychology is, in large part, tied to the role the discipline has played in furthering these governmental imperatives, and more often than not, that has been a role played out within the context of the mass school. Whereas other forms of governance often sought to police the external manifestations of abnormality within the school — tardiness, rudeness, lack of hygiene, and so on — the conduct of the mind was now to be subject to governmental intervention and regulation. The conduct of pupils, and by extension, all citizens, was now to be directed by investigating, cataloguing, interpreting and modifying their mental capacities and predispositions.

Subjective experience was now something that could, and needed to be, managed — and managed largely through the production of more and more categories of difference, such as ADHD. Just as the ‘pauper’ became sub-divided into more precise and workable categories, so now were the mental faculties of the population, beginning with the young. A concern over the notion of the ‘feeble-minded’ in schools, combined with the new-found psychometric techniques of mental measurement, resulted in the burgeoning of the taxonomies which set out the problems of the mind. As Rose observes:

One fruitful way of thinking about the mode of functioning of the psychological sciences ... might therefore be to understand them as *techniques for the disciplining of human difference*: individualising humans through classifying them, calibrating their capacities and conducts, inscribing and recording their attributes and deficiencies, managing and utilising their individuality and variability.¹⁵

The argument here is that disorders such as ADHD are, in the final analysis, artefacts of government. They are essentially devices for regulating the conduct of specific portions of the population. The more that are produced, the tighter the network of administrative intervention available within schools. This is not, a priori, an undesirable state of affairs, as effective governance has become synonymous with good schooling. However, within the context of this paper, it raises two issues. The first concerns the ontological validity of these categories. As Wright and Treacher have noted, such constructs are ‘social through and through, they are the outcome of a web of social practices and bear their imprint’.¹⁶ This observation moves behaviour disorders from the realm of objective natural facts, into the more contingent territory of social policy, thereby ultimately leaving open the possibility of abandoning them as explanatory categories, and sets of administrative devices. The second concerns the problems faced by teachers associated with the rapid expansion of the number of disordered children, and more specifically, the legal implications of this expansion.

III GOVERNANCE AND THE SCHOOL

As previously mentioned, the contemporary school is organised within networks of legislation, although it has been argued that for the most part, what has been described as ‘the blunt instrument of the law’¹⁷ has merely provided a generalised framework for organising the functioning of the institution. Historically, tied as it is to the rise of Liberalism, the law has always had a secondary role to play within mass education. Within Liberalism, the state did not organise the internal conduct of the family based upon such clumsy coercive mechanisms as laws, decrees and regulations. Rather, it administered the raising of children through the expertise associated with disciplines like family guidance, welfare, psychology, community medicine, counselling and pedagogy, with the school becoming one of the most important sites where this governance could occur. As such, the expertise of the teacher became a vital component in the management of an entire segment of the population. Within these new mass institutions, the population would be shaped, governed, in ways deemed necessary for the common good — and it would be teachers who would be asked to provide both the expertise, and the moral guidance, to accomplish this governance. Importantly then, over the last twenty years, it has increasingly been disciplines such as psychology, within the associated production of administrative categories like ADHD, that has provided the intellectual machinery for the ever-tighter regulation of the schooling population.

However, central though they have become to the liberal governance of schooling populations, the increasing numbers of behaviour disorders also have significant legal implications for the teaching profession. One has been addressed already, that is, the expansion of the protection afforded by anti-discrimination legislation. Children once regarded as normal have now been re-classified as ‘special needs’, and as such, fall within the umbrella of disability, with some predictable outcomes. A pupil in Wisconsin vandalised two elementary schools causing \$40,000 worth of damage. His school sought to expel him, along with the two others who caused the damage. During the hearing into his actions, his mother raised the possibility that he might have ADHD, and soon acquired a private psychologist who concurred with this appraisal, even though the school district’s psychologist disagreed. The matter ended up in court, with the student winning his case and avoiding expulsion as a ‘disabled’ student — unlike his two co-vandals.¹⁸

As the school district attorney pointed out, the admission of such post-hoc diagnoses is both ‘disturbing and mysterious’, and adversely affects the schools’ ability to discipline not only students with disabilities, but also those who may then choose to claim them.¹⁹ As the number of students claiming the status of disability continues to increase (via behaviour disorders such as ADHD), and as each disorder has different levels of associated accountability for conduct, teachers may find themselves in the situation of being unable to hold an increasing section of the school population liable for their conduct.

Not unexpectedly, this logic is also extending into the wider realm of criminal law. Disorders such as ADHD are now presented as a significant mitigating factor in sentencing, again, often presented as post-hoc diagnoses. Courtroom accommodations are also made for those diagnosed with the disorder, that is, the repetition of important information, and additional time to think. Also, there is a growing tendency to use ADHD as a defence, with limited evidence of success to date, although one area where the disorder has proven useful to defendants to date is to have crimes requiring intent reduced to ones involving merely reckless behaviour.²⁰

Within the area of civil law, and providing the central focus of this paper, there is the potential for this psychological phenomenon to affect actions in negligence against teachers. As previously stated, the fear of being sued by pupils is the foremost legal concern among teachers. The Chief

Justice of Tasmania, Peter Underwood, in his opening address to the Australian and New Zealand Education Law Association Conference in 2006, stated that

I have found that there is a widespread belief that if a claim is made it will follow that the courts will find that the teacher has breached the duty of care owed to the child and the teacher will be found to have been negligent. Although insurance may remove the risk of financial ruin, there remains the fear that the teacher's reputation will be destroyed. I think that there was some justification for these fears ... It has been said that in order to avoid being found negligent you had to carry out your duties as a teacher with the cautionary habits of a maiden aunt, the reflexes of Michael Schumaker, and the skills of a heart surgeon and all the while, maintain 20/20 hindsight vision.²¹

He suggested that the over-riding fear of litigation among teachers had reached debilitating levels. However, he also goes on to argue that some recent legal changes may have re-organised the field for the better, in that widespread concerns over the high levels of public indemnity insurance, combined with the disastrous collapse of the giant indemnity insurer HIH, eventually resulted in a nationwide review of negligence law. This review resulted in a tightening of the requirements regarding foreseeability — the intention being to attack 'the culture of blame' and to increase personal responsibility. The next section of this paper will examine whether, within the growing category of students with behaviour disorders, such changes are likely to produce this desired outcome.

IV NEGLIGENCE, FORESEEABILITY, AND THE ADHD EPIDEMIC

All actions in negligence are comprised of three elements: the existence of a duty of care, the breach of that duty, and resulting damage. The first of these three elements is normally relatively unproblematic when debating teacher negligence; that is, both school and teachers have an established duty of care towards their students.²² This duty is non-delegable, and hence the schooling authority cannot absolve itself of liability simply by hiring ostensibly skilled teachers. Likewise, the legal debate is not usually over the issue of damage — whether or not the pupil was injured — as this is generally self-evident. Still, the damage must be of a form recognised at law, currently ruling out matters such as leaving school without much of an education, and there must be causation in fact,²³ usually a matter of common sense and experience, and causation in law,²⁴ centred on the issue of remoteness.

However, the elements most frequently in dispute in a negligence action tend to be whether there has been a breach in the duty of care by the teacher, and therefore the school. There are generally variants on two types of action in this area. The first sort of breach involves the protective measures put in place to protect children, which might include issues of adequate supervision, or allowing children to engage in harmful activities. The second normally concerns the actions and decisions made by teachers which put children at risk, such as planning activities that have the potential to lead to injury.

Both these forms of breach are comprised of two foundational components: the standard of care required in the circumstances, and whether or not this standard has been breached.²⁵ Most focus has recently fallen upon the latter issue of breach, and in particular, the level of risk that teachers are required to guard against. That is, how does the law determine what could be considered as a 'reasonably foreseeable' risk? The common law has required all risk to be accounted for unless those risks are deemed to be 'far-fetched or fanciful'. It has often been argued that this level of foreseeability has been far too generous to the plaintiff, resulting in the situation

where if an accident happened, it was foreseeable, and hence the defendant — the teacher — was almost certainly liable. With the exception of the Northern Territory, all Australian jurisdictions have now introduced legislation to replace ‘far-fetched or fanciful’ with ‘not insignificant’, a more defensible position for a teacher charged with negligence. For example, in Queensland the *Civil Liability Act (2003)*, section 9, mandates that a person does not breach their duty of care unless the given risk was foreseeable, and the risk was not insignificant, and in those circumstances, a reasonable person would have taken precautions.

The central issue here is whether this change in foreseeability provides a magic bullet for negligence actions in schooling contexts. If so, the increasing number of disabled students described in the paper should ultimately prove to be irrelevant in the new teacher-friendly legal environment. Teachers have yet to be convinced.²⁶ In spite of this change, most teachers would contend that ‘not insignificant’ only represents a very small improvement on the previous ‘far-fetched or fanciful’. After all, for something to be insignificant, it is also irrelevant, which means that teachers are still liable for virtually every other conceivable risk. The bar is still set very high.

Underwood CJ has a somewhat different viewpoint. While not decrying the legislative changes, he argues that this change was probably not strictly necessary, since ‘the courts were already facing the proposition that the standard of care that had been imposed in the past was far too high and the wheel started to turn the other way’.²⁷ He cites the recent case of *St Anthony’s Primary School v Hadba*²⁸ where a child was injured by another child who grabbed her legs while she was playing on a flying fox. The court held that there was no breach of a teacher’s duty of care for failing to provide constant supervision in this instance. It was noted in this judgment that it is not reasonable to supervise pupils at all times, as this would remove any element of trust between the two groups, a crucial component in the effective development of children. However, this case raises a question pertinent to this paper: would the outcome have been different if the pupil who pulled the plaintiff off the flying fox had been previously diagnosed with ADHD, and the supervising teacher knew of this diagnosis, thereby necessitating a different standard of care? The answer is very possibly yes.

As previous discussed, the standard of care required in the circumstances is the first of the two elements in assessing a breach of duty. The standard is generally set at that of a reasonable person, however there can be changes to this standard based, for example, on the personal characteristics of the defendant, and significantly, the personal characteristics of the plaintiff. A crucial change to the standard of duty of care owed to the plaintiff involves the issue of disability. That is, a plaintiff with a known disability is owed a greater duty of care than one who is not disabled.²⁹

Herein lies the problem. Under the *Disability Discrimination Act 1992* (Cth), section 4(1)(g), a disability is defined as ‘a disorder, illness or disease that affects a person’s thought processes, perceptions of reality, emotions or judgment or that results in disturbed behaviour’. Consequently, the plethora of behaviour disorders fashioned by the psy-disciplines has resulted in the recategorisation of increasingly large numbers of previously normal children as disabled. That is, as more and more children are labelled as special needs — via the medicalised, seemingly objective label of a behaviour disorder — so the number of children for whom there is an augmented standard of care also increases. Furthermore, all of these categories of difference mandate different kinds of care and supervision, each of which correlate to specific sets of knowledge and expertise that teachers are now expected to possess — reasonably or otherwise.

As previous speculated, had ADHD been involved in the case of *St Anthony’s Primary School v Hadba*, it is more than likely that the plaintiff’s case would focus on this very point, and it

would not be difficult to imagine the approach taken by council: ‘You knew the person behind the plaintiff had ADHD, a behaviour disorder characterised by risk-taking and reckless behaviour, and yet you failed to maintain adequate supervision ... in the face of this well-known disability ... around a flying fox! Indeed, the risks of this accident were by no means ‘insignificant’, as required under the act ... this outcome was almost predictable’.

The problem is even exacerbated in terms of the defences available to teachers against claims of negligence. If it was the child on the flying-fox who had been diagnosed with ADHD, and the accident had been as a result of risk-taking behaviour, then it would be far harder for the teacher to make the case for contributory negligence. After all, it would not only be argued that, once again, the teacher ought to have known of the disorder and modified the exercise accordingly, but also that a disordered child can be held less responsible for their actions than a normal counterpart.

Add to this scenario, and others like it, the possibility of any one of dozens of other behaviour disorders, and the magnitude of the problem becomes obvious. Rapidly increasing numbers of children are no longer simply naughty, or boisterous, or ill-disciplined, as all children can be under the right circumstances. They are now regarded as being objectively different, scientifically assessed and nosologically ordered, sufferers from concrete and psychologically validated disorders — and subject to different interpretations and interventions under the law, when compared to the rapidly-shrinking category of normal children. Under these circumstances, the change from ‘far-fetched or fanciful’ to ‘not insignificant’ perhaps seems like less of the legal breakthrough for teachers than it once did.

V CONCLUSION

All these arguments about the behaviour disorders and the law lead to a number of conclusions, ranging from the philosophical, through the administrative, to the legal. First, the issue here has not been to reject the various new psychological/educational categories of difference outright, or to suggest that teachers do the same. Refusing to accept their veracity would be of little use, since their existence as valid disorders has been determined within disciplines other than education. Even so, there is still room for some healthy scepticism over the seemingly endless production of new disorders, disorders which generally first emerge within the school. After all, teachers are not alone in voicing concern over the veracity of typologies such as ADHD. Questions are widely asked over this entity, not only because of concerns over its ontological validity, but also because of the social and administrative *function* it appears to serve within the classroom. That is, suspicions inevitably arise over the objectivity of such disorders when their central purpose appears to be the maintenance of good order within a context as artificial and historically contingent as the panoptic classrooms of contemporary mass education. Still, at a professional level, the very least teachers can do is exhaust the extensive repertoire of their professional skills for dealing with misconduct, whether involving behaviour disordered children or not, before even considering the types of pharmacological intervention now so familiar and readily available within the school.

Second, while these disorders may be of dubious validity, teachers still need specific training in addressing them. That is, given that teachers have to deal with pupils diagnosed with ADHD, or at least the sets of behaviours that constitute those disorders, then like it or not, if they are to avoid the sorts of circumstances that lead to actions in negligence, then they need more information, more training, and more resources. Most teachers would currently contend that they are insufficiently prepared for the existing ocean of disorders, let alone each of the new labels that

continue to appear with ever-increasing regularity. Given that the standard of care required for this rapidly expanding group of pupils is greater than for the normal cohort, to avoid more actions in negligence being taken against them, schools will be forced either to increase the training of teachers to deal with new categories of difference, or they will need to reduce the number of pupils per teacher. Both of these options are expensive, but in the long term, surely cheaper than the wider physical, professional, and economic costs of injury and litigation.

Third, there has been no intention here to suggest that the law sets out to treat teachers unfairly, far from it. Indeed, there is a general recognition by the courts that this is a difficult, complex and legally vulnerable profession.³⁰ In addition, recent changes to the law have certainly started the process of improving the lot of teachers when faced with actions in negligence. These changes go beyond reorganising the notion of reasonable foreseeability, from a risk being 'far-fetched or fanciful' to 'not insignificant'. It is also no longer mandatory to warn of obvious risks. Furthermore, legislation such as the *Personal Injuries Proceedings Act 2002* (Qld) has reduced the size of settlements, arguably to more manageable levels, certainly in terms of public liability insurance.

Finally, this paper is also not suggesting that changes should somehow be made to the established duty of care schools owe their pupils, or that teachers should not be responsible for the health and safety of their students. However, teachers have long argued that actions in negligence have been tilted in favour of the plaintiff. At this point, perhaps the answer lies in reviving calls for a no-fault scheme for dealing with personal injury. Given the complexities of the schooling context, it may well be the case that the courts are ultimately an inappropriate place to secure a safe and productive learning environment. Add a plethora of new behaviour disorders to the equation, and what is already a difficult situation for teachers, may well become untenable.

Keywords: negligence; duty of care; foreseeability; behaviour disorders; ADHD.

ENDNOTES

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