Articles

Negligence and Special Needs Education: The Case for Recognising a Duty to Provide Special Education Services in Australian Schools

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Abstract

All Australian children are required by law to attend school, including children with disabilities and other special needs. However, there is no legal duty imposed upon governments to provide children with special needs with appropriate educational support. In most Australian states and territories, there is no avenue for redress if children with special needs are not provided with the educational services they require. This sets Australia apart from other jurisdictions, such as the United Kingdom and the United States, where mechanisms are available through which aggrieved students and parents can seek a remedy. This article examines whether Australian education departments could be held liable in negligence for failing to provide special education services to children who need them.

Introduction

A child's access to education is considered to be a universal right, extending even to those with severe disabilities.[1] In Australia, it is compulsory for all children to attend school.[2] Yet, very few states and territories in Australia have bound themselves to provide appropriate special education services to children who need them.[3]

The vast majority of Australian children with special needs attend mainstream schools.[4] Indeed, only 11 percent of children with disabilities attend special schools.[5] This means that mainstream schools accept enrolments from children with all kinds of disabilities including intellectual and learning disabilities, physical disabilities and sensory disabilities.[6] These children may struggle within mainstream educational environments if they are not provided with adequate support, and so may their teachers and classmates.[7]

For children with special needs, inadequate special education services can mean the difference between having the opportunity to become an employable adult or not. Not receiving required support services in the

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1 UN Convention on the Rights of the Child 1989, Arts 23, 28, 29; UN Convention on the Rights of Persons with Disabilities 2006, Art 24. See also A Bradley, 'Scope for review: The Convention right to education and the Human Rights Act 1998' [1999] *European Human Rights Law Review* 395, at 405.

2 Exemptions include children enrolled in distance education and children registered for home schooling; see Education Act 2004 (ACT), ss 10–10D, 11G–13; Education Act 1990 (NSW), ss 21B–26; Education Act (NT), ss 20, 20A, 20C, 20F; Education (General Provisions) Act 2006 (Qld), ss 176–179; Education Act 1972 (SA), ss 75, 76, 81A; Education Act 1994 (Tas), ss 4–10; Education and Training Reform Act 1958 (Vic), ss 2.1.1–2.1.3, 2.1.5; School Education Act 1999 (WA), ss 9–11.

3 Note, however, that in 2012, the Australian Capital Territory (ACT) added a right to education to its Human Rights Act 2004 (ACT). Section 27A now provides a right of access to free, school education 'appropriate to his or her needs'. It remains to be seen how this section will be interpreted and enforced in a judicial context.

4 Australian Institute of Health and Welfare, *Disability Update: Children with Disabilities* (AIHW, 2006), 22.

5 Ibid.

6 As to children with disabilities in schools, see op cit n 4, 18.

7 See generally Senate Committee on Employment, Workplace Relations and Education References Committee, *Education of Students with Disabilities* (Commonwealth of Australia, 2002), Chapter 3: 'Integration and Inclusion'.

school environment can result in psychological harm including anxiety, depression, loss of self-esteem and loss of self-confidence.[8]

Educators are aware that many children with special needs will struggle to learn in mainstream educational settings, but ineffective policies and cost pressures often stand in the way of adequate service provision.[9] There are few avenues for redress for Australian children and their parents in these cases.[10] Few states and territories provide children and parents with formal complaints mechanisms for merits review. Disability standards have been created pursuant to the Disability Discrimination Act 1992 (Cth) to guide schools when making reasonable adjustments for students with disabilities,[11] but often it is not discriminatory attitudes that cause the student's legal problem.[12]

This paper will explore whether a suit in negligence may be available to Australian children with special needs in circumstances where an education department has failed to provide them with adequate or appropriate educational services.[13] It will be seen that there are two key obstacles to establishing an action in negligence in these circumstances. First, the Australian courts are generally reluctant to impose a duty of care on public authorities, particularly in light of the complexities of funding and resource allocation. Civil liability legislation further entrenches this disinclination. Secondly, the question of damage raises some difficulties in this context. In Australian law, it has been recognised that schools and education departments have a duty of care to protect children with special needs from physical injury on school grounds,[14] however in the absence of identifiable personal injury, establishing damage is less straightforward. It will be concluded that, despite these obstacles, a cause of action in negligence may be still arguable in some cases.

8 As to the lived experience of children with disabilities in 'inclusive' education settings, see for example M Curtin and G Clarke, 'Listening to young people with physical disabilities' experience of education' (2005) 52(3) *International Journal of Disability, Development and Education* 195; G Laws and E Kelly, 'The attitudes and friendship intentions of children in United Kingdom mainstream schools towards peers with physical or intellectual disabilities' (2005) 52(2) *International Journal of Disability, Development and Education* 79; EB Frankel, 'Supporting inclusive care and education for young children with special needs and their families: An international perspective' (2004) 80(6) *Childhood Education* 310; LH Meyer, 'The impact of inclusion on children's lives: Multiple outcomes and friendship in particular' (2001) 48(1) *International Journal of Disability, Development and Education* 9; RF Schnorr, ' "Peter? He comes and goes . . ." First graders' perspectives on a part-time mainstream student' (1990) 15(4) *Journal of the Association for the Severely Handicapped* 231.

9 I have written on this elsewhere; see T Walsh, 'Adjustments, accommodation and inclusion: Children with disabilities in Australian primary schools' (2012) 17(2) *International Journal of Law and Education* 23.

10 T Walsh, 'Children with special needs and the right to education' (2012) 18(1) *Australian Journal of Human Rights* 27.

11 Disability Standards for Education, pursuant to s 131 of the Disability Discrimination Act 1992 (Cth).

12 See Walsh, op cit n 9.

13 This paper considers a possible cause of action in negligence. It does not address the possibility of a suit for breach of statutory duty. The main reason for this is that, in Australia, breach of statutory duty is a doctrine in decline. Another reason is that it would be difficult to argue that the Australian Education Acts create enforceable statutory duties. Neither does this paper consider the possibility of causes of action that might lie against education departments for breaches of specific undertakings made in the Education Acts. In New Zealand, there was one successful claim of this nature, *Attorney-General v Daniels* [2003] 2 NZLR 742. A provision in New Zealand's Education Act stated that the Crown had a duty to provide special education services 'sufficient to enable the child to receive some sort of worthwhile education'. The Court of Appeal held that this did not establish a 'free-standing right' but that since the proper processes outlined in the legislation had not been complied with, the decision of the Minister to disestablish special services in schools was reviewable.

14 An example of a child with special needs bringing an action against a school for negligence is *Van Donselaar v Central Coast Grammar*. In that case, a Year 12 student on crutches slipped on wet stairs as he attempted to carry his backpack and books to class. His claim failed, and his application for special leave to the High Court was refused, mainly because of the fact that members of staff had offered to assist him but he declined. Since the vigilance of the teachers and the school in trying to prevent harm was not in dispute, the duty of care was considered to have been discharged. See *Van Donselaar v Central Coast Grammar School Ltd* [2004] HCA Trans 274; *Van Donselaar v Central Coast Grammar School Ltd* [2003] NSWCA 241.

Duty to Prevent Physical Injury in Education Settings

Under Australian law, educators have a duty of care to protect students from harm[15] and Australian educational authorities have been held vicariously liable in cases where students have sustained injuries at school.[16] Initially, the British standard of care was affirmed by the Australian courts, namely, that teachers owe students a standard of care comparable to that of a reasonably careful and prudent parent.[17] Two justifications were made for this. First, children, by reason of their 'immature age', are in need of protection against themselves and others. Second, children are beyond the reach of their primary caregiver during school hours so someone else must necessarily assume control and protection of them.[18]

However, the Australian High Court later observed that this formulation was somewhat 'unreal' in the case of a headmaster who has charge over hundreds of students.[19] The High Court also considered whether a school's duty should actually be considered to go beyond that of a parent. It was said by one judge:

> 'A school should not be equated to a home. Often hazards exist in a home which it would be unreasonable to allow in a school. A better analogy is with a factory or other undertaking such as a hospital.'[20]

Extending the analogy between a hospital and a school, the court noted that a hospital has a duty to ensure that reasonable care is taken; this goes beyond a duty to take reasonable care.[21] It is a duty that cannot be delegated[22] and cannot be discharged merely by employing proper staff.[23] The court reasoned that a school authority assumes a duty to the child upon his or her enrolment in school – a duty which is sustained by the continued acceptance of the child as a student there – and accepts liability for damage caused by a negligent failure to provide supervision.[24] Thus, at common law in Australia, a teacher's duty of care has been held to extend to omissions that result in injury, as well as positive acts causing injury.[25] And in instances where the duty is breached, the school authority (generally the education department) will also be liable for any damage.[26]

The Australian courts have recognised that the extent or scope of the duty will be influenced by the facts of each individual case, so that if a child is at greater risk of injury as a result of his or her age, level of

15 See particularly *Commonwealth v Introvigne* (1982) 150 CLR 258.

16 See *Duncan by her next friend Duncan v Trustees of the Roman Catholic Church for the Archdiocese of Canberra* [1998] ACTSC 109 where the school was held vicariously liable for the actions of a teacher whose safety instructions were inadequate to prevent a serious injury in a gymnastics class. As to vicarious liability and direct liability in school negligence matters, see *Commonwealth v Introvigne* (1982) 150 CLR 258, 269 (Mason J). See also *Ramsay v Larsen* (1964) 111 CLR 16; *Geyer v Downs* (1977) 138 CLR 91; *The Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman and Another* [1996] NSWSC 346; *ACT Schools Authority v Raczkowski* [2001] ACTSC 61; *Parkin v ACT Schools Authority* [2005] ACTSC 3; *Abraham bht Abraham v St Mark's Orthodox Coptic College and Others* [2006] NSWSC 1107; *AMA v Victoria* [2012] VCC 1453.

17 *Williams v Eady* (1893) 10 TLR 41. Affirmed in Australia in *Ramsay v Larsen* (1964) 111 CLR 16, 27 (Kitto J). The reasonable parent standard still applies in Canadian school negligence cases; see generally P Babie, CJ Russo and GM Dickinson, 'Supervision of students: An exploratory comparative analysis' (2004) 9 *Australian and New Zealand Journal of Law and Education* 41.

18 See particularly *Geyer v Downs* (1977) 138 CLR 91, 93 (Stephen J); *Richards v State of Victoria* [1969] VR 136, 138.

19 *Geyer v Downs* (1977) 138 CLR 91, 102.

20 *Commonwealth v Introvigne* (1982) 150 CLR 258, 275 (per Murphy J).

21 Ibid, 270 (per Mason J and Gibbs CJ).

22 See *Gold v Essex County Council* [1942] 2 KB 293, 301.

23 *Commonwealth v Introvigne* (1982) 150 CLR 258.

24 Ibid, 279. Note, however, the High Court case of *Hadba* where a majority of the court held that it was not reasonable, or indeed desirable, to expect children to be observed by teachers every single moment of the time: *Roman Catholic Church v Hadba* (2005) 221 CLR 161, at 169.

25 *Geyer v Downs* (1977) 138 CLR 91; *Commonwealth v Introvigne* (1982) 150 CLR 258; *Shaw v Commonwealth* [1992] NTSC 90.

26 *Commonwealth v Introvigne* (1982) 150 CLR 258, 279. Note that damage includes both physical injury (for example *Parkin v ACT Schools* [2005] ACTSC 3; *AMA v State of Victoria* [2012] VCC 1453) and psychiatric injury (for example *Oyston v St Patrick's College* [2011] NSWSC 269; *Cox v State of NSW* [2007] NSWSC 471).

maturity or intellectual or physical capacity, the duty will be more expansive.[27] This means that a higher duty of care might be imposed upon teachers of children with special needs.[28] In *Withyman v State of NSW*,[29] a (male) student with special needs alleged that a (female) special needs teacher entered into a sexual relationship with him. He sued the teacher, and the department, in negligence. The District Court found that a sexual relationship had existed between them, that the actions of the teacher were intentional and amounted to sexual misconduct, particularly in light of the plaintiff's special vulnerability on account of his personality problems. The court concluded, therefore, that the teacher had breached the duty of care she owed to the student.[30]

Legal Avenues for Redress in Australian Special Education Cases

Whilst Australian courts have had little difficulty in finding that a school teacher owes a duty to take reasonable care of his or her students to protect them from personal injury, few attempts have been made in Australia to argue that teachers have a duty to exercise their professional skills in teaching with due care.[31] Further, there have been no reported cases in Australia in which an education department has been sued in negligence for failing to provide special education services to a child with special needs.

Each Australian state and territory has its own Education Act. Most of the Education Acts in Australia provide no remedy for aggrieved parents and students who wish to complain about the adequacy or quality of educational services received. Decisions about the provision of special education services made by officials under Education Acts are generally not reviewable.[32] The exception is the system in the Northern Territory where parents of children with special needs may lodge a complaint in the Supreme Court if they cannot reach an agreement with the minister regarding special arrangements for their child.[33]

Disgruntled students elsewhere have taken legal action against their educators under discrimination legislation.[34] Whilst positive outcomes for students can be achieved through conciliation processes, the vast majority of special needs discrimination cases that proceed to tribunals or courts go against the complainant.[35] This does not mean there is no merit to the complaint per se, but rather some key precedents go against complainants in school disability matters.[36] Another problem with making a

27 *Kretschmar v State of Queensland* [1989] Aust Torts Reports 80.

28 Babie, Russo and Dickinson, op cit n 17, 49. See also *Withyman v State of NSW* [2010] NSWDC 186, at [396]. In Canada, see *Dziwenka v R* [1972] SCR 419.

29 *Withyman v State of NSW* [2010] NSWDC 186.

30 Ibid, at 250, 256. The court did not find the educational authority vicariously liable because the teacher was acting outside the scope of her employment. It held that the teacher must have acted in a 'moment of madness' which was not foreseeable by the department. Inappropriate behaviour on the part of the student was unquestionably foreseeable, the court said, but not on the part of the teacher (at 255).

31 Note that, in some cases, the distinction between educational and supervisory duties may be blurred. For example in *Parkin v ACT Schools* [2005] ACTSC 3, a student incurred an injury to his hand in an industrial design class. The class was being taught by a relief teacher with minimal experience in the use of the machinery. The court held that the injury was foreseeable, and indeed was foreseen by the regular industrial design teacher. The education department was held to be under a duty of care to ensure the relief teacher was sufficiently experienced to teach the class. Therefore, incompetent instruction may provide the basis for a negligence claim; see further RH Jerry, 'Recovery in tort for educational malpractice: Problems of theory and policy' (1980/81) 29 *University of Kansas Law Review* 195, 209.

32 See, for example, Education (General Provisions) Act 2006 (Qld), s 401 and Education Act 1990 (NSW), s 107 for a list of reviewable decisions under those Acts.

33 Education Act (NT), Part 5.

34 See, for example, *Hinchcliffe v University of Sydney* [2004] FMCA 85; *Hurst and Devlin v Education Queensland* [2005] FCA 405; *Clarke v Catholic Education Office* [2003] FCA 1085. One student brought an action under trade practices legislation, but his claim was summarily dismissed by the federal magistrate; see *Yee Tak On v Dr Linda Hort (ANU College)* [2012] FMCA 391.

35 Walsh, op cit n 10.

36 Particularly the decision of *Purvis v New South Wales* (2003) 217 CLR 92. *Purvis* concerned a child with acquired brain injury who had been excluded from school as a result of his aggressive behaviour. Although it was not in dispute that the brain injury caused the behaviour problems, the High Court held that the child was not discriminated against on the

discrimination complaint is that it requires the student to complain about the conduct of their teacher or school. Most often, the issue will be one of resources rather than discriminatory conduct perpetrated by individual educators, so complainants are forced to frame the issue in an artificial manner. An unintended consequence of this is that it can damage relationships between children with special needs and their communities when, in truth, the student's argument is with the education department.[37]

'Educational malpractice' has never been claimed in Australia, but the general principle in Australian law is that professionals who possess a degree of skill and knowledge, and hold themselves out as experts in a particular area of activity, must exercise reasonable care in the exercise of their professional activities.[38] The Civil Liability Acts in each state and territory give some protection to a standard of practice that is consistent with 'peer professional opinion' so that, if a professional acts in a manner that was widely accepted as competent professional practice by a significant number of respected peers, the professional does not breach their duty of care.[39] This is consistent with the standard of 'ordinary care'.[40] This standard has not yet been applied to professionals with responsibility for educating children with special needs in Australia.

Establishing a Duty to Provide Special Education Services in Australia

Education departments are public authorities that exercise a variety of statutory powers, and it has been held in Australia that a public authority may be subject to a common law duty of care when it exercises a statutory power.[41] None of the Australian Education Acts explicitly impose a duty of care in relation to the education of children with special needs, but many do impose general statutory powers that are relevant.

For example, the Queensland Education (General Provisions) Act 2006 states at s 12(a)(i) that: 'For each student attending a State instructional institution, there must be provided an educational program approved by the Minister that has regard to the age, ability, aptitude and development of the student'. In relation specifically to special needs children, the Western Australian Education and Training Reform Act 2006 states that where a child with a disability is enrolled at a government school, the principal is to consult with the child's parents, teachers and if appropriate the child, and take into account the wishes of the parents for the purpose of addressing the child's educational requirements.[42] These sections do not expressly impose a duty of care, or specify a remedy. But by their terms, they do seem to impose obligations on

basis of his disability, but rather on the basis of his behaviour. Since it is not unlawful to treat a person less favourably on the basis of their behaviour, the school was found to have acted lawfully in excluding him. I have discussed this case at length elsewhere; see Walsh, op cit nn 9 and 10.

37 See further Walsh, op cit n 9.

38 *Mutual Life and Citizen's Insurance Co Ltd v Evatt* (1970) 122 CLR 628; *Hedley Byrne and Co v Heller and Partners Ltd* [1964] AC 465; *Rogers v Whitaker* (1992) 175 CLR 479; *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. The terminology 'educational malpractice' is used particularly in the United States: see for example RD Mawdsley and JJ Cumming, 'Educational malpractice and setting damages for ineffective teaching: A comparison of legal principles in the USA, England and Australia' (2008) 20(1) *Education and the Law* 25.

39 Civil Liability Act 2002 (NSW), ss 5O, 5P; Civil Liability Act 2003 (Qld), s 22; Civil Liability Act 1936 (SA), ss 40, 41; Civil Liability Act 2002 (Tas), s 22; Wrongs Act 1958 (Vic), ss 58, 59; Civil Liability Act 2002 (WA), s 5PB (health professionals only). The common law of Australia is consistent with this, and UK the decision of *Sidaway v Governors of Bethlem Royal Hospital* has been affirmed in Australia: see particularly *Sidaway v Governors of the Bethlem Royal Hospital* [1985] AC 871, 881. Note that the approach of the court in *Sidaway* has been preferred over the *Bolam* test in Australia; see *Naxakis v Western General Hospital* (1999) 197 CLR 269, at 275, 285, 297; *Rogers v Whitaker* (1992) 175 CLR 479, at 484.

40 See, for example, *Whitehouse v Jordan* [1981] 1 All ER 267, 280.

41 Of course, as Brennan J said in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 482, a 'statutory power is not the same thing as a statutory duty'.

42 Education and Training Reform Act 2006 (WA), s 73. These provisions may be contrasted with provisions in other jurisdictions that are similar but use discretionary rather than proscriptive language. For example, the ACT Education Act 2004 states at s 7(3) that: 'Everyone involved in the administration of this Act . . . is to apply the principle that

educational departments in relation to the provision of special education services.

It is a well-settled principle that when statutory powers are exercised, reasonable care must be taken.[43] There is little doubt that education departments are aware that if they fail to provide special education services to children with special needs, those children may suffer harm as a result. However, mere foreseeability of harm is not enough to found a claim in negligence.[44] It would need to be established that a duty to avoid certain types of damage exists in the provision of special education services to children with special educational needs. It would need to be established that, by not providing certain special education services to a particular child, the education department is in breach of that duty. And it would have to be proven that some actionable damage resulted from this breach.

In Australia, there is no general test for determining whether a duty of care exists, and there is a divergence of views amongst members of the High Court on how the duty question should be resolved.[45] The High Court has emphasised that it must not be determined merely on the basis of factual similarities to other cases, rather, precedent and principle must prevail[46] to prevent judicial decisions from becoming 'nothing more than idiosyncratic or personal responses to the circumstances of a particular case'.[47] Most members of the High Court have expressed a preference for taking an 'incremental approach'[48] to the development of the law of negligence, and many members of the court have commented that, in novel cases, a duty of care should only be recognised 'by analogy with established categories'.[49] But how is one to formulate such an analogy?[50]

There is a general cautiousness amongst the High Court in imposing affirmative common law duties on statutory authorities.[51] As one judge has remarked:

> 'When courts are invited to pass judgment on the reasonableness of government action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process.'[52]

It has been held that for a common law duty to be imposed on a public authority, the statute must both impose a duty to exercise the power, and confer a private

school education should: (a) recognise the individual needs of children with disabilities; and (b) should make appropriate provision for those needs, unless it would impose unjustifiable hardship on the provider of the school education'. This is more aspirational than binding. In the WA School Education Act 1999, recognition of the right of every child to receive an education and meeting the educational needs of all children are objects of the Act, but persons with functions under the Act are only directed to '*seek* to ensure' that these objects are achieved (ss 3(1)(a), (c), (2)). Two of the 'objects' of the NSW Education Act 1990 are to assist each child to achieve their potential, and to provide special education assistance to children with disabilities, and under Part 5, the Minister *may* provide special or additional assistance to children with special needs, but none of this is proscribed. Similarly, the Northern Territory Education Act (s 6(1)(a)) states that the Minister *may* take all measures to 'assist parents of children in the Territory in fulfilling their responsibility to educate their children according to the individual needs and abilities of those children'. Note also relevant provisions in the Victorian Education and Training Reform Act 2006. There it is expressly stated that 'all Victorians . . . should have access to a high quality education that realises their learning potential and maximizes their education and training achievement', but in a separate provision, it is said that this does not establish a legally enforceable entitlement (see ss 1.2.1, 1.2.3).

43 *Caledonian Colleries Ltd v Speirs* (1957) 97 CLR 202, 220; *Heyman*, op cit n 41, at 436, 458; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 620.

44 Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ in *Sullivan v Moody* (2001) 207 CLR 562, 573; Gleeson CJ in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 555; Gummow, Hayne and Heydon JJ in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 248.

45 McHugh J in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 33.

46 Ibid, 32.

47 Kirby J in *Brodie*, op cit n 43, 592.

48 Note Hayne J's criticisms of the incremental approach in *Brodie*, that recovery becomes an 'accident of history': *Brodie*, op cit n 43, at 631.

49 See Brennan J in *Heyman*, op cit n 41, at 481; *Crimmins*, op cit n 45, Hayne J at 97 and McHugh J at 97 and 29.

50 Hayne J recognised this problem in *Brodie*, op cit n 43, at 622.

51 McHugh J in *Crimmins*, op cit n 45, at 34.

52 Gleeson CJ in *Graham Barclay Oysters*, op cit n 44, at 553.

right of action for breach of that duty.[53] Whether such conditions exist will be a matter of statutory interpretation.[54] Yet at least one judge has cautioned against referring to the intention of the legislature, for this is a 'realm of great uncertainty'.[55] In one case, the court suggested that where no intention is stated, regard may be had to presumptions or policy to supply the intention.[56]

The relevant provisions in the Civil Liability Acts must also be considered. Whilst the Civil Liability Acts are broadly consistent with the common law,[57] they do impose specific considerations that are relevant to the position of public authorities. For example, the Acts state that the fact that a public authority exercises a function does not of itself indicate that the authority is under a duty to exercise the function, or that the function should be exercised in particular circumstances or in a particular way.[58]

Do Australian Education Departments Have a Duty of Care in Relation to the Provision of Special Education Services?

Whilst there are differences in methodology, there now seems to be agreement that a 'salient features' approach should be taken to determining whether a duty of care should be imposed in a particular situation; that is, a number of features must be combined and weighed against one another when determining whether a duty of care should be imposed upon a public authority.[59] The salient features have been identified as including: reasonable foreseeability; the subject of the powers; the vulnerability of the recipient of the powers; the knowledge of the risk; whether the decision made should be characterised as operational or policy in nature; and 'other' relevant factors.[60] No direction has been provided by the High Court as to when a collection of salient features will be of sufficient weight to attract a duty of care, so each novel case must be decided on its own facts.[61] In this next section, each of the features will be examined, in turn, to

53 Brennan J in *Heyman*, op cit n 41, 482.

54 Ibid, 482; Kirby J in *Graham Barclay Oysters*, op cit n 44, 617. Note that statutory interpretation is not synonymous with parliamentary intention. Deference to the intention of the legislature has been criticised, by Hayne J in *Brodie*, op cit n 43, 633 and McHugh and Gummow JJ in *Byrne v Australian Airlines* (1995) 185 CLR 410, 458, and by Kirby J in *Graham Barclay Oysters*, op cit n 44, 617. Rather, it is said, the 'nature, scope and terms of the statute' should be paramount.

55 Kirby J seems to suggest that there is a risk that the court might 'simply give effect to its own ideas of what is desirable, attributing those ideas to the legislature's "intention" ' in *Graham Barclay Oysters*, op cit n 44, 617.

56 *Stuart v Kirkland-Veenstra*, op cit n 44, per Crennan and Kiefel JJ at 263.

57 Stewart and Stuhmcke note, in the context of tort law, that both common law and statute law emanate from the same common law legal tradition; that common law should not be considered to be in the 'shadow' of legislation, but rather common law and statute law have a symbiotic relationship. They also examine the tendency of the High Court to interpret the Civil Liability Acts as consistently as possible with the common law: P Stewart and A Stumcke, 'The rise of the common law in statutory interpretation of tort law reform legislation: Oil and water or a milky pond?' (2013) 21 *Tort Law Journal* 126.

58 Civil Law (Wrongs) Act 2002 (ACT) s 114; Civil Liability Act 2002 (NSW), s 46; Civil Liability Act 2002 (Tas), s 43; Wrongs Act 1958 (Vic), s 85; Civil Liability Act 2002 (WA), s 5AA. See further the provisions regarding resource allocation, discussed below at pp 41–42 and 45–47.

59 The salient features approach seems to have been solidified in *Graham Barclay Oysters*, op cit n 44, see Gummow and Hayne JJ at 597, Kirby J at 624 and Callinan J at 663–664. The salient features approach to negligence is lamented by Kirby J at 624–626. Kirby J's view is that the salient features approach means that there is essentially only one question to be answered in novel cases: is it, in all the circumstances, reasonable to impose upon one a duty of care to the other? (*Graham Barclay Oysters*, op cit n 44, 627). See also *Tame v NSW; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317, 395, and later *Stuart v Kirkland-Veenstra*, op cit n 44, 254.

60 McHugh J in *Crimmins*, op cit n 45, at 39. See also *Graham Barclay Oysters*, op cit n 44, 597 for a similar list. See also *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258, per Allsop P at [103].

61 See M Stubbs, 'Prosper the government, suffer the practitioner: The *Graham Barclay Oysters* litigation' (2003) 26(3) *University of New South Wales Law Journal* 727.

determine whether a duty to provide special needs education services could be imposed on educational authorities in Australia.[62]

1. Reasonable Foreseeability

The threshold question in relation to reasonable foreseeability is: was the harm which the plaintiff suffered a reasonably foreseeable result of the defendant's act or omission,[63] that is, could the defendant have had in contemplation the damage that arose?[64]

In every Australian jurisdiction, a school, teacher or parent may request a certain level or kind of support for a child with special needs; the education department then makes a determination about how much, and what kind, of assistance it will fund or provide for that child.[65] An educational authority necessarily has the risk of damage to the child in contemplation when it makes this decision;[66] it will have before it all the available evidence relating to the child's difficulties, and the reasons why the school feels it cannot educate that child in the ordinary way.

If a child with special needs does not receive the support services he or she requires to access the curriculum, then it is certainly foreseeable that they may not acquire basic literacy and numeracy skills.[67] The difficulties faced by a child with poor literacy or numeracy will compound over time – if early skill development is compromised, the child may find it difficult to catch up. If their educational difficulties remain unresolved, it is reasonably foreseeable that their employment prospects will be compromised; that they may suffer low self-esteem; and that they may even lose the chance of becoming an economically productive citizen. Whether these forms of harm constitute actionable damage is another matter, and this is discussed further below. However, it is certainly arguable that it is reasonably foreseeable that a child with special needs will suffer harm if appropriate educational support services are not provided to them at school.

2. The Subject or Beneficiary of the Powers

A distinction is often made in the Australian cases between statutory powers that are exercised for the benefit of the public at large, and those that are exercised for the

62 Note, however, that the 'salient features' approach has not been universally endorsed. According to Gaudron J in *Crimmins*, there are only two questions to be answered when determining whether a statutory authority owed a duty of care to the plaintiff: whether the powers and functions conferred on the authority were compatible with the existence of that duty; and whether the relationship between the authority and the plaintiff was of a kind that gave rise to such a duty: *Crimmins*, op cit n 45, at 16. It is in relation to the first question that distinctions such as policy/operational factors, discretionary/non-discretionary powers and powers/duties were considered relevant (*Crimmins*, at 19). Gummow and Hayne JJ come up with a similar formulation in *Barclay Oysters*: (1) coexistence of knowledge of harm and the power to avoid it; and (2) the totality of the relationship between the parties: *Graham Barclay Oysters*, op cit n 44, 596. For them, it is in relation to the second question that the various 'salient features' are examined, including control, vulnerability and consistency: *Graham Barclay Oysters*, op cit n 44, 597.

63 McHugh J in *Crimmins*, op cit n 45, 32.

64 Gleeson CJ in *Tame v NSW*, op cit n 59, 336.

65 Australian Capital Territory Department of Education and Training, *Student Centres Appraisal of Need* (2010); New South Wales Department of Education and Training, *Students with Disabilities in Regular Classes: Funding Support* (undated); Northern Territory Department of Education and Training, *Students with Disabilities Policy 2012*; Queensland Department of Education, Training and Employment, *Education Adjustment Program Handbook 2014*; South Australia Department of Education and Children's Services, *Disability Support Program: Five-Step Process* (2007); Tasmania Department of Education, *Register of Students with Severe Disabilities* (2013); Victoria Department of Education and Early Childhood Development, *Program for Students with Disabilities: Guidelines for Schools 2015* (2014); Western Australia Department of Education and Training, *Schools Plus: Resourcing Informed Practice Handbook* (2006).

66 In *Annetts v Australian Stations Pty Ltd*, the court held that since the parents had expressed concerns about their son's welfare, and sought assurances as to his safety, their son's employer must have had the risks to his safety in contemplation, and should have taken reasonable steps to provide adequate supervision; *Tame v NSW*, op cit n 59, per Gleeson CJ at 337 and Gaudron J at 341.

67 As Collingsworth has said, '[a]n obvious foreseeable risk of incompetent teaching is impaired learning': TP Collingsworth, 'Applying negligence doctrine to the teaching profession' (1982) 11 *Journal of Law and Education* 479, 501.

benefit of a specific class of people.[68] It has been said that powers that are exercised for the public generally cannot be the subject of a duty of care; rather the powers must be exercised for the benefit of a particular class of persons only. As one judge has said:

> 'Ordinarily, the more general the statutory duty and the wider the class of persons in the community who it may be expected will derive benefit from its performance, the less likely it is that the statute can be construed as conferring an individual right of action for damages for its non-performance.'[69]

Yet, the powers exercised by educational departments in relation to the provision of special education services are directed at a very specific class of people: school students with special educational needs. The duty proposed is not owed to the public at large, but rather to a specific and identifiable class of individuals. Therefore, this feature is satisfied.

3. Vulnerability and Control

It seems from this 'salient feature' that a duty will only be found in situations where individuals are vulnerable to harm from dangers which they cannot control, understand or recognise.[70] The powers vested in an authority by statute may give it such a measure of control over the safety of the person to oblige it to exercise its powers to avert danger.[71] While the existence of such powers, alone, might not give rise to a duty of care, 'if the authority has used its powers to intervene in a field of activity' and so increased the risk of harm to a person, it may come under a duty of care.[72]

The doctrine of general reliance has been rejected by many Australian judges as a 'fiction',[73] yet the concepts of 'vulnerability' and 'control' are still considered relevant and are still discussed in the cases.[74] For example, in one case, the fact that the victim was a minor was considered relevant when determining whether the defendant was under a duty of care to ensure his safety.[75] In another, the court remarked that a duty is owed by a gaoler to a prisoner because the prisoner has been denied personal liberty and the gaoler has assumed control over them.[76]

A child at school is, similarly, limited in their personal autonomy. A child with special needs in a school setting is all the more vulnerable. The parents of children with special needs send them to school, in accordance with the law, under the assumption that they will be educated there.[77] They rely on the teachers, the school and ultimately the education department to ensure that their child's educational needs are met so that they can participate in school activities. As the House of Lords has noted, 'the education of the pupil is the very

68 Brennan J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 347; Gaudron, McHugh, Gummow JJ in *Brodie*, op cit n 43, 577.

69 Hayne J in *Brodie*, op cit n 43, 633.

70 McHugh J in *Day*, op cit n 68, 370; McHugh J in *Crimmins*, op cit n 45, 40; *Heyman*, op cit n 41, 464; Hayne J in *Brodie*, op cit n 43, 623.

71 Gummow J in *Crimmins*, op cit n 45, 61; Gaudron, McHugh and Gummow JJ in *Brodie*, op cit n 43, 558; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 551–552.

72 McHugh J in *Graham Barclay Oysters*, op cit n 44, 576, 580.

73 Gummow J in *Day*, op cit n 68, 387; Hayne J in *Brodie*, op cit n 43, 627.

74 As to 'vulnerability', see Kirby J in *Day*, op cit n 68, 423; Gaudron J in *Crimmins*, op cit n 45, 24. As to 'control', see Gleeson CJ in *Graham Barclay Oysters*, op cit n 44, 558. Although, in *Brodie*, Hayne says the concepts of reliance and vulnerability are 'legal fictions' and that neither are 'useful analytical tools'. Rather, he says they are merely statements of conclusion since many public authorities provide facilities and services that the public have no choice but to use: *Brodie*, op cit n 43, 627.

75 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 per Gleeson CJ at 337 and Gaudron J at 341.

76 *Stuart v Kirkland-Veenstra*, op cit n 44, 249.

77 P Gallagher, 'The kids aren't alright: Why courts should impose a constitutional duty on schools to protect students' (2001) 8 *Georgetown Journal on Poverty Law and Policy* 377, 379; F Hay-Mackenzie, 'Tackling the bullies: In the classroom and in the staffroom' (2002) 7(2) *Australia and New Zealand Journal of Law and Education* 87, 96. The flipside of this argument is that compulsory education laws actually impose a duty on parents to have their children educated, since the state is the party that is capable of enforcing such laws: see R Funston, 'Educational malpractice: A cause of action in search of a theory' (1980–1981) 18 *San Diego Law Review* 743, 777.

purpose for which the child goes to school'.[78] Depending on the nature of their disabilities, it may not be possible for a child with special needs to access the whole curriculum, but parents rely on educators to set realistic educational goals for their child, and to work towards them with appropriate support services in place.[79]

Further, by accepting the enrolment of a child, a school is 'intervening in a field of activity': it is undertaking to educate the child. The act of admitting children to school for the purpose of education suggests that schools are assuming a duty to educate. Funston likens the legal duty to educate with the duty to rescue, saying:

> 'The uneducated child is like a potential victim in need of rescue. When the schools undertake the attempt to educate this child, though they need not succeed, they do assume a duty to make the attempt non-negligently. If educational alternatives are available and the school negligently fails to utilize them, it has not acted reasonably under the circumstances and should be liable in tort.'[80]

There is no doubt that students with special needs are vulnerable to education departments, and that parents rely heavily upon them in relation to the education of their children. Thus, this feature is arguably satisfied.

4. Knowledge of Risk

Another 'salient feature' is that the defendant knew, or ought to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers.[81] That is, the authority must have been in a position to take steps to minimise the risks for a duty to be imposed.[82] Since negligence is a 'fault based system', it would 'offend current community standards' to impose liability in situations where the defendant could not have apprehended the possibility of damage.[83]

Obviously, education departments are in a position to avert the risks to students with special needs that arise from not being appropriately supported in the school environment. The educational departments ultimately make the decision as to whether, and to what degree, a child will receive funding for educational supports. They also determine how much funding is allocated to special education services in general. In theory, it is within the power of the department to increase this amount in order to avert the risk of harm to a particular student.

However, in practice, decisions regarding the allocation of funds to specific children are complex. The officers that are charged with determining how much funding each child receives are provided with a limited amount of funds to distribute. They may, therefore, be required to balance the needs of students against one another to decide how the funds should be allocated. The reality may be that the funds they are allocated are insufficient to ensure that adequate support is available to every child that needs it. This leads into the next salient feature for discussion: the distinction between operational and policy decisions.

5. Operational or Policy Decision

It has long been said that public authorities will not owe a duty of care in relation to matters that involve an exercise of 'core policy-making' powers or 'functions of a

78 *X (Minors) v Bedfordshire County Council; M (A Minor) v Newham London Borough Council; E (A Minor) v Dorset County Council* [1995] 2 AC 633, 766.

79 In the UK, see *G (A Child) v Bromley London Borough Council* (2000) 2 LGLR 237. The child in this case suffered from cerebral palsy, epilepsy and vision problems. His educational requirements included physiotherapy, occupational therapy and speech therapy.

80 Funston, op cit n 77, 772.

81 McHugh J in *Day*, op cit n 68, 371. As noted in *Sullivan v Moody* (2001) 207 CLR 562, 577, these premises may be derived from the original doctrine of negligence outlined by Lord Atkin in *Donoghue v Stevenson* where the fact establishing liability was that the consumer was unable to discover the defect.

82 Gaudron J in *Crimmins*, op cit n 45, 25.

83 McHugh J in *Perre v Apand Pty Ltd* (1991) 198 CLR 180, 230; also cited in *Crimmins*, op cit n 45, 41.

quasi-legislative character'.[84] Budgetary allocations are often put in the policy-making category, and thus considered exempt from negligence claims.[85] If the courts cannot review decisions that are made on the basis of policy decisions regarding the allocation of resources, are education departments automatically immune from the imposition of a duty of care in relation to special needs education?[86]

The relevance of the allocation of resources to the duty of care issue was raised, in a policing context, in the UK case of *Hill v Chief Constable of West Yorkshire Police*.[87] In that case, the House of Lords noted that police officers make a variety of decisions on matters of 'policy and discretion' including those involving the deployment of available resources.[88] It was held that a duty of care was inconsistent with these functions, and that no duty was owed by police officers to members of the public who might suffer injury as a result of the actions of an offender who they carelessly failed to apprehend. There are some similarities here: police departments have a limited amount of funds available, and they make internal decisions on the allocation of resources to different cases depending on their determined priorities. Education department officers must similarly distribute a finite amount of funds amongst children.

According to one judge of the Australian High Court, the proper question is whether taking the particular course of action suggested would have interfered with the department's budgetary priorities or 'distorted its priorities in the discharge of its statutory functions'.[89] Detailed costing information would be required to answer this question, but inquiries of this nature are not foreign to the courts. Decisions about what is reasonable in a broad budgetary sense are taken in other settings, including discrimination matters.[90] In the area of negligence, such considerations may be more relevant to the question of breach than whether there was a duty in the first place.[91] That is, if a duty is found to exist, questions of budget may be examined when determining what action the public authority might reasonably have taken to avert the risk of harm to the plaintiff.[92]

Either way, it would be open to a judge to conclude that decisions regarding the allocation of funds to special needs services should not be exempt from a finding of negligence merely because they are of a policy nature.[93]

6. Other Supervening Reasons in Policy to Deny the Existence of a Duty of Care

There may be other reasons, in policy, to find that no duty of care existed in the

84 Deane J in *Heyman*, op cit n 41, 499. See also *Anns v Merton London Borough Council* [1978] AC 728, 754; Mason J in *Heyman*, op cit n 41, 457.

85 Note, however that the distinction between policy and operational decisions has not been universally supported in Australia: see Gaudron, McHugh and Gummow JJ in *Brodie*, op cit n 43, 560; and Gummow and Toohey JJ in *Day*, op cit n 68. The policy/operational distinction has been discredited by some commentators and has been rejected by the US Supreme Court. It was also rejected by the House of Lords in *X (Minors)*, op cit n 78.

86 As a former Chief Justice of the High Court has said, the fact that budgetary allocations are at play in a decision should not immunise a public authority from the imposition of a common law duty of care because the same exemption is not afforded to individuals and corporations, who must also manage budgets: Gleeson CJ in *Graham Barclay Oysters*, op cit n 44, 556.

87 *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53.

88 Ibid, 59.

89 Gummow J in *Day*, op cit n 68, 392.

90 See for example *Waters v Public Transport Corporation* (1992) 173 CLR 349; *Cocks v State of Queensland* [1994] QADT 4.

91 See Gaudron, McHugh and Gummow JJ in *Brodie*, op cit n 43, 559; Gleeson CJ in *Graham Barclay Oysters*, op cit n 44, 557. Note, however, this is criticised by Hayne J in *Brodie* – he warns that this will shift the balance in favour of plaintiffs and against defendants: *Brodie*, op cit n 43, 627. He also notes that it may be difficult to determine what kind of authority is 'reasonable' for the purpose of determining what action should have been taken. He says (at 629): 'Is it relevant to know what kind of political pressures an elected body, such as a local council, faced when it prepared its budget?'.

92 This is discussed further below at pp 45–47.

93 However, in some jurisdictions, the Civil Liability Acts render this conclusion less open to the courts: see pp 46–47 below in relation to breach.

circumstances. One example is where the imposition of a duty of care is inconsistent with the statutory scheme.[94] In *Sullivan v Moody*, the High Court held that no duty could be owed by child welfare officers to suspected abusers because child welfare authorities operated within a broader scheme for the protection of children. The court noted that a common law duty of care to alleged abusers would be 'inconsistent with the proper and effective discharge of those responsibilities'.[95] Yet, that is not the case with respect to special education in school settings. The purpose of schools is to appropriately and effectively educate children – no inconsistent duties are apparent.

The 'cost to the community of defensive measures' is another reason why it might be considered prudent to deny the existence of a duty of care in some circumstances.[96] It is often noted that imposing a duty of care in the exercise of statutory powers might change the practice of public authorities so that they act in a defensive manner, with a view to avoiding liability.[97] Acting in a defensive manner may not be consistent with Parliament's intention when conferring those powers.[98] Yet, empirical research has discredited the idea that liability in negligence can distort priorities affecting service delivery.[99] And as one High Court judge has said: '[w]hilst the promotion of individual choice and the efficient use of resources is a proper concern for public authorities, so is the adoption of good administration and procedures for the proper use of statutory powers'.[100]

In the context of the education of children with special needs, defensive practice might mean that more resources are allocated to special education services at the expense of able-bodied students. But the reality is that if special education services are not provided to children with special needs, the classroom teacher will be obliged to meet the needs of those students, which will detract from the educational experience of other students in the classroom.[101] Teachers confirm that they are better able to meet the needs of all students if children with special needs are adequately and appropriately supported.[102] So, defensive practice in this context might actually be beneficial in a broader sense.[103]

One argument run in the US against imposing a duty of care on education departments in relation to the provision of special education services is the 'alternate remedy' policy argument.[104] In the US, there is a federal scheme in place under the Individuals with Disabilities Education Act (IDEA) that requires schools to provide special education services to students who require them, and remedies are available to parents and students where appropriate supports are not provided.[105] It has been argued that since parents of children with special needs have other, more appropriate, avenues for redress available to them, there is no need for a duty of care to be

94 McHugh J in *Crimmins*, op cit n 45, 46.
95 *Sullivan v Moody* (2001) 207 CLR 562, 582.
96 *Stovin v Wise* [1996] AC 923, 955; McHugh J in *Crimmins*, op cit n 45, 50.
97 *X (Minors)*, op cit n 78, 653.
98 Hayne J in *Crimmins*, op cit n 45, 102.
99 J Hartshorne, N Smith and R Everton, '*Caparo* under fire: A study into the effects upon the fire service of liability in negligence' (2000) 63(4) *Modern Law Review* 502, 514–515.
100 Kirby J in *Day*, op cit n 68, 423.
101 Senate Committee on Employment, Workplace Relations and Education References Committee, op cit n 7, 34–35.
102 See for example TE Scruggs and MA Mastropieri, 'Teacher perceptions of mainstreaming/inclusion 1958–1995: A research synthesis' (1996) 63(1) *Exceptional Children* 59; JM Baker and N Zigmond, 'Are regular education classes equipped to accommodate students with learning disabilities?' (1990) 56(6) *Exceptional Children* 515.
103 EJ Ryan, 'Failing the system? Enforcing the right to education in New Zealand' (2004) 35 *Victoria University of Wellington Law Review* 735, 758.
104 B Markesinis and AR Stewart, 'Tortious liability for negligent misdiagnosis of learning disabilities: A comparative study of English and American law' (2001) 36 *Texas International Law Journal* 427, 433, 449, 462.
105 See the Individuals with Disabilities Education Improvement Act 2004 (US); *Donohue v Copiague Union Free School District* 64 App Div 2d 29 (1978), 38–39. See also *Hoffman v Board of Education of the City of New York* 49 NY 2d 121 (1979), 127.

recognised.[106] Yet, just as Markesinis and Stewart note that there is no corollary to IDEA in UK law, there is likewise nothing at all akin to this in Australia.[107]

Can Breach of Duty be Established?

Proof of Breach

In order to prove breach of duty, the question that must be asked is, as a question of fact, what would a reasonable person in the position of the defendant have done to prevent the injury? In relation to the education of children with special needs, the inquiry would be whether the educational authority has taken reasonable steps to prevent students with special needs from suffering harm as a result of a failure to provide them with adequate, appropriate educational supports.

Under Australian common law, the factors to be considered when determining the degree of response required are 'the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience in taking alleviating action and any other conflicting responsibilities the defendant may have'.[108] This is broadly consistent with the considerations imposed under the Civil Liability Acts. Under most of the Civil Liability Acts, in deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the burden of taking precautions to avoid the risk of harm, and the social utility (or potential net benefit) of the activity that creates the risk of harm.[109] Also, the court must consider whether or not, and why, responsibility for the harm should be imposed on the defendant.[110] In this case, therefore, the court would need to examine the reasonableness of the expenditure required and whether a reasonable authority in the position of the education department would have made the decisions it did.

What Supports Should Have Been Provided?

In *Hurst and Devlin v Education Queensland*, a discrimination matter concerning special education services provided to children with hearing impairment, Lander J remarked:

> 'The court is not an expert on education and, more particularly, on the education of profoundly deaf children. Decisions as to the appropriate method of the education of profoundly deaf children should be made by those qualified to make them, namely, educators, after a consideration of all of the evidence and all of the views whether favourable or unfavourable.'[111]

Whilst the relevance of this remark to negligence cases might be questioned, in the US, the courts have reached a similar conclusion in educational malpractice matters. In *Donohue v Copiague Union Free School District*, it was held that the extent to which teachers and schools are considered legally responsible for the educational outcomes of children must be limited because '[t]he courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods'.[112] On the contrary, Markesinis and Stewart note that a standard of care is easily reducible in the case of failure to

106 This was raised as an argument against finding a duty of care in the UK education and social welfare cases also; see *Barrett v London Borough of Enfield* [2001] 2 AC 550, 554, 568–569 and 589; *X (Minors)* op cit n 78, 751.
107 Markesinis and Stewart, op cit n 104.
108 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 44–49; affirmed in *Brodie*, op cit n 43, 577 by Gaudron, McHugh and Gummow JJ. See also *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, per Toohey and Gummow JJ at 454 and Gaudron J at 462.
109 Civil Law (Wrongs) Act 2002 (ACT), s 43(2); Civil Liability Act 2002 (NSW), s 5B; Civil Liability Act 2003 (Qld), s 9(2); Civil Liability Act 1936 (SA), s 32; Civil Liability Act 2002 (Tas), s 11(2); Wrongs Act 1958 (Vic), s 48(2); Civil Liability Act 2002 (WA), s 5B(2).
110 Civil Law (Wrongs) Act 2002 (ACT), s 43(2); Civil Liability Act 2002 (NSW), s 5B; Civil Liability Act 2003 (Qld) s 9(2); Civil Liability Act 1936 (SA), s 32; Civil Liability Act 2002 (Tas), s 11(2); Wrongs Act 1958 (Vic), s 48(2); Civil Liability Act 2002 (WA), s 5C.
111 *Hurst and Devlin v Education Queensland* [2005] FCA 405, at 479.
112 *Donohue v Copiague Union Free School District* 64 App Div 2d 29 (1978), 35.

diagnose learning difficulties by asking whether there were signs, and whether it was reasonable that these signs should have been detected by someone exercising reasonable skill.[113] Taking this one step further, it seems equally straightforward to assess the reasonableness of a failure by the education department to act upon a diagnosis, or identification of need, once it has been made.

In most circumstances, it will be possible to identify what would have constituted a minimum standard of care. In *Board of Education v Rowley*, the US Supreme Court said the standard of education owed to special education students will be satisfied if the child is provided with 'personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction'.[114] Similarly, in the UK case of *Phelps v London Borough of Hillingdon; Anderton and Clwyd County Council*, Lord Slynn remarked that all that is expected is 'ordinary skill'.[115] This is not a particularly stringent standard – it does not require access to the curriculum, it only requires educational benefit.

However, it must be acknowledged that there are many factors that may influence a child's educational performance and literacy acquisition. The child's individual characteristics – medical, social, emotional, behavioural, financial and cultural – will have a role in their academic proficiency, in addition to the role of the educators.[116] But a multifaceted inquiry must always be undertaken to determine causation. At law, a person may be responsible for damage when his or her conduct was one of a number of conditions sufficient to produce the damage,[117] and whether the breach caused the damage will 'ultimately [be] a matter of common sense'.[118]

Under the Australian Civil Liability Acts, the question for the court is twofold: first, it must be established that the negligence was a necessary condition of the occurrence of the harm (known as 'factual causation'); and second, it must be concluded that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused.[119] The High Court has indicated that, to establish factual causation, a plaintiff must turn its mind to possibilities that might have eventuated if circumstances had been different.[120] In this case, therefore, a plaintiff would need to show that it was more probable than not that, but for the provision of appropriate special education services, the harm would not have occurred.[121] It would certainly be possible to argue this. Sufficient research and expert knowledge is available to evaluate claims that inadequate educational support has resulted in avoidable deficits.[122] Indeed, in *Phelps*, the House of Lords was able to find, in agreement with the trial judge, that if one of the plaintiffs had received teaching appropriate to her needs, she would be 'somewhat, perhaps substantially, more literate than she is now' and would likely be more employable.[123]

The Relevance of Resource Allocation

Of course, as noted above, a decision not to provide educational support services or

113 Markesinis and Stewart, op cit n 104, 443.
114 *Board of Education of the Hendrick Hudson Central School District v Rowley* 458 US 176 (1982), 203.
115 *Phelps v London Borough of Hillingdon; Anderton and Clwyd County Council* [2001] 2 AC 619, 655.
116 Funston, op cit n 77, 786. This has been raised as a reason for not recognising a duty of care in the context of educational malpractice claims in the US; see *Peter W v San Francisco Unified School District* 60 Cal App 3d 814 (1976), 824–825; *Donohue v Copiague Union Free School District* 64 App Div 2d 29 (1978), 34; JG Culhane, 'Reinvigorating educational malpractice claims: A representational focus' (1992) 67 *Washington Law Review* 349, 389.
117 *March v E and MH Stramere Pty Ltd* (1991) 171 CLR 506, per Mason CJ, 509.
118 Ibid, 515.
119 Civil Law (Wrongs) Act 2002 (ACT), s 45(1); Civil Liability Act 2002 (NSW), s 5D(1); Civil Liability Act 2003 (Qld), s 11(1); Civil Liability Act 1936 (SA), s 34(1); Civil Liability Act 2002 (Tas), s 13(1); Wrongs Act 1958 (Vic), s 51(1); Civil Liability Act 2002 (WA), s 5C(1).
120 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 442.
121 Using the formulation of the High Court in *Adeels*, ibid, 442.
122 Culhane, op cit n 116, at 360, 363, 373–374.
123 *Phelps v London Borough of Hillingdon; Anderton and Clwyd County Council* [2001] 2 AC 619, 656 (Lord Slynn of Hadley).

facilities to children with special needs will often be based on budgetary considerations rather than a deficient needs analysis. In many cases, teachers' and schools' hands are tied as a result of funding allocations made by the education department. Unlike the UK cases which question the professional skill of the educational psychologists involved with diagnosis,[124] in Australia, the question is more likely to be one of resource allocation.

As noted above, it has been said that the competing demands of a public authority's resources may go to the question of breach.[125] It has been held in Australia that budgetary imperatives are amongst those factual matters to be considered when determining what should or could have been done to discharge the duty of care.[126] A duty of care can only require a public authority to take those steps that a reasonable authority 'with the same powers and resources' would have taken in the circumstances.[127] In discrimination matters, courts must engage in similar analyses. For example, in *Woodbury v Australian Capital Territory*, the tribunal was asked to determine whether the school authority had discriminated against two boys with Autism Spectrum Disorder by not providing them with a particular early intervention service. The tribunal compared the cost of providing this service with the overall budget of the department and found that the cost was excessive and thus unreasonable as compared with the cost of providing an alternative form of early intervention.[128] Similar cost analyses could be conducted in negligence cases to determine what action a reasonable department should have taken in the circumstances.

The problem is that, in Australia, civil liability legislation dictates the manner in which the resource issue must be dealt with. Most of the Civil Liability Acts state that, for the purpose of determining whether a public authority has a duty (or has breached its duty), it is relevant to consider that the authority has limited resources.[129] Indeed, the Acts explicitly state that the general allocation of resources by public authorities is not open to challenge.[130] This means that, if the evidence suggested that a department's special education budget was inadequate to meet demand, it could not be argued that the special education budget should have been increased to minimise the risk of harm to students in need.

The Civil Liability Acts also state that, when deciding how a public authority should have exercised its functions, the broad range of activities of the authority must be considered, and the authority may rely on evidence of compliance with its own procedures and standards to establish that its functions were properly exercised.[131] This provides education departments with broad protection against negligence claims for failure to provide special education services. It would permit a situation where, for example, an education department by its policies and procedures limits the kinds of support it will provide to students, or the kinds of students it will provide support

124 See for example *Skipper v Calderdale Metropolitan Borough Council* [2006] EWCA Civ 238, [2006] ELR 322 where it was held that the schoool's failure to diagnose and address the complainant's dyslexia could result in a successful claim for damages. See also *E (A Minor) v Dorset County Council* [1994] ELR 416 where it was held that if an educational psychology service holds itself out as offering educational psychology services, there is a duty owed to those who avail themselves of that service.

125 McHugh J in *Day*, op cit n 68, 371; McHugh J in *Crimmins*, op cit n 45, at 45.

126 Gummow J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 394; citing Supreme Court of Canada, *Just v British Columbia* [1989] 2 SCR 1228, 1244.

127 Gaudron J in *Crimmins*, op cit n 45, at 21; citing *Stovin v Wise* [1996] AC 923, 933.

128 *Woodbury v Australian Capital Territory* [2007] ACTDT 4.

129 See generally Civil Law (Wrongs) Act 2002 (ACT), s 110(a); Civil Liability Act 2002 (NSW), s 42(a); Civil Liability Act 2003 (Qld), s 35(a); Civil Liability Act 2002 (Tas), s 38(a); Wrongs Act 1958 (Vic), s 83(a); Civil Liability Act 2002 (WA), s 5W(a).

130 See generally Civil Law (Wrongs) Act 2002 (ACT), s 110(b); Civil Liability Act 2002 (NSW), s 42(b); Civil Liability Act 2003 (Qld), s 35(b); Civil Liability Act 2002 (Tas), s 38(b); Civil Liability Act 2002 (WA), s 5W(b).

131 See generally Civil Law (Wrongs) Act 2002 (ACT), s 110(c), (d); Civil Liability Act 2002 (NSW), s 42(c),(d); Civil Liability Act 2003 (Qld), s 35(c), (d); Civil Liability Act 2002 (Tas), s 38(c), (d); Wrongs Act 1958 (Vic), s 83(b), (c); Civil Liability Act 2002 (WA), s 5W(c), (d).

to.[132] Policies of this nature could insulate an education department from liability in negligence, even if the department unreasonably limits support to children in need.

One case in the UK provides a stark contrast to this approach. In *R v East Sussex County Council ex parte Tandy*, a case on breach of statutory duty, resource considerations were considered irrelevant in the context of determining whether or not educational support services should be provided to children with special needs.[133] In that case, a decision was made by the education authority to reduce the number of hours home tuition that a sick child received from five to three. The court found that this amounted to the breach of a mandatory statutory duty,[134] regardless of the fact that the decision was made on the basis of resource limitations. Relevantly, the court said: 'To permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend money in other ways is to downgrade a statutory duty to a discretionary power'.[135] The same might be said of a duty of care.

The Australian courts are unlikely to affirm this reasoning, and the Civil Liability Acts certainly tend to tip the scales in favour of public authorities. However, they do not preclude the possibility of recovery by children with special needs who have not received adequate special education services. Much would depend on the content of the special education policies, and the extent to which education departments bind themselves to provide support services to children with special needs, since it seems that this is the standard against which they are to be judged.

Is There Actionable Damage?

Economic Loss and 'Mental Harm'

It is often said that 'damage is the gist of negligence'.[136] Therefore, it must be concluded that the defendant's negligence has caused actionable damage if a claim is to succeed.[137]

There are many kinds of harm that can arise if a child fails to acquire basic literacy and numeracy skills. It is well established that children will struggle to succeed in life as adults if they are denied a basic education.[138] Failure to acquire skills in literacy and numeracy can result in unemployability, or reduced employability, and thus lost wages.[139] In the short-term, it can result in substantial costs for parents if they access private special education services (such as employing their own teacher's aide), or they engage private tutors and therapists to make up for the lack of state-provided support.

Failure to provide appropriate educational support to children with special needs can also result in psychological harm. In *Skipper v Calderdale Metropolitan Borough Council*, the UK Court of Appeal held that frustration, loss of self-confidence and loss of self-esteem experienced by a child with

132 Queensland provides a current example of this. For a child to receive educational support under its Education Adjustment Program, he or she must come within one of the six impairment categories (autism spectrum disorder, hearing impairment, intellectual disability, physical impairment, speech-language impairment and vision impairment). If a child does not come within one of these impairment categories, it is more difficult to access special education services: see www.education.qld.gov.au/students/disabilities/adjustment.

133 *R v East Sussex County Council ex parte Tandy* [1998] AC 714.

134 The House of Lords found that a provision of the Education Act 1993 (UK) created a statutory duty to provide suitable education to children. The relevant section (s 298(1)) stated: 'Each local education authority *shall make arrangements* for the provision of suitable full-time or part-time education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them'. Subsection 7 defined 'suitable education' as 'efficient education suitable to his age, ability and aptitude and to any special educational needs he [sic] may have'. *Tandy*, ibid.

135 *Tandy*, op cit n 133, 749.

136 Baroness Hale in *Gregg v Scott* [2005] UKHL 2, [2005] AC 176, 231.

137 See *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Company Ltd, The Wagon Mound* [1961] AC 388, 425.

138 Noted in *Brown v Board of Education* 347 US 483 (1954), 493.

139 D Fairgrieve, 'A tort remedy for the untaught? Liability for educational malpractice in English law' [2000] CFLQ 31, 39.

untreated dyslexia led to reduced enjoyment of life and loss of amenity, which could amount to actionable damage.[140] In Australia, psychological impairment has been recognised as actionable damage in personal injury cases occurring within school premises,[141] however, under the Civil Liability Acts, not all forms of psychological harm can be claimed. For example, a defendant does not owe a duty to a plaintiff to take care not to cause mental harm unless a reasonable person ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care were not taken.[142] However, if the defendant knows that the plaintiff is a person of 'less than normal fortitude', this cannot be disregarded.[143] Children with special needs would, in some circumstances, be persons of less than normal fortitude, and the legislation affirms that they should be taken as they are found in this regard.

Further to this, in five Australian jurisdictions, a court cannot make an award of damages for mental harm unless the harm consists of a 'recognised psychiatric illness'.[144] Whilst this might mean that damages for certain forms of mental harm, such as loss of self-esteem, would not be recoverable, children with special needs could claim relief for recognised illnesses such as depression and anxiety.

Loss of Chance

Another type of harm that might be alleged by children with special needs who have not been adequately supported at school is loss of chance. This could be particularised as loss of a chance of economically productive employment, loss of a chance of better employment, or loss of some other specific opportunity based on the facts of the case.

Brennan J of the High Court said in *Sellars v Adelaide Petroleum NL*:

> 'Provided an opportunity offers a substantial, and not merely speculative, prospect of acquiring a benefit that the plaintiff sought to acquire or of avoiding a detriment that the plaintiff sought to avoid, the opportunity can be held to be valuable.'[145]

However, the High Court has noted the difficulties with establishing loss of a chance as actionable damage, The court has said that in order for damage to be established, the court must be capable of determining the position the plaintiff would have been in but for the negligent act.[146] In some cases, expert evidence can assist in establishing this.[147]

Loss of promised opportunity is recognised as actionable damage in contract cases, regardless of the fact that some speculation is required,[148] and Australian courts have compensated claimants for loss of a chance in other matters, such as cases involving the loss of a chance to recover on a cause of action due to deficient legal advice.[149] The Australian High Court has confirmed that, in some cases, a loss of economic chance

140 *Skipper v Calderdale Metropolitan Borough Council* [2006] EWCA Civ 238, [2006] ELR 322.
141 *Oyston v St Patrick's College* [2011] NSWSC 269; *Cox v State of New South Wales* [2007] NSWSC 471. See also *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.
142 Civil Law (Wrongs) Act 2002 (ACT), s 34(1); Civil Liability Act 2002 (NSW), s 32(1); Civil Liability Act 1936 (SA), s 33(1); Civil Liability Act 2002 (Tas), s 34(1); Wrongs Act 1958 (Vic), s 72(1); Civil Liability Act 2002 (WA), s 5S(1).
143 Civil Law (Wrongs) Act 2002 (ACT), s 34(4); Civil Liability Act 2002 (NSW), s 32(4); Civil Liability Act 1936 (SA), s 33(4); Civil Liability Act 2002 (Tas), s 34(4); Wrongs Act 1958 (Vic), s 72(4); Civil Liability Act 2002 (WA), s 5S(4).
144 Civil Law (Wrongs) Act 2002 (ACT) s 35; Civil Liability Act 2002 (NSW), s 31; Civil Liability Act 1936 (SA), s 53; Civil Liability Act 2002 (Tas), s 33; Wrongs Act 1958 (Vic), s 75.
145 Brennan J in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 364.
146 *Tabet v Gett* (2010) 240 CLR 537, 557.
147 See *Phelps v London Borough of Hillingdon; Anderton and Clwyd County Council* [2001] 2 AC 619, 656 (Lord Slynn). In Australia, the example has been given of a medical negligence case, where it might be established that if a cancer had been found earlier, it would not have metastasised; *Tabet v Gett* (2010) 240 CLR 537 per Gummow ACJ, 557.
148 See *Chaplin v Hicks* [1911] 2 KB 786.
149 *Johnson v Perez* (1988) 166 CLR 351; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. Most recently, see *Rosa v Galbally and O'Bryan* [2013] VSCA 116.

will satisfy the requirement of damage.[150] Also, the possibility of applying the loss of chance principle to cases involving negligent medical diagnosis or treatment has been left open by the NSW Court of Appeal, that is, where there is loss of a chance of recovery or treatment.[151]

Having said this, the court has expressed some trepidation in accepting loss of chance as actionable damage in tort. It has been said that treating loss of chance as damage represents an acceptance that something less than proof of injury is required for negligence to be made out.[152] Also, it has been noted that a loss of chance may not, in fact, result in injury. One example of this occurred in *Gregg v Scott*[153] where a cancer sufferer argued loss of a chance of a better medical outcome believing his illness was terminal, but in fact he survived. On this basis, it was concluded that it would require 'strong policy considerations to alter the present requirement' of proof of actual damage.[154]

Conclusion

There are two main barriers to establishing actionable negligence in circumstances where a child with special needs has not been provided with special educational services. First, Australian courts and legislators have demonstrated a general reluctance to impose a duty of care on public authorities due to the complexities associated with budget allocations. Secondly, actionable damage is harder to find in cases where there is no clearly identifiable personal injury.

Yet, the conclusion of this analysis is that the existence of a duty of care on the part of education departments to ensure that children with special needs receive adequate special education support may be arguable in Australia. It may be open to a court to conclude that education departments have a duty to protect children with special needs from harm, and that this duty is breached if special education services are not provided. The damage that results might include economic loss, 'mental harm' if this amounts to a recognised psychiatric illness, and possibly loss of chance. Civil liability legislation does present some additional challenges for plaintiffs seeking relief, particularly because the Acts render the allocation of resources to government programmes virtually unreviewable, however it has been shown that these provisions may not preclude the possibility of relief altogether.

The significance of this inquiry is that, for Australian children with special needs who do not receive special education services, there is no alternative remedy available. Most Australian jurisdictions do not provide a complaints process for children and parents in relation to the provision of special education services. Children might be able to frame their claim as a discrimination matter in some cases, but this is often something of a legal fiction since most children with special needs are met with a surprising amount of goodwill in schools and the education system.[155] The problem is generally one of resources, and the way resources are allocated amongst schools and children in need of support.

Hayes argued in 1984 that the courts were not the best forum in which to have debates about educational quality, particularly as regards special education.[156] This is still true. However, the courts have not hesitated to find teachers, schools and education authorities liable for personal injury on school grounds. Jerry argues that to fail to recognise a duty to provide an appropriate

150 *Johnson v Perez* (1988) 166 CLR 351, 366.
151 *Public Trustee as Administrator of the Estate of the Late Peter Saroukas v Sutherland Shire Council* [1992] NSWCA 192, 10.
152 *Tabet v Gett* (2010) 240 CLR 537, per Gummow ACJ at 557; per Kiefel J at 587.
153 Op cit n 136, per Kiefel J at 583–584. See further the article referred to by Kiefel J: L Khoury, 'Causation and risk in the highest courts of Canada, England and France' (2008) 124 *Law Quarterly Review* 103.
154 Kiefel J in *Tabet v Gett* (2010) 240 CLR 537, 589.
155 Walsh, op cit n 9.
156 R Hayes, 'Legal rights and wrongs of special education' (1984) 8(2) *Australian Journal of Special Education* 18, 22.

or effective education draws an arbitrary distinction between 'supervision' and 'instruction'.[157]

This article has not advanced a position in favour of broad 'educational malpractice' suits in Australia.[158] Rather, it has been argued that a limited duty directed at children who can only be effectively educated if they are provided with special education services should be recognised. Children with special needs are particularly vulnerable in a mainstream education context. Their parents entrust them to education departments with the expectation that they will acquire skills to the extent of their abilities. For some children, their disability will provide no barrier to educational success, as long as reasonable adjustments are made to their environment. Providing these children with appropriate support benefits not only those children, but also their classmates, as the teacher's time can be more evenly distributed.

A failure to provide students whose needs have been assessed, identified and documented with the special education services they require may well constitute negligence. If children with special needs are legally required to attend school, then there must be a duty recognised on the part of the education departments to enable them to be educated there.

157 Jerry, op cit n 31, 208.

158 The closest Australian case to an 'educational malpractice' type suit was brought against an independent school in contract: *Weir v Geelong Grammar School* [2012] VCAT 1736. The plaintiff and her mother argued that they incurred economic loss because the plaintiff's education was inadequate to enable her to get into Sydney Law School. The case could never succeed because there was evidence that the school had gone to considerable lengths to support the plaintiff educationally and personally. The tribunal said (at [150]) 'the allegation of Jane and Rose that Rose failed because of the School would appear to be an outrageous turning of the tables – to allege that a school is obliged to cause the student to achieve a result, as distinct from providing the student with the opportunity and resources to attempt to achieve a result'. Note, however, that some other cases have settled out of court: see Mui Kim Teh, 'Educational negligence: Comparative cases and trends' [2013] Ed Law 200, at 208.