

SCHOOL LIABLE FOR BRAIN DAMAGE?

Authors: Simone Horrobin/Matthew Kilgannon

Education Group

Date: 8 November 2013



DOWNNS
YOUR COMPETITIVE EDGE

156 High Street, Dorking, Surrey RH4 1BQ T: 01306 880110 F: 01306 502283 DX 57300 Dorking
The Tanners, 75 Meadrow, Godalming, Surrey GU7 3HS T: 01483 861848 F: 01483 861856 DX 58308 Godalming1
The Old Coaching Mews, 7b High Street, Cobham, Surrey, KT11 3DH T: 01932 506887 F: 01932 867587 DX: 46102 Cobham
www.downslaw.co.uk

Authorised and regulated by the Solicitors Regulation Authority

SCHOOL LIABLE FOR BRAIN DAMAGE?

The recent Supreme Court decision of *Woodland v Essex County Council* highlights the exposure faced by Schools when engaging third parties to provide services. While the case involved a maintained School, the implications apply equally to independent Schools; indeed, part of the Court's rationale included reference to fee-paying schools having greater exposure given the contractual nature of the relationship.

Background

The pupil suffered a severe brain injury arising from a tragic incident during a swimming lesson organised by her maintained school, but provided by a private contractor.

The School engaged 'Direct Swimming Services' as an independent contractor to provide swimming lessons. Direct Swimming Services was owned and run by an individual who carried on business as an unincorporated entity.

In turn, Direct Swimming Services engaged two ladies to provide the teaching of the swimming lessons.

The pupil alleged that her injuries were due to the negligence of the two swimming teachers, neither of which were directly employed or engaged by the Education Authority (EA).

The pupil sued the EA on the basis that it was liable as it owed the pupil a "non-delegable duty of care" and, as such, was liable for the acts of its contractor.

Non-delegable duty of care

The law of negligence applies (in a basic sense) on a fault-based principle, so that, a person is generally liable for any negligent acts (or omissions) he/she performs. As such, to avoid being negligent a person needs to show he/she has acted with all reasonable care.

This duty is extended by the "vicarious liability" principle, which can, for example, make employers liable for the acts of their employees. However, until this case, there was no scope for a party to be liable for the acts of third parties and independent contractors.

The term "non-delegable duty of care", applies where the general duty to act with all reasonable care is replaced with an obligation to procure the careful performance of work delegated to others.

This duty only applies in rare situations, namely:

1. where some function is either inherently hazardous; or
2. Where three critical characteristics apply:
 - a. It arises because of an antecedent relationship between the defendant and claimant;
 - b. It involves a positive duty to protect a particular class of persons against particular classes of risk; and
 - c. The duty is, by virtue of that relationship, personal to the defendant.

In this second example, the work is usually delegable, but the duty remains with the defendant (in this instance the School).

Decisions

Both the High Court and the Court of Appeal, found that no non-delegable duty existed and the School's duty was discharged when it entrusted its task to an apparently competent provider. Accordingly, the claim against the EA was struck out by both of these Courts.

On appeal to the Supreme Court, it decided that the non-delegable duty of care applied in this instance and relied on a number of factors to find that the second situation detailed above applied, including that:

1. Parents are required to send their children to School and have no influence over the arrangements made by the School;
2. The duty is limited to functions the school has a duty to perform or to arrange its performance, i.e. swimming lessons are required by the national curriculum;
3. Children are vulnerable and the decision helps hold to account those who exercise control over them. When that control is delegated, it is reasonable that the defendant be answerable for the careful exercise of that control.
4. Even though it means schools have greater responsibility than parents, the roles are different and cannot be compared.

As such, it meant that if there is found to be negligence on the part of the swimming teachers, the School could be found liable and ordered to pay compensation. Targeting the EA makes financial sense where it will have deeper pockets than an individual (Direct Swimming Services) who may or may not be covered by insurance.

While there still needs to be a finding of fact as to whether there was negligence, this decision has far reaching implications for both maintained and independent Schools.

Many independent schools "outsource" certain functions; catering, cleaning, sports coaching and all of these come with the risk that the School could be liable for the acts of someone it does not employ, nor over whom it has any control.

As such, it is important for Schools to properly select third party providers, in particular, those who provide services that could impact on the health, safety and welfare of their pupils.

Ensuring proper contractual terms are agreed should allow the School to protect its position, as would ensuring that the provider has and maintains suitable insurance, which is available to the School for inspection at its request.

If you would like to discuss any of the issues raised by this article, then please contact either Simone Horrobin: T: 01483 411535, E: s.horrobin@downslaw.co.uk or Matthew Kilgannon: T: 01483 411517, E: m.kilgannon@downslaw.co.uk.

Details of our full range of legal services can be found on at www.downslaw.co.uk.