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NEGLIGENCE IN SCHOOLS: EDUCATING EDUCATORS ABOUT THEIR LIABILITY

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Abstract

Education is one of the most powerful tools a person can have. It allows us to read, calculate, understand, and make decisions. It informs our opinions, our view of others, and allows us to make our way in the world. This paper assesses the liability of those tasked with providing education at primary and secondary schools. It focusses on negligence, and explores the legal position if educators fail to take reasonable care of their students. The presence of the Accident Compensation Scheme renders physical injury actions largely unattainable. Therefore, the first type of claim relates to a failure to take care of a student's mental well-being. Bullying, exposure to objectionable material, and outrageous conduct are the given examples. The second type of claim relates to a failure to adequately educate the student through poor teaching, which is known as 'educational negligence'. The educational negligence doctrine is controversial, and has attracted different responses overseas. Neither of the above types of claim has been successfully litigated in New Zealand courts yet. The writer takes the view that such claims can, and will, arise in New Zealand in the near future. This informs the conclusion that New Zealand educators do face significant potential liability in negligence. In the modern context of teaching shortages and strikes, the bell may be ringing for the Government to incentivise this profession.

Key words: "*school", "negligence", "teacher liability", "bullying", "educational negligence"*

I Introduction

> Young cat! If you keep
> Your eyes open enough,
> Oh the stuff you will learn!
> The most wonderful stuff!
>
> The more that you read,
> The more you will know.
> The more that you learn,
> The more places you'll go.[1]

With bags packed, shoes tied, and excitement exemplified, thousands of Kiwi kids make their way to school each day. The young mind is so impressionable, and our educators have the task of filling that void with knowledge.

By law, New Zealand (NZ) children must be educated. Public, private, integrated, or at home, NZ's education system affords parents the choice as to who bears the responsibility of ensuring their child can make his or her way in the world.

Schools have long been an environment aloof from scrutiny in society. With public interest trending towards accountability, educators find themselves much closer to the spotlight. In this paper, I assess the liability of schools in negligence, asking the fundamental question "what happens if school staff and authorities fail to take care regarding students?" This encompasses teacher conduct, bullying at school, and the doctrine of educational negligence. My focus is on the compulsory education sector (primary and secondary schools).

Anyone who has studied the law of negligence will know it to be uncertain; its outcomes often dictated by circumstances and policy considerations. These issues are only exacerbated in the schooling context. Individual cases often turn on small details, while the education sector will always be a bone of political contention. The United Kingdom (UK), the United States (US), and Australia all have their own approach, which exemplifies the point.

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[1] Dr Seuss *I Can Read With My Eyes Shut!* (Random House Books, New York, 1978).

The NZ legal position is unclear. I argue negligence claims against educators and authorities are viable in NZ. However, while the ability to bring the claim likely stands, the prospect of success appears difficult. In my analysis, so many variables must align for a claim to succeed. Whether or not this is a deterrent likely depends on the plaintiff, but there is room to sue. From a teacher's perspective, this information should be reflective of what they already know; knowledge is always power. Acknowledging the teaching profession carries this potential liability, the challenge for policymakers in the future will be to incentivise the teaching profession. Increased liability only makes teaching, a profession already in shortage and embroiled in a pay dispute, more unattractive.

II The Education Sector in New Zealand

Before examining liability in negligence, it is helpful to understand the educational framework that exists in NZ. The critical legislation is the Education Act 1989 (the Act). Its essence stemmed from the famed 1988 report, which advocated for education as an individual right controlled by autonomous bodies (Boards of Trustees).[2]

A Right to Education

The Act provides any non-foreign student is entitled to free primary and secondary school education from age five to 19.[3] It is compulsory for NZ citizens and residents to be enrolled at a registered school from age six to 16.[4] If enrolled, students must attend.[5]

B Type of Schooling

Four major types of education institutions are supported in NZ; public, private, integrated, and charter schools. Homeschooling is also allowed.[6]

Public, or state, schools are provided by the Government. The day-to-day running of the school lies with a locally-elected Board of Trustees, who then employs the teaching staff and principal.[7] Public schools must follow the prescribed national curriculum, and adhere to all the standards set out in the Act.

Private schools are owned, run and supported by private individuals or organisations, with relatively minimal Government support.[8] Schools are generally owned by charitable trusts or incorporated societies, and managed by a board of governors.[9] Students pay substantial fees

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2 David Lange (Minister of Education) *Tomorrow's schools: The reform of education administration in New Zealand* (Ministry of Education, 1988); Sally Varnham "Liability for Little Learning: An Examination of the Potential Liability in the Compulsory Education Sector" (LLM Thesis, Victoria University of Wellington, 1999) at 18.

3 Education Act 1989, s 3.

4 Section 20.

5 Section 25.

6 Section 21.

7 Part 9. Also Schedule 6, cl. 6 and s 348.

8 New Zealand Law Commission *Private Schools and the Law* Issues Paper 12 (NZLC IP12, November 2008) at [2.3].

9 At [2.18].

in exchange for education – a contract between the school and fee payer.[10] While the Act prescribes some administrative controls,[11] private schools "may choose their own curriculum, qualifications frameworks and assessment methods, and they may offer education within an educational environment of their design."[12] As an illustration, Motueka Steiner School follows the Steiner principles which focus on practical and artistic ways of learning. Children do not have access to technology and are given the same teacher for their seven years at school.[13] Similarly, Seven Oaks School chose to create their own curriculum to "inspire, engage and nurture" all of its students.[14] Private schools fulfil an important function by ensuring education is not a state monopoly.[15] They represent a diverse approach and provide healthy competition for the public sector, which theoretically should promote higher quality education to be available in NZ.[16]

Integrated schools are former private schools which have been re-established as part of the public system.[17] They receive the same government funding as public schools, and they must teach the national curriculum.[18] However, they retain their private school "special character".[19] Every integrated school's specific "special character" is detailed in its integration agreement, but broadly it refers to teaching and conduct methods.[20] In essence, integrated schools use the state curriculum, but teach it in the same way as they did when they were a private school. For the purposes of this paper, I include integrated schools when referring to "public schools" generally.

Charter schools, called "Partnership Schools | Kura Hourua" under the Act, are different altogether. These schools receive the same government funding as state schools but have large autonomy outside the state system.[21] They are operated by private sponsors, usually

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10 A brief canvas of private schools showed fees generally cost $20,000 – $24,000 per year in NZ.
11 Education Act 1989, ss 35C – 35S.
12 NZLC, above n 8, at [1.1].
13 Motueka Steiner School "About Us" (2018) <www.motuekasteinerschool.nz>.
14 Seven Oaks School "Why Seven Oaks?"(2018) <www.sevenoaks.school.nz>. Their curriculum is called Brilliant Curriculum which is a registered trademark. For more information, see www.journeytobrilliance.com.
15 NZLC, above n 8, at [3.1].
16 At [2.11] and [3.4].
17 Education Act 1989, s 2. The Private Schools Conditional Integration Act 1975 provided the means for private schools to integrate to the state system if they so desired.
18 NZLC, above n 8, at [2.2].
19 Education Act 1989, s 416.
20 Section 422.
21 Newshub "What are charter schools?" (8 December 2012) <www.newshub.co.nz>.

motivated by certain methods of delivering education.[22] Further detail is unnecessary as the current Government is removing partnership schools from the education system.[23] All existing charter schools have applied to enter the public school system when their contracts end.[24] In this paper, reference to "private schools" includes charter schools.

C Parties to Sue

For public schools, liability extends to a number of groups. Teaching staff are the obvious candidates, given their daily interaction with students. It is their conduct which is likely to be the source of a negligence claim. However, they may be shielded from liability. Overseas, the duty on school authorities is non-delegable, or inescapable.[25] Parties under a non-delegable duty can get another to perform but the original party retains all responsibility. In this context, teacher conduct may be at issue but the school authority will retain responsibility. While debate exists whether duties in the education context are non-delegable in NZ, for the purposes of this paper I accept they are.[26]

Next are the principal, as the chief executive of the school, and Board of Trustees, who have governance responsibilities.[27] The school itself has no legal personality so it cannot be sued.[28] A Board's primary objective is to ensure every student at the school is able to attain their highest possible standard in educational achievement.[29] It has further duties to ensure the school is physically and emotionally safe, and that it caters for students with different needs.[30] Legally, the Board is a body corporate, meaning liability attaches to the Board itself

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22 For example, Iwi (focussing on Māori methods), not-for-profit organisations like religious groups (focussing on relevant religious methods), and private companies (Vanguard Military School in Auckland is owned by a limited company).

23 Education Amendment Bill 2018 (15-1), cl. 12A.

24 Ministry of Education "Partnership Schools | Kura Hourua (Charter Schools)" (July 2018) <www.education.govt.nz>.

25 In Australia, *Commonwealth v Introvigne* [1982] 150 CLR 258; In the UK, *Woodland v Essex County Council* [2013] UKSC 66.

26 Further detailed on page 10 and 11. For greater discussion, see David Neild "Vicarious Liability and the Employment Rationale" (2013) 44 VUWLR 707.

27 Education Act 1989, sch. 6, pt. 1, s 4.

28 Paul Rishworth "Legal Liability in Relation to Students" (paper presented to New Zealand Law Society Continuing Legal Education Seminar, Auckland, May 2004) at 27.

29 Education Act 1989, s 93 and sch. 6, pt. 2, s 5.

30 Schedule 6, pt. 2, s 5.

and individual trustees are not personally liable.[31] It represents an attractive target for potential claims.[32]

The Ministry of Education is the final potential defendant for public school plaintiffs, due to the non-delegable duty of care. NZ is distinguishable from other jurisdictions as education is provided for by central government, and therefore recourse is available directly from the executive branch. In jurisdictions such as the UK, education is provided for by local authorities, meaning city councils become the final defendant.

Private schools also carry potential liability. The basis of liability differs as there is an identifiable contract in operation. If a party wishes to bring a claim, its basis will stem from the contractual arrangement with the school as we can assume the contract stipulates the school has a duty to take care (express or implied). The question arises as to whether the contract is the *only* basis for a claim. Private school parents may want to hold an individual teacher personally liable for negligence, but avoid a claim against the school.

Liability in both contract and tort has been controversial.[33] Previously if a contract was in operation, that alone formed the basis for an action.[34] Now, the accepted view is concurrent liability is not objectionable.[35] Tortious duties are imposed by general law whereas contractual duties come from the will of the parties, and there is no basis for confining claimants to one or the other.[36] Conceivably private schools may seek to limit theirs, or their staff's, liability through contract. However, the Court of Appeal has held if these circumstances arose, a wider duty in tort may apply.[37]

On this analysis, the foremost cause of action for private school students will be breach of contract. In the usual case, this will be brought against the headmaster, and the manager

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31 Schedule 6, pt. 1, ss 2 and 24.

32 Ross Knight "Accountability for Teaching Standards" (1997) NZLJ 315 at 316; Alan Knowsley "Safety Of Students – Could You Be Liable?" (5 May 2009) Rainey Collins Lawyers <www.raineycollins.co.nz>.

33 Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 5.

34 *Bagot v Stevens Scanlan & Co* [1966] 1 QB 197 (CA) affirmed in NZ in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA).

35 Todd, above n 33, at 6.

36 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), per Lord Goff; accepted in NZ in *Riddell v Porteous* [1999] 1 NZLR 1 (CA) at 9 and *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at 44.

37 *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 (CA), per Tipping J.

and/or proprietors of the school. Without knowing the particulars of individual contracts, asserting whether individual teachers can be sued for breach of contract is purely speculative. In my view, it seems unlikely individual teachers will be liable for a contract they are not expressly party to. Nevertheless, remedies from individual teachers are available through tort. Tortious duties are imposed by law, not the will of the parties, so teachers should not be insulated through contract for tortious conduct.

On the whole, the avenues appear intriguing for litigious parents. For public school students, recourse is available to teaching staff, principals, Boards, and the Ministry. Individual teachers or principals may not have the means to settle for large sums, but Boards and certainly the Ministry have much deeper pockets. Regarding private school students, recourse to the same groups is available, albeit through changing avenues. Headmasters, managers, and school proprietors can likely be pursued in both contract and tort. However claims against individual teachers may lie only in tort. The most profitable defendant will be the proprietors of the school. These are often trusts or societies, which have better ability to settle for large sums. With these potential defendants in mind, I turn to look at how claims might arise in the schoolyard.

III Suing in Negligence

Internationally, there is a trend towards increased accountability in education.[38] Teaching staff, principals, and national education bodies are coming under increased pressure to deliver, as parents justifiably place professional expectations on them.[39] Such expectation should be welcomed and a source of pride for teaching staff. But the corollary is that parents are prepared to take action when teachers fail to reach such professional standards. The law does not impose unrealistic standards. It demands reasonableness, not perfection. If teachers do what is professionally acceptable, they will always have a valid response to negligence claims.[40]

A Negligence Generally

The tort of negligence is based on a failure to take care. We must "love thy neighbour" and take care of those in our reasonable contemplation.[41] In NZ, the tort can be succinctly stated as:

1. The defendant must owe the plaintiff a **duty of care**; and
    a. For such a duty, there must be a proximate relationship between the parties so the defendant could reasonably foresee harm to someone in the plaintiff's shoes; and
    b. Policy considerations must not negate the duty.[42]
2. The duty of care must be **breached**; and
3. That breach must **cause loss**; and
4. That loss must **not be too remote**.

In novel situations where a duty of care has not been covered by existing authority, courts must consider all material facts in combination. This analysis informs whether it is just and

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38 See Terry Crooks "Assessment for learning in the accountability era: New Zealand" (2011) 37 Studies in Educational Evaluation 71; Deborah Willis "Educational assessment and accountability: a New Zealand case study" (1992) 7 Journal of Education Policy 205; Christine Gilbert "Towards a self-improving system: the role of school accountability" (2012) National College for School Leadership <www.dera.ioe.ac.uk>; Isaac M. Mbiti "The Need for Accountability in Education in Developing Countries" (2016) 30 Journal of Economic Perspectives 109; Wayne Lewis and Tamara Young "The Politics of Accountability: Teacher Education Policy" (2013) 27(2) Educational Policy 190.

39 Rishworth, above n 28, at 25.

40 At 25.

41 *Donoghue v Stevenson* [1932] UKHL 100.

42 *Anns v Merton London Borough Council* [1978] AC 728.

reasonable to find a duty of care incumbent on the defendant.[43] Negligence in schools can be categorised as 'novel' in NZ, given there are no reported cases.

1 ACC Bar

Most overseas education law stems from personal injury cases.[44] In the UK, failure to properly supervise school swimming lessons attracted liability.[45] In Australia, liability has been found for injuries in the schoolyard while teachers were in a meeting,[46] for a fight in a maths lesson,[47] and for molten metal burns in a science lesson.[48] Similarly, the Canadian Supreme Court found liability for injuries in a gymnastics class.[49] Such personal injury claims are barred in NZ due to the presence of the accident compensation (ACC) legislation.[50] This greatly diminishes the liability of school staff and authorities. To claim against schools, NZ plaintiffs must find a way around the ACC bar.

ACC only covers mental injury that arises from physical injury, certain criminal offences, or in relation to work.[51] Therefore, one method is to sue for pure mental injury, not arising from a physical injury.[52] This could occur through a teacher's negligence in failing to detect or recognise bullying or exposure to harmful material. ACC also does not preclude exemplary damages, meaning if teacher conduct is reprehensible enough, a claim could succeed.[53] Finally, a student may be able to claim for a poor education provided it caused them actual loss (educational negligence). The above are all types of claims that could surface in NZ courts today.

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43 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd; Mortenson v Laing* [1992] 2 NZLR 282 (CA) at 293, 305 and 312.
44 Rishworth, above n 28, at 26.
45 *Woodland*, above n 25.
46 *Introvigne,* above n 25.
47 *Richards v Victoria* (1969) VR 136.
48 *Close v Minister for Education* (unreported) C38/1967, WA.
49 *Myres v Peel County Board of Education et al* (1981) 2 SCR 21.
50 Accident Compensation Act 2001, s 317 (1).
51 Sections 26(1)(c), 21 and 21B.
52 *Queenstown Lakes District Council v Palmer* [1998] NZCA 190; *Sivasubramaniam v Yarrall* [2005] 3 NZLR 268.
53 Accident Compensation Act 2001, s 319.

B Negligence in Schools

1 Duty of Care

Given the novelty, NZ plaintiffs need the courts to recognise a duty on teaching staff and authorities in the education sphere. It is clear the relationship between teacher and pupil gives rise to such a duty. Students, as minors, are in a very vulnerable position. The teacher assumes responsibility for protecting students against reasonably foreseeable harm. These factors satisfy the sub-limbs in the duty of care test.

Generally, the public-private school divide has no bearing on the duty of care arising. School staff and authorities assume responsibility for the pupils at school, and this brings about the duty of care. In public schools, this jurisdiction over students derives from the Education Act and can be categorised as a delegated power of the Executive.[54] In private schools, the student's participation is predicated on the consent of parents through contract. The duty comes from the contractual arrangement.[55] Therefore, whether public or private, the school assumes a duty of care.

The House of Lords has gone further, not only accepting the duty exists but holding it to be non-delegable. As mentioned, this is because of the particular vulnerability of students in their relationship with teachers. The non-delegable prefix means teaching staff cannot shift the burden of the duty to another.[56] At a higher level, the school authority cannot argue their duty has been discharged by simply appointing competent teachers.[57] The High Court of Australia agreed:[58]

> The immaturity and inexperience of the pupils and their propensity for mischief suggests there should be a special responsibility on a school authority to care for their safety.
>
> The fact that the Commonwealth delegated the teaching function … does not affect its liability for breach of duty. Neither the duty, nor its performance is capable of delegation.

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54 Des Butler and Ben Matthews *Schools and the Law* (The Federation Press, Sydney, 2007) at 18.
55 At 18.
56 *Woodland,* above n 25.
57 Butler and Matthews, above n 54, at 23.
58 *Introvigne,* above n 25, at [30] and [33].

In another sense, the fact education is compulsory in NZ imposes even greater reason for the duty on teachers and schools, as the students are shorn of their choice to participate.[59] Academics also support the existence of a duty.[60]

It is clear NZ teaching staff and school authorities owe their students a duty of care but whether this duty is non-delegable is not yet settled in NZ. If a case were to arise tomorrow, I believe NZ courts would hold the duty to be non-delegable for Boards and the Ministry. The reasons are directly analogous to overseas case law; students are particularly vulnerable and authorities are under an assumption of responsibility for their care, they have no control over how authorities perform their obligations, and the authorities delegate their day-to-day obligations to teaching staff.[61] Therefore, I proceed on the basis that the duty of care is non-delegable.

(a) How far does the duty extend?

With social media, out-of-school learning, and representative opportunities at events, school authorities face serious blurring as to where their duty of care ends.[62] School hours, whether the conduct occurred outside school grounds, how much control teachers had, and whether they had prior knowledge of the situation, are all relevant as to whether the duty of care was still in action.

It is a difficult, fact-specific question that does not yet have an answer in NZ. In Australia, the High Court held the duty arising depended on whether the relationship of schoolmaster and pupil was in existence.[63] That relationship does not simply start and end when the pupil enters and leaves the school gates.[64] *Geyer* concerned an injury from a flying baseball bat when the students were unsupervised at 8:45am before school started. The Court found the headmaster liable as he had created a situation where adequate supervision was needed, but

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59 Frances Hay-Mackenzie and Kelly Wilshire "Harm Without Damages – A School's Liability for Personal Injury in New Zealand" (2002) 7 Austl. & N.Z. J.L. & Educ. 39 at 40.

60 AN Khan "Liability of Teachers and Schools for Negligence in England" (1991) 20 Journal of Law & Education 537 at 544; Helen Newnham "When is a Teacher or School Liable in Negligence?" (2000) 25 Australian Journal of Teacher Education 45 at 46.

61 *Woodland,* above n 25, at [23]; *Introvigne,* above n 25, at [33].

62 Rachel Schmidt-McCleave "Jurisdiction – when does the school have jurisdiction over students?" (paper presented to New Zealand Law Society Education Law Conference, Auckland, May 2018) at 43.

63 *Geyer v Downs* (1978) 138 CLR 91 at [6].

64 Butler and Matthews, above n 54, at 34.

not provided.[65] In *Koffman*, the school authority was held liable for a student's injury at a bus stop outside a high school 300 metres away, after school hours. The school knew of a risk of mischief occurring with the high school pupils, and a teacher should have accompanied the student. Dismissing the appeal, Sheller JA held "I do not think [the duty's] extent is … limited by the circumstance that the final bell for the day has rung and the pupil has walked out the school gate."[66] In both cases, the school staffs' awareness of potential risk was crucial for liability. Thus, Australian courts require schools to take reasonable, preventative steps if they are aware of a risk to their students, regardless of whether it is inside school hours or grounds.

The UK is more restrictive on the extent of the duty. The leading authority is *Bradford-Smart*.[67] The plaintiff pupil was being bullied on the bus to and from school. School staff knew of this and took preventative steps. But, factually, no bullying occurred at school. The situation is similar to *Koffman*; a known risk to a student occurring outside of school hours and grounds. In contrast, the defendant school authority was not liable. The Court held schools do not owe a general duty to police pupils' activities after they have left its charge.[68] A teacher's duty ends "at the gate", unless exceptional circumstances occur like seeing one student attack another immediately outside.[69] The Court believed cases of this ilk would be very rare.

There is no definitive NZ position. If the bullying was purely non-physical in *Koffman* or *Bradford-Smart*, then an analogous case could be brought in NZ. One could argue the outcome in *Koffman* is a function of the Australian jurisdiction allowing personal injury claims. The Court may have felt compelled to remedy personal injury, and extended the school's supervisory obligations beyond the school gate. With ACC, NZ courts would not be under such pressure and could hold for a bright-line "at the school gate" test. In my opinion, our courts will more likely favour the Australian approach and hold the duty of care does not end at the school gate or after the final school bell.

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65 *Geyer*, above n 63, at [25].
66 *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] NSWSC 349 per Sheller JA.
67 *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7.
68 At [32].
69 At [36].

The position of NZ courts when assessing duties of care in novel situations provides the reason for this. To find a duty, the courts equipped themselves with the ability to assess all the circumstances.[70] It would be anomalous to then apply a bright-line test for when the duty ends. In the factual assessment, the location and time of the conduct would be very relevant.

In the same assessment, applicable school policy would likely be a factor. Recently, the High Court noted Tauranga Boys' College policy deems students under school authority when, amongst other things, they are on the way to and from school, and any time they are in school uniform.[71] If a school deems students as under its authority, then logically the duty will still be in action. However, any policy must be kept in perspective. In a negligence problem, it would be one factor in the assessment of whether the duty was still active – the quite persuasive argument being "the school, through its policy, took responsibility for its students at these times". The implication is not that the courts should recognise, for example, the content of Tauranga Boys' College policy as legal presumptions. Doing so would cause significant inequality between uniformed and non-uniformed schools, as staff in the latter category would be have far fewer obligations and responsibility. The point is, specific school policies, if any, will form part of the factual assessment. This may incentivise schools to clearly delineate when they deem the students under their authority, as Tauranga Boys' College did.

It is suggested that if there is "sufficiently close connection" between student activities and the school, a court will likely hold the school continues to owe a duty.[72] School trips, school-organised transport, off-site activities in the school day, online activity connected to the school, and times immediately before and after school in proximate locations could all be examples of when the duty is still in action.[73] While not unattractive, this just succinctly states the likely end position; NZ courts will use vague enough wording, like "sufficiently close connection", to allow them to consider any and all circumstances. In some cases this may mean the duty stops at the school gate, while in others it may not.

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70 *South Pacific Manufacturing,* above n 43.

71 *Tauranga Boys College Board of Trustees v International Education Appeal Authority* [2016] NZHC 1381 at [39].

72 Schmidt-McCleave, above n 62, at 50.

73 At 50.

2 Breach of Duty

To find a breach, a teacher's conduct must be below the requisite standard of care. Initially, the recognised standard was of a "reasonable parent" owing to the perceived basis of the duty being the teacher stepping into the parent's shoes.[74] This changed with teaching being recognised as a genuine profession. The correct standard is now the skill and care of a reasonable person in that profession, asking "what is acceptable conduct to reasonable members of the teaching profession?"[75] This is known as the "reasonable teacher" standard, and courts defer to opinions and practices of the teaching profession to assess this.[76] The distinction is minor but positive. It correctly recognises teachers as professionals and holds them to the standard of their peers, rather than dealing with the artificiality of a reasonable parent's likely conduct in a school environment. Schools often have access to information that parents may not, and teaching is a profession with standards and practices whereas parenting is not.

Any act or omission falling short of what a reasonable teacher would do in the same circumstances constitutes a breach of the duty. It may be an act such as encouraging or assisting dangerous activities, or an omission like failure to provide adequate supervision, take adequate action, or have in place proper policies to manage risk. Teachers do not have to eliminate all risks. They must only take the steps supported by a "reasonable body of professional opinion".[77] As with the duty stage, this assessment will be largely circumstantial, with members of the teaching profession becoming the experts as to whether conduct fell below the professional standard.

3 Causation

For causation, a nexus must exist between staff conduct and the harm to the pupil. The test is "but for the teacher's conduct, would the harm have occurred on the balance of probabilities?"[78] If the answer is "no", the teacher's conduct is a legal cause of the harm. It is unnecessary to delve further into special cases involving causation.[79] The "but-for" test generally provides a convincing answer in schooling cases, and the inquiry need not go further. In the cases of *Geyer* and *Koffman,* if the school had provided reasonable

74 Known as the *in loco parentis* doctrine.
75 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
76 Butler and Matthews, above n 54, at 24.
77 *Bradford-Smart,* above n 67, at [35].
78 *Barnett v Chelsea & Kensington Hospital* [1969] 1 QB 428.
79 See Todd, above n 33, at [20.2.02] – [20.2.07].

supervision then, on balance, it is unlikely the injuries would have occurred on the field and at the bus stop. Similarly in *Bradford-Smart*, the bullying occurred despite the teacher's preventative actions. Therefore, the harm would have occurred either way, alleviating the school's liability.

Additionally, negligence is not actionable *per se* so recognisable harm must be shown. This is crucially important in NZ as ACC renders physical harm unattainable, which is the usual basis of claim. In a NZ schooling context, the required damage is recognisable mental injury, not caused by any physical injury. Mental injury is a "clinically significant behavioural, cognitive or psychological dysfunction."[80] As a guide, post-traumatic stress disorder (PTSD) or severe anxiety appear the minimum injury to qualify.[81] Plaintiffs suffering unexceptional stress, fear, or anxiety will not find fruit for their claims.[82]

4 Remoteness

Remoteness ensures defendants are only liable for reasonably foreseeable harm. In school situations, this element is not difficult as the harm is often a clear extension of the complained conduct. For example, injury when leaving students playing unsupervised is reasonably foreseeable. Even stronger for plaintiffs is where the school has knowledge or awareness of an issue. With notification of bullying from a parent or other student, no staff member could reasonably argue psychological harm was too remote.

5 Defences

Contributory negligence is often a favourite for defendants to mitigate at least part of the blame.[83] School authorities would need to prove the student contributed to their downfall by failing to take proper care in the circumstances. Difficulty for the defence lays in the fact that claims involve children. Proving what precautions or actions a reasonable child of that age would take is fraught with uncertainty.[84] More can be expected of students who are older or more mature,[85] but generally trying to apportion blame against a "particularly vulnerable" party seems a weak and desperate move.

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80 Accident Compensation Act 2001, s 27.

81 *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [260]. Generally, see Fiona Thwaites "Mental Injury Claims under the Accident Compensation Act 2001" (2012) 13 Canterbury Law Review 244.

82 *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39.

83 Contributory Negligence Act 1947, ss 3 and 4.

84 Butler and Matthews, above n 54, at 65.

85 At 64.

Themselves aside, other groups of people may contribute to a student's downfall. In a bullying or educational negligence case, parents, caregivers, or private tutors may all have some level of answerability. Parents (or caregivers) may fail to detect their son falling behind at school, or may put too much pressure on their daughter to do well, causing her stress. Tutors may teach the wrong methods or curriculum. I see no reason why, if such circumstances allow, defendants cannot use this defence as partial mitigation.

The law also recognises *volenti non fit injuria* as a defence. In essence, this means no liability can arise if someone consents to the risk.[86] For schools, it may appear attractive to suggest parents consented to risks associated with schools by either signing waivers (for trips or activities) or, impliedly, by choosing to send their child there (whether public or private). Consenting to a child's participation, at school and in activities, does not exclude the right to take action in negligence. The best view of the position is consent shows parents acknowledge accidents can occur, but are not agreeing to staff and schools taking less care.[87] Permission slips are not a waiver of negligence. A parental consent form, even with a risk disclosure section, does not legally lessen a school's responsibilities to its students.[88] In my view, modern day schools do a sound job of informing parents of relevant risks, without trading off their standard of care. Anecdotal evidence suggests teachers receive first-aid and risk management training, and students get detailed safety briefings before risky activities. In addition, school camps and outdoor education feature more risky activities and schools often outsource these to third parties with greater experience and expertise of potential pitfalls.

The above section exhibits the elements of a negligence claim in a school context. Below, I detail different scenarios where such claims may specifically arise in NZ.

C Scenarios Where Claims May Arise

Despite ACC, teaching staff and schools can face private law liability for pure mental injury. As elucidated earlier, teaching staff can be sued personally, and school boards and the

86 Todd, above n 33, at 1166.
87 Butler and Matthews, above n 54, at 56.
88 Ministry of Education *EOTC Guidelines 2016 – Bringing The Curriculum Alive* (updated April 2018) at 38; Leo H. Bradley *School Law for Public, Private, and Parochial Educators* (Rowman and Littlefield Publishers, ProQuest Ebook Central, 2017) at 201.

Ministry may be joined as defendants through vicarious liability and the non-delegable duty of care. A major potential claim, as I assess below, may arise in relation to non-physical bullying. Other far narrower claims could also succeed with the existence of specific facts.

In NZ, bullying is a serious issue. 94% of our teachers report bullying occurs at their school, while we had the second-highest rate of general bullying in a recent survey of 51 countries.[89] To succeed in negligence, plaintiffs must to show recognisable mental injury resulting from non-physical bullying.[90] This could occur in person (through name calling, face pulling, gestures, rumour spreading or social exclusion) or with increased use of digital technology in schools, through cyber means.[91] There is no doubt the potential for non-physical bullying has increased with the availability of the internet and cellphones. In response, parents are less tolerant of inaction by schools, and more inclined to bring claims.[92]

In response to cyberbullying, Parliament introduced the Harmful Digital Communications Act 2015. It prescribes a civil and criminal regime aiming to reduce the impact of online abuse and bullying.[93] However, this Act does not deal with liability of those who may be careless in allowing it to occur, meaning the common law still applies to teaching staff in a school context.

To find liability, the elements of negligence addressed earlier must be proved. I reiterate the extent of the duty of care in NZ is unknown, as no NZ school has been sued for failing to prevent harm from bullying.[94] In lieu of precedent, I use the recent Australian decision of *Oyston* to illustrate how an analogous bullying claim could surface in NZ. This case applied the traditional test of negligence to a bullying problem.

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89 Vanessa A. Green and others *Bullying in New Zealand Schools: A Final Report* (Victoria University of Wellington, April 2013) at 5; Michael Daly "Kiwi students report second-highest rate of bullying in international study" (20 April 2017) Stuff <www.stuff.co.nz>; OECD *Programme for International Student Assessment (PISA) 2015 Results (Volume III) – Students' Well-Being* (2017) OECD Publishing <www.dx.doi.org/10.1787/9789264273856-en>.

90 Accident Compensation Act 2001, s 27. ACC only covers mental injury from; physical injury (s 26(1)(c)), sexual crimes (s 21), and work (s 21B).

91 Butler and Matthews, above n 54, at 45.

92 Carol Anderson "School Bullying – The Legal Perspective" (paper presented to New Zealand Law Society Education Law Conference, Auckland, May 2012) at 31.

93 Harmful Digital Communications Act 2015, ss 3 and 6.

94 Anderson, above n 92, at 34.

1 Bullying case study: Oyston v St Patrick's College

Jazmine Oyston was a student at the defendant private girls' high school. She suffered severe panic attacks, anxiety, depression, and stress resulting from bullying by other pupils between 2002 and 2005. She was hospitalised at points, suicidal, had various visits to psychologists, and, despite her parents raising the issue multiple times, she eventually had to withdraw from the school. She brought a negligence claim against the school for failing to protect her against the "foreseeable risk of harm" from the bullying.[95] Her case centred on the inadequacy of the school's bullying policies and actions. The school argued Oyston was not the subject of bullying, and if she was then they were not aware of it. They further submitted she had not suffered a recognised mental injury, and if she had then it was not reasonably foreseeable as it was caused by other stressors, like her home life. Contributory negligence was also claimed.[96]

(a) Duty of care

The school unquestionably owed Oyston a duty of care to protect her from bullying. Students stand in need of care and supervision from teachers. More specifically, bullying is one such risk that could be reasonably foreseen to result in harm. Therefore, schools are under a duty to protect their students from it. This is well established in law.[97] With no issues around the extent of the duty, this would be the identical position in NZ.

(b) Breach of duty

Reasonable members of the teaching profession would take active and adequate steps to protect students from the risk of bullying. In other words, "all reasonable steps" should be taken to prevent the bullying. Here, the school had taken active steps by dealing with bullying through policies and practices, but the live issue was whether they were adequate enough to discharge the duty.[98]

The Court held the school's policies and practices were inadequate, constituting a breach.[99] Its responses to the bullying were "ad hoc, rather than systematic" and did not appropriately

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95 *Oyston v St Patrick's College* [2011] NSWSC 269 (13 April 2011) at [6].
96 At [4] – [7].
97 At [13] and [15].
98 At [15].
99 At [51].

deal with persistent misbehaviour.[100] Examples included; placing overemphasis on supporting the bullies rather than protecting the victim, haphazard recordkeeping of complaints, failing to monitor whether Oyston was continuing to be bullied, and not exercising discretion to practically eliminate bullying.[101] The school provided some counselling for Oyston to withstand the bullying, but it never acted to ensure the bullying ceased. Such inaction always puts "a school at obvious risk of failing in its duty of care to the victim."[102]

In NZ, the situation would be the same. An ad-hoc and inconsistent approach to bullying (a known and foreseeable risk of harm) will always fall short of the "reasonable teacher" standard. Reference to school bullying policies makes this point clear. NZ schools take a raft of different approaches to dealing with bullying but none allow for unreasonable or ad-hoc approaches. Traditional methods usually involve reprimanding the student through various forms of punishment.[103]

However, there is scope for other approaches. Tawa Intermediate School believe punitive consequences isolate the bully, and cloud their appreciation of the damage they have caused. They use restorative practices, which strongly align with tikanga Māori principles. The wrongdoer is empowered to "put things right" by repairing the relationship and taking responsibility for their actions. If the wrongdoer's actions do not cease, only then will punishment flow.[104] Traditional methods, and indeed our criminal justice system, do not favour this approach.[105] However, a lack of traditionalism does not equate to unreasonableness. Tawa Intermediate's approach is used systematically and they have seen appreciable benefits because of it, making it vastly different to the unreasonable practices used in *Oyston.*

(c) Causation

While medical opinion in this case differed, the Court held Oyston had indeed suffered a recognised psychiatric illness. On causation, the Court held it was probable Oyston would

100 At [28] and [36].
101 At [29], [34], [35] and [36].
102 At [57].
103 Such as time-out, detention, visits to the principal, calling parents, suspension or expulsion.
104 Tawa Intermediate School "Restorative Practice" (2018) <www.tawaint.school.nz>.
105 See *Mason v R* [2013] NZCA 310.
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not have suffered psychological injury if the school had exercised the care of a reasonable teacher.[106] It accepted her home life contributed to increased *vulnerability* to such an injury, but ultimately it was the school's failure to stop the bullying which *caused* the harm.[107] The injuries were the direct result of the school's inability to implement and follow adequate policies.[108] This is a direct application of the causation test in NZ. The Court applied the "but for" test, and found a nexus between the school's conduct and Oyston's injury.

Regarding the damage requirement, the case provided some evidence of minor physical bullying (jostling and elbowing) in addition to the dominant non-physical bullying.[109] To remain outside the ACC scheme and proceed with a claim, NZ plaintiffs must ensure a physical injury is not suffered. While framing deliberate bullying as 'accidental' may be conceptually awkward, the ACC ambit is wide enough to include intentional conduct.[110] If physical injury is suffered, the defence could argue the mental injury stemmed from the physical injury. Therefore ACC, not the common law, should compensate the claim.[111]

"Physical injury" has a broad meaning under NZ law. The legislative definition mentions "any sprain or strain" but is otherwise unhelpful.[112] The Supreme Court held a physical injury must have some appreciable, not wholly transitory, impact on the body.[113] At the minimum end, a finger pricked for a blood sample[114] and inflammation[115] have been sufficient. Such a low threshold casts doubt as to whether Oyston could successfully bring a common law claim. Simple jostling and elbowing without further effects are likely transitory, but any sign of bruising or swelling would meet the physical injury threshold and preclude the claim.

(d) Remoteness

The school tried to assert Oyston's particular mental injuries were not reasonably foreseeable, and therefore too remote. The Court disagreed as: the general risk of psychiatric injury from

106 *Oyston,* above n 95, at [318].
107 At [321].
108 At [320].
109 At [33] and [79].
110 Accident Compensation Act 2001, s 25(1).
111 Section 26(1)(c).
112 Section 26(1)(b).
113 *Allenby v H* [2012] NZSC 33 at [56].
114 *Reekie v Attorney-General* [2009] NZAR 304.
115 *Millsteed v Accident Rehabilitation and Compensation Insurance Corp* [2000] NZAR 433.

bullying was foreseen, the school had received numerous complaints and information about the bullying, and Oyston's deteriorating mental state was well-known by the school.[116] The mental injury that did eventuate was reasonably foreseeable. Again, this is exactly how the doctrine would apply in NZ.

(e) Contributory Negligence

The school, heartlessly, tried to claim Oyston contributed to her own demise because she failed to *persistently complain* about the bullying. The Court simply could not accept this. Oyston had personally complained, as had her parents, and others had drawn the school's attention to the ongoing bullying. She desisted in further complaint because the 'help' she was getting through counselling was only aggravating the bullying. To argue a 14 year old girl, who was succumbing to psychological injury, contributed to her downfall by not complaining often enough was unacceptable.[117]

The Court found in favour of Oyston's claim and eventually awarded her A$162,207.34 for various economic and non-economic losses.[118] This level of award is not uncommon in Australia, however the UK have been significantly more conservative.[119] There is nothing preventing a similar claim for mental injury as a result of bullying arising in NZ.[120] The only caveat is ensuring physical bullying, if any, is minor enough that it cannot be construed as a physical injury and therefore covered by ACC. In my view, there would even be a strong case for an award of exemplary damages, covered later, if the *Oyston* facts arose in NZ.[121] It is at least arguable the school showed flagrant disregard for the victim's needs by preferring to support the bullies, not following its own policies, not acting on information, and generally not ensuring the bullying would cease.

A case of cyberbullying, potentially more common in the modern school, would be considered under the same test. Intuitively we think about students bullying fellow students from the same school. However, by its nature, cyberbulling can occur across school boundaries. This could be very common in situations where school pride is at stake, like before and after sports fixtures or school events (for example a production or ball). Students

116 *Oyston,* above n 95, at [308] and [309].
117 At [333] to [338].
118 *Oyston v St Patrick's College* (No 3) [2013] NSWCA 324 (3 October 2013).
119 UK awards generally fall around £1500: Anderson, above n 92, at 49.
120 Agreeing with Anderson, above n 92, at 40.
121 See pages 23 and 24 of this paper.

from one school may engage on social media through comments, messages, or pages to intimidate students from other schools, and assert why their school is better.[122]

The major factor in any cyberbullying claim would be whether the school had sufficient control over the student in the given situation to create a duty of care.[123] This would be entirely fact dependent and speaks to how far the duty of care for schools extends, of which there is no NZ position as yet.[124] Some believe a duty may arise if the bullying occurs on school computers or on websites hosted on school servers, regardless of when or where they are accessed. This is because schools have the requisite control over its own computers and servers.[125] In a bid to be proactive, Kowhai Intermediate (Auckland) and Collingwood Area School (Golden Bay) have gone even further and banned social media to mitigate such issues.[126]

I agree to some extent. Cases where staff allow or are wilfully blind to student bullying should attract liability. However, where the conduct occurs on personal devices, or away from school, it will be extremely difficult to establish the school had assumed responsibility for the student's actions. Holding teachers responsible for such actions would also mean giving them access to students' private accounts, which creates privacy and ethical dilemmas. Further, I am wary of the burden being heaped on schools and their staff. There is already "increasing expectation that schools can, and should, address the myriad of social problems that students bring to the classroom each day."[127] It is one thing to monitor behaviour in the classroom and on the playground, but asserting teachers and schools must be alert to online activity at conceivably all hours of the day goes too far.

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122 Laura Dooney "Investigation launched over rape comments made by Wellington College students" (7 March 2017) Stuff <www.stuff.co.nz>; Jessy Edwards "Wellington College sprayed with obscene graffiti ahead of McEvedy Shield" (22 February 2016) Stuff <www.stuff.co.nz>; Alex Beattie "Why Facebook is a playground for bullies" (26 April 2018) Newsroom <www.newsroom.co.nz>; Ben Strang "Facebook rivals face off on field" (17 September 2012) Kapiti Observer <www.kapitiobserver.realviewdigital.com>.

123 Anderson, above n 92, at 48.

124 See pages 11 – 13 of this paper.

125 Anderson, above n 92, at 48.

126 Vaimoana Tapaleao "School tells parents: Ban your kids from Facebook" (3 February 2018) NZ Herald <www.nzherald.co.nz>.

127 New Zealand Law Commission "Combatting Cyber-Bullying: A Toolkit For Schools" (press release, 15 August 2012).

2 Other scenarios

Moving away from bullying, another potential scenario involves student exposure to objectionable material at school.[128] Immediate examples may include pornography or distressing footage from movies or television. A teacher could breach their duty in this scenario by: not providing adequate supervision, providing unrestricted internet access, showing harmful footage in class without warning, or even through encouragement. The other key battle for plaintiffs would be showing the mental injury was specifically caused by the objectionable material on the balance of probabilities. If students are also being exposed to such material away from school (i.e. online or in video games), it would be extremely difficult for them to argue a single exposure at school was the cause of the harm.

In my view, successful claims on this basis would be rare. With the amount of objectionable material available online, on screen, and in video games today, a single exposure at school will never satisfy the causation requirements. In addition, it would be very surprising if any teacher allowed marginal material to be viewed in their classroom more than once. The only conceivable claim may be a failure to provide proper supervision at lunchtimes. Students may bring such material to school, access it on their device, or be provided it by other students in breaks from class. To respond to such a claim, teaching staff would need to show they exercised reasonable professionalism in their supervision of students on breaks from class.

Finally, students could pursue claims for exemplary damages for outrageously negligent conduct by school staff and authorities, despite claims for compensatory damages being barred.[129] Aside from the general anomaly of ACC allowing exemplary damages, it is still hard to justify imposing them for negligence claims.[130] Negligence is an unintentional tort whereas exemplary damages aim to punish the defendant for outrageous conduct. It would be very rare for a defendant to unintentionally do something with the required outrageousness.[131] Further to the point, to join the Ministry in such a claim would involve imposing exemplary damages vicariously. The Court of Appeal has strongly resisted such claims as punishment should only be given to those guilty of blameworthy conduct.[132] To

128 Hay-Mackenzie and Wilshire, above n 59, at 49.
129 Accident Compensation Act, s 317 and 319.
130 Todd, above n 33, at [2.5.02] discusses the anomaly of ACC allowing exemplary damages.
131 *Ellison v L* [1998] 1 NZLR 416 at 419.
132 *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [88], [90], [91], [122] and [124].

succeed, the plaintiff would need to show each defendant, through their own conduct, showed flagrant disregard for the student's safety which warrants punishment.[133]

NZ school authorities have faced one such case implicitly supporting that exemplary damages can be given. A teacher was imprisoned for sexually abusing students over five years, both in and outside of school. The plaintiffs claimed for exemplary damages in negligence against the principal, senior mistress and Board of Trustees, and vicariously against the Attorney-General (on behalf of the Ministry).[134] The reported decision only considers an application that the trial should be heard by a judge alone, so the Court did not examine the merits of whether the defendants had acted with the requisite outrageousness. The claim against the Ministry would fail, as exemplary damages are not available vicariously.[135] However, in my view, these facts go extremely close to warranting exemplary damages against the principal, senior mistress, and Board (who have a duty to provide safe schools).[136] Failing to detect a number of assaults to multiple students over many years, including on the school grounds, implies a disturbing lack of supervision and awareness by the parties charged with the everyday running of the school. Such failure in their duties of care to students seems deserving of the punishment exemplary damages stand for.

Recent statistics show these cases could conceivably arise, with 81 teachers disciplined for sexual misconduct against a student between 2015 and 2017.[137] Cases of misconduct are not as egregious as the claim above so whether the facts, and the plaintiff's will and means, support such a claim must be considered. It must also be noted that ACC provides cover for sexual crimes, particularly concerning minors.[138] Taking all of this in, I cannot escape the feeling that modern educators would ever be so careless to give rise to this type of claim. Evidently a claim for exemplary damages against school staff could arise, however I doubt it will ever practically eventuate.

With the bar on physical injury claims, NZ educators shoulder less liability than their overseas counterparts. Nevertheless, liability can still arise in negligence for teaching staff,

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133 Analogising at [88].
134 *M v L* [1998] 3 NZLR 104.
135 *S,* above n 132.
136 See page 5 of this paper.
137 Florence Kerr "Education Council reveals the number of teachers disciplined for sexual misconduct" (22 May 2018) Stuff <www.stuff.co.nz>.
138 Accident Compensation Act 2001, s 21 and Schedule 3.

principals, Boards, and the Ministry at school. NZ has no reported cases yet, but the potential exists when a pure and recognisable mental injury has occurred. Furthermore, this potential does not change between public and private schools. In both contexts, school staff and, by extension, school authorities owe a duty of care to their students. The only difference is the basis from which this duty arises.

IV Educational Negligence

Negligence has taken on a new meaning in the educational sphere. A body of law has developed overseas on whether students or their parents can claim in negligence if the quality of their education is poor. Take the classic example: a student passes through the schooling system but leaves essentially uneducated (i.e. without the ability to read or write), therefore suffering loss through diminished work or career prospects. In these cases, plaintiffs point to the school and school authorities as the cause of their loss. The reasons cited vary but could include that the school: failed to identify a learning disability, failed to cater for the student's needs, or simply provided poor quality teaching, all leading to general failure in their duty to educate.

A claim in educational negligence is pleaded in the same way as usual negligence claims. That is: establishing a duty of care, which is breached, causing loss, that is not too remote. The doctrine, also known as "educational malpractice", has barely touched NZ. I assess whether a flawed education could become a basis for NZ parents and students to claim against schools and their authorities.

A US Position

Surprisingly for a litigious nation, US courts have struck out all claims of this nature. Their rationale relies almost exclusively on policy reasons, holding that schools and their staff do not owe students a duty to be educated.

The major cases which defined the US position were *Peter W v San Francisco Unified School District* and *Donohue v Copiague School District*.[139] In *Peter W*, the plaintiff graduated from the school but was essentially illiterate. As a result, he could only ever work as a labourer which requires little or no ability to read or write.[140] In *Donohue*, the plaintiff graduated from the school despite failing standards, and lacking reading and writing skills. This affected his employment prospects because he could not even fill out a job application.[141]

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139 *Peter W v San Francisco Unified School District* 131 Cal. Rptr. 854 (1976); aff'd 60 Cal. App. 3d 814; *Donohue v Copiague Union Free School District* 407 N.Y.S. 2d 874 (1978); aff'd 47 N.Y. 2d 440 (1979).

140 *Peter W v San Francisco Unified School District* 60 Cal. App. 3d 814 at 818.

141 *Donohue v Copiague Union Free School District* 47 N.Y. 2d 440 (1979) at 442.

Both plaintiffs claimed the schools had been negligent by: failing in their general duty to educate, failing in their assessment of each plaintiff's mental capability, failing to provide adequate teaching and supervision, failing to reach the standard of a reasonable teacher, and failing to assess and accommodate their learning needs. Owing to policy reasons, neither cause of action was allowed. Both courts, and subsequent ones, have held no duty to educate exists. The policy reasons are discussed below.

In *Peter W,* the appellate court found no workable standard of care to measure teacher conduct against, implying there is no 'right' way to teach and that students learn in different ways.[142] The Court expressed concern that schools were already socially and financially overstretched, and exposing them to tort liability would compound those problems.[143] Further, opportunistic plaintiffs may bring feigned claims in the hope of a settlement.[144] For public schools, it would be public funds and time spent on fighting the claims, which is hardly an appropriate use. The Court also cited authority which held the lack of insurance available for these claims was a relevant factor.[145] All of these considerations contributed to the finding that no duty to educate existed.

Shortly after came *Donohue.* The first appellate court held it was impossible to prove causation, and therefore no duty should arise. Children's learning is influenced by many social, emotional, economic, and other factors which the educators do not control. A failure to learn does not mean a failure to teach, which is exemplified by the fact other students were educated from the same teaching.[146] The second appellate court agreed. It concurred "factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning", and therefore causation is likely impossible.[147] Further, it believed recognising a duty would cause formidable problems that would not be manageable in the legal system.[148] This is commonly known as the "floodgates" argument. Lastly, it held courts were not the place to review and

142 *Peter W,* above n 140, at 825.
143 At 825.
144 At 823.
145 At 823, citing *Rowland v. Christian* (1968) 69 Cal. 2d 108.
146 Bradley, above n 88, at 202 – 204.
147 *Donohue,* above n 141, at 446.
148 At 445.

judge educational policies. Doing so would be "blatant interference" with the role of the executive branch.[149]

Other policy arguments can be made against a duty existing. Teachers may not teach as effectively if the threat of litigation exists. They could adopt more conservative and traditional techniques, as innovative methods risk students failing to learn and being able to claim. Resources are another factor in determining the degree to which children can be educated. The Ministry may have to defend a claim to answer for a lack of funding or resources which meant teachers could not discharge their duty in the way other educators could. At a higher level, imposition of a duty and increased liability may deter teachers away from the profession.[150] With the profession already in shortage, such a trend would be extremely detrimental to education in NZ.[151]

Further, in my analysis, the modern day pupil's desire for education is waning. The traditional view was one went to school to learn the basics, then sought higher education to improve their income prospects (such as a profession), before working towards retirement. Now children grow up in a world where famous Instagram users, with relatively low qualifications, earn US$1m per post.[152] In 2014, 69 percent of people on the Forbes 400 rich list were self-made.[153] Substantial income is no longer completely synonymous with greater education, as high-earners commonly achieve financial success without it. For various reasons education is not the priority for many modern pupils.[154] Against this backdrop, teachers should not be burdened with a *duty* to educate them.

The aforementioned cases have been followed extensively in the US, their courts not shifting from this position. They continue to hear cases but strike them out, leading academics to state that educational negligence is a claim beloved by commentators but not the courts.[155]

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149 At 445.

150 Varnham, above n 2, at 102.

151 NZ Herald "Teacher shortage hits just over half of NZ primary schools" (5 September 2018) Newstalk ZB <www.newstalkzb.co.nz>; Newshub Staff "New Zealand's teacher shortage expected to reach crisis point by 2030" (31 July 2018) Newshub <www.newshub.co.nz>.

152 Hopper HQ "Instagram Rich List 2018" (2018) <www.hopperhq.com>; Zameena Mejia "Kylie Jenner reportedly makes $1 million per paid Instagram post – here's how much other top influencers get" (31 July 2018) CNBC <www.cnbc.com>.

153 Robert Frank "How self-made are today's billionaires?" (3 October 2014) CNBC <www.cnbc.com>.

154 Reasons could include sporting, arts, leadership, cultural, or social opportunities.

155 Stijepko Tokic "Rethinking Educational Malpractice: Are Educators Rock Stars?" (2014) Brigham Young University Education and Law Journal 105 at 108.

B UK Position

UK courts have not struck out claims based on the vicarious liability of authorities/schools for the negligence of employees.[156] Their courts have accepted a duty to educate exists, and can be breached through teacher negligence. Again, policy plays a crucial role.

The first major authority came from the House of Lords in *X (minors) v Bedfordshire City Council*.[157] This was a collection of claims where all the plaintiffs had learning disabilities. School staff failed to assess these and did not provide appropriate education for the students' needs. The plaintiffs argued this conduct fell below the professional standard, and that the local authority was vicariously liable. The House of Lords held it could not strike out the claim, with Lord Browne-Wilkinson appearing to recognise a duty to educate:[158]

> [A] school which accepts a pupil assumes responsibility not only for his physical well being but also for his educational needs. … If a pupil is underperforming, [the headmaster] does owe a duty to take such steps as a reasonable teacher would consider appropriate to try and deal with such under performance

The House of Lords went a step further in *Phelps,* allowing the case to succeed.[159] The staff at Phelps' various schools failed to recognise she had dyslexia, believing instead that her learning failures were due to emotional issues with her parents and lack of confidence. She completed her years of schooling under this misdiagnosis and left functionally illiterate. She was employed once but was dismissed because of her illiteracy, and had not been employed since. She brought a claim vicariously against the local authority for all three of her schools failing to exercise reasonable professional care in assessing her learning difficulties (dyslexia), and failing to provide appropriate tuition and treatment.[160] The House of Lords overruled the Court of Appeal in favour of Phelps, recognising the existence of a duty.

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156 Jason Newman "Edukashonal Negligence" (2008) 82 L.I.J. 34 at 35.

157 *X (minors) v Bedfordshire City Council* [1995] 2 AC 633 (HL). These were claims from three separate plaintiffs heard together.

158 At 198.

159 *Phelps v Mayor of the London Borough of Hillingdon Anderton and Clwyd County Council* [2000] 4 All ER 504.

160 Per Lord Slynn.

It must be noted that the issue in both *X (minors)* and *Phelps* was a misdiagnosis by an educational psychologist in their professional capacity, not a teacher failing to teach. In many ways, those facts are closer to medical law and appear to only be directly applicable in the special-needs education context. Whether a general duty of care existed in relation to education was not really a live issue on the facts.

Despite this, in *X (minors)* Lord Browne-Wilkinson flirted with recognising such a duty, and in *Phelps,* their Lordships found one existed. They held teaching staff are professionals in the education context, and their role is to educate. In exercising this skill teaching staff owe a duty to their students who may suffer harm if they fall short of the standard, just like doctors, accountants, and engineers.[161] Lord Nicholls in particular, went further and held teachers owe a broad duty to educate all of their pupils:[162]

> It cannot be that a teacher owes a duty of care only to children with special educational needs. The law would be in an extraordinary state if, in carrying out their teaching responsibilities, teachers owed duties to some of their pupils but not others. So the question which arises, and cannot be shirked, is whether teachers owe duties of care to all their pupils in respect of the way they discharge their teaching responsibilities. … I can see no escape from the conclusion that teachers do, indeed, owe such duties.

Regardless of the applicability of facts giving rise to it, their Lordships unquestionably held teachers are under a duty to educate. This stands in direct contrast to the US position, which recognises no duty at all.

Lord Nicholls addressed the objections to the duty, countering the US approach. Responding to fears of feigned claims and limited resources being diverted away from teaching and into defending them, Nicholls held that simply denying the existence of claims altogether is not an appropriate answer. It is a viable cause of action, and it is the job of the courts to weed out the unmeritorious claims.[163] On the floodgates argument, he suggests only genuine claims will succeed as "proof of under-performance by a child is not by itself evidence of negligent teaching … a child's ability to learn is affected by a host of factors".[164] In essence, there

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161 Per Lord Slynn.
162 At 667.
163 At 668.
164 At 668.

must be discernible harm; just leaving the school system with less knowledge than hoped for will not suffice.[165] The US approach uses similar causation arguments to defeat claims at the duty stage, whereas Lord Nicholls' approach allows the duty to stand, acknowledging the difficulties may arise when the test reaches causation. In my view, the latter approach is preferable as it does not conflate the elements of negligence or prejudge issues unnecessarily.

A corollary of recognising teaching as a profession, is the desire for quality and acceptable care within professions. There are many ways a school could contribute to a student failing to learn, and insulating educators from claims would not facilitate the continued delivery of quality education. The same arguments were used to abolish litigation immunity for lawyers, and the sky has not fallen since.[166] When the threat of personal injury litigation increased in Australia, the effect on the teaching profession was positive. School curricula, even in risky subjects like physical education, were not stifled as activities became better planned and executed.[167] I reiterate, the duty only asks for reasonable care which is hardly an arduous standard. The benefit being that knowledge of legal accountability for teaching may lead educators to be less careless and improve the quality of their teaching.[168]

C Comparison of the Positions

The US position is schools and teachers are under no general duty to educate their students. Broadly, their reasoning is fear of opening the floodgates, the impossibility of proving claims, and courts being the inappropriate setting for such issues. The UK position is the opposite. Teaching staff are in the profession of providing education and, like any other profession, if they fail to do so they must answer for it.

There is awkwardness in how these jurisdictions reached their respective positions. The US cases related to poor quality teaching leading to serious underachievement, which caused clear loss. Those courts opted not to recognise any duty in the face of clear harm, based in some way on issues they were prejudging (i.e. causation). It is true "the law does not provide

165 Rishworth, above n 28, at 39.
166 *Lai v Chamberlains* [2007] 2 NZLR 7 (SC) at [52], [61], [68], [72], [80], [203] and [204].
167 Andrew Hopkins "Liability for careless teaching: should Australians follow the Americans or the British?" (1996) 34 Journal of Educational Administration 39 at 54.
168 Varnham, above n 2, at 104.

a remedy for every injury"[169], but there is a strong argument that the interests of justice dictate educators should be liable.[170] Conversely, the UK arrived at their position without facts to support it. Their cases involved educational psychologists misdiagnosing students. The quality of teaching was not at issue. Yet the House of Lords, particularly in *Phelps*, extended a general duty on teachers to educate their students without facts inducing it. The cases can be considered on a spectrum, with poor quality teaching at one end and specific learning disability misdiagnoses at the other.[171] Ideally, the UK position would have been arrived at through cases in the former category, as in the US.

D Finding the NZ Position

NZ educational quality is regulated and monitored by a number of public agencies. Teachers must be registered and certified by the Education Council, Education Review Officers inspect and report on schools, and the NZ Qualifications Authority oversees and monitors national educational standards in secondary schools.[172] NZ strongly desires a quality education system because, as the Law Commission states:[173]

> There is significant public interest in schools educating New Zealanders to a degree where they can leave school to become useful members of society … equipped to participate in their communities and the wider New Zealand society.

The Commission believes there are minimum skills students must leave school with, noting "a case for concern might be a school that does not equip its students to master basic literacy and numeracy skills."[174] In support, NZ has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which "sets out that education should 'enable all persons to participate effectively in a free society'".[175] These statements hit the crux of the educational negligence issue, alluding to the fact NZ educators may be under a duty to

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169 *Donohue,* above n 141, at 445.
170 *X (Minors),* above n 157, at 762.
171 Varnham, above n 2, at 92.
172 Education Act 1989, ss 352, 353, 326, 327, 246A; Paul Rishworth "New Zealand" in Charles J. Russo (ed) and others *The Educational Rights of Students* (Rowman and Littlefield Education, Maryland, 2007) at 148.
173 NZLC, above n 8, at [3.13] and [3.14].
174 At [3.15].
175 At [3.15].

educate their students. However, no claim of educational negligence regarding primary and secondary education has ever arisen in NZ.

Educational negligence has touched the tertiary sector however, in *Grant v Victoria University of Wellington.*[176] A group of students claimed as they were unhappy with the quality of their Masters course at the defendant university, who applied to have it struck out. Justice Ellis noted the US authority in these cases, but held the plaintiffs did not have an unarguable case and did not strike it out. The case then settled. The only other case where the doctrine is mentioned involved abuse of a child in the defendant's care.[177] The Judge cited Lord Nicholls' judgment in *Phelps* with approval.[178] Both cases provide an initial window into how NZ courts may react to educational negligence claims in the compulsory education sector.

Also helpful is the fact NZ courts have not been restrictive on the ability to sue the government.[179] Indeed, such claims can be pursued directly in NZ.[180] Therefore, claims against the Ministry of Education are very conceivable. However, akin to the US, NZ courts have previously expressed doubts about interfering with schools, preferring to give Boards autonomy where possible.[181]

A key case in the NZ educational landscape is *Daniels v Attorney-General*.[182] It involved judicial review of the right to education in NZ.[183] Fifteen parents of special-needs students wished to challenge the Ministry's policy of disestablishing special education facilities, and moving the students into regular classrooms with aid. None sought individual remedy. The claim was framed as to whether the right to education contained a substantive component;

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176 *Grant v Victoria University of Wellington* High Court Wellington CP3 12/96 13 November 1997; [2003] NZAR 185.

177 *A v Roman Catholic Archdiocese of Wellington* [2008] 3 NZLR 289.

178 At [98].

179 E J Ryan "Failing The System? Enforcing The Right To Education In New Zealand" (2004) 35 VUWLR 735 citing *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 and *B and Others v Attorney-General* (16 July 2003) Privy Council PC 1/2003.

180 *W v Attorney-General* (15 July 2003) CA 227/02.

181 *Maddever v The Umawera School Board of Trustees* [1993] 2 NZLR 478 at 508. This was also the purpose of the *Tomorrow's Schools* report, above n 2.

182 *Daniels v Attorney-General* (3 April 2002) HC AK M1516/SW99*;* rev'd *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA).

183 Education Act 1989, s 3.

was there a minimum standard of education that all students must acquire?[184] If there was, it would establish a general duty to educate on teaching staff.

In the High Court, Baragwanath J accepted there was a substantive component. He held s 3 of the Act provided a minimum standard that education must not be clearly unsuitable for the student, and must be regular and systematic.[185] The law requires an individual focus on the learning needs of each child.[186] Despite a desire to recognise the duty to educate at common law, the Judge was limited by the case being "argued solely in terms of the public law challenge."[187]

The Court of Appeal (CA) reversed the decision, holding the right to education was merely procedural. Provided education is simply made available, in accordance with statutory requirements, the right under s 3 is fulfilled.[188] Holding for a substantive right is too opaque and presents grave difficulty for judicial supervision.[189] Besides, supervision of educational quality is already the job of many public bodies.[190] In the Court's view, Baragwanath J abstractly formulated a substantive component and there is no free-standing right to a minimum level of education under the Act.[191]

It becomes clear in both judgments that the plaintiffs framed their claim incorrectly. Justice Baragwanath was inclined to find teachers had a duty to educate at common law. He cited *Phelps* approvingly but could not hold for it as the avenue of challenge was only in public law. The CA had concerns about interfering with educational policy, which is the job of Parliament. Because of this, they held *Daniels*-type claims are non-justiciable. The plaintiffs were a large group, not seeking individual redress, using judicial review to allege breach of a substantive 'right' to education. The CA did not allow it. However, nothing in either judgment precludes a private, individualised claim by parents or students who have suffered loss (educational negligence). Indeed the CA distinguished plaintiff success in *Phelps* because it was in negligence, not under legislation.[192] Such a claim is not an attack by the

184 Rishworth, above n 28, at 37.
185 *Daniels* (HC), above n 182, at [137].
186 At [140].
187 At [110]. See comments at [102] – [109].
188 *Daniels* (CA), above n 182, at [82]; Rishworth, above n 23, at 38.
189 At [82].
190 At [72] – [78].
191 At [83] and [97].
192 At [87].

many on Executive decisions; it is an individual claiming against a lack of care causing them loss.

NZ commentators agree. Rishworth believes the judicial approach in NZ will change depending on whether the claim is systemic or individual.[193] In his view, the CA left room for students to sue for the quality of their *own* education, and affirmed it was the "most promising route".[194] Those sentiments are echoed. Ryan disagreed with the CA, arguing the extensive duty of care found in *Phelps* suggests the right to education is substantive.[195] Further, if the facts in *Phelps* presented themselves in NZ, damages would be awarded which is obscure.[196] I agree. Plaintiffs in negligence will rely on educators being under a duty to educate, but they themselves have no enforceable right to education. Why should students have to wait for negligent teaching to ensure they receive a quality education? Regardless, academic opinion supports claims of educational negligence are sustainable in NZ.[197]

These arguments become even more persuasive when grounded by an example. Significant inequality exists in education between the rich and poor in NZ as data shows students from poor backgrounds find it near-impossible succeed at the highest levels.[198] The ability to sue in tort may have a role in holding the Ministry to account for outcomes suffered by underprivileged students, deprived of equal educational opportunities. Take Dr Ashley Insley. She left high school without a science education because her school did not have a science teacher. Without secondary school science qualifications, becoming a doctor was off the table. However, she was able to get a Māori scholarship allowing her to study medicine, attained the necessary grades, and qualified as a doctor.[199]

Had Dr Insley been barred from pursuing a career as a doctor, on the above analysis she could sue for educational negligence. The provisions made for her school were so poor that she did not even have the opportunity to learn a core curriculum subject. This is worse than the US and UK cases addressed because the issue was not even the quality of the teaching,

193 Rishworth, above n 28, at 36.
194 At 38 and 39.
195 Ryan, above n 179, at 760.
196 At 768.
197 See also Varnham, above n 2.
198 Kirsty Johnston "Big read: The gap between the rich and poor at university" (15 September 2018) NZ Herald <www.nzherald.co.nz>.
199 Johnston, above n 198.

but the complete lack of it. She would be privately suing for her own loss, not publicly attacking the Executive as co-plaintiff. Her loss of potential career path and income was caused by the failure to provide her school a science teacher. The elements of a claim appear made out.

Undoubtedly causation arguments would surface in response.[200] The Ministry's best rebuttal may be that they are serving the needs of the many. Teachers are a limited commodity, and the alternative may have been closure of the school.[201] Faced with the choice of providing a high school without science or no high school at all, the Ministry may validly argue the former achieved better outcomes. There may also be policy concerns over other students at the same school bringing the exact same claim, and Dr Insley would need to ensure she had the means to bring such an action.

Using tort to achieve such noble outcomes is very appealing. It is a viable way to ensure quality exists in the education sector, and ultimately hold the Ministry to account. The major determinant in such claims may be the ability to bring a case. It is likely that Dr Insley's example does not exist in isolation in NZ, but it is equally likely the students who suffer this plight are from similar backgrounds lacking the means to sustain legal action. Litigation funding is a different issue but in spite of this, tort may still be a useful tool to effect change for underprivileged students.

E Conclusion on Education Negligence in NZ

I support the view that educational negligence is a viable cause of action in NZ. Teaching is now well-recognised as a profession, and from that stems an obligation to meet professional standards in the exercise of their chosen skills. I prefer the perspective of Lord Nicholls in response to the policy arguments precluding a duty arising in the US. Accountability in professions is desirable, and teachers should not be exempted. I agree that "[i]f a teacher carelessly teaches the wrong syllabus for an external examination, and provable financial loss follows, why should there be no liability?"[202]

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200 See page 27 of this paper.

201 Jo Moir "Education Minister set to close three schools in East Cape" (22 July 2015) Stuff <www.stuff.co.nz>. Dr Insley's school was in Te Kaha, on the East Cape.

202 *Phelps,* above n 159, at 667.

Furthermore, a standard of reasonable professional care is not imposing a huge burden. Teachers who use recognised practices in their teaching will always satisfy the duty. The threat of liability is against those in the opposite category, who dilute the general quality of education in NZ and should be accountable for harming individual students. Tort is a useful tool to hold parties accountable for the harm they cause to others. In this context, students, especially underprivileged ones, can use it to ensure they have equal educational opportunity.

It must also be said that while claims could arise, that does not speak to their chances of success. I believe plaintiffs will have serious difficulty proving their case because of the number of variables. Causation is the obvious hurdle, with so many other factors that contribute to how a child learns. Despite considering it under the wrong head, this is a persuasive point from the US position. Further, breach will be near impossible to show if teachers have been following reasonable professional practices. No teacher following methods endorsed by their peers can be said to have fallen short of reasonable professional care. Ultimately claims could arise, but only the true cases of negligence will have a chance of success.

There is a question as to the extent of the doctrine's application in the public-private divide. Public schools greater reflect the compulsory education system in that they are available to all students, regardless of wealth. Private schools differ as they demand fees in exchange for education (a contract); the students are paying to be educated. Under educational negligence, parents of private students could argue private school teachers are under a greater duty to educate because of the individual contract in operation.

Little or no literature exists on this point. In my view, there is no greater duty in the private school sphere for three reasons. First, private schools exist to provide educational options for parents and students.[203] It is logical to assert this leads to greater educational quality in NZ than if schools were a state monopoly. But private schools do not exist because they provide a higher quality of education. While anecdotally or statistically private schools may achieve better results, the reality is the fees paid do not *guarantee* students a better chance at education. Therefore, it cannot be asserted that private school teachers owe a greater duty than their public school counterparts. Second, assuming the common law duty to educate

[203] NZLC, above n 8, at [2.11] and [3.4].

does exist, the courts would not apply differing liability to different teachers. People who are to become teachers do not go through different training because they will teach privately. Any registered teacher can teach at a private or public school. Applying different liabilities would create artificial hierarchy in the teaching profession, and obscure the "reasonable professional standard" test. Finally, a key tenet of the Act is equal treatment of students.[204] Allied to the previous points, placing private school teachers under a greater duty implies private students are more entitled to education. It would be astonishing against this backdrop if the common law allowed wealth to determine which students were owed more care in respect of their education.

[204] Education Act 1989, ss 3 and 8.

V Conclusion

There is significant potential liability for educators in common law negligence in NZ. Encompassing teaching staff, principals, Boards of Trustees, and the Ministry of Education in both public and private school settings, avenues exist upon which parents and students could lodge a legal case.

Negligence claims in the education context are framed in the same way as others under the tort. The plaintiff must show a duty of care exists and is breached, and that breach caused proximate loss. The fact that a duty arises between educator and student is well settled, but the boundary of where it ends is not known in NZ. Courts will likely formulate a test that allows them to weigh all the circumstances of a case. I believe the duty will be non-delegable, which gives access to defendants with greater ability to pay like the Ministry. The standard of care to assess conduct against is that of a reasonable professional. This is the reasonable teacher. Interestingly, the public-private divide has little impact on liability in negligence. Teachers owe duties to students generally, whether or not they are paying fees. The only differences are the bases for a teacher's jurisdiction over the student, and the possible ultimate defendant in an action.

Personal injury litigation forms the majority of education law overseas, whereas the existence of ACC in NZ means negligence claims are severely limited. In this sense, our educators shoulder less liability than if they taught overseas. Thus, NZ plaintiffs must escape the ACC system to claim in negligence. Claims for recognisable mental injury, not arising from a physical injury, are not covered by ACC and will be the harm plaintiffs must claim for. A key potential claim lies in non-physical bullying. As illustrated through the case of *Oyston*, there is very little protecting educators if their response to bullying is substandard. In addition, this is one area parents will not hesitate to hold teaching staff accountable for.

Professional standards are expected of educators regarding cyberbullying too. This presents unique issues on the extent of the duty of care as behaviour often transcends school boundaries. Another is mental injury arising from objectionable material. The rising use of online learning presents a real risk, but causation difficulties may occur if students are also viewing such material outside of school. Finally, exemplary damages are available but improbable owing to the need for such "outrageous" conduct.

Educational negligence, teachers owing a duty of education to their students, is a doctrinal source of debate across the world. The US does not recognise such a duty, for policy reasons. The UK does, because teachers must exercise due skill and care as with any profession. There has been no NZ case in the compulsory education sector. However, related case law, judicial indications, and academic opinion all support that it is a sustainable basis for a claim. I agree. The point is made clearer through an example like Dr Ashley Insley.

The common law tort of negligence has been around for centuries, but it is yet to make any headway in NZ's educational space. Such immunity will not continue forever. It is naïve to think NZ educators will never face claims, given they are arising overseas as well as the ever-growing desire for accountability on these shores. The greater liability that exists paints a grim picture for educators, especially when considered alongside issues like increasing class sizes, further potential liability under new legislation, and underwhelming pay leading to strikes.[205] The silver lining is that the standard demanded is more than manageable. For educators who endeavour to serve the individual needs of all their students and follow professional practice, avoiding liability in negligence should not be particularly arduous. That perspective might have weight in theory but evidence shows some have begun to take action to mitigate their potential losses, and have commented on the likely deterrent effect on the profession.[206] If education is important, then it falls to policymakers to intervene and make the profession more attractive. In my opinion, the Government should take such steps, as the value of teachers can never be understated. After all:

> Can you read this? Then you can thank a teacher.[207]

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205 See the Health and Safety at Work Act 2015, s 47.

206 See Oliver Lewis "Scared school principals hide homes in trust to escape tough work safety regime" (20 March 2016) Stuff <www.stuff.co.nz>; Michael Daly "School's tree climbing ban stays, despite Minister's call to 'calm the farm'" (30 March 2016) Stuff <www.stuff.co.nz>; Emily Murphy "Principals concerned new safety law could put off future school leaders" (30 March 2016) Stuff <www.stuff.co.nz>.

207 Protestor sign in the teacher's strike, Wellington, 2018.

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