#ForThe100

A Note regarding a potential duty of care owed by universities to students

Authors: Jamie Burton KC, Sarah Steinhardt
Doughty Street Chambers
Gus Silverman
Irwin Mitchell LLP

15 May 2023

002

A Note regarding a potential duty of care owed by universities to students

Introduction

1. We are lawyers instructed by the parents of Natasha Abrahart, who took her own life in April 2018 at 20 years of age whilst an undergraduate student at the University of Bristol. She was at least the tenth student at the University of Bristol to take their own life since October 2016.

2. We hope this Note will be of use to Parliamentarians ahead of a debate scheduled for 5 June 2023 regarding the need for a statutory duty of care owed by universities to their students. A petition calling for the introduction of such a duty has attracted 128,292 signatures.[1]

The Estate of Natasha Abrahart v University of Bristol

3. In May 2022 His Honour Judge Alex Ralton, sitting at Bristol County Court, found that Natasha's death had been caused by multiple breaches of the Equality Act 2010 on the part of the University of Bristol amounting to disability discrimination.[2] An alternative claim in negligence failed as the judge found no relevant duty of care existed. The judge concluded that had there been a duty of care, it would have been breached by the actions of the University. Natasha's father, Dr Robert Abrahart, brought the claim on behalf of his daughter's estate after having learnt during the inquest of her mistreatment by the University.

4. Natasha had been a high-achieving student until the second year of her undergraduate physics course. In October 2017 academic staff became aware that she was struggling and was experiencing anxiety and panic attacks as a response to oral assessments that formed part of a mandatory laboratory module. In February 2018 a university employee

[1] https://petition.parliament.uk/petitions/622847
[2] https://www.judiciary.uk/wp-content/uploads/2022/05/Abrahart-v-Uni-Bristol-judgment-200522.pdf

received an email from Natasha's account saying "*I've been having suicidal thoughts and to a certain degree attempted it*".

5. At the conclusion of the trial the University accepted that its oral assessment methods had made a material contribution to Natasha's death but denied that it was required to adapt those assessments for her as "*an ability to explain and justify experimental work orally is a core competency of a professional scientist*". This defence was rejected by HHJ Ralton, who concluded: "*It is obvious to me that the fundamental purpose of the assessments was to elicit from Natasha answers to questions put to her following the experiments and it is a statement of the obvious that such a process does not automatically require face to face oral interaction and there are other ways of achieving the same.*"[3]

6. The Judge found that adjustments, such as removing the need for post experiment interviews altogether or, in relation to the end of year group presentation, assessing Natasha in the absence of her peers or using a smaller venue, were reasonable and should have been put in place in accordance with the requirements of the Equality Act. He observed that "*whilst a few ideas*" regarding possible adjustments were "*floated*" by the University "*none were implemented*". [4]

7. Natasha's body was found in her private flat on the day she was due to give a presentation in a large lecture theatre to a group of fellow students and teaching staff.

8. After finding that Natasha's suffering was "*serious and, from what I have seen in the evidence, continuous*", HHJ Ralton ordered the University to pay damages of £50,518.[5] This reflected the injury to Natasha's feelings, the deterioration in her mental health caused by the University, and funeral costs.

9. In March 2023 the University was granted permission to appeal some of the judge's findings regarding the Equality Act to the High Court. It is hoped that the appeal will be

[3] Paragraph 131
[4] Paragraph 133
[5] Paragraph 162

heard before the end of 2023. Natasha's parents will ask the High Court to uphold the claim in negligence, as well as the Equality Act claim.

The relationship between the Equality Act 2010 and negligence

Equality Act 2010

10. As noted above, claims were pursued on behalf of Natasha's estate in relation to both disability discrimination, contrary to the Equality Act 2010, and in negligence.

11. In order to benefit from the disability discrimination protections afforded by the Equality Act 2010 a claimant must first satisfy the court that they were disabled, as defined by the Act, at the relevant time.

12. Pursuant to section 6 of the Act, a person has a disability if they have a physical or mental impairment which has a long term and substantial adverse effect on their ability to carry out normal day-to-day activities. Schedule 1, para 2(1) of the Act provides that long terms means that the effect has lasted or is likely to last for at least 12 months. Section 212(1) provides that substantial means more than minor or trivial.

13. By the time of the trial the University of Bristol accepted that Natasha had been disabled as per the Act, although it had previously resisted making that admission.

14. A claimant in a claim for disability discrimination must then show that the defendant breached one or more of its duties under the Act. These include:

    a. The duty to make reasonable adjustments to a 'provision, criteria or practice' ('PCP') which puts disabled people at a substantial disadvantage compared with those who are not disabled, in order to avoid that disadvantage (sections 20 and 21 and Schedule 13 of the Act).

    b. The duty not to indirectly discriminate on the ground of disability. Indirect discrimination occurs when a defendant applies an apparently neutral PCP which puts or would put people sharing the claimant's disability at a particular disadvantage and which puts the claimant in question at that disadvantage: section 19(1) and (2) of the Act. If those elements are present, then it is open to a

defendant to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

c. The duty not to discriminate against the claimant because of something arising from their disability. Pursuant to section 15 of the Equality Act 2010 this form of discrimination arises where:

i. the defendant treats the claimant unfavourably;
ii. the treatment is because of something arising in consequence of the claimant's disability; and
iii. the defendant cannot show that this treatment is a proportionate means of achieving a legitimate aim;
iv. unless the defendant did not know and could not reasonably be expected to know that the claimant has the disability.

15. HHJ Ralton found that the University of Bristol breached each of these duties, and that those breaches had caused Natasha's death.

Negligence

16. In order for a claim in negligence to succeed the claimant must show:

a. They were owed a relevant duty of care by the defendant;

b. The defendant breached that duty;

c. The breach caused or contributed to the claimant suffering reasonably foreseeable injury and/or financial loss.

17. The negligence claim on behalf of Natasha's estate argued that the University owed her a duty to take reasonable care for her wellbeing, health and safety. In particular, it was argued that the University was under a duty of care to take reasonable steps to avoid and not to cause or contribute to her injury, including psychiatric injury when providing her with education or education related services.

18. A range of factors were relied upon in support of the proposition that such a duty existed, including that the University's Suicide Prevention and Response Plan explicitly recognised that the University was at all material times subject to a duty to take reasonable care for the wellbeing, health and safety of its students.

19. In response to the claim the University argued that it did not owe "*any relevant duty of care*" to Natasha. It contended, amongst other things, that "*No such duty of care has hitherto been recognised authoritatively in the decided case law*" and that "*Students are adults and as such, can generally be expected to take proper care for their own health.*" At the trial the University argued that whilst it cared for its students, it was not legally required to do so.

20. HHJ Ralton found that it would not be "*fair, just and reasonable to impose a duty of care* [on the University] *to Natasha* [in negligence] *because, as a disabled student … she is afforded protection by the Equality Act 2010.*"[6] The University was therefore found to have caused injury to Natasha's feelings and a deterioration in her mental health which led to her death, but was only liable under the Equality Act and not the common law of negligence. HHJ Ralton said that if a 'common law' duty of care was owed then "*There can be no doubt that the University would have been in breach; the main breach would be continuing to require Natasha to give interviews and attend the conference and marking her down if she did not participate when it knew that Natasha was unable to participate for mental health reasons beyond her control.*"[7]

The potential advantages of a claim in negligence as compared with the Equality Act 2010

21. Natasha's estate succeeded in its claim for breaches of the 2010 Act and therefore the fact that the negligence claim failed did not impact of the level of damages awarded. It did however result in Natasha's parents being prohibited from recovering some of their legal costs. It also allowed the University of Bristol to issue a press release stating that "*His Honour Judge Ralton … found the University was not negligent*" thereby presenting

[6] Paragraph 151
[7] Paragraph 159

to the public a confusing, albeit technically correct, picture as to the outcome in Natasha's case.[8]

22. Depending on the individual case, a claim in negligence may provide the claimant with a better opportunity for securing accountability when compared with a claim under the Equality Act:

    a. As noted above, in order to benefit from the disability discrimination protections under the Equality Act a claimant must satisfy the court that they were disabled at the relevant time. Not all students, or families of deceased students, will be able to satisfy this test. If the disability test is not met then a claim for disability discrimination will fail regardless of how badly a student was failed by a university. Negligence will most likely be the only other route by which students / their families can seek accountability through the courts. Claims under the 2010 Act do not benefit from the Qualified One Way Costs Shifting ('QOCS') regime, meaning claimants face a substantial risk that if they lose or abandon their claims they will be liable for the defendant's legal costs. These costs commonly amount to tens of thousands of pounds, and costs over £100,000 for claims lost at trial are not at all uncommon. In contrast, claims for personal injury caused by negligence do benefit from QOCS, meaning a court is unlikely to order an unsuccessful claimant to pay the defendant's costs. A lack of QOCS protection is very likely to deter students or their families from pursuing even meritorious claims against universities due to the risk of having to pay substantial adverse costs. Since the Legal Aid Sentencing and Punishment of Offenders Act 2012 came into force, the market for 'after the event' legal expenses insurance in cases which do not benefit from QOCS protection, and where damages are relatively modest, is virtually non-existent.

    b. Claims under the Equality Act must usually be filed at court within 6 months of the act to which the claim relates.[9] This limitation period will continue to run notwithstanding, for example, the claimant lacking the mental capacity to instruct

[8] https://www.bristol.ac.uk/news/2022/may/abrahart-judgement-statement.html
[9] Section 118(a)

lawyers e.g. due to deteriorating mental health. In contrast, claims in negligence can be filed at court no more than 3 years from the alleged breach where the claim is for personal injury. The limitation period is 6 years where there is no claim for personal injury. The comparatively short limitation period attaching to claims under the Equality Act may therefore serve to exclude otherwise meritorious claims from court. It may be particularly difficult for the family of a deceased student to find the wherewithal in the first 6 months following the death to instruct solicitors in good time prior to the expiry of the Equality Act limitation period. This difficulty is not as acute in relation to a claim in negligence, with its more generous limitation periods. The latter two points would apply equally to a claim that alleges discrimination on the grounds of any of the other protected characteristics. The degree of overlap between such a claim and a would-be negligence claim may not be as obvious as in the case of disability discrimination, but an overlap clearly exists. For example, a failure by a university to respond to an allegation of sexual assault might be both negligent and discriminatory (if for example the university in question simply insisted that the victim should contact the police rather than engaging suitable disciplinary and safeguarding measures in addition to supporting the student to contact the police).

The Government's response to the petition

23. On 20 January 2023, the Government responded to the petition saying:

> "*Higher Education providers do have a general duty of care to deliver educational and pastoral services to the standard of an ordinarily competent institution and, in carrying out these services, they are expected to act reasonably to protect the health, safety and welfare of their students. This can be summed up as providers owing a duty of care to not cause harm to their students through the university's own actions.*"

24. This statement is overly simplistic. As per the recent paper published by the House of Common Library entitled *Higher education providers' duty of care to students*, this language appears to be taken from a 2015 paper published by AMOSSHE The Student

Services Organisation (previously the Association of Managers of Student Services in Higher Education) which in turn appears to have been prepared following a group discussion rather than a detailed review of the relevant legal principles.[10] The paper does not cite any legal authority directly in support of the proposition echoed in the Government response to the petition. On behalf of Natasha's family we have argued that such a duty does exist, with reference to comparable duties (see below) but those arguments have not yet succeeded. As such the acknowledgement in the Government's response to the question raised by the Shadow Minister for Higher Education, Matt Western, in March 2023 is perhaps more instructive than the Government's response to the petition:

> "*The existence and application of a duty of care between HE providers and students has not been widely tested in the courts.*"

The present position regarding the duty of care owed by universities to students

25. As indicated by the *Abrahart* judgment, at present the common law does not impose a duty of care on universities to exercise reasonable care and skill when teaching or providing related services (including pastoral care) to their students. They may be subject to various statutory duties in their capacity as service providers (such as the prohibition against discrimination under the Equality Act 2010) or owners of buildings (such as the duty to lawful visitors under the Occupiers Liability Act 1957). Educational institutions may also owe duties to protect the health and safety of students to the extent specific regulations made under the Health and Safety at Work etc Act 1974 impose obligations on them as employers of staff who interact with those students. Universities may also have relevant contractual obligations to students. But beyond these limited circumstances, the law offers limited protection to students who experience harm because of negligence by their universities.

26. The state of the law may come as a surprise to many. Universities often advertise the fact that they abide by a duty of care to their students and, as noted above, the Government's response to the petition indicates it believes that "*a general duty of care*

[10] Where's the line? How far should universities go in providing duty of care for their students? (May 2015),

to deliver educational and pastoral services to the standard of an ordinarily competent institution" already exists.

27. It has previously been decided that a claim which asserts a breach of a duty owed in tort or contract arising from the exercise of academic judgement (for example a decision to award a particular grade to a student sitting an examination) by a university's professional teaching staff is not justiciable as a matter of law, and is therefore liable to be struck out[11] On the other hand, claims which allege the use of negligent teaching methods, in the devising of courses or the means of acquainting students with the educational content of the courses that are being taught, are actionable in principle (even absent a contract).[12] The standard to be applied in such case is that of the reasonably competent professional education provider and therefore expert evidence regarding accepted professional standards is likely to be necessary. This latter requirement might not apply where what is alleged is "*simple operational negligence in the making of educational provision*." Therefore, a claim that the University of Oxford had failed to ensure adequate resources were available to ensure a course was taught properly was allowed to proceed even absent expert evidence as the allegations focussed "*on the insufficiency of teaching capacity and the alleged failure to remedy that*" rather than "*an attack on a conscious choice of teaching style*."[13]

---

[11] See e.g. *Clark v. University of Lincolnshire and Humberside* [2000] 1 WLR 1988, CA , per Sedley LJ at paragraphs 12-13. However, most academic institutions have procedures in place that allow students to appeal the results they are given.

[12] See the appeals heard together in *Phelps v. Hillingdon London Borough Council [2001] 2 AC 619* , per Lord Slynn at 653F-654B. Although it will often be very difficult to bring such a claim – see Lord Slynn "The difficulties of the tasks involved and of the circumstances under which people have to work in this area must also be borne fully in mind. The professionalism, dedication and standards of those engaged in the provision of educational services are such that cases of liability for negligence will be exceptional." and Lord Nicholls at p667 "This is not to open the door to claims based on poor quality of teaching. It is one thing for the law to provide a remedy in damages when there is manifest incompetence or negligence comprising specific, identifiable mistakes. It would be an altogether different matter to countenance claims of a more general nature, to the effect that the child did not receive an adequate education at the school, or that a particular teacher failed to teach properly. Proof of under-performance by a child is not by itself evidence of negligent teaching."

[13] *Faiz Siddiqui v University of Oxford* [2016] EWHC 3150 (QB)

28. On one view therefore, the claim bought on behalf of Natasha Abrahart's estate was not particularly "*novel*"; it focussed both on the manner of testing (oral assessments) of a particular module on the physics undergraduate course and the operational performance of the University's pastoral services. However, it was deemed to be novel for two reasons: first and most prominently, because it concerned alleged *failures* to act (i.e. omissions) and because damages were claimed for psychiatric harm rather than loss of educational attainment (and associated economic loss).

29. As regards the former issue, it is notable that in *Faiz Siddiqui v University of Oxford*[14] the Judge allowed a student to proceed with a claim that his university had failed to take account of his medical conditions (including anxiety, insomnia, depression and hay fever) when awarding him marks. In particular, the judge rejected the submission that there had been no duty on the college tutor to bring the claimant's medical condition to the examiners' attention in the absence of a request from the claimant that he should do so. It should be noted however that this decision appears to have been reached without full legal argument (which would have taken place had the claim proceeded to trial).

30. In the *Abrahart* case there are doubts about whether the judge was correct to characterise the case as being one concerning pure "*omissions*". But leaving that debate to one side, the judge decided that there is no duty on universities to take reasonable steps to protect the welfare of their students even when it is reasonably foreseeable that a failure to act will result in harm. This is because generally whilst the law does impose obligations not to cause harm, it does not require persons (natural or legal) to "*provide … benefits*."[15]

31. There are some acknowledged exceptions to this rule, but the judge found that none of them applied. In particular, he decided that the relationship between the University and its students was not analogous to that of a school and its pupils or an employer and its employees. This was because there was no "*assumption of responsibility*" for the

[14] [2016] EWHC 3150 (QB)

[15] *Robinson v Chief Constable of the West Yorkshire Police* [2018] UKSC 4, para 69(4)

students' welfare either inherent in the relationship with students or arising from the actions of the University's staff when dealing with Natasha Abrahart in particular. For the same reasons, the University was not responsible for any psychiatric harm arising from its actions or omissions.

32. The end result is that although it was foreseeable that continuing to subject Natasha to oral assessments would exacerbate her mental health, the University was under no duty to take reasonable steps to change the form of assessment in order to avoid causing her harm. As regards the provision of pastoral care, this did not extend to an obligation "*by non-medical staff to tend to Natasha's mental health*."

33. This contrasts sharply with the obligations that universities owe their employees at common law. Under common law, all employers owe a duty of care towards their employees. Employers must take all reasonably practical steps to ensure the health, safety, and wellbeing of their employees in all the circumstances of the case so as not to expose them to an unnecessary risk i.e. to prevent reasonably foreseeable harm. This duty of care extends to the employee's physical and mental health. The law on the duty of care owed to employees by their employers is not prescriptive in that it does not give a specific list of steps an employer must do to comply with the duty. The specific steps that must in fact be taken in any individual case will be defined by what is reasonable in the specific circumstances of that case, and this changes from case to case (which is essential to allow the law to fit flexibly into any number of scenarios).

Conclusion

34. As discussed above, the decision of HHJ Ralton in *Abrahart v University of Bristol* is being appealed to High Court, which will give fresh consideration to the existence of the specific duty of care argued for by Natasha's family. However, at present there is no clear legal authority to the effect that universities owe a duty of care to take reasonable care for their students' wellbeing, health and safety, and in particular to take reasonable steps to avoid and not to cause or contribute to psychiatric injury. This contrasts starkly with the expectations of students, their families, professional bodies such as AMOSSHE and even the Government. The introduction of a statutory duty of care is therefore an

important matter meriting Parliamentary attention. This would have the added benefit of allowing all interested parties and stakeholders to contribute to the creation of a set of legal norms that strike the correct balance between the institutions and the young people they teach. It would also bring the law into line with the position in other common law countries such as the USA[16] and Australia.[17] Perhaps most importantly, it would remove the heavy burden being carried by the Abraharts and other families attempting to have such a duty recognised by the courts, so far without success.

15.05.23

Jamie Burton KC
Sarah Steinhardt
Doughty Street Chambers

Gus Silverman
Irwin Mitchell LLP

[16] *Regents of University of California v. Superior Court of Los Angeles County and Rosen* Ct.App. 2/7 B259424

[17] *SMA v John XXIII College* (No 2) [2020] ACTSC 211


#ForThe100