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Education Case Law Update

doughty street chambers

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Speakers: Nick Bowen KC, Louise Price and Lameesa Iqbal

Nick Bowen KC

DISASTER OR TRIUMPH

- X(Beds) & Phelps: "law enters the classroom"
- A very controversial area: triumph for the liberal judiciary or damp squib?
- Lord Hoffman had no doubts *'An unqualified disaster for this country's education system': 'Reforming the Law of Public Authority Negligence'* The Bar Council Law Reform Lecture, 17 November 2009
- In school cases lot of initial activity if 1st 5-6 years, since then very little: University cases have faired a little better
- (Very) limited success on both fronts: very little recent authority to update [see slide 10]
- Legal aid eligibility removed in negligence claims unless HRA / serious abuse by public authority
- Solicitors stopped taking the cases
- Were, at least, only two education providers with legal aid contracts

NATURE OF DUTY

- A common law duty can exist to meet "educational needs" "a school which accepts a pupil assumes responsibility not only for his physical well-being: X(Bedfordshire) [1995] 2 AC 633 / Phelps v Hillingdon LBC [2001] 2 AC 619
- It was a common law duty against the background of intricate statutory scheme
  - Part IV EA96
  - Children & Families Act 2014
  - ECHP Plans to co-ordinate education / health & social care needs
- No claim for breach of statutory duty / Primary enforcement by JR / statutory appeal
- The duty was policy based on (1) physical safety (2) who exercise of professional skill (3) special relationship (4) giving of advice / reliance (5) Teachers / Ed Psychs / SEN officers -professionals like doctors, accountants, lawyers, engineers can be liable for a negligent discharge of their professional duties

X(BEDS 2)

- Conjoined appeal consisting of claims [1] against social services departments for wrongly removing a child on mistaken belief she was being abused / & failing to remove a child who was being abused & [2] for failures to assess children with SEN.

- Held (applying Caparo test) in the social services cases not fair, just or reasonable to impose a duty for a variety of policy reasons
  - Conflict between duty to family & duty to department
  - Difficult nature of the decisions; need to balance the risk of taking action too soon against the risk of not taking it soon enough
  - Interdisciplinary process: need to balance the views of police & health professionals - why pick on just social workers?
  - Fear that the possibility of liability would lead to a defensive approach with decisions being postponed until litigation-proof evidence had been found.
  - Diversion of resources from the provision of care to the defence of claims
  - Adequate existing remedy against the authority through the statutory complaints process.

- Held in the education cases:
  - Direct claim against the authority for a failure to assess was struck out for policy reasons
  - Any claim based on a failure to assess was non-justiciable for similar policy reasons; something that we have come back full circle to in the HXA / YXA litigation: i.e. a mere exercise of a statutory power / duty was not enough to build a duty of care
  - But policy did not stop a vicarious claim against an educational psychologist or a teacher could succeed because of the (mistaken) belief by Lord BW that the Educational Psychology Service was open to all – like a hospital

PHELPS (1)

- 3 cases concerned children who were dyslexic; 4th suffered from muscular dystrophy. In Phelps there had been a trial, she succeeded before the judge, but failed in the Court of Appeal.
- The 2 others (Jarvis & G) had been struck out. In the Anderton case, the question was whether pre-action discovery should be ordered on the basis that the intended claim was for "personal injuries to a person."
- In Phelps, the claimant sought damages for the negligence of the authority's educational psychologist in failing to diagnose her dyslexia when she was tested at the age of 11.
- As a result, she received inappropriate schooling and her development suffered.
- She was diagnosed with dyslexia after leaving school and sought damages for the loss of earnings she would have made if she had received the appropriate education, and for the cost of tuition to overcome the disability.
- The Court of Appeal held that no duty was owed, considering that any duty to the child would result in a conflict of interest with the psychologist's duty to the authority and that imposition of a duty would lead to a proliferation of education malpractice claims

PHELPS [2]

- The House of Lords reversed this decision. A seven member House of Lords confirmed the suggestion in X(Beds) that a duty could be owed by staff giving advice about special needs, and appeared to confirm a change in emphasis in relation to policy arguments, which had been apparent in Barrett.

- A special relationship / "sufficient nexus" was required to underpin the duty of care. Lord Slynn saw no difficulty in holding that the psychologist owed a duty both to the authority and to the child. Lord Nicholls thought the duty would extend to teachers of all pupils and not just those with special educational needs.

- He was "not persuaded by fears" that resources would be diverted from teaching to litigation or that schools would focus on defensive record keeping. Hopeless claims would be weeded out to ensure the door was not open to claims based on poor quality teaching.

- Lord Clyde similarly argued that "[a]ny fear of a flood of claims may be countered by the consideration that in order to get off the ground the claimant must be able to demonstrate that the standard of care fell short of that set by the Bolam test" which would allow for different approaches to teaching method and practice. He also considered that a duty might "have the healthy effect of securing that high standards are sought and secured".

SCOPE OF DUTY

- Duty to competently assess a range of learning difficulties: dyslexia / MLD / SLD / Dyspraxia / ASD.
- What thought given to extending to a failure to assess ADHD / Neurodiversity which have achieved prominence since the effective death of this type of litigation.
- Reexplained as AoR: in Lord Reid's judgment in N v Poole reminds us that Phelps called into question X(Beds) policy-based reasoning which if applied would also have led to a denial of the duty of care [see slide 11]
- The key feature of the case was whether there was an "assumption of responsibility" towards the child. This is a reinterpretation of the approach in Phelps itself, which was couched in terms of whether the duty was owed to the child or its parents, or simply to the employing local authority.
- Phelps, therefore, is now interpreted as a case where there was an assumption of responsibility.

TYPES OF CHALLENGES

- See Siddiqui v University of Oxford [2016] EWHC 3150 (QB) [univ case – loss] [see paras 41-46]
- Tort or contract challenges aimed at academic judgments [broadly non-justiciable] [41]

- Phelps cases / negligent teaching / failure to diagnose learning difficulties [43-45]
  - Need expert evidence
  - Need to satisfy Bolam

- Simple operational negligence in the making of educational provision [46]: eg:
  - Administrative error leading to student sitting the wrong exam containing questions where no tuition given
  - Taught wrong syllabus
  - Cancelled classes due to lack of staff
  - Drunk / soporific teacher

- Unsatisfactory supervision arrangements for Phd courses have had some success [Winstanley v University of Leeds [2013] EWHC 4792 (QB)]

Cited only once in Cody v Remus [2021] EWHC 1755 (QB)

POST PHELPS DEVELOPMENTS (1)

- Despite the existence of the duty and the extension of the duty to education officers in Carty v Croydon LBC [2005] EWCA Civ 19, when litigated in the lower courts the claims ran into formidable difficulties establishing liability.

- Standard of care / breach:
  - Alleged failings generally involve questions of professional judgment, such as determining whether a child has a learning difficulty, and which provision ought to be made for him or her.
  - These professional judgments can often be defended and satisfying the Bolam test problematic [eg. Abromova: self marking case: (one of many)]

POST PHELPS DEVELOPMENTS (2)

Causation: difficult & complex to establish causation

- need to show that the negligence of the defendant was the cause of the harm he or she suffered: [Abromova: self marking case]
- the claimant had to show if properly diagnosed and received the correct teaching it 'would probably have made a difference in the sense of a "real difference" to the claimant'. [Clarke v Devon CC [2005] ELR 375 CA
- Need to establish that 'but for' the defendant's negligence, the harm the claimant suffered, be it psychological problems or poor employment prospects, would not have been occasioned. [DN v Greenwich London Borough Council [2005] ELR 133 CA]
- Evidential difficulties: eg. claimants who contend that their learning difficulty was not properly diagnosed will need to show that, given a proper diagnosis, they would have done better educationally.
- In almost every case educational failure will be caused, not only by the failure of a school or local education authority, but by a range of other factors, such as the child's home life, or his or her abilities. Marr v LB Lambeth [2006] EWHC 1175 (QB).
- Indeed, the more severe is the learning difficulty which it is said a school ought to have detected, the more likely it will be that it would have caused some level of educational failure, however conscientiously the school had responded to it.
- Limitation: real issue as so many historic claims [Smith / Robinson / Adams [HL]
- Damages: quantum tended to be low for the PI element & economic loss was assessed as the loss of a chance to earn at a higher rate, the awards were all low – rarely more than £25,000.

APPLICATION OF PHELPS IN EDUCATIONAL NEGLIGENCE CONTEXT

- Cody & Vogel v Remus [2021] EWHC 1755 (QB) – [school - negligent teaching – deceit / negligence / rare win]
- Siddiqui v University of Oxford [2016] EWHC 3150 (QB) [univ case – loss] [see paras 41-46]
- Winstanley v University of Leeds [2013] EWHC 4792 (QB) [univ case – win on appeal] – inadequate supervision of PhD course
- Abramova v Oxford Institute of Legal Practice [2011] EWHC 613 (QB) [Higher prof education – loss]
- Connor v Surrey CC [2011] QB 429 [claim by head teacher] – win
- Nuttall v Mayor & Burgesses of Sutton LBC [2009] EWHC 294 [school case – loss]
- Crowley v Surrey CC [2008] EWHC 1102 (QB) [school case – loss]
- Kendall v Southwark BC [2007] EWHC 2089 (QB) [school case – loss]
- Smith v Hampshire CC [2007] EWCA Civ 246 [limitation]
- Marr v Lambeth LBC [2006] EWHC 1175 [school case – loss]
- Skipper v Calderdale MBC [2006] EWCA Civ 238 [school case – loss]
- Clark v Devon CC [2005] EWCA Civ 266 [school case – loss]
- Shaw v Redbridge LBC [2005] EWHC 150
- Carty v Croydon LBC [2005] 1 WLR 2312 [loss facts / win law]
- DN v Greenwich LBC [2004] EWCA Civ 1659 [school case – loss]
- Adams v Bracknell Forest BC [2005] 1 AC 76 [limitation]
- Keating v Bromley LBC (No.1) [2003] EWHC 1070 [historic school case – loss]
- Robinson v St Helens MBC [2002] EWCA Civ 1099 [limitation]
- Bradford-Smart v West Sussex CC [2002] EWCA Civ 7 [Bullying case – loss facts / win law]
- Clarke v University of Lincolnshire & Humberside [2000] 1 WLR 1988 [academic judgment challenge] – loss per Sedley LJ paras 12-13

Cited only once in Cody v Remus [2021] EWHC 1755 (QB)

THE NEW APPROACH

- Michael v Chief Constable of South Wales Police [2015] AC 1732
- Robinson v Chief Constable of West Yorkshire Police [2018] AC 736
- N v Poole Borough Council [2019] 2 WLR 1478
- Tindall v Chief Constable of Thames Valley Police [2002] 4 WLR 104 *[SCt Appeal listed in June 2024]*
- What does this mean for the prospect of bringing more cases?
- No change / risk of retrenchment / or new opportunities?
- Very complex area, boiled down summary:
  - The same legal principles apply to public bodies and individuals
  - Public bodies, like private citizens, are responsible for causing harm / making matters worse rather than the law imposing obligations to confer benefits – i.e. failing to make things better
  - This is anchored by the general rule against liability for omissions
  - Classic examples, no legal duty to intervene to save a child drowning in a shallow pond / no duty to shout a warning to a person walking towards a cliff edge with his head in the air
  - These (police & social services cases) were about duties to protect from harm by 3rd parties yet the general principles stemming from Michael & developed in Robinson & Poole apply now to all negligence cases & have recast the negligence of public authorities.
  - Public policy considerations no longer underpin the existence of a duty of care
  - Save in novel cases the Caparo test [FJR] has no role to play
  - The emphasis is now on the application of legal principle and fitting cases into established categories where liability has been established
  - The law develops incrementally not in leaps & bounds
- But the general rule against omissions is not absolute & there are (theoretically) at least 4 exceptions:
  - A has assumed a responsibility to protect B from that danger
  - A has done something which prevents another from protecting B from that danger":
  - A has a special level of control over that source of danger
  - A's status creates an obligation to protect B from that danger

NO CHANGE IN BASIC PHELPS DUTY BUT UNLIKEY TO GET EASIER

- Established category
- Negligent advice / teaching / failure to diagnose cases [dyslexia etc] – duty secure as AoR
- The higher courts are very conservative & protective of public authorities / change in the climate – [fate of HXA etc but hope re Champion & Tindall]
- Difficult to see how Carty can survive if challenged as the SEN officer is carrying out what is a pure statutory function & there is unlikely to be a special relationship. sufficient nexus with the child
- All the old problems remain on breach / causation / limitation / damage
- Litigation unlikely to get any easier
- Found a single recent example - see 1st instance decision in Abrahart [[2022] WLUK 260
  - Claim succeeded on disability / discrimination grounds
  - A novel duty on a University to take reasonable care for the well being, health & safety of its students & to avoid psychiatric harm was rejected on Caparo grounds so no reason to apply the new principles
  - The application of the new omission based principles would anyhow have led to the rejection of the negligence claim (see paras 144,149-159)

CAUSING HARM / MAKING MATTERS WORSE

- Would like your views on safeguarding failures
- Might a duty which is based upon a positive act which makes matters worse or perhaps a harmful policy succeed?
- Two examples have crossed my desk recently:

Drugs

  - Zero tolerance drug policy in very academic / selective private school
  - Unexplained deterioration in previous high performing pupil's performance & behaviour
  - Staff express (internally) profound concerns & ask if parents aware
  - Nothing done [omission]
  - Peer group know of a serious secret drug addiction – drug policy = certain expulsion
  - Extent of the duty on current law questionable
  - Can an overly harsh policy turn this into a causing / MMW case?

- Sexting case

  - Boy accused of sexting by girl
  - Denial & subsequent acquittal in the magistrates
  - No fair process
  - School move to exclude w/o investigation fearful of reputational damage
  - School assist prosecution
  - Prosecution abandoned when boy exonerated
  - Girl fabricated
  - Could this be a causing harm / MMW case

DSC

- Here we are creative as shown by our track record

- Give us a go!

Post-16 and Higher Education: the educational transition for disabled young people

Lameesa Iqbal

FORMAT OF PRESENTATION

Statutes in play

Respective remedies

The *Abrahart* case

Commentary

THE WEB OF AUTHORITIES IN PLAY

- Education/training/employment with study is compulsory for young people until the age of 18.

- Multiple bodies/statutes in play:
  - Local Authorities
  - Education Providers
  - Health Bodies
  - Residential placements

- Remedy:
  - PAP letters/Judicial Review
  - Claims in the county court for breach of contract
  - Appeals to the SENDIST

LOCAL AUTHORITIES

- Under CFA 2014 s30, each local authority must publish a 'local offer' which sets out in one place information about provision they expect to be available across education, health and social care for children and young people in their area who have SEN or are disabled.
  - Information in relation to post 16 education and training provision available to young people for children with SEN and disabilities up to the age of 25 must also be included
- Respective frameworks found in the Apprenticeships, Skills, Children and Learning Act 2009, and the Education and Skills Act 2008
- Local Authorities are expected to liaise with education providers to identify children under the age of 16 years old who are at risk of not participating post-16 and for intensive support to be provided to remedy the situation.
- The Upper Tribunal has held that when deciding whether a young person could still benefit from educational provision, that it is not necessary for the young person to be working towards any formal qualifications.

EDUCATION PROVIDERS

- All institutions, including post-16, must publish a SEN information report per the SEND Regs 2014 regs 51–52.
- The reasonable adjustments duty from the EqA 2010 requires those subject to it to anticipate the likely needs of disabled learners and take steps that are reasonable to meet those needs – with the cost of those reasonable steps to be met by the body concerned. Support may include: providing accessible information, mentoring, assistive technology, alternative methods of learning, access to therapies, housing/independent living training.

HEALTH BODIES

- Duty to bring certain children to the Local Authority's attention, where the CCG/NHS Trust forms the opinion that the child has, or probably has, SEN or a disability (per CFA 2014 s23).
- S31 CFA 2014 creates a duty to ensure co-operation in individual cases. It allows a Local Authority to request the co-operation of a wide range of partners including health bodies in any individual case. The partner body must comply with the request, unless they consider that doing so would a) be incompatible with their duties, or b) otherwise have an adverse effect on the exercise of their functions (s31(2)). If they decide not to comply with a request under section 31, they must give the authority that made the request written reasons for the decision (s31(3)).

RESIDENTIAL PLACEMENTS

- Complexity of needs often increases as a child ages- so the suitability of residential placements/waking day curriculums more frequently arises in the context of post-16 education.
- Where there is social care input into a residential school placement, it is likely that it will be made under CA 1989 s20 and the child will become 'looked after'
- Some independent residential school placements will include elements of healthcare provision within its costs. In these cases, the local authority is neither obliged nor able to fund the healthcare provision even where that provision is 'essential for [the child] to be educated' and funding for the healthcare elements will need to be sought from the responsible CCG. However, because of the National Trial, the SENDIST has the power to make recommendations to the CCG.

WHEN IS A PAP/JR APPROPRIATE?

- Local authority not providing education/adhering to timescales.

- Most usually post-16 in the context of a disabled young person not being provided with the EOTAS package promised, or in the interim of setting up suitable provision.

- When multiple Local Authorities are involved (either in the case the family has moved, or if the young person is resident in a different borough) and are refusing to fund.

WHEN IS THE COUNTY COURT APPROPRIATE?

- Most often in cases of disability discrimination at the university level.
- Breach of university contract.
- Following the internal complaints process has not yielded results.

WHEN IS THE SENDIST APPROPRIATE?

- To challenge the provisions of an EHCP.
- To challenge the decision to refuse a needs assessment (very low threshold).
- To challenge the suitability of a school placement.
- Social care/health can be brought in via the National Trial.

THE UNIVERSITY OF BRISTOL V DR ROBERT ABRAHART [2024] EWHC 299 (KB)

- The first court decision on a claim against a university under Part 6 of the EqA 2010 in a long time.
- Summary of the decision at first instance
- Summary of the High Court's findings
- Outlining the parameters of a higher education institution's duty to disabled young people
- Commentary

SUMMARY OF THE BACKGROUND FACTS

- Natasha was enrolled on an undergraduate programme in physics in 2016. Her first year progressed well academically and there was no indication that she had a disability, although her friends were aware that she suffered social anxiety.
- During her second year, Natasha was required to give interviews lasting 25 minutes after conducting laboratory experiments, and participate in a laboratory conference culminating in a presentation. The interviews/oral presentations formed part of the university's formal assessment the students' performance.
- Natasha could not cope with the interviews and oral presentations. She either said nothing during the interviews or did not turn up for them and received zero marks. Her mental health deteriorated as a result. Limited efforts to assist her were made.
- On 30 April 2018, when she would have been expected to make an oral presentation at a conference with fellow students, she committed suicide.

THE DECISION AT FIRST INSTANCE

- Natasha's father brought claims for damages under the EqA 2010 and in negligence at common law.
- The medical evidence adduced during the County Court hearing agreed that NA suffered from "severe depression with prominent anxiety features" and social anxiety disorder, which could have been exacerbated by the fear of performing in oral assessments.
- A duty of care was not owed at common law
- 3 breaches of the EqA 2010 were found.

BREACHES OF THE EQA 2010 FOUND:

1) That the University had breached its duty to make reasonable adjustments

- The requirement for oral assessment did not amount to a competence (which is exempt from the requirement for reasonable adjustments) but rather a method of assessment which substantially disadvantaged Natasha and should have been adjusted.
- The University had stalled in its consideration of said adjustments

2) That the University had indirectly discriminated against Natasha.

- The court rejected the argument that a comparator was someone with similarly poor skills of oral presentation

3) That the University had treated Natasha unfavourably because of something arising in consequence of her disability.

- There was no dispute that marking her down and imposing penalties in respect of her non-attendance at oral assessments was unfavourable. The court held that the university had not justified the lack of adjustments given their knowledge of Natasha's disability..

APPEAL TO THE HIGH COURT

- All findings of breaches of the EqA 2010 were appealed by the University. Dr Abrahart cross-appealed the finding of no duty of care with regards to the negligence claim.

The primary considerations for the court were:

  - Whether oral assessments did in fact constitute a competence standard
  - Whether the university was in breach of their duty to make reasonable adjustments

- The High Court agreed with the CC's findings of fact that what was being tested was knowledge, rather than oral communication. The key question then was if what was being tested was knowledge, and the method of assessment put Natasha at a substantial disadvantage, was it reasonable for the university to assess that knowledge by other means, such as written responses? It upheld the decision that it was reasonable.

CONT…

- The University said it did not have sufficient expertise, knowledge or expert evidence to be required to act, and that it was not prepared to take any steps without a referral to its Disability Support Services and/or without medical evidence.
- CC's finding was that the university knew that Natasha was suffering injury to her mental health from the end of Oct 2017, connected to the laboratory interviews.
- The High Court agreed that it was not a defence that the university did not have a definitive diagnosis and that the cause of NA's mental-health problems was not fully known. The duty to make reasonable adjustments is concerned with the effect of the PCP on the disabled person and the University was aware of that effect.
- Further, the problem with the university's reliance on its own regulations and policies was that they were not the law and by inference, they could be adjusted or waived to prevent Natasha from suffering substantial disadvantage.

COMMENTARY FROM THIS CASE

- In this case, Natasha suffered from a clear and obvious disability that needed no expert diagnosis. Its manifestation was its own evidence and required a simple response by the relevant academic department. Requiring a support plan was not necessary.
- However, many disabilities are hidden, complex and require expertise to identify their particular effects. It is not unreasonable in those circumstances for a university to request medical evidence/ require a student to undergo an assessment of needs. The process should be efficient, and implemented as early as possible.
- It is a university's responsibility to consider, suggest and implement reasonable adjustments, not the student's responsibility (anticipatory).
- Staff should be provided with training to understand the disability-related requirements of the EqA 2010. Academic staff, in particular, should have a clear understanding of the distinction between competence standards and methods of assessing whether students have acquired those competence standards.

NOTABLE CASES/PRINCIPLES CITED IN THE JUDGMENT

- Cosgrove v Cesar and Howie: no requirement for C to have identified at the time the adjustments which ought to have been made (but must have done so by the time of bringing a claim)
- Reasonable steps- it is well established that the test of reasonableness is an objective one for the court (Allen v Royal Bank of Scotland [2009] EWCA Civ 1213 at [40]). Whether the defendant thought that it was a reasonable step would not be a relevant consideration precisely because the question is an objective one for the court.
- Steps taken to avoid disadvantage do not have to avoid the disadvantage in its entirety. D cannot take any steps and use this as a reason why: Noor v Foreign and Commonwealth Office [2011] ICR 695

PARA 267

- *"For the avoidance of doubt, the lesson of this part of the case is not that due process and evidence are unimportant where the question of reasonable adjustments arises in this context. They are important. There will no doubt be many cases where it is reasonable to verify what the disabled person says and/or to require expert evidence or recommendations so as to make well informed decisions. A degree of procedural formality will also generally be appropriate for the reasons which the University advanced. But what a disabled person says and/or does is evidence. There may be circumstances, such as urgency and/or the severity of their condition, in which a court will be prepared to conclude that it is sufficient evidence for an educational institution to be required to take action. That was the view of the County Court on the facts of this particular case."*

Education update: SEN

Louise Price

OO AND BO V LONDON BOROUGH BEXLEY: [2023] UKUT 223 (AAC)

- Local authority decided that the attendance of the child at the school requested by the parents would be incompatible with the provision of efficient education for others (s39(4)(b)(i)).
- Authority considers meaning of test in section 39 (4) (b) (i).
- The test in s39(4)(b)(i) is a 'sophisticated one' (i.e. careful and precise) [para 20].

OO AND BO V LONDON BOROUGH BEXLEY: [2023] UKUT 223 (AAC)

- FtT decision held quality of provision for existing pupils at Woodside Academy would be "materially affected" by Q's attendance.
- However, UT considered the requirement for a degree of precision and/or detail as to which children would be affected was not sufficiently reasoned by FtT.
- Helpful reminder Gibbs J in Essex County Council v SENDIST and S [2006] ELR 452 at paragraph [29] that the word 'incompatible' is a strong term, with a suggestion that it has a stronger meaning than "prejudicial to".

OO AND BO V LONDON BOROUGH BEXLEY: [2023] UKUT 223 (AAC)

- FtT/LA needs to ask four questions:
- Which other children's education would be affected by Q's attending Woodside Academy?
- Was the standard of those other children's education currently at, or above, the "efficient education" standard?
- What effect would Q's attendance have on the standard of those other children's education?
- If the effect was to reduce the standard below that of "efficient education", was that unavoidable or, for example, could adjustments reasonably be made to avoid that effect? [para 16].

LC & RC V HAMPSHIRE CC [2023] UKUT 281 (AAC)

- Concerns difference between suitability (section 39) and appropriateness (section 40).
- The Appellants disagreed with the school named in O's plan, which was an independent special school for children and young people aged 8-19.
- Instead they wanted Section I (named school) of O's plan left blank and for O to be provided with education otherwise than in a school.
- Correct test was whether C School was appropriate for O (the test in s40(2)(a)).
- The UT found it appeared that the FtT's decision mistakenly applied the test in s39(4)(a) ("suitability" of the school for the "age, ability, aptitude or special educational needs" of the child).
- Reason section 40 (2) (a) was relevant was that the Appellants had not requested that the Respondent secure that a particular school to be named in O's plan.

LC & RC V HAMPSHIRE CC [2023] UKUT 281 (AAC)

- In my view, the tribunal's [FtT] decision adequately took these into account, and so would have reached the same conclusions, had it applied the correct "holistic" test (whether C School would be "appropriate for O"), rather than the incorrect "circumscribed" test (whether C School was "suitable for O's age, ability, aptitude and special educational needs") [para 27].
- Although on this case it was found the error was not material.
- The decision makes clear that the two tests are different, despite similar wording.
- On different facts this could produce a different outcome.

AA & BB V BRISTOL CITY COUNCIL [2023] UKUT 52 (AAC)

- Case where LA sought for a placement at B school.
- Appellants wanted a year of EOTAS and then a different school placement starting the following year.
- During the hearing B school's evidence was that they could no longer offer a place.
- No one sought to adjourn.

SECTION 61 OF CFA 2014

- Special educational provision otherwise than in schools, post-16 institutions etc.

(1)A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.

(2)An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.

AA & BB V BRISTOL CITY COUNCIL [2023] UKUT 52 (AAC)

- The FtT found that, for the purposes of section 61 of the 2014 Act, the absence of a specific placement option did not, "make it inappropriate to make the special educational provision he requires in school" (paragraph 165).
- The absence of a specific placement "despite the efforts of the parents and the LA" was not "sufficient to engage section 61".
- The Tribunal did not name a specific school in section I. Instead, it specified a type of school namely a mainstream school.

AA & BB V BRISTOL CITY COUNCIL [2023] UKUT 52 (AAC)

- Appeal ground that was given permission was the issue of fairness and whether or not an adjournment should have been granted.
- PoA decision held 'The Appellants have a realistic prospect of establishing that the proceedings were unfair because they were left with almost no time to respond to the fact that, by the date of the final hearing, there was no longer any specific placement option for R put before the FtT. Alternatively, the FtT arguably erred in law by failing to consider whether fairness required an adjournment in order for steps to be taken by at least the local authority to try to identify an alternative suitable placement…'

AA & BB V BRISTOL CITY COUNCIL [2023] UKUT 52 (AAC)

- UT found that there was no unfairness in this circumstance.
- Operation of section 61, was not impacted by removal of offer of a potential suitable school place.
- The authority submit that the underlying issue of law on this appeal concerns a local authority's duty to the First-tier Tribunal "within the appeal".
- Interestingly, LA relied on Upper Tribunal Judge West's decision in AJ v London Borough of Croydon [2020] UKUT 246 (AAC) in which he said, at paragraph 129, that an authority's duty at a hearing is to "assist the Tribunal by making all relevant information available", "not to provide only so much information as will assist its own case" and "should be placing all its cards on the table, including those which might assist the parents' case". The judge added, at paragraph 130, that, in an appropriate case, the authority's duty extended to obtaining further evidence.

LONDON BOROUGH OF CROYDON V K-A (SEN): [2022] UKUT 106 (AAC)

- Concerns the proper interpretation and application of section 9 of the Education Act 1996.
- Specifically looked at the factors to be taken into account in balancing exercise of unreasonable expenditure.
- Should the benefit be limited to educational issues?
- PoA was given regarding whether the FtT had erred taking an impermissibly wide approach as to the range of factors it was able to consider when conducting the balancing exercise called for when applying section 9 of the Education Act 1996.

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Section 9 of the Education Act 1996 provides,

Pupils to be educated in accordance with parents' wishes

9. In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

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- Preferred HH Judge Pearl's decision in K v Hillingdon LBC (SEN) [2011] UKUT 71 (AAC), 'a LA (and the tribunal on appeal) when conducting the balancing exercise, are obliged to take account of wider social and health benefits when deciding whether additional public expenditure is unreasonable' [29] considered.
- Argued that the decision in KE v Lancashire CC (SEN) [2017] UKUT 468 (AAC) case questions and indeed throws doubt on this approach, at least to some extent (at paragraphs 20 and 21).

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- Gave a number of reasons for preference, one was that K was a reported decision.
- A decision is only reported (in the AACR) if the decision and its reasoning commands the broad assent of the majority of the Chamber's judges [47].
- This difference involves an important distinction in the doctrine of precedent operated in this Chamber.
- The reported status of K v Hillingdon LBC (SEN) [2011] UKUT 71
- (AAC) means at the very least that it carries more weight.

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- UT held that section 9 analysis is not limited to consideration of the educational advantages of the placement.
- Held, I conclude that the Tribunal did not err in law in taking into account, when considering the section 9 balancing exercise in relation to the prospective placements for J, the "wider social and health benefits when deciding whether additional public expenditure is unreasonable".