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FOIL UPDATE 23rd November 2021



Liability for an assault by a pupil on a teacher

Cunningham v Rochdale Metropolitan Borough Council (2021) EWCA Civ 1719

The claimant/appellant, the Assistant Head Teacher at a school was assaulted by a disruptive pupil who punched the claimant in the face. As a result, he suffered a fractured cheekbone and consequential psychiatric injuries. The claimant did not recover and had retired from teaching.

The claimant brought a claim against the defendant/respondent who ran the school and employed him. The claim was pleaded in negligence and breach of statutory duty.

Two main parts of the claim made against the school were first that the pupil should have been excluded from the school before the assault, and secondly that the incident should have been handled in a different manner. In the light of the expert and other lay evidence at trial, the case that the pupil should have been excluded from the school before the incident was not pursued in final submissions at that hearing. The judge at first instance rejected both of these ways in which the claim was put, and there was no appeal against those findings. This appeal focussed on claims made relating to a failure to produce risk assessments, and a failure to follow policies and arrange a return to school interview and a restorative justice meeting between the pupil and the claimant at any time after an earlier assault by the pupil on the claimant and before the incident in question.

IN BRIEF

The Court of Appeal found that a judge had been justified in finding that breaches of duty on the part of the defendant (including the absence of risk assessments) had not been causative of the assault by a disruptive pupil on the claimant teacher.

The judge at first instance addressed the lack of recorded risk assessments and found that the school had failed to carry out or record any formal risk assessment. However, the judge went on to find that there was no causal link between this breach and the assault that occurred. His findings on this point are set out below in the Court of Appeal's judgment.

The essence of the claimant's case on the appeal was that the judge at first instance should have found that there was a breach of duty by failing to have a return to school interview and a restorative justice meeting with the claimant after the pupil's earlier attack on the claimant and the judge, following the approach in *Vaile v Haverling LBC (2011)*, should have found that such an interview and meeting would have prevented the second assault.

The council resisted the appeal and contended that the judge at first instance made findings of fact which were properly based on the evidence and that the claim was properly dismissed. The council submitted that the judge's findings about dynamic risk assessments were reasonable, and although the school did not complete written risk assessments in relation to the pupil the failures to do so could not have made any difference, given the circumstances of the assault on the claimant. There was no breach of duty, and if there was any breach of duty it did not cause the assault on the claimant. As to the critical issue on the appeal, the defendant submitted that the judge had been entitled to find that there was no breach of duty in not having the return to school interview and restorative justice meeting after the earlier assault. The council further submitted the judge was right to find that it was speculative to suggest that the interview or meeting would have had any effect on the actions of the pupil on the actual day so causation could not be established.

On the issue of duty of care and reasonable foreseeability, the appellate court found that it was reasonably foreseeable to the school and the defendant that the claimant might be attacked by the pupil. It was established that it was not necessary to show the exact nature of the attack which took place could be foreseen. In these circumstances in order for the claimant to succeed on the appeal he would in addition need to show that there was a relevant breach of duty, and that the relevant breach of duty caused loss in the sense that if there had not been a breach of duty the attack would not have occurred.

As to risk assessments, the school's own policies and the evidence at the trial proved that the school acted in breach of the standard of care owed to the claimant by failing to complete risk assessments. Therefore, a breach of duty in this respect was established. However, this left the issue of causation.

The school had set out policies to have a return to school interview and a restorative justice meeting. Although it was right to show that there were difficulties in organising those meetings because the pupil was not regularly attending school, there was no evidence at the trial below to show that those meetings could not take place. In those circumstances the unexplained failure by the school to comply with its own policies was a breach of duty, because it fell below the standards of care that the school had set for itself. This again left the issue of causation.

So far as causation was concerned, *Vaile v Haverling LBC* did not establish any new principles of law in relation to the issue of causation in general, or causation in particular relating to attacks on teachers by pupils. As to the breach of duty in failing to complete risk assessments in this case the judge said "I am not persuaded that if there had been any formal written risk assessment or proper written behavioural plan that it would have altered the defendant's approach to [the pupil] and his difficulties". This was because the judge found that the school was a small community and it had

not been shown that the incident arose because of a lack of awareness of either the deterioration in his behaviour or the risk he posed. Nothing had been identified on behalf of the claimant, even with the benefit of hindsight and the passage of time, which might have been raised by a written risk assessment which would have prevented the assault on the claimant. Therefore, this breach of duty did not cause the attack and the claimant's loss.

The most difficult issue was whether it had been shown that the failure to hold the return to school interview and the restorative justice interview between the pupil and the claimant would, on the balance of probabilities, have prevented the attack. This was not at the forefront of the case advanced on behalf of the claimant and the specific pleading of causation was in relation to the failure to exclude the pupil before the attack. The causative effect of either the pupil being excluded from school or the situation on the day of the attack being managed differently would have been obvious, but as the judge said "it is more difficult to say that if there had been different interventions whilst the claimant remained at [the school] it would have made a difference".

The prospect that the pupil would, in the final event, have not assaulted the claimant because he had had a return to school interview and a restorative justice interview with the claimant was possible, but it was not probable and more likely than not to have prevented the attack. This was because the pupil had had the benefit of extensive interventions over the course of the year as his behaviour deteriorated

In all of these circumstances the attack in this case was not of a kind likely to have resulted from the failure to have the return to school interview and the restorative justice meeting. This appeared from the sustained nature of the incident, the circumstances of the assault, and the fact that all of the other interventions did not prevent the assault. The claimant was unable to show on the balance of probabilities that a return to school interview or a restorative justice interview would have prevented the pupil's serious assault on him. The claimant was unable to show that if there had not been any breaches of duty on the part of the school, the attack and his loss would have been avoided, and therefore causation was not established.

Andrew Ellis a partner in **Forbes Solicitors** and a member of the Public Sector and Blue Light SFT comments:

This is an interesting decision of the Court of Appeal. Despite the school being in breach of its duty to carry out suitable risk assessments or hold meetings, the Court of Appeal stated that it was still for the claimant to show that had formal risk assessments been provided and the meetings held with the pupil, that the claimant would have taken steps to avoid the assault. The claimant was not able to show this. It was found by the court that even if risk assessments had been prepared this would not have prevented the assault. The school was already aware of the risks posed by the pupil and the claimant had been trained to deal with them. Had the return to school interview and restorative justice meetings taken place, it was not probable that the assault would not have occurred in any event (to use a double-negative). Accordingly, it appears that the Court of Appeal was of the opinion that there was nothing the school could have done to prevent the assault, it not being pursued at first instance, in light of relevant expert and lay evidence, that the pupil should have been excluded from school.

This case exemplifies that the failure to have risk assessments in place may not necessarily be fatal to the defence of a claim in a situation where the preparation of a risk assessment could not have prevented the incident occurring or reduced the risk. However, this decision does not mean that risk

assessments can be dispensed with, as it is still important to show risks have been assessed and reasonable steps taken as a result thereof to control that risk. A failure to have taken steps to control risks would usually lead to a finding of breach of duty, but in this case it was found that the school were already aware of the risks that the pupil posed and that the staff had received training to deal with these risks.

The full case report may be found at: [Cunningham v Rochdale Metropolitan Borough Council \[2021\] EWCA Civ 1719 \(19 November 2021\) \(bailii.org\)](#)

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