Lord Justice Mummery : C.A. 17 March 2005

This is the judgment of the court to which we have all contributed.

Educational Negligence: General

1. **Phelps v. Hillingdon Borough Council** [2001] 2 AC 619 (**Phelps)** is the leading case on liability for negligent failure to diagnose children's learning difficulties, such as those attributable to dyslexia, and to treat their special educational needs. It is the case on which the trial judge (HHJ Overend) based his award to Mr Stuart Clark (the claimant) on 25 July 2004 of £10,000 general damages and £25,000 special damages for loss of earnings, making, together with interest, a total award of £38,210.

2. The sole defendant was the appellant, the Devon County Council (the Council). It was the relevant local education authority and employed the educational psychologist, Mrs Sue Holt, who was found to have been negligent in her report on the claimant in April 1991.

3. The judge ordered the Council to pay all the costs of the action, even though (a) claims in respect of the alleged negligence of 2 other educational psychologists and 2 head teachers employed by the Council were either dropped or rejected at the trial; (b) a claim for psychiatric damage for a major depressive disorder failed; (c) a claim for failing to diagnose dyspraxia was dropped at the beginning of the trial; and (d) the claimant had only limited success on the quantum of damage (the special damages claimed in the Particulars of Claim being around £217,000).

Phelps

4. In **Phelps** the House of Lords held that, in relation to the assessment of, and future educational provision for, a dyslexic child, an educational psychologist, who was specifically asked to advise on a child's special educational needs, owed a common law duty of care to the child. The local education authority, as employer of the educational psychologist, was vicariously liable to the child for the employee's breach of duty.

5. The breach of duty occurred where there was *"a failure to diagnose a congenital condition and to take appropriate action as a result of which failure a child's level of achievement is reduced, which leads to loss of employment and wages."* Lord Slynn, who delivered the leading speech in the House of Lords, stated that *" Questions as to causation and as to the quantum of damage, particularly if actions are brought long after the event, may be very difficult, but there is no reason in principle to rule out such claims."* (p654F-G).

6. Lord Clyde also warned of the difficulties of establishing liability in cases of this kind, although he did not think that they should stand in the way of allowing such claims in principle-
"There may also be severe difficulty in establishing a causal connection between the alleged negligence and the alleged loss and in the assessment of any damages. But these possible difficulties should not be allowed to stand in the way of the presentation of a proper claim, nor should justice be altogether denied on the ground that a claim is of a complex nature. That any claims which are made may require a large number of witnesses, a consideration which weighed with the Court of Appeal, and involve considerable time and cost, are again practical considerations which should not be allowed to justify a total exclusion of an otherwise legitimate claim…" (p673A-B)

7. The trial judge in **Phelps** (Garland J, whose judgment is reported in [1998] ELR 38) found that *"the adverse consequences of the plaintiff's dyslexia could have been mitigated by early diagnosis and appropriate treatment or educational provision."* (p64B) The House of Lords upheld his finding on liability, saying that *" there was evidence upon which the judge was entitled to find that the negligence had caused the damage in respect of which the claim was made."* (p657B). It was accepted that the child would have been taught differently if the diagnosis of dyslexia had been made. The House agreed with the trial judge and disagreed with the Court of Appeal, which had overturned his decision, that the failure to diagnose dyslexia would have made a "real difference." (p656F).

8. While observing that the assessment of damages was "extremely difficult" the House of Lords declined to interfere with Garland J's award of general damages of £12,500 *"for loss of congenial employment" and special damages of £25,000 for future loss of earnings ("**a lump sum representing the loss of opportunity to earn at a higher rate than that which the plaintiff is now able to command (if fit and willing) or may be able to command after 2 or 3 years' further tuition and education**"* [1998] ELR

at 64G-H)) , *saying that "although there is much room for debate as to quantum in this type of case, no better approach in this case has been suggested than that adopted by the judge."*(p 657E)

9. In a paper comparing English law and US law on this topic ("***Negligent Misdiagnosis of Learning Disabilities***" published in "***Tort Liability of Public Authorities in Comparative Perspective***: edited by Duncan Fairgrieve, Mads Andenas and John Bell, BIICL 2002) Sir Basil Markesinis and Mr Adrian Stewart commented specifically on the substantial difficulties facing claimants both on causation and quantum of damages-
"Causation could also raise formidable problems for future plaintiffs, especially since the absence of records and delay in bringing such claims might make it very difficult for plaintiffs to substantiate them. But even leaving problems of evidence aside, the hurdles of ***Phelps*** *on causation for plaintiffs are formidable. They would have to satisfy the court first, that if their difficulties had been discovered in time, the school ought to have taught them in a different way and then, if that had happened, their ultimate educational attainment would have improved. These are not insubstantial hurdles; and overcoming them still leaves open the question of the extent, in financial terms, of the plaintiff's future loss. The quantum problems are thus also likely to be formidable."*(p 258).

The Appeal

10. The principal question in this appeal is whether the judge was wrong, as the Council contends he was, in holding that the claimant had established causation and quantum. The appeal also raises troubling questions about the conduct of actions of this kind and the magnitude of the legal costs incurred in order to obtain even a modest award of damages.

11. When May LJ granted permission to appeal on 12 December 2003 he indicated that serious attempts should be made to compromise the appeal, having regard to the disproportionate costs involved. Unfortunately attempts at mediation have failed. The result at the end of the day may well be that, despite the large expenditure of public money (estimated at £150,000) on the litigation about education, no benefit has been derived from it by either of the parties or by the public. This is not a satisfactory outcome.

12. Before considering the detailed grounds of appeal on causation, quantum and costs, we need to say more about the basic facts and about the course of the proceedings.

The Facts

13. The claimant was born on 29 August 1980. He is seriously dyslexic with a reading age of 8 or 9. He is also dyspraxic. The proceedings were commenced just before the claimant's 21st birthday and over 10 years after the breach of duty by Mrs Holt.

14. The Council was responsible for the claimant's schooling between the ages of 8 and 15 i.e. from November 1988 to June 1996. In November 1988 the claimant started at John Stocker Middle School, following his family's move from East Sussex to Devon. He was unhappy at that school. He was transferred on 5 December 1988 to Alphington Primary School. In March 1989 the head teacher, Mr Pritchard, referred him first to the Special Needs Advisory Teacher (Yvette Corner) and then to the School Psychological Service.

15. Over the next 5 years the claimant was seen by three educational psychologists. The first was Dr Frances Canning (now called Dr Bellinge), who reported on him on 8 May 1989 and again on 9 November 1989. The second was Mrs Sue Holt to whom Dr Canning handed over her caseload and who produced a report on the claimant on 10 April 1991 after seeing him on 24 January 1991.

16. In September 1992, at the age of 12, the claimant moved to St Thomas High School, Exeter, where the headteacher was Mr William Ridley. The claimant experienced difficulties there: lack of concentration, lack of motivation and severe behavioural problems. In January 1994 a third educational psychologist, Ms Alison Russell, reported on the claimant. The claim that she had been negligent was dropped during the trial.

17. In May 1994 an offer was made to the claimant of a transfer to Queen Elizabeth Community College, Crediton in September 1994. The offer was declined by the claimant's mother, Mrs Brenda Clark, as it was considered that the claimant could not cope with the move. Mrs Diane Martin, the head of the Special Learning Difficulties Support Centre at Queen Elizabeth Community College, attended St

Thomas's to give the claimant weekly sessions for a term in the autumn of 1994. When he left school in June 1996 at the age of 15 the claimant was illiterate and innumerate. After that he was only in employment spasmodically for short periods. It was casual employment at low rates of pay. Since September 2000 he has been certified unfit for work and is in receipt of incapacity benefit.

The Proceedings

18. The claimant alleged that the Council was liable for the negligence of at least 5 of its employees: the heads of 2 of the schools attended by him and the 3 educational psychologists who reported on him. Having heard evidence from 11 witnesses, including Mr Woodhouse, an educational psychologist, and the Head of the Special Learning Difficulties Support Centre at Queen Elizabeth Community College, Mrs Diane Martin, the judge found that the Council was only liable in respect of the negligence of Mrs Holt in failing properly to diagnose special educational needs in 1991 or to identify the nature of the special educational provision needed to address his special needs. She recommended continued placement in a mainstream school when she should have recommended placement in a school with special resources over and above those in a mainstream school. But for this breach of duty, the judge held, the claimant would have attended and been taught differently at Queen Elizabeth Community College between September 1991 and September 1994. He would have had specialist education in its in-house resource for pupils with special needs attributable to dyslexia and would have benefited from it.

19. The breach of duty caused damage to the claimant. He was deprived of a specialist education by specialist teachers who would have helped him to overcome his difficulties with reading and writing in the 3 year period September 1991 to 1994. The judge held that the period of loss was not longer than that, as the claimant had, by turning down the offer by Queen Elizabeth Community College in 1994, failed to mitigate his loss.

20. The judge held that neither of the head teachers was negligent. He also held that, although Dr Canning's 1989 report breached the duty of care, no loss to the claimant had flowed from it.

Causation

21. On the issue of causation regarding Mrs Holt's negligence the judge directed himself as follows
"5. …it is necessary for the claimant to establish, once breach of duty has been established, (a) that he would have been taught differently, and (b) that the teaching, which I have indicated has to be specifically identified, needs to have made a measurable difference."

22. Mr Fletcher, appearing for the claimant, did not accept that this direction was an accurate formulation of the causation issue, even though its application by the judge resulted in a finding that Mrs Holt's negligence had caused the claimant loss and damage. Mr Fletcher correctly pointed that the expression "measurable difference" used by the judge was not used either by Garland J in **Phelps** or by the House of Lords in upholding his decision. The expression appeared in the judgment of Stuart Smith LJ in the Court of Appeal in **Phelps** [1999] 1 WLR 500 at 526F), but that decision was overturned on appeal. The need to establish "a measurable difference" stated the position on causation too high. It is more accurate, Mr Fletcher submitted and we agree, to say that the remedial teaching would probably have made a difference in the sense of "a real difference" to the claimant.

23. The judge's conclusions on the causation issue were as follows-
"96. I turn to the issue of causation and ask the questions, firstly, would Stuart Clark have been taught differently but for the breaches of duty, and, secondly, would it have made any difference. The aspects that need to be considered are following Dr Canning's breach of duty in which she failed to suggest specialist teachers coming into Alphington either some time after her report in May or possibly after her supplementary consideration in November 1989; and secondly after Mrs Holt's breach of duty when the transfer to the specialist school from September 1991 did not take place.

97. There was no direct evidence that visits of specialist teachers at Alphington between sometime in 1990 and 1991 would have made a measurable difference to the progress of Stuart Clark. The court is invited to infer it from Mr Woodhouse's evidence that it should have been tried as the remedial teaching and attention of the

Learning Support Team in the form of Yvett Corner, the advisory teacher, were not producing the required progress.

98. The evidence of causation, however, is stronger in the case of the proposed transfer to Queen Elizabeth, Crediton. Mrs Martin's evidence was that the vast majority of pupils did benefit. However, she was very frank in her approach to the court, She said there are always problems, and she pointed out the attitude of Stuart when she went out of her way to help him in September 1994 as an example.

99. On balance I find that causation is established for the three year period between September 1991 and September 1994; in other words, the period when Stuart Clark should have been at Queen Elizabeth, Crediton before any question of a failure to mitigate arose. I am not, however, persuaded that the evidence supports a causative link flowing from Dr Canning's breach of duty."

24. Was the judge was wrong in holding that there was a causative link between the breach of duty by Mrs Holt and the loss suffered by the claimant? The breach of duty was Mrs Holt's recommendation for the statement of educational needs on 10 April 1991 of continued placement in a mainstream school, such as St Thomas, and her failure to diagnose the claimant's special educational needs. She ought to have recommended placement in and transfer to Queen Elizabeth Community College. The damage occurred when the claimant was not transferred to that college in September 1991.

25. In our judgment the judge was entitled to find on the evidence given by Mrs Diane Martin and Mr John Woodhouse that, but for the breach of duty by Mrs Holt, the claimant would have been taught differently. He would have received appropriate treatment at an earlier stage in a special resource for the amelioration of his symptoms. As a result of Mrs Holt's negligence he did not have specialist remedial teaching at Queen Elizabeth Community College to treat his dyslexia and to mitigate its adverse consequences.

26. According to the evidence given at trial the vast majority of dyslexic pupils at Queen Elizabeth Community College received some benefit from the special teaching there. They got better GCSE results. The special resource there would probably not have existed at all if it was found that it did not make a real difference to those who attended. The judge was entitled to find that the claimant would have derived benefit from being placed there at an earlier age than the subsequent offer of a place in 1994 and would have derived help in overcoming his problems from 3 years attendance at that college.

27. Mr Edward Faulks QC, appearing for the Council, contended that causation was difficult to prove. He submitted that the judge had failed to make material findings of fact in respect of causation. He was wrong to find for the claimant in the absence of evidence measuring or quantifying specifically the difference that the teaching at Queen Elizabeth Community College would have made to the claimant. The judge had not calculated what the benefit to the claimant would have been. The evidence fell short, he submitted, of proving "a measurable difference" relating to the claimant's literacy and numeracy skills. The mere fact that 3 years at that college would have been "beneficial" to him was not enough. The correct test was whether the three years there would have made a "measurable difference" and the evidence failed to establish that.

28. In our judgment, there was sufficient material in the evidence for the judge to find a causative link between Mrs Holt's negligence and the claimant's loss of 3 years' remedial teaching to ameliorate the adverse effects of his dyslexia. The judge was not required to find that there would have been "a measurable difference." It is true that Mrs Martin frankly acknowledged in answers to questions put to her by the judge that it was very difficult to say what would have happened if the claimant had attended between 1991 and 1994.The judge was, however, entitled to conclude that this did not detract from her clear evidence that benefit accrued to the vast majority of pupils with similar problems at Queen Elizabeth College.

Quantum and Loss of earnings

29. The Council does not appeal against the award of £10,000 general damages for the three-year period during which the claimant's dyslexia was not ameliorated. Nor is there an appeal by the claimant against the dismissal of the claim for psychiatric injury.

30. The Council's appeal is from the award of £25, 000 for past and future loss of earnings on which the judge concluded as follows-

> *"116. I finally turn to the claim for loss of earnings, and this is the most difficult of all three to assess. I appreciate that Stuart Clark has attempted a number of jobs since leaving school. They were almost all of short duration and in nearly all cases resulted in abrupt dismissal due to his difficulties with reading, writing, or possibly his organisational disability of dyspraxia, the latter of course for which the defendants are not liable.*
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> *117. It was the view, I think, of Dr Conway that in five years time he should be able to hold down a job. He needs to be weaned away from his home into sheltered accommodation. He needs to have advice from an adult other than his mother to give him advice and support. He has been set back, but part of his difficulties have been of his own making because of the decision not to go to Queen Elizabeth, Crediton. He will find it more difficult now to recover where he would have got to had he gone initially in September 1991.*
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> *118. It is almost impossible in those circumstances to produce a figure. The approach has to be on a lump sum basis. Mr Fletcher has suggested that one should consider a past loss of earnings of £23,000 and a future loss of earnings of £50,000, making in excess of £70,000 in all, and he stresses that in coming to those figures he relies upon Mrs Greenaway's report using very modest earnings for manual work from the New Earning Survey.*
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> *119. Miss Mortimer on behalf of the defendant equally has difficulty in putting forward a figure but she put forward a figure of £10,000. I had in fact selected a figure before asking either counsel what their figures were and I am sticking by mine, £25,000, which I think should cover both past and future earnings."*

31. The claimant's case was that he suffered future loss of employment and earnings as a result of not having 3 years remedial teaching at the special resource in the college in Crediton. Mr Edward Faulks QC described it as a speculative claim which had been wrongly allowed by the judge without giving a sufficient explanation or identifying any reasons to support it.

32. In our judgment, the evidence given to the judge was sufficient to entitle him to make an award of compensation to the claimant for loss of employment and earnings. As was held in **Phelps,** the lump sum method is the correct approach in this difficult exercise. There was sufficient material in the evidence given by Mr Woodhouse and Mrs Diane Martin and in the employment report made by Ms Greenaway to justify an award for past and future loss of earnings in the region of the amount awarded in **Phelps.** It cannot be said that the size of the sum awarded by the judge was outside the permissible range.

Costs

33. As already indicated (paragraph 3 above) the judge ordered the Council to pay all of the claimant's costs. Mr Edward Faulks QC submits that the claimant was entitled to no more than a proportion of his costs (he suggests 50%). Mr Fletcher submits that this court should not interfere with the judge's exercise of discretion, since it was not plainly wrong. In concluding that the claimant was entitled to his costs, the judge said: *"I have taken into account what has been urged on behalf of the defendants as to a percentage order. I do, however, take two factors into account. One, this is a case which is concerned with education over a long period of time and the fact that you have to identify which teachers, which educational psychologists, which schools, is part and parcel of the technique of getting home and it shouldn't be, in my judgment, for a claimant such as this to give up his award because of a technical fact that some parties have escaped the claim. I reach that conclusion with, as I say, acceptance of the difficulty of the question, but I think that in the exercise of my discretion a 100% order is the correct order and I so order."*

34. CPR 44.3(2) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. Rule 44.3(4) provides that in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of the parties and *"(b) whether a party has succeeded on part of his case, even if he has not been wholly successful."*

35. It is necessary to summarise the allegations that were made by the claimant in this case. Proceedings were issued on 24 August 2001. The Brief Details of Claim showed that the claim was for damages for

vicarious liability for the negligence of the two head teachers (of Alphington Primary School and St Thomas High School) and of the educational psychologists who advised the Council as to the claimant's special educational needs between 1988 and 1996.

36. The claim was crystallised in the Re-Amended Particulars of Claim which were served on 6 January 2003. It was alleged that the Council was liable for the negligence of three educational psychologists and two head teachers. The psychologists were Dr Canning (for the report of May 1989), Mrs Holt (for her report of April 1991) and Ms Russell (for her report of January 1994). It was alleged that each of these psychologists failed to identify the claimant's educational problems and the special educational provision that was necessary to address his needs. The teachers were the head teachers of the two schools to which we have referred. It was alleged that they failed to take proper steps to ensure that the claimant's known educational problems were fully and properly considered and investigated, and to act upon such reports and assessments as they received or to implement their recommendations.

37. This was the claimant's finally pleaded case. It is true that the report of Mr John Woodhouse exonerated Ms Russell. But the allegations of negligence by her were not deleted from the pleading, and were not withdrawn until after the start of the trial. We reject the submission that it should have been obvious to the Council on receipt of the Woodhouse report that the allegations against Ms Russell were being abandoned. Upon reading the report, the Council would have been well advised to raise the matter with the claimant's solicitors. But in our view, the Council was entitled to proceed on the basis that the latest version of the claimant's particulars of claim represented his case. The allegations of negligence against the head teacher of Alphington Primary School were also withdrawn at the outset of the trial. All the other allegations were pursued.

38. As we have seen, the only claim that succeeded was the allegation against Mrs Holt. The claim against Dr Canning failed because, although the judge was satisfied that he had been negligent, causation was not proved. And the claim against the head teacher of St Thomas School was dismissed.

39. In short, therefore, of the five discrete allegations made in the Re-Amended Particulars of Claim, two were withdrawn at about the time of the commencement of the trial; two were dismissed by the judge; and one succeeded. It first sight, it seems obvious that the Council had a significant measure of success in this litigation. Why did the judge not reflect this at all in his order for costs? The principal reason he seems to have given was that it had been necessary to cover the whole of his educational history. In these circumstances, it would not be reasonable to deprive the claimant of a proportion of his costs merely because he had made allegations of negligence against other professional persons in relation to that wider period. The second factor relied on by the judge is difficult to interpret. It is not at all clear what he meant when he referred to the claimant having to give up part of his damages "because of the technical fact that some parties have escaped the claim." But, if he was saying that there were no circumstances in which a claimant could be denied some of his or her costs simply because the claim against other named persons had failed, that would clearly be unjustified, and Mr Fletcher did not seek to support such a proposition.

40. Mr Fletcher says that it is a misconception to regard allegations such as were made in this case as a series of self-contained claims. In his skeleton argument he put it this way: *"It is a single claim for a failed education over a period of time where allegations are commonly pursued in the alternative against psychological advisers and teachers."*

41. He submits that educational negligence claims may be regarded as analogous to a clinical negligence claims, where the claimant alleges negligence on the part of a number of persons who played different parts in a failed operation, and the claimant succeeds against one or more, but not all of the participants. He points out that in **Phelps** the claim against the educational psychologist succeeded, but the claim against the teachers failed, and yet the claimant recovered all her costs from the defendant authority. Mr Fletcher also relies on the fact that it was reasonable to advance all the claims, since they were all supported by independent expert evidence, and that cases of this kind require an examination of all the evidence surrounding the claimant's schooling in order to deal with a range of complex issues and determine whether there has been negligence, and if so, by whom.

42. In our view, there will no doubt be some educational negligence cases where the suggested analogy with the type of clinical negligence case referred to by Mr Fletcher is apt. For example, suppose that the allegation is that a single report by a single educational psychologist was made negligently and/or that there was negligence on the part of a teacher in relation to that report. Provided that it was reasonable for the claimant to make these allegations against both the psychologist and the teacher, it might well be appropriate to order the defendant to pay all of the claimant's costs, even if only one of the allegations succeeds: that would be by analogy with a **Sanderson** order (**Sanderson v Blyth Theatre Company** [1903] 2 KB 533) or a **Bullock** order (**Bullock v London General Omnibus Co** [1907] 1 KB 264). We refer also to **Civil Procedure** Volume 1 para 44.3.8.

43. But in a case such as the present, the suggested analogy is not apt. The allegations against the three psychologists did not relate to a single episode or incident, such as a failed operation. Each report was made in different circumstances and related to a different period in the claimant's life. In our judgment, it is wrong to characterise all educational negligence cases as being single claims for a failed education over a period of time, as if special rules applied to them. We accept that, even where there is a single allegation relating to a single report, it will often be necessary to adduce evidence as to a much larger part of the educational history, possibly even the whole of it. Indeed, the difficult issues of causation that frequently arise in these cases may require that to be done. But the mere fact that a wide canvas of history will be traversed in the evidence (including the expert evidence) cannot, of itself, justify making allegations of negligence against those who may (or will) be called as witnesses. We did not understand Mr Fletcher to go that far. But it seems to us that the first factor identified by the judge may well be seen as an acceptance by him of that extreme proposition.

44. Mr Fletcher submits that if we were to set aside the judge's order for costs; the result would be that the claimant would receive little or nothing of the modest damages that were awarded in his favour. Given the notorious difficulties of proving causation and damage in this class of litigation, the effect of disallowing part of the claimant's costs in a case like this would be seriously to discourage claimants from making such claims. We acknowledge that this is a possible outcome. But we do not consider that the undoubted existence of the jurisdiction to award damages for negligence in education cases should be seen as a charter for claimants to make allegations against all the professionals who have been involved in a child's education secure in the knowledge that, provided that they succeed in one allegation against one professional, they will recover all their costs from the education authority. CPR 44.3 requires a more nuanced approach than that. We emphasise that the right of a child to claim damages for negligence in this area is not in question. But the interests of the professionals need to be considered as well. It is stressful, as well as extremely time-consuming, for any professional person to have to meet an allegation of negligence. Those advising claimants should consider carefully with their experts which of the professionals it is reasonable to allege were negligent and whose negligence caused provable loss.

45. In the present case, the claimant was successful in relation to the report of Mrs Holt. He was entitled to damages for the loss he suffered as a result of not having the education that he should have had in 1991-94. But he had a very considerable measure of failure in relation to wholly discrete issues. In our judgment, the judge erred in not reflecting that failure in his order for costs. We bear in mind that many of the witnesses who were called in relation to the issues on which the claimant failed would have been called to give evidence even in the claim had been confined to he allegations against Mrs Holt. We also have regard to the fact that the trial would have been only somewhat shorter if the other allegations had not been made. Taking these factors into account, we think that the judge should have awarded the claimant 70% of his costs. To that extent, the appeal on the question of costs is allowed.

Result

46. Save that the appeal is allowed to the extent of reducing the costs awarded to the claimant to 70% of his costs, the appeal is dismissed.

MR EDWARD FAULKS QC (instructed by Veitch Penny) for the Appellant

MR DAVID FLETCHER (instructed by Stephens & Scown) for the Respondent