THE LAW OF EDUCATION

Bulletin Editor
Nicholas Hancox BSc LLM Solicitor
(Nicholas Hancox Solicitors: www.nicholashancox.co.uk)

HEADLINES

The fascinating case of *Woodland v Essex County Council* has reached the Supreme Court and judgment was given in October 2013. The Supreme Court provided guidance on the circumstances in which a non-delegable duty of care may arise and allowed the appeal. The local authority owed the appellant school pupil a non-delegable duty of care even though she was taking part in a school swimming class provided by an independent contractor at a pool run by a different council.

Contents of this Bulletin

Headlines

STATUTORY INSTRUMENTS

National Curriculum Assessment Arrangements

Education (*National Curriculum*) (*Key Stages 1 and 2 Assessment Arrangements*) (*England*) (*Amendment*) *Order 2013* (*SI 2013 No 1513*)

This Order amends the Education (National Curriculum) (Key Stage 2 Assessment Arrangements) (England) Order 2003 (SI 2003/1038) and the Education (National Curriculum) (Key Stage 1 Assessment Arrangements) (England) Order 2004 (SI 2004/2783).

Amendments to SI 2003/1038:

The Explanatory Note says:

> 'Article 2 omits provisions relating to single level tests and to the English writing test. It also amends provisions in relation to science in order to introduce a new biennial test. It makes provision for the moderation of teacher assessment in writing and for determination by the Secretary of State.'

Amendments to SI 2004/2783:

The Explanatory Note says:

> 'Article 3 makes provision for the application of [SI 2004/2783] to maintained nursery schools that have pupils aged 6. It amends the definition of 'core subject topics' so as to include the attainment targets in science and mathematics. It amends article 4(2) to require teacher assessment to determine overall levels as well as levels against each attainment target. It provides that a phonics check must be carried out in respect of those pupils who were not assessed the previous year. It also makes provision for the Secretary of State to make a determination in relation to a pupil's phonics check.'

Local: Pupil Premium Admissions Priority

Lawrence Sheriff School (*Pupil Premium Admissions Priority*) *Order 2013* (*SI 2013 No 1553*)

This Order relaxes and modifies provisions in the School Standards and Framework Act 1998 to enable the Governing Body of Lawrence Sheriff

School (in Rugby) to give priority in their admission arrangements to those pupils in respect of whom the school would receive Pupil Premium. The Order was made on the application of the Governing Body and will cease to have effect on 17 July 2016.

Wales: School Governors' Annual Reports

***School Governors' Annual Reports* (*Wales*) (*Amendment*) *Regulations 2013* (*SI 2013 No 1561*)**

The Explanatory Note says that these Regulations make a number of changes to the School Governors' Annual Reports (Wales) Regulations 2011 (SI 2011/1939) as a consequence of s 94 of the School Standards and Organisation (Wales) Act 2013 coming into force on 4 May 2013:

> 'Section 94 of the 2013 Act gives parents a right to petition for a meeting with the governing body of the school at which their child is a registered pupil. Section 95 of the 2013 Act repeals the duty on a governing body to hold an annual parents' meeting in section 33 of the Education Act 2002.
>
> Paragraphs (2), (3)(*a*) and (*b*) and (4) of regulation 2 of these Regulations omit references in the 2011 Regulations to the duty to hold an annual parents' meeting in section 33 of the Education Act 2002.
>
> Regulation 5 of the 2011 Regulations says that a copy of the school governors' report should be provided free of charge to parents unless one of the exceptions set out in that regulation applies. Paragraph (3)(*c*) of regulation 2 of these Regulations amends regulation 5 of the 2011 Regulations so as to add to the list of exceptions of when a free copy of the governors' report must be provided to parents of registered pupils.
>
> Paragraphs (5) and (6) of regulation 2 of these Regulations amend the 2011 Regulations so as to require a governing body to include certain information relating to its duty to hold a parents' meeting in section 94 of the 2013 Act in its annual report.'

Wales: Protection of Freedoms Act 2012 Commencement

***Protection of Freedoms Act 2012* (*Commencement No 2*) (*Wales*) *Order 2013* (*SI 2013 No 1566*)**

The Explanatory Note says:

> 'Article 2 of this Order brings into force on the 1 September 2013 sections 26 to 28 of the 2012 Act to regulate the biometric information of children and young persons in schools in Wales and further education institutions (FEIs) in Wales.
>
> Section 26 imposes a requirement on schools and FEIs to notify parents and obtain parental consent before processing a child's biometric information.

Section 27 specifies exceptions to the consent requirement and makes further provision about consent and notification.

Section 28 contains definitions relevant to the operation of sections 26 to 28.'

FE and HE: Local

***Education* (*Designated Institutions*) (*England*) *Order 2013* (*SI 2013 No 1572*)**

The Liverpool School of Tropical Medicine is designated as eligible to receive support from funds administered by the Higher Education Funding Council for England.

School Governance (1)

***School Governance* (*Roles, Procedures and Allowances*) (*England*) *Regulations 2013* (*SI 2013 No 1624*)**

School governance is altered yet again. The Regulations, in force from 1 September 2013, deal with the procedures to be adopted by governing bodies of all maintained schools in England and simplify the requirements previously contained in the Education (School Government) (Terms of Reference) (England) Regulations 2000, the Education (Governors' Allowances) (England) Regulations 2003 and in the School Governance (Procedures) (England) Regulations 2003 (all of which are now revoked). They also make amendments to the School Governance (Federations) (England) Regulations 2012, SI 2012/1035, **LOE D [59401]** and the Education (Pupil Referral Units) (Management Committees etc) (England) Regulations 2007, SI 2007/2978, **LOE D [48551]**.

Please refer to **LOE D [61101]** for the full text of the Instrument and to SI 2013/2688 below, which amends these Regulations from 14 November 2013.

Wales: School Admissions Code Appointed Day

***School Admissions Code* (*Appointed Day*) (*Wales*) *Order 2013* (*SI 2013 No 1659*)**

A new School Admissions Code for admissions to schools in Wales came into force on 8 July 2013. The Code applies to admissions to the School Year 2014/2015 and subsequent years and replaces the 2009 Code. According to the Explanatory Note, the main changes in the new Code include:

'(*a*) a requirement that admission authorities' oversubscription criteria includes alongside 'looked after children', 'previously looked after children' as the first criterion in all instances;

(*b*) the setting of common offer dates on which decision letters must be issued within each local authority on a phased basis;

(*c*) a requirement that waiting lists are maintained until 30 September where schools are oversubscribed;

(*d*) additional exceptions to the class size legislation;

(*e*) more opportunities to vary existing admission arrangements without reference to the Welsh Ministers.'

The Code is reproduced in full at **LOE E1(W) [1301]**.

Welsh FE and HE: Local (1)

***Coleg Sir Gâr Further Education Corporation* (*Dissolution*) *and Coleg Sir Gar* (*Designated Institutions in Further Education*) *Order 2013* (*SI 2013 No 1663*)**

The further education corporation established to conduct Coleg Sir Gâr ('Coleg Sir Gâr') is dissolved with effect from 1 August 2013. Coleg Sir Gar ('Coleg Sir Gar') is designated as a new college conducted by a registered company limited by guarantee, for the purposes of s 28 of the Further and Higher Education Act 1992.

***Yale Sixth Form College Further Education Corporation and Deeside College Further Education Corporation* (*Dissolution*) *Order 2013* (*SI 2013 No 1673*)**

Also dissolved with effect from 1 August 2013 are the further education corporations established to conduct Yale Sixth Form College and Deeside College. The property, rights and liabilities of each corporation transfer to Coleg Cambria Further Education Corporation ('Corfforaeth Addysg Bellach Coleg Cambria').

Inspectors of Education, Children's Services and Skills (1)

***Inspectors of Education, Children's Services and Skills* (*No 6*) *Order 2013* (*SI 2013 No 1717*)**

Six individuals are appointed as Her Majesty's Inspectors of Education, Children's Services and Skills with effect from 1 September 2013.

Welsh FE and HE: Local (2)

***Ystrad Mynach College Further Education Corporation* (*Dissolution*) *Order 2013* (*SI 2013 No 1724*); *Coleg Powys Further Education Corporation* (*Dissolution*) *Order 2013* (*SI 2013 No 1727*)**

The further education corporations established to conduct Ystrad Mynach College and Coleg Powys are dissolved with effect from 1 August 2013. Their property, rights and liabilities transfer to Coleg Morgannwg Further Education Corporation and Neath Port Talbot College Further Education Corporation respectively.

FE and HE: Student Support and European University Institute

***Education* (*Student Support and European University Institute*) (*Amendment*) *Regulations 2013* (*SI 2013 No 1728*)**

The Explanatory Note says:

> 'These Regulations amend the Education (Student Support) Regulations 2011 (S.I. 2011/1986) and the Education (Student Support) (European University Institute) Regulations 2010 (S.I. 2010/447).
>
> The amendments to the Student Support Regulations increase elements of the student support package and introduce new fee loan caps for eligible students studying at an institution in England or Wales who are undertaking: (i) an Erasmus year (defined in regulation 2(1) of the Student Support Regulations); (ii) a period of study at an overseas institution; or (iii) a sandwich course. They also amend the definition of Erasmus year and change the conditions which must be satisfied for a course to be designated under the Student Support Regulations. These amendments come into force on 1 September 2013 and apply in respect of an academic year beginning on or after 1 September 2014.
>
> These Regulations also make various other minor amendments to the Student Support Regulations and the European University Institute Regulations which come into force on 1st August 2013…'

Welsh FE and HE: Local (3)

***Swansea Metropolitan University Higher Education Corporation* (*Dissolution*) *Order 2013* (*SI 2013 No 1729*)**

Swansea Metropolitan University is dissolved. Its property, rights and liabilities are transferred to the University of Wales Trinity Saint David.

Welsh FE and HE: The Higher Education Funding Council for Wales

Higher Education Funding Council for Wales* (*Supplementary Functions*) *Order 2013* (*SI 2013 No 1733*), *LOE D*(*W*) *[15601]

Supplementary functions are conferred on the Higher Education Funding Council for Wales. These functions 'relate to the payment of the new fee grant to higher education institutions (and the recovery of overpayments of such grant) and requesting and receiving information connected to the payment of the new fee grant. These functions apply in respect of students starting designated higher education courses on or after 1 September 2013.'

School Performance Information

***Education* (*School Performance Information*) (*England*) (*Amendment*) *Regulations 2013* (*SI 2013 No 1759*)**

The Explanatory Note says:

'These Regulations amend the Education (School Performance Information) (England) Regulations 2007 to omit the reference to the Phonics Document. They also make provision for Academies to report the information about pupils in KS1 set out in the assessment and reporting arrangements to relevant local authorities.

The Regulations also require schools to report subject teacher assessment levels in relation to pupils in KS2 and KS3 for each attainment target in English, mathematics and science, and overall subject levels. This information is to be reported to the authority or the Secretary of State. They omit the requirement to provide information about the second and third key stage assessments to the National Data Collection Agency and the external marking agency.'

Charities Act 2011: Principal Regulators of Exempt Charities

***Charities Act 2011* (*Principal Regulators of Exempt Charities*) *Regulations 2013* (*SI 2013 No 1764*)**

The Secretary of State for Business, Innovation and Skills is prescribed as the principal regulator of further education corporations in England and their connected charities. The Welsh Ministers are prescribed as the principal regulator of further education corporations and connected charities in Wales.

Charities Act 2011 Commencement

***Charities Act 2011* (*Commencement No 2*) *Order 2013* (*SI 2013 No 1775*)**

'This Order brings into force certain provisions of the Charities Act 2011 for the purposes of specified exempt charities in the further education sector. These are Saint David's Catholic College, further education corporations generally, and charities connected to them. … '

Welsh FE and HE: Student Fees, Awards, Qualifying Courses and Persons

***Education* (*Student Fees, Awards, Qualifying Courses and Persons*) (*Wales*) *Regulations 2013* (*SI 2013 No 1792*)**

These Regulations amend the Education (Fees and Awards) (Wales) Regulations 2007 (SI 2007/2310) and the Student Fees (Qualifying Courses and Persons) (Wales) Regulations 2011 (SI 2011/691) and apply to those students starting their courses on or after 1 September 2013.

Regulations 4 and 7 insert reference to St-Barthélemy into the 2007 and 2011 Regulations.

Regulations 5 and 8 amend the 2007 and 2011 Regulations to remove the requirement for non-EU family members of EU nationals to have been ordinarily resident in the EEA for the 3 years immediately preceding the start of their course.

Wales: Local Curriculum

Operation of the Local Curriculum* (*Wales*) *Regulations 2013* (*SI 2013 No 1793*), *LOE D*(*W*) *[15651]

The Explanatory Note states that 'these Regulations make provision in relation to the operation of the local curriculum, introduced by the Learning and Skills (Wales) Measure 2009. They set out how various provisions of education related legislation are applied in relation to pupils and students following courses of study for the purpose of the local curriculum provided at a school or institution other than their own. The Regulations make it clear when they are to be taken as a pupil or student of that other school or institution.'

Wales: School Organisation Code Appointed Day

***School Organisation Code* (*Appointed Day*) (*Wales*) *Order 2013* (*SI 2013 No 1799*)**

This School Organisation Code came into force on 1 October 2013. It applies in Wales to school organisation proposals published on or after 1 October 2013. The Code itself will be reproduced in the December Issue of *The Law of Education*.

Wales: School Standards and Organisation (Wales) Act 2013 Commencement

School Standards and Organisation* (*Wales*) *Act 2013* (*Commencement No 2, Savings and Transitional Provisions*) *Order 2013* (*SI 2013 No 1800*), *LOE D*(*W*) *[15751]

This second commencement order made by the Welsh Ministers under the School Standards and Organisation (Wales) Act 2013 commences further sections of the Act.

The following provisions of the 2013 Act are now in force with effect from the date stated:

Statutory Instruments

Provision of the Act		*Date in force*	*Commenced by*
Section 1	Overview of this Act	5 March 2013	Section 100
Chapter 3 of Part 2 (ss 32–37)	School improvement guidance	4 May 2013	Section 100
Section 38 in so far as it relates to the laying of the School Organisation Code	School Organisation Code	26 April 2013	SI 2013/1000
Section 38 in so far as it is not already in force	School Organisation Code	19 July 2013	SI 2013/1800
Section 39 in so far as it relates to the laying of the School Organisation Code	Making and approval of School Organisation Code	26 April 2013	SI 2013/1000
Section 39 in so far as it is not already in force	Making and approval of School Organisation Code	19 July 2013	SI 2013/1800
Chapter 2 of Part 3 (ss 40–56)*	School organisation proposals	1 October 2013	SI 2013/1800
Chapter 3 of Part 3 (ss 57–63)*	Rationalisation of school places	1 October 2013	SI 2013/1800
Chapter 4 of Part 3 (ss 64–70)*	Regional provision for special educational need	1 October 2013	SI 2013/1800
Chapter 5 of Part 3 (ss 71–77)*	Proposals for restructuring sixth form education	1 October 2013	SI 2013/1800
Chapter 6 of Part 3 (ss 78–83)*	Miscellaneous and supplemental	1 October 2013	SI 2013/1800
Sections 88 to 90	Free breakfasts in primary schools	1 April 2013	Section 100

Section 91	Amendment to power to charge for school meals etc	4 May 2013	Section 100
Sections 92 and 93	School-based counselling	1 April 2013	Section 100
Sections 94 and 95	Parents' meetings	4 May 2013	Section 100
Section 97 in so far as it relates to the laying of the School Organisation Code	Orders and regulations	26 April 2013	SI 2013/1000
Section 97 in so far as it is not already in force	Orders and regulations	4 May 2013	SI 2013/1000
Section 98 in so far as it relates to the laying of the School Organisation Code	General interpretation and index of defined expressions	26 April 2013	SI 2013/1000
Section 98 in so far as it is not already in force	General interpretation and index of defined expressions	4 May 2013	SI 2013/1000
Section 99 partially–see Sch 5 below	Minor and consequential amendments	5 March 2013	Section 100
Section 99 in so far as it relates to the amendments made by Part 2 of Sch 5*	Minor and consequential amendments	1 October 2013	SI 2013/1800
Section 100	Commencement	5 March 2013	Section 100
Section 101	Short title and inclusion as one of the Education Acts	5 March 2013	Section 100
Sch 2*	Regulated alterations	1 October 2013	SI 2013/1800

Sch 3*	Implementation of statutory proposals	1 October 2013	SI 2013/1800
Sch 4 Paras 1 to 7 and 9 to 39 of Sch 4*	Implementation of proposals to change category of school	1 October 2013	SI 2013/1800
Sch 5 Para 31, 33, 34(1) and (3), 35 and 36 of Part 3 of Sch 5 (and section 99 in so far as relating to those paras		4 May 2013	Section 100
Part 2 of Sch 5*	Minor and consequential amendments	1 October 2013	SI 2013/1800

*subject to the savings in article 4 and the transitional provision in article 5 of SI 2013/1800.

School Teachers' Pay and Conditions

***School Teachers' Pay and Conditions Order 2013* (*SI 2013 No 1932*)**

The provisions in section 2 of the School Teachers' Pay and Conditions Document 2013 have effect from 1 September 2013. The document can be found at **LOE E2 [1301]** and on the DfE's website. The 2012 Order is revoked.

School Staffing

***School Staffing* (*England*) (*Amendment*) *Regulations 2013* (*SI 2013 No 1940*)**

These Regulations amend the School Staffing (England) Regulations 2009 (SI 2009/2680, **LOE D [54901]**) by making provision about persons subject to a prohibition order or interim prohibition order. The Explanatory Note says:

> 'Regulation 3 [of the 2009 Regulations] sets out various staff qualifications. These Regulations amend the principal regulations so that when determining whether an appointed person is to be treated as meeting the staff qualification requirements, the governing body must check that the person to be appointed is not a person who is subject to a prohibition order or interim prohibition order. These Regulations also amend Schedule 2 to the principal regulations to provide that for members of staff appointed on or after 2nd September 2013, governing bodies are required to record in a register whether a check has been made that the person is not subject to a prohibition order or interim prohibition order. Further amendments to Schedule 2 to the principal

regulations require the governing body to ensure that they have had written notification from an employment business that a check that a person is not subject to a prohibition order or interim prohibition order has been made and that for members of staff supplied on or after 2nd September 2013, the checks are recorded in the register.'

Welsh FE and HE: Student Support and European Institutions

***Education* (*Student Support and European Institutions*) (*Wales*) *Regulations 2013* (*SI 2013 No 1965*)**

These Regulations amend the Assembly Learning Grants and Loans (Higher Education) (Wales) (No.2) Regulations 2011 (SI 2011/886, **LOE D(W) [12951]**); the Education (Student Support) (Wales) Regulations 2012 (SI 2012/3097, **LOE D(W) [14651]**)); and the Education (European Institutions) and Student Support (Wales) Regulations 2013 (SI 2013/765, **LOE D(W) [14951]**).

The Explanatory Note states that 'the 2011 Regulations and the 2012 Regulations provide for financial support for students who are ordinarily resident in Wales and undertaking designated higher education courses in academic years beginning on or after 1 September 2012 or 1 September 2013 respectively. The 2013 Regulations provide for financial support for students who are ordinarily resident in Wales and undertaking postgraduate courses at the graduate school for international relations established by Johns Hopkins University of Bologna (known as the Bologna Center) and at the College of Europe.'

The principal Regulations are amended to include reference to the new benefit, 'universal credit'. The definition of 'person with leave to enter or remain' in regulation 2(1) of the 2012 Regulations is amended, and the term 'ordinarily resident' is removed from the Schedules to the principal Regulations.

FE and HE: Further Education Teachers' Qualifications

***Further Education Teachers' Qualifications* (*England*) (*Revocation*) *Regulations 2013* (*SI 2013 No 1976*)**

These Regulations revoke, from 1 September 2013, the Further Education Teacher's Qualifications (England) Regulations 2007 (SI 2007/2264). They remove the obligation for teachers to obtain one of the qualifications specified in the 2007 Regulations before they may be employed by a further education institution.

Wales: Free School Lunches and Milk

***Free School Lunches and Milk* (*Universal Credit*) (*Wales*) *Order 2013* (*SI 2013 No 2021*)**

Where a person or their parent is in receipt of universal credit on or after 6 September 2013, they are now within s 512ZB(4) and, as such, are eligible

for free school lunches and milk when a request has been made by them (or on their behalf) that these be provided free of charge.

Faith Schools: Local (1)

***Designation of Schools having a Religious Character* (*England*) *Order 2013* (*SI 2013 No 2029*)**

A number of schools are designated as schools having the following religious character: 13 Church of England, 6 Roman Catholic, 1 Roman Catholic/ Church of England, 2 Jewish and 1 Hindu schools are so designated.

Wales: Education Penalty Notices

Education* (*Penalty Notices*) (*Wales*) *Regulations 2013* (*SI 2013 No 1983*), *LOE D*(*W*) *[15801]

These Regulations prescribe the necessary details for the operation of the penalty notice scheme under s 444A of the Education Act 1996. They apply to penalty notices served on or after 2 September 2013, whether the offence (under s 444 of the 1996 Act) was committed before or after that date.

Wales: Healthy Eating in Schools

Healthy Eating in Schools* (*Nutritional Standards and Requirements*) (*Wales*) *Regulations 2013* (*SI 2013 No 1984*), *LOE D*(*W*) *[15851]

These Regulations set out the types of food and drink that can, and cannot, be provided during the school day and define the nutrient content of school lunches. They apply to local authorities and governing bodies of maintained schools that provide food and drink to pupils of maintained schools, whether they are on school premises or not, and to other persons on school premises with effect from 2 September 2013.They replace the Education (Nutritional Standards for School Lunches) (Wales) Regulations 2001 (SI 2001/1784).

Healthy Eating in Schools* (*Wales*) *Measure 2009* (*Commencement*) *Order 2013* (*SI 2013 No 1985*), *LOE D*(*W*) *[15901]

The Healthy Eating in Schools (Wales) Measure 2009 is commenced as follows:

- section 4: 8 August 2013 (power to make regulations)
- sections 1 to 3 and 5 to 11: 2 September 2013 (remaining provisions).

Education (Wales) Measure 2011 Commencement

***Education* (*Wales*) *Measure 2011* (*Commencement No 2*) *Order 2013* (*SI 2013 No 2090*)**

Chapter 2 of Part 2 of the 2011 Measure (provision about training for governors and clerks and the provision of a clerk to a school governing body) came into force on 19 September 2013.

Curriculum Requirements

***Education* (*Amendment of the Curriculum Requirements*) (*England*) *Order 2013* (*SI 2013 No 2092*)**

Section 84(3) of the Education Act 2002 is amended. 'Computing' is substituted for 'information and communication technology' as a foundation subject for the KS1, KS2 and KS3. Section 85(4) is amended to have the same effect for KS4.

***Education* (*Amendment of the Curriculum Requirements for Second Key Stage*) (*England*) *Order 2013* (*SI 2013 No 2093*)**

Section 84 of the Education Act 2002 is amended to add a foreign language as a foundation subject in the National Curriculum for England for the second key stage. Subsections (4) and (5) are also amended so as to enable foreign languages to be specified by order for the purposes of subsection (4).

Pupil Information

***Education* (*Information About Individual Pupils*) (*England*) *Regulations 2013* (*SI 2013 No 2094*)**

These Regulations, reproduced in full at **LOE D [61201]**, revoke and re-enact with modifications and additions the Education (Information About Individual Pupils) (England) Regulations 2006 (SI 2006/2601). They 'enable the collection of information in relation to individual pupils by requiring schools to provide such of the information specified in Schedule 1 to either the local authority or the Secretary of State as is so requested'.

Biometrics in Schools

***Protection of Freedoms Act 2012* (*Commencement No 9*) *Order 2013* (*SI 2013 No 2104*)**

Sections 26 to 28 of the Act came into force on 1 September 2013. The Explanatory Note states:

> 'Section 26 of the Act imposes a requirement on schools, 16 to 19 Academies and further education institutions to notify parents and obtain parental consent before processing a child's biometric information.
>
> Section 27 specifies exceptions to the consent requirement and makes further provision about consent and notification.
>
> Section 28 contains definitions relevant to the operation of sections 26 to 28.'

Consequential amendments and repeals are also brought into force.

Wales: School Governance

***Government of Maintained Schools* (*Training Requirements for Governors*) (*Wales*) *Regulations 2013* (*SI 2013 No 2124*)**

The training requirements for governors at maintained schools in Wales are set out in these Regulations with the content of the training set out in documents published by the Welsh Ministers. The Regulations came into force on 20 September 2013 and are reproduced at **LOE D(W) [16051]**, along with the explanatory note.

***Government of Maintained Schools* (*Clerk to a Governing Body*) (*Wales*) *Regulations 2013* (*SI 2013 No 2127*)**

These Regulations, which came into force on 20 September 2013, set out requirements as to clerk to the governing body of a maintained school. They require a local authority that maintains a school to provide the governing body with a suitable person to appoint as a clerk within 16 weeks of being requested by the governing body to do so and may charge a fee to cover the cost of providing the clerk. They also make provision as regards training of the clerk.

This instrument is reproduced at **LOE D(W) [16101]**.

Information as to Provision of Education

***Information as to Provision of Education* (*England*) (*Amendment*) (*No 2*) *Regulations 2013* (*SI 2013 No 2149*)**

These Regulations amend the Information as to Provision of Education (England) Regulations 2008 (SI 2008/4).

The Explanatory Note says:

> 'These Regulations amend the requirement for local authorities to provide information on the total numbers of applications made, preferences expressed and offers made for school places in respect of children living in their area, to a requirement that local authorities provide this information in respect of each individual child. They extend the requirement that local authorities provide this information for secondary schools to include the same information about places in primary schools, and to coincide with the Primary National Offer Day on 16 April. Local authorities are required to provide this information no later than five working days after the relevant National Offer Day.'

Wales: Local: Education Endowments

***Diocese of Swansea and Brecon* (*Education Endowments*) (*Llanfihangel Nant Brân*) (*Wales*) *Order 2013* (*SI 2013 No 2155*)**

Swansea and Brecon Diocesan Trust is appointed as trustee of the endowment of the educational foundation known as the Llanfihangel Nant Brân

(more recently known as Llanfihangel Nant Brân Village Hall) School Foundation and new provision is made as to the use of that endowment.

Faith Schools: Local (2)

Designation of Schools Having a Religious Character (Independent Schools) (England) Order 2013 (SI 2013 No 2162)

Some independent schools are designated as schools having the following religious character: 5 Church of England, 5 Islam, 4 Christian, 3 Jewish, 2 Sikh, 1 Orthodox Jewish and 1 Sunni Deobandi school.

The Order also lists specified entries from previous Orders which are now revoked.

National Curriculum

Education (National Curriculum) (Languages) (England) Order 2013 (SI 2013 No 2230), LOE D [61251]

This Order revokes and replaces the Education (National Curriculum) (Modern Foreign Languages) (England) Order 2008 (SI 2008/1766). It sets out the meaning of a 'foreign language' and a 'modern foreign language' for the purposes of ss 84(A4) and (4) of the Education Act 2002. In relation to the second key stage, a foreign language means any foreign language. In relation to the third key stage, a modern foreign language means any modern foreign language.

Education (National Curriculum) (Attainment Targets and Programmes of Study) (England) Order 2013 (SI 2013 No 2232), LOE D [61301]

The Explanatory Note says:

> 'This Order makes provision for a new National Curriculum from 2014 by giving effect to the Framework Document, which contains new programmes of study and attainment targets for core and other foundation subjects at all four key stages (except that there are no attainment targets at KS4).
>
> It also provides for the revocation of those Orders (listed in the Schedule) which contain the current programmes of study and attainment targets for each core and other foundation subject at all four key stages.
>
> The exceptions to the revocation are in respect of the core subjects (mathematics, English and science) for pupils who are in the final year of the KS1, the final year of the KS2 or the KS4 before 1st August 2015, to whom the Framework Document does not apply.
>
> The attainment targets in the P Level Document (instead of the Framework Document) apply to a pupil with special educational needs who is doing a core or other foundation subject in the first, second or

third key stage on or after 1st August 2014 and during the relevant key stage is working at a level described within the P Level Document.

A copy of the Framework Document can be accessed at this web link:

www.gov.uk/dfe/nationalcurriculum

A copy of the P Level Document can be accessed at this web link:

http://education.gov.uk/schools/teachingandlearning/curriculum/g00227592/p-scale '

FE and HE: Designated Institutions

***Education* (*Designated Institutions*) (*England*) (*No 2*) *Order 2013* (*SI 2013 No 2490*)**

The National Film and Television School is designated as eligible to receive support from funds administered by the Higher Education Funding Council for England.

Wales: Admission Appeal Arrangements

***Education* (*Admission Appeals Arrangements*) (*Wales*) (*Amendment*) *Regulations 2013* (*SI 2013 No 2535*)**

These Regulations amend the Education (Admission Appeals Arrangements) (Wales) Regulations 2005 (SI 2005/1398) and apply to all appeals heard on or after 1 January 2014. The Explanatory Note says:

'Regulation 2 substitutes a new regulation 6 in the 2005 Regulations. The new regulation provides that appeal panels may consider whether admission arrangements are unlawful because they do not comply with either the 1998 Act, or the mandatory provisions of any school admissions code (issued under section 84 of the 1998 Act). When a child is refused a place at school on the basis that to admit the child would breach the statutory limit on infant class size unless a relevant measure were taken to avoid that breach … new regulation 6 provides that a panel may uphold such appeals if it is satisfied that either the child would have been offered a place if the relevant admission arrangements had been properly implemented, or if they had been lawful, or if the panel is satisfied that the decision of the admission authority was unreasonable.

Regulation 2 also substitutes a new regulation 7 so that allowances that may be paid to panel members reflect the rates applicable to Community Councillors under Part 8 of the Local Government (Wales) Measure 2011.'

Inspectors of Education, Children's Services and Skills (2)

***Inspectors of Education, Children's Services and Skills* (*No 7*) *Order 2013*(*SI 2013 No 2596*)**

A further 6 inspectors are named with effect from 10 October 2013.

Designation of Rural Primary Schools

***Designation of Rural Primary Schools* (*England*) *Order 2013* (*SI 2013 No 2655*)**

This Order designates those primary schools in England which are rural primary schools for the purpose of s 15 of the Education and Inspections Act 2006. It does so by reference to a list of such schools published on the Department for Education's website: www.education.gov.uk/schools/leadership/schoolorganisation/a00192440/the-designation-of-rural-primary-schools-2013

The Designation of Rural Primary Schools (England) Order 2012 (SI 2012/1197) is revoked.

School Governance (2)

***School Governance* (*Roles, Procedures and Allowances*) (*England*) (*Amendment*) *Regulations 2013* (*SI 2013 No 2688*)**

Executing a rather fast U-turn, these Regulations amend from 14 November 2013 the School Governance (Roles, Procedures and Allowances) (England) Regulations 2013 (SI 2013/1624) which had come into force on 1 September 2013. The Explanatory Note says:

> 'The amendment at Regulation 2 re-introduces a requirement that reports or other papers to be considered at meetings of governing bodies and meetings of committees of governing bodies are circulated seven days in advance of such meetings. This requirement was contained in the School Governance (Procedures) (England) Regulations 2003 that were revoked by the [first lot of] 2013 Regulations.
>
> The amendment at Regulation 3 provides that governing bodies may approve alternative arrangements for members of committees of governing bodies to participate or vote at meetings of the committee, including but not limited to by telephone or video conference.'

CASES DECIDED AND REPORTED

Teachers: Human Rights; Safeguarding Children: CRB Checks

R* (*on the application of L* (*v Chief Constable of Cumbria Constabulary [2013] EWHC 869* (*Admin*); *judgement on 19 April 2013

A teacher in his mid-forties successfully challenged disclosure in an Enhanced Criminal Record Bureau (ECRB) check as disproportionate and unjustifiable infringements of his Article 8 rights.

The facts of the case related to allegations made by an 18-year-old that she had had a chance encounter in a pub with L, who was a teacher at her school, and that he had hugged her inappropriately and propositioned her, offering her £200 to go home with him.

The police decided to take no action, the ISA decided it was not appropriate to include him on the Children's Barred List or on the Adults' Barred List and the GTCE decided there was no case to answer. But the ECRB disclosure had been 'as severe for L's employment prospects as if he had been convicted of a serious offence of sexual misconduct and placed on the Sex Offenders' Register: it is a killer blow and its effects are likely to be long lasting'. Even if the allegations were true, the risk disclosed by the one episode was slight and to a very limited class of persons in tightly defined circumstances.

School Admissions: Infant Class Size Appeals

R* (*on the application of DD*) *v Independent Appeal Panel of the London Borough of Islington [2013] EWHC 2262* (*Admin*); *judgment on 25 July 2013

The issue in this case was the correct test to be applied by an independent appeal panel where the admission of a pupil would not breach the infant class size rule in the child's first year at the school, but would probably do so in future years. The judge in the High Court held that the IAP had been right in considering future infant class prejudice:

> '**[5]** The claimant contends that the Panel was wrong to treat the claimant's appeal as an infant class size appeal under section 4 of the 2012 version of the Schools Admissions Appeals Code (The Appeals Code). The claimant says that, because the limit on infant class sizes would not have been breached in her son's first academic year at the school if he had been admitted, her appeal should have been treated as an ″ordinary″ appeal pursuant to section 3 of the Appeals Code and in doing so she relies heavily on the absence in the Appeals Code of any explicit reference to any requirement to consider the possibility of both current and future infant class size prejudice in deciding whether to comply with a parental preference, unlike in the case of the previous statutory scheme and indeed an earlier edition of the Appeals Code issued in 2009.

…

[49] To my mind, the answer lies in a close reading of the wording in section 3 and 4 of the Appeals Code and the context in which it sits rather than comparing the text of the 2012 Appeals Code with earlier versions or indeed now repealed plainly transitional provisions drafted using a very different technique. In this regard, that infant class sizes should comprise no more than 30 children in reception, years 1 and 2 is plainly an important statutory policy. When admission authorities consider the admission of a child to reception and years 1 and 2 any prejudice arising out of a breach is to be taken into account and Panels are enjoined to apply a strict test when considering appeals against a decision by an admissions authority to refuse to admit a child on the ground that to do so would give rise to prejudice arising out a breach of the infant class size limit. It would to my mind be wholly inconsistent with the context to construe the 2012 Appeal Code as requiring panels when considering whether they would be in breach of the limit on infant class size to look only at a breach that is likely to occur during the first academic year that the child spends at the school. Nor is such a construction necessary, accepting as I do the force of the submissions made on behalf of the defendant and more particularly the Secretary of State to which I have referred above. The ordinary and natural meaning of the words used in the 2012 Appeals Code to my mind supports the interpretation put on them by the defendant and the Secretary of State. Thus the words used plainly envisaged that a Panel is required to exercise a judgement as to what is to happen in the future and does not place any temporal limitation on when the breach of the infant class size limit might arise. That interpretation is also more coherent and better reflects the statutory policy that infant class size limits take priority over parental preference and does not, by contrast with the interpretation contended for by the claimant, require additional words to be read into the Appeals Code.

…

[52] It follows in my judgment that the panel correctly treated the appeal as an infant class size appeal and it properly directed itself that, when considering whether the admission of the claimant's son to T primary school would breach the infant class size limit, it was to look not just at the academic year when the claimant's son would first enter T primary school but also the subsequent two academic years.'

FE and HE: Funding of Tuition Fees; Former Looked After Children

R (on the application of Kebede) v Newcastle City Council [2013] EWCA Civ 960; decision on 31 July 2013

The appellant local authority refused to fund university fees for two claimant brothers who were former looked after children. It lost the judicial review case in the High Court and then appealed unsuccessfully to the Court of

Appeal. The questions to be decided were: (1) whether the payment of tuition fees counted as expenses for the purposes of the legislation; (2) whether the local authority was entitled to take into account restrictions on resources; and (3) whether immigration status was irrelevant.

At issue were the proper construction and application of ss 23C(4) and 24B(2) of the Children Act 1989. Section 23C(4) says (inter alia) that it is the duty of the local authority to give a former relevant child assistance of the kind referred to in s 24B(2), to the extent that his welfare and his educational or training needs require it. Section 24B(2) says that the relevant local authority may give assistance to an eligible person by (*a*) contributing to expenses incurred by the person in question in living near the place where he is, or will be, receiving education or training; or (*b*) making a grant to enable him to meet expenses connected with his education or training.

Sir Stanley Burnton in the Court of Appeal did not accept the argument that the phrase 'expenses connected with his education' did not extend to the fees charged by an educational institution, but was limited to incidental expenses incurred for the purposes of education.

> '**[13]** … However, I agree with the judge that in the present connection, the natural meaning of "expenses connected with his education" includes the major expense, namely the tuition fees. Moreover, I can readily understand why Parliament should have imposed a duty in relation to former relevant children where otherwise there is a discretion. It is highly unlikely, to say the least, that a former relevant child, who by definition was looked after by his local authority until the age of 18, could have the resources to pay any of the costs of tertiary education, or any fees or other costs of training, and equally unlikely that a former relevant child could have such resources. Section 24B(2) and (5) would appear to confer no practical benefit on former relevant children unless they extend to tuition fees. Lastly, it is difficult to see the point of the requirement in section 23C(4) that the prospective student's "welfare and his educational or training needs require" the assistance in question if it is limited to the costs of books and stationery and the like. That requirement most obviously relates to what is central and essential to the education or training in question.
>
> …
>
> **[17]** … Parliament has prescribed what is to be taken into account in assessing need and the duty to make provision. The assistance is to be given "to the extent that [the former relevant child's] welfare and his educational or training needs require it". This leaves no room for a consideration of the resources of the local authority.
>
> **[18]** Lastly, the test is objective: assistance is to be given to "the extent that [the former relevant child's] welfare and his educational or training needs require it". Whether and to what extent his welfare and his educational or training needs do require the assistance in question must be decided by the local authority, subject to conventional judicial

review principles. Clearly, it requires input from the former relevant child, but the decision is that of the local authority. The assessment of the availability of the resources of a local authority is far more subjective. It may involve political questions as to the priority to be given to some items of expenditure as opposed to others, and similar questions as to the level of council tax to be levied or the loans to be taken.

[19] For these reasons, I would reject Newcastle's contention that its resources are a relevant factor in its deciding whether to make a grant pursuant to section 24B(2) of the Act.

[20] I would also reject the contention made on behalf of the Respondents by their solicitors in correspondence that the immigration status of a former relevant child is irrelevant to the question whether his welfare and his educational needs require the assistance in question. Taken to its extreme, this would mean that a person whose leave to remain expires before, or shortly after, the commencement of a university course, with no likelihood of his leave being extended, has an educational need for a course that he cannot complete. In my judgment, immigration status is manifestly relevant.'

Appeal dismissed.

Special Educational Needs

WH v Warrington Borough Council (SEN)[2013] UKUT 0391 (AAC); decision on 7 August 2013

The question in dispute in this appeal to the Upper Tribunal was whether the First-tier Tribunal had correctly dealt with the handling of the parents' preferred choice of an independent school (WHS) to be named in Part 4 of their child's Statement of Special Educational Needs. The First-tier Tribunal had decided that placement at that school was 'much more expensive' than a placement at the maintained special school (GLS) named by the Council. The appeal was complicated by the complexity of the child's needs, and also by some additional aspects of the case. Upper Tribunal Judge, David Williams, said:

'the case must be decided in the light of the new arrangements introduced in 2013 for funding special education in both schools funded by a local authority and independent schools. It must also be decided in the context of a child who has been accommodated by the local authority for a number of days each week under section 20 of the Children Act 1989. A factual complication in this case was that the care provided under the 1989 Act was in part provided by the same establishment as that which the parents wished to have named as the school in Part 4, namely WHS.'

Dismissing the appeal, he concluded:

'**80** I therefore respectfully follow what I consider to be the authority of the House of Lords in Burridge [*Burridge v London Borough of Harrow*,

[2000] All ER (D) 73, HL, **LOE F [2000.15]**] and the Court of Appeal in *Oxfordshire v GB* [*Oxfordshire County Council v GB* [2001] EWCA Civ 1358] read together with the recent comments of the Court of Appeal in *Shurvington* [*Dudley Metropolitan Borough Council v Shurvington* [2012] EWCA Civ 346, **LOE F [2012.4]**] and do not follow the decision in the *Lewisham* case [*O v Lewisham London Borough Council* [2007] EWHC 2130 (Admin)] or the decisions that have followed that decision at this level. Putting it another way, for the above reasons I take the narrow view not the wide view of the proper interpretation of "unreasonable public expenditure" in section 9 of the Education Act 1996.

I accordingly decide that in this case the First-tier Tribunal was entitled to leave out of account the respite care and other costs that were met from public expenditure but were not met from the education budget of the Council

Summary

81 My conclusion is that the decision of the First-tier Tribunal is to be analysed by reference to the evidenced costs to the Council's education budget in placing B at GLS or WHS and not by reference to respite or other non-educational costs. It may be that the First-tier Tribunal decision was somewhat compacted and the Tribunal could better have separated out the strands in its thinking. But the essential point is whether its outcome decision is or is not materially affected by any error in law on its part. I can see no basis on which, on a proper analysis of the law, the First-tier Tribunal would have reached a different conclusion to the conclusion it did reach that the appeal failed before it for the reasons on which the Council relied. In particular, the First-tier Tribunal was correct in not taking into account the respite and other costs that did not come from the Council's education budget. As that was the only issue before me, I must dismiss the appeal.'

Buckingham County Council v ST (SEN) [2013] UKUT 468 (AAC); decision on 17 September 2013

The decision of the First-tier Tribunal to award costs to a mother who appealed against the Statement of Special Educational Needs made in respect of her son was set aside. The judge in the Upper Tribunal said this:

'**23** I have set aside the costs order because the judge failed to take sufficient account of the fact that the issue of PL School had never been fully considered. The local authority did not accept that its argument was not sustainable. It settled by a compromise that was acceptable to both parties and to the tribunal …

24 The solicitors for Charlie's mother say that this was not a concession in any meaningful sense as the tribunal had effectively told the local authority that it would lose on this point. I do not accept that. It was a compromise …

25 The judge expressed the tribunal's views at the hearing and has maintained that position in her costs decisions, but that position has never been the subject of full argument. I consider that she was not entitled to form the opinion that it was unreasonable to adopt and pursue the preference PL School …

26 Moreover, I do not accept that it will always be unreasonable to present and pursue an argument that the tribunal decides it would be perverse to accept. The test in the case law is not one that is applied with the benefit of hindsight. Applying the Court of Appeal's acid test does not require either that approach or that result. The local authority has presented arguments in response to the tribunal's concerns. The judge does not accept that they were practical in the circumstances, but that does not mean that they are not relevant to the issue of whether the conduct of the proceedings was unreasonable.

Conclusion

27 In conclusion, I consider that the judge was not entitled in the circumstances of this case to characterise the conduct of the local authority as unreasonable.

28 There are two lessons to be taken from this case. One is that judges should be cautious in how they express concerns to the parties. The other is that they should make appropriate allowance when judging the reasonableness of a party's conduct for the fact that the proceedings were compromised with the result that arguments were left undeveloped and unexplored in the context of a full analysis of a child's needs. This does not mean that a party is entitled to pursue a hopeless argument for tactical advantage. That is not what has happened in this case.'

Buckinghamshire County Council v HW (SEN) [2013] UKUT 0470 (AAC); decision on 20 September 2013

This case raised issues on the interpretation and application of the legislation governing a request for an assessment when a child is about to move from primary to secondary education, and considered how a local authority should act pending a challenge to the First-tier Tribunal's decision. The judge in the Upper Tribunal said this:

'**14** The issue of fact was whether Eloise had a learning difficulty that called for special educational provision. The issue for judgment was whether it was necessary to determine what that special educational provision was. Those few words give rise to a host of problems of interpretation and application.

…

18 Whether something is necessary assumes a reason and a purpose. The reason and purpose is obviously to identify whether a child needs further educational provision and, perhaps, a statement of special educational needs.

19 Although the assessment must be made on the basis of evidence and that evidence will relate to the past and present, the purpose of an assessment looks to the future. This led me to ask in my grant of permission to appeal whether the statutory language allowed the tribunal to look to the future. That may not make much difference when the child is not in or approaching a transitional phase. But Eloise was.

…

21 The statutory test inevitably directs attention to something that will happen after the assessment has been made. The assessment is made for a purpose. That purpose involves identifying provision necessary to meet a child's needs. The assessment cannot realistically limit itself to the immediate present. When there will be a change of circumstances in the near future, it is impossible to ignore that future. … I can see no reason in principle why it should not be permissible to take account of the future, subject to the practical evidential problems that this may involve. There is some support for this, as Ms McConnell pointed out, in paragraph 5.66 of the Code, which refers to the importance of planning ahead when transferring schools. It would be strange if, in the midst of so much statutory provision for a child with special educational needs, there were no provision requiring or even allowing for those needs in a new school to be anticipated, at least to the extent that that is possible.

…

23 Mr Bowers asked me to provide guidance for local authorities on how they should proceed if they wished to challenge a decision of the First-tier Tribunal. He was concerned that implementing a decision that might be overturned could waste resources.

24 The legal position, as I said at the hearing, is clear. A decision is binding as soon as it is promulgated by the First-tier Tribunal. That tribunal has power to suspend the effect of its decision under rule 5(3)(*l*) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) pending the determination of an application for permission to appeal. The Upper Tribunal has power to suspend under rule 5(3)(*m*) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698). The sooner that a local authority applies for permission to appeal to either tribunal, the sooner an application for suspension can be considered. This is not a perfect solution to the problem identified by Mr Bowers, but it is the best the law can offer.'

Negligence: Occupiers' Liability

West Sussex County Council v Master Lewis Pierce* (*A Child by his Litigation Friend Mrs Annette Pierce*) *[2013] EWCA Civ 1230; judgment on 16 October 2013

The Respondent child was injured on school premises during some mischief with his brother near a water fountain. He injured his thumb when he

accidentally struck the underside of the water fountain bowl. The trial judge held that the defendant local authority had been negligent, but the decision was overturned on appeal.

In the Court of Appeal Sharp, LJ, in considering whether the Appellant had complied with the duty in s 2 of the Occupiers' Liability Act 1957, said this:

> '**17** The question which has to be addressed therefore is whether as a matter of objective fact, visitors to the School were reasonably safe in using the premises, including for this purpose, the water fountain, bearing in mind of course that children do not behave like adults, and are inclined to lark around.
>
> **18** In my view the answer to that question is yes. The water fountain was reasonably safe, or putting it another way, the evidence did not establish that it was not. This court looked at and felt the underside edge of the water fountain. I do not think it can be described as sharp, let alone extremely sharp. It was not possible for example to cut a finger by pressing on it. But whether it could be described as sharp or not, by no stretch of the imagination could it be said to constitute a danger to children. Certainly, the edge could have been bevelled, or padded, and had that been done, the claimant might not have injured his thumb. But to say that misses the point it seems to me. The School was not under a duty to safeguard children against harm under all circumstances. Each case is of course fact sensitive, but as a matter of generality, the School was no more obliged as an occupier to take such steps in respect of the water fountain than it would be in respect of any of the other numerous ordinary edges and corners or surfaces against which children might accidentally injure themselves whilst on the premises. The law would part company with common sense if that were the case, and I do not consider that it does so.
>
> **19** It is of course unfortunate that this little boy hurt his thumb in what might be described a freak accident, but such things happen. This was not a case where the appellant was liable in law for his injury and in my opinion the appeal must therefore be allowed.'

Appeal allowed.

Exclusion: IAP Failure to Give Effect to Parties' Agreement

SA (by his Litigation Friend, MA) v London Borough of Camden Independent Appeal Panel [2013] EWHC 3152 (Admin); judgment given on 18 October 2013

The Claimant, SA, was permanently excluded from school when he was in Year 9 following a rapid deterioration in his behaviour. At that time, he did not have a Statement of Special Needs, but his Head Teacher considered that he had needs which required support and which could not be met at that school. After taking advice, he permanently excluded SA in an attempt to

ensure that SA could be assessed and access appropriate support, which, as an out of area pupil, SA had been unable to obtain up to that point. The Governors confirmed the permanent exclusion and SA's mother, MA, appealed on SA's behalf. MA was not seeking reinstatement of her son at the school, but did not want his record to show that he had been permanently excluded.

The Head teacher, Chairman of the Governors and MA's solicitor reached agreement and sent a joint letter to the IAP. The terms of the agreement said:

> 'It is common ground between the parties that SA's special educational needs will be more appropriately addressed at an alternative provision and that he will not be returning to H School.
>
> We have therefore reached an agreement as to how this appeal should be disposed of and would respectfully propose that the permanent exclusion is overturned on the basis that SA is not reinstated due to exceptional circumstances. We would respectfully request that a direction is made accordingly by the Panel.
>
> The parties are all legally represented and have reached this compromise with the benefit of independent legal advice. Given the agreement reached, the school does not propose to file any evidence. The parents' representative has already filed submissions prior to the agreement being reached.
>
> Given that the parties have reached an agreement, it is suggested that neither party should attend the Panel hearing. This is with a view to conserving public resources and no disrespect is intended to the Independent Appeal Panel …'

When the IAP came to consider the case, they decided that they were not bound by the agreement and, rather than deciding the matter on written submissions, as the parties expected, they heard from the local authority representative who was present. They decided to uphold the exclusion.

In the judge in the High Court said this:

> '**28** The head teacher of H School, in dealing with the claimant, was faced with a sensitive and difficult issue. With knowledge and sensitivity, he sought to obtain appropriate assessment and provide adequate support for the particular needs of the claimant. He is to be commended for the consideration which he gave to this matter. By December 2011 by reason of the claimant's conduct and because of his inability to obtain appropriate assessment and support for the claimant, the head teacher believed, and was independently advised, that the only course open to him was one of permanent exclusion.
>
> **29** Nothing better reflects his predicament and the view he ultimately took than the evidence which he gave to the Governing Body on 17 January 2012. He said that the School had tried its best to avoid permanent exclusion, contact had been made with both Camden and Brent in an effort to avoid it but the School had been unable to obtain a

package of support. The School was happy to find a resolution that would ensure that permanent exclusion was not the only option. The head teacher described it as perverse that the School could not find a solution. A managed move to the PRU was attempted but it was only possible if the claimant was a resident in the borough, he was not. The head teacher referred to the inflexibility of the system and of a more humane approach. He recognised that the permanent exclusion was as a result of continued breaches of the School Behaviour Policy and the risk which the claimant posed to the welfare of adults and students in the school, but balanced against that, the need for a proper assessment and thereafter support for the claimant.

30 The exclusion letter dated 12 December 2011, written by the head teacher refers to his hope of moving the claimant for assessment and more therapeutic support without permanent exclusion. He identifies the fact that it was upon the advice of Brent's Pre-Exclusion Officer that in order to access appropriate support through Brent's Pupil Referral Unit, he was permanently excluding the claimant as it was the only way in which his needs could be assessed and ultimately met. The letter and the minutes of the meeting of the Governing Body were before the IAP at their meeting as was the covering email of the head teacher dated 27 February 2012 which reflected his concerns and identified the fact that the proposed agreement was believed to be in the best interests of the claimant.

31 It is common ground between the claimant and the defendant that it was only the IAP who had the power to exercise the "exceptional circumstances" provision identified in Regulation 6(6)(*c*) of the 2002 Regulations [Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002, SI 2002/3178]. The Governing Body of the School had only two decisions open to it: to uphold the exclusion or direct the pupil's reinstatement. The claimant and the School sensibly sought independent legal advice. Having done so, the course proposed reflected the discretion accorded to the IAP by Regulation 6(6)(*c*) of the 2002 Regulations.

32 The matter came before the IAP. In their decision letter, reference is made to the fact that they received "legal advice". This advice came from the clerk to the IAP who is not a lawyer. The Court was informed that the clerk would have received "training" in order to advise the IAP.

33 The 2008 Guidance [*Improving behaviour and attendance: guidance on exclusion from schools and Pupil Referral Units*] did not provide for the situation which presented itself to the IAP when it was asked to consider and approve the proposed agreement. If there were doubts on the part of the IAP and its clerk as to what to do in the absence of specific Guidance, the prudent course would have been to have adjourned the matter and invited representations from the parties and, if necessary, sought independent advice from a qualified lawyer.

34 The agreement was signed on behalf of the three relevant parties: the claimant, the School, the Governing Body. Given the limited role of the local authority, in particular that it was no part of its remit to propose or endorse a particular conclusion, it would not have been appropriate for it to be a signatory to the agreement. Thus it was that the IAP was given the agreement, informed that it was considered to be in the best interests of the claimant and that the relevant parties had obtained legal advice. In addition, the IAP was provided with the head teacher's letters and minutes of the Governing Body's meeting which clearly demonstrated the thinking and the purpose of the agreement. Presented with all of the above, the IAP, in effect, ignored the agreement.

35 In its detailed decision letter, the IAP made just two references to the agreement. They gave no indication as to what consideration had been given to its terms, nor the motivation behind it. No reason was given as to why they chose not to follow an agreement said to be in the best interests of the claimant and reached by all relevant parties who had received independent legal advice. On the defendant's behalf it is said that the mother knew what decision had been made and why. In my view, both counsel on behalf of the defendant and the IAP at its meeting, failed to grapple with the real issue, namely, the motivation and reasoning behind the agreement which represented the concern and thinking of all relevant parties.

36 As to the defendant's contention that in choosing not to attend the meeting, the claimant's solicitor took a risk the result of which cannot be attributed to the IAP. I am of the view that this misses a fundamental point, namely, that if the IAP were not intending to give effect to such an agreement, it would be reasonable to expect the IAP to give that indication and its reasons for so doing in order to allow the parties to make representations upon such a course.

37 No good or even adequate reason was given by the IAP for not giving effect to the agreement. The IAP sidestepped the issue, it wholly failed to address the reasoning behind the agreement. Such a course is particularly concerning when the agreement was before the IAP as representing the best interests of the claimant. In my view, there was an unlawful failure on the part of the IAP to provide reasons for not giving effect to the agreement between the parties. The direction, from whosoever it came, that the IAP was required to reach its own decision rather than give effect to the agreement between the parties unless there was good reason not to do so, was a misdirection. Accordingly upon Ground 1, I quash the decision of the IAP and remit the matter for a hearing before a new Panel.

Ground 2

38 In her email dated 27 February 2012, the clerk to the Court stated that the "determination of the appeal will therefore be on the basis of written submissions". This did not happen. Oral representations were made by the local authority albeit they could not make representations

as to the course to be taken by the IAP. Upon this basis alone, Ground 2 is made out. Given my findings upon Ground 1, namely that having formed a view that they would not follow the agreement, the IAP should have adjourned the hearing in order to receive representations upon such a course, I also find that there was procedural unfairness. Accordingly, I grant permission to bring proceedings for judicial review upon Ground 2. I find that the challenge is made out and grant the relief sought.'

Negligence: Non-Delegable Duty of Care: Supreme Court

Woodland* (*Appellant*) *v Essex County Council* (*Respondent*) *[2013] UKSC 66; judgment given on 23 October 2013

The issue in this case was whether or not the Respondent County Council owed the Appellant school pupil a non-delegable duty of care when she was taking part in a swimming class provided by an independent contractor at a pool run by the District Council. The decision in the High Court was reported in Bulletin 93, and that of the Court of Appeal in Bulletin 95 and at **LOE F [2012.2]**.

The judges in the Supreme Court unanimously allowed the appeal. The judge's order striking out the allegation of a non-delegable duty was to be set aside.

In the leading judgment, Lord Sumption said this:

'**[22]** The main problem about this area of the law is to prevent the exception from eating up the rule. Non-delegable duties of care are inconsistent with the fault-based principles on which the law of negligence is based, and are therefore exceptional. The difference between an ordinary duty of care and a non-delegable duty must therefore be more than a question of degree …

[23] In my view, the time has come to recognise that Lord Greene in *Gold* [*Gold v Essex County Council* [1942],2 KB 293] and Denning LJ in Cassidy [*Cassidy v Ministry of Health* [1951] 2 KB 343] were correct in identifying the underlying principle, and while I would not necessarily subscribe to every dictum in the Australian cases, in my opinion they are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care. If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features:

"(1) The Claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the Defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

(2) There is an antecedent relationship between the Claimant and the Defendant, independent of the negligent act or omission itself, (i) which

places the Claimant in the actual custody, charge or care of the Defendant, and (ii) from which it is possible to impute to the Defendant the assumption of a positive duty to protect the Claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the Claimant. It is characteristic of such relationships that they involve an element of control over the Claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(3) The Claimant has no control over how the Defendant chooses to perform those obligations, ie whether personally or through employees or through third parties.

(4) The Defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the Claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the Defendant's custody or care of the Claimant and the element of control that goes with it.

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the Defendant and delegated by the Defendant to him."

[24] In *A* (*Child*) *v Ministry of Defence* [2004] EWCA Civ 641, [2005] QB 183, at para 47, 82 BMLR 149 Lord Phillips of Worth Matravers MR, delivering the leading judgment in the Court of Appeal, suggested that "hitherto a non-delegable duty has only been found in a situation where the Claimant suffers an injury while in an environment over which the Defendant has control". This is undoubtedly a fundamental feature of those cases where, in the absence of a relevant antecedent relationship, the Defendant has been held liable for inherently hazardous operations or dangers on the public highway. But I respectfully disagree with the view that control of the environment in which injury is caused is an essential element in the kind of case with which we are presently concerned. The Defendant is not usually in control of the environment in which injury is caused by an independent contractor. That is why as a general rule he is not liable for the contractor's negligence. Where a non-delegable duty arises, the Defendant is liable not because he has control but in spite of the fact that he may have none. The essential element in my view is not control of the environment in which the Claimant is injured, but control over the Claimant for the purpose of performing a function for which the Defendant has assumed responsibility. The actual result in *A* (*A Child*) was therefore correct. The Ministry of Defence was not responsible for the negligence of a hospital with whom it contracted to treat soldiers and their families. But the true reason was the finding of the trial judge (quoted at para 28 of Lord Phillips' judgment) that there was 'no sound basis for any feeling …that secondary treatment in hospital …was actually provided by the Army (MoD) as opposed to arranged by the army'. There was therefore no delegation of any function which the

Ministry had assumed personal responsibility to carry out, and no delegation of any custody exercised by the Ministry over soldiers and their families. For exactly the same reason, I think that the Court of Appeal was right in *Myton v Woods* (1980) 79 LGR 28 to dismiss a claim against a local education authority for the negligence of a taxi firm employed by the authority to drive children to and from school. The school had no statutory duty to transport children, but only to arrange and pay for it. As Lord Denning MR put it, the authority was not liable for an independent contractor "except he delegates to the contractor the very duty which he himself has to fulfil." Likewise, the Court of Appeal was right in *Farraj v King's Healthcare NHS Trust* [2009] EWCA Civ 1203, 111 BMLR 131, [2010] 1 WLR 2139, to dismiss a claim against a hospital which had employed an independent laboratory to analyse a tissue sample for a patient who was not being treated by the hospital and was therefore not in its custody or care. As Dyson LJ put it at para 88, the rationale of any non-delegable duty owed by hospitals is that

> "the hospital undertakes the care, supervision and control of its patients who are in special need of care. Patients are a vulnerable class of persons who place themselves in the care and under the control of a hospital and, as a result, the hospital assumes a particular responsibility for their well-being and safety."

[25] The courts should be sensitive about imposing unreasonable financial burdens on those providing critical public services. A non-delegable duty of care should be imputed to schools only so far as it would be fair, just and reasonable to do so. But I do not accept that any unreasonable burden would be cast on them by recognising the existence of a non-delegable duty on the criteria which I have summarised above. My reasons are as follows:

(1) The criteria themselves are consistent with the long-standing policy of the law, apparent notably in the employment cases, to protect those who are both inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives. Schools are employed to educate children, which they can do only if they are allowed authority over them. That authority confers on them a significant degree of control. When the school's own control is delegated to someone else for the purpose of performing part of the school's own educational function, it is wholly reasonable that the school should be answerable for the careful exercise of its control by the delegate.

(2) Parents are required by law to entrust their child to a school. They do so in reliance on the school's ability to look after them, and generally have no knowledge of or influence over the arrangements that the school may make to delegate specialised functions, or the basis on which they do so, or the competence of the delegates, all of which are matters about which only the school is in a position to satisfy itself.

(3) This is not an open-ended liability, for there are important limitations on the range of matters for which a school or education authority assumes non-delegable duties. They are liable for the negligence of independent contractors only if and so far as the latter are performing functions which the school has assumed for itself a duty to perform, generally in school hours and on school premises (or at other times or places where the school may carry out its educational functions). In the absence of negligence of their own, for example in the selection of contractors, they will not be liable for the negligence of independent contractors where on analysis their own duty is not to perform the relevant function but only to arrange for its performance. They will not be liable for the defaults of independent contractors providing extra-curricular activities outside school hours, such as school trips in the holidays. Nor will they be liable for the negligence of those to whom no control over the child has been delegated, such as bus drivers or the theatres, zoos or museums to which children may be taken by school staff in school hours, to take some of the examples canvassed in argument and by Laws LJ in his dissenting) judgment.

(4) It is important to bear in mind that until relatively recently, most of the functions now routinely delegated by schools to independent contractors would have been performed by staff for whom the authority would have been vicariously liable. The recognition of limited non-delegable duties has become more significant as a result of the growing scale on which the educational and supervisory functions of schools are outsourced, but in a longer historical perspective, it does not significantly increase the potential liability of education authorities.

(5) The responsibilities of fee-paying schools are already non-delegable because they are contractual, and the possibility of contracting out of them is limited by legislation. In this particular context, there seems to be no rational reason why the mere absence of consideration should lead to an entirely different result when comparable services are provided by a public authority. A similar point can be made about the technical distinctions that would otherwise arise between privately funded and NHS hospital treatment.

(6) It can fairly be said that the recognition of a non-delegable duty of care owed by schools involves imputing to them a greater responsibility than any which the law presently recognises as being owed by parents. Parents would not normally incur personal liability for the negligence of (say) a swimming instructor to whom they had handed custody of a child. The Appellants' pleaded allegation that the school stood in loco parentis may not therefore assist their case. The position of parents is very different to that of schools. Schools provide a service either by contract or pursuant to a statutory obligation, and while LEA schools do not receive fees, their staff and contractors are paid professionals. By comparison, the custody and control which parents exercise over their children is not only gratuitous, but based on an intimate relationship not readily analysable in legal terms. For this reason, the common

law has always been extremely cautious about recognising legally enforceable duties owed by parents on the same basis as those owed by institutional carers: see *Surtees v Kingston-on-Thames Borough Council* [1992] PIQR 101, 121 (Beldam LJ); *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 588 (Lord Hutton).

APPLICATION TO THE PRESENT CASE

[26] In my opinion, on the limited facts pleaded or admitted, the Respondent education authority assumed a duty to ensure that the Appellant's swimming lessons were carefully conducted and supervised, by whomever they might get to perform these functions. The Appellant was entrusted to the school for certain essential purposes, which included teaching and supervision. The swimming lessons were an integral part of the school's teaching function. They did not occur on school premises, but they occurred in school hours in a place where the school chose to carry out this part of its functions. The teaching and the supervisory functions of the school, and the control of the child that went with them, were delegated by the school to Mrs Stopford and through her to Ms Burlinson, and probably to Ms Maxwell as well, to the extent necessary to enable them to give swimming lessons. The alleged negligence occurred in the course of the very functions which the school assumed an obligation to perform and delegated to its contractors. It must follow that if the latter were negligent in performing those functions and the child was injured as a result, the educational authority is in breach of duty.

[27] I would accordingly allow the appeal and set aside the judge's order striking out the allegation of a non-delegable duty.'

Lady Hale, in her judgment, added:

'**[29]** It is also important, so far as possible, that the distinctions produced by this process make sense to ordinary people …

[30] Consider the cases of three ten-year-old children, Amelia, Belinda and Clara. Their parents are under a statutory duty to ensure that they receive efficient full-time education suitable to their age, ability and aptitude, and to any special needs they may have (Education Act 1996, s 7). Amelia's parents send her to a well-known and very expensive independent school. Swimming lessons are among the services offered and the school contracts with another school which has its own swimming pool to provide these. Belinda's parents send her to a large school run by a local education authority which employs a large sports staff to service its schools, including swimming teachers and life-guards. Clara's parents send her to a small state-funded faith school which contracts with an independent service provider to provide swimming lessons and life-guards for its pupils. All three children are injured during a swimming lesson as a result (it must be assumed) of the carelessness either of the swimming teachers or of the life-guards or of

both. Would the man on the underground be perplexed to learn that Amelia and Belinda can each sue their own school for compensation but Clara cannot?

[31] Of course, there are differences between them which he might think relevant. Amelia's parents are paying for her education, whereas Belinda's and Clara's parents are not. In the context of a necessary service, such as education, this does not seem a compelling distinction. And would he perceive any difference between Belinda's school which employed its own teachers and Clara's which did not? All three girls have at least these features in common: (i) they have to go to school – their parents may be criminally liable if they do not and in extreme cases they may be taken into care if they refuse to go to school; (ii) when at school they have to do as the teachers and other staff say, with various sanctions if they do not; (iii) swimming lessons are part of the curriculum which the school has undertaken to provide; (iv) neither the children nor their parents have any control or choice about the precise arrangements made by the school to provide them with swimming lessons; (v) they are all young people who need care and supervision (as well as to be taught how to swim) for their own safety.

[32] As lawyers, we know that the three girls fall into three different legal categories. Amelia (we will assume) has the benefit of a contractual obligation of the school to secure that care be taken for her safety. Belinda has the benefit of the rule which makes an employer vicariously liable for the negligence of its employees. Clara has the benefit of neither and can only succeed if the school has an obligation to secure that care be taken for her safety.

[33] In many ways, as Christine Beuermann points out in her valuable article "Vicarious liability and conferred authority strict liability" (*2013*) *20 Torts Law Journal 265*, it is unfortunate that the courts have not considered both bases of liability in previous cases concerning harm suffered by school pupils. They are conceptually quite different, as Laws LJ made clear in the Court of Appeal at [2012] EWCA Civ 239; [2013] 3 WLR 853, paras 5 to 7, and Lord Sumption explains at paras 3 and 4 above. In the one case, the Defendant is not liable because he has breached a duty which he owes personally to the Claimant; he is liable because he has employed someone to go about his business for him and in the course of doing so that person has breached a duty owed to the Claimant. In the other case, the Defendant is liable because he has breached a duty which he owes personally to the Claimant, not because he has himself been at fault, but because his duty was to see that whoever performed the duty he owed to the Claimant did so without fault.

[34] No-one in this case has seriously questioned that if a hospital patient is injured as a result of a nurse's carelessness it matters whether the nurse is employed by the hospital or by an agency; or if a pupil at school is injured by a teacher it matters whether the teacher is employed

by the school or is self-employed. Yet these are not employees of the hospital or school, nor can it be said that their relationship with the school is 'akin to employment' in the sense in which the relationship of the individual Christian Brothers to their order was akin to employment in the case of *Various Claimants v Catholic Child Welfare Society and others* [2012] UKSC 56, [2013] 2 AC 1, [2013] 1 All ER 670. The reason why the hospital or school is liable is that the hospital has undertaken to care for the patient, and the school has undertaken to teach the pupil, and that responsibility is not discharged simply by choosing apparently competent people to do it. The hospital or school remains personally responsible to see that care is taken in doing it.

[35] As Lord Sumption has shown, the principle of personal responsibility of this sort is well-established in our law. The prime example is the responsibility of an employer to see that his employees are provided with a safe place of work, safe equipment and a safe system of working. As Lord Brandon of Oakwood put it in *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906, 919, [1987] 2 All ER 878, [1987] 3 WLR 212:

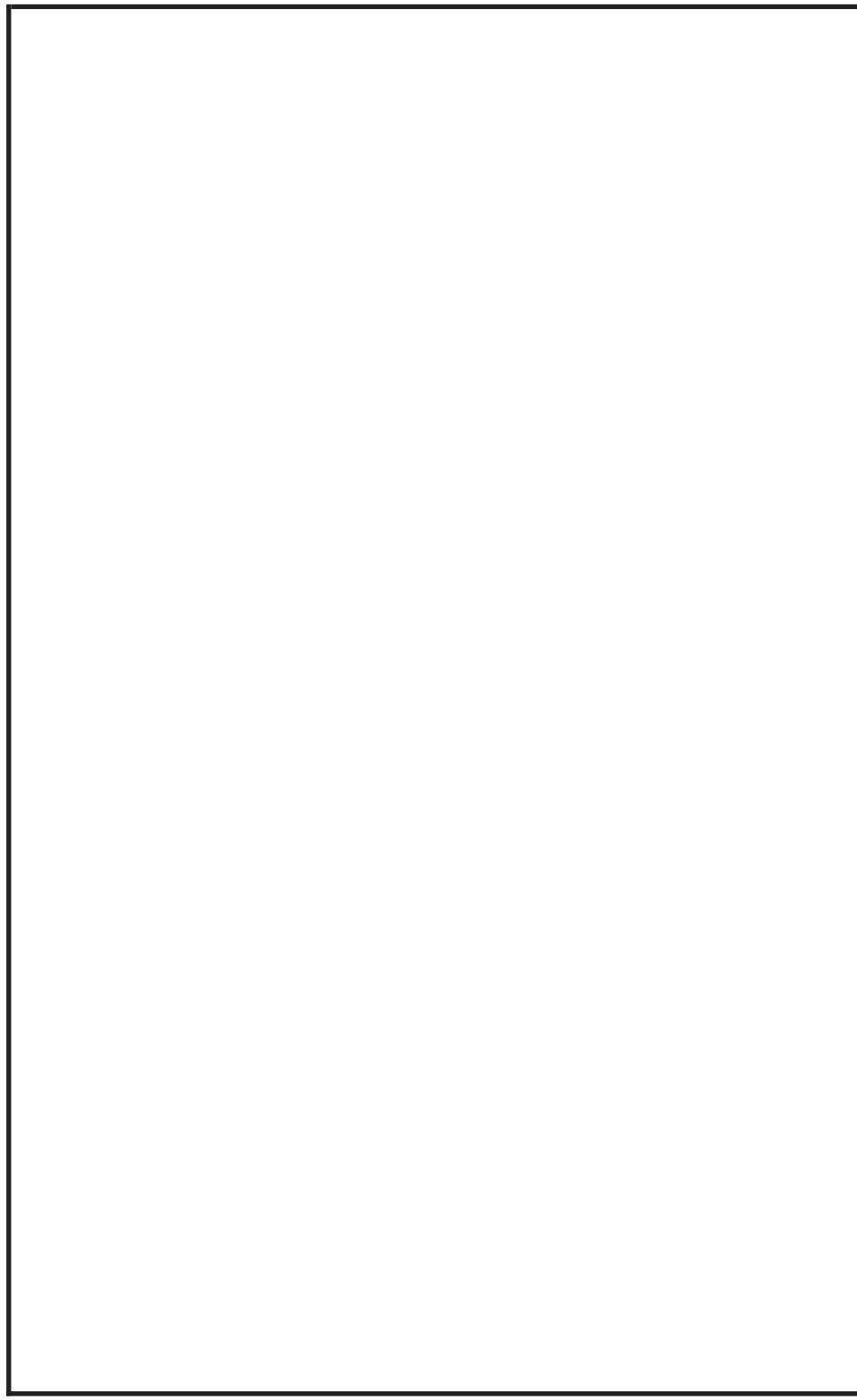
> 'The essential characteristic of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty.'

[36] The duty may originally have been formulated in that way to get round the problem that, at common law, an employer could not be vicariously liable for injuries negligently caused by one of his employees to another. But McDermid shows that it not only survived the abolition of that doctrine by the Law Reform (Personal Injuries) Act 1948 but also applied where performance of the duty was delegated to an independent contractor. Also, given that there exists a contract of employment between employer and employee, the duty might perhaps have been formulated as an implied term in that contract, rather than in the law of tort. But it was not.

[37] As Lord Sumption has explained, both Lord Greene MR in *Gold v Essex County Council* [1942] 2 KB 293, 301, [1942] 2 All ER 237, 40 LGR 249, and Denning LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343, 362–363, [1951] 1 All ER 574, [1951] 1 TLR 539, would have applied the same principle to get round what was then perceived to be another problem with the law of vicarious liability, that its theoretical foundation was supposed to be the control which the employer could exercise over the manner in which the employee did his work. This provides a ready answer to the examples of the agency nurse and the supply teacher and I agree with Lord Sumption that the time has come to recognise that Lord Greene and Denning LJ were correct in identifying the underlying principle.

[38] …

[39] In my view, those features clearly apply to the delegation of the conduct of swimming lessons to the swimming teacher, Mrs Burlinson, and (subject to any factual matters of which we are unaware) to the lifeguard, Ms Maxwell. Taking care to keep the children safe is an essential part of any swimming lesson and of the responsibility which the school undertakes towards its pupils. That is what the life-guard is for. These features clearly would not apply to the negligent ice-cream vendor or zoo-keeper. They would not normally apply to the bus driver but they might do so if the school had undertaken to provide transport and placed the pupils in his charge rather than that of a teacher. The boundaries of what the hospital or school has undertaken to provide may not always be as clear cut as in this case and in *Gold* and *Cassidy*, but will have to be worked out on a case by case basis as they arise.'



Correspondence about the content of this Bulletin should be sent to: Nicola Eathorne, Content Delivery, LexisNexis, 30 Farringdon Street, LONDON, EC4A 4HH (tel: 01503 269250). For online services queries, please contact +44 (0)84 5370 1234; Fax: +44 (0)20 8662 2012.

Subscription and filing enquiries should be directed to LexisNexis Customer Services Department (tel: +44(0)84 5370 1234)

Published by LexisNexis

ISBN 978-1-4057-7675-2