11KBW

Academic judgment

Peter Oldham QC

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What this talk is about

The bar on the Court determining matters of academic judgment.

And why this is a rickety concept.

Defining our terms

What is and what is not academic judgment?

No court has ever sought to explain precisely what it is and what it is not.

The shape of the caselaw

Many of the cases concern non-contractual relationships – judicial reviews and tort claims.

Bear that in mind: you may think that if you are paying for a service you should be able to go to court and claim breach of contract if you get a substandard service.

Looking at 2 of the main cases routinely relied on to defeat academic judgment arguments, Vijayatunga, and Clark v Univ of Humberside …

Vijayatunga

R v Her Majesty the Queen in Council, ex parte Vijayatunga [1990] 2 QB 444 CA

C believed that her PhD examiners weren't qualified to judge her work. Visitor rejected her complaint. CA dismissed her judicial review claim.

BUT

Main issue was visitor's powers, not the Court's

Not dealing with private law rights

Bingham LJ said there might be cases where Court could intervene in visitor's powers

Clark v Univ of Humberside (1)

Clark v University of Humberside [2000] 1 WLR 1988 CA

What happened:-

C was given a mark of zero. Sued for breach of contract. The judge struck out the claim on the basis that it was not justiciable. CA allowed her to amend her claim by pleading a breach of the university's regulations.

Clark v Univ of Humberside (2)

What was said:-

Sedley LJ said that some parts of the relationship student/university relationship were justiciable: but that there were some claims on which any Court "would be jejune and inappropriate", including marks for an exam.

Woolf MR and Ward LJ agreed, without reasons.

BUT…

Clark v Univ of Humberside (3)

… None of the old cases on which Sedley LJ based his reasoning in fact said that the Court could not deal with matters of academic judgment.

Either they were about visitors' jurisdiction or, in the case of the foundation authority, Thomson v University of London (1864) 33 LJ Ch 625, the claim was rejected because it was of a type previously unknown to the Courts, though this did not prevent Kindersley VC from also considering – and rejecting – the claim on its merits.

Clark v Univ of Humberside (4)

Sedley LJ also said that matters of academic judgment were outside the Court's competence in the same way that aesthetic and religious questions were.

But the Court will sometimes consider such questions: Re Pinion [1965] Ch 85 CA (aesthetic value of paintings etc.); Re Delius [1957] Ch 299 (aesthetic value of music); Ladele v Islington BC [2010] 1 WLR 955 CA (what amount to core religious beliefs); R ota Hodkin v Registrar General of Births, Deaths and Marriages [2014] 2 WLR 23 SC (is scientology a religion)

Clark v Univ of Humberside (5)

No reference made to Supply of Goods and Services Act 1982, s 13 (then in force):

13 Implied term about care and skill

In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill. …

No exclusion under s 12(4). Applied in Abramova v Oxford Institute of Legal Practice [2011] ELR 385 in the case of allegedly under par teaching.

See now Consumer Rights Act 2015, s 49

If Clark is right, who you gonna call?

The visitorial jurisdiction has been abolished: Higher Education Act 2004, s 20.

The OIA cannot deal with academic complaints: section 12(2).

Who can deal with your claim?

The flaky boundaries of academic judgment (1)

Phelps v Hillingdon LBC [2001] 2 AC 619 HL

Teachers owe a tortious duty of care in the provision of education.

Teaching involves questions of judgment – indeed academic judgment e.g. how best to explain difficult concepts, how to differentiate for pupils of different skills. Phelps confirms that claims may be made successfully if that judgment is negligent.

Flaky boundaries (2)

R ota LB Lewisham v AQA and others [2013] ELR 281

Van Mellaert v Oxford University [2006] ELR 617

R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 WLR 242

Moroney v Anglo-European College of Chiropractic [2009] ELR 111

R ota Mustafa v OIAHE [2013] ELR 446

Flaky boundaries (3)

Tribunals and courts are already required to tread heavily on grounds of academic judgment in the equalities field, whether in schools or universities: see Equality Act 2010, sections 85, 91, 114, 116, para 3 of Sched 17.

See Burke v College of Law [2012] EqLR 279 CA (was disabled student given enough time to sit an exam?).

The walls are tumbling down …

HL/SC approach to immunities is now that they have to be justified

Arthur J S Hall & Co v Simons [2002] 1 AC 615 HL (barristers)

Jones v Kaney [2011] 2 AC 398 SC (expert witnesses)

Smith v MoD [2013] 3 WLR 69 SC (combat immunity)

And more fundamentally still-

Shergill v Khaira [2014] 3 WLR 1 (validity and effect of a trust, where its determination required the resolution of religious issues)

Context

Failing a GCSE or A level due to poor teaching at a maintained school or academy

… or at an independent school?

Or due to mismarking?

Failing a university degree due to poor supervision or mismarking.

Failing a PhD due to the appointment of the wrong examiners.

And so on.

Making a claim?

... but you still have to show

Breach – Bolam gives a wide leeway for professionals. And you'll very likely need expert evidence- Abramova.

And resultant loss.

So is there a floodgates problem?