
NEGLIGENCE IN THE VIRTUAL LEARNING ENVIRONMENT- ANALYSIS OF THE DUTY OF CARE AND CHALLENGES TO ITS APPLICATION

Ambika Harishankar, B.A. LL.B., Symbiosis Law School, Noida

ABSTRACT

A significant shift in the educational landscape that particularly made its mark worldwide during the pandemic, online education has, ever since, continued to hold relevance as a new mode of education. The virtual learning environment, involving the online platform or tool used for teaching, learning and sharing material, the educational institution, the teachers, and the students, comes with its own set of risks. From the possibility of these risks stems a legal duty of care vested with those involved in imparting education virtually to reasonably try to prevent these. When problems do arise, some can be attributed to breaches of this duty of care. This legal duty of care, its breach and consequential damage is the foundation upon which the tort of negligence stands. Therefore, while discussing the duty of care of those involved in a virtual learning environment, the key legal question is whether, and when, an actionable claim for negligence can be brought against those who can be considered under law to have had the duty to take care, and breached it. This paper analyses this question by correlating the care to be taken and possible instances of its breach in a virtual learning environment with the essentials required to be fulfilled for a valid claim of tortious negligence. This study begins by identifying the risks involved in the conduct and management of a virtual learning setup, to ascertain the associated duty of care and who owes this duty. This will be correlated with the standard and degree of care generally required, the standard and degree of care that can be reasonably expected and practically possible in a virtual setup, and when the said duty of care can be said to have been reasonably met. The last step in this study is to ascertain whether and when, in such a case, the threshold of damage can be fulfilled to constitute actionable negligence.

INTRODUCTION

Virtual classrooms and learning environments have gained significant momentum across the world in recent years as a crucial mode of imparting education. Since its rise to popularity, virtual learning using online tools and meetings is seen as a significant change in the mode of imparting education that will never die down. Learning through interactions taking place online, instead of face-to-face interactions between teachers and students, termed as remote learning, has continuing relevance because of the advantages it carries. It is considered to be a growing trend, capable of reshaping the educational landscape.

However, a virtual teaching and learning environment has underlying risks that, if not mitigated, can become a cause of harm. These include privacy concerns, online harassment, maintaining fairness and adequate supervision in online examinations, and other issues that can hamper the learning process. While keeping a check on some of these concerns involves the exercise of a more general duty of care by the persons as users of an interactive online tool, others involve a duty of care arising due to the convergence of education and a remote, virtual environment.

Imparting virtual education thus comes with a duty to take care to prevent associated risks, and the care that is expected and necessary to avoid harm is different from the care needed while imparting education physically. Therefore, managing the virtual learning setup presents a category of duty of care and liability that is relatively new.

“The categories of negligence are never closed”¹. The tort of negligence as defined by Winfield is “the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff”². This issue is thus centred around a legal duty of care and consequences of its breach, keeping in mind both the risks that using interactive online tools brings with it and the problems that remote learning poses. There can be numerous instances of perceived negligence, and failure to take care, however, such instances, to become actionable in a court of law, have to meet the threshold set to constitute an actionable claim of negligence.

¹ Donoghue v. Stevenson, (1932) A.C. 562

² Ratanlal & Dhirajlal, The Law of Torts 518 (Lexis Nexis, 29th ed. 2023)

RESEARCH OBJECTIVES

This paper seeks to meet the following objectives-

- To identify the areas where a legal duty of care requires to be exercised while imparting education virtually.
- To analyse the extent of care practically possible, and when it may be considered breached.
- To ascertain when this breach of care can be legally actionable under the law of negligence, keeping in mind the essential of actual damage.

RESEARCH QUESTIONS

The research has been guided by the following questions-

- What legal duty of care is required to be taken by those involved in the virtual learning process, and who owes what duty?
- What is the standard and degree of care that can be expected of and practically met by those involved? Based on this, when can the duty of care said to be breached?
- When can a valid claim of negligence, actionable only on proof of damage, be made in such cases?

RESEARCH METHODOLOGY

The research conducted for this paper follows the doctrinal legal research method. Relevant statutes and legal precedents have been relied on. To analyse the topic, secondary sources such as data, information and opinions from journal articles and research studies previously conducted, have also been understood and referred to.

LEGAL PRINCIPLES

Negligence is an actionable tort if three essentials are met- a legal duty of care owed by the defendant towards the plaintiff, a breach of this duty of care by the defendant, and damage

being suffered by the plaintiff as a result.

As recognised in *Jai Laxmi Salt Works (P) Ltd. v. State of Gujarat*³, new duty of care situations arise as social, economic and political scenarios evolve. To assess whether there exists a duty of care in such cases, three principles are considered- reasonability, foreseeability and proximity. Reasonable foreseeability as held in *Donoghue v. Stevenson*⁴ requires that a person, while doing an act, owes a duty of care to those whom the person can reasonably foresee will be closely and directly affected by it. In *Davis v. Radcliffe*⁵, proximity was held to not be restricted to only physical proximity, but to involve the “relation between the parties making it just and reasonable to impose a duty of care on the defendant”.

The standard of care in negligence is the care expected of a “reasonable and prudent person” in that particular situation. While this standard remains constant, the degree of care that would classify as reasonable would vary depending on the situation and the individuals involved⁶.

In *Blyth v. Birmingham Waterworks Co.*⁷, this standard was identified as the test to determine whether there has been a breach of duty of care. The defendant is considered to have breached his duty of care if he did something that a reasonable and prudent person in that situation should not do, or omitted doing something that such a person should do. However, *Haley v. London Electricity Board*⁸ highlighted that a person may owe varying degrees of care towards different people, based on the circumstances.

The breach of duty of care may also be due to the act of a third party. However, in *Smith v. Littlewoods Organisation Ltd*⁹, it was held that, despite the act of the third party, the defendant may still be liable for the breach when a “special relationship exists between parties, where a source of danger was negligently created by the defendant, it being reasonably foreseeable that a third party may interfere and trigger the danger, or where the defendant, with knowledge or means of knowing that a third party was creating a risk of danger, had failed to take reasonable steps to abate it”.

³ *Jai Laxmi Salt Works (P) Ltd. v. State of Gujarat*, (1994) 1 S.C.C 1

⁴ *Donoghue v. Stevenson*, (1932) A.C. 562

⁵ *Davis v. Radcliffe*, (1990) 2 All ER 536

⁶ *Ratanlal & Dhirajlal, The Law of Torts* 544 (Lexis Nexis, 29th ed. 2023)

⁷ *Blyth v. Birmingham Waterworks Co.* (1856) 11 Exch 781

⁸ *Haley v. London Electricity Board*, (1965) A.C 778

⁹ *Smith v. Littlewoods Organisation Ltd.*, (1987) 1 All ER 710

In negligence, it is also essential that damage must be caused. The breach of duty has to be the legal cause of the damage; there must be a direct, reasonably foreseeable causal link between the breach of duty and resultant injury¹⁰. Damage must be material, in the form of physical injury or clinically diagnosed psychiatric illness, as held in *Rothwell v. Chemical and Insulating Co. Ltd*¹¹. In *Murphy v. Brentwood District Council*¹², purely economic loss was held to be insufficient, unless a special contractual relationship exists between the parties, and the economic loss is a direct result of breach of contract. Mere risk of injury is not sufficient; the injury has to materialise. Proving material damage is vital, as negligence is actionable only on proof of damage.

THEORETICAL ANALYSIS

I-Areas where negligence can take place and who has the duty of care

Privacy

Privacy is a major concern in an e-learning classroom setting. Privacy and security concerns in remote learning were studied and highlighted in research conducted in the US in 2021¹³. Most virtual meetings require the students and teachers to keep their cameras on, which can lead to their photo and video feeds being misused. During an online meeting, students' personal data is captured and visible not only to the instructors and other students, but also the platform, and co-inhabitants of those in the meeting. This data includes what they convey themselves, and what is visible when they broadcast their home environment, reflecting their socioeconomic status. Such information can leak to third parties especially if the platform does not have adequate encryptions and protections. The information shared through and stored in virtual learning platforms includes everything from the users' identities and personal data, to the work they share. Online meetings also come with class recordings, which if spread to unauthorised parties, can interfere with the privacy of those in the meeting.

Every right of a person implies a corresponding duty of others to not violate that right. Right to privacy comes with the expectation that the personal data one shares will be subjected to

¹⁰ A Lakshminath & M Sridhar, Ramaswamy Iyer's The Law of Torts 540 (Lexis Nexis, 10th ed. 2007)

¹¹ *Rothwell v. Chemical and Insulating Co. Ltd*, (2008) A.C 281

¹² *Murphy v. Brentwood District Council*, (1990) 2 All ER 908

¹³ Shaanan Cohny et al., *Virtual Classrooms and Real Harms: Remote Learning at U.S. Universities*, Proceedings of Usenix Soups 2021, Aug. 2021, at 653, 653

only appropriate use¹⁴. Those who have authorised access to such data have the legal duty to not violate the person's privacy.

Statute recognises this duty of care of the platform imparting virtual teaching. Platforms used for virtual classes facilitate the uploading, sharing and dissemination of information from the institution and faculty to the students, and can be classified as a 'social media intermediary' defined by Section 2(w) of The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021¹⁵, as 'an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services'. Section 3(j) of the Rules¹⁶ imposes a duty on the intermediary to follow reasonable security practices to secure its computer resource and information contained therein. The platform is also expected to take reasonable measures to secure information and recordings on its database to prevent it from spreading to or being accessed by unauthorised third persons through the platform.

A duty of care to prevent privacy violations is also owed by the educational institution to the faculty and students, and by the teachers to the students in an online meeting. Under section 43A of the Information Technology Act¹⁷, any body-corporate, including associations of persons engaged in professional activities, that possesses, deals or handles any "sensitive personal data" should maintain reasonable security practices relating to such data, and negligence in doing so can invite penalty. So, the educational institution having access to personal information of students and teachers in the form of online records or information shared in meetings has a duty of care to take reasonable steps to prevent its unauthorised spread, like choosing a secure platform, appropriately training its faculty and ensuring that the records they maintain do not spread to unauthorised parties.

This duty of care may fall on the teachers also. When teachers use online tools and platforms on their own discretion, that come without the special protection offered to the institution by the platform that it endorses the usage of, they have the responsibility to ensure that the tool contains reasonable security measures. Teachers are also expected to be aware of default settings on platforms which a reasonable and prudent person would change to ensure

¹⁴ Bhairav Acharya, *The Four Parts of Privacy in India*, Epw, 30 May 2015, at 32, 34

¹⁵ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, §. 2(w), (Gazette of India)

¹⁶ *Id.* §. 3(j)

¹⁷ The Information Technology Act, 2000, §. 43A, No. 21, Acts of Parliament, (India)

protection. For example, if restricting recording is an option that can be chosen by the user, teachers have the duty to ensure that only they can record the meeting and that they share the recording only to authorised persons.

Cyberbullying

Virtual classrooms mean greater online exposure, and greater opportunity for online harassment. It has been found to be an emerging problem with e-learning taking the form of insults targeting someone, joining meetings using a fake profile, and excluding others in the chat room, possibly leading to long term psychological harm and suicidal thoughts¹⁸. A positive relationship between a teacher and students, creating a more supportive online learning environment, plays a role in mitigating such behaviour¹⁹. The duty of care to prevent bullying during an online meeting, verbally or through typed messages, may vest with the teacher supervising the meeting. The institution would also have the responsibility to have a code of conduct penalising those engaging in cyber bullying during interactions in the virtual classroom.

Fairness in assessments

In *Guru Nanak Dev University v. Harjinder Singh*²⁰, the Supreme Court emphasized on the duty and role of educational institutions in preserving academic integrity during examinations by taking reasonable steps to avoid misconduct by students. This duty of care vests with both the institution and invigilator during examinations. It has been observed that online assessments make the academic learning process more susceptible to academic dishonesty and cheating, such behaviour becoming more frequent when there is an increased opportunity to do so due to inadequate preventive means²¹. So, during online examinations, care needs to be exercised by the invigilator, by taking reasonable steps such as ensuring that there is no visible sign of third parties by mandating keeping cameras on, and by the institution by endorsing the

¹⁸ N.Balaji et al., *Cyberbullying in Online/E-Learning Platforms Based on Social Networks*, in *Intelligent Sustainable Systems* 227, 229-230 (2022)

¹⁹ Samiha Sayed et al., *Cyberbullying among University Students during the E-learning Transformation Era: The Role of the Student-Teacher Relationship and Virtual Classroom Community*, RCPHN, June 2023, at 135, 136

²⁰ *Guru Nanak Dev University and Another v. Harjinder Singh and Another*, (1994) 5 S.C.C 208

²¹ Sonali Bhattacharya et al., *The social and ethical issues of online learning during the pandemic and beyond*, 11 *Asian J. Bus. Ethics* 275, 278 (2022)

use of secure proctoring tools.

Educational negligence

Educational negligence is when a student suffers due to incompetent and negligent teaching²². Courts in common law countries have dealt cautiously with educational negligence claims. This is on the premise that an extraordinary duty of care cannot be imposed on teachers and institutions burdening them with the fear of legal claims against them for their way of teaching, since quality of teaching is subjective, seen as fulfilled by one student but not by the other. In However, as concluded in *Phelps v. Hillingdon London Borough Council*²³, persons with professional training and skill in teaching owe a duty of care to their students in the discharge of their professional responsibilities, and liability should lie for “manifest incompetence or negligence comprising identifiable mistakes”. This would mean a duty of care to teach the correct syllabus and not neglecting their responsibility to teach. During virtual classes, teachers may thus have a duty of care to reduce the losses faced by students due to the absence of face-to-face interaction, by taking reasonable steps such as being present in meetings, responding to queries, teaching using the facilities available, and reasonably ensuring that students actually attend by asking individual questions or making it mandatory to keep cameras on.

II-Standard and Degree of Care

Traditionally, the standard of care of teachers and school authorities is equated with that of a reasonable and prudent parent, which implies that they have the duty to protect the students from reasonably foreseeable injury within the school’s premises. There is also a view that teachers being skilled professionals have a different duty of care than solely that of quasi-parents²⁴. However, in case of a virtual learning environment, the duty of care expected from the institution and teachers also involves a duty of care as reasonable and prudent users of an online platform. This encompasses protection from risks such as privacy and online bullying, protection of academic integrity online, and a reasonable awareness of the facilities needed to virtually impart their professional skill.

²² Ian M. Ramsay, *Educational Negligence and the Legalization of Education*, 11 UNSW L.J 184, 184 (1988)

²³ *Phelps v. Hillingdon London Borough Council*, (2001) 2 A.C 619

²⁴ Helen Newnham, *When is a teacher or school liable in negligence*, Aust. J. Teach. Educ. 2000, at 45, 48

The institution and teachers may also owe a higher degree of care towards some students. This can be the case with a student who has a poor socio-economic background, or a student with learning problems. Teachers using their own chosen tools not having the protection given to the tools used by the institution may also have a higher duty of care to ensure that no data leak occurs due to its use.

PRACTICAL CHALLENGES

I-The extent of duty of care that can actually be exercised

The relatively new duty of care of those involved in the management of a virtual classroom fulfils the tests of proximity, foreseeability and reasonability. The risks that come with virtual classroom education are reasonably foreseeable by the platform, institution and teachers. The relation between the institution and its faculty and students, and that between the teachers and the students, is also such that imposing a duty of care on the institution and teachers is just and reasonable.

However, in a virtual environment, the extent to which care, control and supervision can be exercised is less than that possible in a physical school environment. So, whether the duty of care in a virtual classroom is met as per the standard of reasonability cannot be considered by linking it to the duty of care reasonably possible in a physical classroom. In a virtual setup, the steps that institutions and teachers can take to exercise their duty of care are limited. For example, steps that can be taken to prevent malpractices during online examinations are limited to exercising remote supervision over the students by checking on their audio and video. In case of data leaks by a third party's act, if this risk was indirectly created by the platform, institution or teachers by not taking reasonably possible measures to prevent it, they may be liable- however, unauthorised access may be gained by a third party despite reasonable security measures being taken by the platform, institution and teachers, in which case holding them liable may not be justified.

So, while ascertaining whether there has been a breach of duty of care in a virtual learning environment, it needs to be considered whether ordinary and reasonably possible steps were taken to avoid the issue. The threshold of reasonability also needs to be set differently, due to the limitation on practically possible exercise of care.

II-The damage hurdle

A significant problem with negligence in virtual teaching being actionable, even if there is a clear breach of reasonably expected care, is the absence of actionable damage. The widely accepted threshold of physical harm or clinical psychiatric illness is a very difficult one to cross in a virtual environment. It is extremely improbable for a breach of duty of care by the institution, teachers, or the platform to lead to direct physical harm. Misuse of personal data and cyber harassment may lead to mental harm, but mental harm itself usually does not constitute a valid cause of action unless it is of the nature of nervous shock or recognised psychiatric illness. In case of negligence in teaching or lack of fairness in examinations, losses may be faced in educational achievement and may lead to future economic losses, but such damage would be remote, making it difficult to prove causation. Moreover, economic loss in itself is seen as actionable only in special cases. This requirement of damage and its strict interpretation means cases where negligence in a virtual learning management can constitute a valid claim in law may be very limited.

CONCLUSION

A conclusion regarding whether negligence in the virtual learning environment is actionable or not depends on the facts of the individual case. However, through this analysis, it is clear that virtual classroom management does involve duty of care situations. This relatively new duty of care can be legally established under the reasonability, foreseeability, and proximity principles. In many possible scenarios, issues may arise due to breaches of this duty of care. But in other cases, the practical limitations on the extent of control and care possible in a virtual setting may lead to issues arising despite steps being taken, when these steps, viewed practically, may be considered to have fulfilled the reasonable prudence test. In such cases, the duty of care may not be considered to be breached. However, even if a breach of duty can be established, the problem of proving damage remains. If the requirement of proving strictly physical and psychiatric injury to claim negligence is considered applicable here, which is still almost uniformly upheld by courts, it may be rare for negligence in the management of virtual classrooms to be actionable. The development of case laws on the issue is needed to help arrive at a clearer conclusion. With virtual teaching and learning becoming an integral part of the educational landscape, actionable tortious negligence in this area presents legal questions that need answers.