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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**07/11/2025**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

JG (A Patient, for whom a Controller has not been appointed) by his mother and next friend RG

Plaintiff

and

The Education Authority in its own right and as Successor to the South-Eastern Education and Library Board

First Defendant

and

The South Eastern Health and Social Care Trust in its own right and as Successor to the Ulster Community and Hospitals Health and Social Services Trust

Second Defendant

and

The Regional Health and Social Care Board in its own right and as Successor in title to the Eastern Health and Social Services Board

Third Defendant

and

The Belfast Health and Social Care Trust

Fourth Defendant

Mr Heaney (instructed by McEvoy Sheridan, Solicitors) for the Plaintiff

Mr M. McEvoy (instructed by The Education Authority Solicitors) for the First Defendant

Mr Park (instructed by the Business Services Organisation) for the Second, Third and Fourth Defendants

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Master Bell

Introduction

[1] This application is concerned with the issue of whether a plaintiff can sue for breach of a statutory duty in connection with special educational needs (hereafter "SEN").

[2] The facts in this case are alleged to be that the plaintiff suffered from autism but was failed by the professionals in the education field who were duty-bound to use their professional skills in their response to his health and developmental needs. The plaintiff issued a writ on 25 January 2019 which was subsequently amended on 9 February 2021. In the writ he alleges that the defendants were both negligent and breached their statutory duty to him and, as such, were liable to him in damages.

[3] The first defendant now brings an application that part of this writ is misconceived and that no plaintiff is entitled to sue for breach of statutory duty in this particular context. Under Order 18 Rule 19(1)(a) the first defendant therefore invites the court to strike out that part of the statement of claim on the basis that there is no reasonable cause of action. It is accepted by all that, even if the first defendant is successful in this application, the action against all the defendants for their alleged negligence continues.

First Defendant's Submissions

[4] Mr McEvoy submits that the court should strike out from the statement of claim the alleged particulars of statutory duty, including:

(i) Failing to identify and assess the plaintiff's SEN.

(ii) Failing to make and maintain a statement of SEN in respect of the plaintiff.

(iii) Failing to review the making of a statement of SEN in respect of the plaintiff.

(iv) Failing to record in sufficient detail the SEN of the plaintiff.

(v) Failing to have regard to the need to promote equality of opportunity for the plaintiff.

Each of these breaches of statutory duty is alleged to have been contrary to the Education (Northern Ireland) Order 1996, the Educational (Special Educational Needs) Regulations (Northern Ireland) 1997, or the Special Educational Needs and Disability (Northern Ireland) Order 2005,

[5] Mr McEvoy referred me in standard fashion to the principles articulated by McCloskey LJ in *Magill v Chief Constable* [2022] NICA 49 on the approach to be taken by the court in strike out applications.

[6] The key argument made by the first defendant was that, on examination, it could be seen that Parliament did not intend the statutory provisions relied upon by the plaintiff to form any basis for a duty such as would create a remedy in damages in the instance of a breach.

[7] Mr McEvoy referred me to the decision of the House of Lords in *X (Minors) v Bedfordshire* [1994] 2 AC 633 where Lord Browne-Wilkinson took the view that only exceptionally would an administrative system designed to promote the social welfare of the community give rise to private rights enforceable by an action for breach of statutory duty. In respect of actions for breach of statutory duty simpliciter, the basic proposition is that, in the ordinary case, a breach of statutory duty does not, by itself, give rise to any private law cause of action.

[8] Counsel also submitted that the approach to breach of statutory duty contained in *X (Minors) v Bedfordshire CC* was confirmed by the House of Lords in *Phelps v Hillingdon LBC* [2001] 2 AC 619 where it was held that, in the context of the legislation then in force in England and Wales, there was no action for breach of statutory duty for a failure to identify, diagnose and treat the special educational needs of a pupil, namely the claimant's learning difficulties and/or dyslexia. In *Phelps v Hillingdon*, Lord Slynn said that, although the duties were intended to benefit a particular group, mainly children with SEN, the legislation was essentially providing a general structure for all children who fall within its provisions.

[9] Mr McEvoy also referred me to the decision Ouseley J in *Marr v Lambeth* [2006] EWHC 1175 (QB), where the court held that the claim in question was, in reality, an action for breach of statutory duty in disguise or an action based on a general claim of inadequate teaching or an inadequate educational system. Ouseley J noted:

> "32. I turn to the tortious basis for the claim. Much of this was agreed. It was agreed that no action for mere breach of the various statutory duties which I have adumbrated lay against the LEA; no action could lie for a failure to conduct a statutory assessment or to provide a statement of special educational needs."

[10] Mr McEvoy then referred me to *Carty v London Borough of Croydon* [2005] EWCA Civ 19 which he submitted was another decision of the English courts which held that no claim for damages for breach of statutory duty could lie in the context where the allegations were that there had been a failure to assess and issue a statement of SEN.

[11] Mr McEvoy submitted that none of the pleaded breaches of statutory duty in the plaintiff's Statement of Claim could survive a survey of these authorities.

Plaintiff's Submissions

[12] The majority of the plaintiff's written submissions centered on the law that applied to strike out applications. While obviously not irrelevant to the application before the court, the principles to be applied were not really in dispute.

[13] Mr Heaney submitted that the element of the statement of claim alleging breach of statutory duty was not misconceived and that the plaintiff enjoyed a reasonable prospect of success if he was allowed to prosecute that part of his claim. Counsel submitted that the law in this field had developed after the decision in *X (Minors) v Bedfordshire*. He argued that the decision in *Phelps v Hillingdon* had overturned the decision in *X (Minors) v Bedfordshire* in respect of what Lord Browne-Wilkinson had stated about breach of statutory duty. Counsel therefore argued that there had been further development of the law in *Phelps v Hillingdon*.

[14] In particular Mr Heaney referred me to a portion of Lord Clyde's speech in *Phelps v Hillingdon* where he said:

> "The appellant claims a direct liability on the authority as well as a vicarious liability. But there is no necessity to explore that aspect of the matter in the case of *Phelps* which can succeed upon the basis of a vicarious liability. With regard to the other cases where the issue is still open, careful consideration would require to be given to the view expressed by Lord Browne-Wilkinson in *Dorset* at pp. 761-2, along with the further qualification which he added in *Barrett v. Enfield London B.C.* [1999] 3 All ER 193 at p. 197. But it may be open to argument that a prohibition upon a direct liability should not be a matter of absolute exclusion. Where the parents of a child have participated in the decision under attack it may well be difficult to allow a claim that the decision was negligently taken. But the case might be different if the parents did not take a hand in the making of the decision. It may be that few cases would arise of direct claims, but it might not seem that justice is being served if on that account the door of the court should be closed. The point may be open to further argument but it would be inappropriate to embark upon that chapter without any inquiry into the facts. I am certainly not prepared to deny the possibility that such a duty may exist."

[15] Mr Heaney observed that in *Phelps v Hillingdon*, Lord Slynn, who delivered the leading judgment, confirmed that a cause of action in damages will arise from a breach of statutory duty. Lord Slynn stated:

> "A cause of action in damages will arise if it can be shown as a matter of construction of the statute that the statutory duty was imposed for

> the protection of a limited class of the public and that Parliament intended to confer on members of the class a private right of action for breach of duty."

[16] Mr Heaney submitted that the availability of other remedies such as, in this case, an appeal to the Special Educational Needs and Disability Tribunal (hereafter "SENDIST") and or the ability to initiate judicial review proceedings to enforce an obligation arising under the statutory provisions, did not necessarily preclude the existence of a further remedy in damages. As authority for this proposition, Mr Heaney referred the court to the dicta of Lord Slynn in *Phelps v Hillingdon* where he said:

> "In *Lonrho Ltd. v. Shell Petroleum Company Ltd. (No. 2)* [1982] A.C. 173, Lord Diplock said that even where a remedy was provided to enforce the obligation, a further remedy (sc. in damages) might be available to a person belonging to a class of individuals for whose benefit or protection the obligation was imposed."

Mr Heaney observed that neither SENDIST nor judicial review proceedings dealt with claims in respect of compensation for personal injuries suffered by reason of an alleged breach of the statutory provisions referred to in the plaintiff's Statement of Claim.

[17] Mr Heaney laid great store on the speech of Lord Clyde in *Phelps v Hillingdon* and referred me to the following passage:

> "The appellant claims a direct liability on the authority as well as a vicarious liability. But there is no necessity to explore that aspect of the matter in the case of *Phelps* which can succeed upon the basis of a vicarious liability. With regard to the other cases where the issue is still open, careful consideration would require to be given to the view expressed by Lord Browne-Wilkinson in *Dorset* at pp. 761-2, along with the further qualification which he added in *Barrett v. Enfield London B.C.* [1999] 3 All ER 193 at p. 197. But it may be open to argument that a prohibition upon a direct liability should not be a matter of absolute exclusion. Where the parents of a child have participated in the decision under attack it may well be difficult to allow a claim that the decision was negligently taken. But the case might be different if the parents did not take a hand in the making of the decision. It may be that few cases would arise of direct claims, but it might not seem that justice is being served if on that account the door of the court should be closed. The point may be open to further argument but it would be inappropriate to embark upon that chapter without any inquiry into the facts. I am certainly not prepared to deny the possibility that such a duty may exist."

Second, Third and Fourth Defendants' Submissions

[18] Mr Park offered no submissions on behalf of these defendants, being content to wait for the outcome of the court's decision in respect of the first defendant's application.

Discussion

The Law on Striking Out

[19] The plaintiff and the first defendant agree as to the law in respect of the power of the court to strike out pleadings.

[20] In the decision of the court in *Magill v Chief Constable*, [2022] NICA 49, McCloskey LJ summarised the principles to be applied in strike out applications:

> "[7] In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 12 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 the following principles apply:
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> (i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.
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> (ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.
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> (iii) In approaching such applications, the court should be cautious in any developing field of law; thus in *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:
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> > "In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by

> deciding each case on a case-bycase basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim'.

(iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.

(v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.

(vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out." Thus, in *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham stated:

> "This means that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can properly be persuaded that no matter what (within the bounds of the pleading) the actual facts of the claim it is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim *in limine*."

[21] I also bear in mind that as long as a statement of claim discloses some cause of action, or raises some question fit to be decided at trial, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (*Moore v Lawson* (1915) 31 TLR 418 CA).

[22] These are the principles which the court must therefore apply in deciding whether or not to strike out the plaintiff's statement of claim.

Breach of Statutory Duty

[23] Clerk and Lindsell on Torts (24th Edition) helpfully and concisely explain in paras 8-01 and 8-02 the general principles relating to breach of statutory duty:

> "Legislation covers most aspects of social and economic activity, regulating relationships between private individuals and between private individuals and public bodies. Almost all public bodies rely upon a legislative framework authorising their activities, creating both the power to act and, in many cases, duties to act in the discharge of public functions. Sometimes the activities of public bodies correspond broadly to those of private individuals (for example, in the provision of health care through the National Health Service) but many have no direct counterpart in private law. This will tend to be the case where the public body is engaged in a "regulatory" function with a view to protecting the public, or sections of the public, from harm (in its broadest sense). Often, it may be very obvious that a failure to discharge a statutory duty could cause damage to someone, but it does not follow that they are entitled to claim damages at common law for such a breach of duty. A person who has suffered damage as a result of the breach of a statutory duty *may* have an action in tort, classified by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire CC* as an "action for breach of statutory duty simpliciter". In English law, this is a specific common law action which is distinct from the tort of negligence, even where the negligence action is based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it. The careless performance of a statutory duty does not in itself give rise to any cause of action in the absence of either a right of action for "breach of statutory duty simpliciter" or a common law duty of care in negligence. The question, then, is when will a breach of a statute give rise to an action for damages at common law?
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> Some statutes are expressly designed to create new civil remedies, and others are intended to modify or clarify existing common law rights of action. Equally, there are some statutes which create criminal sanctions but which state expressly that they do not confer any civil remedy; and some may create both criminal and civil remedies. Unfortunately, most legislation fails to give any express guidance as to whether an action for damages is available for its breach, and then the courts have to decide what Parliament intended. Determining Parliament's intention when it has pointedly declined to express one is something of a haphazard process. The courts look to the construction of the statute, relying upon a number of "presumptions" for guidance, but in practice there are so many conflicting presumptions, with variable weightings, that it can be extremely difficult to predict how the courts will respond to a particular statute."

[24] From a plaintiff's viewpoint, actions for breach of statutory duty often have significant advantages over actions for negligence. The most obvious of these are that, in actions for breach of statutory duty, it is not usually necessary to prove fault by the defendant or foreseeability of harm. As a result of such advantages, from time to time, plaintiffs seek to sue for breach of statutory duty where no such statutory duty exists. Two examples of this are *Wilson v Department of Health for Northern Ireland and others; Kitchen v Department of Health for Northern Ireland and others* [2023] NIKB 2 and *Maye (a minor) v Craigavon Borough Council* [1998] NI 103.

[25] In *Maye (a minor) v Craigavon Borough Council* [1998] NI 103 Kerr J dealt with an application where the plaintiff brought an action against the council alleging negligent discharge of its statutory duty under art 7(1) of the Litter (Northern Ireland) Order 1994 to keep the roads in its district clean and free from litter. Kerr J observed that the topic of breach of statutory duty had been dealt with by Lord Browne-Wilkinson in *X* (M*inors*) *v Bedfordshire* as follows (at 731):

> "(*A*) *Breach of statutory duty simpliciter*
>
> This category comprises those cases where the statement of claim alleges simply (a) the statutory duty, (b) a breach of that duty, causing (c) damage to the plaintiff. The cause of action depends neither on proof of any breach of the plaintiff's common law rights nor any allegation of carelessness by the defendant. The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398; *Lonrho Ltd. v. Shell Petroleum Co. Ltd.* (*No. 2*) [1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory

> premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v. Wimborne* (*Lord*) [1898] 2 Q.B. 402."

[26] Clerk and Lindsell summarise at para 8-06 of their textbook when the courts will interpret a statute as containing a private law cause of action for breach of statutory duty:

> "There is no general rule by which one can determine the intention of Parliament, but there are a number of "indicators". Thus, if the statute provides no other remedy for its breach and the parliamentary intention to protect a limited class is shown, this indicates that there may be a private action, since otherwise there would be no means of enforcing the protection that the legislation was intended to grant. Where the statute does provide an alternative remedy to enforce the relevant duty, that will normally indicate that the statutory right was designed to be enforceable by those means only and not by private right of action. However, the mere existence of some other remedy is not necessarily decisive. It may still be possible to show that on the true construction of the Act, the protected class was intended by Parliament to have a private remedy."

[27] The leading work on Statutory Interpretation by Bennion, Bailey and Norbury (8th edition) explains that because, as is usually the case, express provision about the consequences of a breach of statutory duty is seldom made by Parliament, then, as Lord Steyn said in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15 "in a case founded on breach of statutory duty the central question is whether from the provision and structure of the statute an intention can be gathered to create a private law remedy." Section 9.11 of Bennion, Bailey and Norbury explains in a detailed fashion the way in which an analysis of particular statutory provisions should be carried out with a view to deciding what the intention of Parliament was in a particular instance.

Does the Plaintiff have a Private Law Remedy in this Action?

[28] The question as to whether or not there exists a remedy of breach of statutory duty in request of failures to carry out duties in respect of SEN under the relevant legislation in England and Wales has already been dealt with by the House of Lords in *X (Minors) v Bedfordshire* and *Phelps v Hillingdon*. I begin by noting that the decisions in *X (Minors) v Bedfordshire* and *Phelps v Hillingdon* need careful analysis to understand them correctly. Each decision involves multiple plaintiffs and the proceedings brought by those plaintiffs often include different types of cause of action, which arose in different contexts, some in the field of child abuse and some in the field of education. The comments by their Lordships are often referring to the specific circumstances of one particular plaintiff. An analysis of either of the two decisions therefore needs to carefully distinguish as to whether their lordships are making general statements of principle, statements which refer to a specific type of

cause of action, or statements which refer to the specific facts alleged by one particular plaintiff.

[29] In *X (Minors) v Bedfordshire* Lord Browne Wilkinson concluded:

> "Although, for present purposes, I am prepared to assume that the plaintiff, as a child having special educational needs, was a member of a class for whose protection the statutory provisions were enacted, I can find nothing in either set of statutory provisions which demonstrates a parliamentary intention to give that class a statutory right of action for damages. As to the 1944 Act, the basic duty relating to children in need of special treatment is imposed by s 8(2)(c) which requires the authority to 'have regard' to the need for securing such treatment. Plainly such a duty cannot produce a private right of action for damages. Section 33(2) deals only with the type of school at which such children are to receive such treatment; to the extent that it imposes a duty at all it imposes a duty to provide such treatment in special, not ordinary, schools contrary to the case being made by the plaintiff. The obligation to provide special treatment to the child under s 34(4) only arises if the authority decides that the child requires such treatment. In my judgment there can be no statutory claim for damages for breach of duty which leaves so much to be decided by the authority. Moreover, ss 68 and 99 of the Act contain machinery whereby the minister can enforce any duties imposed by the Act on the education authority. All this indicates that Parliament did not intend to confer a private right of action.
>
> As to the machinery in the 1981 Act relating to children with special needs, it is far more detailed and absolute in its terms than under the 1944 Act. However, as I have described above in dealing with the *Dorset* case the machinery itself involves the parents at every stage of the decision making process and gives them rights of appeal against the authority's decisions. I have never previously come across a statutory procedure which provided for such close involvement of those who would be affected by a decision in the making of that decision or which conferred more generous rights of appeal. To suggest that Parliament intended, in addition, to confer a right to sue for damages is impossible.
>
> Therefore I agree with the Court of Appeal that the claims based on breach of statutory duty were rightly struck out by the judge."

[30] In *Phelps v Hillingdon* the leading speech was given by Lord Slynn. Pamela Phelps, whose dyslexia had not been diagnosed at school, issued a writ against Hillingdon claiming damages for breach of statutory duty and alternatively for negligence. Following an analysis of the legislative provisions, the case law on the subject and what had occurred in the hearings before the case reached their Lordships, Lord Slynn stated:

“These statutory duties laid on local education authorities are of the greatest importance; the authorities must provide the facilities which Parliament intended should be available for children with learning difficulties. A failure to fulfil the duties by an authority either generally or in a particular case can have a serious effect on a child's education, his well-being and his future life.

It is clear from the legislative provisions to which I have referred that Parliament intended that various stages of the process were to be monitored by an appeals procedure. Moreover, there can be no doubt that some of the acts of the authority may be examined by way of judicial review, even if in other areas the extent of the discretion conferred on the authority with its particular expertise is likely to lead to a Court refusing to interfere even by way of judicial review (see e.g. *A. v. Liverpool City Council* [1982] A.C. 363 at page 373 per Lord Wilberforce).

There is, however, no express indication that a failure to carry out these duties, even in respect of a particular individual, should lead to an award of monetary compensation if damage can be shown. That still leaves the question whether, having regard to the purpose of the legislation, Parliament is to be taken to have intended that there should be a right to damages.

It is clear that the loss suffered by a child who has not been treated in accordance with the statutory intent can often be said to be foreseeable, proximate and serious. The damage may be physical or psychological, emotional or economic. This does not, however, in itself lead necessarily to the conclusion that Parliament intended there to be a remedy in damages for breach of statutory duty.

In *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398, Lord Simonds said:

> ". . . if a statutory duty is prescribed, but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration" (p 407).

In *Lonrho Ltd. v. Shell Petroleum Company Ltd. (No. 2)* [1982] A.C. 173, Lord Diplock said that even where a remedy was provided to enforce the obligation, a further remedy (sc. in damages) might be available to a person belonging to a class of individuals for whose benefit or protection the obligation was imposed.

Arguably, both of these can be said to apply to some sections of the Education Acts. But again neither is conclusive; a broader approach is required. As Lord Jauncey of Tullichettle put it in *Reg. v. Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58 at page 170H:

"it must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision".

(See also *Calveley v. Chief Constable of the Merseyside Police* [1989] A.C. 1228 per Lord Bridge of Harwich at page 1237).

In the present case, although the duties were intended to benefit a particular group, mainly children with special educational needs, the Act is essentially providing a general structure for all local education authorities in respect of all children who fall within its provision. The general nature of the duties imposed on local authorities in the context of a national system of education and the remedies available by way of appeal and judicial review indicate that Parliament did not intend to create a statutory remedy by way of damages. Much of the Act is concerned with conferring discretionary powers or administrative duties in an area of social welfare where normally damages have not been awarded when there has been a failure to perform a statutory duty. The situation is quite different from that concerning the maintenance of factory premises as in *Groves v. Wimborne (Lord)* [1898] 2 QB 402.

Taking all these factors into account, it does not seem to me that it can be said that Parliament intended that there should be a remedy by way of damages for breach of statutory duty in respect of the matters complained of here."

[31] I agree with Mr Heaney's general statement that the law as set out in *X Minors v Bedfordshire* was then later developed in *Phelps v Hillingdon*. However, I do not agree with Mr Heaney's proposition that *Phelps v Hillingdon* overturned the decision in *X Minors v Bedfordshire*. That is, in my view, a misunderstanding of the decision in *Phelps v Hillingdon*. Importantly, *Phelps v Hillingdon* does not, in my view, alter the law on breach of statutory duty. Its significance lies in the fact that it develops the law of negligence. It is not necessary for the purpose of this judgment to discuss that development in any detail. The fact that *Phelps v Hillingdon* does this does not, of course, assist the plaintiff's argument in this application which is focussed solely on the law in relation to breach of statutory duty and has nothing to do with the law of negligence.

[32] I put it to counsel for the plaintiff during oral arguments that he was confusing the concepts of negligence and breach of statutory duty. He disagreed with that perception and submitted that their lordships wanted to keep the issue of direct liability open. Unfortunately, counsel for the plaintiff has confused the concept of direct liability with the concept of breach of statutory duty. They are not synonyms. In *Phelps v Hillingdon* the court is discussing the direct liability of the defendant education authorities and contrasting that with the vicarious liability of those education authorities for the actions of the individual staff they employed. This is not therefore a reference to breach of statutory duty.

[33] The law of negligence in this field may be developing. The law on breach of statutory duty in this field has shown no sign of further development since the judgment of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire*. The decisions in *Marr v Lambeth* and *Carty v Croydon* are clear demonstrations that it is now the settled approach in England and Wales that a plaintiff cannot sue in the field of SEN for breach of statutory duty. In *Marr v Lambeth*, Ousley J began his decision by saying:

> "1. This is a claim for damages for negligence in educational provision brought by a young man who is now 23 years old. …
>
> 2. The defendants denied negligence, causation of loss or its existence. Some of the claims were not justiciable and were in essence an attempt to mount a claim for damages for breach of statutory duty in another guise."

[34] In *Carty v Croydon*, the case as originally pleaded was eventually abandoned by the claimant's junior counsel at trial and was refined so as to reduce it to six allegations of negligence only. In his judgment, Dyson LJ commented:

> "[19] It is common ground that no claim for damages for breach of statutory duty can lie in this case even if it can be shown that there has been such a breach. It was held in *Phelps v Hillingdon Borough Council* [2001] 2 AC 619, [2000] 4 All ER 504, 652F-H that the duties cast on local authorities in relation to special educational needs were intended to benefit a particular group, namely all children with such needs who are within the area of the authority, and that Parliament did not intend that there should be a remedy by way of damages for breach of statutory duty."

[35] This understanding of the non-availability of breach of statutory duty is also adopted by the authors of textbooks on education law. For example, paragraph 2949 of "The Law of Education" states:

> "At common law, local authorities are not directly liable for failing to exercise their statutory discretion conferred on them by the Education Acts. See *X v Bedfordshire County Council*. A claim for breach of statutory duty can only be brought when three conditions are met:
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> • The harm suffered is that against which the statute is designed to protect;
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> • The claimant is of a particular class which the statute is designed to protect;
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> • There is no special remedy provided by statute for the protection of the claimant."

[36] For all these reasons it is therefore clear that Mr Heaney's argument that Lord Brown-Wilkinson's approach to breach of statutory duty in *X (Minors) v Bedfordshire* was overruled in *Phelps v Hillingdon* is incorrect.

Conclusion

[37] Although the legislation in the application before this court differs somewhat from the legislation before the House of Lords in *X (Minors) v Bedfordshire* and *Phelps v Hillingdon*, this is mainly due to the fact that Northern Ireland has its own separate legislation on the subject of SEN. However, in my view, the analysis carried out in the cases of *X (Minors) v Bedfordshire* and *Phelps v Hillingdon* equally applies to the equivalent Northern Ireland statutory regime.

[38] Consequently I do not consider that Articles 12, 13, 14, 15, or 19 the Education (Northern Ireland) Order 1996 or Regulation 11 of the Education (Special Educational Needs) Regulations (Northern Ireland) 1997 provide any pupil with the possibility of initiating a claim for breach of statutory duty. It was not the intention of Parliament to create such a remedy. I therefore strike out the claim of breach of statutory duty against the first defendant under Order 18 Rule 19(1)(a) on the basis that there is no reasonable cause of action in respect of breach of statutory duty. The claim of negligence set out by the plaintiff in his statement of claim of course continues.