

Quantifying loss: dyslexia and other special needs

by Keith Carter, employment consultant, Keith Carter &
Associates, Islington

While *Phelps v London Borough of Hillingdon* related to the adverse consequences of failing to identify and treat dyslexia, it was rightly noted that a teacher owes a duty of care to all children, not just those with special needs.

This recent ruling held that failure to diagnose and treat a congenital condition and to take appropriate action, as a result of which the child's level of achievement is reduced leading to loss of employment and wages may constitute damage for the purpose of a claim. The Law Lords, however, left the issue as to quantum "open for debate".

Key questions to address in cases such as *Phelps v London Borough of Hillingdon* are:

i) the extent of loss in academic attainment;

ii) loss of employment opportunities;

iii) loss of earnings.

Can loss in academic attainment be measured?

Around four per cent of the population is severely dyslexic with a further six per cent having mild to moderate problems. This means in effect one child in every classroom.

However, it may be argued that dyslexia makes no measurable difference to a child's attainment. This, however understates the value and support that can be received from both home and school. Dyslexia occurs in people from all socio-economic backgrounds and all levels of ability, from people who cannot read and write to those with university degrees.



Academic attainment may mean the difference between a person becoming a skilled mechanic with a main car dealer or an unqualified exhaust fitter. For others, it may be the difference between a degree and professional employment as opposed to manual work.

But is it possible to distinguish between those who may not have performed well at school, even if they had not had dyslexia, and those who might have had the potential to gain a degree?

From the late 60s, sociologists have been attempting to identify key influences on educational attainment. *Home and School* (Douglas) and Basil Bernstein's concept of restricted codes in language both for example attempted to analyse factors affecting educational attainment.

Educationalists in establishing the National Curriculum through to classroom teachers giving projected GCSE and A level grades look to set benchmarks from which to measure "likely attainment".

Loss of employment opportunities

By drawing on such data, lawyers may find they have the tools to assess whether a "measurable" difference has occurred in a child's level of achievement and hence whether there is a potential "loss of employment and earnings".

The effects of dyslexia on an individual's career may be:

- i) reduced career opportunities;
- ii) restricted career development or advancement;
- iii) increased difficulties in getting a job and thereby lower career expectations.

For example, if a selection panel were confronted with the following written response they may question the applicant's intellectual capabilities:

"Responsibility in my previous job included report writing and overseeing staff."

While fortunately (sic) some employers may look for other qualities in an applicant, the effects of dyslexia are serious.

In considering loss of employment opportunities, it is necessary to consider whether dyslexia is covered by the 1995 Disability Discrimination Act, which notes:

"A person has a disability if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities."

Loss of earnings

As dyslexia does not always affect a person's ability to carry out normal day to day activities they may find they are not covered by the Act.

However, paragraph A 8 of *Guidance to the Definition of Disability* argues:

"In some cases people have coping strategies which cease to work in certain circumstances (for example where someone who stutters or has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of the impairment will break down so that these effects will sometimes occur, this possibility must be taken into account when assessing the effects of the impairment."

Measuring loss of earnings is perhaps the easiest of the questions and may be approached in three ways:

- i) measure differences in earnings by qualification;
- ii) look at the difference in earnings by occupation;
- iii) adopt the approach used in *Doyle v Wallace* and consider the loss of a chance.

Calculation by qualification

The General Household Survey notes the difference between earnings for those with no qualifications (£14,903), those who have GCSEs at grades D to G (£15,137) and at grades A to C (£17,097). While it goes on to give information by higher qualifications this assessment may provide the basis on which to start to assess loss.

Calculation by occupation

To illustrate this approach, take the example of a young man or woman who wanted to join the police force or security services. While no qualifications are needed for security guards, typically GCSEs are required to be a police officer.

The difference in earnings is £15,901 p.a. gross for security work, as opposed to £27,487 p.a. gross for police officers.

Loss of a chance

An example under this heading might be provided by *Doyle v Wallace* The Times, [22 July 1998]. If it is thought that with appropriate education the chance may have existed for the individual to become a teacher but equally that person may have worked in a general administrative post; take a proportion of an average teacher's salary (£26,681 p.a. gross), and a proportion of an administrative worker's salary (£14,669 p.a. gross) as a basis for calculation.

Speculation v labour market analysis

There is likely to be considerable debate regarding quantum in cases such as *Phelps v London Borough of Hillingdon*. However, as the judgment itself notes, quoting from *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 Lord Simonds:

"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 damaged by the breach."

While quantifying 'loss' as a result of a local education authority's negligence may be difficult, this should be no reason to shy away from the task. In many cases a substantial heading of damages may be at stake. ■