



LJMU Research Online

Diver, AR

Invitation to Trusteeship rather than Treat? Higher Education, human rights, and student litigation: A response to Fulford (2020)

<http://researchonline.ljmu.ac.uk/id/eprint/12639/>

Article

Citation (please note it is advisable to refer to the publisher's version if you intend to cite from this work)

Diver, AR (2020) Invitation to Trusteeship rather than Treat? Higher Education, human rights, and student litigation: A response to Fulford (2020). Higher Education Quarterly, 75 (1). pp. 22-34. ISSN 0951-5224

LJMU has developed **LJMU Research Online** for users to access the research output of the University more effectively. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LJMU Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain.

The version presented here may differ from the published version or from the version of the record. Please see the repository URL above for details on accessing the published version and note that access may require a subscription.

For more information please contact researchonline@ljmu.ac.uk

<http://researchonline.ljmu.ac.uk/>

Invitation to trusteeship rather than treat? Higher Education, human rights and student litigation: A response to Fulford (2020)

Alice Diver 

School of Law, Liverpool John Moores University, Liverpool, England

Abstract

This article argues that, as tutors, we are bound not only by the rules of contract law (i.e., to avoid breaching the terms of that which was agreed to), but also by our duty of care, and the principles of human rights law that protect the right to education. We must strive to avoid negligent acts and any potentially harmful practices or policies. Looking to recent litigation, we are bound also to provide useful, meaningful guidance on how learners might best achieve—and subsequently evidence—high levels of intellectual attainment and wider ‘learning gains.’ The concepts of fairness and equitable treatment are key, especially where universities have agreed to widen access and improve opportunities. With the protection of vulnerable learners increasingly leaning towards the provisions—and promises—of human rights law, a sort of estoppel-led ‘trusteeship’ (over shared knowledge and learning processes) can perhaps also be inferred.

Astratto

Questo articolo sostiene che, in qualità di tutor, siamo vincolati non solo dalle regole del diritto contrattuale (vale a dire per evitare di violare i termini concordati), ma anche dal nostro dovere di diligenza e dai principi del diritto dei diritti umani che proteggono il diritto all'istruzione. Dobbiamo impegnarci per evitare atti negligenti e pratiche o politiche

This is an open access article under the terms of the Creative Commons Attribution License, which permits use, distribution and reproduction in any medium, provided the original work is properly cited.

© 2020 The Authors. Higher Education Quarterly published by John Wiley & Sons Ltd

potenzialmente dannose. Guardando ai recenti contenziosi, siamo anche tenuti a fornire una guida utile e significativa su come gli studenti potrebbero raggiungere meglio - e successivamente prove - alti livelli di raggiungimento intellettuale e "guadagni di apprendimento" più ampi. I concetti di equità e trattamento equo sono fondamentali, soprattutto dove le università hanno deciso di ampliare l'accesso e migliorare le opportunità. Con la protezione degli studenti vulnerabili sempre più orientati verso le disposizioni - e le promesse - della legge sui diritti umani, si può forse anche dedurre una sorta di "amministrazione fiduciaria" guidata dall'estero (sulla condivisione delle conoscenze e dei processi di apprendimento). In questo articolo discutiamo come in qualità di docenti non siamo tenuti soltanto a rispettare il diritto contrattuale (per esempio le clausole che impongono di non violare i termini dell'accordo), ma anche del dovere di prenderci cura degli studenti e dei principi derivanti dai diritti umani che sanciscono il diritto all'educazione. Dobbiamo pertanto evitare di porre in essere condotte negligenti e qualsiasi pratica o procedura che possa danneggiare gli studenti stessi. Alla luce di riferimenti giurisprudenziali abbiamo il dovere di fornire una guida utile ed effettiva agli studenti, affinché possano raggiungere (per poi provarlo) alti livelli di apprendimento. Il concetto di equo e giusto trattamento sono cruciali, soprattutto laddove le università si sono impegnate ad ampliare l'accesso ed a migliorare le opportunità per gli studenti. Tenuto conto che la protezione degli studenti che si trovano in situazioni particolarmente problematiche è (e sarà) sempre di più tutelata dai diritti umani, è possibile dedurre che esista una sorta di "estoppel trusteeship" sulla condivisione della conoscenza e dei processi di apprendimento.

1 | INTRODUCTION

A central feature of higher education is the collaborative relationship between university and student. This relationship enables and challenges students to achieve their learning goals in a supportive academic environment, and is multi-faceted, encompassing teaching, pastoral care and delivery of services such as accommodation ... Underpinning this relationship are the requirements of consumer protection law. These requirements place a duty on universities to ensure that students who invest time and money in their education are treated fairly. (Universities UK, 2016)

Fulford's recent argument (2020) for utilising the contract law device of 'invitation to treat'¹ to perhaps [re]negotiate aspects of 'the student experience', is an intriguing one, for several reasons. Invitation to treat is generally regarded as a sort of *pre-offer*, or precursor to formal agreement, incapable of being accepted and made into an offer (Taylor & Taylor, 2017, p. 23). Clearly, in the context of higher education we do invite our students to 'treat' with us, by motivating them to engage meaningfully with the various processes of learning both within and beyond the classroom. Negotiation occurs to some extent, too, not least in the sense that higher education students often have input into curriculum design via, for example, modular evaluation, the National Student Survey (NSS) and the Teaching Excellence Framework (TEF). They also ultimately have the final say in deciding which—if indeed any—bits of information they might retain, challenge, ignore or build upon within any given teaching session, module or degree programme. This aspect of their independent learning and study occurs, however, against a distinct backdrop of contracted-into services and legally frameworked expectations as to eventual outcome. That students are able to access our 'product' means that they have accepted a clearly defined offer and actively entered into a formalised agreement to both learn and be taught (Bunce, Baird, & Jones, 2017). Consideration—the third key element needed to form a contract, once offer and acceptance have been achieved and evidenced (O'Sullivan & Hilliard, 2016)—is also demonstrable in such contexts. Serving as a 'badge of enforceability' (McKendrick, 2017, p. 66), the doctrine of consideration requires an active exchanging of things of value (Morgan, 2015, p. 31). In the higher education context it may be argued that academic wisdom, knowledge, experience and support are given in return for students' time, attention, effort and—of course—fee payments.

This article will argue that we are bound not only by the rules of contract law (i.e., to avoid breaching the terms of that which was agreed to), but also by our duty of care, and the principles of human rights law that protect the right to education. Put bluntly, we must strive to avoid negligent acts and any potentially harmful practices or policies.² Looking to recent litigation by disappointed students, the paper argues also that we are bound to provide useful, meaningful guidance on how learners might best achieve—and subsequently evidence—high levels of intellectual attainment and wider 'learning gains'³ (Evans, Howson, & Forsythe, 2018). This is so, irrespective of whether these are framed as key aspects of 'graduateness' (Glover et al, 2002; Hoover et al., 2010; Steur et al., 2012) or as some worked-for sense of academic or professional 'belongingness' (Yorke, 2016).⁴ Implicit to all of this, increasingly, is the added 'promise' (underwritten by the legislative protections of the Consumer Rights Act 2015 and public-facing student feedback and complaint mechanisms) that our students will depart higher education in a more advanced state of 'work-readiness' (Allen, Quinn, Hollingworth, & Rose, 2013) than when they first entered it. The concepts of fairness and equitable treatment are key, especially where universities have agreed to widen access and improve opportunities. With the protection of vulnerable learners increasingly leaning towards the provisions—and promises—of human rights law,⁵ a sort of estoppel-led 'trusteeship' (over shared knowledge and learning processes) can perhaps also be inferred.

2 | RECENT LITIGATION OVER PASTORAL CARE AND EMPLOYABILITY: BREACHES OF CONTRACT, EPISODES OF NEGLIGENCE AND A 'RIGHT' TO EDUCATION?

As the recent case law confirms, the concept of academic judgement immunity from judicial scrutiny or oversight (confirmed almost two decades ago in *Clark v University of Lincolnshire and Humberside*)⁶ appears to be weakening, both within and beyond the United Kingdom (UK) (Kamvounias & Varnham, 2006).⁷ Jurisprudence on student dissatisfaction and disappointment highlights how intricate matters of procedure have become ever more prone to Judicial Review,⁸ whereby the High Court can analyse in detail—and evaluate—the finer workings of our various agreements with students (Cummings, 2017; Farrington & Palfreyman, 2006). Marking and modes of assessment, the effectiveness of teaching methodologies, and the adequacy—or otherwise—of pastoral care policies and practices have all been the subject of recent legal challenges. In *Crawford* (2014), for example, a medical

student claimed that the University's marking and assessment processes were ultra vires, on the basis of not having followed their own internal Regulations: this suggested not only a breach of contract, but also the potential for significant unfairness. The appeals adjudicator had, for example, accepted without question a memo from an academic stating that marking procedures had been carried out correctly, despite the presence of complex ambiguities within their wording. Although it was held that there was no onus on the university to confer a degree upon the claimant, it was noted by the court that a resit opportunity should, however, have been offered here.⁹

The courts' language and reasoning in similar cases confirms that breaches of contractual terms and tortious liabilities are key issues for university decision-makers, particularly in terms of gauging who must ultimately bear—or share—responsibility for particularly adverse outcomes. With significant numbers of students seeking special consideration, increasingly pleading mitigating circumstances and revealing an ever-widening variety of profound external pressures,¹⁰ it seems likely that the need to provide them with greater—or at the very least adequate—pastoral support will similarly grow. The concept of access to education as a human rights issue, clearly also rests upon long-established principles of non-discrimination, and equality of opportunity and treatment. As the provisions of the United Nations Principles for Responsible Management Education (PRME) and the Sustainable Development Goals (SDGs) further serve to remind us, we are duty-bound to actively promote and protect social inclusion, not least by ensuring that fair and ethical behaviours underpin all processes of higher education (King, 2001; Muff et al., 2013; Palmer, 2015).¹¹ Future career prospects clearly matter: the problems raised in cases such as *Siddiqui* (2018) (examined below) are not unique to the UK.¹² A fairly recent Australian case offers some persuasive guidance on how to avoid unclear terms within the higher education contract.

In *Re Humzy Hancock* (2007),¹³ a law student was found to have plagiarised three times: as a result, he was unable to get a 'good character' reference from a former tutor. He was therefore prevented from gaining a place on a practice course and could not make progress in his legal career. It was found that the University's own Regulations on plagiarism did not define the offence correctly—although the student had clearly committed it in the court's opinion, he had not done so according to the School's governing Regulations. The court stressed that the wording of such internal policies had to be very clear, to avoid any such uncertainties and ambiguities. The quality of the academic work being assessed was also, however, a key concern here. Oddly, the issue of *procedural fairness* (and the question of whether or not this had been achieved by the university across its processes) did not seem to rank as highly, however. And yet, with students continuing to plead external, mitigating pressures when faced with difficulties such as this, procedural matters seem likely to only gain in significance.¹⁴ This is especially so where students feel that a career-prejudicing breach of contract has somehow occurred. In, for example, *R (Mustafa)* (2013),¹⁵ the claimant student had been given a mark of zero on an assessment post-plagiarism, and then pleaded several mitigating factors. An apparent inability to take part in group work had led to his suffering social isolation and having unfinished assignments, while a deadline extension had led to depression and exhaustion, which then in turn had adversely affected his exam performance. Again, the University's definition of plagiarism was scrutinised by the court, who found that it differed from those used in most other higher education institutions (HEIs). Though not the case here, the issue of determining whether or not plagiarism has occurred could, for now, still be deemed to fall within the judicial immunity principle covering matters of academic judgement.¹⁶

In *Gopikrishna* (2015), however, a move away from this position was seen.¹⁷ Here, a second-year medical student faced removal from her course, after having failed her exams. The basis for the decision to withdraw her was that she would, in the opinion of the panel deciding her fate, have been unlikely to have completed her degree. The Office of the Independent Adjudicator (OIA) initially considered this decision to fall within the remit of academic judgement (and therefore be immune from judicial scrutiny) but it was argued subsequently that the process behind the decision was clearly unfair. Only her first year's performance had been taken into account by the panel, her extenuating circumstances had not been considered and her personal tutor had not been consulted with, as was required under the university's own Regulations. These 'failings of reason and procedure' meant that the usual immunity associated with academic judgement would not apply. Not only had a breach of the contractual terms occurred, their interpretation by the university had been deficient, if not perhaps negligent.

The use of academic or administrative discretion (e.g., in determining what exactly constitutes extenuating or mitigating circumstances, cheating or plagiarism, and their level of seriousness) seems likely to face enhanced external scrutiny, whether through student feedback, formal complaints or litigation. Given also how frequently instances of illness, stress and anxiety feature within the jurisprudence, together with family issues and financial problems, it is difficult to frame pastoral care as anything other than an essential aspect of the wider, contract-ed-into student experience. The case of *Siddiqui* (2018) is particularly worrying in this respect and in terms of just how much time had passed since the claimant's undergraduate journey had ended (i.e., in a 2.1 rather than a hoped-for First). His employability over the next two decades was, it was alleged, very adversely affected through his having suffered high levels of stress, anxiety and depression, especially in the wake of his graduation. One quite problematic undergraduate module came under the spotlight, however, for reasons which were clearly beyond the scope of most tutors' responsibility: a high number of lecturers had taken sabbaticals, so that the School was not fully staffed. Negligence was also alleged in relation to the teaching methods used—in the claimant's view, these were deficient—and in respect of marking his assessments. It is noteworthy, too, that an old letter of complaint (written long ago by a former student, but with the apparent encouragement of another lecturer) was referred to by the court in connection with the issue of gauging what might amount to 'poor' teaching quality.¹⁸

It is in respect of the various pastoral care issues, however, that this case is perhaps most significant. Put briefly, crucial information on the student's illnesses had not been passed on by his personal tutor to those who possessed the authority to suggest or effect reasonable adjustments or potentially moderate exam results. His personal tutor claimed to have had no memory of any mental health issues having been raised by the student but did recall reassuring him that no paperwork would be needed to evidence his various extenuating circumstances. Close scrutiny by the court included a detailed look at such matters as staff teaching hours, course administration methods and policies, and private correspondence between staff and students, even beyond that which had passed between the claimant and his former personal tutor. Even though he was in the end unsuccessful, the case confirms that, for many students, high-level pastoral care is becoming an increasingly integral, essential aspect of their overall learning experience (Pavlin & Svetlik, 2014, p. 420). This has clear implications for universities wishing to avoid tortious or contractual liability, but also for those aiming to promote and protect a human right to access education via 'massification' (Casal & Selamé, 2015). Inherent, 'invisible' and overlooked vulnerabilities and disabilities can hinder students on their learning journey before, during and after undergraduate study.¹⁹ Students may well claim that early promises of help or extra support have not been honoured: assurances made to them, whether express or implied in a prospectus, online adverts, or perhaps given verbally at clearing or open days, can therefore conceivably be seen as part of a wider higher education contract. Once included in the agreement, such statements are likely to pass the *consensus ad idem* test to become enforceable contractual terms, rather than disappearing as mere 'trader's puff', which, as vague opinion or outlandish statement, is generally not capable of being included as a term or of being litigated (McKendrick, 2017).²⁰

In *Siddiqui*, the concept of long-term 'employability harms' was at least a juridical one, in the sense that the court not only entertained the notion but examined in considerable detail the various claims made. The background component to his grievances was his unmet need for pastoral care and academic support, and the duty on tutors to adhere to those processes aimed at addressing such need. It is not beyond the realms of possibility that student complaints and similar litigation will continue to arise from adverse student responses to poor degree results, where students cite unmet needs. The university's response here (that the student was lacking in key skills and had not engaged in sufficiently independent study) could potentially be countered in future by a learner's claim that certain, key study skills, and/or better pastoral support, should have been provided by the respondent university, especially given the likely demands of certain professions.

Arguably, such a claim could perhaps potentially yet fall within the ambit of Article 2, Protocol 1 of the European Convention on Human Rights (A2P1) which states that 'No person shall be denied the right to education.'²¹ The European Court of Human Rights (ECHR) has confirmed that A2P1 protects the right to access to educational institutions existing at any given time; a right to an effective education; and a right to official

recognition of those studies which a student has successfully completed.²² Although signatory states are not under an obligation to provide third-level education, they are obliged to provide practical and effective access to any education that has been put in place.²³ As Lady Hale recently stressed in *Tigere* (2015)—albeit on the issue of accessing student loans—if third-level education were to become ‘prohibitively expensive’ for students, this would render the right to education essentially fictive.²⁴ It could perhaps be argued that certain other preventable or removable barriers to education—such as lack of pastoral or academic support, bottlenecked support services or inadequate facilities—might yet be seen to fall within the remit of A2P1’s protections. This is particularly so if we define ‘costs’ in wider terms than the strictly financial sense: as ‘consumers’ (Molesworth et al., 2010) students do invest time, effort and emotional responses into the learning process, often at the expense of their well-being or mental health.²⁵

In *Re Croskery* (2010), the right to education under A2P1 was mentioned: here, a student had complained over dissertation supervision and his final grade classification. The High Court confirmed that the key question was whether he had been denied *any* right to education, given that the Article clearly did not enshrine a right to litigate over the presence of certain educational barriers.²⁶ A2P1 was silent as to whether or not any broad right to higher education existed, not least in respect of academic assessments. The court went on to confirm that the Convention rights referred to by the student were simply not engaged in this case.²⁷ Arguably, had he perhaps been a disabled student facing significant learning barriers or a lack of reasonable adjustments, or been given assurances of extra support prior to accepting the university’s offer of a place there, then this decision might not have been so easily reached. The case of *Cardao-Pito* (2012) merits mention here, given the nature and substance of the complaints made, namely academic bias and prejudice against the PhD student litigant. The court’s language was unequivocal: ‘having regard to what is fair and reasonable in all the circumstances’ they held that he ‘was entitled to be compensated for the loss of the Opportunity to have his appeal properly heard and the distress and inconvenience’²⁸ caused to him as a result. Here, the university in question failed to provide him with information on their Bullying and Harassment Procedures, and then rejected his complaints outright. They sought—inappropriately, it was later found—to also deter him from appealing against their decision to terminate his studies. (He later completed his doctorate at another university.) The court stressed that ‘the effect of [a] supervisor’s conduct’ upon a student, and upon their academic performance, did fall within the remit of judicial oversight, and beyond the protective scope of the academic immunity principle.²⁹ Issues of ‘unusual’ academic conduct included: inappropriate tone of feedback given by the supervisor, both verbally and in emails, and an inconsistent lowering of his original mark following the resubmission of an apparently ‘much improved’ paper. The university’s approach in not following its own procedures on appeals and complaints had been particularly ‘disappointing’ insofar as it had

*... failed to recognise its own serious failure, that being its omission to address a serious set of allegations against one of its senior staff, which if true had seriously affected the welfare and academic success of one of its students.*³⁰

The duty to promote and protect student welfare is an overarching one, as evidenced by the OIA’s focus on the need for universities to provide meaningful levels of pastoral care. Their recent Discussion Paper (on requests for special consideration) reaffirms that, as a matter of process, ‘deciding whether the student has presented a good case for special consideration does not involve academic judgment’ (OIA, 2019). External scrutiny (via the OIA complaints system or through Judicial Reviews in the High Court) seems therefore likely to continue, if not intensify, given the high numbers of higher education students now seeking or needing more varied and higher levels of support. As Thorley (2017) observed:

With widening access to higher education, the student population is more closely reflecting the UK’s wider socioeconomic and demographic make-up, and a growing proportion of students would appear to

be affected by mental illness. Over the past 10 years there has been a fivefold increase in the proportion of students who disclose a mental health condition to their institution.³¹

3 | EQUITABLE TREATMENT, FAIR PROCESS AND THE NOTION OF 'TRUSTEESHIP' OVER LEARNING?

Most, if not all, HEIs accept the following:

1. the student journey/experience will inevitably at times be a difficult, emotionally challenging one, even for those unaffected by a disability or other vulnerable characteristic[s];
2. that they have actively contracted with their students to provide them with services that are 'fit for purpose' in accordance with law and policy;
3. that they owe a duty of care towards our students, grounded—at the very least—in the avoidance of tortious liability.

The Office for Students (OfS) has, however, recently highlighted the clear need for greater *equity*, as opposed to—or rather in conjunction with—the more basic aims of non-discrimination and equality, in *all* of our dealings with our learners:

Academic and professional staff and accompanying systems and processes will all need to be clearly inclusive, promoting equity of opportunity such that no student is disadvantaged once they are in higher education. (Broughan, 2018)

On the concept of fairness, the International Compliance Association (ICA) has offered further guidance: a fair *process* on deciding special consideration is, for example, likely to include regulations that:

1. are 'easy to find, to understand and to follow';
2. are 'well-advertised' with students being reminded of them at key points during their studies;
3. have expectations clearly set out 'so that students understand what circumstances and events are likely to be considered, and what sort of evidence they are likely to need to provide';
4. are flexible, in terms of 'consider[ing] each case on its individual facts';
5. will 'explain what is likely to happen if the request is accepted—and what will happen if it is not'.

Students should know who will consider their case and how this will occur, and receive a written decision, including reasons. Consistency is key, and there should be a process for identifying those students who have perhaps sought special consideration several times, and who therefore might be in need of additional support or more detailed, bespoke advice. Appeals must always be possible, too (OIA, 2019). In sum, the concept of fairness, not always necessarily a core feature of the commercial, contracted-into 'bargain',³² is becoming an increasingly significant one for all concerned:

The starting point should be that a student who is ill, or injured, or bereaved, or has been through a difficult experience should be treated compassionately, and in a way that is fair and consistent across the student body.³³

Gauging whether or not HEI decision-makers have behaved fairly and equitably requires analysis and reasoning beyond that of commercial law or tort principles. As Fulford (2020) observed, contract law is not always the most useful device for promoting equitable outcomes. The *Carbolic Smoke Ball* case demonstrated that it was not enough for the

plaintiff to simply purchase the product in question, and to gain compensation when it failed to make her resistant to various illnesses. Her consideration—and the right to receive a remedy for this breach of contract—lay in doctrine: the fact that she had regularly inhaled the medication as required, before falling ill, was key. She accepted the contract terms offered to her via her behaviour, but then went on to fulfil all of her obligations, by falling ill. She was therefore 'rewarded' by being compensated financially, despite the defendant's subsequent attempts to renege upon their widely advertised promise to pay out to all who might become sick.³⁴ The message for HEIs is a clear one—they must not attempt to frame any statements or implied promises as 'mere puff', where there is a chance that these might well be relied upon later by disappointed students, as an implied or express contractual term.

Where students rely upon the promises made by universities (for example, over pastoral care or academic support) and then perhaps suffer detriment as a result, it may be argued that this brings to mind the language—if not the principles and reasoning—of the law of Equity and Trusts.³⁵ As Hudson (2016, p. 25) explains, the concept of the trust was 'created to prevent unconscionability' with 'property ... held by one person as a form of steward for the benefit of someone else'. In other words, the need to pinpoint 'true ownership', and to remind trustees that they must serve as fiduciaries, to benefit vulnerable or disadvantaged others, is a fundamental one. The shield-like imagery of promissory estoppel is perhaps especially apposite here, given how the presence of detrimental reliance (upon promises made) and subsequent losses (e.g., of fees, time or career opportunities) may, in theory at least, spark equitable remedies for an aggrieved promisee (Farran & Davies, 2016, p. 51). The language of this area of law is again well suited to the processes of learning and teaching: jurists refer often to the holding and gifting of items of value and of preserving carefully such things as may benefit future generations. A near-sacred nature attaches to promises made to vulnerable beneficiaries (Hudson, 2016, p. 30).³⁶ In other words, if 'an education' is framed as an item of value which can be owned, gifted and inherited (rather than simply bartered over or squandered), then a number of interesting possibilities arise.

Degree parchments might perhaps be regarded as the 'title deeds' of learning (Diver, 2019, p. 7), evidencing not only the genuine intellectual endeavours of graduates but speaking also to their taking hard-earned ownership of their studies. This in turn might act as a reminder of the need for consistent, independent effort, ethical behaviour and honesty in all that they—and we, as tutors—do. As a valuable, much-prized item that is capable of being owned, an education should not be damaged: it should be seen as something to be highly valued and perhaps held 'on trust' for future generations of learners. Such an approach might also serve to persuade learners, tutors, managers (and an often-sceptical public) that an education should not simply be viewed as the end product of some quickly bartered trade deal, designed to be consumed at speed and then rapidly exchanged, ticket-like, for a job with the highest bidder. By the same token, students might yet come to view themselves initially as beneficiaries (in terms of receiving wisdom and learning to learn) but with a wider mission to later become themselves the trustees of scarce knowledge, by serving and protecting the interests of those who will follow behind them. In other words, by framing higher education students in this way, rather than viewing them as paying customers, it may make it easier for us to persuade them that are joining a collegial community of higher learning. They should see themselves as duty bound to contribute positively to wider society, too, to serve as mentors for those following them into their industry or profession, and to act as ambassadors for their university or discipline.

In terms of litigation and complaints, where a student has been let down by the various processes or pitfalls of higher education, it may be further argued that a basic, contract-led approach to the issue of their disappointment (i.e., refund, replace or repair) will often fall well short of the ideals and aims of access-widened, aspirational higher-level learning. The common law remedies for breaches of contract and/or negligence generally lie in an award of monetary damages, with judicial review possibly permitting an examination of decision-making processes and offering the chance of them being redone, afresh.³⁷ Equitable remedies offered by the law of Trusts may seek to go further than either of these approaches, looking rather to provide meaningful redress for—or rectification of—those harms or losses suffered by claimants in the wake of a fiduciary obligation breach.

4 | CONCLUSIONS

As the OfS has recently argued, it is important to 'be giving students a voice and involving them in the creation of services'.³⁸ In terms of also meeting our domestic and international obligations under human rights law, HEIs must strive to amend, innovate, improve upon, perhaps even craft from scratch ever more diverse, learner-friendly and industry-relevant assessments and activities. As tutors, we should be fully prepared, for example, to allow extensions on deadlines and effect reasonable adjustments where these are necessary—not least in relation to actively providing more academic support sessions and offering pastoral care as or when these are needed. Adherence to the principles and aims of the European Convention, Agenda 2030s SDGs and the PRME requires meaningful acknowledgement and visualisation of the student perspective. We tend to do this already via direct or indirect liaison with student representatives and by taking positive action on the receipt of their feedback. The notion, however, that this dialogic part of the essential 'bargain' of learning is somehow negotiable, is a limited one. It is these aspects of higher education—rather than those occurring during classroom-led or work-based learning sessions—that likely offer the most scope for tangible negotiations and exchanges between learners and tutors (albeit often with hindsight and largely for the benefit of future cohorts). If these exchanges were to be regarded not as contract-building exercises, but as the basis for longer-term relationships, grounded in the equitable principles of Trusts law, then perhaps we may yet convince learners that they are not simply passive consumers, poised to litigate or complain bitterly if the end product somehow falls short.

As the case law referred to above makes plain, litigation and formal complaints within the UK and other Commonwealth jurisdictions continue to focus upon the disappointment felt by poorly performing students who did not gain the results—or perhaps the pastoral or academic support—that they needed or had hoped for. The dissatisfied customer is not an inaccurate analogy in such scenarios, given how the jurisprudence centres upon breached contracts, broken promises and tortious liability. Via judicial reviews, human rights issues are increasingly evident also, with the right to education gradually gaining a more meaningful level of justiciability. The ideals of accessible learning and equality of treatment sit well with the notions of fairness and equity, as the recent guidance from the OfS confirms. And yet, the litigation is seldom just about a failure to learn or to have been taught adequately: often the cases highlight systemic, unseen deficiencies in pastoral care systems, or reveal significant errors of judgement made by hard-pressed decision-makers when interpreting or drafting university policies, rules and regulations. The 'Tripadvisor effect' (for want of a better term) of publicly visible student feedback is likely, however, to continue for the foreseeable future, reinforcing the currently predominant notion of the learner as consumer-investor (Bunce et al., 2017). Disgruntled students' criticisms—whether at modular level or via the wider NSS, LEO (Longitudinal Education Outcomes) and TEF mechanisms—carry the potential for harsh sanctions and close scrutiny: for example, of teaching methods and assessment policies. Courses with low satisfaction rates are more likely to be seen as having somehow soured the wider 'student journey'. Peer esteem may be easily lost, module enrolment rates might drop and 'charges' of offering poor value for money are likely to be made from several directions (not least as a result of the current Covid-19 pandemic and its potential, long-term impacts upon higher education and wider society).³⁹

Fulford's analogy of the 'coffee cup for cash' (in respect of contractual consideration, evidencing agreement) is a useful one to conclude upon. As consumers, students are entitled to receive adequate goods and services—a decent coffee representing a good learning experience—but they still may yet decide whether or not to drink their beverage on any given day. We should be prepared for some—perhaps many—of them to be unable to visit the coffee shop at various times: they may be or become unwell or be too stretched in terms of finances or part-time work, or family commitments. At the risk of overdoing the analogy, some may also develop an aversion or addiction to the product on offer, perhaps becoming anxious or ill as a result. If we are their 'baristas', then we are bound to deliver an acceptable standard of goods and services, and not be negligent in the processes of doing so. Harm should not occur, and no one should be excluded from the experience on the basis of needing some assistance or requiring reasonable adjustments to be made. It bears mentioning, however, that the high-speed

nature of modern contracts—instantaneous payment exchanged for immediate ownership of goods, not least in terms of easily downloaded, superficial rough knowledge—creates a very dangerous precedent. The idea of fee payments somehow guaranteeing instant *and* future successes, in terms of high marks, degree classification, graduate-premium employability skills and excellent career prospects, is a dangerous one. Subsequent failure to enjoy any given student journey/experience might well be directly attributed to whoever has offered—or perhaps more accurately, promised—guaranteed success or very high levels of extra support.

Clarity (in respect of learning outcomes, assessment, regulations, penalties, marking criteria and so on) is paramount, especially in respect of any promises made; this is so even where statements might well be found to fall well short of a perfectly worded contractual term. Many things may induce students into signing up to any given course: for example, exemptions from professional exams, bursaries, a year abroad, or extra support to cope with disabilities, background, anxieties or personal difficulties. Aside from the risks of litigation, we are duty bound also to be mindful of our role and remit in promoting and protecting the welfare and well-being of our beneficiary-students. To promise them more than can be reasonably given is to forget that we want them to become involved, informed and willing stakeholders in both their own learning and future development. As Borges et al. (2017, p. 172) argued, students seek 'fulfilment, personal growth and active participation in the social changes of their time'. We can invite them to 'treat' with us by way of opening up useful discourse, but this cannot really serve as an alternative to entering into clearly defined, workable contractual obligations with them. Rather, we should ensure that they are both encouraged and enabled to claim increasing ownership of their own efforts and education, and, ultimately, to see themselves as entering into the role of 'trusteeship' that should attach to the furthering of knowledge and the maintenance of high standards and ethical behaviours.

ORCID

Alice Diver  <https://orcid.org/0000-0003-2268-6931>

ENDNOTES

- ¹ The nature of any exchanges made at this stage is clearly a fragile one: 'Invitation to treat falls short of being an offer capable of binding acceptance; instead it is an invitation for the other party to make an offer, which the former party is *free to accept or reject*' (emphasis added) Taylor and Taylor (2017) 'Contract Law' Oxford University Press: Oxford, p. 23.
- ² A contract clearly exists: the sector must provide: 'upfront, clear, transparent and accurate information that allows students to make informed choices about where to study' (offer and acceptance); fair and balanced terms and conditions that *provide a clear contractual relationship* between a student and their university (emphasis added); robust, accessible and clear complaint handling processes that allow students to hold universities to account' (provision for breaches of contract) Universities UK (2016) 'Universities and Consumer Rights: Findings of The Universities UK Self-Assessment Exercise' p. 3 (retrieved from <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/consumer-rights-universities.pdf>).
- ³ See further the arguments of D Boud (2018) 'Assessment could demonstrate learning gains but what is required for it to do so?' *Higher Education Pedagogies* 3(1) 54–56.
- ⁴ See further Hoover et al. 'Assessing the effectiveness of whole person learning pedagogy in skill acquisition' *Academy of Management Learning and Education* (2010) 9(2) pp 192–203 on the need for upskilling in terms of, for example, enhanced communication, team-working and problem-solving.
- ⁵ The concept of a fundamental right to education, as enshrined in Article 2 of the First Protocol (A2P1) to the European Convention on Human Rights (ECHR), has been raised in the Northern Ireland High Court, in connection with determining whether or not the supervision of an undergraduate dissertation was deficient or adequate: *Croskery's application* [2010] NIQB 129.
- ⁶ *Clark v University of Lincolnshire and Humberside* [2000] EWCA Civ 129, where a student's degree classification was capped as third-class; the court noted that students' remedies can lie in both private and public law, so that they can sue for breach of contract and negligence in addition to seeking Judicial Review in the High Court, for errors or failings in terms of process.

- ⁷ Noting also the 'reluctance on the part of courts to intervene in non-disciplinary decisions which involve academic judgement'. See also Draft Rules 5.2 of the Office of the Independent Adjudicator (OIA) at <http://www.oiahe.org.uk/media/119825/oia-draft-rules-2018.pdf>. For a useful summary of the role and remit of the OIA see also <https://www.oiahe.org.uk/media/1885/oia-and-judicial-review-fm.pdf>.
- ⁸ Judicial Review may be usefully defined here as a remit-defining device: 'the means by which administrative authorities or others with law-making and administrative powers—are confined within the powers granted to them by Parliament by the courts' H Barnett *'Constitutional and Administrative Law'* (2020) Routledge: London p. 71.
- ⁹ *Crawford v University of Newcastle* (2014) EWHC 162 (Admin).
- ¹⁰ See, for example, the Australian cases *Re Liveri* (2006) QCA 152; *Re AJG* (2004) QCA 88 and *Law Society of Tasmania v Richardson* (2003) TASSC 9 on how 'procedural unfairness' may well arise if wider issues associated with financial and familial stresses are not taken into consideration by decision-makers.
- ¹¹ See further Collinson et al. 'Clients, clinics and social justice: Reducing inequality (and embedding legal ethics) via an LLB portfolio pathway', (2018) 8 *Higher Education, Skills and Work-Based Learning* pp. 323–336, on how law students may be guided towards, and reminded of, their moral obligations to wider society via pro bono efforts.
- ¹² *Siddiqui v The Chancellor, Masters & Scholars of the University of Oxford* EWHC 184 (QB).
- ¹³ *Re Humzy Hancock* [2007] QSC 034. His reasons for plagiarising three times included family issues, lack of time and a failure to reference sources correctly.
- ¹⁴ The court looked, for example, at *Liveri, Re* [2006] QCA 152, and *AJG, Re* [2004] QCA 88, *Law Society of Tasmania v Richardson* [2003] TASSC 9.
- ¹⁵ *R (Mustafa) v OIA* [2013] EWHC 1379 (Admin).
- ¹⁶ Interestingly, however, the court made mention of the case of *S v Chapman* (2008) EWCA Civ 800 where a disabled pupil had claimed that their secondary school had been negligent in terms of failing to provide 'an appropriate education on the basis of curriculum and timetabling'. Though ultimately unsuccessful, it is not completely inconceivable that a similar argument could perhaps be made in respect of higher education provision, for example, in terms of not making reasonable adjustments or otherwise accommodating vulnerable learners.
- ¹⁷ *Gopikrishna R v OIA* [2015] EWHC 207.
- ¹⁸ *Siddiqui v The Chancellor, Masters & Scholars of the University of Oxford* EWHC 184 (QB), para 29: the module apparently had 'issues peculiar to it'. As sometimes happens with social media and Internet reviews over poor quality service, the university admitted to having had staffing difficulties, suggesting a useful awareness of the vagaries of academia at least. See further Diver (2019), p. 554.
- ¹⁹ A wide range of factors—beyond the scope of this article but relevant to the issue of our duties of care and safeguarding—can clearly affect student success and well-being: for example, mental health issues, caring commitments, financial hardship, issues involving race, ethnicity, nationality, gender, identity or sexual orientation. Continuing austerity clearly places further strain on higher education staff and systems: see further S Bradshaw et al. 'Gender and poverty: what we know, don't know, and need to know for Agenda 2030' *Gender, Place & Culture* (2017) 24 (12) pp. 1667–1688.
- ²⁰ 'Mere puff or trader's puff' is a 'statement of opinion [with] no legal effect', and therefore not capable of forming part of the contract (McKendrick, 2017, p. 157). On *consensus ad idem* (a 'meeting of minds' needed to evidence contractual agreement) see further Taylor and Taylor (2018, p. 18).
- ²¹ It is noteworthy that although this Article has been incorporated into national law by the Human Rights Act 1998, the UK filed a reservation (a sort of limiting, or 'get-out clause') in respect of it, which speaks to the need to avoid 'unreasonable public expenditure'.
- ²² *Belgian Linguistic* (1968) 1 EHRR 252. The 'right' to an education is not necessarily covered by the right to fair hearing enshrined in Article 6 of the ECHR, however; see further <https://ukhumanrightsblog.com/incorporated-rights/articles-index/protocol-1-article-2/>.
- ²³ *Leyla Şahin v. Turkey*, no. 44774/98, 10 November 2005 (at paras. 136–137).
- ²⁴ *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3,820 at para 24; see also *Hunter, Re Judicial Review*, [2016] CSOH 71.
- ²⁵ See further National Union of Students (NUS) 'The Effects of DSA cuts on Disabled Students' Briefing Note: https://studentsunionucl.org/sites/uclu.org/files/u84290/documents/dsa_cuts_briefing1.pdf.
- ²⁶ The court stressed that 'the applicant ... had access to and ha[d] exercised his right to third level education' (*Croskery's application* (2010) NIQB 12 at para 18, per Treacy J). Article 6 of the European Convention (protecting the right to a fair hearing) was also mentioned, however, which serves as a reminder of the need for HEIs to adhere to fair practices.

- ²⁷ *Croskery's application* [2010] NIQB 12 at para 21.
- ²⁸ *R (Cardao-Pito) v OIA* [2012] EWHC 203 (Admin). (2012) at para 55, per Gilbert J.
- ²⁹ *R (Cardao-Pito) v OIA* [2012] EWHC 203 (Admin). (2012) at para 96, per Gilbert J. The right to fair hearing under Article 6 of the ECHR was not engaged by the OIA's actions or decisions here, but it was confirmed that students do have the right to bring separate proceedings on the basis of breach of contract or tortious liability, in such cases (at para 99).
- ³⁰ Para 146, adding that the university 'had conducted itself in a most unattractive manner' para 153.
- ³¹ See also M. Williams et al. (2019) *Review of Support for Disabled Students in Higher Education in England: Report to the Office for Students by the Institute for Employment Studies and Researching Equity, Access and Participation* (p. 130) retrieved from <https://www.officeforstudents.org.uk/media/a8152716-870b-47f2-8045-fc30e8e599e5/review-of-support-for-disabled-students-in-higher-education-in-england.pdf>. The Office for Students (OfS) has similarly noted the 'increasing numbers of students with increasingly complex needs and comorbidity'.
- ³² Consideration in contract law must be adequate but will not necessarily always be sufficient: see, for example, *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 97, where discarded sweet wrappers were held to be 'valuable' consideration, in terms of contract formation. Fulford's point (2020) is entirely valid insofar as some agreements and promises made within higher education may often require disproportionate contributions from one side or the other.
- ³³ OIA (Discussion Paper: *Requests for Special Consideration* (November, 2019) p. 6, n. 7 (retrieved from: <https://www.oiahe.org.uk/media/2388/discussion-paper-requests-for-special-consideration.pdf>).
- ³⁴ *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.
- ³⁵ On the nature of the Trust see further A. Hudson (2016, p. 25) who notes that 'trusts were created to prevent unconscionability' with 'property ... held by one person as a form of steward for the benefit of someone else'.
- ³⁶ See further S. Farran and K. Davies 'Equity & Trusts' (2016) Hall & Stott: Saltford p. 105; A. Hudson 'Principles of Equity & Trusts' (2016) Routledge: London p. 30: 'The court may fashion any remedy it pleases either to give effect to the promise made in the representation, or to compensate the claimant for their detriment, or to prevent unconscionable advantage being taken of the complaint.'
- ³⁷ The process of Judicial Review already seeks to examine whether issues of illegality, irrationality, procedural unfairness or incompatibility with the provisions of the ECHR have arisen. It is 'the means by which administrative authorities or others with law-making and administrative powers—are confined within the powers granted to them by Parliament by the courts' P. H. Barnett *Constitutional and Administrative Law* (2020) Routledge: London p. 71.
- ³⁸ M. Williams et al. *Review of Support for Disabled Students in Higher Education in England: Report to the Office for Students by the Institute for Employment Studies and Researching Equity, Access and Participation* (p. 137 n. 31) retrieved from <https://www.officeforstudents.org.uk/media/a8152716-870b-47f2-8045-fc30e8e599e5/review-of-support-for-disabled-students-in-higher-education-in-england.pdf>.
- ³⁹ At the time of writing, online learning has replaced classroom teaching and supervision, and alternative assessments have supplanted traditional exams. The knock-on effects of the pandemic are likely to be felt for some time (e.g., in terms of delayed graduations/professional qualification, adverse impacts on the mental—and physical—health of students and staff) and seem set to have profound implications for future practice and policy (enabling remote working, redefining reasonable adjustments, caring commitments, extenuating circumstances) that might have been quite unthinkable only a few months ago.

REFERENCES

- Allen, K., Quinn, J., Hollingworth, S., & Rose, A. (2013). Becoming employable students and 'ideal' creative workers: Exclusion and inequality in higher education work placements. *British Journal of Sociology of Education*, 34(3), 431–452.
- Barnett, P. H. (2020). *Constitutional and administrative law*. London, UK: Routledge.
- Borges, J. C., et al. (2017). Student organizations and Communities of Practice: Actions for the 2030 Agenda for Sustainable Development. *International Journal of Management Education*, 15, 172–182.
- Boud, D. (2018). Assessment could demonstrate learning gains but what is required for it to do so? *Higher Education Pedagogies*, 3(1), 54–56.
- Bradshaw, S., Chant, S., & Linneker, B. (2017). Gender and poverty: What we know, don't know, and need to know for Agenda 2030. *Gender, Place & Culture*, 24(12), 1667–1688.
- Broughan, C. (2018). Can automated student support information management systems provide equity of attainment? Retrieved from <https://www.officeforstudents.org.uk/news-blog-and-events/our-news-and-blog/can-automated-student-support-information-management-systems-provide-equity-of-attainment/>

- Bunce, L., Baird, A., & Jones, S. E. (2017). The student-as-consumer approach in higher education and its effects on academic performance. *Studies in Higher Education*, 42(11), 1958–1978.
- Casal, P., & Selamé, N. (2015). Sea for the landlocked: A sustainable development goal? *Journal of Global Ethics*, 11(3), 270–279.
- Collinson, R., Diver, A., & McAvoy, S. (2018). Clients, clinics and social justice: Reducing inequality (and embedding legal ethics) via an LLB portfolio pathway. *Higher Education, Skills and Work-Based Learning*, 8, 323–336.
- Cummings, J. J. (2017). Where courts and academe converge: Findings of fact or academic judgment? *Australia & New Zealand Journal of Law & Education*, 12(1), 97–108.
- Diver, A. (2019). *Employability via higher education: Sustainability as scholarship*. New York, NY: Springer.
- Evans, C., Kandiko, C., Howson, C., & Forsythe, A. (2018). Making sense of learning gain in higher education. *Higher Education Pedagogies*, 3(1), 1–45.
- Farran, S., & Davies, K. (2016). *Equity & trusts*. Saltford, UK: Hall & Stott.
- Farrington, D., & Palfreyman, D. (2006). *The Law of Higher Education*. Oxford: OUP.
- Fulford, A. (2020). Contracting with students: Re-thinking higher education as invitation to treat. *Higher Education Quarterly*, 74(1), 63–74.
- Glover, D., Law, S., & Youngman, A. (2002). Graduateness and employability: Student perceptions of the personal outcomes of university education. *Research in Post-Compulsory Education*, 7(3), 293–306. <https://doi.org/10.1080/13596740200200132>
- Hoover, J. D., Giambatista, R. C., Sorenson, R. L., & Bommer, W. H. (2010). Assessing the effectiveness of whole person learning pedagogy in skill acquisition. *Academy of Management Learning & Education*, 9(2), 192–203.
- Hudson, A. (2016). *Principles of equity & trusts*. London, UK: Routledge.
- Kamvounias, P., & Varnham, S. (2006). In-house or in court? Legal challenges to university decisions. *Education and the Law*, 18(1), 1–17. <https://doi.org/10.1080/09539960500529850>
- King, B. (2001). The UN global compact: Responsibility for human rights, labor relations, and the environment in developing nations. *Cornell International Law Journal*, 34, 481–486.
- McKendrick, E. (2017). *Contract law*. London, UK: Palgrave MacMillan.
- Molesworth, M., Scullion, R., & Nixon, E. (2010). *The marketisation of higher education and the student as consumer*. London, UK: Routledge.
- Morgan, J. (2015). *Great debates in contract law*. London, UK: Palgrave MacMillan.
- Muff, K., Dyllick, T., Drewell, M., North, J., Shrivastava, P., & Haertle, J. (2013). *Management education for the world: A vision for business schools serving people and planet*. Cheltenham, UK: Edward Elgar.
- OIA. (2019, November). Discussion Paper: Requests for special consideration (p. 6). Retrieved from <https://www.oiahe.org.uk/media/2388/discussion-paper-requests-for-special-consideration.pdf>
- O'Sullivan, J., & Hilliard, J. (2016). *The law of contract*. Oxford, UK: Oxford University Press.
- Palmer, E. (2015). Introduction: The 2030 Agenda. *Journal of Global Ethics*, 11(3), 262–269.
- Pavlin, S., & Svetlik, I. (2014). Employability of higher education graduates in Europe. *International Journal of Manpower*, 35(4), 418–424.
- Steur, J. M., Jansen, E., & Hofman, W. (2012). Graduateness: An empirical examination of the formative function of university education. *Higher Education*, 64, 861–874.
- Taylor, R., & Taylor, D. (2017). *Contract law*. Oxford, UK: Oxford University Press.
- Thorley, C. (2017). Not by degrees: Improving student mental health in the UK's universities. *IPPR*. Retrieved from <https://www.ippr.org/research/publications/not-by-degrees>
- Universities UK. (2016). Universities and consumer rights findings of the universities UK self-assessment exercise. Retrieved from <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/consumer-rights-universities.pdf>
- Williams, M., Pollard, E., Takala, H., & Houghton, A. M. (2019). OfS review of support for disabled students in higher education in England: Report to the office for students by the institute for employment studies and researching equity, access and participation (p. 130). Retrieved from <https://www.officeforstudents.org.uk/media/a8152716-870b-47f2-8045-fc30e8e599e5/review-of-support-for-disabled-students-in-higher-education-in-england.pdf>
- Yorke, M. (2016). The development and initial use of a survey of student 'belongingness', engagement and self-confidence in UK higher education. *Assessment and Evaluation in Higher Education*, 41(1), 154–166.

How to cite this article: Diver A. Invitation to trusteeship rather than treat? Higher Education, human rights and student litigation: A response to Fulford (2020). *Higher Educ Q*. 2021;75:22–34. <https://doi.org/10.1111/hequ.12260>