EMERGING LEGAL THEORIES OF EDUCATIONAL MALPRACTICE AND JUDICIAL REJECTION

DISSERTATION

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CHAPTER ONE

Introduction

Educational integrity on the part of teachers is a much-debated issue today. The former basis of trust and respect among parents, students and teachers in elementary and secondary schools as well as institutions of higher learning is slowly but surely deteriorating. More and more demands are being made for a measurable standard of educational delivery and performance whose effectiveness can be shown by results, as measured by student performance and a student's "actually acquired" knowledge.

This dissertation is concerned with litigation that has already been decided by Federal Courts, State Appellate Courts, and State Supreme Courts; and the implications thereof for educational institutions, if and when educational malpractice becomes a legally accepted concept.

With increasing litigation by parents and students claiming that educational institutions are not performing satisfactorialy to ensure that students are learning the necessary skills, and considering West Virginia's Supreme Court ruling that education is a fundamental right, we may have moved closer to a legal acceptance of the theory

of "educational malpractice." It is imperative, therefore, to research the significant issues concerning such a legal concept and the serious implications for educational institutions that are unprepared to deal with that concept.

Problem Statement

To identify emerging legal elements of educational malpractice as of December 31, 1983.

Subproblems of Study

1. Research federal and state court decisions relating to the issue in order to:
   a) determine what constitutes "educational malpractice (1) factual; (2) inferential;
   b) identify the important factual and legal issues involved in these court actions regarding educational malpractice;
   c) determine the kind of deference, and the court's attitude toward educational institutions in this area of concern; and
   d) determine the relative degree of success or failure in actions charging "educational malpractice" and the basis or rationale for such outcomes.

2. Review literature on educational malpractice.
3. Review available West Virginia Court cases and statutes relating to educational malpractice.
4. Research the extent to which other legal fields are influencing the issue of educational malpractice.
5. Research the issue of students' responsibility to learn in the educational process for the purpose of:
   a. determining what constitutes comparative (or contributory) negligence, and
   b. identifying the potential grounds constituting student negligence.
6. Develop recommendations for educators and educational units and for further studies.

Justification of Study

According to Black's Law Dictionary,[1] "education" encompasses the following elements of knowledge and skill a student is supposed to acquire in school and college: the student "comprehends not merely the instruction received at school or college, but the whole course of training; moral, . . . vocational, intellectual, and physical. Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to

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[1] Black's Law Dictionary (5th ed., 1979).

them all. Acquisition of all knowledge tending to train and develop the individual."

In addition, Pauley v. Kelly, 255 S.E. 2d 859 (1979), decided by the Supreme Court of Appeals of West Virginia, stated clearly that it is a violation of the West Virginia Constitution (Article XII, Section I) if a "thorough and efficient" education is denied, which was also considered a denial of the equal protection of the law. The court also unequivocally declared (ruled) that the constitutional requirement of a "thorough and efficient system of free schools" made education a fundamental right in West Virginia, and remanded the case for a decision in agreement with this opinion. However, the courts generally have refused to entertain claims for educational malpractice on public policy grounds.

Considering the development and expansion of civil rights legislation in the United States, the public pressure in response to students graduating from educational institutions lacking the very skills they were supposed to acquire, and increasing litigation foreshadow an assumption that educational malpractice may one day become an accepted legal basis for litigation.

Malpractice, as defined in Black's Law Dictionary, could very well encompass education, since it reads that malpractice encompasses:

> Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the "average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them." It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct" (emphasis added) (Mathews v. Walker, 296 N.E. 2d, 569, 571, 1973).[2]

As the research further shows, contract law will play a role in this area as well. A breach of contract might be declared educational malpractice based on an analogy to medical malpractice. Additionally, the area of tort law will find application and can therefore not be neglected. The word "torts" is derived from the Latin "tortus" or "twisted." The metaphor is obvious: A tort is conduct that is twisted or crooked, just not straight, and causes harm (cause and effect relationship). Concepts and principles of tort law pervade the entire field of conduct and law.

Thus, the justification for this study encompasses the following points:

1. To the writer's knowledge, educational malpractice has not been studied previously.
2. The educational process and existing policies are being affected by the increasing number of

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[2] Black's Law Dictionary (5th ed., 1979).

legal actions brought by parents and students against educational administrative bodies.

3. Increased litigation in the area of educational malpractice will probably have a sizeable impact on education in the future.
4. Based on these examinations and results, educational administrative bodies may develop policies, procedures, and decisions to provide a more productive educational environment, which will result in greater protection to the institution by reducing its exposure to liability.
5. This study will also enable parents and students to better understand their own required inputs into the educational process to avoid litigation or to have a greater degree of protection in this area.

If and when the courts recognize suits on "educational malpractice," educational institutions must be aware of and, even more important, be prepared for such an eventuality. If they are not, such litigation may inflict a great amount of financial damage on an institution. Also to be considered are the damage to the institution's reputation and the stress of having to readjust policies, contracts, faculty and administrative procedures in a rather short amount of time. Such a

result could prove to be quite damaging in a time of scarce resources as we are experiencing right now.

Regardless of their outcome, the fact that suits have been filed and litigated demonstrates a real need for addressing this problem. The question of the "proper forum" for dealing with such a problem is quite significant.

Because little has been written about this important area, administrators and educators do not have sufficient knowledge and awareness to maintain an institution free of "educational malpractice."

Research Procedure

The descriptive method of research was used in this study because it is best suited for answering the general research questions of "what was," "what is," and "what will be," and is also very well suited for answering the problem statement. This analytical type of descriptive research was employed to identify and analyze the imperative legal and factual issues and elements involved in the total question of educational malpractice. The method was used to develop a policy model based upon a combination of the legal rationale of courts, related legal fields, and the literature.

Since the objective of the analytical method was bifurcated, separate research procedures were adopted.

To identify the important legal issues and the laws involved, the customary sources of legal research were employed. These included, among others, a review of federal and state court reports, federal and state constitutions, statutes, law review, legal texts and, finally, the research method of Shepardizing was employed to locate all relevant decisions.

The cases are presented as abstracts (see Appendix). Research literature as well as research studies and articles concerning educational malpractice were investigated and used in this study also.

Two very traditional effective pressures have so far been influential in preparing the way for an ultimate recognition of educational malpractice. First, continuous public dissatisfaction, followed by news reports, commentaries, published results of national polls, and articles in professional education and law journals; and, second, an increase in litigation. Although the complaints have been addressed foremost to public schools, other institutions of learning are being targeted more and more.

At a conference sponsored by the International Council on the Future of the University, several speakers mentioned the "egalitarianism doctrine" which, they maintained, had led to a decrease in standards as well as quality.

The Ohio Board of Regents appointed a study commission in fall of 1980 to study the problems of students entering college lacking basic skills in reading, writing and mathematics. The commission found the problem to be nationwide; it called for a preparatory curriculum for all college-bound high school students, for improved teacher education, and better preparatory information for parents and students.

In his book, Educational Malpractice, Dan Stewart observes that educational institutions are mandated to prepare students to be able to take full advantage of society's opportunities, and to benefit society as well as benefit from society. Educational institutions are receiving taxpayers' money for the purpose of using it wisely and beneficially to educate students. They are also charged to develop each student to his maximum capabilities and potential. This function of educational institutions is written in almost every charter or constitution of America's schools.

This all should be accomplished by design and not by chance, Stewart explains. He states that today much seems to be left to the individual teacher, who struggles on the one hand with the many educational theories on how to teach and, on the other hand, with a diverse student group having a number of inherent problems. Thus,

teachers experience quite a bit of defeat. Stewart mentions that nothing breeds more failure than failure. He further notes that failure basically is not acceptable to the healthy human mind; therefore, he concludes that students who fail are eventually going to reject the concept of success and with it the very environment and/or society that supports it.

Quoting Somerset Maugham who once said, "Failure makes people bitter and cruel," Stewart sees a dim future if no change occurs. At this time, he states, it seems that maintaining the status quo in our educational systems can only result in losing money to unemployment, job programs, manpower development programs, and eventually, welfare. This trend explains to some extent the increasing number of lawsuits by parents who discover that their children are not able to function successfully in society because they lack basic skills.[3]

Definition of Terms[4]

Accountability--a means to hold an individual or group of individuals responsible for performance

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[3] Stewart, D. Educational Malpractices: The Big Gamble in our Schools. Westminster Company. State Services Publishers (1971).

[4] The definitions of terms are taken from Black's Law Dictionary (5th ed., 1979).

at a certain, specified level.

Action--a lawsuit or proceeding taken in a court of law to enforce or protect the rights of an individual.

Breach of Contract--failure, without legal excuse, to perform any promise within a contract or the contract itself.

Cause of Action--the fact or facts which give a person a right to judicial relief. A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf (Thompson v. Zurich Ms. Co., D.C. Minn., 309 F. Supp. 1178, 1181).

Compensatory Relief--relief or compensation for damages caused or debts owed.

Contract--a promise made by one person (entity) to another.

Court of Appeals--the United States Court of Appeals.

Damages--monetary reimbursement for any harm caused resulting from a breach of contract or from commission of tort.

Declaratory relief--a judicial declaration of the existing rights of parties under a statute or other document.

District Court--the United States District Court.

Element--material; substance; ingredient; factor.

Injunctive relief--an injunction or order issued by a court of equity commanding a person or institution to do or refrain from doing, an act, or continuing with an act which would injure another by violating his legal rights.

Legal duty--obligation.

Legal right--right against some person who is under a duty to the one who has the right.

Mandamus (Lat.)--We command. This is the name of writ which issues from a court of superior jurisdiction, and is directed to an inferior court or agency. . . to compel performance of a ministerial act or a mandatory duty when there is a clear legal right in plaintiff, a corresponding duty in defendant, and a want of any other appropriatwe and adequate remedy (Cohen v. Ford, 19 Pa. Cmwlth 417, 339 A.2d 175, 177). To take or not to take some action--mandamus will lie.

Res ipsa loquitur--The thing speaks for itself. Rule of evidence, whereby negligency of alleged wrongdoer may be inferred from the mere fact that an accident happened, provided character of accident (event) and circumstances attending it lead

reasonably to belief that in absence of negligence it would not have occurred and that thing which caused injury is shown to have been under management and control of alleged wrongdoer (Hillen v. Hooker Const. Co., Tex. Civ. App. 484 S.W. 2d 113, 115).

Happening of injury permits an inference of negligence where plaintiff produces substantial evidence that injury was caused by an agency or instrumentality under exclusive control and management of defendant, and that the occurrence was such that in the ordinary cause of things it would not happen if reasonable care had been used.

Res judicata--a matter adjudged, a thing judicially acted upon or decided; a thing or matter settled by judgment.

Social problems in Education: In an increasingly technological society "non-education" or "under-education" has severe social, economical and psychological consequences in the lives of individuals and the society as a whole. (Stewart, D.; See footnote 3 supra).

Supreme Court--Supreme Court of the United States.

Theory of case--facts on which the right of action is claimed to exist. The basis of liability or

grounds of defense (Higgins v. Fuller, 48 N.U. 218, 148 P. 2d 575, 579).

Theory of law--the legal premise or set of principles on which a case rests.

Torts--conduct which is twisted, or crooked, not straight. It is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.

CHAPTER TWO

Educational Malpractice and Related Issues

History

In our early American history the family had major responsibility for education. With the Industrial Revolution, the family as an all-providing, self-sufficient unit slowly disappeared, and state and local governments gradually assumed the task of providing compulsory, tax-supported school systems.

In Brown v. Board of Education, the Supreme Court recognized that education has become one of the most significant functions of government.[5] Before Brown, public education, rather than being a right, was more a privilege enjoyed mainly by an elite group.

Privilege implies something that is bestowed, and so were the conditions and terms of education established by the State. Students could be denied schooling because of, for instance, race or mental/physical handicap. Schools were operated at the will and pleasure of the State. The Brown decision changed that. It enunciated a limitation on the power of the State in regard to operating schools.

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[5] Brown v. Board of Education, 347 U.S. 483 (1954).

The court-established Brown principle was that when a State undertakes education it must be made equally available to all. The court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life, if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.[6]

The argument regarding a right to education has been supported and strengthened by a fairly recent Supreme Court decision in Goss v. Lopez.[7] Here, students were suspended for misbehavior. The claim brought by the students regarding a right to education was based on the State's compulsory education law. They argued that since the State had created the right, it could not deprive any

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[6] Id. 483-493.

[7] Goss v. Lopez, 95 S. Ct. 729 (1975); see also noted in 44 U. Cin. L. Rev. 393 (1975); see Mills v. Board of Education, 348 I. Supp. 866 (D.D.C.) (1972).

student of it without constitutional due process guarantees (prior notice and right to be heard).

This court held that the right to education was both a property interest as well as a liberty interest granted by the Constitution itself. It needs to be noted, however, that Goss does not address the quality of education at all. The court also reasoned that the principle of equal protection requires the provision of education to all children, and concluded that, based on the assumption that once students/children are guaranteed equal access to the educational system, equal opportunity to learn is assured as well. However, this is not the case because of such variables as mental and physical handicaps, environment, the student himself, and so forth. The following cases as noted by Patricia Wright Morrison[8] in the Right to Education are examples:

> Terna v. Portales, 351 F. Supp. 1279 (E.N.U.) (1972) and Lau v. Nichols, 414 U.S. 563 (1974) are illustrative.
>
> In these cases the children had been accepted into school. However, the parents claimed that the children's right to education was denied because the education they received was meaningless; the children spoke only Spanish or Chinese, yet no effort was made to teach them English. The court found that the system discriminated on the basis of national origin insofar as they did not offer a meaningful education and ordered the districts to provide English language instruction.

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[8] 44 U. Cin. L. Rev. 803-804 (1975).

> The cases are significant in that they recapture the emphasis in Brown on the quality of education. Brown assumed that equal education was guaranteed by equal access.
>
> Terna and Lau stood for the proposition that acces must be in fact, not just in form.

But note that even though all states provide free public schooling, there is no federal constitutional requirement for them to do so. In addition to the fact that all states must admit children on equal terms, the U.S. Supreme Court has held that the quality of education need not be uniform within a state.

In the Rodriguez case[9] parents claimed that the children who were poor (those living in poorer areas) were discriminated against and received less education since less money was spent on their education. The parents further argued that education was a fundamental right. The court, however, while emphasizing that schooling plays a vital role in a democratic society, nevertheless concluded that education was not a fundamental right because it was not guaranteed by the Constitution. The court stated:

> The key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor

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[9] San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

> is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicity or implicitly guaranteed by the Constitution.[10]

Nevertheless, Rodriguez provides some authority, since Justice Powell indicated that in the opinion of the court, the plaintiffs did not establish that the children had been denied a "minimal education." This implies that a state has an obligation to provide "minimal education" for its school-age citizens. The question of what constitutes a "minimal education" standard remains.

However, it is important to note a West Virginia case, Pauley v. Kelly,[11] in which the parents of five children attending public school in Lincoln County brought an action on behalf of themselves and as a class. They claimed that the financing system for public schools violated the West Virginia Constitution, Article XII, Section I, because a "thorough and efficient" education was denied to students living in property-poor counties that had less monies available.

In this case the Supreme Court of Appeals of West Virginia held that the state's constitutional requirements of a "thorough and efficient system of free

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[10] 411 U.S. 1-33 (1973).

[11] 255 S.E. 2d 859 (1979).

schools" did indeed make education a fundamental right in West Virginia. This opinion indicates that an action for educational malpractice in West Virginia may have a good chance for success, since the constitutional "strict scrutiny" principle could be invoked when a constitutional right is denied.

There are two standards or principles of judgment available to the courts. One is the "strict scrutiny" or the "rational relationship" test. In a strict scrutiny a state must justify its action by showing a compelling interest worthy of the violoation of a person's constitutional rights. The other standard is the "traditional standard," in which a state has only to show a rational relationship between its action and a legitimate state purpose.

The strict scrutiny test applies whenever a right that has been violated is a fundamental right. This is probably not applicable except in West Virginia. The West Virginia Supreme Court of Appeals in Pauley v. Kelly, 255 S.E. 2d 859 (1979) held that education was a fundamental right in that state. Therefore, it is reasonable to argue that a fundamental right was formed based on the West Virginia constitutional standard of a "thorough and efficient" system of free schools (W.V. Const. Art. XII, §§ 1).

Public education in the United States is based on a delicate balance of fulfilling the needs and interests of the student, the parents and the state. Historically, a relationship of trust and faith in the educational system and its educators was presumed. Trust was vested in state authorities' proper exercise of their powers in a reasonable manner to the benefit of all parties involved. And courts deferred to the expertise and discretion of school administrators and professionals.

However, many of the bases for these premises have changed drastically. Public dissatisfaction has emerged and increased over the years.[12] At the same time, parents have become more aware of the variety of available choices in method and style of education, ranging from private education to many different programs within the school system.[13] Thus, parents who earlier left education to the authorities and professional educators now are increasingly inclined to question the educational process and product, especially in view of discovering illiterate students with high school diplomas.

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[12] Frazier, "Wanted: R_x for the Equitable Management of Paraent-School Conflict," 70 Elementary School Journal, 239 (1970).

[13] Stewart, D., Educational Malpractices: The Big Gamble in Our Schools, Westminister Company, State Services Publishers (1971).

Today, parents have three alternatives to pursue. One, they can select a private educational institution which agrees with their philosophy; two, privately tutor their children at home; and three, seek ways to influence the educational system (public schools).

The first choice is available only to parents who have sufficient financial resources to meet the costs of private education. The second approach has limitations also; not only is money a factor but parents also are required to show that their children are receiving an education equivalent to public schooling in accordance with state law.[14] This leaves the majority of parents without any other choice but to attempt to influence the public school system. Thus, parents can try to influence school boards by working through local interest and power groups, but today's parents do not share a common philosophy or common goals.[15] They can attempt to achieve change through legislation, or, lastly, they can involve the judicial system. In using court action to influence the school system and its educational processes, several

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[14] People v. Turner, 212 Cal. App. 2d 861, 263 P. 2d 685, appeal dismissed, 347 U.S. 972 (1953); State v. Vaughn, 44 N.J. 142, 207 A 2d 537 (1965); State ex rel. Shoreline School Div. v. Superior Court, 55 Wash. 2d 177, 346 P. 2d 999 (1959).

[15] U.S. News and World Report, September 1, 1975, at 42.

options may be considered: professional negligence (misfeasance or nonfeasance), breach of contract, misrepresentation, breach of a state constitutional statutory or common law duty, breach of a federal statutory duty, or vindication of a federal constitutional right. As will be seen later, all of these alternatives are fraught with difficulties, and past attempts in bringing educational malpractice actions have failed dismally.

We will have to ask ourselves if successful litigation would actually improve the quality of education in general. For the sake of argument, let us take the Fourteenth Amendment's equal protection allegation. Such argument would be based on inequality, and hence, discrimination, but the real issue is "quality in education," misrepresentation to a student, and professional negligence of various kinds.[16] Other matters need to be taken into account, such as: defining the legally recognized professional obligations schools have to their respective students; determining measurable educational standards; deciding whether the courts are the appropriate forum to assess negligence regarding the attainment of these obligations; and asking if the tort remedy of "remuneration" for accrued damages such as illiteracy,

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[16] 83 Harv. L. Rev. 7-13 (1969).

misplacement, and similar charges, is the proper remedy the court should award if educational malpractice were proven.[17]

According to Hogan,[18] a review of historical and present court actions in education showed five stages:

1. First Period, prior to 1850--Strict judicial-laizzez-faire
   Education was seen as a purely local matter.

2. Second Period, 1850-1950--"Stage of State Control"
   A body of case law developed at the State level, which sanctioned educational policies and practices regardless of little involvement of the U. S. Supreme Court.

3. Third Period, 1950-on--"Reformation Stage"
   This stage is ongoing. Courts enter into suits which bring policies and practices into agreement with consitutional provisions.

4. Fourth Period, parallel stage to the third period--"Education under Court Supervision"
   Federal courts have taken on the responsibility to make sure that "minimum reform standards for school administraton and programs are carried out.

5. Fifth Period, 1973--"Strict Construction"
   Initiated through the Supreme Court's

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[17] J.J. Harris, III. "Educational Malpractice and Intentional Student Misrepresentation (April 1979)." Paper presented at the Annual Meeting of the American Educational Research Association, San Francisco, CA (April 8-12, 1979).

[18] Daniel B.Hogan. A Review of Malpractice Suits in the United States, Ballinger Pub. Co., Cambridge, MA, 1979.

Rodriguez decision[19,20] (emphasis supplied).

Such analysis implied that courts would eagerly step in and provide remedies to cure ills within the American school system, but this is not so. The public school system in the United States is a creature of the individual states. Every state but Connecticut has a provision in its constitution for establishing a public school system. A state legislature has a wide range of discretion in determining the procedural and substantive structure of public education, including the financing of schools, the curriculum, the qualifications required of teachers and students, and the duties and compensation of teachers as well as other school personnel.[21]

Educational Malpractice

Richard Vacca in his unpublished paper, "Legal Issues of the 1980s," notes that:

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[19] Ronald Campbell, Laverne Cunningham, Raphael Nystrand and Michael Usdam. The Organization and Control of American Schools. Columbus, Ohio: Charles E. Merrill Publishing Company at 148 (1975).

[20] Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280 (W.D. Tex., 1971), rev'd 441 U.S. 1, 93, S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

[21] Patricia Wright Morrison. "The Right to Education," 44 U. Cin. L. Rev. 800-806 (1975).

> Educational malpractice is considered an issue of "quality of education" which has been addressed by the courts, particularly in regard to possible liability claims against the public school districts for failure to adequately educate a student (emphasis supplied).[22]

The lawsuit approach to remedy educational malpractice is seen to be due increasingly to the demand for accountability in the face of the growing problem of "functional illiteracy." Looking at the declining scores on nationally standardized tests, it appears that an ever-increasing number of students are learning less and less. It seems not to be a rarity for a student enrolled in public school to move through the system (grades K-12) without acquiring the necessary skills such as reading and writing, which are essential for him to be integrated into society's socioeconomic process.[23]

Due to the trend, quite extensive legal and general literature on the subject of educational malpractice has

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[22] Richard Vacca. "Legal Issues of the 1980s: Student Competencies, Educational Malpractice, the Implications of P. L. 94-132 in Education for the Handicapped," unpublished paper presented at the Annual Superintendents' Conference, State of West Virginia, Canaan Valley State Park (June 24, 1980).

[23] Comment, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction," 58 N.C.L. Rev. 561 (1980).

emerged and is suggested reading.[24]

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[24] General

Stull. "Why Johnny Can't Read His Own Diploma," 10 Pac. L.J. 647 (1979).

Don Stewart. Educational Malpractice: The Big Gamble in our School, Westminster, CA, State Services Publisher (1971).

"Suing for Not Learning," Time, March 3, 1975, at 73.

"Help! Teacher Can't Teach," Time, June 16, 1980.

Remarks of Senator Proxmire, 124 Cong. Rec. S14862, daily ed., September 11, 1978.

Change, "A Quest for Common Learning," April 1981.

Chronicle of Higher Education, Vol. XXII, No. 11, "Doctrinaire Egalitarianism of the 1960s Has Weakened Academia, Scholars Warn," May 4, 1981.

Chronicle of Higher Education, Vol. XXII, No. 10, "Retrenchment in High School Lower Skills of Freshmen, Ohio Commission Finds," April 27, 1981.

Chronicle of Higher Education, Vol. XXII, No. 2, Schools of Education Tightening Programs in Response to Attacks on Teacher Training," March 2, 1981.

O. Kramer. The Negligent Doctor: Medical Malpractice In and Out of Hospitals and What Can be Done About It. New York: Crown Publishers, Inc. (1968).

Pat Lynch. Legal Implications of Models of Individual and Group Treatment by Professonals, 9 Nolpe School Law J. 38 (1980).

Moskosvitz. Parental Rights and State Education, 50 Was. Law. Rev. 623 (1975).

Phi Delta Kappan, Vol. 62, No. 3, p. 193.

Petterson, A. "Professional Malpractice: Small Cloub, but Growing Bigger (November 1980).

Don Stewart. The Changing Role of the Educator: A Behavioral Learning Systems Approach to Instruction.

Richard Vacca. "Legal Issues of the 1980s: Student Competencies, Educational Malpractice, the Implications of P.L. 94-142 on Education for the Handicapped. "Unpublished paper presented at the annual Superintendents' Conference, State of West Virginia, Canaan Valley State Park (June 24, 1980).

However, this mass of legal and general writings

Legal

Comment, "Educational Malpractice: When Can Johnny Sue?" 7 Ford Urb. L.J. 117 (1979).

Comment, "Educational Malpractice, 124 U. Pa. L Rev. 755 (1976).

Note, "Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?" 13 Suffolk U.L. Rev. 27 (1979).

Comment, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction. 58 N.C.L. Rev. 561 (1980).

Comment, "Schools and School Districts: Doe v. San Francisco Unified School District; Tort Liability for Failure to Educate." 6 Loyola U.L.J. 462, Chicago (1975).

Comment, "Damages Actions for Denial of Equal Educational Opportunities." 45 Missouri L. Rev. 281 (1980).

Claque, "Competency Testing and Potential Constitutional Challenges of 'Everyday Student.'" 28 Cath. U. Law Rev. 469 (1979).

Dugan, "Teacher's Tort Liability. 11 Cleveland Marshall L. Rev. 512, 520 (1962).

Elson, "A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching." 73 Northwestern U.S. Rev. 641 (1978).

Hagenau, "Penumbras of Care Beyond the Schoolhouse Gate." 9 Journal of L. and Educ. 201 (1980).

Halligan, "The Function of Schools, the Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice." 45 Miss. L. Rev. 667 (1980).

Jorgenson, "Donohue v. Copiague Union Free School District: New York Chooses Not to Recognize 'Educational Malpractice.'" 43 Albany L. Rev. 339 (1979).

Lynch "Legal Implications of Models of Individual and Group Tretment by Professionals." 9 Nolpe School L.J. 38 (1980).

Moskovitz, "Parental Rights and State Education." 50 Was. L. Rev. 623 (1975).

Nordin, "The Contract to Educate: Toward a More workable Theory of the Student-University Relationship." 8 College and University L. Journal. 141 (1981-82).

Notes, "Educational Malfeasance: A New Cause of Action for Failure to Educate?" 14 Tulsa L. Journal. 383 (1978).

seems totally disproportionate, compared with the few decided cases (ten total). The other surprising fact is that the commentary, with only very few exceptions, is unanimously enthusiastic for asking the judiciary, through educational malpractice actions, to solve the problem of failure to educate.

The assumption is becoming prevalent that somehow the concept of educational failure should be legally compensable, much as is failure in the professions of medicine and law.[25] The writers seem to maintain the idea that educators have a legal obligation to carry out their educational function in such a manner that the respective student(s) retain a minimal level of competency in the basic subjects of reading, writing, and mathematics. Thus far, commentators as well as counsel have found it difficult to identify the source of that

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Notes, "Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?" 15 New England L. Rev. 101 (1979).

Notes, "Implementation Problems in Institutional Reform Litigation." 91 Harvard L. Rev. 428 (1977).

Notes, "The Right of Handicapped Children to an Education: The Phoenix of Rodriguez." 59 Cornell L. Rev. 519 (1974).

Remz, "Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children." 14 Columbia Journal of Law and Social Problems 339 (1979).

[25] Wood, "Educational Malfeasance: A New Cause of Action for Fairlure to Educate? 14 Tulsa L.J. 383 (1978).

obligation. The claims that have reached the courts, however, do not deal only with this area. The cause of action seems based on a much wider range of deficient treatment, including social promotion,[26] or a student not being advanced to a level of competency that he would have been able to master.[27] Another cause of action is based on misrepresentation of the student's accomplishment to the parents or to the student himself.[28] Even though it is not yet established, educational malpractice could be considered as being misfeasance, the improper performance of the professional function; or nonfeasance, the omission of an educational performance. Note however, that the cases of Hoffman, Donohue, and Peter W. were based on claims of acts of both commission and omission.

The elements of educational malpractice are also

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[26] A student is moved from one grade to another for the sake of convenience, not because he has mastered the subjects. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

[27] Hoffman v. Bd. of Educ. 64 App. Div. 2d 369, 410 N.Y.S. 2d 99 (1978); rev'd 49 N.Y. 2d 121, 400 N.E. 2d 317, 414 N.Y.S. 2d 376 (1979).

[28] Id.

fraught with problems in establishing liability.[29] One must ask if a teacher/school district teaches the wrong subject[30] or if wrong or inappropriate pedagogy is used.[31] Thus, the real unanswered issues are whether a school district teaches the wrong subjects (curriculum), or whether a proper curriculum is taught by ineffective or inappropriate means, or perhaps both, or perhaps other combinations. In fact, among other reasons, this very ambiguous state regarding the proposed cause of action renders educational malpractice suits ineffectual.

And then there is the question of who should be sued. Educational malpractice can be likened to medical malpractice, an area to which reference is often made. In medical malpractice suits, the individual physician is named most of the time, although that does not necessarily preclude an action against a nurse and/or hospital as well. Even though individual teachers may have been negligent, school districts and school officials are

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[29] Hoffman v. Board of Educ. 64 App. Div. 2d 369, 387-90, 410 N.Y.S. 2d 99, 118-19 (1978) (dissent by Judge Damiani), Donohue v. Copiague Union Free School Dist., 64 App. Div. 2d 29-40, 407 N.Y.S. 2d 874-80. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814-24, 131 Cal. Rptr.

[30] Comment, "Educational Malpractice," 124 U. Pa. L. Rev. 755, 801-01 (1976).

[31] Elson, supra, note 19, at 745-55.

usually named in educational malpractice suits, either under the doctrine of respondeat superior or for improper hiring.[32]

However, if for some reason, such as immunity from liability,[33] a school district could not be held liable,

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[32] Keeton, W. Page, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, Prosser and Keeton on The Law of Torts, 160-66 (5th ed., 1984).

[33] Comment, "Educational Malpractice, 124 U. Pa. L. Rev. 755-805 (1976).

In the reported cases of educational malpractice, governmental immunity was not an issue. It may be assumed that immunity will not become a bar to ducational malpractice suits. For further reading on the doctrine of governmental imm;unity in regard to education, see also Annot., 33 A.L.R. 3d 703 (1970).

See e.g. Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961). The modern stance has been to abrogate governmental and related immunities. These usually were brought about by legislation and, in some jurisdictions, made contingent on available insurance. In some states, the doctrine of governmental immunity has been abolished by the courts.

Note e.g. Wood v. Strickland, 420 U.S. 308-20 (1975). The United States Supreme Court has also supported this trend through its decisions of rejection of immunity for school officials when those had violated the civil rights of student. The Court stated:

> "(I)mmunity would not be justified since it would not sufficiently increase the ability of school right manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations."

Pipps in "The Tort Liability of the classroom Teacher," 9 Akron L. Rev. 19-20 (1975) notes that there are a very few states who statutorily made it possible to bring direct actions against districts for damages caused

damages might then be awarded against the individual teacher or teachers (a student meets a number of teachers while passing through school) and questions that must be answered are, who was negligent, when and how. Of course, suing a teacher would present a problem in that teahcers could not afford to pay substantial amounts as awards. A byproduct of such suits could be a flood of resignations or a marked drop in young people entering the teaching profession. It could also have an unpleasant tax effect if public school teachers would be compelled to carry malpractice insurance for which they would be compensated by an increase in salary. Nevertheless, as the individual physician can be sued, so can a teacher.[34]

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by their respective boards, officers, agents, teachers, and employees.

Ohio Valley Contractors v. Board of Education of Wetzel County, Joseph A. Baker & Associates, ETC 293 S.E. 2d 437. West Virginia e.g. is one of the States where the West Virginia Supreme Court of Appeals rendered a decision which established that: "Local Boards in W.V. do not have State constitutional immunity nor common law, governmental immunity from suit." Therefore, school districts and their administrative units can be sued without being able to claim that particular protection.

[34] Elson, "A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching." 73 N.U.L. Dev. 648-67 (1978).

Medical Malpractice

Two large groups of factors are distinguishable in medical malpractice. This division is used also by the courts:

1. The action is based solely upon an unsuccessful diagnosis or treatment or bad results from a diagnosis or treatment, and
2. The action is based upon distinctive acts or omissions by the physician.

Thus, misdiagnosis is a cause of a substantial number of malpractice suits. Such a diagnosis may involve the following:

a) The physician fails to discover a disease which the patient has,

b) The physician tells the patient he has a certain disease but does not diagnose the real disease,

c) The physician tells a patient who is free of disease that he has a condition from which he does not actually suffer,

d) The physician administers the wrong medication or fails to prescribe medication or other specific treatment, and

e) The physician fails at any point in the medical process, that is in diagnosis, prescription or

> treatment. Even with failure at any point there may be no malpractice if the physician applied the best knowledge available and/or the prevailing standard of care.

The standard of care requires "the use of the same degree of skill, care, and knowledge as would be used by the average prudent physician with the same or similartraining in the same or similar geographical area."[35]

The plaintiff is required to prove that standard and the deviation from it. He is also held to prove it through expert testimony (which is difficult to do). The defendant has the right and must be given the opportunity to defend himself on the ground that he was not negligent. If he so desires, he also can present an affirmative defense, which includes:

1. a defense that he had not been negligent, and
2. a showing that the plaintiff caused the problem himself.

It is general practice of the courts to not allow a verdict without expert testimony to establish the standard of care and its breach, since the judges and juries have no medical training and such findings require the

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[35] Alden v. Providence Hospital, 382 F. 2d 163, 1967.

application of scientific knowledge and experience to complicated and scientific facts.

On the other hand, courts have found that some areas of negligence are so clear and understandable that a layman can comprehend them without expert help. In those cases, the doctrine of res ispa loquitur is applicable.

Black's Law Dictionary[36] defines the doctrine of res ipsa loquitur as follows:

> The thing speaks for itself. Rebuttable presumption or inference that defendant was negligent, which arises upon proof that the cause of the injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negiligence.

Res ipsa loquitur is the rule of evidence wherby negligence of an alleged wrongdoer may be inferred from the mere fact that the incident happened, provided that he character of the incident and the circumstances attending it lead reasonably to belief that in the absence of negligence it would not have occurred and that the thing which caused the injury is shown to have been under the management and control of the alleged wrongdoer.[37]

Under the doctrine of res ipsa loquitur, the happening of an injury permits an inference of negligence in

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[36] Black's Law Dictionary (5th ed., 1979).

[37] Hillen v. Hooker Const. Col, Tex. Cir. App.,484 S.W. 2d 113, 115.

which the plaintiff produces substantial evidence that the injury was caused by an agency or person under exclusive control and management of the defendant, and that the occurrence was such that in the ordinary course of things, it would not have happened if reasonable care had been used.[38] In other words, this doctrine may be used in malpractice suits and is acceptable to the courts if the factor that caused the injury was under the sole control and management of the defendant and if the act would not have happened if the person or persons in control of that factor would have used proper care. In such a situation, if the defendant cannot rebut the allegations, courts find that the injury was caused by a "lack of care."[39]

Note, however, that mere unsuccessful treatment or mere termination of treatment with poor or negative outcomes does not invoke the doctrine of res ipsa loquitur. It is generally and universally recognized that a poor outcome does not raise a presumption or inference of negligence. Such outcomes could, and often do, have various causes outside of any negligent behavior. Thus, a poor outcome, in itself, does not establish evidence of

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[38] Black's Law Dictionary (5th ed., 1979).

[39] "Medical Malpractice," 162 A.L. Rev. 805.

a negligent action or acts. Nevertheless, in certain recurring and common situations, some courts have applied the doctrine of res ipsa loquitur with respect to specific negligent acts or omissions.[40]

In medicine, the doctrine is applied in situations where an injury occurs which would not have occurred if proper, skillful care and treatment had been applied.[41] In Quinley, the court made the following statement:

> While the authorities are in conflict, we think the cases generally hold that res ipsa loquitur applied where, during the performance of surgical or other skilled operations, an ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject; while it would not apply in cases involving the diagnosis and scientific treatment.[42]

In summary, when res ipsa loquitur is used, the jury usually infers negligence from the circumstances. It may also raise the preseumption of negligence; that is, the jury must find for the plaintiff, unless the defendant is able to show causes for the injury other than negligence.[43]

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[40] Mitchell v. Saunders, 13 S.E. 2d 242 (1941).

[41] Calhoun v. Fraser, 126 S.W. 2d 381 (1938).

[42] Quinley v. Cocke, 192 S.W. 2d 992 (1946).

[43] Carruthers v. Phillips, 131 P. 2d 193 (1942) as cited in Holden Rodders, Medical Malpractice Law, N.Y. (2d ed., 1918).

In regard to malpractice the rule of respondeat superior is also sometimes a consideration. Black's Law Dictionary states it as follows: "Let the master answer." This means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. This liability is basically an exception to the general law of negligence. It imposes responsibility on a person who may not have been present at the actual scene or participated in causing the injury.

This respondeat superior rule would be applicable in any situation where a master-servant relationship has been established through:

1. Selection and engagement of a servant,
2. Payment of wages,
3. Power of dismissal, and
4. Control over a servant's conduct and performance.

In Wheatley, the court defined malpractice as follows: "Malpractice may consist of lack of skill and care in diagnosis as well as in treatment. . . ."[44] The cases indicate that due care in regard to examinations and

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[44] Wheatley v. Heideman, 102 N.W. 2d 343 (1960).

diagnosis requires more than just a superficial, cursory examination.[45]

As far as tests are involved in the diagnostic process, the general rule is that failure to utilize the appropriate tests on which a correct diagnosis would depend may be considered negligent as well. However, liability would not be incurred, as long as the physician made the diagnosis in good faith; that is, he made it on the basis of all available and reasonable facts, even when in error.[46]

The basic argument of the proponents of educational malpractice is that since malpractice in other professions, such as medicine, is legally compensable, educational malpractice should be treated no differently. The assumption is that the educator has a duty (obligation) to carry out specific academic instruction, resulting in the student's achieving a certain basic competency in the respective disciplines. Yet, the difficulty counsel is struggling with is to establish the source out of which such an obligation would come.

Claims of educational malpractice, based on the reported cases, show that the causes of action are di-

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[45] Hicks v. United States, 368 F. 2d 626 (1966).

[46] Pugh v. Swiontec, 253 N.E. 2d 3 (1969).

verse. In some instances, the allegation was that it was educational malpractice to fail to advance a student to a level of instruction which he could have comprehended and mastered.[47]

In other cases, educational malpractice was seen as promoting a student from grade to grade until he graduated, allowing said student to graduate although he had not mastered such basic academic skills as reading, writing, and mathematics, which is called "social promotion."[48]

The fundamental question is, whether the essence of educational malpractice rests on an act of "misfeasance," improper or negligent performance of the assigned educational function; or on an act of "nonfeasance, the omission of certain acts or performances within the educational function. However, it can be both; a single act may constitute a misfeasance and a nonfeasance at the same time.[49]

Other problems as already mentioned regarding educational malpractice suits are found in defining or deline-

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[47] See note 27 supra.

[48] Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

[49] Comment, "Educational Malpractice: When Can Johnny Sue?" 7 Ford Urb. L.J. 117-19.

ating the elements of educational malpractice. For instance, it is sometimes alleged that schools are teaching the wrong subjects,[50] or that the school adopted the wrong pedagogical strategies, even though it adhered to a proper curriculum. And, of course, it is absolutely possible that both instances may apply at the same time.[51]

This amorphous and ambiguous nature of the proposed cause of action is an argument the courts note and one which prevents recognition by the courts.[52] So far, the courts have been extremely reluctant to recognize "a cause of action" for educational malpractice, since they do not recognize a "legal duty" for public policy reasons. That is, there has been no recognized standard of good educational practice analogous to "good medical practice" or "good legal practice." There is also some judicial language expressing apprehension that such recognition would bring a flood of litigation and that the awarding of damages might stress the financial situation of the school districts and society to an unacceptable

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[50] Comment, "Educational Malpractice," 124 U. Pa. L. Rev. 755-8-2 (1976).

[51] Elson, "A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching," 73 N.W.U.L. Rev. 746-54 (1978).

[52] See notes 43 and 47 supra.

level, probably to the point of hampering the execution of their duties. And last but not least, the courts have expressed the opinion that they are not the proper forum for testing and evaluating school programs and educational methods and theories or for deciding which ones would be the best, most effective and appropriate.[53]

Theories and Elements as Presented by the Cases

So far, counsel and proponents of educational malpractice are still searching for workable theories of recovery. The most prevalent theories are "negligence" and "misrepresentation."

The failure to educate, either through misfeasance (improper performance) or nonfeasance (lack of performance), constitutes some form of professional negligence which would be compensable under traditional tort principles. The theory of negligent or intentional misrepresentation is more promising, however. One could argue that if a student's achievements are inaccurately represented, he could suffer damages and the school district

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53 "Educational Malpractice," 124 U. Pa. L. Rev. 782 (1976); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Donohue v. Copiague Union Free School Dist., 47 N.Y. 2d 440, 391 N.E. 2d 1352, 418 N.Y. 2d 375 (1979), aff'g 64 App. Div. 2d 29, 407 N.Y.S. 2d 874 (1978), aff'g 95 Misc. 2d 1, 408 N.Y.S. 2d 584 (1977); Hoffman v. Board of Educ., 64 App. Div. 2d 369, 410 N.Y.S. 2d 99 (1978), rev'd 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979).

and/or the respective teacher(s) should be liable.[54]

Attempts have been made to argue that schools are comparable to mental hospitals, because the students are involuntarily confined to a classroom setting and thus, if they do not receive proper instruction (resp. treatment), their confinement represents an unconstitutional deprivation of liberty without due process of law.[55]

A contract-based theory has also been argued, alleging that a contract exists either between the student and the school, or between the school and the taxpayer with the student becoming a third party beneficiary.[56]

It must be emphasized that, as of today, the courts have not generally recognized any of the alleged causes of action for various reasons, the exceptions are found in a passing remark in Hunter[57] where the Court of Appeals of Maryland stated that a claim can be brought

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[54] Elson, note 51 supra at 693-768. Comment, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction, 58 N.C.L. rev. 561 (1980).

[55] "Donohue v. Copiague Union Free School Dist.: N.Y. Chooses not to Recognize 'Education Malpractice.' 43 Neb. L. Rev. 339-59 (1979).

[56] Note, "Educational Malfeasance: A New Cause of Action for Failure to Educate?" 14 Tulsa L.J. 383-401 (1978).

[57] Hunter v. Board of Education of Montgomery County, MD et al 439 A. 2d 583, Court of Appeals of Maryland (1982).

against an elementary school principal and a teacher for intentional and malicious misplacement of a child, and relief can be claimed. The Court stated, however, that it was in agreement with the cases of Donahue,[58] Peter W.[59] and Hoffman[60] that public policy considerations generally preclude liability, but distinguished the Hunter case as being an alleged willful, malicious and outrageous conduct by the educational system. In Hoffman,[61] the court noted that the case, although not so stated, sounded in educational malpractice; but that the public policy considerations in the Donohue case applied in the Hoffman case to educational malpractice actions--based on allegations of educational misfeasance or non-feasance--were equally applicable here.

It may be reasonable to suggest that a more persuasive stance to take would be a theory analogous to "products liability." Here, due to societal demands and

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[58] 47 N.Y. 2d 440, 391 N.E. 2d 1352, 418 N.Y.S. 2d 375 (1979), aff'g 64 App. Div. 2d 29, 407 N.Y.S. 2d 874 (1978), aff'g 95 Misc. 2d 1, 408 N.Y.S. 2d 584 (1977). (For a brief of the case see Appendix page 000).

[59] Peter W. v. San Francisco Unified School District, 131 Ca. Rpt. 854, Court of Appeals, First District, Division 4 (1976).

[60] Hoffman v. Board of Education of City of New York, 49 N.Y. 2d 121, 424 N.Y. S. 2d 376, 400 N.E. 2d 317, 320 (1979).

[61] Id.

emerging needs, the courts have in the past been willing to fashion a new "cause of action." It started out with a number of theories such as negligence, misrepresentation fraud, etc. But today, the products liability cause of action is established and accepted universally.[62]

This theory is an example of the evolutionary nature of the law of torts. The theory, however, does not offer any guidelines as to how, when, where, and who, and some people may argue that its value to the topic at hand is minimal. However, never before have educational institutions been under attack as they currently are because of their defective output in the academic area.

One can argue reasonably easily that this is as severe a situation as the situation which existed prior to product liability. Education is a monopoly public service and has a definable product (an educated graduate). It is present judgment that our modern society with universal outreach and involvement is more than ever dependent on well-functioning and contributing citizens because of the greater demands of a technologically oriented, increasingly competitive world.

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[62] Keeton, W. Page, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, Prosser and Keeton on The Law of Torts, 160-66 (5th ed., 1984).

Robins, in chapters on Socialization, Personality, and Special Development in the Handbook of Child Psychology states clearly that "adult antisocial behavior virtually requires childhood antisocial behavior."[63]

It is noteworthy to consider that a teacher's lack of ability to perform may perpetuate antisocial behavior in young people, which in turns burdens society as a whole.

As already mentioned, the courts consistently have been reluctant to recognize a cause of action for educational malpractice, regardless of which theory was the basis for the respective claims.

In the case of Peter W. v. San Francisco Unified School District,[64] one of the major, most widely publicized cases involving nonlearning, the court held that a public school district could not be held liable for educational malpractice. The case was dismissed by the California Appellate Court (affr. the trial court's decision).

Peter W. had attended elementary and secondary schools of the San Francisco Unified School District in

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[63] Robins, Handbook of Child Psychology, Vol. IV, 4th Ed., H. Mussen, ed., John Wiley and Sons, Inc., New York, 1983, p. 822.

[64] 60 Cal. App. 3d 814, 131 Cal. Rptr., 854 (1976). (For a brief of the case, see Appendix page 191).

California. When he graduated form high school he was unable to read beyond the eighth grade level. In his lawsuit, he alleged that the school district and its teachers had negligently failed to provide him with adequate instruction, guidance, supervision, and counseling in basic academic skills, such as reading and writing. He further claimed that his teachers, despite his lack of ability in reading and writing, had promoted him from one grade level to another, full well knowing that he lacked the necessary and required skills to do so. Despite his teachers' knowledge, he was allowed to graduate from high school. Accordingly, Peter W., the plaintiff, claimed that he had suffered a "permanent disability" which prevented his entering gainful and meaningful employment. He sought to recover damages for this permanent injury.

The court ruled that the plaintiff had failed to state a cause of action in tort against the authorities in charge of the respective public school systems that had inadequately educated the student. The court stated further that these officials had no duty of care upon which to base a cause of action for negligence, that they were not liable by reason of statute and that the facts did not support a cause of action for either negligence or intentional misrepresentation.

Regarding the negligence causes of actions based on an alleged breach of a duty to adequately educate, the court reasoned:

> that it did not conceive at present the workability of a rule of care against which the officials' alleged wrong conduct might be measured.
> that no reasonable degree of certainty was shown by which it could be found that the student suffered an injury within the meaning of the law of neglignce.
> that also no perceptible connections could be established between the educational institution's conduct in this case and the injuries suffered as alleged which would establish a causal link between the two within the meaning of the law of negligence.
> The court continued to say that recognized public policy considerations alone negated any actionable "duty of care" in persons and agencies who are administering the academic phase of the public educational process, and added:
>
> If such persons and agencies would be held to an actionable duty of care in the discharge of their academic functions, numerous real or imagined tort claims would arise; the consequences would be that public monies and time as well as personal consequences would burden them and society beyond any calculation.
>
> The plaintiff's claim based on a statutory education code enactment providing for protection against the risk of a specific injury for which the public entity is liable, if caused by its

> failure to discharge the duty, was answered by the court saying that some enactments were not designed to protect against the risk of a particular kind of injury but, rather, were provisions directed to the attainment of the benefit of optimum educational results. For that reason, a violation would not create a liability under such a statute.
>
> The claim of intentional and/or negligent misrepresentation was denied as well, since according to the court no facts were found showing the requisite element of reliance upon the misrepresentation asserted.[65]

Donohue v. Copiague Union Free School District[66] was a case in which the plaintiff, Edward Donohue, sued his school district for alleged educational malpractice and a negligent breach of a constitutionally imposed duty to educate, claiming that although he had received a certificate of graduation from high school, he lacked the rudimentary skills to comprehend written English to such a degree that he could not fill out an application for gainful employment. He sought damages for knowledge deficiency allegedly resulting from a failure by the defendant school district to perform its duties and obligations to educate.

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[65] Id.

[66] See note 58 supra.

The court responded to the claims, saying that there were:

1. no cause of action for educational malpractice, and
2. no cause for a negligent breach of a constitutionally imposed duty to educate.

Further, even though a section of the respective state constitution commands that the legislature provide for the maintenance and support of a system of free and common schools wherein all children may be educated, the court stated that even a terse reading of this provision demonstrated that the obligations of maintaining and supporting a system of public schools did not also impose a duty upon a local school district to ensure that each student received a minimum level of education. The court conceded that the breach of such a contract would entitle a student to compensatory damages, and continued to say that within the structures of a traditional negligence or malpractice action, a complaint of educational malpractice might be formally pleaded; but that the heart of the matter was whether, assuming such a cause of action might be stated, the courts should entertain such a claim as a matter of public policy.

The court concluded that such a claim should not be entertained, because recognizing such a claim would require the courts to (1) enter into judgments of the

validity of broad educational policies, and (2) sit in review of the day-to-day implementation of these policies. The court viewed this as a blatant interference with the responsibilities of the administration of a public school system--responsibilities which were expressly lodged with that very system by the state constitution and statute. The court's directive was that plaintiffs in this type of suit should take advantage of administrative processes provided by statute and enlist the aid of the commission on education to ensure that such students received a proper education.

In Pietro v. St. Joseph's School[67] the court also held that no cause of action existed for educational malpractice against a private school, but did recognize that a parent may be entitled to recover tuition if an express agreement had been entered between the parent and a school, such as, e.g., the school contracting that the student would reach a certain proficiency after completing specific studies.

The major claims made by plaintiffs are found in the following two of the three leading cases in the area of education malpractice.

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[67] 48 U.S.L.W. 2229 (1979).

In Donohue[68] and Peter W.,[69] the plaintiffs claimed that the respective schools their children attended had a duty to educate their children and therefore were accountable for the results, as measured by the students' actual achievements, or lack thereof. Both cases can be termed "non-feasance" cases. In other words, the plaintiffs maintained that the school districts had breached their legal duty to educate by failing to do what their duty required, thereby producing nonfunctioning, illiterate high school graduates unable to lead productive and useful lives in the community, as it was contemplated they could do had the duty been performed. Each alleged that there was a presumptive causal relation between their child's illiterate condition and the respective school district's negligent administration and performance of teaching and conveying academic knowledge.

Analysis of Cases

Peter W. sought general damage for the injury suffered as well as special damages for tutoring services. The plaintiff charged that the school district's negligence or misrepresentation resulted in his apparent injury. However, the court stated that the school dis-

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[68] See note 55 supra at 1352-55.

[69] See note 54 supra at 856.

trict owed no duty of care toward the plaintiff-student. Since this conclusion negated any negligence action,[70] other negligence issues were not addressed. In its opinion, however, the court indicated that it doubted if a workable standard of care could ever be established in regard to educational malpractice. It questioned that the plaintiff had ever suffered an injury within the meaning of tort law and stated that a sufficient causal link (nexus) was missing between the injury claimed and the school district's negligence.[71]

In discussing the legal question of an existing duty of care owed to the plaintiff-student, the court linked the duty with its deliberations and considerations of issues of public policy:

> (I)t should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.[72]

Thus, the court made the establishment of a duty of care dependent upon public policy considerations. The

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[70] Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. at 860.

[71] Id. at 861.

[72] Id., 131 Cal. Rptr. at 860.

court cited Rowland v. Christian,[73] which supported its stance. Rowland says that the fundamental principle of tort liability requires all persons to use "ordinary care" to prevent injury to others through their conduct, but there is an equally fundamental exception, stated as being "except where a deviation" was clearly supported by public policy.[74]

Reasoning from these citations of prior authority, the Peter W. court spelled out the public policy factors it considered pertinent to the determination of a duty of care.

- The sociability of the activity out of which the injury arises, compared with the risks involved in its conduct;
- the kind of person with whom the act is dealing;
- the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury;
- the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread;
- the body of statutes and judicial precedents which color the parties' relationship;
- the prophylactic effect of a rule of liability;

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[73] 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 2d 561 (1968).

[74] Id., 443 P. 2d at 564.

- in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget;

- and, finally, the moral imperatives which judges share with their fellow citizens--such are the factors which play a role in the determination of duty.[75]

According to this court, the issue of whether a respective defendant owes the requisite "duty of care" in a given situation presents a "question of law" and therefore will be determined by the courts alone.[76] Furthermore, the court umistakably stated that the very basis out of which such suits emerged spoke against sustaining them, and to hold school districts, administrators, and teachers responsible to an "actionable duty of care" regarding the performance and execution of their academic resposibilities, would bring about "burdened public schools and society beyond calculation." The court continued:

> Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large.
>
> Their public plight in these respects is attested in the daily media, in bitter governing board

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[75] 131 Cal. Rptr. at 858-59.

[76] 131 Cal. Rptr. at 859.

> elections, in wholesale rejections of school bond proposals, and in survey upon survey. To hold them to an actionable 'duty of care' in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigations, but for which no permenent solution has yet appeared. . . . The ultimate consequences in terms of public time and money would burden them--and society--beyond calculation.[77]

Thus the court in Peter W. was adamant in saying that a cause of action for educational malpractice would be disastrous to the schools and to society as a whole and therefore should not be recognized. The court also touched on the evolutionary character of tort law and noted that from time to time additional areas of liability had been accepted (see development of products liability in The Law of Torts[78]). However, the court also cautioned that certain conditions had been present in these areas to justify the sanction of these new torts:

> the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework. . . . This is simply not true of wrongful conduct and injuries allegedly involved in educational malfeasance. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with

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[77] 131 Cal. Rptr. at 861.

[78] See note 62 supra, at 640-82.

> different and conflicting theories of how or what a child should be taught, and any layman might--commonly does--have his own emphatic views on the subject.
>
> The "injury" claimed here is the plaintiff's inability to read and write. Substantive professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.[79]

In regard to the cause of action on misrepresentation, the court held that the claim of negligent misrepresentation was immaterial based on the former findings rejecting the negligence cause of action.[80] Intentional misrepresentation was insufficient as a cause of action, the court held, since it did not disclose any facts showing the "requisite element" of reliance upon it.[81] But, public policy still was the central theme of the court's findings.

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[79] Id., at 860-61.
Id., Footnote 6--From among innumerable authorities to these effects, defendants cite Gagne, The Conditions of Learning, Holt, Rinehard & Winston (1965); Schubert and Fargerson, Improving the Reading Programs, William C. Brach Company (1968); Flesch, Why Johnny Can't Read, Harper (1965).

[80] Id., at 862.

[81] Id., at 863.

"Public policy" considerations were emphasized even more and relied upon in the case of Donohue v. Copiague Union Free School District.[82] The New York Court of Appeals saw the possibility that "within the structures of a traditional negligence or malpractice action, a complaint sounding in 'educational malpractice' might be formally pleaded."[83] The court accepted a legal duty inherent in the educator, if educators were viewed as professionals, and conceded that a proximate cause could be established with a judicially recognizable injury. Halligan, however, maintains that teachers are not professionals, because he says they must teach subjects and use methods and materials by requirement, not by their own design.[84] Yet, although teachers may teach partially by requirements, they also teach by their own design in terms of teaching methods and various approaches to teaching.

However, the court also noted emphatically that even if such a cause of action could and would be legally framed, it should be rejected on the basis of public

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[82] See note 58 supra.

[83] 391 N.E. 2d at 1353.

[84] T. Halligan, "The Function of Schools, the Status of Teacher, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice," 45 Misc. L. J. 667 (1980).

policy considerations alone. The court reiterated that the undue burden this would place on the courts and their lack of expertise in educational policy matters would be enough of a deterrent to entertaining educational malpractice suits. However, this reasoning seems insupportable for the reason that courts decide many medical malpractice cases without having expertise in medicine. In medical malpractice cases, the profession itself provides the standard through expert testimony defining the standard, how it was breached and how it caused the subject harm. On the other hand, the teaching profession has no such standard, and the court in Peter W. emphasized this clearly in its opinion:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--commonly does--have his own emphatic views on the subject.[85]

It is obvious that the courts are shying away from the issue of educational malpractice due to the lack of a standard and the far-reaching consequences a positive decision for the plaintiff would have.

Yet, the court suggested that students and their parents could and should use the available "administra-

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[85] See note 77 supra.

tive procedures to enlist support and/or aid of the State Commissioner of Education," and also to search for a "standard of professional care, because of the administrative law doctrine of primary jurisdication, to establish their educational rights and to remedy the suffered wrongs."[86] With that, the New York Court of Appeals summarily dismissed the plaintiff's claim of a constitutionally created duty to educate.[87]

However it is important to mention the dissenting opinion in the Donohue case, written by Justice Suozzi. The opinion is significant and has great depth. He commented that the complaint clearly states a valid cause of action. Justice Suozzi noted that the reasons for the plaintiff not achieving a basic level of literacy were truly a question of fact to be resolved at a trial. He termed as unpersuasive the feared flood of litigation and the problem of framing an appropriate measure of damages. He continued that the complaint was not based solely on educationl malpractice but that the plaintiff also failed various subjects, that the defendant knew about this fact, and that the defendant failed in its duty to ascertain the causes of these failures. Relying on a then-

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[86] N.E. 2d at 1354-55.

[87] Id., 391 N.E. 2d 1352.

existing statute mandating a board of education of each school district to use suitable examinations to ascertain the physical, mental, and social causes of underachievement, Justice Suozzi found a true statutory duty, which flowed from the defendant to the plaintiff, and which the defendant obviously violated. Justice Suozzi summarized his opinion as follows:

> In my view, the negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose the specific condition, and (2) treat the condition, and instead allows the patient to suffer the invevitable consequences of the disease. Such medical malpractice would never be tolerated. At the very least, a complaint alleging same would not be dismissed upon motion. In the case at bar, the plaintiff displayed, through his failing grades, a serious condition with respect to his ability to earn. Although mindful of this learning disability, the school authorities made no attempt, as they were required to do, by appropriate and educationally accepted testing procedures, to diagnose the nature and extent of his learning problem and thereafter to take or recommend remedial measures to deal with this problem. Instead, the plaintiff was just pushed through the educational system without any attempt made to help him. Under these circumstances, the cause of action at bar is no different from the analogous cause of action for medical malpractice and like the latter, is sufficient to withstand a motion to dismiss.
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> Finally, it should be noted that even in Peter W. v. San Francisco Unified School District, 60 Ca. App. 3d 814, 131 Cal. Rptr. 854, supra, the California appellate court recognized that a cause of action for intentional and fraudulent misrepresentation, if properly pleaded, could withstand a motion to dismiss. Accordingly, even though the majority has chosen to affirm the dismissal of

> the complaint, the affirmance should be without prejudice to replead a cause of action for intentional misrepresentation.
>
> For the reasons heretofore set forth, I dissent and vote to deny that branch of the defendant's motion which sought to dismiss the complaint for failure to state a cause of action. It should be noted that the defendant also moved to dismiss the complaint based upon the plaintiff's failure to file a timely notice of claim pursuant to section 3813 of the Education Law. Since the Special Term dismissed the complaint for failure to state a cause of action, it did not deal at all with the second branch of the defendant's motion, i.e., the plaintiff's failure to serve a timely notice of claim. Accordingly, I would remand to Special Term for determination of that issue.[88]

The most extreme statement of reluctance to recognize a cause of action in educational malpractice is illustrated in the case of Hoffman v. Board of Education.[89] This case followed the Donohue case within about six months. It was an arguably distinguishable case, one in which there had been a monetary award for damages suffered due to nonfeasance, but which, nevertheless, the New York Court of Appeals reversed.[90]

Daniel Hoffman, who had once spoken clearly, lost

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[88] 47 N.Y. 2d 440, 391 N.E. 2d 1352, 418 N.Y.S. 2d 375 (1979), aff'g 64 App. Div. 2d 29, 407 N.Y.S. 2d 874 (1978), aff'g 95 Misc. 2d 1, 408 N.Y.S. 2d 584 (1977).

[89] 64 App. Div. 2d 369, 410 N.Y.S. 2d 99 (1978), 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979).

[90] Hoffman v. Board of Educaton, 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376.

his father when he was about age two. After the death of his father, Daniel ceased speaking and when he began to speak again, he had developed a serious speech defect of probable psychosomatic origin. Daniel was enrolled in kindergarten in the fall of 1956 in the New York City school system. He was tested by a clinical psychologist. On his intelligence quotient test Daniel scored 74, while 75 had been established by the New York City Board of Education as the cutoff point distinguishing children of normal intelligence from retarded children. On the basis of this test, Daniel was placed in a class for children of retarded mental development.

It is noteworthy that the examining clinical psychologist was uncertain of his findings and qualified his report by stating two conditions to be followed by the school. He said that Daniel should (1) receive speech therapy, and (2) be reevaluated within two years in order to obtain a more accurate reading of his intellectual capacity and abilities.[91] However, no such retesting ever took place. The plaintiff, Daniel, remained in classes with mentally retarded children until he was graduated at the end of the twelfth grade; he was by then seventeen years old.

He was transferred to a Pace-Center at his mother's

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[91] See note 89 supra.

request and received a second IQ test. His overall score reached 94. Because he was not retarded, he was exluded from that facility, where he was supposed to receive vocational training. The plaintiff and his mother were informed that he was unqualified since he showed normal intelligence. The plaintiff, according to his mother, was unable to work and earn money. He could not even hold a job as a delivery boy. His mother related that he was depressed, sitting most of the time in his room behind closed doors.

The plaintiff then brought an action against the New York Board of Education, claiming negligence because it had failed to follow the clinical psychologist's recommendation to retest him. He therefore was misclassified and misplaced in a class for mentally retarded children. He further claimed that severe emotional and intellectual injury had taken place. And finally, the plaintiff claimed that all this had diminished his ability to obtain employment.

The jury at the trial court awarded him $750,000 in damages. The defendants appealed and a closely divided appellate court affirmed the trial court's decision of liability, but reduced the amount of damages to

$500,000.[92] The majority's opinion rested on the fact that the board of education's failure to follow its psychologist's recommendation and retest the plaintiff represented an "affirmative act of negligence" and thus was actionable.

However, the New York Court of Appeals reversed both the liability and the damage award decisions made by the lower court.[93] The courts' votes show the complexity of the Hoffman case as compared with the Donohue case:

Case	Intermediate Appellate Court	Court of Appeals
Donohue	Virtual unanimity	Virtual unanimity
Hoffman	3:2 Liable (aff.)	4:3 Reversal

Thus, one may be inclined to think that the court's stance regarding educational malpractice is a strong one,

[92] Hoffman v. Board of Education, 64 App. Div. 2d 369, 410 N.Y.S. 2d 99 (1978).

[93] Hoffman v. Board of Education, 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979).

although Hoffman might be looked upon as distinguished. However, even though Hoffman can be seen as a case of nonfeasance as compared to a charge of misfeasance, the distinguishing factors do not seem very significant. Nonfeasance is the omission of a required act, while misfeasance is the improper execution of an act required in performing one's professional duties. A single act can represent both a misfeasance and a nonfeasance at the same time. Therefore, to distinguish Hoffman to the point of saying that the case does not fall under educational malpractice may seem like splitting hairs.

In Donohue and Peter W., the boards of education had failed to take steps to detect and correct their academic deficiencies. In Hoffman, the board of education failed to follow its rules of retesting based on its own psychologist's recommendation, which in turn was nothing more than to establish the plaintiff's academic ability. In so doing, the board committed affirmative acts of negligence. On the other hand, in Donohue and Peter W., a legal duty of care claim could not be so easily supported, since a teacher (professional) must be allowed some descretion in choosing pedagogical theory and strategies to use in the classroom.

Hoffman, however, was definitely a nonfeasance, which burdened and neglected the plaintiff to such a

degree that he could not lead a productive and happy life after the error was discovered twelve years later. Here, it would seem a clear duty could be established, a breach thereof had taken place, and his quite obvious injury had been caused by the neglectful action. Not even remedial training would be helpful to the plaintiff at that point. In order to undo some of the damage resulting from the committed nonfeasance by the school authorities, a long-range counseling and therapeutic program would be necessary and even then the outcome would be unpredictable.[94]

But even such a strong basis for an educational malpractice claim did not convince the court. Thus, the New York Court of Appeals, relying heavily on Donohue, dismissed Hoffman for failure to state a cause of action, noting that even though a cause of action for educational malpractice could be quite possible and cognizable under traditional notions of tort law, it nevertheless should not be recognized as a matter of public policy.[95]

Until now, there have been ten cases, three of which

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[94] Diamond, "Education Law," 29 Syracuse L. Rev. 103, 79-160 (1978).

[95] See note 90 supra at 376-79.

are unreported educational malpractice decisions.[96] In all of these cases the courts ruled that educational malpractice should not be recognized on grounds of public

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[96] Reported decisions:

Donohue v. Copiague Union Free School Dist., 47 N.Y. 2d 440, 391 N.E. 2d 1352, 418 N.Y.S. 2d 375 (1979), aff'g 64 App. Div. 2d 29, 407 N.Y.S. 2d 874 (1978), aff'g 95 Misc. 2d 1, 408 N.Y.S. 2d 584 (1977).

D.S.W. v. Fairbanks North Star Borough School District, and L.A.H. v. Fairbanks North Star Borough School District, 628 P. 2d 554, Supreme Court of Alaska (1981); cases were joined by the Court.

Hoffman v. Board of Educaton, 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979).

Hunter v. Board of Education of Montgomery County et al. 439 A. 2d 583, Court of Appeals of Maryland (1982).

Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854.

In re Peter H. 3323 N.Y.S. 2d 302, Westchester County Family Court (1971).

Pietro v. St. Joseph's School, 48 U.S.L.W. 2229, New York Supreme Court, Suffolk City (1979).

Unreported decisions:

Doe v. Board of Educ., No 48277, Cir. Ct. Montgomery County, Md (July 6, 1979) reported in Comment, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction," 58 N.C.L. Rev. 561 (1980).

Carvell v. School Bd. of Broward County, No. 77-8703, Cir. Ct., Fla. (Dec. 5, 1977) reported in Richard Funston, "Educational Malpractice: A Cause of Action in Search of a Theory, 18 San Diego L. Rev. 743-812 (1981).

McNeil v. Board of Education, No. L-17207-74, Super. Ct. Law Div., N.J. (May 31, 1974); a finding of failure to state a cause of action, reported in Elson, "A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching," 73 N.W.U.L. Rev. 641 (1978).

policy, even though a possibly cognizable cause of action was stated or might be stated.

So far, courts in the following states have refused to recognize educational malpractice as an acceptable cause of action, primarily due to public policy considerations: Alaska, California, Florida, Maryland, New Jersey, and New York. In view of these decisions, one is hard pressed to understand the expressed beliefs of critics and commentators who have suggested that such a cause of action may be recognized in the near future.

Additionally, the general posture of the courts has been not to interfere in "academic affairs," meaning controversies between students and the faculty concerning academic achievements, grading, instruction, etc. In Hamilton,[97] the U.S. Supreme Court did set a precedent for such a stance by declaring that administrators (regents) possessed inherent authority to establish internal organizational standards for instruction.[98]

In recent years, courts have entered into controversies between students and institutions of higher education when a clear violation of constitutional rights

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[97] Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

[98] Id.

was involved. In contrast, however, courts still feel unqualified to judge matters of a purely academic nature.

Many courts have recognized the doctrine of academic freedom, which upholds the philosophy that teaching and learning must be free of outside control.[99]

In Donohue v. Copiague Union Free School District the court held that "courts cannot decide the curriculum or degree of proficiency needed to advance from grade to grade in the school system."[100] It also stated that:

> The field of education is simply too fraught with unanswered questions for the courts to consitute themselves as a proper forum for resolution of these questions.
>
> Thus, public policy of this state (New York) bars an action for educational malpractice.

The courts still maintain that they should not be directly involved in the inner workings, policy decisions, or questions of an educational nature regarding public schools. Furthermore, judges are also convinced that school administrators possess an expertise in their respective fields enabling them to deal with teacher

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[99] Board of Education v. Allen, 392 U.S. 236 ff (1968) and Walman v. Walter, 433 U.S. 229 ff (1977).

[100] Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440, 391 N.E. 2d 1352, 418 N.Y.S. 2d 375 (1979) aff'g 64 App. Div. 2d 29, 407 N.Y.S. 2d 874 (1978) aff'g 95 Misc. 2d 1, 408 N.Y.S. 2d 854 (1977).

incompetence much better than the courts could. The court in Donohue[101] stated:

> (T)he recognition of a cause of action sounding in negligence to recover for "educational malpractice" would impermissibly require the courts to oversee the administration of the State's public school system.

The court thinks that an inherent expertise makes administrators better equipped to deal with incompetent teachers. Incompetent teachers traditionally have dismissed, and administrators still use this very slow and ineffective remedy.[102] Dismissal cannot be used against tenured teachers. On the other hand, the dismissal of a teacher does not compensate the injured student in need of remedial aid but unable to afford it.

Legal Considerations

Courts also fear that a flood of litigation may occur, once they recognize educational malpractice. This belief and attitude were expressed in Peter W. v. San Francisco Unified School District.[103]

Competencey testing is seen as another solution. Tests are being designed and implemented to detect learning difficulties of students in mathematics,

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[101] Id.

[102] Appelbaum v. Wulff, 95 N.E. 2d 14 ff (1950).

[103] 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

reading, and writing, with results being passed on to parents and teachers. For instance, the Massachusetts Department of Education in 1978 proposed a basic skills improvement program for grades K-3, 4-6, and 7-12.[104] Massachusetts requires that the tests be developed on the local level with the involvement of everyone, meaning teachers, administrators, parents, employees, and students.[105] This definitely will reduce the possibility of class action suits[106] and induce across-the-board communication and cooperation. Such tests should entail at least two, and probably three, components:

1. early identification of learning problems,
2 suggestions and direction for remedial aid, and
3. retesting of students to see if they have reached minimal required competency or if

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[104] Bureau of Research and Asssessment, Massachusetts Department of Education: Questions and Answers on the Basic Skills Improvement Policy and Proposed Regulations, at I (1978). Ascribed in Notes, "Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?" 151 New England L. Rev. 116.

[105] Id.

[106] Robinson v. School Board of Palm Beach County, No. 78-2137, Cir. Ct. (June 8, 1978).

other learning programs have to be induced.[107]

Competency testing may be part of an answer to the problem of educational malpractice. It could serve two vital purposes: (1) to form a basis the courts can work with, and (2) to decrease educational malpractice. However, a number of problems are inherent in such an approach. The student may not have the ability to attain the minimum competency level he or she is required to reach. Responsibility would have to be placed permanently on the student, the teacher, and/or the school district. Again, this emphasizes the court's point: there is no standard by which to measure "successful or proper educational professional competence."

A standard will be needed for determining how to measure variables other than IQ, who should perform such measurements and what instruments should be used. Peter

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[107] The University of the State of New York, The State Education Department; The Regents Competency Testing Program Information Brochure (September 1978) at 1, ascribed in Notes, "Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?" 15:1 New England L. Rev. 116.

W.[108] and Donohue[109] as well as Hoffman[110] showed that intelligence was not the problem. And there are additional social and economic variables, such as home environment and educational and social exposure. Additional reading is suggested.[111]

Several major considerations need to be addressed by the courts, including the recognition of educational malpractice suits despite policy considerations, the inherent expertise doctrine, or the doctrines of academic freedom and exhaustion of administrative remedies, and

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[108] Peter W. v. San Francisco Unified School District., 60 Cal. App. 3d 814 131 Cal. Rptr. 854 (1976).

[109] Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440, 391 N.E. 2d 1352, 418 N.Y.S. 2d 375 (1979).

[110] Hoffman v. Board of Education of City of New York, 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979).

[111] Additional Suggested Reading

A. Washco, Jr., A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Education at Temple University, Philadelphia (1933).

M. Schoen, Editor, The Effects of Music, Harcourt, Brace and Company, Inc., New York (1927).

R. Lundin, An Objective Psychology of Music, The Ronald Press Company, New York (1967)

C. Diserens, A Psychology of Music, The Influence of Music on Behavior, College of Music, Cincinnati, Ohio (1939).

the fear of a flood of litigation.[112] If the courts decide to deal with the issue, they will need to consider a problem solving approach that would aid the schools and do justice to a deserving and injured plaintiff.

Robinson[113] in Psychology and Law notes:

> To the extent that every civilization begins to collapse first from within--and this is only partly true--the earliest signs of internal weakness are institutional for it is institutions that give a civilization its defining properties. In this regard none is more basic than the institutions of law (I would like to add the institution of Education) "for none speaks more directly and diffusely to the people at large."
>
> The civilizations that have earned our respect and our love are those in which the laws were not only just--for this can happen as a result of fear or rebellion or habit or even accident--but were intented to be just. They reveal their intentions to us by their devotion to principle and their resistance to unreasoning clamor. Aristotle spoke for one of these civilizations when he wrote:
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> > "He therefore that recommends that the law shall govern seems to recommend that God and reason alone shall govern, but he that would have man govern adds a wild animal also; for appetite is like a wild animal and also passion warps the rule of even the best men. Therefore, the law is wisdom without passion." (emphasis supplied)

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[112] Donohue v. Copiague Union Free School District; Peter W. v. San Francisco Unified School District; Hoffman v. Board of Education of City of New York. See also notes 108 and 110 supra.

[113] D. N. Robinson, Psychology and Law, Oxford University Press, Oxford (1980).

The United States District Court for the Western District of Missouri made the most comprehensive and significant statement regarding the relationship between courts and education in The General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education.[114] This statement spelled out the situtation necessary for a court to enter into controversies, down to the obligations of students. The court provided additional understanding of courts' deference in regard to educational institutions. Although this applies mainly to institutions of higher learning, inference can be made to public education, since primary and secondary schools are the undergirding structure that makes higher education possible.

These standards, which grew out of the Kent State uprisings in the 1960s, are for reviewing disciplinary actions, suspension or dismissal for misconduct, disrupting school activities, and the need for mainstreaming discipline (not necessarily an educational result). Inference can be made to the educational process, especially since the statement itself mentions the processes of education and teaching. However, today's schools are

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[114] 45 F.R.D. 133 at 134-41 (September 18, 1968).

fraught with disciplinary problems and it would seem that educational problems should be dealt with in conjunction with disciplinary standards.

The following summary quote of the major points provides guideposts in an otherwise little spelled out area:

> Achieving the ideal of justice is the highest goal of humanity.
>
> Justice is not the sole concern of the courts.
>
> Education is euqally concerned with the achievement of ideal justice.
>
> Higher education is the primary source of study and support of improvement in the courts.
>
> Therefore, courts should exercise caution when importuned to intervene in the important processes and functions of education.
>
> A court should never intervene in the processes of education without understanding the nature of education. . . .
>
> Education is the living and growing source of our progressive civilization, of our open repository of increasing knowledge, culture and our salutary democratic traditions. As such, education deserves the highest respect and the fullest protection of the courts in the performance of its lawful mission.
>
> There have been . . . there will be instances of erroneous and unwise misuse of power by those invested with power of management and teaching in the academic community as in the case of all human fallible institutions.
>
> When misuse of power is threatened or occurs, our political and social order has made available a wide variety of lawful non-violent, political, economic, and social means to prevent or end the misuse of power.

These same lawful, non-violent, political economic and social means are available to correct an unwise but lawful choice of educational policy or action by those charged with the powers of management and teaching in the academic community.

Only where erroneous and unwise actions in the field of education deprive students of federal protected rights or privileges does a federal court have power to intervene in the educational process.

Lawful Missions of an Educational Institution

To maintain, support, critically examine, and to improve the existing social and political system.

To train students and faculty for leadership and superior service in public service, science, agriculture, commerce and industry.

To develop students to well rounded maturity, physically, socially, emotionally, spiritually, intellectually and vocationally.

To develop, refine and teach ethical and cultural values.

To provide fullest possible realization of democracy in every phase of living.

To teach principles of patriotism, civil obligation and respect for the law.

To teach the practice of excellence in thought, behavior and performance.

To develop, cultivate and stimulate the use of imagination.

To stimulate reasoning and critical faculties of students and to encourage their use in improvement of the existing political and social order.

To teach and develop lawful methods of change and improvements in the existing political and social order.

To provide by study and research for increase of knowledge.

> To provide by study and research for development and improvement of technology, production and distribution for increased national production of goods and services desirable for national civilian consumption, for export, for exploration, and for national military purposes.
>
> To teach methods of experiment in meeting the problems of a changing environment.
>
> To promote directly and explicitly international understanding and cooperation.
>
> To provide the knowledge, personnel and policy for planning and managing the destiny of our society with a maximum of individual freedom, and
>
> To transfer the wealth of knowledge and tradition from one generation to another.
>
> The tax supported educational insitution is an agency of the national and state governments. Its missions include teaching, research and action, assisting in the declared purposes of government in this nation, namely:
>
> To form a more perfect union,
>
> To establish justice,
>
> To insure domestic tranquility,
>
> To provide for the common defense,
>
> To promote the general welfare, and
>
> To secure the blessing of liberty to ourselves and to posterity.
>
> The nihilist and the anarchist, determined to destroy the existing political and social order, who direct their primary attacks on the educational institutions, understand fully the missions of education in the United States.[115]

The court continued to stress the power and influence of

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[115] Id.

these instituions which were the reason for the court's reluctance to interfere:

> Federal law recognizes the powers of the tax supported institutions to accomplish these missions and has frequently furnished economic assistance for these purposes.
>
> The genius of American education, employing the manifold ideas and works of the great Jefferson, has made the United States the most powerful nation in history. In so doing it has in a relatively few years expanded the area of knowledge at a revolutionary rate.
>
> With education the primary force, the means to provide the necessities of life and many luxuries to all our national population and to many other peoples, has been created.
>
> This great progress has been accomplished by the provision to the educational community of general support, accompanied by diminishing interference in educational processes by political agencies outside the academic community.
>
> If it be true, as it well may be, that man is in a race between education and catastrophe, it is imperative that educational institutions not be limited in the performance of their lawful missions by unwarranted judicial interference.[116]

This court's strong stance even in regard to courts' interference in disciplinary processes supports the hands-off policy the courts have shown in relation to educational malpractice suits. The court stated that education deserves the highest respect and the fullest protection of the courts in the performance of its lawful

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[116] Id.

mission. The court spelled out those lawful missions,[117] saying, among other things, that students are to be developed into well rounded maturity--physically, socially, emotionally, spiritually, intellectually and vocationally--provided by study for increase of a "well rounded" knowledge.[118] In case a lawful mission is not being carried out, interference or rectification of the wrong and/or the mission will be required.

This would not be "limiting," or "unwarranted judicial interference," as the court stated, if the interference occurs because of the violation of these very lawful missions, by allowing students to graduate without the necessary reading, mathematical and writing skills. The most appropriate bodies available to deal with these problems are the legislature, the courts, and administrative entities (agencies). The court's reasoning here seems somewhat incomplete. On the one hand it claims the importance of education but it does not want to deal with the wrongs and problems of the educational system that may weaken its very importance, existence, and mission.

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[117] See note 114 supra at 441.

[118] See note 115 supra.

CHAPTER THREE

Student Responsibilities and Obligations in the Educational System

Until recently, a student was not necessarily considered to carry an obligation in the total learning process. The teacher was seen more as the one responsible for student learning and student discipline. This trend, however, is changing rapidly. So far, there seems to be little hesitation to spell out students' rights. It is very difficult, however, to come up with students' obligations in the learning process. Perhaps one reason for this may be found in the vulnerability of students because of their dependency on a complex educational and bureaucratic system with its many intricacies.

The question of contributory (now called comparative) negligence is to be considered, however, when we ask what responsibility a student has in the area of educational malpractice. Some states have a minimum age below which it is assumed that a child can not commit negligence; others do not. Some states take the age of seven as the cut-off age; others use the age of

fourteen.[119] Although most rulings on age and comparative negligence are related to physical injury, inference can be made to other areas of injury, such as a suit of educational malpractice would incur.

Note that typically a child is held "to the . . . degree of care which ordinary children of his age, intelligence and experience ordinarily exercise under similar circumstances."[120] But even this standard is not precise. We cannot define an ordinary child or the parameters of experience. The courts have not attached meaning to these terms but have used them interchangeably.[121]

Thus, one can assume that since considerable diversity and ambiguity exist in regard to a young child's "standard of care," will take some time to set a standard of care for older students up to the age of eighteen; students above that age would come under the adult standard of care, known as the one held by the "reasonable man."[122] Nevertheless, intelligence tests, tests measuring maturity, level of responsibility and so forth, would contribute to the determination of such standards,

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[119] Swanson v. Wesley College, 402 A. 2d 401 (1979).

[120] Perry v. Linderman, 408 U.S. 593 (1972).

[121] N.L.R.B. v. Yeshiva, 444 U.S. 672 (1980).

[122] Id.

which could, and probably would, vary according to age bracket.

If such standards would be applied, a seven-year-old could be held responsible. "Contributory negligence" is a factor courts may need to consider. Of course, psychological tests and examinations would be used to develop a factual standard or standards of responsibility for the various ages. Such examinations would assure defense attorneys and courts of having factual evidence with which to work. A major defense in medical malpractice, for example, is "lack of cooperation" by the patient, which causes poor results and is considered to be "contributory negligence." What constitutes contributory negligence in educational malpractice has not yet been determined. Some defense is probable--almost certain--if a cause for educational malpractice is ever recognized.

Up to now, the courts have not formed a legal theory on educational responsibility and duty by students. They have stated no clear, legal directions, formula, or theory regarding such standard. Nevertheless, increasing litigations may bring about the development of such a standard and/or theory.

The standard of assessment applied would be basic (procedural) fairness; the very key to that standard, according to the courts, is "reasonableness"

(constitutional).[123] "Reasonable expectations," as part of contract theory, bind both parties to the performance of obligations spelled out beforehand. The contract and the ascribed acts of the student would provide some evidence of prior setting up of such obligations. However, the additional factor of academic custom would become involved. Academic custom, in tradition as well as in practice, will be considered by the courts in (1) developing mutual expectations, and (2) evaluating the results or achievements (e.g., in case of litigation, a disinterested party or parties may be used to evaluate results). All legal theories take such considerations into account. The U.S. Supreme Court referred to "usages of the past" in Perry v. Sinderman,[124] and in the very recent Yeshiva case[125] spoke of the "historical evolution of . . ." and then ruled that faculty are managerial employees. In DeMarco[126] the court held that a contract confers mutual duties on a university and on the student, which must not be overlooked.

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[123] Swanson v. Wesley College 402 A. 2d 401 (1979).

[124] 408 U.S. 593 (1972).

[125] N.L.R.B. v. Yeshiva, 444 U.S. 672 (1980).

[126] DeMarco v. Univ. of Health Sciences, The Chicago Medical School, 40 Ill. App. 3d 474, 352, N.E. 2d, 356.

So far, this can be considered the major basis for assessing comparative negligence on the part of a student. Proving a student's negligence as a factor in his or her not achieving will rest on a contract spelling out the duties, activities, and level of performance required in order to obtain a degree or to graduate. If it is proven that the student has the ability to learn or understand, nonperformance of these duties and activities could constitute student negligence and may offer positive defenses for the institution. It is important to point out that such a defense is a major one in medical malpractice suits.

In an article on competency testing, McClung,[127] emphasized his firm belief that learning involves both teachers and students. If so, it should follow that each should share the responsibility of educating the student. Thus, if students are evaluated, teachers must be tested, too. He also said that administrators must perform their role well and be willing to make the necessary changes within the school structure. Such a position necessarily involves the public as well, since changes and improvements cost money and the public would have to provide the necessary finances.

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[127] McClung, "Are Competency Testing Programs Fair? Legal?" Phi Delta Kappan, at 397 (February 1978).

The aforementioned General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education by the U.S. District Court for the Western District of Missouri also spelled out the "obligation of students attending an institution of learning":

> The voluntary attendance of a student in such institutions is a voluntary entrance into the academic community. By such voluntary entrance, the student voluntarily assumes obligations of performance and behavior reasonably imposed by the institution of choice relevant to its lawful missions, processes, and functions. These obligations are generally much higher than those imposed on all citizens by the civil and criminal law. So long as there is no invidious discrimination, no deprival of due process, no abridgement of a right protected in the circumstances, and no capricious, clearly unreasonable or unlawful action employed, the institution may discipline students to secure compliance with these higher obligations as a teaching method or to sever the student from the academic community.
>
> No student may, without liability to lawful discipline, intentionally act to impair or prevent the accomplishment of any lawful mission, process, or function of an educational institution.[128]

Although the court addressed higher education and stressed voluntary attendance, an analogy can be made to public institutions. There is an obligation and a responsibility on a student's part from the moment he/she can be declared capable of contributory (now comparative) negligence. To argue that the public schools' compulsory

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[128] 45 F.R.D. 133, at 141 (September 18, 1968).

attendance requirement relieves a student of his disciplinary and academic duties seems especially out of line. It seems axiomatic that when a person enters an institution or simply takes a driver's test, for instance, he/she is responsible for acting in accordance with and adherance to well-understood rules and regulations.

Professor John Grote suggested as far back as 1862 a role for the student in the learning process: "Success in teaching is a function of the recipient as well as the communicator."[129] However, schools can not wash their hands of all responsibility and thus avoid liability by saying that schools promise opportunities, but not results.

At this moment, it looks like the "window to future educational malpractice claims has now been barricaded."[130] The courts rely on public policy as a justification for the refusal to charge liability. It has been stated that if certain public policy considerations outbalance the need for protection from injury,

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[129] A. Small, "Accountability in Victorian England," III Phi Delta Kappan at 439 (March 1972).

[130] M. A. McGhehey, ed., School Law in Contemporary Society, Topeka, Kansas, National Organization on Legal Problems of Education (1982).

educational malpractice claims are possible and justifiable.[131]

Another reason the court did not recognize a cause of action for educational malpractice was that the court had determined that any dispute or controversy regarding placement of children in a particular educational program could best be resolved within the school system and its review mechanism or through established administrative processes.[132]

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[131] Policy considerations, according to Rowland v. Christian, 443 P. 2d 561 (1968) can include the following: foresee ability of harm; degree of certainty of injury; closeness of connection between defendent's conduct and the injury; moral blame; prevention of future harm.
Extent of burden on defendant; consequences to community of imposing a duty of care; cost; prevalence of insurance.

[132] Hoffman v. Board of Education, 410 N.Y.S. 2d 99-119 (1978).

CHAPTER FOUR

Summary of Theories of Educational Malpractice and Their Viability

Introduction

Several theories of educational malpractice have been presented in court cases and in legal literature. Among the major theories are: contract theory, third party beneficiary, misrepresentation, negligent misrepresentation, intentional misrepresentation, constitutional right, involuntary confinement, right to an education, and negligence. The major legal and educational considerations are presented in the following sections.

Contract Theory

Courts have recognized previously that a contractual relationship exists between private schools and their students.[133] Some proponents of educational malpractice would extend this holding to the public school sector and find the contract approach advantageous in cases where the plaintiff claimed a failure of learning due to

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[133] Pietro v. St. Joseph's School, 48 U.S.L.W. 2229, N.Y. Sup. Ct., Suffolk Cith (September 21, 1979).

teacher negligence. The advantages claimed are as follows:

1. the unavailability in contract of various defenses barring recovery in tort;

2. governmental immunity would be less likely to hinder recovery under contract than under tort;

3. there are longer running statutes of limitations under contract;

4. there might be a possibility that courts would be more willing to grant recovery for an expectancy.[134]

It is doubtful if a contract approach would work simply because no proof can be offered of any "bargained-for" exchange. It would be very difficult to come up with negotiations on which to base a finding of consideration.

There is, however, one avenue that could be pursued. A plaintiff could plead promissory estoppel, arguing that he did forego attending a private school on the explicit promise of the public school to avoid negligent instruction. However, a plaintiff would need to prove that he had the money to actually attend a private school. In turn, this would benefit only, or mainly, children of well-to-do parents who could afford private education while others would have no recourse. But even here a problem arises, because recovery under such a suit would

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[134] R. Funston, "Educational Malpractice: A Course of Action in Search of a Theory," 18 San Diego L. Rev. 743 ff (1981).

depend solely on an implied term of an implied contract.[135] And it is doubtful if the courts would be willing to do much contractual construction to support such a claim.

The doctrine of quasi-contract was developed to avoid undue enrichment of parties.[136] This does not apply to education at all because the school district or educator is not likely to get unduly enriched because a graduating student cannot read or write.

Contract Theory--Third Party Beneficiary

Here a student plaintiff could argue that he was the third party beneficiary of a contract existing between the teacher and the school district or between the taxpayers and the school district, in which it was implied that the teacher or school district promised to properly educate its students. In order to recover, however, a student plaintiff would need to show that the parties had contracted and intended to benefit him (third party).[137]

If a plaintiff would attempt to claim recovery as a third party under an implied contract between the respective school district (state) and the taxpayer, his

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[135] Id. at 761.

[136] Id.

[137] Id. at 762.

attempt might not be successful, because the majority of jurisdiction takes the position that when a governmental agency contracts to benefit a total community, an individual has no enforcement rights.[138] So far, contract cases have required an explicit promise to the claiming part (individual); a statute or a constitutional rule does not satisfy the requirement.

Theory of Misrepresentation

A more clearcut, tangible and promising approach for establishing a cause of action in educational malpractice would be a claim of misrepresentation. That is, a student plaintiff could argue that by misrepresenting his academic progress or lack thereof to his parents or guardians who relied on such communications, education officials refrained from otherwise necessary actions that would have been beneficial to the student's educational progress. Note that the court dismissed a claim of intentional misrepresentation in Peter W. for not alleging the "requisite element" of reliance.[139] In Donohue the court simply refused to accept such an

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[138] Id.

[139] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814-24, 131 Cal. Rptr. 854-60.

issue.[140] This could imply that proper pleading might produce a different result.

Cause of Action for Negligent Misrepresentation

Under this theory, a student plaintiff would seek to show that the school was under a "duty" to provide accurate information based on evaluations of performance. Further, he would seek to show that the school had breached that duty in failing to take reasonable care to make sure of the facts and the truth and that this breach was causally related to the injury suffered by the student.[141] In states that have statutes mandating that their school districts keep parents/guardians informed of their children's academic progress, there may be a probable basis for finding the required duty.

The problem with such an approach is that under this type of negligence (ordinary negligence) the plaintiff might encounter difficulties in showing that he suffered an injury cognizable by law.[142] Another problem would be establishing the required causal link because a variety

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[140] Donanue v. Copiague Union Free School Dist., 64 App. Div. 2d 29-40, 407 N.Y.S. 2d 874-81.

[141] R. Funston, "Educational Malpractice: A Cause of Action in Search of a Theory," 18 San Diego L. Rev. 743 ff.

[142] Id. at 764.

of extraneous variables affecting education and learning can be identified as probable or likely causes of a student's failure to learn, as discussed previously.

The ordinary negligence defenses, e.g., contributory negligence or misrepresentation of opinion as opposed to misrepresentation of fact, also supply barriers to recovery. It is hoped that misrepresentation of opinion would not apply when relating test scores, although that action can be looked upon as opinion also.[143]

Cause of Action for Intentional Misrepresentation

This cause of action is very rare and hard to prove. In such cases, the student plaintiff would be required to prove that the defendant had intended to deceive him;[144] e.g., a teacher misrepresented a student's inability to reach certain grades in order to keep parents from going to the respective authorities. But if a teacher errs in his assessment, any malicious or fraudulent intentions will be dispelled immediately.

Even assuming an intent to deceive can be shown, the plaintiff still must prove the following elements:

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[143] W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser and Keeton on The Law of Torts, 5th ed., 161-66 (1971).

[144] Id. at 706.

1. that he and his parents relied upon the educator's misrepresentation;
2. that he and his parents had a right to rely on said misrepresentation; and
3. that it was reasonable for them to rely on it.[145]

Finally, it must be demonstrated by the plaintiff that but for the misrepresentation, they (he and his parents) would have chosen a different course of action in regard to his educational situation (put him in private school, provided tutors, etc.).

At present, defendant school districts can argue that the parents should be able to judge for themselves if their child lacks rudimentary academic skills, by maintaining that such assessment does not require any particular expertise. This may cause the court to find the whole argument immaterial. These arguments demonstrate how important it is to develop a "professional standard of care" for public school educators, for the purpose of improvement and growth on the job; to educate properly, on the one hand, and to provide guidelines for the courts if necessary, on the other hand. In fact,

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[145] Id. at 710-16.

such a "professional standard" would benefit all parties involved.

Constitutional Right

Propenents of educational malpractice also consider suits based on constitutional rights. Such claims try to invoke liability for educators and educational administrators under 42 U.S.C. § 1983. But because there is no federal guarantee of a constitutional right to education, § 1983 may not be relevant. The section states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ot Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[146]

The principal points to be considered in bringing § 1983 actions are:

1. the sources and nature of federal rights allegedly infringed;
2. the determination of whether the 11th Amendment bars action against a public school district;
3. the presentation of justifiable questions;
4. the nature of the mental state required for

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[146] 42 U.S.C. S 1983 (1976).

liability and the availability of qualified immunity to school officials; and

5. the nature and proof of damages.[147]

"Under Color of Law"

In considering the possibility of § 1983 litigations, the one issue that must be clarified is whether the person/institution involved acted "under color of any statute, ordinance and/or regulation. First, it must be determined whether the person/institution is a public one or whether the person/institution is acting under the color of state law.

To act under color of law means that the person/institution has obtained its power by virtue of state law; it does not mean that a person acts within the law. State action exists where an institution is owned, established and controlled by the state. Public institutions of learning that are "state related" or "state linked" have a close nexus to the state and the challenged action so that the action can be treated as that of the state itself.

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[147] 45 Missouri L. Rev. 288, Comment, "Damages Actions for Denial of Equal Educational Opportunities" (1980).

Sovereign Immunity and Section 1983

An institution of learning, as an agency of the state, enjoys "sovereign immunity," according to the United States Constitution:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State....[148]

In Scheuer v. Rhodes, the U. S. Supreme Court stated: "It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact."[149]

While the 11th Amendment would be an absolute bar to suits under § 1983, many states have waived their sovereign immunity through statutory provision. Others, like West Virginia which enacted H.B. 1271, have taken out malpractice insurance for its teachers. Thus, suits in both state and federal courts are allowed in these states. However, "a clear declaration in the statutory language that the state intended to waive its 11th Amendment immunity as well as its sovereign immunity under

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[148] United States Constitution, Amendment XI.

[149] 416 U.S. 232-37 (1974).

state law" must be present.[150] It is to be noted, however, that immunity provided by the 11th Amendment does not bar federal court action for prospective injunctive relief from unconstitutional state actions.[151] This immunity, enjoyed by institutions of learning, does not apply to individuals, according to a Supreme Court decision in Scheuer v. Rhodes: "It has been settled that the 11th Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under color of law."[152] It is therefore possible in some instances to skirt the issue of the 11th Amendment immunity by entering a suit against an individual rather than against the institution itself.

It has not been suggested that §§ 1983 was intended to create a waiver of a state's 11th Amendment immunity merely because an action could be brought under that section against state officers, rather than against the state itself.[153]

The 11th Amendment itself does not bar suits against the state by its own citizens. The U. S. Supreme Court

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[150] Id. at 487 (1974).

[151] Id. at 445-52 (1974).

[152] Id. at 232-37 (1974).

[153] Id.

has consistently held that an "unconsenting State is not immune from suits brought in federal courts by her own citizens . . . ."[154] It is also well established that even though a state is not a named party to the action, the suit may nonetheless be barred by the 11th Amendment. In Ford Motor Company v. Department of Treasury, the court said:

> (W)hen the action is in essence one for the recovery of money from the state, the state is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.[155]

Thus, the rule has evolved that 11th Amendment bars private parties seeking to impose a liability which must be paid from public funds in the state treasury.[156]

The court also quoted Rothstein v. Wyman:

> It is not pretended that these sources are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. . . .
>
> It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the

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[154] Hans v. Louisiana, 134 U.S. 1 (1890). Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973).

[155] Ford Motor Compnay v. Department of Treasury, 323 U.S. 459 (1945).

[156] Kennecott Copper Corporation v. State Tax Commission, 327 U.S. 573, 1946.

> programs he administers. It is quite another thing to force the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the 11th Amendment if that basic constitutional provision is to be conceived of as having any present force.[157]

The "Every Person" Interpretation

According to its very clear and plain language, § 1983 appears to apply to all persons. However, the Supreme Court has drastically narrowed the scope of the act by "recognizing various immunities through judicial interpretation." Thus, the executive branch of government has been designated as the only group to which § 1983 applies; both the legislative and judicial branches have absolute immunity. Nevertheless, the executive branch did receive some immunity, called "qualified immunity." This point was clarified by two cases: Scheuer v. Rhodes,[158] and Wood v. Strickland.[159] In Scheuer, the Court held that there was no absolute executive immunity available under Section 1983 but a specified immunity under the following test:

> (I)n varying scope, a qualified immunity is available to officers of the executive branch of

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[157] Rothstein v. Wyman, 467 F. 2d 236-37 CA 2 (1972).

[158] See note 150 supra.

[159] 420 U.S. 308 (1975).

> government, the variation being dependent upon the scope of discretion and reponsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all circumstances, coupled with good-faith belief that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[160]

Total immunity for the executive branch would drain § 1983 of its meaning, the court reasoned, while at the same time recognizing that some freedom of action and descretion was needed.[161] The court, however, rejected "absolute immunity" by reasoning that it would not improve the ability of school executives to fulfill their responsibilities. The court formulated a sliding scale test of "good faith" through objective and subjective means.[162]

> We think there must be a degree of immunity if the work of the schools is to go forward; and however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished.[163]

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[160] See note 150 supra.

[161] Id.

[162] Id.

[163] Id.

However, no immunity whatsoever--even where good faith was shown--would be granted because of ignorance of constitutional rights:

> The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law.[164]

The court also held that the official is bound by: "a standard of conduct based not only on permissable inventions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.[165]

It also ruled that a school board member is not immune from liability under § 1983, "if he knew or should have known . . . (certain act or situation) would violate the constitutional rights of the students."[166]

Pulling it all together, it can be stated that:

1. Total immunity for the executive branch is not granted, since it would drain § 1983 of its meaning.
2. Thus, Scheuer, recognized that all executive officials could be liable under § 1983.

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[164] Id.

[165] Id.

[166] Id.

3. Absolute personal liability is rejected by the court due to the heavy financial burden which would deter people from seeking office, from teaching, and from fulfilling their responsibilities.

   But the court formultated a sliding scale test for responsibility called-good faith through (a) objective, and (b) subjective means.

4. No immunity even under a showing of good faith would be granted because of ignorance of the law/constitutional rights.

5. Thus, local governing bodies can be sued directly under § 1983 for (a) monetary, (b) declaratory, or (c) injunctive relief. This includes teacher, school boards, and school districts.

6. The U.S. Supreme Court, however, stated quite clearly that local governing bodies cannot be held liable under th doctrine of respondeat superior, except for deliberate indifference on the respective superior's part.

As can be seen by these rulings, officials and professionals need to familiarize themselves with the constitutional rights of their students. Wood definitely implies that all institutional officials, including

faculty, must possess a certain degree of knowledge (legal knowledge not yet specified by courts) about their responsibilities, duties, functions and powers.

Courts will respond to a claim of action if gross negligence and deliberate indifference are involved.

Actions under §§ 1983 are seen by some authors as the future channel for obtaining damages from educational systems and/or their officials/professionals. For example, constitutional causes of actions might be given by alleging a right to an equal educational opportunity. "Social promotion" violates this right, because if a student with failing grades is put into the next grade, he will not have an equal opportunity at that higher level. A cause of action under the 14th Amendment has not been tried yet and could only be based on a confinement without due process of law. However, these actions are standing on shaky ground, as this paper will discuss later. Education at this point is not a constitutional right,[167] and all cases in this area deal with equal access.[168]

Although the court in Rodriguez[169] indicated that when a state chooses to provide public education it is

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[167] San Antonio School District v. Rodriquez, 411 U.S. 1, 35 (1973).

[168] Id.

[169] Id. at 24.

bound to provide a minimally adequate one, it nevertheless seems that this opinion alone may not be sufficient to establish any liability under the Civil Rights Act. The Rodriguez case was a class action and therefore it is questionable whether the court's established "minimum standard" would be available to an individual student. Rodriguez also holds that the quality of instruction does not have to be absolutely equal, which gives some leeway for treating students differently, within acceptable limits, in the classroom.[170]

Involuntary Confinement Theory

Even though courts have not been enthusiastic about the idea, a claim of involuntary confinement may have merit.[171] In Gregory B., the defendants argued that their habitual truancy was justified since the educational institution did not teach them anything.[172]

In the so-called "right to treatment" cases which involve people involuntarily committed to prisons or state institutions, the courts have held that the confinement--a deprivation of liberty--took place for the sole purpose of nonnegligent treatment, and if such

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[170] Id.

[171] 88 Misc. 2d 313, 387 N.Y.S. 2d 380, Fam. Ct. (1976).

[172] Id.

treatment was not provided, the commitment constituted a deprivation of liberty and a violation of due process of law. In addition, strength is added to such a cause of action since "due process" already has been used to govern a variety of student-school interactions.[173] An analogy could be drawn here to sustain an educational malpractice case on a theory of due process, but it would not be without analytical problems. A plaintiff would need to show that he was truly under compulsory confinement; that is, that compulsory attendance also constituted compulsory confinement at the same time. However, confinement in an institution is different from compulsory school attendance. Confinement in an institution includes 24-hour-a-day confinement twelve months a year, while school attendance encompasses only certain hours during a number of months annually. Thus, it would be difficult to consider schools even as "in-kind" total institutions such as mental hospitals and prisons. In addition to this obstacle, the right to treatment cases

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[173] Tinker v. Des Moines, Inc. Community School Dist., 393, U.S. 503 (1969) (to suspend a student from school for wearing black arm bands to protest the Vietnam War is violative of due process guarantees. . . .).

Goss v. Lopez, 419 U.S. 565 (1975) (a student is entitled to public education. Such entitlement constitutes a property interest, therefore a suspension from a public school requires due process proceedings.). But not Arnett v. Kennedy, 416 U.S. 134 (1974) (a state can substantively limit the extent of an entitlement; it therefore can also set procedural limitations).

showed that no treatment at all was administered, while educational institutions provide some education to students each day.[174] A final problem here would be in developing an educational standard that could measure the quality of education provided and set prodedures for conveying such education. Neither is available at this time, which also is true in the right to treatment cases.

Thus, an involuntary confinement action contains many difficulties and shows little promise for success in the area of educational malpractice.

The Right to an Education

Brown v. Board of Education[175] is the case addressing individual rights and public education. This suit attacked discriminatory racial segregation of public school children based on 14th Amendment grounds.[176] The U. S. Supreme Court unmistakably spelled out the basic value of education in our society, a noteworthy statement

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[174] Wyatt v. Stickney, 344 F. Supp. 387, M.D. Ala., (1972) and O. Connor v. Donaldson, 422 U.S. 563 (1975).

[175] 347 U.S. 483 (1954).

[176] U.S. Const. Amend. XIV, S 1, states: " N or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

which has been quoted in a large number of public education cases.[177]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[178]

Today, education is highly valued by society and is very important to people concerned about their careers and professional progress in life. The same, of course, applies to handicapped children. If, as in Hoffman v. Board of Education,[179] a child is removed from the heterogeneous mainstream of society and the educational system for negligent reasons, a denial of the right to education has occurred.

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[177] Goss v. Lopez, 419 U.S. 565-76 (1975); Milliken v. Bradley, 433 U.S. 267 (1977); Mills v. Board of Education, 348 I. Supp. 866-75, D.D.C. (1972); Arthur v. Nyquist, 573 F. 2d 134, 2d Cir., cert. denied, 439 U.S. 860 (1978); Hobson v. Hausen, 269 F. Supp. 401, D.D.C. (1967).

[178] 347 U.S. 493 (1954).

[179] 64 App. Div. 2d 369, 410 N.Y.S. 2d 99 (1978), 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979).

The court in Brown v. Board of Education stated that a child could not reasonably be expected to succeed in life if he is denied the opportunity of an education. The court also noted: "Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on an equal basis" (emphasis supplied).[180] Thus, one could argue that when a student is promoted to a class level substantially below or above his competency level, as in Hoffman v. Board of Education, he is in effect deprived of an equal educational opportunity.[181]

Pauley v. Kelly

The West Virginia Supreme Court of Appeals in Pauley v. Kelly even held that education was a fundamental right.[182] Therefore, in West Virginia, it is reasonable to argue that the West Virginia Supreme Court of Appeals began to frame a fundamental right out of the constitutional standard of a "thorough and efficient" system of free schools.[183] Although the case arose on issues of fair taxation, Pauley v. Kelly (255 S.E. 2d 859, decided

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[180] See note 178 supra.

[181] See note 132 supra.

[182] 255 S.E. 2d 859 (1979).

[183] W. V. Const. Art. XII, S 1.

in 1981 by the West Virginia Supreme Court) enumerated a constitutional requirement for a "thorough and efficient" education. In the course of its opinion the court stated that the constitution in requiring a "thorough and efficient" education was making education a fundamental constitutional right in that state. The court also found that the "thorough and efficient" clause in Art. XII, § 1 of the West Virginia Constitution requires the legislature to develop a high quality statewide education system.[184] Arthur M. Recht, Special Judge of the Circuit Court of Kanawha County, Charleston, West Virginia, on remand from the West Virginia Supreme Court of Appeals, developed a set of high quality standards. Judge Recht noted that "the role of the trial judge in this case is just that--a trial court judge trying a lawsuit upon remand from West Virginia Supreme Court of Appeals. . . ."[185] He continued with the following opinion and rationale for his "Opinion, Findings of Fact and Conclusions of Law and Order":

> After all the rhetoric subsides, this is a lawsuit, where extensive testimony was heard, thousands of exhibits introduced, and the law of the State of West Virginia applied. From the testimony and exhibits certain findings of fact were made. From the Constitution, statutes and case

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[184] See note 182 supra.

[185] "Opinion, Finding of Fact and Conclusions of Law and Order," West Virginia Law Library, L.L.S. 6.

law of the State of West Virginia, certain conclusions of law based upon those facts were also made.

That is the unique role of the trial judge in a non-jury trial, which this was.

These findings of fact were based upon what this trial judge determined to be the clear and convincing evidence which was introduced during the some forty days of trial.

The conclusions of law were a result of this trial judge's interpretation of the Constitution of West Virginia, certain West virginia statutes and existing case law, particularly the case decided by the West Virginia Supreme Court of appeals in Pauley et al v. Kelly et al decided February 20, 1979, and cited as 255 S.E. 2d 859.

In order for there to be a clear understanding of the Opinion, Findings, Conclusion and Order in this case, that is Pauley et al v. Bailey et al, it is imperative--no--indispensable, that one reads and comprehends what the West Virginia Supreme Court has said in Pauley et al v. Kelly et al which is recited in the most precise, unequivocal terms, as to the development of this case on remand. In other words, the West Virginia Supreme Court in 1979 in Pauley et al v. Kelly et al established the definitive guidelines and direction for the trial of the matter just concluded, which this Court was bound to follow in order to discharge the oath of office as a trial court judge.

First, in regard to the development of the high quality educational standards, and the relationship of that development to the role of the commissioner who is to work with the representatives of the Legislative and Executive branches and all other interested parties, to prepare a master plan[186] for consideration by the Legislature and other state and local boards of education:

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[186] Master plan drafted and implemented by West Virginia State Department of Education 1984-85 school year. See also note 175 supra.

I want to emphasize that everything contained in this Opinion, Findings, Conclusion and Order regarding high quality educational standards was nothing more than what was required by the explicit mandate of the West Virginia Supreme Court in Pauley et al v. Kelly et al, supra.

Having said that, let me quote directly from that opinion in relation to the matter of standards and why they were included in the Opinion, Findings, Conclusion and Order with the precision and specificity that they were:

> "We also have determined that the thorough and efficient clause requires the development of certain high quality educational standards, and that it is in part by these quality standards that the existing educational system must be tested. Directly related to this is the further finding that if these values are not currently met, it must be ascertained that this failure is not a result of inefficiency and failure to follow existing school statutes....
>
> "Here the trial court (the original trial court, Judge Smith) was asked to decide whether the state financing system was so deficient that in certain counties, such as Lincoln, it failed to provide a thorough and efficient system of education. On the record before us we (West Virginia Supreme Court of Appeals) choose to make no definitive judgment on this point. The trial court (Judge Smith) was unable to make any judgment either, because it lacked any suitable standards to set the core values of any thorough and efficient educational system.
>
> "However, given the legally recognized components of thorough and efficient school systems it is obvious from the Circuit Court's (Judge Smith's) findings about Lincoln County schools that they are, to say the least, woefully inadequate by those standards, and we (Supreme Court of Appeals) would frankly be surprised if the school system will meet any thorough and efficient standard that may be developed on the remand.
>
> "Of course, when we (Supreme Court of Appeals) talk of setting standards for a thorough and

> efficient education system, we (Supreme Court of Appeals) recognize that expert testimony will be needed. Mere rote comparison with other more affluent counties does not necessarily serve to define the values of such a system"

Also, let us examine what the West Virginia Supreme Court in Pauley et al v. Kelly et al concerning the definition of a thorough and efficient system of schools and within which definition the standards are to be developed:

> "It develops, as best the State of Education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."
>
> "Legally recognized elements," continues the West Virginia Supreme Court, "in this definition are development in every child to his or her capacity of:
>
> 1. Literacy;
> 2. Ability to add, subtract, multiply and divide numbers;
> 3. Knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance;
> 4. Self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work--to know his or her options;
> 5. Work-training and advanced academic training as the child may intelligently choose;
> 6. Recreational pursuits;
> 7. Interests in all creative arts, such as music, theatre, literature and the visual arts;
> 8. Social ethics, both behavioral and abstract, to facilitate compatibility with others in this society."

The Supreme Court continues:

"Implicit in the above elements are supportive services:

1. Good physical facilities, instructional materials and personnel;

2. Careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency."

Therefore, on remand and during the trial of the suit which began on August 10, 1981, and finished with oral arguements on January 6, 1982, based upon these guidelines:

1. Expert testimony was received defining the high quality educational standards. Some of these expert witnesses were as follows:

ART	-- William J. Thomas and Richard Layman Also Comprehensive Educational Program, 1975
EARLY CHILDHOOD	-- Dr. Margaret Campbell Also Comprehensive Educational Program, 1970
FOREIGN LANGUAGE	-- Robert J. Elkins and Robyn C. Wills
HEALTH EDUCATION	-- John M. Cavendish
INDUSTRIAL ARTS, HOME ECONOMICS	-- Paul W. DeVore, David L. McCory, Judy Edwards and Lucy Busby
LANGUAGE ARTS	-- David England and Jenny Bechtold
MATHEMATICS	-- Randall Charles and Patricia Pockl (Recommendations for mathematics education final report of the task force, mathematics achievement in Wood County Schools, Randall Charles)

MEDIA	-- Carolyn Skidmore, Walter Filty and Evelyn Kovalick
MUSIC	-- Reginald Goeke, Patricia Hannah, and Thomas Bowen
PHYSICAL EDUCATION	-- Allen Canonico and Elmer Freese Planning Facilities for Athletics, Physical Education and Recreation published by American Association of Health, Physical Education, Recreation, and Dance, Kanawha County Curriculum Guides
SCIENCE	-- Robert Seymour, James McGlumphy, and Phyllis Barnhart.
SOCIAL STUDIES	-- Lydia McCue and Vicki Wood
VOCATIONAL EDUCATION	-- Dennis Davis
SPECIAL EDUCATION AND REMEDIAL PROGRAMS	-- Edward Necco, Kate Long, and Douglas Smith
GUIDANCE AND COUNSELING SERVICES	-- William Mullet
EDUCATIONAL HEALTH PROGRAMS	-- Jean Morris and John M. Cavendish

(Thus it is clear that the standards which were included in the findings of fact were not those of the West Virginia Supreme Court or of this Court, but were the conclusions and opinions of well-recognized experts in the field of education.)

2. A comparative analysis was then made of these standards established by the experts to existing conditions;

3. A determination was made based upon the evidence that the developed values and standards based upon expert testimony are not being currently met;

4. A determination was made, based upon the evidence, that the failure was not a result of inefficiency and failure to follow existing school statutes;

5. A determination was made, based upon the evidence, that the failure was a result of the current method of financing free public schools.

Therefore, findings 19-90, which established the standards, were nothing more than a recitation of what expert witnesses testified the components of high quality educational standards as required by the West Virginia Supreme Court. Nothing more, nothing less.

No real attempt was made by the State defendants to offer any direct testimony to refute these standards.

Therefore, this Court had no other choice than to consider and adopt the standards set forth in this opinion and findings as being based on the only credible, clear and convincing proof offered during the trial.

I want to also emphasize that this Court on remand was required to give legislatively established existing standards great weight. However, as noted on pages 92 through 99 (findings 92-110), there existed no current valid legislative values which established a high quality educational standard based upon the testimony offered.

Interestingly, however, many ingredients of the standards referred to in this Opinion were actually a product of the Comprehensive Educational Program adopted by the State Department of Education under West Virginia Code Ch. 18, Art. 2, Sec. 23. However, as recited in Finding 103, the State Department of Education has retreated from these standards, and have elected to allow them to remain without implementation.

The exact standards which are delineated in the opinion and findings are not necesarily those which should be included in the master plan to be developed pursuant to this opinion.

This master plan, which is designed to be the product of the combined, cooperative efforts of the representatives of the Legislative and Executive branch, together with appropriate state agencies and educational organizations, should contain:

1. SUGGESTED suitable high quality standards to set the core values of a thorough and efficient educational system;

2. SUGGESTED time tables when these standards should or could be in effect;

3. SUGGESTED methods by which the resources to guarantee the delivery of these standards will be provided.

The testimony in this case developed the standards set forth herein--representatives of the Legislative and Executive branches and/or various agency representratives and/or other interested parties, working with the commissioner to develop the master plan, may modify or embellish the standards as they may deem appropriate, so long as they retain the high quality as required by the West Virginia Supreme Court and as testified to by the experts in this case (emphasis in the original and supplied).

I wish to make it crystal clear that the master plan is a proposal, a suggestion, which will conform to the guidelines established at the request of the West Virginia Supreme Court as expressed through this Court based upon the testimony (emphasis in the original).

HOWEVER, this Court cannot and does not have the power--authority--or jurisdiction to DEMAND that the West Virginia Legislature adopt this particular plan or, for that matter, any single piece of legislation--to do so would violate the traditional concepts of the separation of power--specific legislation is exclusively a legislative function (emphasis in the original).

What this Court has held is that what now exists in the public schools in West Virginia, in terms of the absence of high quality educational stand

standards and the resources to deliver those standards, does violate the thorough and efficient clause of the West Virginia Constitution as interpreted by the West Virgina Supreme Court in Pauley et al v. Kelly et al, and as developed by the testimony on remand, as well as the equal protection clause, and this Court will suggest through the master plan certain legislation for standards, time tables, and ways and means to provide the resources to deliver those standards.

However, it is ultimately a legislative function, as to whether to adopt the master plan, and whatever the Legislature does do, can only and will only be measured by the existing constitutional standards when the matter is again considered.

It is a constitutional imperative that the Legislature provide for a thorough and efficient system of free schools by general law.

It is a judicial function to determine if this legislative responsibility is being exercised in conformity with the language of the Constitution.

> "Our basic law makes education funding second in priority only to payment of the state debt, ahead of every other state function."

And in State ex rel. Board of Education v. Rockefeller:

> "In final analysis . . . our Constitution . . . gives a constitutionally preferred status to public education in this State."

Lastly, there was also no evidence that the adoption of statewide high quality educational standards and the resources to deliver those standards will require business to move from the State of West Virginia, instead the effect of all testimony, and the definitions established by the West Virginia Supreme court, is that the delivery of high quality standards will provide a more educated citizenry, and thus a more educated labor force. Thus not only retaining the existing businesses, but serving as one of the essential

elements in attracting new industries.[187]

What is expressed in this Supplemental Opinion is contained in various protions of the original Opinion, but is offererd in a condensed version so there will be no misunderstanding as to the intent and scope of this opinion and why it was reached. Nationwide, however, education is not yet a basic right for all.

Since education is a fundamental right in West Virginia, a duty of care rests upon the educators and responsible administrators of that state. Judge Recht's established "standard of care" at this point is only an opinion. Because of the separation of powers, the court cannot in any way demand that the legislature adopt these standards and plan. It would take specific legislation to develop standards to be implemented in the school system and against which the the courts, if needed, could measure educational performance, delivery and procedures. Lacking these, all West Virginia has now is the West Virginia Supreme Court of Appeals' ruling that education is a fundamental right, which has emerged from the West Virginia Constitution, Art. XII, § 1.

Plaintiff-students seeking educational equality through the federal 14th Amendment equal protection

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[187] See note 185 supra.

rights will fail, as held in Rodriguez[188] since the states are responsible for examining their own constitutions to determine their education responsibility.[189] That is just what happened in West Virginia through the ruling of the Supreme Court of Appeals in Pauley v. Kelly.[190] In footnote 7 of that case, it is noted that "equal protection applied to education must mean an equality in substantive educational offerings and results, no matter what the expenditure may be."[191] So far, so good, but despite these positive statements, opinions, and so forth, West Virginia at this point does not have standards for education that would carry weight. If an educational malpractice suit would be tried right now in West Virginia, there would be no standards against which to measure performance. However, since education is a fundamental right in West Virginia, there is an established "duty of care." The judge in such a case could say that the needed standards were not available and that the school district should develop such in order for the court to alleviate the problem. The court would

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[188] San Antinio Independent School District v. Rodriquez, 411 U.S. 1, 935 Ct. 1278, 36 L. Ed. 2d 16 (1973).

[189] See note 182 supra at 864.

[190] Id. at 859.

[191] Id. at 865.

not have to accept developed standards if they did not help alleviate the problem. However, it is doubtful that the court would get involved to such a degree as long as the legislature did not enact special legislation in this area.

A plaintiff-student otherwise could actually bring a suit of educational malpractice based on education being a fundamental right. He could argue that the school district did not provide his equal education opportunity, which violated his equal protection rights. Thus if Donohue[192] and Peter W.[193] had been tried in West Virginia, the plaintiffs probably would have had more success than they did in their own states. Although West Virginia does not have professional standards of education, it nevertheless has "a duty of care" and Judge Recht's established general standard following the Pauley v. Kelly case.[194] These standards have been adopted by the West Virginia State Board of Education, whose recently developed "Master Plan" (based on expected

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[192] See note 141, supra.

[193] See note 140, supra. Pauley v. Kelley 255 S.E. 2d 859, W.Va. (1979) Supreme Court of Appeals of W. Va. (February 20, 1979).

[194] Pauley v. Kelley 255 S.E. 2d 859, W.Va. (1979) Supreme Court of Appeals of W.Va. (February 20, 1979)

results) began to be implemented during the 1984-85 school year.[195]

Hoffman[196] especially is arguable by these West Virginia standards that the plaintiff-student may have been able to frame a successful case, claiming that the school district had the duty to provide him with an equal education. He could have claimed that his equal protection right had been violated since he was not retested and was left in a class with mentally retarded children where he was kept below the level of his intellectual ability to learn, decreasing his opportunities to receive a thorough and efficient education that would enable him to lead a productive, happy life. However, we must ask if the West Virginia courts also would be reluctant and invoke public policy considerations as was done in Peter W. and Donohue. The court might find and accept a compelling state interest, such as, for instance, financial exigency, such as, for instance, financial exigency (strict scrutiny test applies).

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[195] West Virginia State Department of Education, "Master Plan for Public Schools"--to be obtained through: 1. West Virginia State Department of Education, 2. Local Boards of Education, 3. Respective Superintendents, 4. Local Public Libraries.

[196] See note 88 supra.

Negligence

Common Law Negligence

In order to successfully create a liability for educational malpractice under the theory of common law negligence, a legal duty of care owed by the educator to the respective students would need to be established. In the cases of Peter W. and Donohue, as well as Hoffman, the courts clearly noted that in the final analysis, a legally cognizable duty of care could not be found. These cases could be termed ordinary educational malpractice suits since they involved only a general failure of the school district to educate adequately and the practice of social promotion.[197] The New York courts spelled out the very factors to be taken into account when analyzing a cause of action under the common law tort of negligence. These factors are:

1. The existing relationship between a plaintiff and the respective defendant;
2. The existence of a standard of care in order to measure the defendant's conduct;
3. The proof that the plaintiff has suffered an injury;
4. The establishment of a causal link between

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[197] Peter W. v. San Fancisco Unified School Dist., 60 Cal. App. 3d at 817, 131 Cal. Rptr. 855; Donohue v. Copiague Union Free School Dist., 347 N.Y. 2d 442, 391 N.E. 2d at 1353, 418 N.Y.S. 2d 376.

the plaintiff's injury and the defendant's conduct.[198]

The California Court of Appeals in Peter W. very emphatically displayed maximum resistance to a cause of action in educational malpractice, holding that school districts have no legal duty to educate their students properly.[199] It mentioned the great difficulties in establishing the necessary elements of a cause of action in common law tort, which are a workable standard of care, a measurable injury and a causal relationship between such injury and the defendant's conduct.[200] Finally, public policy considerations were involved which prevented the court from recognizing any cause of action in these two cases. These public policy considerations were based on two major points: (1) the heavy social burdens and (2) the economic burdens.[201, 202, 203] The court also said that "the creation of a standard with which to judge our educators' performance (would not)

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[198] Comment, "Hoffman v. Board of Education N.Y." 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979); 10 Hofstra L. Rev. 279-309 (1981).

[199] Id. at 825 and 131 Cal. Rptr. 861.

[200] Id.

[201] Id. (concern about public image of schools).

[202] 47 N.Y. 2d 444, 391 N.E. 2d 1354, 418 N.Y.S. 2d 377-78.

[203] Id. at 443, 391 N.E. 2d 1353, 418 N.Y.S. 2d 377.

pose an insurmountable obstacle."[204] The court in Donohue also recognized a cognizable injury, since the plaintiff-student was incapable of comprehending simple English.[205] It even conceded that causation might in fact be established, although the "many outside factors involved in the learning process"[206] were seen as a problem in establishing a cause of action.

Not quite clear is the Court of Appeals' stance in the Hoffman case. Even though Hoffman did not allege educational malpractice, the above court noted that "although plaintiff's complaint does not expressly so state, his cause of action sounds in educational malpractice."[207] However, Hoffman is quite different from the other two cases, since specific acts of negligence had been committed which ruined the plaintiff's chances in life. These acts are also distinguishable insofar as they could not be termed "frequently

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[204] Id.

[205] Id.

[206] Id.

[207] 49 N.Y. 2d 125, 400 N.E. 2d 319, 424 N.Y.S. 2d 378. Diamond, Education Law, 29 Syracuse L. Rev. 103, 150-56 (1978).

reoccurable" as they were in the other two cases.[208] Hoffman also involved a clear and specific affirmative act of negligence where the necessary elements could be established easily . One can speculate that the court saw these facts too, but nevertheless did not accept a cause of action in either educational malpractice or in tort, being very convinced of the detrimental impact such actions might have on the schools and on society as a whole (effects of misplaced children).[209] This is an indication that educational malpractice suits might lead to too many detrimental side effects without getting at the root causes of the problem.

Elements of Negligence

Duty. In tort, no recovery is possible except a duty of due care can be legally imposed upon the defendant. Therefore, a court would first have to be

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[208] McClung, "Competency Testing Programs: Legal and Educational Issues," 47 Fordham L. Rev. 651-54 (1979). The Department of Health, Education and Welfare published a study estimating that about one million youths between the ages 12-17 could not read at a fourth grade level and could be considered illiterate; this would justify the courts' concern about a flood of litigation overflooding the courts, bringing in their wake financial burdens for school districts.

[209] Larry P. v. Riles 343 F. Supp. 1306-08 (N.D. Cal., 1972) aff'd, 502 F. 2d 963, 9th Cir. (1974) (a child misplaced in a class for retarded children may suffer irreparable harm over a short period of time).

convinced that the educator has a duty to provide efficient instruction.

Standard of Care. Furthermore, the court will be looking for a standard of care against which to determine if that duty has been breached. There are two choices available, depending on the origin of the duty: (1) the reasonable person standard of care, or (2) the professional standard of care. For instance, such a standard probably could be derived from an occupational standard of care, which would measure the educator's acts against the profession's standards and customs.[210] The problem, however, is that such standards and customs cannot be so easily found, due to a lack of specific goals and a wide range of approaches to pedagogy and pedagogical problems. For instance, just consider the problem of getting educators to agree on "the primary goal of education." The goal might be to teach basic skills, to socialize human beings, to develop creative capacity, or perhaps all three. We must ask if experts could testify to a clear-cut educational standard as is possible in medicine. The court in Otero v. Mesa county Valley School District, No. 51, had the following to say:

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[210] Comment, "Hoffman v. Board of Education," 10 Hofstra L. Rev. 279-309 (1981).

> Certainly, if the expert testimony proved anything, it proved that educational theory is not an exact science, and an expert can be found who will testify to almost anything. Listening to these experts causes one to conclude that if psychiatrists' disagreements are to be compared to differences between educators, psychiatrists are almost of a single mind.
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> In the case of Hoffman, however, a clear or particular educational theory would not have been necessary to accept the argument that the school district in Hoffman failed to meet a comprehensible, measurable, spelled-out standard of due care.[211]

Injury. A plaintiff in negligence must show an injury and it also must be a legally compensable one.

The court in Peter W. stated that it could not find with "any reasonable degree of certainty that . . . plaintiff suffered injury within the meaning of the law of negligence.[212] The Supreme Court, Appellate Divisionin Donohue took the same stance, relying on Peter W.[213] The court in Donohue said that "the law was not intended to protect against the 'injury' of

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[211] 408 F. Supp. 162-64, D. Colo. (1975), vacated on prodedural grounds, 568 F. 2d 1312, 1th Cir. (1978).

[212] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814-25, 131 Cal. Rptr. 854-61 (1976).

[213] Donohue v. Copiague Union Free School district, 64 Aoo. Div. 2d 29-36, 407 N.Y.S. 2d 874-80 (1978) (see also note 200 supra).

ignorance, for every individual is born lacking knowledge, education and experience."[214]

But in Donohue the court rejected the Peter W. court's stance and held that one could not in good faith deny that a student who upon graduation from high school cannot comprehend simple English . . . has not in some fashion been injured.[215] If this is so, how much easier to find an injury in the case of Hoffman.[216]

A very stern stance should not be left out here, which the court took in Gregory B.[217] Gregory B. claimed unconstitututional confinement (compulsory school attendance) since he received inadequate education:

> How is such inadequacy to be measured? Against the inadequacy of nothing, that is to say, not going to school? . . . A court may reasonably assume that a student, even in a school which falls below the median . . . is educationally better served than without an education at all.[218]

Causation. It does not seem so difficult to establish the aforementioned elements of duty of care, standard of care, and injury, as required in a suit of

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[214] Id.

[215] Id.

[216] See note 211 supra.

[217] In re Gregory B., 88 Misc. 2d 313-18, 387 N.Y.S. 2d 380-84, Fam. Ct. (1976).

[218] Id.

negligence. More difficult, it seems, to establish is a nexus between the injury caused by faulty or negligent educational approaches and the failure of a student to learn. It is a very difficult or even the most difficult task to tackle.[219] The problem is that there are a number of causes leading to nonlearning. Most of them are not well understood nor is their interaction or main fixation. Thus, the courts feel that as a matter of law, a causation cannot be proven.[220] Causation, also called culpability, comes with a characteristic of proximate and/or direct cause requirement. A plaintiff-student in tort must prove that the defendant's educational conduct was in fact the direct cause of his nonlearning or injury.[221] Then he also has to prove that it is the

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[219] Comment, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Distinction," 58 N.C.L. Rev. 596 (1980); Generally: W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser and Keeton on The Law of Torts, 161-66, 5th ed. (1984); Comment, "Educational Malpractice: When Can Johnny Sue?" 7 Ford U.R.B. L.J. 117-32 (1979); Note, "Educational Malfeasance: A New Cause of Action for Failure to Educate," 14 Tulsa L.J. 383-401 (1978).

[220] "Suing for Not Learning," Time, at 73 (March 3, 1975); "Suing the Teacher," Newsweek, at 101 (October 3, 1977); Stull, "Why Johnny Can't Read--His Own Diploma," 10 Pac. L.J. 647 (1979).

[221] Prosser and Keeton, supra note 219 at 236-45.

proximate cause of that harm as well.[222] The test for cause in fact is the "but for" rule; where it can be proven that such would not have happened "but for" the tortious conduct . . . plaintiff is entitled to full damages.[223]

This test could have been applied in Hoffman, where a clear negligent act was committed.[224] In the cases of Peter W. and Donohue[225] a multiplicity of factors might be claimed as variables affecting a student's learning, because there is no clear understanding of how these variables affect the learning process. Some of those variables include emotional, social, economic, cultural, psychological (student-teacher relationship), and intellectual variables, peer pressure, attitude, etc.[226] The court in Peter W. was cognizant of this fact and held:

> (T)he achievement of literacy in the schools or its failure are influenced by a host of factors which affect the pupil subjectively, from outside the formal reading process; and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental.

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[222] Id. at 245-70.

[223] Restatement of Torts § 912, Comment f at 586 (1939).

[224] See note 211 supra.

[225] See notes 212 and 213 supra.

[226] Sprinthall and Sprinthall, Learning and the Classroom in Educational Psychology, 159-65 (1969).

> They may be present but not perceived, recognized but not identified.[227]

Because of the interaction of these many variables, the "substantial factor" test may be more appropriate. Here liability remains with the defendant if it can be proven that his conduct was a material factor in causing the injury--in our case, the illiteracy.[228] Expert testimony would be required which probably would contested due to the aforementioned disagreements concerning education and its pedagogical approaches. This may lead to almost an absence of scientific evidence and/or theoretical consensus in regard to the best teaching method and process.[229] It was also proposed to use the "comparative method" of proof.[230] The plaintiff using this method would try to prove that the class of which he was a member performed significantly poorer than did

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[227] See note 217 supra.

[228] Note, "Educational Malpractce: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?" 13 Suffolk U.L. Rev. 27-32 (1979) Comment, "Educational Malpractice: When Can Johnny Sue?" 7 Ford U.R.B. L. Rev. 117 ff (1979).

[229] Funston, "Educational Malpractice: A Cause of Action in Search of a Theory," 18 San Diego L. Rev. 743-812 (1981).

[230] Comment, "Educational Malpractice," 124 U. Pa. L. Rev. 755-82 (intentional tort) 783-90 (mandamus) (1970).

identical classes (identical in all major aspects except for the defendant-educator).[231]

The general problem here is that it is so difficult to prove whether the student himself, other variables, or the teacher caused the academic liability to perform at a twelfth-grade level. The court in Donohue expressed it as follows:

> (T)he plaintiffs complaint must be dismissed because of the practical impossibility of demonstrating that a breach of the alleged common law and statutory duties was the proximate cause of his failure to learn. . . . (I)t is virtually impossible to calculate to what extent, if any, the defendant acts or omissions proximately caused the plaintiff's inability to read at his appropriate grade level.[232]

But in Hoffman[233] no such insecurity and difficulties existed. Duty, injury and proximate cause could have been established. Hoffman's miplacement over a twelve-year period because the school did not retest him after the psychologist's recommended period of two years was indisputable. However, Hoffman is not a case of educational malpractice as such, but a situation where a school district had set up a rule--that is, to retest its

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[231] Id. at 750-91.

[232] Donohue v. Copiague Union Free School Dist., 64 App. Div. 2d 29-35, 407 N.Y.S. 2d 874-81 (1978).

[233] Hoffman v. Board of Education, 64 A.D. 2d 369-76, 410 N.Y.S. 2d 99-104, 49 N.Y. 2d 121, 400 N.E. 2d 317, 424 N.Y.S. 2d 376 (1979).

students based on the psychologist's recommendation--which it violated. Thus, Hoffman was a pure case of plain negligence (nonfeasance). In Larry P. v. Riles[234] the court noted that improper placement in education is a permanent stigma on a student's record. Thus, it is clearly recognized that misplacement does cause injury regardless of any other factors.

But Hoffman's cause of action was denied because of policy considerations,[235] adding the argument of a court's impropriety to judicially interfere in educational matters;[236] similar concerns were expressed in Donohue[237] and Peter W.[238]. In deciding all three cases the court relied mainly on policy considerations.

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[234] 343 F. Supp. 1306, N.D. Cal. (1972) aff'd, 502 F. 2d 963, 9th Cir. (1974).

[235] 400 N.E. 2d at 319.

[236] Id.

[237] 407 N.Y.S. 2d at 878-79, 47 N.Y. 2d at 444-45, 391 N.E. 2d at 1354-55, 418 N.Y.S. 2d at 378.

[238] 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

CHAPTER FIVE

Conclusions and Recommendations

Conclusions

1. To this point the courts have steadfastly refused to recognize a cause of action for educational malpractice. The judiciary seems to be motivated by two different policy concerns, one internal and the other pertaining to external matters. The internal concerns deal with the impact that recognition of educational malpractice would have on the courts, such as being swamped by a flood of litigation, much of which would be frivolous, pretentious, and so forth.

The external or public policy concerns center on the consequences of such litigation, such as increased financial burdens on an already burdened school system, teacher shortages, stifling of creativity, and encouragement of defensive teaching.

2. The quite extensive legal and general literature on educational malpractice that has emerged says that educational malpractice should be accessable to all students and families; and that such actions are bound to occur in the immediate future. Another surprising point is that

most of the commentaries, legal notes, and related literature are unanimously enthusiastic for the judiciary to solve the problem of non- and/or undereducation.

3. Noninterference in day-to-day academic operations of schools is the prevailing judicial course of action. The courts feel that they should not get involved in the daily management of schools.

4. West Virginia is different from other states in regard to educational malpractice. The situation can be summarized as follows.

West Virginia's constitution has a standard of a "thorough and efficient" system of free schools" (W. V. Const. XII. § 1). The West Virginia Supreme Court of appeals in Pauley v. Kelley, 225 S.E. 2d 859 (1979), formed a fundamental right out of this constitutional standard. Thus the Pauley case enumerated a constitutional requirement for a "thorough and efficient" education in West Virginia. The court in its opinion noted further that the West Virginia Constitution in requiring a "thorough and efficient" education was making education a fundamental right in that state, establishing a "duty of care." This has been followed by a Master Plan developed by the State Department of Education. Due to this unique situation in West Virginia, educational malpractice litigation may be viewed with a certain optimism

for success. So far, West Virginia does not have any statutory provisions regarding educational malpractice.

5. "Public policy" considerations were important in the educational malpractice cases. The court in Peter W. stated that "The ultimate consequences in terms of public time and money would burden them (the courts)--and society--beyond calculation."

6. Public policy considerations conflict with individual injuries. Many authors regret this stance of the courts because they see a remedy in educational malpractice suits for the deserving student, who gets lost in the system and loses out just like Hoffman.

Thus a twofold dilemma emerges. On the one hand policy considerations seem to be justified to a large degree, but on the other hand there is the unremedied tragedy of an individual student.

7. Educational malpractice cases probably have only a small chance of success in the immediate future. A judge may, however, become convinced of the need for educational malpractice litigation and pick up on the Hunter and Hoffman cases as well as the West Virginia Pauley v. Kelley case and its legal ramifications.

Recommendations

Recommendations for Implementation

Based on the research conducted and the emerging conclusions, it is the author's opinion, that the courts are not necessarily the proper forums for dealing with noneducation or undereducation. It seems at least questionable that the solution to the problem of educational malpractice should rest solely with the judiciary due to the nature of the academics dispute and its likelihood of being a social problem. Courts in themselves are not reform forums, but rather forums to interpret the law and to review rules, regulations, procedures, and applications and/or violations of statutes.

Thus, a different, more comprehensive approach needs to be considered.

1. Development of a Professional Standard for Educators

In order for courts to determine that a duty of care has been breached, a standard is essential. It is therefore recommended that the lack of a professional standard of care be remedied through the development of such by the profession (educators). Such a standard could be derived from an ocupational standard of care, measuring an educator's acts against the standards and customs of the profession.

2. Administrative Relief

Damages in the traditional sense of tort law should not be granted since such awards might not further the improvement of the educational process or remedy a student's academic deficiencies at the time of graduation. However, remedial training could be awarded in combination with a monetary award and other necessary remedies that would improve the educational situation for an individual student through an internal process similar to a grievence procedure.

3. Establishment of an Educational Law Administrative Agency

An independent quasijudicial system should be established that would function as an administrative agency, when the administrative relief is not deemed adequate. Educational law judges with a necessary staff of educational researchers and investigators would investigate, review, and rule in cases and situations such as Hoffman, Peter W., and Donohue, and the courts would have only an oversight role through a review process if necessary.

The democratic process of input into the situation by educators and educational administrators would be guaranteed and desirable.

Recommendations for Further Studies

Due to a variety of inconsistencies and the diverse variables involved in educational malpractice, further clarification is needed. The following further studies are therefore suggested:

1. Research in education sciences to determine the root causes of educational malpractice.
2. Synthesis of legal writing on educational malpractice to develop consistent definitions.

APPENDIX

ABSTRACTS OF CASES

Case

Negligent Supervision of Extracurricular Activity of Students

Bradshaw v. Rawlings, 464 F. Supp. 175, United States District Court, Eastern District of Pennsylvania (1979).

Facts: Bradshaw and Rawlings, two sophomore students at Delaware Valley College, attended a sophomore class picnic at a grove operated by the Moennerchor Society. Attendance was free of charge and draft beer was served in unlimited quantity.

Involved in the program planning was a faculty member of the college (sophomore class advisor) who also disbursed the money to purchase the alcoholic beverages.

The college administration provided flyers notifying the sophomores of the upcoming event, date, time and place. The flyers contained pictures of beer mugs. They were displayed throughout the campus. This event took place in spite of the published regulations of the college prohibiting the use of alcoholic beverages by students under the age of 21 years.

Rawlings attended the party for several hours and was observed drinking 5-6 mugs of beer. He--at the end of the party--was seen to drive his vehicle at a high speed and in a circle on a grassy field. He was asked to leave immediately. Rawlings did so with Bradshaw being his passenger. On the way back to the college he lost control of his vehicle, smashed into a parked car, totaling both vehicles.

Bradshaw suffered a cervical fracture which caused quadraplegic paralysis.

Bradshaw and his parents brought action in the United States District Court seeking damages based upon the alleged negligence of: (1) Rawlings, (2) the College, (3) the Borough of Doylestown, Pennsylvania, and (4) the beer distributor who sold the beer consumed at the class picnic.

Issue(s): Under Pennsylvania law, is a college subject to liability based upon negligent supervision of a student activity, when the college participates in the planning of the event involving the consumption of beer--by persons under the legal drinking age--assists in the purchase of the beer and advertises the event as well, but does not supervise the event?

Answer: Yes.

Reasoning of the Court

Court noted that a college administration does not need to supervise sophomores in all circumstances and instances. However, in this instance a faculty member had been involved in the planning of the event where beer was served, assisting in the disbursement of funds for purchasing it but failed to attend the picnic or to ask a faculty colleague to attend. The advertising clearly implied (by the drawings) that beer would be available. In addition, the Court noted, the institution's rules indicated the institution's knowledge of the danger of the use of alcohol by immature students. Under these circumstances and where the activity was contrary to the institution's own rules and no supervision was afforded the college may be held liable for negligence.

The Court said: ". . .the College was permitted to argue to the jury that it was not negligent because it was powerless to control the habits of college sophomores in regard to drinking beer. The jury rejected the College's defense that it acted in a reasonable manner under the circumstances."

All four cited defendants were found liable for damages in excess of one million dollars.

Case

Professor fails to perform a duty.

Butler v. Louisiana State Board of Education, 331 So. 2d 192, Court of Appeal of Louisiana, Third Circuit (1976).

Facts: A biology professor allowed a student to conduct an experiment which required the extraction of blood from other student volunteers.

One of the coed volunteer students fainted after the extraction of blood, while being walked to a table. She fell forward (on the ground) and broke and damaged six teeth in the process.

While the experiment was conducted, no wheelchair, bed or other readily available place for lying down was available.

The coed student (plaintiff) charged that the professor was negligent for not having properly instructed the experimenting student as to the procedures to be followed in such a situation and for not providing equipment such as a stretcher, bed, etc., for just such an emergency.

Issue(s): When a student obtains permission from the professor to perform an experiment requiring a medical function, does that professor owe a duty to the volunteer student in such an experiment insofar as to take the same safety precautions for a person's welfare as would be taken by licensed medical doctors in that locality?

Answer: Yes.

Reasoning of the Court

The court stated that: "The law is well settled that nurses and medical technicians who undertake to perform medical services are subject to the same rules relating to the duty of care and to liability as are physicians in the performance of professional services. The same

rule applies to a university professor. . .who approves and undertakes to supervise a project which includes the performance of a medical function such as the withdrawal of blood from volunteer students. If he allows a student to perform that medical function then he owes a duty to the volunteer patient or blood donor to see that the same precautions are taken for the safety and well being of that patient as would be taken by licensed medical doctors in that locality." This constituted "a proximate cause of the accident."

Note: 1. The professor had failed to properly instruct the student who conducted the experiment.

2. The professor had failed to provide for the necessary safety facilities.

Case

Maryland does not recognize cause of actions for "Educational Malpractice" based on public policy.

Doe v. Board of Education of Montgomery County, Md., Cir. Ct. 48 U.S.L.W. 2077 (1979).

Summary of Facts, Issues, Reasoning of the Court

(See following quoted U.S.L.W. summary. Case not at WVU Law Center.)

"Educational Malpractice--Maryland does not recognize cause of action for 'educational malpractice' brought against county school board by public school student who claims that, as result of school officials' misdiagnosis of mental ability, he is virtually illiterate.

"The court refuses to recognize educational malpractice as a cause of action in Maryland. Before any plaintiff can recover in a negligence action, he must show a breach of either a common-law duty or statutory duty of care resulting in an injury to the plaintiff. The trial courts are free to find new causes of action, or that there is a new duty arising to some person through new law or social change. However, the question of whether or not there is a duty arising here so that an individual student can bring a suit for damages to correct an inadequacy in the school system is one that is better dealt with procedurally as in Peter W. v. San Francisco Unified School District, 60 Cal. App. 2d 814, 131 Cal. Rptr 854, and Donohue v. Copiague Union Free School District, 407 N.Y. Supp. 2d 874. Both held that no duty to provide an adequate education existed toward the individual student. While other types of suits might be brought to enforce the duties of educators to provide a meaningful education for the youth of the state, those cases ruled that an action for damages by an individual student was not available for an alleged failure to reach certain educational objectives. It would be a sad state of affairs if juries were able to decide whether or not the school system had functioned properly, and dole out taxpayers' money with the idea that this might in some way correct the situation. I do not believe that it is in the public interest to adopt this type of cause in this state.

"One case recognized negligence or misfeasance as compared to nonfeasance as the basis for a cause of action for 'educational malpractice.' I do not think that either misfeasance or nonfeasance should give rise to that cause of action in this state. Finally, the fact that a school board purchases insurance to protect itself from this type of suit does not necessarily give rise to any cause of action.
--Miller, J.

"Md. Cir. Ct., Montgomery Cty; Doe v. Board of Education of Montgomery County, Maryland, 7/6/79."

Case

Educators owe no legal duty of care to their students to base a negligence action for "educational malpractice."

Donohue v. Copiague Union Free School District, 407 N.Y.S. 2d 874, New York Supreme Court, Appellate Division (1978).

Facts: A former high school student brought action against his former school to recover damages for "educational malpractice" or for breach of statutory duty to educate. He had received failing grades in various subjects and although he lacked basic reading and writing skills, he was allowed to graduate.

After graduation he needed to acquire those skills through tutoring.

In his suit he alleged that the school "gave passing grades and/or minimal or failing grades in various subjects. Failed to evaluate the plaintiff's mental ability and capacity to comprehend the subjects being taught to him at said school; failed to take proper means and precautions that they reasonably should have taken under the circumstances; failed to interview, discuss, evaluate and/or psychologically test the plaintiff in order to ascertain his ability to comprehend and understand such subject matter; failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as the plaintiff is concerned in order to ascertain the learning capacity, intelligence and intellectual absorption on the part of the plaintiff; . . .failed to advise his parents of the difficulty and necessity to call in psychiatric help; that the processes practiced were defective and not commensurate with a student attending a high school within the county of Suffolk; failed to adopt the accepted professional standards and methods to evaluate and cope with plaintiff's problems which constituted educational malpractice."

Issue(s): Do the Courts of the State of New York recognize a cause of action to recover for so-called "educational malpractice," or for breach of a statutory duty to educate?

Answer: No.

Reasoning of the Court

This court held that educators owe no legal duty of care to their students upon which a negligence action for educational malpractice could be based. The educators' failure to evaluate the "under-achiever student" as set forth in the New York statute, the court found, did not give rise to "action sounding in tort." The last point made was that education was surrounded by a multitude of factors affecting it and the learning processes as well; therefore making it impossible to prove that acts or omissions by teachers were the actual proximate cause(s) of a student's lack in basic skills.

Justice Suozzi (dissenting)

Because of the significance and depth of this dissenting opinion, it will be reproduced here in full:

"In my view, the complaint states a valid cause of action.

"The first cause of action sounds in negligence and malpractice and alleges, interalia, that the defendant school district was under a duty to educate the plaintiff and qualify him for a high school graduation certificate and that the defendant failed to properly perform that duty.

"As a second cause of action, plaintiff alleges the breach of a constitutional duty under section 1 of article XI of the State Constitution. This provision of the Constitution states:

'The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.'

"In dismissing the first cause of action, the Special Term and the majority rely on a decision of an appellate court in California which dismissed a very similar cause of action (Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854). An examination of the decision in Peter W. reveals that the cause of action was dismissed because of two distinct policy considerations (Peter W., 60 Cal. App. 3d 814, 824-25, 131 Cal. Rptr. 854, 861, supra):

1. '[T]hat the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

2. 'To hold [schools] . . . to an actionable duty of care, in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. . . . The ultimate consequences, in terms of public time and money, would burden them--and society--beyond calculation.'

"In dismissing the second cause of action for breach of a constitutional duty, the Special Term relied primarily on two New York Court of Appeals cases (Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E. 2d 704 and Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896).

"In Moch, the defendant, a waterworks company, contracted with a city to supply water for various needs, including service at fire hydrants. During the period that the contract was in force, a building caught fire, spread to plaintiff's warehouse and destroyed it. Plaintiff brought suit against the water company for failing to supply adequate water pressure and failing to stop the spread of the fire before it reached plaintiff's warehouse.

"In dismissing a cause of action for breach of a statutory duty (as well as for breach of contract and for common-law tort), the court stressed that the statutory duty was merely one to furnish water and that there was nothing in the statutory requirements to 'enlarge the zone of

liability where an inhabitant of the city suffers indirect or incidental damage through deficient pressure at the hydrants' (Moch, supra, p. 169, 159 N.E. p. 899).

"In Steitz, supra, 295 N.Y., p. 54, 64 N.E. 2d p. 705, plaintiff brought an action against the defendant city to recover for damage to property from fire, based on a City Charter which provided that the city 'may construct and operate a system of waterworks' and that 'it shall maintain fire, police, school and poor departments.' In dismissing the cause of action, the Court of Appeals stated (p. 55, 64 N.E. 2d p. 706):

"'Quite obviously these provisions were not in terms designed to protect the personal interest of any individual and clearly were designed to secure the benefits of well ordered municipal government enjoyed by all as members of the community. There was indeed a public duty to maintain a fire department, but that was all, and there was no suggestion that for any omission in keeping hydrants, valves or pipes in repair the people of the city could recover fire damages to their property.

"'An intention to impose upon the city the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect.'

"Finally, Special Term noted that the commencement of this action had received substantial attention in educational circles and the news media and that this factor, coupled with the recent adoption of 8 NYCRR 3.45 by the Board of Regents, effective June 1, 1979, indicated that this case posed a grave policy question which should be passed upon by appellate courts. The regulation adopted by the Board of Regents states:

"'3.45 Diplomas. No high school diploma shall be conferred which does not represent four years or their equivalent in grades above grade eight, and no such diploma shall be conferred upon a pupil who has not achieved a passing rating in each of the basic competency tests established by the commissioner.'

"Initially, it must be emphasized that the policy considerations enunciated in Peter W., supra, do not mandate

a dismissal of the complaint. Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the school system, as the plaintiff alleges, or was the product of forces outside the teaching process, is really a question of proof to be resolved at a trial. The fear of a flood of litigation, perhaps much of it without merit, and the possible difficulty in framing an appropriate measure of damages, are similarly unpersuasive grounds for dismissing the instant cause of action. Fear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our courts where damages are difficult to assess. Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts.

"Over and above these preliminary observations, there are additional reasons which dictate against dismissal of the complaint at this stage and which were not discussed by Special Term or by the majority.

"The complaint herein is not drafted solely in terms of educational malpractice, i.e., the failure of the school system to successfully teach plaintiff at a certain level. The complaint also charges the following:

1. 'That the plaintiff failed various subjects;

2. 'That the defendant was aware of these failures; and

3. 'That the defendant failed in its duty to ascertain the reason for these failures and to prescribe appropriate corrective measures, if necessary.'

"The language of the complaint is illustrative:

"'[T]he defendant. . .gave. . .failing grades in various subjects; failed to evaluate the plaintiff's mental ability and capacity to comprehend the subjects being taught to him at said schoo; failed to take proper means and precautions that they reasonably should have taken under the circumstances; failed to . . .psychologically test the plaintiff in order to ascertain his ability to comprehend and understand such subject matter.'

"That the plaintiff was failing various subjects is readily demonstrable from his high school transcript, which is part of the record and which has numerous course failures (grades below 65, the listed passing grade) designated thereon, including two in English. Nor can the defendant claim that these failing grades did not violate any educational standard. It is true that the regulation of the Board of Regents establishing competency tests and passing grades thereon as a requirement for receipt of a diploma (8 NYCRR 3.45) will not be effective until June 1, 1979. However, it should be emphasized that at present, and during the plaintiff's four years at the defendant's high school, the State Commissioner had a regulation in effect which provided (8 NYCRR 103.2):

"'103.2 high school diplomas. In order to secure a State diploma of any type the following requirements must be met: The satisfactory completion of an approved four-year course of study in a registered four-year or six-year secondary school, including English, social studies including American history, health, physical education and such other special requirements as are required by statute and [regents regulations] established by the Commissioner of Education.'

"Anyone reading the plaintiff's high school transcript would be hard pressed to describe his work as a 'satisfactory completion' of a course of study.

"Having established that the plaintiff was failing numerous courses, which fact was known to school authorities, the crucial question to be resolved is whether the school had a duty under these circumstances to do more than merely promote this plaintiff in a perfunctory manner from one year to the next.

"In this regard, former section 4404 of the Education Law, which was in effect at the time the plaintiff was attending defendant's high school, is crucial. Subdivision 4 of that statute provided, in pertinent part:

"'The board of education of each school district shall cause suitable examinations to be made to ascertain the physical, mental and social causes of. . . under-achievement of every pupil in a public school, not attending a special class, who has failed continuously in his studies or is listed as an under-achiever. Such examinations shall be made in such manner and at such times as shall be established by the commissioner of education, to determine if such a child is incapable of benefiting through ordinary classroom instruction,

and whether such child may be expected to profit from special educational facilities. The commissioner of education shall prescribe such reasonable rules and regulations as he may deem necessary to carry out the provisions of this paragraph.'

"Section 203.1 of the commissioner's regulations provides:

"'Children who fail or under-achieve.'

"'A pupil who has failed continuously in his studies within the meaning of subdivision 4 of section 4404 of the Education Law is one who has failed in two or more subjects of study for a year.'

"An examination of the plaintiff's transcript indicates that he came within the definition of a pupil who failed continuously. Despite this fact, the complaint alleges that the defendant failed to. . .psychologically test the plaintiff in order to ascertain his ability to comprehend and understand such subject matter, which was in direct contravention of the mandate of former section 4404 (subd. 4) of the Education Law.

"The plaintiff has, therefore, shown the existence of a mandatory statutory duty flowing from the defendant to him personally and has alleged the breach thereof by the defendant. To dismiss the complaint, as the majority proposes, without allowing the plaintiff his day in court, would merely serve to sanction misfeasance in the educational system.

"In my view, the negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose the specific condition, and (2) treat the condition, and instead allows the patient to suffer the inevitable consequences of the disease. Such medical malpractice would never be tolerated. At the very least, a complaint alleging same would not be dismissed upon motion. In the case at bar, the plaintiff displayed, through his failing grades, a serious condition with respect to his ability to learn. Although mindful of this learning disability, the school authorities made no attempt, as they were required to do, by appropriate and educationally accepted testing procedures, to diagnose the nature and extent of his learning problem and thereafter

to take or recommend remedial measures to deal with this problem. Instead, the plaintiff was just pushed through the educational system without any attempt made to help him. Under these circumstances, the cause of action at bar is no different from the analogous cause of action for medical malpractice and, like the latter, is sufficient to withstand a motion to dismiss.

"Finally, it should be noted that even in Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854, supra, the California appellate court recognized that a cause of action for intentional and fraudulent misrepresentation, if properly pleaded, could withstand a motion to dismiss. Accordingly, even though the majority has chosen to affirm the dismissal of the complaint, that affirmance should be without prejudice to replead a cause of action for intentional misrepresentation.

"For the reasons heretofore set forth, I dissent and vote to deny that branch of the defendant's motion which sought to dismiss the complaint for failure to state a cause of action. It should be noted that the defendant also moved to dismiss the complaint based upon the plaintiff's failure to file a timely notice of claim pursuant to section 3813 of the Education Law. Since the Special Term dismissed the complaint for failure to state a cause of action, it did not deal at all with the second branch of the defendant's motion, i.e., the plaintiff's failure to serve a timely notice of claim. Accordingly, I would remand to Special Term for determination of that issue."

Case

Actions for damages could not be maintained against school district for negligent classification, placement, or teaching of students who were suffering from dyslexia.

D.S.W., by his next of friends, R.M.W. and J.K.W., v. Fairbanks North Star Borough School District

and

L.A.H., by his next of friends, L.H. and V.H., v. Fairbanks North Star Borough School District, Alaska, 628 P. 2d 554 (1981), Supreme Court of Alaska (cases were joined by the court).

Facts: L.A.H., seventeen years, now suffers from a learning disability known as dyslexia. He attended Borough School District schools from kindergarten through sixth grade. During these years the school district failed negligently to diagnose that he was suffering from dyslexia. Finally at the last day of L.A.H.'s second year in the sixth grade, the district did determine that he was dyslexic.

After that the district gave him special education for a time to assist him in overcoming the effects of this disability. However, these educational efforts (courses) were negligently terminated, despite the district's awareness that L.A.H. had not overcome his dyslexia.

The complaint stated that L.A.H. had suffered damage caused by these negligent acts and omissions including loss of education, loss of opportunity for employment, loss of opportunity to attend college or post high school studies, past and future mental anguish and loss of income and income earning ability.

D.W.S.'s claim is very similar. He, too, suffers from dyslexia. Here, the school district discovered this condition in the first grade but did not induce assistance

to him in order to overcome it until the fifth grade. He received a special education program during fifth and sixth grades which was negligently discontinued in the seventh grade, well knowing that he had not been adequately trained to compensate for dyslexia. Nevertheless, nothing was being done any more for D.S.W.

D.S.W. claims money damages against the school district naming the same injuries as claimed by L.A.H.

Issue(s): Can actions be brought against a school district for negligent classification, placement and teaching of a student suffering from dyslexia?

Answer: No.

Reasoning of the Court

The full opinion of the court is given due to its comprehensive use (summary of the issues in Peter W., Donohue and Hoffman):

"Although this is a claim of first impression in Alaska, two other jurisdictions have considered the question whether a claim may be maintained against a school for failing to discover learning disabilities or failing to provide an appropriate educational program once learning disabilities are discovered. In neither of these jurisdictions has a claim for damages been permitted.

"The earliest case is Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854, Cal. App. (1976). There the plaintiff alleged, among other claims, that he suffered from reading disabilities and that the School District was negligent both by failing to discover the disabilities and by placing him in inappropriate classes. The court defined the problem as whether an actionable duty of care existed, which is essentially a public policy question involving the following considerations:

> "The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved."

131 Cal. Rptr. at 859-60.[1] The court noted that the defendant's conduct, the degree of certainty that the plaintiff suffered injury, and the establishment of a causal link between conduct and injury were all highly problematical in educational malpractice claims:

> "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--and commonly does--have his own emphatic views on the subject. The injury claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.
>
> "We find in this situation no conceivable workability of a rule of care against which defendants' alleged conduct may be measured, no reasonable 'degree of certainty that. . .plaintiff suffered injury' within the meaning of the law of negligence, and no such perceptible 'connection between the defendant's conduct and the injury suffered' as alleged which would establish a causal link between them within the same meaning (citations and footnotes omitted).

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[1] This court applied a similar list of factors in determining whether a cause of action for negligent misrepresentation should exist in Howarth v. Pfeifer, 443 P. 2d 39, 42, Alaska (1968).

Id. at 860-61. The court also believed that much burdensome and expensive litigation would be generated if such lawsuits were allowed, stating:

> "Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey. To hold them to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. The ultimate consequences, in terms of public time and money, would burden them--and society--beyond calculation (citations omitted).

In Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440, 418 N.Y.S. 2d 375, 391 N.E. 2d 1352 (1979), the New York Court of Appeals was faced with a claim similar to that presented in Peter W. The court concluded that the claim should not be entertained because it would involve an unjustifiable encroachment by the judiciary in the administration of public education:

> "Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies (citation omitted)."

Id. 418 N.Y.S. 2d at 378, 391 N.E. 2d at 1354.

Hoffman v. Board of Education of the City of New York, 49 N.Y. 2d 121, 424 N.Y.S. 2d 376, 400 N.E. 2d 317 (1979) presented the problem in a different, and more sympathetic, context. Hoffman, a person of normal intelligence, was negligently diagnosed to be mentally retarded, and was placed for virtually his entire school career in classes

for the mentally retarded. A jury had awarded Hoffman damages of $750,000. The Appellate Division affirmed Hoffman's right to recover (64 A.D. 2d 369, 410 N.Y.S. 2d 99, 1978). The Court of Appeals reversed, based on Donohue and in doing so rejected any distinction between claims involving misfeasance and nonfeasance (424 N.Y.S. 2d at 379, 400 N.E. 2d at 320).

Smith v. Alameda County Social Services Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979) involved as one of the plaintiff's claims an allegation that he had been negligently placed in a class for the mentally retarded when the school district knew or should have known that he was not retarded. The court ruled that no cause of action was stated, relying on its earlier decision in Peter W.

"We agree with the results reached in these cases and with the reasoning employed by the California Court of Appeal in Peter W. and Smith. In particular we think that the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education. The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment, rendering legal cause an imponderable which is beyond the ability of courts to deal with in a reasoned way.

"No different result is mandated under the Alaska statutes to which appellants have referred us, AS 14.30.180-350, the so-called Education for Exceptional Children Act. Nothing in the Act either expressly or impliedly authorizes a damage claim. The same considerations which preclude a damage claim at common law for educational malpractice preclude inferring one from the Act. Similar statutory claims were also presented, and rejected, in Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. at 862, and Donohue v. Copiague Union Free School District, 64 A.D. 2d 29, 407 N.Y.S. 2d 874, 880-81, App. Div. (1978) aff'd, 47 N.Y. 2d 440, 418 N.Y.S. 2d 375, 391 N.E. 2d 1352 (1979).

"Our conclusion does not mean that parents who believe that their children have been inappropriately classified

or placed are without recourse. AS 14.30.191(c)[2] provides that any parent believing classification or placement to be in error may request an independent examination and evaluation of the child, and for a hearing before a hearing officer in the event of a substantial discrepancy. Further, that section provides that the proceedings so conducted are subject to the Administrative Procedure Act, which in turn expressly provides for judicial review (AS 44.62.560).

"In our view it is preferable to resolve disputes concerning classification and placement decisions by using these, or similar, procedures than through the mechanism of a tort action for damages. Prompt administrative and judicial review may correct erroneous action in time so that any educational shortcomings suffered by a student may be corrected. Money damages, on the other hand, are a poor, and only tenuously related, substitute for a proper education. We recognize, of course, that there may be cases when a student in need of a special placement is negligently not given it by the school district, and the student's parents, having no reason to know of the need, do not initiate an administrative review proceeding. In such cases there are authorities suggesting that corrective tutorial programs may be appropriately mandated.[3] However, we need not reach that question here."

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[2] AS 14.30.191(c) provides: If a parent or guardian believes that the educational assessment of his child is in error, he may request an independent examination and evaluation of the child. If a substantial discrepancy exists between the educational assessment of the school district and the independent evaluation, and if the parent or guardian so requests, a hearing shall be held before a hearing officer in order to resolve the discrepancy between evaluations and to determine the appropriate educational program placement for the exceptional child. The Department of Education shall adopt regulations for the conduct of hearings authorized by this section and for the appointment and qualifications of the hearing officer. Regulations adopted and proceedings conducted under this section are subject to the Administrative Procedures Act.

[3] See J. Elson, "A Common-Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching," 73 N.W.L. Rev. 641, 762-68 (1978); Note, "Implications of Minimum Competency Legislation: A Legal Duty of Care?" 10 Pac. L.J. 947, 967 (1979).

Case

Since student was not denied the process, by virtue of university procedures made available, and he did not exhaust his administrative remedies he was thus not entitled to have his grades corrected.

Hill v. Trustees of Indiana University, 537 F. 2d 248 (1976).

Facts: A student (plaintiff) brought action against the Indiana University, its trustees, and professor who had given him failing grades in two classes based upon the determination that the student had committed plagiarism.

Issue(s):

1. Are plaintiff's assertions that due process had been denied to him, because he had received the two failing grades without any prior hearing or opportunity to present his defense, valid?

2. Does it constitute a due process violation (14th Amendment) that professor did not comply with the new code?

3. Did plaintiff who was neither expelled nor suspended and failed to exhaust the available administrative remedies give rise to the deprivation of a constitutionally protected interest with a necessary prior hearing?

Answer: (1) No; (2) No; (3) No.

Reasoning of the Court

Plaintiff was neither expelled nor suspended from the university as a result of his grades. Nor did he incur any other form of disciplinary action. In fact, he remained a student in good standing with the full opportunity of enrolling in Indiana University during the fall of 1970.

The requirement of a hearing depends, in part, on the nature of the penalty imposed (Black Coalition v. Portland School District No. 1, 484 F. 2d 1040, 1044). Plaintiff has alleged no facts which would show that his failing grades gave rise to the deprivation of a constitutionally protected interest, while such interest was protected by the university's effort to stay any consequence of the charge until plaintiff's exercise of the procedures set forth in the Student Code of Conduct. Held for the defendants.

Case

New York's policy against recognizing "educational malpractice" suits bars negligence action against city board of education for improperly classifying and placing student, without re-evaluating him as suggested by clinical psychologist.

Hoffman v. Board of Education of City of New York, 400 N.E. 2d 317, Court of Appeals of N.Y. (1973).

Facts: The plaintiff was tested by a clinical psychologist while in kindergarten. He suffered from a severe speech defect, which created some doubts about the true assessment of his level of intelligence.

The psychologist suggested placing the student in a class for retarded children since he showed an IQ of 77, but to retest him within two years of the placement.

The student, Hoffman, was never re-evaluated and remained for about 12 years in the class for children with retarded mental development, due to the result of the first test and "presumably because his teachers' daily observations confirmed his lack of progress" (48 L.W. 2459, 1979).

After 12 years the student was transferred to a shop training center for retarded youths.

There he was retested within a year. The results of the test showed that he was not retarded. Therefore, he could not stay any more in the shop training center.

Thus, the action was brought about by the student alleging that the school board was negligent in not re-evaluating him as suggested by the clinical psychologist, which allegedly resulted in severe injury to plaintiff's intellectual and emotional well being and reduced his ability to obtain employment.

At trial, the jury awarded plaintiff $750,000 damages.

The Appellate Division affirmed this judgment. Two justices were dissenting, as to liability, but would have reversed this judgment and required plaintiff to retry the issue of damages had he not consented to a reduction from $750,000 to $500,000.

The Appellate Division based its affirmance upon defendant's failure to administer a second intelligence test to plaintiff as recommended by the clinical psychologist.

The Appellate Division of New York characterized defendant's failure to retest plaintiff as an affirmative act of negligence, actionable under New York law. This court said there should be a reversal.

Issue(s): 1. Even though the student was not retested as suggested, were public policy considerations still precluding recovery from alleged failure to re-evaluate his intellectual capacity?

2. Will courts intervene in the administration of the public school system in the most exceptional circumstances involving gross violations of such defined policies?

3. Are the court systems the proper forum to test the validity of an educational decision to place a particular student in one of the many available educational programs offered by the schools?

4. Are disputes concerning the proper placement of a child in regard to educational programs best resolved by seeking review of such professional educational judgment through the administrative processes provided by statute?

Answer: (1) Yes; (2) Yes; (3) No; (4) Yes.

Reasoning of the Court

Although the student Hoffman did not expressly so state, the court held that his cause of action sounds in educational malpractice. The recitation of specific acts of negligence, the court noted, is in essence an attack upon the professional judgment of the board of education grounded upon its alleged failure to properly interpret and act upon the psychologist's recommendations.

Citing Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440, the court held that such a cause of action should not, as a matter of public policy, be entertained by the courts of New York.

Only in the most exceptional circumstances, involving gross deviation from defined public policy, will courts in New York intervene in the administration of the public school system.

The court continued to say that the lower court's distinction of Donohue upon the ground that the negligence alleged there was a failure to educate properly or nonfeasance from the present case which involved an affirmative act of misfeasance was not valid! But even if this court would accept such a distinction it would still reach the same result. The court maintained that the policy considerations that prompted the decision in Donohue were applying with equal force to educational malpractice actions based on allegations of educational misfeasance and nonfeasance.

The court closed its reasoning by holding that the court system was not a proper forum to test the validity of the educational decision of the placement of children in any of the many educational programs offered by the schools.

Any dispute concerning the proper placement of a child in a particular educational program can best be resolved by seeking review of such professional educational judgment through the administrative processes provided by statute. Accordingly, the court reversed the Appellate Division's ruling and dismissed the case.

Judge Meyer (dissenting)

He agrees with the New York Appellate Division, Judge Shapiro (410 N.Y.S. 2d 199) that this case does not

involve "educational malpractice" as the majority of the New York Supreme Court suggests, but discernible affirmative negligence on the part of the board of education in failing to carry out the recommendation for re-evaluation within a period of two years which was an integral part of the procedure by which plaintiff was placed in a class for retarded students, and thus readily identifiable as the proximate cause of plaintiff's damages.

Case

Proximate causation, resulting injury and damages suffice to state a cause of action in regard to negligence.

Hoyem v. Manhattan Beach City School District, 585 P. 2d 851, Supreme Court of California (1978).

Facts: A ten-year-old student-truant left the school premises of Foster A. Begg School during summer school hours without permission and was injured by a motorist.

The mother and the student-truant brought action against the school district.

The trial court held that the school district was not liable under such circumstances. The Supreme Court of California concluded that the trial court was in error and that if plaintiffs could prove that the injuries were proximately caused by the school district's negligent supervision, the district may be held liable for the resultant damages.

Issue(s):

1. Can a school district be held liable for a student's injuries, if plaintiff can prove that student's injuries were proximately caused by district's allegedly negligent supervision of said student while on school premises?

2. Is the determination, whether district's alleged negligence proximately caused student's injuries, a question of fact for jury?

3. Is it proper to discuss mother's causes of action for loss of son's comfort and society and for the emotional shock which she suffered when observing her son's injuries at the hospital?

Answer: (1) Yes; (2) Yes; (3) No.

Reasoning of the Court

The court stated that:

"A school district bears a duty to supervise students while on the school premises during the school day and the district may be held liable for a student's injuries which are proximately caused by the district's failure to exercise reasonable care under the circumstances."

The court further noted that a school district cannot be considered an insurer of students' safety but it bears a legal duty to exercise reasonable care in supervising students for which the district is responsible and therefore may be held liable.

The court said that:

"California law has long imposed on school authorities a duty to 'supervise at all times the conduct of the children on school grounds and to enforce those rules and regulations necessary to their protection.'"

The court also noted that:

". . . (the question of proximate cause) revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved of liability toward the plaintiff. . . ."

There is no recovery of damages by Mary Ann Hoyen for loss of Michael's comfort and society and for her own injuries due to the impact of seeing Michael's injuries at the hospital. Mrs. Hoyen claimed the Dillon Rule which says:

"Courts should allow recovery to a mother who suffers emotional trauma and physical injury from witnessing the infliction of death or injury to her child for which the tort-feasor is liable in negligence. Deboe did not extend the Dillon Rule; that is, refused to include a wife who suffered emotional and physical injury when seeing her husband in the hospital hours after he had been injured in an automobile accident due to defendant's negligence."

Case

Public school systems cannot be sued for improperly educating a child--but individual educators can be sued for intentional and malicious action to injure a child, because such actions can never be considered to have been done in furtherance of beneficient purposes of educational systems since such alleged intentional torts constitute abandonment of employment.

Hunter v. Board of Education of Montgomery County, Md., et al, 439 A. 2d 583, Court of Appeals of Maryland (1982).

Facts: Ross Hunter, acting through his parents, brought an "educational malpractice" suit against the board of education of Montgomery County, the principal of the elementary school, and a board employee who had tested the child, Ross Hunter, as well as the boy's sixth grade.

The Hunters charged that in 1968 their son, Ross, now in Westfield State College in Massachusetts, was placed in second grade in Hungerford Elementary School in Rockville (now, after completed consolidation procedures, called Hungerford Park Elementary School).

They maintained that he was forced to repeat first grade material although he already had completed it earlier in a satisfactory manner.

They further complained that the school system negligently evaluated the child's learning abilities and therefore required him to repeat the first grade materials even though he was placed in second grade.

This practice, the Hunters declared, which was maintained throughout elementary school, caused Ross Hunter to experience "embarrassment" thus developing "learning deficiencies" at the same time. In addition, the Hunters stated that he experienced a "depletion of ego strength" and claimed that the defendant educators were acting intentionally, maliciously, and did furnish false information to Ross Hunter's parents concerning his learning disability. They further claimed that they had altered school records to cover up their actions and thus demeaned

the boy. Both claims were dismissed by the lower courts.

Issue(s): 1. Can an educational malpractice action against a school board and various individual employees for improperly evaluating, placing and teaching a student be successfully asserted?

2. Can an action be brought against an elementary school principal and a teacher for intentional and malicious misplacement of a child and claim for relief?

Answer: (1) No; (2) Yes (reversed and remanded)

Reasoning of the Court:

The court first states that it conceives that the gravamen of petitioner's claims were sound in negligence, asserting damages for the alleged failure of the school system to properly educate Ross Hunter.

The court stated then that all these so-called "educational malpractice" claims were so far unanimously rejected by those few jurisdictions that were considering the topic, such as D.W.S. v. Fairbanks North Star Borough School District, 628 P. 2d 554, Alaska (1981); Smith v. Alameda County Social Services Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979); Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Hoffman v. Board of Education of City of New York, 49 N.Y. 2d 121, 424 N.Y.S. 2d 376, 400 N.E. 2d 317 (1979); Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440, 418 N.Y.S. 2d 375, 391 N.E. 2d 1352 (1979).

The court noted that all these decisions generally hold that "a cause of action seeking damages for acts of negligence in the educational process is precluded by considerations of public policy, among them being the absence of a workable rule of care against which the defendant's conduct may be measured, the inherent uncertainty in determining the cause and nature of any damages and the extreme burden which would be imposed on the already strained resources of the public school system to say nothing of those of the judiciary."

The court relied here on Peter W., supra, and continued to say that the New York court concluded that if action would be permitted, it would "contribute blatant interference with the responsibility of the public school system lodged by (state) constitution and statute in school administrative agencies."

The court then quoted Hoffman v. Board of Education of City of New York, and noted that the New York Court of Appeals had declared that "(t)he policy considerations which prompted our decision in Donohue apply with equal force to 'educational malpractice' actions based upon allegations of educational misfeasance and nonfeasance."

Thus the court felt that it found itself in substantial agreement with all other decisions in this area. It stated further that the award of money damages to "represent a singularly inappropriate remedy for asserted errors in the educational process." The court continued to say that "the misgivings expressed in these cases concerning the establishment of legal cause and the inherent immeasurability of damages that is involved in such educational negligence actions against the school systems are indeed well founded. Moreover, to allow petitioners' asserted negligence claims to proceed would in effect position the courts of this State as overseers of both the day-to-day operation of our educational process as well as the formulation of its governing policies. This responsibility we loathe to impose on our courts. Such matters have been properly entrusted by the General Assembly to the State Department of Education and the local school boards who are invested with authority over them. . . . In this regard we have stated in another context that 'the totality of the various statutory provisions concerning the Board (of Education) quite plainly. . .invests the. . .Board with the last word on any matter concerning educational policy of the administration of the system of public education.'"

The court advised parents not to think that there was no recourse to them in case they were aggrieved by an act or actions of public educators that would affect a child. It suggested that the General Assembly had provided a reviewing process for placement decisions of handicapped children with the inclusion of an appeal to the circuit court--but emphasized to use and exhaust the administrative remedies and if necessary to seek the courts through the Administration Procedures Act.

Regarding the parents; claim that the defendants had acted intentionally and maliciously the court noted that research

had revealed that none of the prior cases of educational malpractice had "squarely" dealt with the question of whether public educators might be held responsible for their intentional torts arising in the educational context. But the court noted that even though it had declined to entertain educational negligence and breach of contract suits, it "in no way wants to shield individual educators of their liability for their intentional torts." The court emphatically stated:

"It is our view that where an individual engaged in the educational process is shown to have wilfully and maliciously injured a child entrusted to his educational care, such outrage greatly outweighs any public policy considerations which would otherwise preclude liability so as to authorize recovery. It may well be true that a claimant will usually face a formidable burden in attempting to produce adequate evidence to establish the intent requirement of the tort. . . . Thus, the petitioners are entitled to make such an attempt here.[4]

This is not the first time that this Court has recognized suits based on malicious or outrageous conduct in areas where public policy generally precludes liability (see Lusby v. Lusby 283 Md. 334, 352, 390 A. 2d 77, 85-86, 1978) (interspousal immunity not applied to intentional and outrageous acts); Mahnke v. Moore, 19 Md. 61, 68, 77 A. 2d 923, 926 (1951) (parent-child immunity abrogated for malicious and wanton wrongs).

We note that petitioners do not allege that any individual members of the school board acted intentionally and maliciously toward young Hunter. Under the doctrine of responsible superios, the Board can only be held liable

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[4]In Peter W., the California court dismissed plaintiffs' claim of intentional misrepresentation for lack of specificity after plaintiffs failed to amend their complaint. In Donohue and Hoffman, however, the New York Court of Appeals did imply in dicta that liability might exist for those charged with educational responsibility where their actions constituted "gross violations of defined public policy."

Hoffman v. Board of Education of City of New York, 49 N.Y. 2d 121, 424 N.Y.S. 2d 376, 400 N.E. 2d 317, 320 (1979); Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440, 418 N.Y.S. 2d 375, 391 N.E. 2d 1352, 1354 (1979).

for the intentional torts of its employees committed while acting within the scope of their employment (Lepore v. Gulf Oil Corp., 237 Md. 591, 595, 207 A. 2d 451, 453, 1965; Tea Company v. Roch, 160 Md., 189, 192, 153 A. 22, 23, 1931; Western Union Tel. Co. v. Rasche, 19 Md., 126, 130, 99 A. 991, 993, 1917; Consolidated Rv. Co. v. Pierce, 89 Md. 495, 502, 43 A. 940, 941-42, 1899). An intentional tort is within the scope of employment where it is carried out in furtherance of the master's business or is intended in part for the master's benefit. Lepore v. Gulf Oil Corp., supra, 237 Md. at 595, 207 A. 2d at 453; Tea Company v. Roch, supra, 160 Md. at 192, 153 A. at 23; Evans v. Davidson, 53 Md. 245, 249, 1880. See also 2 F. Harper and F. James, The Law of Torts, § 26.9 at 1391, 1956; W. Prosser, Law of Torts § 70 at 464, 4th ed. (1971); 1 Restatement (Second) Agency, § 235, comment a at 520, 1958; accord Park Transfer Co. v. Lumbermen's Mut. Casualty Co., 142 F. 2d 100 (D.C. Cir., 1944); Averill v. Luttrell, 44 Tenn. App. 56, 311 S.W. 2d 812, 814 (1957); Cary v. Hotel Rueger, 195 Va. 980, 81 S.E. 2d 421, 424 (1954); Brazier v. Betts, 8 Wash. 2d 549, 113 P. 2d 34, 39 (1941); Linden v. City Car. Co., 239 Wis. 236, 300 N.W. 925, 926 (1941). Where, as here, it is alleged that the individual educators have wilfully and maliciously acted to injure a student enrolled in a public school, such actions can never be considered to have been done in furtherance of the beneficent purposes of the educational system. Since such alleged intentional torts constitute an abandonment of employment, the Board is absolved of liability for these purported acts of its individual employees. Consequently, we are not called upon here to consider whether or to what extent the board has another defense available to it under the doctrine of governmental immunity. See, however, Md. Code (1978 and 1981 Cum. Supp.), § 4-105 of the Education Article which waives governmental immunity to a limited extent.

Judge Reita Davidson, concerning and dissenting:

The dissent agreed that individuals teaching an educational system who intentionally insure a child entrusted to their educational care should be held liable; and plaintiffs are entitled to pursue the action against these defendants.

The judge dissented, however, to the fact that individuals teaching in an educational system and who, through mal-practice, negligently injure a child entrusted to their

educational care, should not be considered liable and therefore the plaintiffs are not entitled to maintain an action.

The rest of the dissent is given in its entirety due to the stance Davidson takes:

"As long ago as 1889 in Cochrane v. Little, 71 Md. 323, 331-32, 18 A. 698, 700-01 (1889), Chief Judge Alvey stated the following with respect to actions against lawyers for their negligent acts:

"'Apart from any mere special or technical objections, the declaration would seem to contain all the averments essential to entitle the plaintiffs to maintain their action. This is best shown by a brief statement of the principles upon which the action is maintainable. It is now well settled by many decisions of courts of high authority, both of England and of this country, that every client employing an attorney has a right to the exercise, on the part of the attorney, of ordinary care and diligence in the execution of the business intrusted to him, and to a fair average degree of professional skill and knowledge; and if the attorney has not as much of these qualities as he ought to possess, and which, by holding himself out for employment he impliedly represents himself as possessing, or if, having them, he has neglected to employ them, the law makes him responsible for the loss or damage which has accrued to his client from their deficiency or failure of application. Or, as said by Lord Chancellor Cottenham, in delivering the opinion in Hart v. Frame, 6 Cl. and Fin. 193, 209, a client who has employed an attorney has a right to his diligence, his knowledge, and his skill; and whether he had not so much of these qualities as he was bound to have, or having them, neglected to employ them, the law properly makes him liable for the loss which has accrued to his employer. And in another part of the same opinion the learned Chancellor said: Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case, therefore, ought to depend upon its own peculiar circumstances; and when an injury has been sustained which could not have arisen except from the want of such reasonable skill and diligence, or the absence of the employment of either on the part of the attorney, the law holds him liable. In undertaking the client's

business, he undertakes for the existence and for the due employment of these qualities, and receives the price of them. Such is the principle of the law of England, and that of Scotland does not vary from it. . . .'"

* * * * * *

". . .In the course of the trial several exceptions were taken by the defendant to rulings of the court. The first two of these were taken to the admissibility of the testimony of lawyers, examined by the plaintiffs, for the purpose of proving to the jury, that, in their opinion, the advice given by the defendant to Korns, under the facts and circumstances proved by other witnesses in the case, was not such as a prudent, careful lawyer, or ordinary capacity and intelligence, would have given, or ought to have given. As we understand it, this was not an attempt on the part of the plaintiffs to prove to the jury by the lawyers, that the abstract principle involved in the advice given by the defendant was not law, for that would have been an usurpation of the functions of the court; but simply that the advice, in view of all the circumstances and conditions under which it was given, was not such as a prudent, careful lawyer, of ordinary capacity, would have given. Such testimony, in this class of cases, is allowed, as furnishing aid to the jury, in considering the question of negligence or want of skill. There are many cases in which testimony has been received, but it is not deemed necessary to refer to more than Godefroy v. Dalton, 6 Bing. 460; Hunter v. Caldwell, 10 Q.B. 69; Swinfen v. Chelmsford, 5 Hurl. and N. 890, 897. There was therefore no error in the rulings on these exceptions.'

"As recently as 1974, in Raitt v. Johns Hopkins Hospital, 274 Md. 489, 498-99, 336 A. 2d 90, 95 (1975), Judge Levine stated the following with respect to the nature of the duty of care and the standard of care applicable in actions against physicians for their negligent acts:

> '. . .in Dashiell v. Griffith, 84 Md. 363, 380-81, 35 A. 1094 (1896), our predecessors stated: . . .The cases are generally agreed upon the proposition, that the amount of care, skill and diligence required is not the highest or greatest, but only such as is ordinarily exercised by others in the profession generally. . . . There had been a hint of this standard in State, use of Janney v. Housekeeper, 70 Md. 162, 172, 16 A. 382 (1889), where this court held that. . .the degree of care and skill required

> is that reasonable degree of care and skill which physicians and surgeons ordinarily exercise in the treatment of their patients. . . .
>
> "This rule, which makes no reference whatever to the defendant-physician's community, was consistently followed prior to 1962 (see, e.g., Lane v. Calvert, 215 Md. 457, 462, 138 A. 2d 902 (1958) (standard of care 'such as is ordinarily exercised by others in the profession generally' McClees v. Cohen, 158 Md. 60, 66, 148 A. 124, 1930.) Indeed, it has been noted occasionally even since 1962 (Nolan v. Dillon, 261 Md. 516, 534, 276 A. 2d 6, 1971) (standard of care 'such as is ordinarily exercised by others in the profession generally) (Anderson v. John Hopkins Hospital, 260 Md. 348, 350, 272 A. 2d 72, 1971) ('. . .the standard of skill and care ordinarily exercised by surgeons in cases of this kind. . . .'); Johns Hopkins Hospital v. Genda, 255 Md. 616, 620, 258 A. 2d 595 (1969) ('. . .the standard of skill and care ordinarily exercised by surgeons in cases of this kind. . . .').

"Thus, this Court has consistently recognized, notwithstanding the existence of a myriad of intangibles, a multiplicity of unknown quantities and a variety of other uncertainties attendant in any profession, that a professional owes a duty of care to a person receiving professional services; that a standard of care based upon customary conduct is appropriate; and that it is possible to maintain a viable tort action against a professional for professional malpractice. Finally, as recently as 1979, this Court has recognized that under certain circumstances there can be recovery for mental or emotional distress resulting from non-intentional negligent acts. The application of all of these principles to this case leads me to the conclusion that there should be a viable cause of action on the facts alleged here.

"In my view, public educators are professionals. They have special training and state certification is a prerequisite to their employment. They hold themselves out as possessing certain skills and knowledge not shared by non-educators. As a result, people who utilize their services have a right to expect them to use that skill and knowledge with some minimum degree of competence. In addition, like other professionals, they must often make educated judgments in applying their knowledge to specific individual needs. As professionals, they owe a professional duty of care to children who receive their services and a standard of care based upon customary

conduct is appropriate. There can be no question that negligent conduct on the part of a public educator may damage a child by inflicting psychological damage and emotional distress. Moreover, from the fact that public educators purport to teach it follows that some causal relationship may exist between the conduct of a teacher and the failure of a child to learn. Thus, it should be possible to maintain a viable tort action against such professionals for educational malpractice.

"Here the declaration alleges, in pertinent part, that the individual defendants 'owed a duty to the minor plaintiff to comport themselves within the standards of their profession, and to exercise that degree of care and skill ordinarily exercised by those similarly situated in the profession. . . .' The declaration further alleges that the defendants breached that duty by, among other things, placing the child in the second grade and requiring him to repeat first grade materials even though he had satisfactorily completed these materials in his first year in school, subsequently placing him in a grade ahead of the material he was actually studying, testing the child so incompletely and inadequately as to result in total failure of evaluation of the problems, and insulting and demeaning the child in private and public. Finally, the declaration alleges that the defendants' acts in breach of their duties were the proximate cause of injuries to the child which included, among other things, substantial learning deficiencies, psychological damage and emotional stress. This declaration alleges that the defendants owed a professional duty to the child to act in conformity with an appropriate standard of care based upon customary conduct, that there was a breach of that duty, and that unforeseeable injuries were proximately caused by that breach. Manifestly, it states a cause of action that comports with traditional notions of tort law.

"Unlike my colleagues, I believe that public policy does not prohibit such claims from being entertained. It is common knowledge, and indeed the majority recognizes, that the failure of schools to achieve educational objectives has reached massive proportions. It is widely recognized that, as a result, not only are many persons deprived of the learning that both materially and spiritually enhances life, but also that society as a whole is beset by social and moral problems. These changed circumstances mandate a change in the common law. New and effective remedies must be devised if the law is to remain vital and viable.

"Moreover, I do not agree with my colleagues that adequate internal administrative procedures designed for the achievement of educational goals are available within the educational system. In my view none of the available procedures adequately deal with incompetent teaching or provide adequate relief to an injured student. A cause of action for educational malpractice meets these social and individual needs.

"In addition, I do not agree with the majority that recognition of such a cause of action will result in a flood of litigation imposing an impossible burden on the public educational system and the courts. Similar arguments appearing in cases that recognized the constitutional rights of students that have not been validated by subsequent empirical evidence. See Goss v. Lopez, 419 U.S. 565, 600 n.22, 95 S. Ct. 729, 749 n.22, 42 L. Ed. 2d 725, 1975 (J. Powell, dissenting).

"Finally, I do not agree with the majority that the recognition of such a cause of action 'would in effect position the courts of this State as overseers of both the day-to-day operation of our educational process as well as the formulation of its governing policies,' roles that have been 'properly entrusted by the General Assembly to the State Department of Education and the local school boards.' That the Legislature has delegated authority to administer a particular area to certain administrative agencies should not preclude judicial responsiveness to individuals injured by unqualified administrative functioning. In recognizing a cause of action for educational malpractice, this Court would do nothing more than what courts have traditionally done from time immemorial--namely, provide a remedy to a person harmed by the negligent act of another. Our children deserve nothing less."

Case

The "doctrine of discretionary immunity" applies only to those officials who are not involved and engaged in actual decision making at the planning level (able in performing ministerial rather than discretionary duties).

Larson v. Independent School District No. 314, Braham University, Minn., 289 N.W. 2d 112, Supreme Court of Minnesota (1980).

Facts: Percy Larson brought action against three defendants, the superintendent, the principal, and the teacher of the Graham School District on behalf of Steven C. Larson, a minor of whom he is the natural guardian. The action against the three officials was induced for injuries received by Steven in an eighth grade physical education class during teaching the headspring before the class had participated in the necessary preliminary progressions of less advanced gymnastic exercises, progression designed in part for safety, and that the teacher Lundquist was improperly spotting the exercise at the time Steven was injured.

Issue(s):

1. Was student's injury due in part to negligence of principal who neglected to inform, introduce and instruct his new physical education teacher and in doing so failed to exercise reasonable care in supervising the development, planning and administration of this curriculum?

2. Are state officials and employees absolutely immune from suit under the doctrine of discretionary immunity?

3. Are public officials, who are charged by law with a duty that calls for exercise of judgment or discretion personally liable to an individual for damages, except being guilty of a wilfull or malicious wrong?

4. Was (a) the judgment used by the physical education teacher in determining how to spot and teach an advanced gymnastic exercise decision making and entitled to protection under the doctrine of discretionary immunity, and (b) is the instructor therefore liable for the negligent spotting and teaching of the exercise?

Answers: (1) Yes; (2) No; (3) No; (4a) No; (4b) Yes.

Reasoning of the Court

". . .A ministerial duty is one in which nothing is left to discretion, a simple, definite duty arising under and because of stated conditions and imposed by law. The idea has been put in this language: 'Official duty is ministerial when it is absolute, certain and imperative involving merely the execution of a specific duty arising from fixed and designated facts.'"

The court further observed:

"It is settled law in Minnesota that a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a wilfull or malicious wrong.

The phys ed teacher Lundquist is not entitled to protection under the doctrine of discretionary immunity, because the established evidence shows that he was (a) negligent in spotting the headspring Steven performed; (b) using judgment does not mean to perform a discretionary duty; (c) Lundquist's teaching was improper because he allowed Steven to perform the headspring before he was able to safely perform the headspring before he was able to safely perform such an advanced exercise.

The principal was also held liable on the following basis:

"Discretionary immunity must be narrowly construed in light of the fact that it is an exception to the general rule of liability. Because of the special protection that the law affords school children (Spanel v. Moundsview School District, No. 621, 118 N.W. 2d 795, 802, 1962) failure by Peterson, in this case, to adequately supervise the planning and administration by Lundquist of the physical

education curriculum cannot be considered decision-making that the doctrine of discretionary immunity is designed to protect. We therefore hold that Peterson's liability is not precluded by the doctrine of discretionary immunity. Regarding the superintendent's liability, the court held that since he did not have any knowledge about the fact that the high school principal had allowed unsafe physical education curriculum to develop, he also had made an improper transition from the first physical education teacher to the new one and that he did not provide proper supervision.

The court found no liability regarding the superintendent since there was no showing that the superintendent had lacked in supervision toward the principal and that he had had knowledge of problems in the physical education curriculum. The court found no evidence that a negligent act of the superintendent had caused the accident in question.

The superintendent was too far removed from the actual scene.

Case

1. Doctrine of judicial non-intervention in scholastic affairs.

2. It is in the absolute discretion of the institution of higher education to dismiss a student--delinquent in his studies--without due process.

Mustall v. Rose, 211 So. 2d, Supreme Court of Alabama (1968).

Facts: A medical student failed two courses in the Medical College of the University of Alabama and was subsequently dismissed by the Promotion Committee without due process considerations.

The student claimed that the professors gave him lower grades than deserved and that the average of various interim grades indicated a passing grade. The professors noted that these grades were only tentative ones and that the final grades were based on the overall performance of a student which included in this case oral questions as well.

The student finally claimed that the decision of dismissal was not in accordance with due process since he had not been heard and had been absent while the decision had been made.

Issue(s): Do school authorities (faculty and administrators) have absolute discretion in determining whether a college student should be dismissed or not, based on delinquency in studies without following due process requirements (notice and hearing)?

Answer: Yes--in the absence of bad faith, capriciousness, arbitrariness and/or unreasonableness.

Reasoning of the Court

The court stated that in its opinion there was no evidence of unfairness in the dismissal of the student and continued

that the evidence was supporting the failing grades in the courses.

The court pointed out that the rule of judicial non-intervention in scholastic affairs was particularly applicable in the case of a medical school, since courts were not supposed to be learned (educated) in medicine and were therefore not qualified to pass an opinion on student achievements.

The court continued saying that there is a difference in dealing with a disciplinary problem or a standard of excellence in the academic area and emphasized: "Even the federal courts have not yet gone so far as to require the notice and presence of the student when a decision is being readied to dismiss a student for failing to meet the required scholastic standards."

Case

Education is a fundamental, constitutional right in West Virginia.

Pauley v. Kelly, 255 S.E. 2d 859, W. Va. (1979), Supreme Court of Appeals of West Virginia (February 20, 1979).

Facts: The plaintiffs, parents of five children attending public school in Lincoln County, brought an action on behalf of themselves and as a class for declaratory judgment, claiming that the financing system for public schools was violating the West Virginia Constitution, Article XII, Section I, since it denied plaintiffs the guaranteed "thorough and efficient" education and by also denying them the equal protection out-of-balance funding in property-poor counties as compared with those in wealthier counties.

The Kanawha County Circuit Court dismissed the complaint and also denied the plaintiffs' motion for a summary judgment. The plaintiffs appealed.

Issue(s):

1. If recognized by trial court that plaintiffs had asserted valid constitutional challenges regarding the present school financing system, so that it was not their legal theories that were deficient, is it then improper to grant the motion to dismiss the case on grounds that plaintiffs had not demonstrated, in their affidavits, admissions and other documents, that the poor school system in Lincoln County was a product of the present school financing system as alleged?

2. Does the constitutional requirements of a "thorough and efficient system of free schools" make education a fundamental educational right in West Virginia?

3. Does, under equal protection guarantees, any discriminatory classification in a state's educational financing system require the state's demonstration of some compelling state interest to justify such unequal classification?

4. Does the "thorough and efficient" clause contained in Article Xii, Section I, of the West Virginia Constitution require the legislature to develop a high quality statewide education system?

5. Do the provisions of the Constitution of the State of West Virginia, in certain instances, require higher standards of protection than afforded by the Federal Constitution?

Answer: (1) Yes; (2) Yes; (3) Yes; (4) Yes; (5) Yes.

Reasoning of the Court

Federal 14th Amendment equal protection rights are not available to children seeking educational equality. A state is also not constrained by the federal constitutional standard; however, must examine its own constitution to determine its education responsibilities. Thus, a state constitution may require higher standards of protection than are afforded by comparable federal constitutional standards. There is, of course, no specific reference to public education in the United States Constitution, but education sections in state constitutions can be classified whether they reasonably may be considered to require legislatures to provide for: (a) public school systems of specified quality, or (b) simply say that public school or uniform public school systems may/shall be established. Constitutional mandates, the court points out, require that the legislatures provide "thorough and efficient education systems," representing the traditional quality requirement. They are to be found in the Ohio, Minnesota, Maryland, Pennsylvania, New Jersey, Illinois (from 1870 until 1970) and West Virginia Constitutions. Colorado, Idaho and Montana require "thorough systems," while Arkansas, Texas, Kentucky, Delaware, Virginia (until 1971) and Illinois (since 1970) require efficient systems.

The court, having done thorough research of cases and the debates and dialogues of the Ohio and West Virginia Constitutional Conventions, states that: "Each of the fifteen states' appellate courts, and some federal courts applied the 'thorough and/or efficient clauses.'" These clauses were held to be mandatory upon legislatures, making education a state, rather than a local, responsibility. Broad legislative authority and discretion have

been acknowledged, and courts made for themselves guidelines for testing legislation against this clause. Although there is judicial deference to legislative plenary power over education, courts didn't stop there; they all intervened when an act by a legislature or a proceeding by a local school board, as agent of the legislature, is offensive to judicial notions about what a "thorough and efficient" education system is. Courts will not inquire into the reason, wisdom, or expediency of the legislative policy with regard to education, but whether the legislation has a reasonable relation to a "thorough and efficient system of public schools."

The court emphasized that a system of instruction in any district of the state which is not thorough and efficient falls short of the constitutional command; and whatever the cause and/or reason for such a violation, the obligation is the State's to rectify. In case a local government fails, the State government must compel it to act; if the local government can't carry the burden, the State must itself meet its continuing obligation.

According to the court the terms that are basic to this case at hand are: "thorough"; "efficient"; and "education." The court's interpretation given reads as follows: Education is the development of mind, body and social morality (ethics) to prepare persons for useful and happy occupations, recreation and citizenship.

Thorough and efficient systems of schools develop, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically. The court continued to say that legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government so that the child will be equipped as a citizen to make informal choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work--to know his or her options; (5) work training and advanced academic training as the child may intelligently choose; (6) recreational pursuits;

(7) interests in all creative arts, such as music, theatre, literature and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in his society.

Implicit are--according to the court--supportive services as well: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.

The educational system must be tested by these high quality educational standards and since, under West Virginia's Equal Protection Clause and because education here is a constitutionally derived fundamental right, the more demanding "strict scrutiny equal protection standard" is thrust upon the State.

The Circuit Court's judgment was herewith reversed and the case remanded with definite directions in agreement with the appellate court's decision.

Case

California does not recognize cause of action for "educational malpractice."

Peter W. v. San Francisco Unified School District, 131 Ca. Rptr. 854, Court of Appeals, First District, Division 4 (1976).

Facts: Plaintiff, an 18-year-old male high school graduate from the San Francisco Unified School District, brought action against the said district, alleging that he had been inadequately educated through negligence on the educators' part.

He filed the following charges against the school district, its educators and agents:

"1. Failure to provide him with adequate supervision, guidance, counseling and/or supervision in basic academic skills, such as reading and writing.

"2. Failure to use reasonable care in the discharge of its duties to provide plaintiff with adequate instruction . . . in basic academic skills.

"3. Failure to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances."

The plaintiff continued to state five subsections where he alleged the following:

"The school district, its agents and employees negligently and carelessly" in each instance:

"1. Failed to apprehend his reading disabilities.

"2. Assign him to classes in which he could read 'the books and other materials.'

"3. Allowed him 'to pass and advance from a course or grade level' with knowledge that he had not achieved its completion of the skills 'necessary for him to succeed or benefit from subsequent courses.'

"4. Assigned him to classes in which the instructors were unqualified or which were not 'geared' to his reading level.

"5. Permitted him to graduate from high school although he was 'unable to read above the eighth grade level, as required by Education Code Section 8573 . . . therefore depriving him of additional instruction in reading and other academic skills.'"

Plaintiff further alleged that "as a direct and proximate result of the negligent acts and omissions by the defendant School District, its agents and employees . . . plaintiff has suffered a loss of earning capacity by his limited ability to read and write and is unqualified for any employment other than . . . labor which requires little or no ability to read or write. . . ."

The trial court dismissed the case.

The California Court of Appeals affirmed the judgment of dismissal, and the appellant's petition for a hearing by the Supreme Court was denied (September 29, 1976).

Issue(s): 1. May a person who claims to have been inadequately educated, while a student in a public school system, state a cause of action in tort against the public authorities who operate and administer the system?

2. Did plaintiff show sufficient facts to prove that defendants owed him a "duty of care"?

Answer: (1) No; (2) No.

Reasoning of the Court

In Muskopf v. Corning Hospital District, 359 P. 2d 457, the doctrine of governmental immunity from tort liability was abolished; this case also clearly established that "governmental liability for negligence is the rule, and immunity the exception." A provision of the 1963 Tort Claims Act makes the defendant school district extremely "liable for any tortious act of its employees which would give rise to a cause of action against them personally." This is Gov. Code, § 815.2, Subd. (a). However, this would only come to bear if--as Muskopf holds--"negligence" is there.

At this point the court continued to note: "According to the familiar California formula, the allegations requisite to a cause of action for negligence are:

1. Facts showing a duty of care in the defendant;

2. Negligence contributing a breach of the duty;

3. Injury to the plaintiff as a proximate result.

The court declared the plaintiff's cited authorities as irrelevant since they did not address the question of whether the school authorities owed students a "duty of care" in the process of their academic education.

The court noted that although a "duty of teachers to exercise reasonable care in instruction and supervision of students is recognized in California," the cited decisions in the state here were inapplicable because they address only "that public school authorities have a duty to exercise reasonable care for the physical safety of students under their supervision." [5]

The court acknowledged that a "duty of care" was existent considering the "commanding importance of public education in society."

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[5] A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against the employee or his personal representative.

However, the court distinguished between "duty of care" as a term of common parlance and a "duty of care" as a legalistic concept. Only the latter is able to sustain liability for negligence in its breach.

Thus, the court says, there are several constants to be considered:

"1. The concept itself is still an essential factor[6] in any assessment of liability for negligence.

"2. Whether a defendant owes the requisite 'duty of care' in a given factual situation presenta a question of law which is to be determined by the courts alone. 7

"3. Judicial recognition of such duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by considerations of public policy."[8]

The court cited Rowlands where the Supreme Court defined various "public policy" considerations. The court declared that "the foundation of all negligence liability in this state was Civil Code Section 1714,"[9] paraphrased the section in terms of duty of care (as expressing the principle that "[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct"), and stated that liability was to flow from this "fundamental principle" in all cases except where a departure from it was "clearly supported by public policy." The court then continued to state the important factors of public policy and their pertinent role.

The balancing of a number of considerations can be the only justifier for a departure from these basic principles:

1. The foreseeability of harm to the plaintiff;

2. The degree of certainty that the plaintiff suffered injury;

3. The closeness of the connection between the defendant's conduct and the injury suffered;

4. The moral blame attached to the defendant's conduct.

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[6]Dailey v. Los Angeles Unified School District, 470 P. 2d 360 (1970).

[7]United States Liability Insurance Company v. Haidinger-Hayes, Inc., 463 P. 2d 770 (1970).

[8]Raymond v. Paradise Unified School District, 218 Cal. App. 2d 1.

[9]Rowlands v. Christian, 443 P. 2d 561 (1968).

5. The policy of preventing future harm;

6. The extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach;

7. The availability, cost and prevalence of insurance for the risk involved.[10]

The court suggested that the concept of "duty" may perhaps focus upon the rights of the injured plaintiff instead of upon the defendant's obligations. Nevertheless, the same principles would apply and control whether a cause of action may be stated or not.

The court further elaborated, saying that the Supreme Court, when occasionally opening a new area of tort liability, said that "the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework."

The court here maintained that this was simply not true of "wrongful conduct and injuries allegedly involved in educational malfeasance." And it elaborated as follows:

"Unlike the activity of the highway or the marketplace, classroom methodology affords to readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--and commonly does--have his own emphatic views on the subject." The "injured" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

Thus, the court finds no cause of action recognizing the state's policy considerations.

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[10] "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned by another by his want of ordinary care or skill in the management of his property or person. . . ."

The plaintiff's other five causes of action are based on the theory that "it states a cause of action for breach of a 'mandatory duty' under government code section 815.6[11]

However, the court notes that no cause(s) of action was stated (act causing injury); the court reasoned that this was so because "the statute imposes liability for failure to discharge only such 'mandatory duty' as is 'imposed by an enactment that is designed to protect against the risk of a particular kind of injury'. . . . the failure of educational achievement may not be characterized as an 'injury within the meaning of tort law'"[12] and furthermore the court continued: "It appears that the several 'enactments' have been conceived as provisions directed to the attainment of of optimum educational results, but not as safeguards against 'injury' of any kind; i.e., as administrative but not protective."

Thus, their violation imposes no liability.

The alleged misrepresentation of plaintiff's achievements to his mother and natural guardian was also not successful. The court stated that for the public policy reasons and with respect to the first court, no cause of action was stated for negligence in the form of the misrepresentation alleged. The court also notes that "a cause of action for intentional misrepresentation is assisted by judicial limitations placed upon the scope of the governmental immunity which is granted, as to liability for 'misrepresentation.' But a cause of action was not stated for intentional misrepresentation because it alleges no facts showing the requisite element of reliance upon the 'misrepresentation' it asserts."

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[11] "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

[12] Prosser, Law of Torts, 4th ed., pp. 1-33 (1971).

Case

Defendant school district had to pay tuition for one year at the nonpublic facility.

In RE Peter H., 323 N.Y.S. 2d 302, Westchester County Family Court (1971).

Facts: A mother had had her son--suffering from organic brain syndrome--3-1/2 years in public school where he made practically no educational progress, although he had been in special classes with children suffering other types of disability. When the child was put into a nonpublic special educational facility he had made remarkable progress. The Family Court of Westchester County ordered the City and the State to pay the child's full tuition at the nonpublic facility rather than leaving to attend a yet to be established, and thus unproven, public school program for brain damaged children.

Issue(s): 1. Is the court empowered to exercise discretionary power in advancing a child's well being?

2. Can a child progressing in a nonpublic school while formerly not progressing in a public school remain in that school, while the public school district and the state have to pay the tuition accruing in the nonpublic school?

Answer: (1) Yes; (2) Yes.

Reasoning of the Court

In a case entitled ReVasko, 263 N.Y.S. 552, the Appellate Division stated: ". . .Manifestly, it was the intent of the legislature to invest the court with wide power of discretion, to be exercised on the advice of competent medical . . . authority . . . in advancing the well being of the child."

The court was favorably impressed with the testimony concerning the excellent progress the child had made.

"It has been shown to the Court's entire satisfaction that if this child is ever to be permitted to develop his intellectual potential and succeed in the academic area, it can be accomplished only in a special educational setting. It has been similarly shown that the Adams School can meet these needs. Whether or not the public school system in Mt. Vernon can do likewise in the coming year remains to be determined.

"Realizing that the Family Court is under a mandate to act in the best interests of this child, the Court cannot permit his entire future to be further jeopardized by gambling on a special educational system that has yet to prove itself. Unfortunately, three and a half precious years have already been wasted, which fact serves to further the Court's resolve not to switch educational horses at this time. A year hence, upon a similar application, and after considering the conclusions and recommendations of a professional evaluation of this special educational program, it may well be that the Court would decide this question against the petitioner. At this time, however, there appears no reasonable alternative to opting in favor of the child continuing his education in the school setting which is at hand and presently achieving good results.

"Accordingly, the Court sustains the petition and directs that the cost of providing for the special education of said child be paid pursuant to the provisions of Section 4403 of the Education Law. . . ."

Case

Public policy bars educational malpractice suits of a student and/or parent against a private school for failure to educate child.

Pietro v. St. Joseph's School, 48 U.S.L.W. 2229, New York Supreme Court, Suffolk City (1979).

Facts: The student attended a private school from 1970 to 1978 during which time the school allegedly failed to ascertain whether the student was capable of learning. The plaintiff (parent) also claimed that the school failed to evaluate the student, to provide him with special educational facilities and to teach him in a way so that he could understand.

Issue(s): Does public policy bar recognition in New York of students' and/or parents/ "educational malpractice" suits against school authorities and officials?

Answer: Yes.

Reasoning of the Court

In quoting Donohue v. Copiague, 47 N.Y. 2d 440, which held that New York courts should not as a matter of public policy entertain "educational malpractice" claims, the court noted that parochial schools and public school districts were sharing the same problems regarding the consideration of "educational malpractice" claims.

Here, the parent seeks to recover the tuition paid the school.

The court felt that there could be a case where a parent might recover tuition if an express contract existed or an agreement had been made between the school and the parents, to the effect that the student would reach a certain proficiency after pursuing certain studies, which was not the case here in Pietro.

Case

Actions were brought (1) against a county social services agency and school district alleging, interalia, that the social services agency negligently or intentionally failed to take reasonable actions to bring about his adoption and (2) against the school district for negligently placing the boy in classes for mentally retarded children under circumstances where the school district knew or should have known that he was in fact not retarded; both actions were dismissed by the Superior Court; the Court of Appeals held, interalia, that no valid claim for recovery of damages was stated.

Dennis Smith, etc., v. Alameda County Social Services Agency et al, and Hayward Unified School District, 153 Cal. Rptr. 712 (1979).

Facts: Shortly after Dennis was born--who at the time of this action was 17 years old--his mother relinquished him to the custody of the before named agency for the purpose of adoption.

This was done according to a Civil Code section. which sets up a procedure by which a "father or mother may relinquish a child to a licensed adoption agency for adoption."

Dennis was placed in a series of foster homes, but was never adopted. The agency then left him with one set of foster parents for many years without asking them whether they wanted to adopt him.

The agency never attempted to find a proper pre-adoptive home for Dennis. Thus, he spent his entire childhood in a series of foster and group homes. He therefore was deprived of a stable home environment, parentual nurturing, continuity of care and affection, a secure and homelike family environment and proper and effective parental guidance. This caused Dennis various damages, primarily mental and emotional suffering and grave interference with his psychological development. This, then, is the heart of Dennis' first and main cause of action.

Issue(s): 1. [main issue] is a social services agency liable in damages to a 17-year-old boy on the allegation that said agency negligently or intentionally failed to take reasonable actions to bring about his adoption, but instead left him for many years with foster parents when it knew or should have known that such foster parents never intended to adopt him?

2. Is a social services agency liable in damages to a child placed in its custody on the theory that, failing to procure child's adoption, agency failed to carry out mandatory duties imposed on it by statute to administer program to encourage adoption of "hard-to-place" children?

3. Can such statutory provisions reasonably be construed as designed to "protect" "hard-to-place" children from "injury" of not being adopted?

4. Can boy recover damages from county social services agency and its consulting clinical psychologist on the theory that latter negligently construed tests which indicated that boy suffered from mental retardation, which resulted in discouraging adoptive parents from adopting him?

5. Does there lie a cause of action on behalf of the boy against the school district on allegations that the district negligently placed the boy in classes for the mentally retarded, when district knew or should have known that he was in fact not retarded?

6. Is there a cause of action for the child on the theory that he was the express beneficiary of agreement between his mother and the social services agency, whereby the mother relinquished him to the agency and the agency promised that he would be adopted or that the agency would make reasonable efforts to that end, but agency failed to make such efforts?

Answer: (1) No; (2) No; (3) No; (4) No; (5) No; (6) No.

Reasoning of the Court

The court noted that analytic confusion had to be avoided and it therefore would not treat the question primarily as one whether there is or is not immunity under the California Tort Claims Act (Gov. Code, § 810 et. seq.). Under that act, the court stated, the inquiry would be whether the conduct here alleged involved "basic policy decisions" (Tarasoff v. Regents of the University of California, 551 P. 2d 334, 1976).

The court felt that before the issue of governmental immunity can be dealt with, the more fundamental question of whether there is any liability for damages under these circumstances at all had to be faced.

The court declared: "Decisions as to whether to tighten or enlarge 'the circle of rights and remedies' are often phrased in terms of a 'duty of care.' The existence or absence of a duty cannot be determined by mechanical or formal tests. Rather, 'judicial recognition of such duty in the defendant, with the consequence of his liability in negligence for its breach is initially to be dictated or precluded by considerations of public policy" (Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854, 859, 1979; Dillon v. Legg, 441 P. 2d 912, 1968; Raymond v. Paradise Unified School District, 31 Cal. Rptr. 847, 1963).

The court continued to say that "duty is not sacrosanct in itself but only an expression of the sum total of these considerations of policy which lead the law to say that the particular plaintiff is entitled to protection" (Prosser, Law of Torts, 2d ed., 333, quoted with approval in Dillon v. Legg, supra).

The court noted that invasion of protected interest had replaced duty of care on the Restatement's delineation of the essentials for a negligence cause of action (Peter W., 131 Ca. Rptr. 854); however, the court felt that the nature of the inquiry here was the same as in Peter W., regardless if viewed from the perspective of duty of care or of protecting a particular interest.

The court felt that the inquiry was not significantly affected by phrasing it in terms of recognizing a new set of rights and duties or in terms of departing from the basic principle of liability for negligence (Rowlands

v. Christian, 443 P. 2d 561, 1968). Regardless of how the question was going to be approached, said the court, the inquiry would turn upon policy considerations, and quoted:

In Rowlands v. Christian, supra, the court stated the major factors to be considered: "[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved" (69 Cal. 2d at p. 113, 70 Cal. Rptr. at p. 100, 443 P. 2d at p. 564).

Similarly, in Raymond v. Paradise Unified School District, supra, 218 Cal. App. 2d at p. 8, 31 Cal. Rptr. at p. 851, 852, the court said: "The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, specially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens--such are the factors which play a role in the determination of duty" (Citations).

The court noted that the duty sought to be imposed did not present a reasonably clear or manageable standard for assessing the wrongfulness of the agency's conduct. A trier of fact, the court said, "would have to exercise hindsight over 17 years of social work involving difficult and at least partially subjective decisions. Social work does not provide a readily acceptable standard of care."

The court continued saying that in considering foreseeability of harm, degree of certainty of injury and the closeness of the connection between the defendant's conduct

the injury, it does not follow that a foster child would suffer more damage than an adopted one.

The type of injury here, the court felt, is necessarily the result of a host of causative factors other than the above stated. The court stated: "A trier of fact would face inscrutable problems of trying to relate injury to violation of duty and in determining at what point or points in the long history in the relationship between appellant and the agency violations occurred. In short, harm is not easily foreseeable, let alone certain, nor closely connected to the assertedly wrongful conduct and damages cannot be ascertained with any reasonable degree of certainty. The reasons for denying liability here are even stronger than in cases such as Borer v. American Airlines, Inc. (1969), 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P. 2d 858 and Suter v. Leonard (1975), 45 Cal. App. 3d 744, 120 Cal. Rptr. 110, which held that minors may not sue for the loss of companionship, affection and guidance resulting from conduct of a defendant who negligently injured the minor's parent. There is less foreseeability of harm, less certainty of injury and a far more remote connection between the assertedly wrongful conduct and the injury in the situation before us than in Borer and Suter. Those cases declined to let minors recover for losses of consortium which, prior to the parents' injury, the minor had enjoyed; here the parental consortium never came into existence, although appellant did have, as we noted, the care, companionship and guidance of foster parents. '[N]ot every loss can be made compensable in money damages, and legal causation must terminate somewhere.' (Suter v. Leonard, supra, 45 Cal. App. 2d at p. 746, 120 Cal. Rptr. at p. 111-12).

"We doubt that the proposed liability would reduce future harm. If anything, it would be more likely to impede the proper functioning of adoption agencies. It is doubtful that the liability here involved can be insured against, let alone insured at reasonable cost. This factor, while not decisive, is worth noting in light of the budgetary restraints on public social service agencies, especially in the wake of the recently passed constitutional limitation on property taxes, Proposition 13. Finances aside, we do not believe that the placement process or the children, foster parents and social workers involved in it would be helped by trying to reconstruct events that necessarily are heavily tinged by considerations of judgment, discretion and a host of personal factors--events that occurred long

ago and over an extended period of time--and by passing judgment on these events in a courtroom. In short, we view judicial intervention under these circumstances as neither useful nor workable."

The decisions of Courts II - V are basically decided on the same principle as have been Courts I and II.

CURRICULUM VITAE

Tanya Ruth (Schock) von Gustedt, Extension Associate Professor - Continuing Education. Born in Stuttgart, West Germany, on July 7, 1932.

FORMAL EDUCATION

1960-1964	Stuttgart University, Stuttgart, West Germany; MSW.
1967	Sex Education Seminar.
1975-1978	West Virginia University, Morgantown, West Virginia; MA, Education Administration in Higher Education.
1979-1985	West Virginia University, Morgantown, West Virginia; Ed.D., Higher Education Administration, minor in Law.

PROFESSIONAL AND RELATED EXPERIENCE

1954	Assistant to the Director, Home for retarded adolescents, adults and youth from broken homes. Reutlingen, West Germany.
1955-1960	Administrative Assistant, City Health Department. Stuttgart, West Germany.
1964-1965	Social Work Supervisor and Administrator, City and County Department of Supportive Systems for low income and other social needs programs. Ludwigsburg and Esslingen, West Germany.
1971-1973	Developer of educational materials and trainer for paraprofessionals and their supervisors (home economists), West Virginia University, Center for Extension and Continuing Education.
1973-1978	Family Life Specialist for the state of West Virginia, West Virginia University.
1979-1980	Study leave to work on doctoral program.
1981-Present	Extension Associate Professor - Continuing Education, West Virginia University.

AWARDS

Area Health Education Center Project Coordinator

Creative and exemplary effort in new programs award in Continuing Education

PUBLICATIONS

11 publications

COMMITTEES

Chairperson: State Family Life Conference Committee

Chairperson: Committee on Stress and Hypertension Programs and Workshops

Chairperson: Committee on Stress Reduction for Middle and Upper Level Management

Administrative Committee for Rank and Tenure within Extension

Advisory Group Committee

Conference Child Care Committee

BOARDS AND OFFICES

Mental Health Board (1974-1977)

Vice President, St. Francis PTA (1977-1978)

EDITOR

Editor for two years of "Young Family Frontiers," a newsletter for young families.

PRESENTATIONS AND TEACHING ASSIGNMENTS

Guest lecturer at four universities and trainer for social agencies, university professionals and others.

CONSULTATIONS

Clarksburg, WV, Welfare Department: Conflict Resolution

21 local Extension Home Economics offices on various matters pertaining to programming and conflict

MASS MEDIA PRESENTATIONS

Two educational articles per month for newspaper releases and radio programs, during 1973-1978.

EMERGING LEGAL THEORIES OF EDUCATIONAL MALPRACTICE AND JUDICIAL REJECTION

Tanya Ruth von Gustedt

ABSTRACT

This is a study of the current legal theories, elements, and courts' stances affecting educational malpractice litigation. General and legal issues were researched as a basis to identify court attitudes and general public pressures. The study also took a look at the question of possible avenues for dealing with problems of educational malpractice. Should the courts decide why Johnny can't read and award monetary damages? Should the legislature deal with the problem of faulty education, or should a totally different agency become involved in such an undertaking?

Related fields, such as medical malpractice, torts, contract theory, and responsiblities and obligations of students in the educational system, were examined as well.

Will suites of educational malpractice succeed? Should they succeed? The question of the likelihood of educational malpractice suits to succeed is also dealt

with, based on the decided cases of Hoffman v. Board of Education, Donohue v. Copiague Union Free School District, Peter W. v. San Francisco Unified School District, Pauley v. Kelley, and related holdings. Suggestions for alternative approaches to educational malpractice are proposed.