EDUCATIONAL MALPRACTICE IN CANADIAN SCHOOLS: FACT OR FICTION?

by

Cathleen Anne Thornicroft

B. A., University of British Columbia, 1978

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS (EDUCATION)

in the Faculty

of

Education

SIMON FRASER UNIVERSITY

March, 1989

APPROVAL

Name: Cathleen Anne Thornicroft

Degree: Master of Arts (Education)

Title of Thesis: Educational Malpractice in Canadian Schools: Fact or Fiction?

Examining Committee:

Chair: Gloria Sampson

Michael Manley-Casimir
Senior Supervisor

Suzanne C. deCastell
Associate Professor

Wendy J. Devine
Campney & Murphy
Barristors & Solicitors
595 Burrard Street
Vancouver, B.C.
External Examiner

Date Approved March 9, 1989

PARTIAL COPYRIGHT LICENSE

I hereby grant to Simon Fraser University the right to lend my thesis, project or extended essay (the title of which is shown below) to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the library of any other university, or other educational institution, on its own behalf or for one of its users. I further agree that permission for multiple copying of this work for scholarly purposes may be granted by me or the Dean of Graduate Studies. It is understood that copying or publication of this work for financial gain shall not be allowed without my written permission.

Title of Thesis/Project/Extended Essay

Educational Malpractice in Canadian Schools: Fact or Fiction?

Author:

(signature)

Cathleen Anne THORNICROFT

(name)

March 9, 1989.

(date)

ABSTRACT

Malpractice lawsuits have long been successfully litigated against the medical and legal professions but few, if any, educators have been successfully sued for "educational malpractice." The public's increased demand for court enforced accountability has only recently affected the educational system. Educational malpractice may be defined as "an intentional or negligent act, which constitutes a breach of duty to properly educate or place a student, and which results in injury (physical or non-physical) to the student."

Although society places great importance on education, there are no reported cases in Canada and only a few case reports in the United States where damages have been sought in consequence of receiving an inadequate education. In fact, the number of law review articles far exceed the number of cases arguing this concept.

This thesis examines the possibility of holding a teacher negligent for failure to educate. Those legal arguments already presented -- citing case law where necessary -- and the difficulties a plaintiff faces in proving educational malpractice are discussed. My research explores the possible bases on which an action for failure to educate may be grounded and the impact such litigation may have on the education system. This thesis also examines the impact of the Charter on future claims and explores the facts of the Keegstra case from a tort perspective.

I conclude that a claim for educational malpractice could be formally pleaded, but that liability will be limited by public policy considerations. The mere threat of educational malpractice will have an impact on educational policy and decision-making. Just what the impact will be depends on the courts' decisions, how the court reaches them and finally the schools' responses. Whether the impact will be positive or negative is difficult to predict. In order to limit the impact of court-mandated decisions, educators would be wise to take the initiative to define "good" educational practices and to closely monitor those practices that have the potential to create liability for educational malpractice. A proactive, rather than reactive approach should better serve both educators and the general public as these issues take on increasing prominence.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

CHAPTER ONE

Introduction

Malpractice lawsuits have long been successfully litigated in the medical and legal professions but few, if any, teachers or school boards have been successfully sued for educational malpractice. This situation, however, is changing in the United States and likely to change in Canada. Cases of educational malpractice are now coming before the courts. The threat of malpractice litigation in and of itself may have a serious impact on educational policy and decision-making (Foster, 1985). Legislators will be required to address the quality and effectiveness of academic programmes, instruction, supervision, guidance, and counselling if they hope to improve the public's confidence in the school system and limit the involvement of the courts in delineating the role and responsibilities of educators.

To date, the courts have allowed recovery in educational settings for physical injuries but not for intellectual harm. A number of cases have dealt with the liability of teachers and school boards for failing to provide adequate care and supervision within the school facility. Those cases have only involved physical injuries. The courts up until now have been reluctant to address issues of intellectual injury and failure to educate.

This study explores the possible bases upon which an action for failure to educate may be found and the impact such litigation may have on teacher performance in the classroom. The term "educational malpractice" as it relates to teacher behavior implies that teachers

are liable and accountable for providing a quality education for students. The question being raised is that if through teacher negligence, a student fails to achieve that level of educational success he was capable of achieving or was misled to his detriment as to his academic abilities, would the student be able to sue the teacher successfully? Furthermore, do teachers owe their students a duty of care to safeguard them against non-physical or intellectual harm, breach of which duty is actionable in negligence? Can a teacher who departs from the prescribed curriculum be found negligent in his duties to perform to an appropriate standard of care? Finally, do teachers owe their students a legal obligation to more than just access to a seat in the classroom?

The concept of teacher misconduct is not dealt with in this thesis. The concept has no clearly defined meaning and leads to broad interpretation. There is no general application of the term. Misconduct does not assume negligence but rather is behaviour that is inconsistent to some a priori standard of behaviour -- whether it be in the teacher's educational capacity, refusal to follow board policy or personal behaviour affecting the fiduciary relationship between teacher and student. Because teacher misconduct is difficult to define, this paper focusses primarily on the relationship between the teacher and the student and the results a negligent education has on the latter.

The landmark decision of the United States Supreme Court in Brown v. Board of Education spoke directly to the importance of education in a democratic society (347 U. S. 483, (1964)). Since that time, courts

have adjudicated claims concerning students who have failed to achieve a minimal level of literacy at the time of high school graduation. In the 1970s, the Peter W. v. San Francisco Unified School District (1976), Donohue v. Copiague Free School District (1978) and Hoffman v. Board of Education of the City of New York (1979) cases raised novel legal questions about professional accountability for the consequences of the educational process. "What educational obligations do schools legally have to their students? Are the courts the proper forum in which to assess negligence for failing to meet those obligations? Where malpractice or negligence is proven is the tort remedy of damages appropriate for a court to award?" (Abel, 1974, p. 417).

These and other questions regarding competency and accountability for incompetency are creating much anxiety within the educational community. The fear of lawsuits brought by students claiming negligence and malpractice have caused many public school systems to become more cognizant of their duty to deliver a satisfactory service. In addition to this, the demand for increased expenditure for public education, higher expectations and awareness on the part of the public, and the ambivalent results of many recent evaluative efforts, will increase government involvement and influence in the policy decisions and operations of the public school system. The use of legislation and the courts in making the educational system and those within the system more accountable may not be an unreasonable and unforeseeable expectation.

My prediction in this thesis is that the concept of negligence in

education will, in the future, include the more subtle and elusive elements of negligence as it relates to non-physical harm. Negligence lawsuits will arise when a substantial deviation from a standard procedure occurs, or when an individual does not conform to accepted practices and procedures. It is the intent of this thesis to examine the possibility and probability of holding a teacher negligent for failure to educate. These claims will be based on the teacher's failure to instruct, test, place or counsel a student properly or adequately, and the consequent intellectual harm that may result. In the absence both of reported Canadian cases on the question of educational malpractice and of any court decisions in the United States which have imposed liability on educators for failure to educate, this inquiry will be hypothetical. My approach is to re-examine those arguments already presented and assess the role, if any, the courts can play in providing redress to a student who suffers non-physical harm as the result of receiving an inadequate, incompetent or negligent education.

I consider legal theories established under the law of torts -- specifically, the law of negligence -- and the law of contracts. This thesis also discusses the difficulties a plaintiff faces in proving educational malpractice. As there is a dearth of law in this area, many of the arguments and conclusions presented are anticipatory in nature.

Chapter two discusses the issue of malpractice and the plausible theories upon which an action may be founded. The scope of this

analysis is primarily limited to a discussion of negligence, although other areas of law are touched upon. The third chapter examines the concept of liability as it relates to other professional groups -- namely doctors and lawyers -- and discusses the extension of principles developed in these professional contexts to the arena of education. This chapter examines the nature of teaching and whether or not teachers, either as professionals or otherwise, could be liable for malpractice, and if so under what conditions (see Covert (1987) and Foster (1987b) for debate over this issue). Chapter four examines legal precedents and highlights some recent developments in education. I also examine the Keegstra case from an educational malpractice perspective. The question asked is: since Keegstra deviated from the prescribed curriculum, could he have been charged with educational malpractice? What legal arguments could have been made to support such a charge? The final chapter deals with the problems and consequences of malpractice litigation for teachers and schools.

This study is significant to teachers. As the fear of educational malpractice grows, the practical impact upon schools will be demonstrably palpable. Cases involving both substantive and procedural issues will change the underlying concept of education and will challenge the nature of academic decision-making and educational experience. Notwithstanding the problems of proving educational malpractice, the threat of malpractice claims standing alone, will impact the school system and in turn will serve as a catalyst for significant change.

CHAPTER TWO

Educational Malpractice: Assessment of Underlying Legal Theories

Although society greatly values education, there are no reported cases in Canada and only a few case reports in the United States where plaintiffs have sought damages for allegedly receiving an inadequate education. Notwithstanding the dearth of case law, however, educational negligence and malpractice have received a great deal of attention in academic circles. In fact, the number of law review articles, notes and comments on educational malpractice far exceed the number of cases litigating this issue. The literature posits that of the three largest professional groups -- lawyers, doctors and educators -- the latter is the only group still unburdened by malpractice suits. Despite this, the argument is made that in this age of professional accountability there is a real prospect of aggrieved students seeking recourse through the court, and teachers being held liable for incompetent instruction.

To date, the primary concern of law makers has been to ensure that all members of society receive an education for a specified minimum period of time, have equal access to an educational institution during that period, and have an opportunity to pursue post-secondary education. Provincial legislation has set guidelines for grade-level curricula. The role of law makers has matured to one of mandating minimal performance standards and quality instruction. To meet those concerns and objectives, the courts while implicitly

recognizing the importance of an education to the well-being of both the individual and society, will have to address the "substance" as well as the "form" of education. Legislation will have to specify the content and quality of the educational experience and to some degree delineate acceptable "outcomes" (i.e. minimum levels of student competency). Increasing litigation, indicating public dissatisfaction, will signal the need for legislative response. In the past courts have been willing to expand the scope of liability in response to changing societal values. Recognizing a cause of action for inadequately educated persons would recognize the importance in contemporary life of certain basic skills, and would acknowledge both the individual and societal benefits education produces.

A cause of action based on teacher negligence could be advanced under several existing legal theories. The action could be founded on common law principles, mainly the law of torts (although the law of contract would also be relevant; or perhaps constitutional law). Malpractice is generally defined as any professional conduct that falls below an acceptable standard of care; a breach of a professional obligation to perform a legally recognized duty (Black, 1968). The balance of this chapter defines the concept of malpractice as it applies to education -- educational malpractice -- and examines the elements necessary for tort liability. I examine facets of negligence such as negligent misrepresentation on report cards of student progress and failure to carry out statutory duties. Another theory is

based on breach of an implied contract. Liability might also be established by proving an infringement or denial of the student's rights under the Canadian Charter of Rights and Freedoms (i.e., a constitutional claim). This latter action would require the courts to delineate the nature and extent of students' rights and if successful, teachers' and schools' correlative obligations.

Court-enforced educational accountability (culminating in claims of educational malpractice), is seen to be analogous to medical malpractice. Accountability can be defined as "holding an individual or group responsible for a minimal level of performance or accomplishment". If one looks at the historical use of the term "malpractice", one sees that educators and physicians have much in common. Members of both professions, acknowledged to play an important role in society, are viewed with growing skepticism by the public. While the idea of suing a physician for malpractice is no longer novel, suing schools and teachers for failure to educate adequately is a new idea, albeit one that may catch on (Sugarman, 1974).

A clear legal definition of educational malpractice has yet to be formulated. In this thesis educational malpractice is defined as "an intentional or negligent act, or failure to act, which constitutes a breach of duty to properly educate or place a student, and which results in injury to the student." Further, an educational malpractice action can be defined as a lawsuit claiming professional negligence; a

situation in which educational services rendered are argued to fall short of reasonable expectation.

Black's Law Dictionary describes malpractice as "any professional misconduct, unreasonable lack of skill or fidelity in professional ... duties, evil practices or illegal or immoral conduct" (4th ed., 1968, p. 111). Ballentine's Law Dictionary (1969) states that malpractice is the "violation of a professional duty to act with reasonable care and in good faith without fraud or collusion" (p. 769). Thus, teachers, if considered to be similar to lawyers and physicians, should be subjected to legal action when their conduct breaches accepted professional standards.

The law of torts constitutes a set of duties or responsibilities of general application, the breach of which is considered tortious conduct remediable by monetary compensation or other redress by court action -- known as the "rights and duties" approach (Fleming, 1971, p. 4).

Alternatively, the law of torts can be regarded as providing a legal framework within which are found the various interests enjoyed by people generally, and which are worthy of legal recognition and protection (Fleming, 1979, p. 4). From this perspective, the law of torts may be viewed as the gradual recognition and protection of various interests as they emerge in society -- the "interests" approach. This divergent development has led to discussions concerning the differences which exist between the competing

approaches.

The first view holds that the law of torts serves to compensate victims of tortious conduct; it has an individual-level focus. The second view holds that the law of torts recognizes and seeks to maintain certain desirable, if minimal, standards of conduct for those who belong to a given group. Therefore, the focus is broader; more societal level in scope. There are significant differences between the two approaches although they are not mutually exclusive. The conflict exists between those who see the law of torts as confined within the limits of its historical development and the theoretical as well as legal framework that has emerged over the centuries, and those who regard the law of torts as capable of infinite growth, stretching to bring within its scope whatever future conduct that may be regarded as socially undesirable or worthy of protection (Fridman, 1978, pp. 1-13).

A tort is a civil wrong against a person. The law of torts concerns compensating for losses incurred as a result of the socially unacceptable conduct of others. Three areas of tort law are relevant to a cause of action for failure to educate: negligence, intentional torts, and misrepresentation (deceit and negligent misrepresentation) (Fleming, 1971, pp. 102-105).

Negligence

The expression "negligence" refers to some kind of conduct involving neglect. There are three terms used when dealing with negligence claims. These are:

1) misfeasance - the improper performance of a given function.
2) nonfeasance - the omission of an act
3) malfeasance - the performance of an act wholly wrongful and unlawful. (Black, 1968, p. 902)

Negligence connotes a failure to act with the standard of care that would normally be expected in the circumstances. The basis of negligence is the idea that a person is obliged to behave as a reasonable person, given the exact circumstances of the situation and the precise position occupied by the person in question relative to other persons. Needless to say, what is reasonable behavior for a sales clerk is not necessarily reasonable for a doctor (Fleming, 1971, pp. 102-105). In a sense, negligence can be seen as the failure to act with reasonable care or acting in a manner which shows an unreasonable disregard for the foreseeable consequences of one's acts or omissions. It follows that whenever one behaves negligently he[1] will be liable to those injured in consequence, unless there is some

[1]The use of the pronoun "he" is simply used for reference and is not meant to connote a gender bias.

limitation on his liability arising from legal doctrines such as voluntary assumption of risk (Fleming, 1971, pp. 239-250), contributory negligence (Fleming, 1971, pp. 215-235), remoteness of damage (Fleming, 1971, pp. 250-259), or some statute that precludes such liability (i.e., a statute removing a right of action; a limitation statute) (B. C. School Act, 1979, sections 95-96).

The basic elements necessary to establish negligence include:

1) a duty to conform to a standard of conduct established to protect persons within a given class;
2) a failure to conform to that standard;
3) a harm suffered which is legally compensable; and
4) a causal relationship between the harm suffered and the failure to conform to the standard. (actual or proximate cause)

Essentially, a successful negligence suit would include a duty of care, a negligent act or omission (for a detailed definition, see Black, 5th ed., 1971, p. 902), a legally recognized harm, and actual or proximate cause. The plaintiff bears the burden of proving that the defendant had a duty to conform to a standard of conduct established by law for the benefit of the plaintiff, that the defendant failed to conform to that level of care, that the harm incurred by the plaintiff was the result of that failure, and finally that the plaintiff suffered harm that is legally recognized and compensable by damages. The burden of proof for each element remains the same -- the balance of probabilities.

In a suit against a teacher seeking damages for a student's failure to learn attributable to teacher negligence, the student must establish that his failure to learn is a harm cognizable under tort law, that the teacher had a duty to competently teach the student, that the teacher was in fact negligent and that "but for" such negligence, the student would not have suffered that harm. The student would have to establish that his failure to learn was a foreseeable event, consequent on the teacher's poor classroom techniques. In evaluating the possibility of the recognition of an educational malpractice claim, each of these elements must be separately examined.

Duty of Care

Initially, the plaintiff must establish that the school system has a duty to provide competent academic instruction (MacKay, 1984, p. 112). The plaintiff must convince the court that a legal basis exists for imposing this duty, whether that duty arises under common law or through legislation.

Additionally, the plaintiff must consider the myriad of social policies that may affect the level of duty imposed upon educators. As stated in the Peter W. case, the specific criteria for determining the existence of a duty include:

> 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, 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 the 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 limitation 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 (131 Cal Rptr, 1976, p. 859).

Common law duty. At common law it is generally assumed that when someone undertakes to render a service to another, there exists a duty to act without negligence. Applied to education, the principle suggests that once a school district (including the schools and its employees) undertakes to provide education, it assumes a duty to educate competently; it does assume a duty to make a non-negligent, bona fide attempt. This "gratis" undertaking theory, however, may not apply since education is not voluntary, but mandatory. It is thus possible that individual teachers or school districts might not be held liable for breach of a duty that is imposed upon them by the provincial government.

Another approach flows from the school's duty to take care for the physical safety of its students while at school. In physical injury cases, educators have been held to have a duty to properly supervise and instruct. Negligent instruction resulting in physical

harm has been argued and accepted as an actionable tort (Thornton v. Board of School District No. 57 Prince George, 1978). Further, a teacher acting in a supervisory capacity may be liable for either malfeasance or nonfeasance resulting in physical harm. A creative litigant might argue that intellectual injury is no less foreseeable and no less real than physical injury.

One of the difficulties in extending the analogy of physical harm to intellectual harm concerns what level of care needs to be established. When a teacher is charged with a duty of care protecting students from physical harm, he is held to the usual "reasonable person" standard of care. If however, the teacher is to be charged with tortious conduct regarding academic instruction, what level of care can we or should we expect -- that of a reasonable person, a prudent parent, a "reasonable teacher" or a higher professional standard? The level of care expected in these two cases may be very different and hence the basic distinction between the care applicable to physical supervision and academic instruction may weaken the analogy between the two.

A final argument for recognition of an educator's duty to provide competent instruction could be based on analogies to certain types of professional negligence -- notably legal and medical malpractice. This approach is based on the premise that teachers are professionals and that their behaviors or functions are sufficiently analogous to other professional groups. If educators are considered professionals

then their conduct could be analyzed in terms of established common law principles regarding professional duties. This line of reasoning is developed further in chapter three.

Statutory duty. The common law also recognizes the principle that negligent failure to perform a statutory duty may give rise to a cause of action in tort. In order for a plaintiff to recover for injury caused by such negligence, the plaintiff must be a member of a class of persons for whose benefit the statute was enacted. The plaintiff must then prove that the injury suffered was of a type which the statute sought to prevent (Funston, 1981, p. 776). Educational statutes, however, are generally enacted to ensure the creation and maintenance of schools. They are not specifically designed to protect individual students against the injury of non-education but rather are designed to benefit society as a whole (Prosser, 1971, pp. 190-197). Compulsory attendance also reinforces the belief that education is not an individual right, but rather a duty imposed upon parents to ensure that their children receive an education -- an education not for the benefit of the child, but for the benefit of society (Hogan, 1985, pp. 1-22). The courts' acceptance of a statutory duty will thus depend on its willingness to recognize the student's legal right to an adequate education.

Standard of Care

Once it is established that a legally recognized duty of care exists, the plaintiff must define a standard of care to be used by a court to determine whether an educator breached his duty (Foster, 1987, pp. 205-221). The court could choose between a "reasonable person" standard, a "prudent parent" standard, a "reasonable teacher" standard or a "professional" standard of care (Tracy, 1980, p. 572).

Reasonable person standard. Under common law, all persons have a duty to conduct themselves in such a way so as not to harm others. In order for liability to rise, any harm suffered must be reasonably "foreseeable" from the point of view of the tortfeasor. The test often used by the courts is whether a reasonable person would, under the same circumstances, have similarly acted and whether a "reasonable person" would have foreseen the accident and the subsequent injury. Furthermore, if it is foreseeable that someone might be injured, it is necessary for the person to take whatever steps a prudent or reasonable person would take to avoid causing such a foreseeable injury (MacKay, 1984, p. 115). This standard is more appropriate when it is applied to a teacher's duty to supervise the physical activities of the students than it is to the prevention of intellectual harm because the foreseeability of physical, rather than intellectual, harm is often much more clear.

Prudent parent standard. Teachers and schools have special duties of care imposed on them because of the nature of their work. Arising from the special relationship existing between teachers and their students, is the common law doctrine known as "in loco parentis" (MacKay, 1984, p. 393). Teachers are expected to use the same degree of care with respect to the students as prudent or careful parents would with their own children. Although a prudent parent may be expected both to take a more active role in the education of his child and to be more familiar with the school system, it is doubtful that the parent is fully aware of the pedagogical issues involved in providing a sound education let alone educating a group of students. Many parents lack the resources and the expertise available to educators. Furthermore the school environment does not resemble the home environment. The process of education more often than not requires that educators have specialized knowledge and training not possessed by many parents. Teachers are required to provide students, who exhibit a broad range of characteristics and experiences, with individual instruction while supervising other students' progress in the class. The prudent parent standard then has limited use and acceptability given current expectations and societal goals (Foster, 1987, p. 215). This might then lead to the development of a vocational or professional standard of care for determining the minimum acceptable level of competence within a school setting.

Reasonable teacher standard. It could also be argued that the student-teacher relationship is one that is very special; and one to which the law has attached a duty to engage in positive conduct for the benefit of another (Foster, 1987, p. 184-186). As Fleming (1971) has noted:

> there is strong support for a duty of affirmative care, including aid and rescue, incidental to certain special relations ... To ... these the law has long come to attach exceptional obligations of protective care, because of the peculiar vantage by one party to such a relation in preventing accidents and a corresponding dependence by the other on such help. Once it has come to be held that this imparted a duty from the former to safeguard the latter even from perils not of his own making, it is but a short step to insist also on a duty to aid and rescue so long as the latter remained within his protective pale. (p. 143).

Educators hold themselves out to the public as providing a very worthwhile service. In return, teachers receive an economic benefit from the student-teacher relationship. Because the relationship is one which the teacher exercises power over the intellectual development of the student, it could be argued that the former is under a duty to rescue the latter from the "abyss of ignorance" and to exercise care in doing so. This duty would include competent teaching and would require a standard of care greater than those previously mentioned.

Professional standard. It has been suggested that the appropriate standard of care for determining the minimum acceptable level of conduct in educational malpractice cases should be drawn from the professional group to which educators belong. Thus, a teacher would be judged not by the "reasonable man" standard applied in ordinary negligence cases, but by a comparison to his professional peers. This would include a comparison with colleagues in his own or similar community and under similar circumstances, and with those members who enjoy the same status and profess the same level of specialization (Foster, 1987, pp. 223-224).

Because of the abstract quality of education and the lack of consensus about what constitutes "sound educational practices", it becomes very difficult to determine how a reasonably careful educator would have acted (Funston, 1981, p. 780). This standard of care would have to reflect the teacher's qualifications, level of certification, years of teaching experience as well as the students' ages and mental abilities. Although this standard may be difficult to establish, teachers do hold themselves out as possessing special skills and knowledge. Needless to say, the general public expects them to perform accordingly.

Breach of Duty

Once an appropriate standard is established, it must then be shown that it has been breached by the defendant. The plaintiff must

prove that the educator failed to meet that minimum standard of care. The plaintiff would call witnesses to give an "expert opinion" on whether the defendant's action complied with the skill and learning ordinarily exercised in the profession, and whether it was professionally acceptable conduct. In addition, the plaintiff may attempt to prove an educator's breach of duty by establishing:

> his lack of proper certification; or his failure to comply with legislative statutes (School Act) governing such matters as the methods of instruction and instructional materials to be used in the content of, the time to be devoted to and the assessment of the teaching of particular subject, skills and programmes (Foster, 1987, p. 225).

Similarly, other evidence such as peer and student evaluations, testimony by parents and community members, past review reports and class achievement scores may be introduced to show that the educator's performance fell below the minimumally acceptable level.

In deciding whether the educator has breached his duty to educate, the court must make a factual determination concerning what was or was not done for the student given the surrounding conditions. In the situation where negligence is alleged, much of the evidence, may be circumstantial. In this case, the burden of overcoming that circumstantial evidence would fall to the defendant (Linden, 1971, p. 78). The overall onus of proof would still remain with the plaintiff to establish a negligent act but it would be up to the defendant to explain "away the compelling circumstances" or absolve

himself from responsibility (Foster, 1987, pp. 226-228).

Causation

Another issue that must be addressed is proving causation. Causation is perhaps one of the most difficult of all jurisprudential concepts. The first task in attributing legal responsibility for a particular injury is to ascertain whether the defendant's conduct was a causally relevant factor (Fleming, 1971, p. 169). The defendant's conduct must cause the plaintiff's loss or else there is no liability. In other words, there must be some connection or link between the wrongful act and the damage; the harm must result from or be attributed to the act of the wrongdoer. In essence, the mere establishment of some causal link is not sufficient to establish liability. The damage must be directly connected to the behaviour.

The courts have adopted a common sense approach to the problem of causation. The most commonly employed technique for determining causation-in-fact is the "but for" test. For example, if the accident would not have occurred but for the defendants' negligent, then his conduct is a cause of the injury. If, however, the accident would have occurred just the same, whether or not the defendant acted negligently, then his conduct is not a cause of the loss. Thus, the act of the defendant must have made a difference. If his conduct had nothing to do with the loss, he escapes liability. In situations where there are multiple causes, the "but for" rule may be difficult

to apply. Responsibility may be divided up based on the premise that those contributing acts were both sufficient and necessary to cause injury.

Once a causal relationship has been established between the defendant's behaviour and the plaintiff's damage, the courts will then ask whether the damage was sufficiently foreseeable to ground liability. The task is to select those factors that are significant to justify liability and then to draw a line as to the degree of compensation awarded. The defendant's behaviour must be the "proximate" cause of the harm and the consequence must not be "remote". When dealing with this issue, the courts will use "directness and foreseeability" as the tests for remoteness or recognition of a legally recognized duty of care. When dealing with policy issues the courts may deny recovery by relying on the doctrine of remoteness.

In educational negligence, the plaintiff must prove that his educational failure was the direct result of a teacher's negligent instruction. The student would be required to prove that his substandard performance was not the consequence of his own lack of intelligence, aptitude, diligence, attitude or ambition (Patterson, 1976; pp. 790-796). The plaintiff would have to establish that the defendants' negligent action was the "proximate" cause of the harm: the consequence must not be too "remote". This approach would limit the liability of the defendant for only reasonably foreseeable

consequences. The courts would have to consider such matters as: was there a "natural and continuous" sequence between the cause and effect, was the conduct a "substantial factor" in producing the result, was there a "direct connection", and was the result "too remote" given the time and place of the occurrence (Loscalzo, 1985, p. 605).

The multiplicity of factors affecting the learning process, coupled with the lack of a clear understanding of the impact such factors have on learning, makes it extremely difficult to prove that the educator's negligence was a cause-in-fact of a students' illiteracy or other educational failing. One way a plaintiff could prove "teacher-induced failure" would be to present a comparative statistical analysis. Using this method of proof the plaintiff establishes causation by proving that a class of which he was a member performed significantly poorer than did classes identical in all essential aspects except that they were taught by another teacher (see Patterson, 1976, p. 790-796 for a description of some of the difficulties pursuing this approach). This analysis may not prove negligence but merely that the quality of a teacher's performance was different to that of a teacher in the comparison class. The plaintiff would still have to prove negligence and causation of harm. This approach, already attempted in the United States, may be more applicable to class action suits rather than individual law suits.

Legally Compensable Injury

Finally, the injury must be a natural, probable and foreseeable consequence of the defendant's conduct. The plaintiff must demonstrate that he suffered a legally compensable injury. Clearly, not learning is a foreseeable risk of negligent teaching. However, some courts have held that the law is not meant to protect against the "injury of ignorance". The courts have held that any harm incurred by educational negligence does not conform to the accepted understanding of tortious injury -- for example, such harm has not heretofore been legally recognized as compensable.

A plaintiff could argue that lack of adequate skills and loss of potential earning power constitute compensable injury rather than a loss of a mere expectancy interest -- that is, only a possible economic advantage. Recovery for negligently induced loss of prospective pecuniary benefits may necessitate the demonstration that a special relationship exists between the parties -- i.e. that the teacher is a fiduciary vis-a-vis the student. Arguably, the teacher-student relationship has two special aspects which may permit recovery: first, the law mandates the existence of the relationship and second, individuals and society rely on the effectiveness of the relationship to produce an informed populace. To satisfy the foreseeability requirement, the plaintiff would have to provide evidence showing that the conduct of the defendant was so unreasonable as to render learning clearly improbable.

The plaintiff should probably avoid the terms intellectual harm, mental stress or psychological damage as these terms do not have clear meanings. Instead the plaintiff should advance a claim of "failure to learn" or "functional illiteracy". These terms can be measured against specific criteria -- achievement tests, minimum competency tests, reading and writing tests, etc. The inability to read and write at a minimally acceptable level can easily be verified by establishing testing methods and in fact is far easier to identify and measure than many tort injuries, i.e. future income loss for an injured child. Difficulties, do arise, however, as to how to compensate for the injury (Tracey, 1980, p. 581-582).

The primary function of tort law is to provide a means of redress and compensation. At least three remedies might be applicable in the school context:

1. removal of an incompetent teacher (injunction)
2. provision for remedial instruction to correct the problem (rectification)
3. monetary compensation for loss of future income or opportunities (damages) and to offset additional educational costs (special damages).

The least appropriate remedy would be the granting of a monetary award as it is not the role of schools to assure certain levels of income upon graduation. A plaintiff could argue that there was a loss of expectancy or a failure to receive a benefit as the result of failure to learn. Recovery, however, would be denied if there was not a

sufficient degree of certainty that the anticipated benefit would have been received. If a loss of benefit could be established, then the valuation of the loss would be calculated to that degree of certainty (i.e., if the loss is $100,000 and there is a contingency of 20% attached to such loss, the award should be $80,000). The option of rectification is only useful if the plaintiff has not incurred irrevocable harm or injury. Damages would be limited to the cost of rectification and possibly those wages lost during that period of re-instruction. The option of removing an incompetent teacher has the advantages of being relatively cost-free as well as eliminating the possibility of future harm to other similarly situated students. Unfortunately, it does nothing to make whole the student who has already suffered at the hands of the incompetent teacher. Further, the "public good" nature of this remedy would lead to few, if any, actions being brought by individual plaintiffs thus, in effect, insulating the incompetent teacher.

In lieu of the above difficulties, it might be advisable for the plaintiff to first seek removal of the incompetent teacher and then seek damages representing the cost of remedial instruction and any wage loss accruing during that period. A claim for damages reflecting diminished earnings should only be pursued after liability has been established in suits for teacher dismissal and rectification (Patterson, 1976, pp. 757-760).

Intentional Tort and Misrepresentation

The task of proving negligence may be less formidable if the plaintiff can prove the teacher intentionally or maliciously acted to injure the student. Such an "intentional tort" would additionally open the door for a claim of non-compensatory damages known as "punitive" or "aggravated" damages -- these awards may be larger than the sum of all compensatory claims.

An intentional tort is one in which the wrongdoer either desires to bring about a result (i.e., an injury to another), or believes that the result is substantially certain to follow from his actions. A negligent tort is one where the defendant, as a reasonable person, should have foreseen (but did not in fact foresee) that his conduct involved a risk of harm to others, though falling short of substantial certainty that such a result would ensue (Fleming, 1971, p. 74). Therefore, it could be argued that the intentional denial of an educational benefit may constitute an argument for compensation.

A more promising approach for establishing a cause of action for educational negligence would be to argue that, by inaccurately representing a student's educational progress and competence, the teacher should be liable in damages for misrepresentation. Misrepresentations are usually conveyed by words, oral or written, but may consist of any other form of conduct which creates a misleading impression. An example of misrepresentation would be the teacher who issues a satisfactory progress report about a student whom the teacher

knows, or should know, is not progressing satisfactorily. Another example of misrepresentation would be the teacher who claims to have certain qualifications to teach within a given subject area and in fact does not have the appropriate certification or level of knowledge. A student who has been repeatedly promoted and has been reported to be working at or near grade level, should be able to sue the schools for misrepresentation when he discovers at graduation that he is functionally illiterate. The school has a responsibility to keep parents and students accurately informed about the student's progress (B. C. School Act, 1979, section 148). A school, therefore, that inaccurately represents a student's competence should be held responsible for any damage to the student resulting from reliance on that misrepresentation (Funston, 1981, pp. 763-766).

The tort action of deceit requires proof of a fraudulent intent and only misrepresentations of existing or past fact are actionable. The aforementioned examples could well meet the element for a tort action in deceit. These elements include (Prosser, 1971, pp. 685-686):

1. a false representation about a past or current state of affairs made by the defendant;
2. the knowledge that the representation is false or, what is regarded as equivalent, that he has not a sufficient basis of information to make a decision;
3. an intention to induce the plaintiff to act or to refrain from action in reliance upon the representation;
4. a justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining

from it; and
5. damage to the plaintiff resulting from such reliance.

Other Approaches

Although the causes of action discussed above are possible avenues of redress for plaintiffs, other bases for liability should also be considered. These include breach of contract and an infringement of a constitutional right under Section 7 or 15 of The Canadian Charter of Rights and Freedoms.

Law of Contracts

The law of contracts may provide several arguments which might support an educational malpractice lawsuit. It can be argued that there is a contract between teachers and students and between school boards and students, and that an implied term of the contract is to provide competent instruction. This theory is more attractive in the private school setting (and possibly the post secondary setting) where students and parents have the option of seeking an education elsewhere (Janisch, 1980, pp. 495-500). An action for breach of contract arises where an institution accepts a student's tuition fees and then fails to provide the educational services bargained for by the student. Another argument could be made on the theory that a contract exists between the parents and a school board. Parents (as homeowners) pay school taxes and education statutes stipulate compulsory attendance for students ages 7 - 15. Thus, there is an implied contract between

parents and school boards (which is for the benefit of the student -- i.e. a contract with a third party beneficiary) which may be sued upon in the event of its breach. Arguably, there is an implied promise of competent instruction. The parents, on the behalf of the student (the third party beneficiary) may have a right to recover damages for breach of contract (Patterson, 1976, pp. 784-789).

A key element in a contract is "consideration". For a contract to be binding, both parents and students must receive some form of consideration. A promise of a benefit is not legally binding unless there is an exchange of values between the two parties. One of the defects of the contract-based theory of recovery is the absence of any "bargained-for" exchange. The fact that students, through legislated compulsory attendance, must attend school argues against attendance as a form consideration. Attendance is the subject matter of the contract, not the benefit given up. On the other hand, the school cannot refuse to accept the student and to do so may well constitute a breach of contract. The most logical candidate for "consideration" is the payment of school taxes on the one hand and the promise to provide a minimally adequate education on the other. However, where does this argument leave parents who pay no school taxes (perhaps because they are renters)? Even though their rent may reflect school tax levies, there is no contract action because of the legal doctrine known as "privity of contract" which holds that only contracting parties can sue or be sued under the contract.

Another obstacle that might need to be overcome is the actual intent of the contract -- is it intended to benefit the whole community or the individual per se? If compulsory education is designed to benefit the entire community, then an individual student could not maintain an action to enforce the contract.

Finally, it should be noted that the law of contracts has historically been less flexible than the law of torts and much less receptive to novel circumstances. Given the fact that public education may be quasi-contractual in nature, the plaintiff may not want to rely solely on this area of the law when pursuing a cause of "educational malpractice".

Constitutional Argument

The Canadian Charter of Rights and Freedom adds another dimension to educational malpractice and may provide further legal recourse for the plaintiff. In particular, section 7 of the Charter states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Even though the Charter does not specifically provide for the right or entitlement to an education, the "liberty" reference has the potential of indirectly guaranteeing a right to a public school education (Anderson, 1986, pp. 183-189). An education can be seen as a means of

earning an adequate livelihood, permitting enjoyment of life to the fullest, and helping individuals fulfill the duties and responsibilities of a good citizen. An education, in that it supposedly reflects the values and goals of a community can be seen as vital and basic to a civilized society.

An argument could also be made relying on the entitlement theory of public benefits (Patterson, 1976, pp. 772-775). That argument may be inherent in section 15(1), which provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, sex, age or mental or physical disability.

If every individual has a right to the equal benefit of the law, then it seems reasonable that every individual is entitled to receive those benefits which the state provides to the public (Funston, 1981, pp. 766-771). If these entitlements are denied, or if an individual can demonstrate that he is similarly situated to an individual who is receiving a particular benefit, the first individual may be able to demand the same benefit or compensation in lieu thereof.

A claim under the Charter may be an alternative source of recourse providing a similar remedy to a malpractice claim. A litigant first has to establish that a duty to competently educate exists and then establish the parameters of that duty. The Charter may imply a right to an education and provincial statutes broadly

delineate the duties of educators' to provide opportunities for learning. Problems arise, however, when trying to decide how this duty to educate should be characterized and who is accountable for what. Education is not passive, rather it is interactive. A student may not learn because of his own failings -- not those of the teacher. Neither the school nor the court can mandate students to learn.

In lieu of the above difficulties in bringing forward an educational malpractice claim, the plaintiff will have to attempt to apply those principles established in medical and legal malpractice actions that can be transferred to the educational setting. Chapter three of this thesis examines the role of the educator as a professional and then investigates how malpractice is determined in the medical and legal professions. The last section of chapter three examines the application of these "terms" to an action for failure to educate.

CHAPTER THREE

Educational Malpractice: Medical and Legal Analogies

The law of torts defines a variety of civil wrongs, other than breach of contract, for which a court of law will afford a remedy in the form of an action for damages. Negligence represents only one category of the law. The basic elements necessary to establish negligence are:

1) a duty to adhere to a standard of conduct established to protect
2) a failure to meet that standard
3) a harm suffered which is legally compensable
4) a causal relationship between the harm suffered and the failure to meet the established duty of care.

(Prosser, 1971, p. 165)

The expression "negligence" refers to some kind of conduct which involves a lack of care. It connotes a failure to act with such care as would normally be expected in the circumstances. There is a certain positive obligation in this requirement; a demand that a person act so as to protect others from harm. Under this standard, it is assumed a person not only acts intelligently, but also acts with some knowledge of the world around him. Furthermore, any special knowledge that a person has obtained through education, formal training or experience affects the duty of care owed. A person is,

therefore, required to utilize any special knowledge, no matter how obtained, that would affect his conduct under the circumstances.

The above is an outline of the basic components of the requisite standard of care in negligence cases. A negligence action, seeking to hold a professional liable for breach of a professional obligation is commonly referred to as a "malpractice". Charges of malpractice will most likely fall into two categories:

1) cases where an accepted procedure was not followed by the defendant; AND
2) cases where the expected good result has not occurred.

A professional is generally held to a higher standard of care within the scope of his professional services than that of an ordinary lay person. The applicable standard is often established by both professional standards and by public policy.

The professional person is required to behave in a prudent manner and to act with reasonable care and intelligence but is also judged by reference to his professional skills. The courts will expect from the professional a certain level of special skill and knowledge regardless of whether or not the defendant actually possesses such special skill and knowledge. The minimally acceptable level of skill expected will flow from the learning and skill ordinarily possessed and exercised by members of the profession. This standard is known as the "minimum professionally acceptable conduct". The non-negligent professional must follow those practices deemed "professionally acceptable", or

"commonly engaged in" or "within minimum acceptable practices", or else face liability.

With regard to the problem of a "bad result", professionals may fear that they will have to answer for damages merely because the results were poor or unanticipated. A bad result per se is not proof of negligence. However, when a bad result can be determined (or is so manifestly obvious) to be the direct outcome of negligent conduct, the professional will be held accountable.

The law of negligence is the legal theory which underlies the malpractice action. If an individual has or holds himself out to have credentials or knowledge, skill or intelligence superior to the ordinary person, the law requires that he conduct himself in a manner consistent with that professional standard of care.

A professional malpractice claim requires an extension of the "reasonable man" principles. These additional considerations include:

1) the relationship established between the professional and his client

2) the agreement or disagreement among others in the profession pertaining to the methods and treatment provided to the plaintiff by the defendant

3) the standard of care observed in the community

4) the professional's competence in the particular case as determined by expert testimony

5) whether or not the professional appropriately informed

> his client of the risks (medical, financial or otherwise) involved in the provision of his services.
>
> (Prosser, 1971, p. 157-161)

Malpractice may be found in a lack of skill and knowledge or in the failure to apply such skill. The failing may be an intentional, negligent or ignorant act. Malpractice can be determined from a single act or from a course of conduct.

Liability for malpractice has already been established in several professions. A strong legal argument for recognition of an educator's duty to provide competent academic instruction could be based on similarities to certain recognized theories of professional negligence (i.e., legal and medical malpractice).

To date, no court in Canada or in the United States has accepted an educational malpractice claim couched in those terms. The courts have addressed this question of educational malpractice in three reported cases and in several unreported decisions (see Bollinger, 1985, for a review of cases brought before the courts between 1955-1975).

The courts have often been reluctant to consider novel extensions of negligence theories, rationalizing that they are fearful of "legislating", or that they are uneasy about tampering with existing precedent. In recent years, however, a number of legal commentators have asserted the need and propriety of judicial responsibility for the upkeep of the common law. As Prosser (1971) notes, "The progress of the common law is marked by many cases of first impression, in

which the court has struck out boldly to create a new cause of action, where none has been recognized before" (p. 3). Prosser further argues, "When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to recovery" (p. 4).

Many experts feel that educational malpractice should be judicially recognized and that as statutes and regulatory exigencies create greater accountability in public education and specify more clearly a standard of care, the courts may at last recognize such a cause of action. Since an education is regarded as a necessary prerequisite for a productive adult life, this issue of accountability will not likely disappear.

One mechanism for making people accountable is the payment of damages when they fail to perform in a minimally acceptable manner. The law of torts, to date, has been utilized to provide relief in a variety of educational contexts -- general accidents to and from school (Barnes v. Hampshire County Council (1969)), accidents in laboratories and industrial shops (James v. River East School District #9 (1976), accidents during physical education classes (Thornton v. Board of School Trustees of School District No. 57 (1978), supervision of the educational environment -- health and safety of students (Williams v. Eady (1983)). Some sectors of the public wish to extend the concepts of tort law, namely negligence, to the classroom in order

to hold teachers and the school system responsible for the education they provide (Levin, 1974). The consequences for the educational system of such litigation may include mandatory malpractice insurance, more stringent certification requirements, peer reviews, the end of the present tenure system, licencing with annual or other periodic requalifications, etc. The fear of educational suits may stifle innovation, increase paperwork and finally put parents in an adversarial position vis-a-vis educators. Given the above ramifications, it becomes necessary to examine those elements of established malpractice claims that might be applied to education. Of importance, then, before an analogy can be drawn, is to research the development of existing medical and legal malpractice claims by considering:

1) the chronology of important professional negligence principles
2) the legal relationships of the physician to the patient or lawyer to the client
3) the duty of care that has been established, AND
4) the proximate cause considerations.

Historical Perspective

The law of torts can be traced to the time of the Norman Conquest. Its purpose was to provide a remedy for some injury or harm suffered by one person at the hands of another in circumstances which

might eventually lead to a breach of peace, social disharmony and/or unrest. The Norman kings and their successors were concerned with the settlement of land they had conquered -- lands that were insecure for some time after the conquest. They sought a system of justice which would promote peace and harmony as well as provide compensation for injuries. The purpose of such remedies, and the law of torts itself, was and still is to restore the injured party to the position prevailing prior to the damage or loss being suffered. The principle underlying the law is compensation, not punishment or deterrence.

From the fourteenth century onward, references to negligent conduct can be found in English Court decisions and in the common law literature (Fridman, 1978). The allegation that the defendant had behaved negligently was held to be sufficient to establish a cause of action in certain circumstances. In the earliest times (late thirteenth century) such situations involved negligent performance of duties by persons who professed a "public" calling and who held themselves available to members of the public upon payment of a fee -- i.e. medical practitioners, carriers, farriers and the like. Later, the scope of negligence was expanded to include other circumstances outside a public profession. Employers of labour, occupiers of property, those who handled items which were inherently dangerous to others, users of roads, might all be liable to anyone injured as a result of negligence in relation to the employment, occupation, dissemination of items, use of the highway, etc. This was

particularly true during the Industrial Revolution when new industries, occupations and the expansion of roads increased the possibility of harm to persons from negligent behavior. By the latter part of the nineteenth century, a more generalized concept of negligence was accepted by the English courts, and subsequently, in Canada. During this time, however, negligence was still only seen as a mode of behavior rather than as something more specific in a legal sense. The duty to behave in a reasonable way was not seen as a legal duty. In particular, it was not yet accepted that there was anything more than a list-of-fact situations in which a person who acted negligently, might be held liable if he caused damage to another (Levi, 1949).

The establishment of a more general concept of negligence was hindered by three important factors. First, the privity of contract which held that where there was a contract between two parties involving some duty to take care on the part of one party, and he breached that duty by acting negligently, the only person who might sue if injured in consequence was the other contracting party -- i.e. the beneficiary of the contractual duty. The privity doctrine limited the liability issue to one of failing to perform a duty owed under a contract. Second, the courts had some difficulty distinguishing between direct and indirect injuries, or to put it another way, between conduct which directly affected the plaintiff and that which indirectly caused him harm. Third, the issues surrounding

forseeability, or remoteness of damage, had not yet been developed in depth by the courts. This concept created an element of uncertainty which clouded the question of causation and limited the scope of liability for negligent conduct. During this time, the courts were content to deal only with liability cases involving simple illustrations of neglect resulting in damages or loss.

The state of the law of negligence in the early 1930's, was dramatically changed by the historic decision of the House of Lords in Donoghue v. Stevenson (1932). That decision greatly expanded the concept of negligence and such inherent elements as duty of care, foresight, causation and remoteness of damage. From 1932 onward negligence had two meanings. It could still refer to the older idea of carelessness, which might or might not produce liability in tort. It could also refer to a breach of duty of care which caused harm and so created liability in tort. Negligence became an independent tort, comprising its own elements, of which negligence, the older more general sense of carelessness, was one.

The modern law of negligence is based on the idea that an individual is obliged to behave as a reasonable person, given the circumstances of the situation and the precise position occupied by the tortfeasor in question. Incorporated into this obligation, is the tenet that reasonable behavior depends on the task that is undertaken, the degree of professionalism or experience possessed by the defendant, the potential danger involved, and the extent of harm that

might result from the defendant's conduct.

The concept of negligence was late in developing in the common law. Perhaps the first group of cases in which the idea began to take shape involved the liability of persons who professed competence in certain callings. One of these "callings" was that of the medical practitioner.

Medical Malpractice

Medical malpractice as applied to medical practitioners (physicians and surgeons) generally means:

> Professional misconduct toward a patient which is considered reprehensible either because [it is] immoral in itself or because [it is] contrary to the law or expressly forbidden by the law.
>
> (Black, 1968, p. 864)

It also refers to medical treatment which is administered carelessly, preceding from ignorance, want of proper professional skill or total disregard for established rules or principles.

The genesis of the law of medical malpractice can be found in English common law. Initially, liability was found under contract principles and concerned only a breach of duty so deficient that the court recognized an actionable wrong. As the law of negligence developed, medical malpractice was expressed in negligence terms and did not rely solely on contractual obligations.

Medical malpractice claims revolve around three essential elements:

1) the physician-patient relationship
2) a duty of care owed to the patient
3) the proximate cause of the harm suffered

(McCoid, 1959)

Physician-patient Relationship

Before a physician owes a duty of care to a patient, a relationship between the two parties must exist. There must also exist a duty of care (as well as a breach of that duty which was the proximate cause of the injury) if liability is to be imposed.

The physician and patient relationship is generally established in contractual terms, either express or implied. The determining factor is whether or not the patient entrusted himself to the care of the physician and whether the physician obligated himself to render care. Treatment is the foundation of this relationship. Treatment covers a broad range of services including examination, diagnosis, and prescription and delivery of remedies.

A physician's duty of care may also extend to a third party, for example a child whose parents seek out the physician's services. No matter who pays for or obtains the physician's services, a relationship exists between the physician and the patient. The

treatment must be undertaken with reasonable care, diligence and skill.

Once the relationship is established the physician is under a duty to conform to the accepted standard of care established within that community. He may not limit his services because they are gratuitously rendered nor can he sever the relationship without dismissal by or consent from the patient. The patient has the right to assume the physician will advise him properly since the relationship is one built on utmost trust and confidence -- i.e. a fiduciary relationship.

Duty of Care

By entering into a relationship, a duty of care by the physician toward his patient is established. The duty of care requires that the physician conform to an established professional standard of care for the protection of his patient against unreasonable risks of harm. The legal source for this duty of care arises firstly from common law principles and secondly from legislation.

Generally, the duty of care owed by a physician to his patient can be summarized as follows:

> The legal duty requires that the physician undertaking the care of a patient possess and exercise that reasonable and ordinary degree of learning; skill and care commonly possessed and exercised by reputable physicians practising in the same locality, or in similar localities, in the care of similar cases; it

> requires also that the physician in caring for the patient exercise his best judgment at all times.

Furthermore...

> The duty imposed on a physician or surgeon is to employ such reasonable skill and diligence as is ordinarily exercised in his profession in the same general neighbourhood having due regard to the advanced state of the profession at the time of treatment....The physician must use such ordinary skill and diligence and apply the means and methods generally used by physicians and surgeons of ordinary skill and learning in the practise of the profession, i.e., in the same general line of practice in like cases to determine the nature of the ailment and to act upon his honest opinion and conclusions.
>
> The physician assumes toward the patient the obligation to exercise such reasonable care and skill in that behalf as is usually exercised by physicians or surgeons of good standing, of the same system or school of practice in the community in which he resides, having due regard to the condition of medical and surgical science at that time.
>
> (McCoid, 1959, pp. 22-23)

A physician need not exercise extraordinary learning and skill but must instead use the learning and skill of the average member of the medical profession. He cannot be held liable for an error of judgment, if he acted in good faith. A physician does not (absent a contractual warranty) guarantee "good results" but he does promise (either expressly or by implication) to use reasonable skill and learning to attempt to bring about a good result. A physician is obligated to keep abreast of new medical treatments and use them to

help his patients. He is required to administer approved treatment as would be administered by the majority of the medical profession. Any deviations from normal and appropriate practices, given the nature of the case and current medical knowledge, may be viewed as negligent behavior. A physician who holds himself out as a specialist has a higher duty of care than that of a general practitioner. A specialist is required to exercise the level of skill and knowledge ordinarily possessed by other specialists in the field.

In summary, in the medical profession, a duty of care has been established that arises from common law and in some areas, legislation. Although this minimum standard of conduct has developed slowly over the last several centuries by interpretation of numerous cases awarding damages to the plaintiff, it now has a general accepted meaning.

Proximate Cause

In all negligence cases including medical malpractice cases, the plaintiff must prove by a preponderance of the evidence that the defendant's breach was the proximate cause of the injury. It must be determined that the injury would not have occurred "but for" the breach of duty in question. The plaintiff must prove that the physician was negligent in carrying out his services and that this breach of duty caused the plaintiff to suffer harm. Generally, a plaintiff will argue that the physician deviated from acceptable

medical practice or that he failed to disclose material risks inherent in the particular treatment.

In medical malpractice actions, proving proximate cause can be very difficult. Many medical procedures are complex thus making it difficult to determine the cause of the injury. Proof of causation requires expert testimony from those possessing medical knowledge and experience.

Before proceeding to analogize medical malpractice principles to education, it might also be instructive to examine the concept of malpractice in the legal profession.

Legal Malpractice

Professional liability is also found in the legal profession. The concept of negligence within the legal profession was established as early as the middle of the eighteenth century (Wade, 1975, p. 217). Black (1968) defines legal malpractice as:

> the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performance of tasks which they undertake, and when such failure proximately causes damage it gives rise to an action in tort.
>
> (p. 864)

Legal malpractice includes those acts resulting from negligent performance of legal services such as the unauthorized disclosure of a client's confidence, the representation of adverse or conflicting

interests, failure to meet procedural deadlines, faulty research or abstract, etc. (Stern, 1981, pp. 3-5).

Lawyer-client Relationship

The lawyer's liability for negligence arises primarily from the lawyer-client relationship. This relationship is generally created by a contract. Implicit in the contract is the lawyer's duty to exercise the degree of care, skill and knowledge which would be possessed by the average lawyer. Entwined in this lawyer-client relationship is the principle that a duty of care does not arise unless there is a binding contract with valid contractual consideration (consideration in the legal sense implies that both parties must receive some benefits from the relationship). If there is no legal consideration, then there is no binding contract and hence no contractual duty can be imposed. Under tort law, however, negligence is not concerned with a lack of consideration. In tort, if a lawyer undertakes to proceed with a law suit, and is guilty of neglect resulting in his client's loss, the duty of care owed is not negated for want of consideration. As a result, under tort law, if a lawyer undertakes to represent a client, regardless of whether or not there is any consideration, a lawyer is obligated to fulfill his fiduciary duties to his client.

A lawyer who enters a relationship with a client may be liable in negligence for abandoning the client at a critical stage. A lawyer is required to follow through in rendering his services and only upon the

client's consent for termination or the completion of the task, may he end the relationship (Stern, 1981, p. 18). Regarding third party liability, privity of contract generally prevails: only under certain conditions can a third-party beneficiary sue for negligence -- i.e. wills.

The lawyer-client relationship is based on a foundation of trust and confidence. The lawyer is under a duty to loyally represent his client, to protect his client's confidences and to disclose to the client any information bearing on the lawyer's retainer. The lawyer must exercise his honest and best judgment in favour of the client. Breach of the above obligations may result in an unauthorized disclosure of the client's confidence, representation of conflicting interests, giving false expectations regarding the quality of services to be expected and unrealistic assurances of success.

Duty of Care

Once a lawyer-client relationship is established, the lawyer owes his client a duty of care requiring him to conform to an established professional standard of care. The legal basis for this duty primarily arises from common law. Two other sources of the standard of care are: legislation (i.e. the Barrister and Solicitor Act RSBC) and the Canadian Bar Association's Code of Professional Responsibilities). These sources have attempted to codify and regulate the fiduciary obligations of lawyers. They have not been

designed, however, to impose civil liability on professional misconduct. The main goals are to regulate, through disciplinary rules, the conduct of its members and to establish ethical parameters. The Canadian Bar Association Code of Professional Responsibilities establishes a standard of care upon which a breach of that standard might result in tort liability for malpractice.

A lawyer is required to use a reasonable degree of care or skill and to possess a reasonable knowledge requisite to a proper performance of his duties. A lawyer is required to understand the fundamental principles of the Common law, to be familiar with the current Statutes and to be knowledgeable in rules of law which are clearly defined in the textbooks and to be knowledgeable regarding leading court decisions. Where the state of the law is unclear or ambiguous, or where there is disagreement among lawyers or the courts in interpreting laws, then the lawyer is not liable for an error in judgment. In this connection, as long as the lawyer has adequately researched and prepared his case, incompetence cannot be inferred from a bad result. The standard is still based on the reasonableness of the lawyer's conduct.

To define competence and in a sense establish the level of care to be imposed on lawyers, it is necessary to examine such qualities as knowledge, diligence, skill and capacity (Mallen, 1981, p. 131). If a lawyer misconstrues the law, the courts will consider the subject matter of the error (i.e. is the law clear? ambiguous? the result of

an oversight or merely an error in judgment?). If there is negligence in the prosecution of a matter or a failure to comply with procedure the courts focus on "diligence" (i.e. was there unreasonable delay in bringing suit? or was the suit in the wrong court?). If an error occurs as a result of poor research or an improperly executed document then the required "skill" is questioned (i.e. was there an error in the affidavit? error in proceedings of discovery? or a failure to arrange for witnesses and court appearances). If a lawyer proceeds with an unauthorized appearance for a party or acts beyond the scope of his delegated authority, then his "capacity" is questioned (i.e. did the lawyer fail to follow his client's instructions? Were the client's best interests at risk?). In challenging a person's competence, these terms can be used individually or in combination. A lawyer is required to use his best judgment in considering the status of the law, the adequacy of his research and the quality of his information.

The standard of care requires a duty to possess and exercise the skill, knowledge and diligence of the reasonable lawyer under similar circumstances. It would be expected then that a lawyer who holds himself out as a specialist (or a lawyer who predominantly practices in a specialty area) will be held to the legal skill and knowledge common among such specialists.

In conclusion, tort liability is usually the result of negligence in a professional relationship (specially where a conflict of interest

arises) and through negligent errors (failure to meet procedural deadlines; faulty research or abstract; malicious prosecution or abuse of process; and failure to comply with statutes of limitation (Stern, 1981, pp. 3-5). Although the duty of care in the legal profession is not as well defined as the duty of care in the medical profession, the movement towards accountability to the client has begun and the courts seem more receptive to this tort liability.

Proximate Cause

Proof of causation is the same in legal malpractice as in other negligence and medical malpractice cases. The wrongful act must be a proximate cause of the injury. The burden of proof (by preponderance of evidence) on the issue of causation resides with the plaintiff. To say the negligent act is the proximate cause, the plaintiff must prove the loss would not have happened "but for" the lawyer's conduct. This poses a real problem in the legal profession when examining damages. In the medical profession, the damage which a physician produces by his negligence is normally physical injury; that produced by a lawyer is normally economic loss. Problems as to the ambit of liability -- those of proximate cause as distinguished from cause in fact -- are potentially more controllable in the case of the physician. In order to recover in a negligence action against a lawyer, it is necessary to clearly show that his negligence was the cause of the client's loss or damage. In situations regarding procedural errors this may not pose a

major problem. When the negligence is in giving advice or in the conduct of litigation (where little time is given for reflection), the question of causation poses many problems.

As can be seen from the above discussion, a charge of malpractice in the legal profession, under certain circumstances could be difficult to prove. Notwithstanding these difficulties, however, legal malpractice is recognized by the courts.

Educational Malpractice

There has been no cause of action to date in the area of educational malpractice. The courts have been reluctant to apply traditional negligence claims in the public school setting. This reluctance is a reflection of several public policy issues -- one of which is whether to extend to a student the right to be protected from certain school actions.

The plaintiff alleging education malpractice must, at the very least, fulfill those requirements common to all negligence actions. The plaintiff must establish that the school system has a legal duty to act with care in providing academic instruction, and that this duty of care exists between the student and the school. In addition to establishing that the school has a duty to provide competent instruction, the plaintiff would have to present a standard of care that could be used by the courts to determine whether an educator has breached his duty. Finally, the plaintiff must show that he has

suffered a legally compensable injury of which there is a factual and a proximate causal relationship between defendant's breach and the injury suffered.

Similar to legal and medical malpractice, the principles of negligence, upon which an action in education may be grounded, must be proven to exist. There must exist a student-teacher relationship upon which a duty of care is required or no liability can be founded.

Teacher-student Relationship

For a professional duty of care to occur a relationship must exist. Difficulties arise out of the sources upon which this relation is imposed -- Is it based on a legal or social obligation? When does the relationship begin and where does it end? What is the purpose of the relationship? AND What are the expected outcomes of such a relationship. All of these issues have been answered in legal and medical malpractice litigation but none of them have been affirmatively answered in an educational setting where negligence is charged. The relationship between teacher and student could be established either through common law principles or statutory sources (Charter of Rights or provincial school legislation).

Duty of Care

A duty of care has to be legally recognized in a court of law and must conform to a standard of care for the protection of others

against unreasonable harm. A tort action may be founded in common-law principles and those statutes that govern school systems.

Within the framework of a common law duty, the theory of an undertaking -- the idea that an action voluntarily assumed creates a duty to non-negligently bring it to completion -- might be successfully argued (Prosser, 1971, pp. 343-348). One might also argue that the long recognized duty of care for the physical safety of students should apply by analogy to academic instruction. The strongest legal argument for recognition of an educator's duty to provide competent academic instruction may be based on analogies to other types of professional negligence. Recognition of a professional duty of care for educators, however, poses two immediate problems. First, it must be established that public school educators are indeed quasi-professionals, at least for the purpose of litigating allegations of negligent academic instruction (Foster, 1987). Second, assuming the court acknowledges educators as professionals, a plaintiff must show that an educator's functions are sufficiently analogous to other professional functions that his conduct may be reasonably analyzed in terms of established malpractice principles. As stated by Tracy (1980), "the primary justification is that the professional, by his occupation, holds himself out as possessing certain skills and knowledge and, as a result, people who utilize his services have a right to expect him to use that skill and knowledge with some minimum degree of competence" (p. 568).

Whether teachers are professional; and whether they can be held liable for malpractice even if they are not has been extensively debated by both Covert (1987) and Foster (1986, 1987). Covert feels that teachers are not professionals in the traditional sense. He focusses on the teachers' lack of autonomy regarding policy-making and the fact that teachers are salaried employees. Covert further states that teachers are under the control of lay people (trustees) who have the power to veto teacher judgments and to impose standards upon the teaching profession and the delivery of educational services. Foster counters by stating that although teachers lack autonomy regarding policy-making they do exert power over the implementation of those policies. Within the privacy of their own classrooms, teachers are constantly making professional judgments (i.e., diagnosis, prescription, presentation and evaluation). The perception of both legislators and the public will also determine the professional status of teachers. Teachers through their pro-d activities and their self-imposed code of ethics imply a degree of professionalism. The role of the British Columbia Teachers' Federation as a "professional" union wanting more control over the educational system, the demand by local teachers' associations to bargain for working conditions and the establishment of the College of Teachers are all indicators of the trend towards a "new" form of professionalism and the desire to be more self-governing.

Whether or not teachers are "true" professionals in the sense

that they are self-governing, hold special qualifications and exhibit special expertise, has no bearing on the question of civil liability. So long as teachers hold themselves out as possessing special skill and training (as they unquestionably do) they will face liability (either under the broad framework of malpractice if teachers are viewed as professionals, or more specifically as negligence if they are not viewed as professionals (Foster, 1987b) when third parties rely on such special skills and training to their detriment (cf. Hedley, Byrne v. Heller and Partners, 1964, AC 465).

In addition to common-law theories of duty, plaintiffs have argued for the recognition of a statutory duty. Tort actions may be based on constitutional ground or on statutory violations. The constitutional approach has not been successful in the United States nor does it look like it will likely be successful in Canada because of its global purpose. The constitution, regarding the establishment and maintenance of schools, was designed to benefit the public and society and was not seen as a means of protecting individual rights against injury of any kind. Regarding provincial statutes, arguments have been put forward regarding the fact that compulsory attendance rules compel a child to school (even if a parent has the alternatives of home schools or private institutions), and hence there should be a right-to-treatment for being involuntarily committed (Blackburn, 1978, p. 120). Others would argue that compulsory attendance laws are based on the duty of parents to educate the child and not for the benefit of

the child, but for the state (Funston, 1981, p. 777).

For example, in British Columbia, some people may regard government exams in grade 12 as "measures of minimum levels of proficiency". Blackburn (1978) would argue that a high school diploma is issued on the basis of satisfactory completion of these exams (pp. 127-128). Other sources of legal responsibility may include procedures for evaluation and remediation (Tracy, 1980, p. 570), teacher certification and evaluation requirements (Lynch, 1980, p. 52), graduation requirements (Blackburn, 1978, pp. 127-128), specified courses to be taught and specific program requirements (McCarthy, 1982, pp. 54-57). Many specialist groups -- Learning Assistants, Counsellors -- are limiting their memberships and demanding certain academic requirements of their members. These groups are asking school boards to refine their selection process to include such qualifications in their hiring practices. This may imply a higher standard of care for those specialist groups.

It should be stated again that most statutes are designed to protect the public at large. The statutes were not intended to establish a duty of care for individuals or groups of individuals. In order to prove educational malpractice, the plaintiff must prove the educational harm he suffered was the kind of harm the statute was intended to prevent (Funston, 1981, p. 776).

Once a duty of care has been established, it is necessary to ascertain the standard by which a teacher or educator can be judged.

Without such standard of care, the court cannot determine whether a teacher breached his duty or not. As can be seen from Chapter 2, several standards exist, namely a "reasonable person" standard of care and that of a "professional person".

Generally, the reasonable person standard is used in cases resulting in physical injury. With regard to instructional practices, the professional person standard will likely be applied. It is assumed that because teaching requires special training and knowledge which are different from the training and knowledge of the ordinary person, teachers must be held to a higher standard (Foster, 1987a). A charge of malpractice requires that the profession has formulated a minimum level of skill and knowledge common to its members in good standing. The professional is liable to a charge of malpractice when he fails to perform in accordance with that norm. Charging malpractice, thus assumes a professional standard of care.

The legal and medical professions have already established a standard of professional care that focusses on specific behaviours. In education, several sources for arriving at a professional standard have been suggested:

1) those statutes and regulations that are directed at procedural responsibilities -- i.e. placement, remediation, testing, reporting...
2) statutes identifying the duties and responsibilities of teachers (i.e. curriculum requirements, time allot-

ments, instruction, ...)

3) self imposed standards established by local school boards or teacher associations (i.e. code of ethics)

4) standardized testing to establish class profiles and indirectly make educators accountable for their behavior and their students' performance on these tests.

As yet, however, there is no firm standard of care which has been established through the court system. There does not exist a prevailing standard of care to which consensus could be arrived at among educators (Funston, 1981, pp. 779-782). Schools have "neglected" to articulate the role of education when it comes to what instruction should be given (we vacillate between a back-to-basics focus to one of addressing social concerns -- family life instruction, computer literacy, values clarification...); what learning should take place, and for what teachers are accountable for. Teachers are also reluctant to agree upon a clear standard of care when it comes to how a teacher should teach or, more importantly, on who should review the performance of teachers (Foster, 1985, pp. 220-221). To date, teacher associations have only published a code of ethics but not a code of conduct regarding instructional performance in the classroom.

As can be seen, it is no surprise that a legal standard of care for educational malpractice has not yet evolved which: describes professional skill and knowledge, diligence and professional judgment;

states requirements to keep abreast of current educational matters; provides an explanation of approved methods AND; considers locality, customs, and areas of specialization (McCoid, 1959, pp. 14-15).

Proximate Causes

If a professional standard of care could be established and agreed upon by educators, a violation of such standards alone would not presuppose negligence. A proximate and causal connection must occur between the breach of duty and has established the injury. Once the plaintiff has established a breach of duty, and that an injury has occurred, a causal relationship must exist. The plaintiff must satisfy the "but for" clause to pursue a negligence cause of action. The court has to decide whether the defendant had a duty to protect the plaintiff against the events which in fact took place. The courts then have to decide whether the defendant's conduct, given the significance and corresponding cause of the plaintiff's injury, warrants him being legally accountable (Funston, 1981, pp. 784-785).

In a suit charging negligent instruction, the plaintiff would have to prove the school district and its representatives failed to teach, therefore he failed to learn and/or that his failure to learn was a foreseeable risk given the poor classroom methods implemented. The evidence must be substantial to sustain proof of the causal relationship. Suggestions for demonstrating a causal relationship between a teacher's action and a student's performance include:

1. a class comparison that "but for" the teacher in question, one class performed significantly worse than another class where these classes were identical in all essential elements (Funston, 1981, pp. 788-789).
2. the doctrine of res ipsa loquitur which is based on the inference that the quality of the teacher's conduct falls significantly below the average teacher's performance in that community or specialty area and that this difference alone could explain why one class did significantly worse than another class (Patterson, 1980, pp. 797-798).
3. expert testimony examining the specific circumstances of the situation, the appropriateness of the activity for the specific group of students in question, the educational value of the activity and the adequacy of instruction given (Blackburn, 1978, pp. 126-127)

To succeed in an educational malpractice suit, a plaintiff would have to establish that he has suffered damage as a result of the defendant's conduct. This may be a herculean task when trying to connect supervision of instruction with learning.

In summary, the professional liability of physicians and lawyers rests primarily on common law principles established over the past 600 years. It is within the last century that a duty of care in medical malpractice has been defined, and even more recently that legal

malpractice has become a substantive area of law based on principles of negligence (prior to this, a breach of duty was seen as a breach of contract). It has only been in the past 10-15 years that the courts have been asked to intervene into the professional responsibilities of educators and to grant remedies for student's non-learning. The focus of chapter four will be to examine those cases, specifically Peter W. (1976), Donohue (1978) and Hoffman (1979) which tried to apply tort principles to the educational malpractice cause of action. The latter part of the chapter will attempt to provide a current scenario which might have allowed a successful cause of action for malpractice -- that of the Keegstra (1983) case in Alberta.

CHAPTER FOUR

Assessment of Educational Malpractice Jurisprudence

In the last three decades, increasing public dissatisfaction with the American educational system has stimulated a move to find redress in the courtroom (for a list of cases, see Bollinger, 1985). Frustrated parents who believe that schools should guarantee every student an adequate education and appropriate placement in the classroom have become increasingly aware of the possibility of suing to rectify these grievances. That education is one of the most significant functions of government (both in the United States and Canada) only reinforces the belief that the courts should be the final arbiter of education-related disputes.

In Canada, the provinces exercise exclusive jurisdiction over education by virtue of the Constitutional Act (1867). However, the Canadian Charter of Rights and Freedoms entrenched in the Constitutional Act of 1982 may erode the exclusive jurisdiction and thus limit provincial autonomy in educational matters. Since the Canadian Charter is the supreme law of Canada, any statute that is inconsistent with it is inoperative (Section 52(1). The Charter requires a balancing of individual and community rights leaving the door open for plaintiffs to challenge current provincially-mandated education practices. Such challenges might include equal access to particular educational opportunities, equal distribution of educational benefits (Marchand v. Simcoe County Board of Education,

(1986)), and equal opportunity to obtain an adequate education (Bales v. School District 23, (1984).

The law of torts has been applied to the educational system in the past but its focus has been limited. Court decisions (case law) have identified several areas where educational negligence and malpractice can be successfully pursued. These areas include playground safety, premises and playground supervision, supervision of school sponsored field trips, mishaps during physical education classes and the like (Nicholls, 1984). Some cases arise from classroom activities such as inadequate care and supervision in the science lab, but all cases have concerned only liability for physical injuries (Giles, 1988). As stated by Janisch (1980): "Concerns have been exclusively for broken bones and not broken minds, psyches and expectations" (p. 491). However, new theories of liability are being put forward: negligent diagnostic assessment and placement of handicapped students; failure to properly prepare students for competency tests; and causing injury, either physical or psychological, through negligent instruction. Litigation arguing these new tort theories has been largely confined to the United States with limited extension into Canada. Many American state courts have ruled on suits alleging educational malpractice. Although sixteen cases have been tried in the United States with three of them reaching the appeal level, none have been successful (Covert, 1988, p. 187). Further, the courts have done little to define the nature or scope of

educational malpractice claims thus providing little direction for future litigants. Key issues in these cases include: What is the harm suffered and how is the loss (i.e. damages) measured?; Are positive results in education guaranteed especially considering the interactive role of the learner; AND finally What duty of care should be imposed on educators? Overshadowing these issues are policy and economic concerns which the courts have largely deferred to educators and legislators.

This chapter traces the history of educational malpractice as it relates to "failure to educate", and focusses primarily on three leading American cases -- Peter W. v. San Francisco Unified School District (1976), Donohue v. Copiague Union Free School District (1978) and Hoffman v. Board of Education of the City of New York (1979). This chapter summarizes the case facts and the courts' decisions as well as examine the issues presented.

I anticipate that similar claims will come before Canadian courts; therefore I will discuss the extension of educational malpractice to Canada through an investigation of the James Keegstra and Eckville High School situation. Although the Keegstra case was initially decided under the Criminal Code (as a criminal prosecution for distribution and promotion of hate against a minority group), it is interesting to examine the Keegstra case hypothetically from a "tort" perspective (as a class action for malpractice).

Bellman v. San Francisco High School District

The first reported case in which a teacher was held liable for poor quality instruction was Bellman v. San Francisco High School District (1938). In Bellman, a high school sophomore was injured while executing a gymnastics stunt. The young plaintiff sustained a serious head injury. She alleged that the instructor should have known that not all students could perform the particular manoeuvre safely, and that her specific physical ability limited the type of gymnastics moves she could execute and finally, that the teacher's instruction had been negligent. The student won a jury verdict which was affirmed on appeal. The finding that the teacher's instruction had been negligent and that the student may not have been an appropriate candidate for instruction introduced the concept of educational malpractice. Although this was one of a few cases where educational malpractice was successfully litigated prior to the 1980s, it expanded the concept of negligent instruction.

Jacobsen v. Columbia University

In the 1950s and 1960s, school litigation dealt predominantly with the problems of resource allocation and of access (Brown v. Board of Education, (1954). There was, however, an interesting case in which a student sued a university for "failure to impart wisdom" (Jacobsen v. Columbia University, (1959)). The student alleged that the university had made numerous unfulfilled promises and hence should

be found liable for misrepresentation. Although this claim was rejected, the case served as a warning against making promises which could not be guaranteed. In Jacobsen, the courts did not rule out the possibility of future claims for misleading statements or false promises regarding educational outcomes. To be successful, the claim will be have to be specifically framed and focussed.

Peter W. v. San Francisco Unified School District

In the 1970s, three major cases concerned the courts making the schools responsible for provision of educational services. The first case, Peter W. v. the San Francisco Unified School District (1976), raised novel legal questions about professional responsibility for the consequences of the educational process. What legal responsibilities do schools owe to students? Are the courts the proper forum to assess negligence in meeting these obligations? Where malpractice is proven, is the tort remedy of monetary damages the appropriate award? (Abel, 1974)

Peter W. (1976) is considered to be the first major case dealing with the issue of educational malpractice. The eighteen year old plaintiff graduated from high school after the usual twelve year period. He received a diploma despite reading below fifth grade level and lacking the ability to write. School records indicated that he was of average intelligence, had never been involved in any serious disciplinary action, maintained an average attendance record through

his school career and had received average grades. His parents testified that they had made numerous attempts to secure accurate information about Peter's educational progress. Each time, they received assurances that their son was performing at or near grade level and that no remediation was necessary.

Following graduation, the plaintiff was independently examined by two reading specialists who concluded that he was functionally illiterate. This prompted the parents to file suit against the school and the school district. The complaint against the San Francisco Unified School District alleged misrepresentation, breach of constitutional and statutory duties and negligence (for a fuller discussion of these theories see Saretsky, 1978). Concerning negligence, the plaintiff alleged that the school district "negligently and carelessly...

1. failed to apprehend his reading ability;

2. assigned him to classes in which he could not read the 'books and other materials';

3. allowed him to 'pass and advance from course or grade level' with knowledge that he had not achieved either its completion or the skill necessary for him to succeed or benefit from subsequent courses;

4. 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, effective the date the plaintiff graduated from high school."

(131 Cal Rptr, 1976, p. 856)

The allegations also listed specific acts explicating the district's failure to meet its duty and stated other facts necessary to satisfy the required elements of negligence, including proximate cause, injury and damages.

In essence, the plaintiff contended that the school system negligently and carelessly failed to take reasonable care in the discharge of its common law and statutory duties to provide adequate instruction, guidance, counselling and supervision AND to exercise that degree of professional skill required of an ordinary prudent educator. In seeking general damages in excess of $500,000.00, the plaintiff alleged loss of future earning power, diminished employment opportunities and that he had suffered mental distress, pain and suffering. Peter W. (1976) also requested special damages for the costs of compensatory tutoring.

At trial, the court focussed primarily on whether the facts presented were sufficient to show that the defendant owed the plaintiff a legal duty of care. The plaintiff argued that the special student-teacher relationship, the existence of statutory law regarding the function of instruction and requiring attendance up to a specific age, was sufficient to show the requisite duty of care. The court, however, responded by saying that:

> no reasonable observer would be heard to say that these facts did not impose upon defendants a duty of care within any common meaning of the term: given the commanding importance of public education in society,

> we state a truism in remarking that the public authorities who are duty-bound to educate are also duty-bound to do it with care. But the truism does not answer the present inquiry, in which a duty of care is not a term of common parlance; it is instead a legalistic concept of duty which will sustain liability for negligence in its breach, and it must be analyzed in that light. (131 Cal Rptr, 1976, p. 861)

The court (at trial and on appeal) refused to recognize the existence of an actionable legal duty by the defendant, basing its finding on public policy considerations. The two predominant policy factors favouring a denial of liability were:

1. administrative considerations (i.e., difficulty of proof necessary to show readily acceptable standards of care for classroom methodology) AND

2. socio-economic considerations (i.e., acceptance of a tort claim would create too great a public burden in time and money)

(131 Cal Rptr, 1976, p. 861)

The plaintiff's argument based on a breach of the statutory duty of the schools to keep parents informed about student progress was also dismissed. The court held that the code sections relied upon by the plaintiff were designed to provide "optimum educational results," not to protect against risks or a particular type of injury (131 Cal Rptr, 1976, p. 862).

The plaintiff's last argument resting on a theory of intentional or negligent misrepresentation was also dismissed. The court stated that the complaint had been improperly pleaded, by failing to allege

the requisite element of reliance on the asserted misrepresentation (131 Cal Rptr, 1976, p. 863). The plaintiff failed to amend the complaint and hence, the case was dismissed. The educational malpractice issue was thus temporarily settled. The case failed in part because the duty of the school district to educate had not been specified in a precise manner. The trial judge ruled in favour of the defendant because he felt no legal duty to educate had been established. The court in Peter W. (1976) did not deny its capacity to recognize educational malpractice as a tort. Instead, it noted that when courts have previously sanctioned new areas of tort liability, the wrongs and injuries have been clearly accessible. It concluded that "no court could separate injury caused by a negligent school district from the physical, neurological, emotional, cultural and environmental factors that affect how and what students learn" (131 Cal Rptr, 1976, p. 861).

Donohue v. Copiague Union Free School District

In the second reported case, Donohue v. Copiague Union Free School District (1978) the plaintiff, a high school graduate, received failing grades in several subjects. A New York education statute required the Board of Education to examine carefully such students who were not already in special education classes. Failure was defined as failing two or more classes within one academic year. Underachievers were also subject to the same policy. The school authorities were

aware that Donohue met the evaluative criteria and yet did nothing to diagnose his problems. After graduation, Donohue, realizing he lacked basic reading and writing skills, sought out the assistance of a private tutor. A lawsuit was initiated relying heavily on the Peter W. case. More specifically, the plaintiff alleged that the defendant school district, its officers and employees had breached their duty by failing to:

1. evaluate his mental ability and capacity to comprehend what was being taught;
2. be as reasonable and prudent as they should have been under the circumstances;
3. interview, discuss, evaluate and/or test to ascertain his ability to comprehend and understand subject material;
4. provide facilities, employees and support personnel trained to ascertain his intellectual capability;
5. hire personnel skilled and experienced in such matters;
6. utilize appropriate teaching techniques and strategies;
7. provide adequate supervision;
8. keep his parents informed of the instruction difficulty and need for psychiatric assessment; AND
9. adopt the accepted professional standards and methods to evaluate and cope with his problems which constituted "educational malpractice" (407 N.Y.S. 2d, 1978, p. 874)

The plaintiff further argued that the school district had a statutory duty to "provide for the maintenance and support of free

common schools, wherein all the children of the state may be educated" and that although public schools were in operation, the defendant failed to educate him (407 N.Y.S. 2d, 1978, p. 877). In the final analysis the court dismissed this complaint for failure to state a proper cause of action. First, the court found that no legal duty had been improperly performed resulting in the plaintiff's alleged injury. Second, the court said that the education laws were designed to "confer the benefits of free education on the public and that those benefits could not be enacted to protect against any 'injury of ignorance', for every individual is born lacking knowledge, education and experience" (407 N.Y.S. 2d, 1978, p. 880).

Although the original court decision was upheld on appeal, a dissenting judge recognized the concept of educational malpractice, closely related to malpractice doctrines recognized in regard to other professions. He stated:

> It may very well be that even within the structures of a traditional negligence or malpractice action, a complaint sounding in educational malpractice may be formally pleaded. Thus, the imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students. If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators" (407 N.Y.S. 2d, 1979, p. 441).

Hoffman v. Board of Education

The third and probably the most significant case concerning educational negligence is Hoffman v. Board of Education (1979). An action was brought against the City Board of Education for damages resulting from the placement of the plaintiff, a person of normal intelligence, in a special class for mentally handicapped children, and keeping him in such a class for eleven years. The plaintiff's argument alleged the following:

1. misdiagnosis
2. misplacement AND
3. not following through with recommendations (misfeasance).

On entering kindergarten Hoffman took a Stanford-Binet Intelligence Test administered by a district psychologist. He scored 74, one point below the cut-off score for placement in a regular classroom and was assigned instead to a "special needs" class. The psychologist recommended the above placement and further requested that his I.Q. be reevaluated within two years and that he receive speech therapy. Unfortunately, Hoffman remained in the special needs class for eleven years and was never retested during that time. At the age of nineteen Hoffman was given another I.Q. test and was scored to be of average intelligence. On further examination of the initial test scores (as compared to the subsequent scores) there was some indication that his low score at age five might have been due to his

severe speech disability.

The plaintiff sued the defendant school board arguing that the failure of the defendant to follow the recommendation of the district psychologist concerning reevaluation constituted a negligent act. The defendant claimed that despite the delay in retesting and Hoffman's placement in a special needs class, he had received a sound education.

The Hoffman (1979) civil jury awarded him $750,000.00 in damages for the malpractice of school officials. An intermediate New York appeals court upheld the jury verdict on liability but reduced the damages award to $500,000.00 to compensate him for his diminished intellectual development and psychological injury. The defendant filed a further appeal and the Court of Appeal reversed the jury verdict and dismissed the case (424 N.Y.S. 2d, 1979, p. 376).

In the initial trial, the judge ruled in favour of the plaintiff stating that a board of education was responsible under the rule of respondeat superior (i.e., the master's responsibility for the wrongful acts of its servants) for the negligence of its teaching professionals. Thus, it had a duty to follow the recommendation of the psychologist for retesting within two years. The court supported the plaintiff's recovery against the defendant school district by emphatically stating:

> Therefore, not only reason and justice, but the law as well, cry out for an affirmance of plaintiff's right to recovery. Any other result would be a reproach to justice. In the words of the ancient Romans: 'Fiat

> justitia, ruat collum' (Let justice be done, though the heavens fall)." (410 N.Y.S. 2d, 1978, p. 101)

The lower court recognized a duty created by the undertaking of specific acts directed toward the plaintiff individually.

The appellate court supported the previous court decision and stated:

> That the defendant's undertaking to perform a non-discretionary function -- that is, to retest plaintiff to determine the propriety of his retarded classification -- created a duty toward plaintiff that was breached by the failure to retest plaintiff within two years and for a number of years thereafter. (410 N.Y.S. 2d, 109, p. 1978)

The New York Court of Appeal reversed and dismissed the action in a 4-3 split decision. As one judge said:

> the court system is not the proper forum to test the 'validity' of educational decisions or to second-guess such decisions
>
> AND
>
> that the judiciary should not interfere in educational policy determinations except when extreme violations of public policy occur. (424 N.Y.S. 2d, 1979, p. 380)

The Court of Appeal held that Hoffman could not recover damages against the school district for educational malpractice because public policy considerations precluded recovery for an alleged failure to properly evaluate a student's intellectual capacity. The Court of

Appeal did not address the merits of the case based on malpractice principles but rather concluded that the plaintiff was unable to state a legally recognized cause of action.

The Peter W., Donohue and Hoffman cases were brought before American courts between 1976 and 1979. Since that time several other cases have been brought before the courts. In each instance, these cases referenced the arguments presented in the aforementioned three cases with the courts adopting the previous policy objections to the recognition of a claim for educational malpractice.

Snow v. State of New York

A recent New York Court of Appeals decision, Snow v. State of New York (1983), may, however, signal the breakdown of this public policy barrier (Loscalzo, 1985). The Appeals' court affirmed the trial decision to award the plaintiff 1.5 million dollars in damages resulting from the "retardation and corruption of the normal learning process caused by inadequate medical treatment and testing and the failure to educate or train him" (98 A.D. 2d, 1983, p. 443).

Snow, a deaf student, was mistakenly institutionalized in a State school for mentally handicapped students for ten years. At age three, he completed an I.Q. test designed for those with hearing ability. Based on the results of the tests, Snow was classified as severely retarded. After institutionalization and the discovery of his deafness, the school failed to retest him despite positive reports

from his teachers. Snow's lawyers brought a claim against the state for negligence and medical malpractice. The defendant argued that the claim was one for educational malpractice and was therefore not cognizable under New York law. The court held that the failure to reassess the test results after discovering the boy's deafness "constituted a discernable act of medical malpractice rather than a mere error in judgment vis-a-vis claimant's educational process" (98 A.D. 2d, 1983, p. 444). Although this case was decided on a theory of medical malpractice, Snow puts educators on notice that if a misdiagnosed or misclassified plaintiff can properly frame a cause of action then recovery will not necessarily be precluded by public policy considerations.

Concerns for the 1980s

In general, educational malpractice cases reflect a general frustration of parents and students regarding the quality of education received by students. The plaintiffs seek satisfaction by bringing their cases before the courts. Judges are being asked to decide if damages for instructional injuries could be granted. More recently, the courts have taken a different perspective and have examined the issue should damages for instructional injuries be granted? The courts have based their decisions on the belief that the social need for educational services outweighs the interest of any particular plaintiff or class of plaintiffs in recovering for educational

benefits denied through teacher or school district negligence. The costs of awarding damages to individuals would impose too great a burden on the current educational system. Of the court decisions to date, none have denied the possibility of imposing liability on educators for negligent acts. Many of the legal arguments have been formulated (based on general principles of tort and contract law) and public awareness is high. As long as the accountability movement continues, there will be pressure on the courts or some other quasi-judicial review board (i.e. School Boards, Teacher Competency Review Panels) to address the issue of educational malpractice.

In Canada, individuals are more reluctant to use the courts as a means of reform. Our judicial system is somewhat dissimilar to that found in the United States (Manley-Casimir, 1986). The U.S. courts have traditionally been seen as the appropriate forum for enforcing rights--

> No state shall ... deprive any person of life, liberty, or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws" (U.S. Constitution as reprinted in Black's Law Dictionary, 5th ed., 1979, p. 1500)

The Canadian Charter, however, is seen as a positive confirmation of rights rather than one of negative restraint. Sections 7 and 15(1) state:

> Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. (Section 7)
>
> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (Section 15(1))

With the recent constitutional entrenchment of the Charter, the United States experience may become more relevant for us. Although Canadians tend to be more reserved and are more likely to search out other avenues of recourse, the Charter may assist those individuals and the courts when looking at educational rights (Cruickshank, 1986).

As mentioned before, the Canadian courts have not been a popular forum for resolution of educational disputes. In the 1980s, "rights" issues have largely involved minority language rights, denominational rights and the rights of mentally and physically handicapped persons (Poirier, 1988). As we proceed into the 1990s, other litigants may ask the courts to intervene in the educational forum. As more educational issues (raised as Charter rights) are addressed by the courts, the more likely it is that the issue of educational malpractice will be addressed.

Regina v. Keegstra - From a Tort Perspective

Given the current lack of Canadian authority on educational malpractice, it is my intent to examine, in retrospect, the facts of a

particular case which arose in a school in Eckville, Alberta. The case of Regina v. Keegstra (1988) was a criminal prosecution for the distribution of hate literature and the promotion of hatred against a class of persons. If this case had proceeded as a tort action, how could the case have been decided? What legal theory -- statute or common law -- could have been utilized? What kinds of damages could have been pursued? If this case had been successfully litigated (on behalf of the parents and students of Eckville), would the judgment affect lesser conduct or less blatant conduct? All of these questions will be addressed, in some sense hypothetically, in the next section.

The Keegstra case initially began in 1981, when the Superintendent of Schools in Central Alberta was asked to investigate a complaint concerning the Eckville High School. The situation involved a teacher and the material he was presenting to his Social Studies classes. Much of what he taught departed markedly from the prescribed curriculum. In particular, James Keegstra taught his students that there was a Jewish conspiracy to take over the world and that the Jews were to blame for communism and capitalism, and that the Holocaust was a hoax. Keegstra went further with his anti-semitic views to include an anti-Catholic, anti-Masonic, white supremacist outlook.

Much of what Keegstra taught did not appear in the Alberta Social Studies curriculum and Keegstra did not use accepted sources for his classes. Keegstra told his students that the conventional history

books were filled with lies so he preferred to use his "own sources." Students were required to listen to his lectures and copy down notes off the blackboard. Test questions and assignment topics for the course were based on selected materials, his lectures and blackboard notes. After several complaints from parents of students enrolled in his classes, Superintendent David spoke to the principal and to Keegstra. A directive was issued to Keegstra demanding that he change his course and bring it within curriculum guidelines. David noted that Keegstra had a biased view of history, that his students believed him, and that he was indoctrinating the students with his viewpoint. He finished his letter by stating:

> I am not giving you this directive to muzzle your academic freedom or to limit your intellectual integrity, but simply to insist that all sides of a historical question must be presented in as unbiased a way as possible, so that students can judge contradictory points for themselves. Furthermore the "Jewish Conspiracy" theory must not be taught as if it were fact instead of another view of history. (R.K. David to J. Keegstra, December 1981)

Keegstra refused to follow this directive and a second letter was sent threatening the termination of his contract. Keegstra was advised of the proposed hearing and invited to attend. His threatened dismissal was premised on three charges:

1. failing to comply with the Alberta Social Studies Curriculum
2. teaching as fact, discriminatory theories

3. failure to change teaching methods and content as requested
(R.K. David to J. Keegstra, January 1982)

Keegstra appeared before the board, accompanied by an Alberta Teachers' Association (A.T.A.) representative. Keegstra was not dismissed at this time. Another letter of warning was issued demanding that Keegstra comply with the superintendent's directives or be dismissed. Complaints continued throughout 1982 and several letters and meetings followed. On December 7, 1982, Keegstra, after another Board hearing, was dismissed. Keegstra, represented, at no charge, by an A.T.A. in-house lawyer, appealed the decision. The hearing was held before the Alberta Court of Queen's Bench. Justice McFayden upheld the dismissal stating:

> there was failure on the part of the Appellant [Keegstra] to treat racial groups in a respectful manner and a failure by him to use the social inquiry process in this portion of his Social Studies program, both aspects being basic to the Social Studies curriculum. (Appeal to the Board of Reference, 1983, p. 20)

Approximately six months later, the Alberta Teachers' Association suspended Keegstra's teaching certificate. At this point, sparked by the outrage expressed across the country, the matter changed from a purely civil issue to a criminal one. Following a trial lasting several weeks, Keegstra was convicted for promoting hatred. Keegstra appealed the decision arguing that section 281.2 of the Criminal Code

contravened the Canadian Charter of Rights and Freedoms. On June 6, 1988, the Alberta Court of Appeal overturned his conviction. The Court of Appeal's concern was not the merits of the case but rather, the constitutionality of the law under which he was convicted.

The significance of the Keegstra affair should not die with the conclusion of this trial. What is important about the Keegstra affair is that those in the community who recognized the danger Keegstra posed, were determined to do something about it. Outraged parents and a handful of officials, were together able to remove Keegstra from the classroom. The question now to be considered is whether the courts would have found against Keegstra if his behavior was outside the Criminal Code? Would the parents of Keegstra's students been successful (re. the removal of Keegstra from the classroom) if they had proceeded with a civil suit claiming educational malpractice against the teacher, the school and the school board? How would such a case be developed incorporating the principles of negligence? AND FINALLY How can such an incident be prevented from happening again?

The pleaded particulars of a negligence action against Keegstra might have included:

1. failure to provide or maintain reasonably adequate academic instruction;
2. failure by school officials to provide or maintain reasonably adequate instructional supervision;
3. failure to provide reasonably adequate, qualified and competent staff and to ensure their continued adequacy and competency;

4. failure to assign approved academic materials;
5. failure to follow prescribed curriculum;
6. failure to adopt reasonably adequate and appropriate methods of instruction;
7. deliberate and willful manipulation of historical facts;
8. deliberate and willful doctrination of a "captive" audience.

Looking at the facts of the case, Keegstra was a qualified industrial education teacher who had only taken two university courses in History. Why was he teaching Social Studies? In Alberta, as in many provinces, a teacher's certificate permits the holder to teach any subject or grade according to the needs of the employer school district. Is this acceptable? Most teachers consider themselves and their colleagues to be professionals and to hold a minimum level of expertise in specific subject areas or grade levels. Is it possible to transfer this knowledge from one discipline to another without affecting the "quality of instruction"?

Keegstra's teachings were not confined to the classroom. Many of Keegstra's colleagues knew of his biases and were aware of what he taught in his classes. Keegstra's principal had first hand knowledge of the content of Keegstra's lessons because his son had been a Keegstra student in 1978. Many of Keegstra's colleagues discounted his teachings implying <u>how</u> he taught was for them far more important than <u>what</u> he taught. Complaints, however, from parents regarding the

content of Keegstra's course had been filed as early as 1975 and yet nothing was officially done until 1981. Up until that time no individual took responsibility to act on nor follow-up the complaints given. Keegstra was not formally observed during this time nor did he receive any teacher evaluation reports -- a duty that is generally imposed on principals when a teacher's competence is questioned. Should the teachers and the principal have been made culpable for knowing of Keegstra's questionable conduct and not taking some immediate action to stop it?

With regard to providing adequate academic instruction, Keegstra's alleged focus was searching for "truth." He preferred to teach about "truth" because he wanted to give his students inquiring minds. However, when Keegstra taught his students about truth he taught them that there were only two ways of looking at it: a right way based on Christian dogma and a wrong way based on anti-Christian ideology. Keegstra simplified the complexity of the world and forced the students to look at the present world as well as past historical events from a very narrow perspective. This approach played an essential role in his teachings on the international Jewish conspiracy -- a predominant theme in most of his courses.

Keegstra's approach contradicted the Alberta Social Studies curriculum which was designed to teach students that the human condition is complex; that choices involving costs and benefits must usually be made when social directions are determined and that

historical events usually have multiple causes.

Keegstra failed to teach the prescribed Social Studies programme -- he did not attempt to meet the aims and objectives of the curriculum, he did not cover all of the topics he was supposed to, he did not try to foster the skills of inquiry that he said he was intending to develop and he did not rely on any of the recommended texts for his information.

Keegstra's teaching style could be described as a form of indoctrination. Even though Keegstra urged his students to seek other sources in their research and to openly challenge his ideas in class, the test answers and essays had to come straight from his teachings. The students' notebooks chronicled Keegstra's fixation with the Jews. Some students believed whole-heartedly what Keegstra taught them, while others claimed they never believed him, but gave him what he wanted in order to graduate and perhaps go on to university. The students in Keegstra's classes did not cover the material they were expected to learn and which other Alberta students were exposed to. Could the parents have sued for disparate treatment under the requirements of the Social Studies curriculum? The answer is far from clear, but certainly the possibility cannot be dismissed out of hand.

Finally, in view of the relationship between educators and students and its inherent inequality of status, students are often justified in relying on educators' statements. Keegstra, as an authority figure, willfully used this power to teach his beliefs to

the students. He took advantage of the fact that students generally must have "some degree of respect for and confidence in [a] teacher in order to be receptive to the instruction [that] teacher offers" (Foster, 1987a, p. 177). Many students lack the maturity, knowledge, expertise or authority to question the veracity or reasonableness of statements made to them, let alone to reach independent and informed decisions on complex issues. In the Keegstra case, the detrimental reliance on the "facts" presented in class could constitute negligent misrepresentation.

Many parents in Eckville felt that Keegstra's students were not only misled, but cheated of their rightful education. Given Keegstra's bizarre conduct in the classroom and the absence of district policy requiring satisfactory supervision of classroom instruction, it seems reasonable to assume a legal cause for educational malpractice could have been established against the school board as well as against Keegstra.

General Comments

As in legal and medical malpractice cases, negligence must be proven to justify a claim of educational malpractice. First and foremost, an educator-student relationship which establishes a duty of care must be present before any liability may be imposed. Attempts to establish a duty arising from an educator-student relationship have been made by analogy to medical and legal malpractice. Constitutional, statutory and regulatory bases have also been

suggested. Under common law principles, the plaintiff could argue that when an individual or public entity undertakes to perform an act, even one voluntarily or gratuitously assumed, that person or entity is under a legal duty to exercise reasonable care and not perform the act negligently. The courts have long recognized tort liability where physical injury has resulted from failure to exercise reasonable care in instruction. A physical injury is no more real or foreseeable than intellectual/mental harm. The school's duty of care arises from the special relationship between the student and the educator; a relationship reflecting both trust and unequal power (as teachers exercise a degree of power over the intellectual development and well-being of the student).

Schooling is compulsory; this imposition presupposes the existence of some necessary and meaningful educational experience. Curriculum requirements under the School Act and a Teachers' Professional Code of Conduct (both established provincially) may be used to create or define a standard of care to be imposed on educators. This would imply that teachers have a duty to adhere to curriculum requirements and to behave in accordance with those standards set out by Teacher Associations.

Negligence on the part of the educator may be proved by showing:

1. a lack of proper certification or qualifications;
2. a failure to comply with legislative norms governing matters such as methods of instruction, appropriate instructional materials to be used, and the time

devoted to the teaching of particular subjects; and
3. teacher assessment of student skills and their progress within specific programmes.

Evidence may be introduced to show that the educator's performance fell below a minimum competency standard. Such evidence might include peer and administrative evaluations; testimony by students (past and present) and parents; student achievement scores; records of specific behaviors adversely influencing student learning; and evidence of the teacher's attitude toward the curriculum and the learning process.

The plaintiff must therefore establish the fact of a duty of care, its breach, and a consequent injury linked to the breach. In the Keegstra case, what the students thought to be true was based on Keegstra's classroom teachings. The weeks of court testimony by Keegstra's students showed that a number of them were either confused by their teacher's instruction, or had incorporated his views into their own beliefs about the world; beliefs that might ultimately promote hatred towards a class of persons. The outcomes of Keegstra's teachings were well documented during the trial.

If the law recognized a legal cause of action for educational malpractice (i.e., setting aside the public policy arguments), the next issue to be determined is the question of damages. Would they be monetary and if so how could the plaintiff(s) be reimbursed? Would it be satisfactory to remove the defendant from the classroom and hence deny him the opportunity to further force his views on students?

Would the parents of those already affected by Keegstra's teachings be satisfied with this outcome? An alternative to monetary damages and to the removal of the defendant could be the remedy of "reteaching".

Although it may be academic to discuss the merits of a suit claiming educational malpractice based on the facts of the Keegstra case, it does serve as a warning to educators. The mere threat of a malpractice claim may act as a catalyst for change. In the Keegstra case, the impact of the legal proceedings and the subsequent publicity, caused several changes to be made in the Alberta education system. For example, in 1985, the Alberta Teachers' Association replaced its Code of Ethics and Standards of Professional Conduct with a Code of Professional Conduct, the first item of which states:

> The teacher teaches in a manner that respects the dignity and rights of all persons without prejudice as to the race, religious beliefs, color, sex, physical characteristics, age, ancestry or place of origin.
> (A.T.A. handbook, 1985, p. 30)

In addition, the Ministry of Education and the Alberta Teachers' Association formed the Council on Alberta Teaching Standards (C.O.A.T.S.) which was given the authority to advise and recommend to the Minister of Education on an array of concerns such as teacher certification, education requirements, evaluation, practice reviews and professional development (Ministerial Order No. 78/85, 1985). This could lead to amendments to the Alberta Teaching Profession Act holding those teachers who wilfully ignore a fellow teacher's

unprofessional classroom conduct liable for damages. Discussions regarding curriculum content, presentation of controversial matters and indoctrination are regularly occurring in teacher training and professional development activities.

The significance of the Keegstra affair does not lie solely in his trial or in the possibility of an educational malpractice claim. What is perhaps more important is the power that a group of concerned individuals utilizing the courts can have in forcing changes and increasing accountability on the educational system. Chapter five will be primarily devoted to the types of defenses that may be raised, the implications of possible educational malpractice claims, and finally some concluding remarks.

CHAPTER FIVE

Toward a New Cause of Action

No plaintiff to date has succeeded in gaining recognition of a cause of action for educational malpractice. The fact that previous decisions dealing with educational malpractice have concerned mainly policy issues rather than law only further dims the optimism of potential litigants. Notwithstanding the prevailing situation, it is open to Canadian courts to expand the scope of the tort of negligence to encompass educational malpractice. The attitude of the public towards educational institutions and their staffs has altered. The implicit confidence which once was placed in the integrity, efficacy and quality of the system has deteriorated (Foster, 1987c, p. 4). The demand for greater accountability underlies the critical scrutiny the educational system has been subjected to by frustrated parents and students who feel that it has not produced the anticipated results. This frustration has led some dissatisfied individuals to seek recourse through the courts. Several commentators have argued that the law of negligence should be extended to impose liability on educators and educational institution for non-physical harm resulting from inadequate, incompetent or negligent instruction (in part or in whole). The arguments for and the legal means whereby liability could be imposed is the subject of this final chapter.

Arguments for A "New Cause of Action"

The strongest legal argument for recognition of an educator's legal duty to provide competent academic instruction is based on analogies to certain types of professional negligence -- notably legal, medical and psychiatric malpractice (Janisch, 1975). As Janisch has queried:

> Why in a society which holds engineers liable for badly built bridges, surgeons liable who do not measure up to the standard of reasonable competence and yes, even lawyers liable when they forget limitation periods, should we not hold the ... teacher and his employer ... liable, if he fails, in his particular chosen profession, to live up to a standard of reasonable competence (Janisch, 1975, p. 8)

Although much debate has occurred about whether educators are "true professionals" or "aspiring semi-professionals," a student seeking to substantiate a claim of educational malpractice may be wise to point out that educators do classify themselves as professionals (Funston, 1981, pp. 774-775). Many educators characterize themselves as professionals and hence the argument for a common law duty of non-negligent academic instruction might receive judicial support as it has, say, for insurance agents or appraisers.

A second line of argument favouring a common law duty to educate flows from a school's duty to ensure the physical safety of its students while they are at school. A shift in emphasis from one of educational malpractice to educational negligence, may allow reference

to a larger body of law under which teachers have been held responsible for physical harm resulting from negligence (Covert, 1988). Covert states: "If teachers can be held responsible for negligence causing physical harm, perhaps they can be held liable in negligence situations causing non-physical harm" (Covert, 1988, p. 187). The plaintiff alleging educational negligence would have to meet formal pleading requirements common to all negligence actions. The applicable standard of care would be that of a "reasonable teacher or educator." To hold an educator responsible for academic instruction implies that this standard of care can be defined. The basic distinction between standards of care applicable to physical supervision and academic instruction may weaken an attempt to analogize the two. Regardless of the differences in the standard of care expected, it is imperative that the plaintiff prove that:

1. defendant owed a duty to the plaintiff to act in accordance with <u>some</u> standard of care;
2. the defendant failed to meet the appropriate standard of care;
3. a legally compensable injury was suffered by the plaintiff; AND
4. there was a proximate causal relationship between the defendant's breach and the plaintiff's injury.

(Prosser, 1971, p. 143)

All four criteria must be met before liability and any damages can be determined. To justify the extension of a negligence claim for

incompetent instruction, the plaintiff would also have to prove the foreseeability of harm received.

Advocates for an educational malpractice cause of action have argued that statutory educational requirements create a duty of care regarding academic instruction. A statutory duty exists only if the underlying purpose of the statute is the protection of individuals from injury of a particular type (Prosser, 1971, pp. 190-197). Although a person might argue that compulsory attendance assumes that an adequate education will be provided, the statute was primarily designed for the benefit of the state, not the individual. Hence, the plaintiff would have no claim of action. A statutory duty concerning curriculum and academic requirements, however, may focus more on individual rights and would likely support liability for negligent instruction. Again, the plaintiff must be careful in the wording of his arguments relying heavily on the actual intent or purpose of the statute in question.

After a student alleging educational malpractice pleads duty, breach, injury and causation within the framework of established tort principles, he must turn his attention toward the various policy factors that affect the recognition of this novel cause of action not only in theory but also in practice (Tracy, 1985, p. 180). In analyzing those cases brought forward claiming educational malpractice, the courts have been greatly influenced by practical problems that lie more in the realm of pubic policy than legal theory.

Arguments Against A "New Cause of Action"

There are two principal policy objections to a recognition of a cause of action for educational malpractice. The first concern is the potential impact such recognition would have on the courts; in particular, the fear that excessive litigation would unduly burden the courts and that fraudulent and frivolous claims would be pursued. Compounding this anticipated problem is the fact that teachers arguably form the largest group of professionals and are more directly and continuously in contact with their "clients" than any other group of professionals. Couple this with compulsory education laws and a public funded school system which forces many individuals to accept the level of services given, creates a significant number of potential plaintiffs. The judiciary concern is the courts' reluctance to interfere in educational policy-making. It has been stated that recognition of a cause of action for educational malpractice would require the courts to review both broad educational policies and to make judgments about the day to day implementation of those policies. Such litigation could unduly strain scarce court resources and usurp the authority of elected and appointed school officials. Furthermore, most judges possess little, if any, expertise in the complex educational issues that are and would be involved in malpractice suits; they are untrained in the substantive issues of pedagogical policy and lack adequate information gathering and deliberative processes to make an informed evaluation of them. As stated in Donohue:

> The courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods. [It would be unfair] to call upon the courts to decide the plaintiff should have been taught one subject instead of another, or whether one teaching method was more appropriate than another, or whether certain tests should have been administered or test results interpreted in one way rather than another, and so on, ad infinitum. It simply is not within the judicial function to evaluate conflicting theories of how best to educate. (407 N.Y.S. 2d, 1978, p. 874)

In addition to a fear of excessive litigation and interference of the judiciary in educational policy-making, educational malpractice decisions to date have reflected the difficulties in formulating standards for teaching and learning. As stated in Peter W.:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standard 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. (131 Cal Rptr, 1976, pp. 860-861)

This absence of acceptable standards of care, and clear delineation of cause or injury has not only limited litigation but has facilitated wide discretion in the courts whether to allow a particular claim (Foster, 1985, pp. 190-192).

The second set of objections to recognizing an educational malpractice claim are external to the judiciary. The judicial process is slow, costly, inefficient and at times prone to misconceive the public good. Interference by the courts could have a detrimental effect on the educational system.

The courts have noted alternative procedures for correcting, reforming or deterring incompetent instruction. These procedures include political action, public hearings, certification procedures imposing minimum qualifications, review boards, grievance and disciplinary procedures, supervisory control over teachers and school officials, and a school board's power to terminate incompetent teachers. Hence, the courts are somewhat reluctant to supercede those forms of recourse to rectify dissatisfaction. Furthermore, no educational malpractice plaintiff has alleged, let alone proven, that these various alternatives are inadequate and that the courts should intervene. The legislative policy underlying the above procedures does not pass unnoticed by the judiciary: these internal quality control mechanisms are perceived to be more effective than judge-made, somewhat ad hoc solutions in individual cases which nonetheless have system-wide ramifications.

The potential financial costs involved in recognizing a cause of action for educational malpractice is another policy issue arguing for judicial conservatism. Substantial damage awards could have a deleterious effect on finite and shrinking public school budgets.

School boards might have to divert funds from their educational budgets to cover expenses associated with educational malpractice lawsuits. Funding for educational services would be reduced; the successful plaintiff would benefit at the expense of the rest of the student population.

The social utility of education may also undermine an individual's right to sue for educational malpractice. The benefits of an education to society as a whole cannot be put at risk for the benefit of a grieving individual. As Fleming (1983) states: "Exceptionally, the social utility of an activity may be valued so highly as to warrant the complete negation of any duty of care" (p. 10). There is little doubt about the great importance to society of the educational system and the role played by educators. The right to an education does not imply guaranteed outcomes. This would be a risky venture given the nature of the learning process. Hence, the courts (particularly in the United States) have provided some form of immunity to educators against malpractice claims. All the courts have asked is that each member of society receive an education for a specified period of time, have equal access to an educational institution during that period and the opportunity to pursue higher education; the courts have said little about the quality of education that should be provided.

Implications

If the above mentioned policy issues are overcome and a cause of action for educational malpractice is recognized, the implications for future educational policy and practice are unclear. It is possible that malpractice litigation could have a positive "threat" effect. The fear of lawsuits by dissatisfied students and their parents may deter negligent school administration; prevent the hiring of incompetent teachers; and reform classroom practices. The threat of litigation may help to ensure that educational institutions and their members possess and utilize at all times the minimum level of skill and expertise demanded by their profession. It would force educators to rethink their rules, philosophies and practices to reflect the changing values of society. Advocates for judicial intervention also argue that accountability improves the quality and uniformity of goals of public education. The status of the student would be elevated and the influence of parents would be increased. Administrators would be required to justify their rules, expectations and behaviors. Fairness and due process in school procedures may be another benefit of injecting judicial values into the educational process. Parents and students would have greater access and input in the educational decision-making process.

On the other hand, the impact of successful malpractice suits may produce negative consequences for the educational system. Beyond the immediate financial costs, the imposition of a legally enforceable

duty of care on educators would: discourage experimentation and innovation; force teachers to teach defensively; reduce expectations of student performance, establishing minimum standards; encourage teachers to "teach to the test" as test scores could be used as a measure of teaching competency; AND discourage qualified and competent individuals from entering the profession. Judicial intervention may also lead to centralized authority over education, removing regional diversity and control; and forcing homogeneity over the entire system.

Given both sets of arguments, it is difficult to conjecture whether the threat of liability will lead to positive or negative outcomes. Clearly, to minimize adverse influences, the courts must act with restraint and only impose liability in the most outrageous and blatant cases of educational malpractice. Educators would be well advised to take an active role in the above process and to develop a non-adversarial relationship with its various constituencies.

With the entrenchment of the Charter in 1982, the courts have slowly become involved in resolving educational policy issues (particularly in the area of minority language rights and special education). The power of the Charter lies in its ability to strike down a law that is in conflict with the Constitution (Section 52). This applies to the Federal government and the governments of each province. Further, the Charter gives the courts broad discretion to decide what remedy is appropriate and just in the circumstances. Damages awarded under a Charter action may not necessarily be

compensatory or punitive in nature. Rather a claim under the Charter may only establish a declaration of a right. The Charter may provide a remedy but no damages to the plaintiff. The Charter may also be used to validate or invalidate existing legislation.

The role of the courts will be to determine the breadth of interpretation and application of the Charter to the specific facts of a given situation. The courts will be asked to interpret the meaning of a given statute in the context of the Charter -- to distinguish between those sections that are stated as ideals and those that impose legal obligations on school boards. The courts will have to prepare a framework within which to address valid disputes -- particularly those dealing with students' values, parental values and educators' values. Their role will be to adjudicate competing claims. Section 1 of the Charter serves as the fulcrum between maintaining an individual's rights or the limitation of those rights (a determination made by deciding what is reasonable when weighing individual rights against collective rights).

The Charter's impact on educational issues may be perceived as either positive or negative. The Charter may encourage national unity and cohesion as well as protect individual freedoms if legislative and government restraint should fail. On the other hand, the Charter may limit administrative discretion and initiatives at the provincial and local level. There may be a shift from legislative to judicial power -- a move towards judicial activism (Wise, 1986).

Educators will be required to examine their present practices in light of the social values enunciated in the Charter. Numerous debates about education will be raised -- What is the purpose of education? (Vickers, 1988) How can schools help to facilitate the desired vision of Canadian society? Do current educational practices reflect the democratic values of a literate, tolerant and pluralistic society? (MacKay, 1988)

The Charter may impose greater liability on those educators who exercise greater responsibility over educational situations. For example, those educators who counsel, test and place students (i.e., Counsellors, Special Ed. teachers, Learning Assistance teachers, district psychologists, etc.) are more likely to be held accountable for their action than the ordinary classroom teacher. Clearly, the harm resulting from misplacement, misdiagnosis OR failure to diagnose and appropriately place a student is far greater and perhaps more directly established than the harm incurred from negligent classroom teaching. Administrators, whose activities are not as closely related to the learning function, may be more often held liable than teachers because the consequences of their actions are not clouded by the "teaching-learning equation." School boards, who exercise a high degree of control over the school system and its policies, may be increasingly vulnerable to malpractice lawsuits. Policy statements that violate the intent of the Charter will be considered null and void (Covert, 1988).

What Should Educators Do?

This threat (whether fact or fiction) of educational malpractice should not encourage educators to be either complacent or fearful. Rather than forcing the courts to become interventionists, educators would be wise to carefully analyze their current practices and initiate change from within. As Patterson (1984) points out: "It is generally wise to solve problems rather than crises; to deal with problems at the symptomatic stage rather than wait for the disease to become an epidemic" (p. 72). The fear of litigation should not precipitate action that is restrictive in its attempt to prevent or fulfill a predicted future. The focus should be to encourage practices that improve education quality.

Educators should establish guidelines for good professional practices, based on the legal and practical principles of due care and due process. Educators should improve present practices and abandon (or at least carefully monitor) practices which have the potential for liability. Some suggestions for improvement include:

1. setting minimum standards for student competency;
2. issuing various kinds of diplomas to indicate various levels and areas of achievement;
3. establishing remediation procedures at each grade level;
4. establishing a promotion policy reflective of the attainment of certain basic skills rather than a body of knowledge;

5. improving methods of reporting student progress to parents and subsequent teachers;

6. establishing procedural safeguards concerning testing, diagnosis and placement of students;

7. improving the evaluation process of teachers to include remediation (if required), certification requirements and denial of tenure;

8. developing written documents that identify pertinent policies, available services, and procedures for both teachers and parents;

9. establishing standards of conduct and ethical behavior by educators;

10. developing a mechanism for handling educational disputes before they end up in court (i.e., conciliation, mediation, arbitration).

Finally, educators should determine what practices could provoke a lawsuit, define what restrictions impede improved practices (i.e., limited resources) and attempt to describe alternatives (i.e., grievance procedures) to going to court that could be used should a dispute arise (i.e. use of a tribunal). Self-regulation and governance may limit the role of the courts in influencing educational policy; the courts may continue to defer to the judgments of educators if sound dispute resolution policies are in place.

In summary, the courts should give limited recognition to a cause of action for educational malpractice. Since most teachers hold themselves out as possessing special skills and knowledge, students have a right to expect them to use these skills non-negligently. This reasonable expectation demands the creation of a professional educator's duty to the extent that special skills are claimed.

Further, a statutory duty of care could be properly recognized on the basis of those detailed statutes and regulations that are directed toward teaching behaviors and student outcomes and that do not call for the discretionary exercises of judgment. The courts would not have to determine those functions in which educators should have expertise but rather would only have to deal with what educators do (or at least claim to) have expertise in. A statutory duty is derived from a legislative expression of public policy that is sought to reside in the educational system. Thus the role of the judiciary in enforcing such a statutory duty is not to determine policy but merely to enforce a policy already in effect. Finally, a teacher's code of conduct and ethics (which is formulated by the teachers themselves) could be used by the courts to ensure that educators act in conformity with their own expressed policies. A professional standard of care could be drawn from customary behaviors of the profession while still incorporating local customs and similar circumstances.

Either the professional or statutory standards of care outlined above avoid the need for judicial interference in educational policy-making. The proposed standards consider either the educator's own determination of proper behavior or public policy judgments of appropriate behavior implicit in statutory requirements to which educators have been subjected. In determining the appropriate remedy, the courts must balance the losses of the individual plaintiff against the potential effect on the ability of the educational system to serve

the collective needs of the larger student population. Toward this end, remedies with potentially far reaching detrimental effects (i.e., punitive monetary awards based on "lost" future income) should be rejected in favour of alternative remedies with the potential for benefiting not just the plaintiff but all students (i.e., remedial education at no cost to the plaintiff or dismissal of incompetent teachers). By carefully limiting remedies by this balancing process, the courts will support rather than hinder the educational system's ability to right an individual wrong without compromising educational service for many students. The combined effect of these limitations would greatly reduce the number of cases that could be successfully litigated and would in fact eliminate most fraudulent cases, thereby reducing the "feared" flood of excessive litigation and the potentially heavy economic burden that would be placed on the educational system.

Although the courts have traditionally preferred to deal with procedural questions rather than become involved with the substance of education, the mere involvement of the courts with educational complaints will have an impact on the educational system. Moreover, as the cases get closer to the heart of academic decision-making, the nature of academic decision-making and the educational experience will change. Educators, by monitoring their own behaviours and becoming more cognizant of their responsibilities to their students can help limit malpractice claims. As well, in so acting, they may provide a

more effective education for students. Educators should initiate action rather than wait for judicial intervention.

The future is difficult to predict but if a claim of educational malpractice is successful, even in part, it will have an impact on the practices and policies of educators. Just what this impact will be depends on the court's decision, the reasoning underlying the decision and the schools' response. Whether the impact is perceived as positive or negative will depend on one's view of the educational process and how change takes place. Few people would deny, however, that it is better to develop rules than be ruled.

BIBLIOGRAPHY

Abel, D. (1974). Can a student sue the schools for educational malpractice? Harvard Educational Review 44(4), 416-436.

Alberta Teachers' Association. (1985). Alberta Teachers' Association Handbook. Edmonton, Alberta: Author.

Balderson, J. (1983). Clean out the Keegstras. Canadian School Executive, 3, 36-47.

Balletine's law dictionary. (1969). USA: Lawyers Cooperative Publishing Co.

Bercuson, D., & Wertheimer, D. (1985). A trust betrayed: The Keegstra Affair. Toronto: Seal Books.

Black, H. C. (1968). Black's law dictionary. USA: West Publishing Co.

Black, H. C. (1979). Black's law dictionary. USA: West Publishing Co.

Bollinger, D. L. M. (1985). Educational malpractice: The legal accountability of educators. Unpublished doctoral dissertation, Lehigh University, Atlanta, Georgia, USA.

British Columbia, Province of. (1979). British Columbia School Act. Victoria, BC: Author.

Clement, A. (1987). Educational malpractice: Physical educators should be concerned. Physical Educator, 44, 226-232.

Cohen, J. H. (1978). The ABC's of duty: Educational malpractice and the functionally illiterate student. Golden Gate University Law Review, 8, 293-315.

Covert, J. R. (1987). The profession of teaching: A reply to professor Foster. Canadian Journal of Education, 12(1), 214-217.

Covert, J. R. (1988). Educational malpractice and the future of teaching. Education Law Journal, 1, 183-198.

Curran, W. (1959). Professional negligence -- Some general comments. Vanderbilt Law Review 535-547.

Dickinson, G. M. (1988). R. vs. Keegstra. Education Law Journal, 1, 199-207.

Essex, W. L. (1986/87). The teacher and malpractice: Ten ways to invite a lawsuit. Clearing House, 60, 212-215.

Etzioni, A. (Ed.). (1969). Semi-professionals and their organizations. New York: Free Press.

Fleming, J. G. (1971). The law of torts. Canada: Carsewell Company Ltd.

Flygare, T. J. (1982). Another state rejects educational malpractice lawsuit. Phi Delta Kappan 5, 631-632.

Foster, W. F. (1986). Educational malpractice: Educate or litigate. Canadian Journal of Education, 11, 122-151.

Foster, W. F. (1987a). Educational malpractice: A tort for the untaught. UBC Law Review, 19, 165-244.

Foster, W. F. (1987b). Educational malpractice: A rejoinder. Canadian Journal of Education, 12(1), 218-228.

Foster, W. F. (1987c, May). Why not sue the school for teacher malpractice? The Lawyer's Weekly, p. 4.

Fridman, G. H. L. (1978). Introduction to the law of torts. Canada: Butterworth's.

Funston, R. (1981). Educational malpractice: A cause of action in search of a theory. San Diego Law Review 3(18), 743-810.

Gallup, G. (1985). The seventeenth annual Gallup poll of the public's attitudes toward the public schools. Phi Delta Kappan, 67, 25.

Giles, W. H. (1988). Schools and students. Toronto: Carswell Co. Ltd.

Goodlad, J. (1984). A place called school. USA: McGraw-Hill Book Company.

Harris, J., & Carter, D. (1980). Educational malpractice: The concept, the public, the schools and the courts. School Law in Contemporary Society: USA: NOPLE.

Henchey, N., & Collins, P. (1982). Education in Ontario, 1980-2005: Scenarios on the future. Canada: Ontario Ministry of Education.

Hogan, J. (1978). The right to education: A constitutional analysis. University of Cincinnati Law Review, 44, 796-803.

Hooker, C. P. (Ed.). (1978). The courts in education. USA: University of Chicago Press.

Janisch, H. N. (1980). Education malpractice: Legal liability for failure to educate." The Advocate, 38, 491-500.

Johnson, G. M. (1969). Education law. USA: Michigan State University Press.

Jones, T. N. (1984). School law update: Preventative school law. USA: NOPLE.

Kirman, J. M. (1985/86). James Keegstra and the Eckville High School incident. History and Social Science Teacher, 21, 209-213.

Kirp, D. L. (Ed.). (1984). School days, rule days: The regulation and legalization of American education. USA: Falmer Press.

Klar, L. (Ed.) (1977). Studies in Canadian tort law. Canada: Butterworth's.

Klein, A. (1979). Educational malpractice: Can the judiciary remedy the growing problem of functional illiteracy? Suffolk University Law Review, 13, 27-62.

Koch, N. (Ed.). (1986). Essays on Canadian education. Canada: Detselig Enterprises Ltd.

Kramer, C. (1976). Medical malpractice. New York: Practicing Law Institute.

La Morte, M. W. & Smythe, J. (1971). Students' legal rights and responsibilities. USA: The W.H. Anderson Company.

Leary, J. L. (1987). But these six factors have reduced the threat of education malpractice suits. American School Board Journal, 174, 33-34.

Levi, E. H. (1949). An introduction to legal reasoning. USA: University of Chicago Press.

Linden, A. M. (1972). Canadian negligence law. Canada: Butterworth and Co. Ltd.

Loscalzo, T. E. (1985). Liability for malpractice in education. Journal of Law and Education. 14(4), 595-607.

MacKay, A. W. (1984). Education law in Canada. Canada: Emond-Montgomery Publications Ltd.

Mallen, R. (1980-81). Legal malpractice: The legacy of the 1970's Forum, 16, 119-156.

Manley-Casimir, M., & Pitsula, P. (1988). The Charter, culture and the public school curriculum: Emerging perspectives and guidelines. Submitted for publication to Education Law Journal.

Manley-Casimir, M. E. & Sussel, T. A. (Eds.). (1986). Courts in the classroom. Canada: Detselig Enterprises Ltd.

Massery, E. (1981). Handling the professional liability case. USA: McGraw-Hill Publishing Co.

Mazurek, K. (1986). Crisis of confidence: Speculations on the assault on the teaching profession. Essays on Canadian Education. Canada: Detselig Enterprises Ltd.

McCoid, A. H. (1959). The care required of medical practitioners. Vanderbilt Law Review 549-648.

McKay, W. (1987). The Elwood case: Vindicating the educational rights of the disabled. Canadian Journal of Special Education, 3, 103-108.

McKay, W. (1988). The judicial role in educational policy-making: Promise or threat? Educational Law Journal, 1, 127-150.

Mertl, S., & Ward, J. (1985). Keegstra - The issues, the trial, the consequences. Saskatoon: Western Producer Prairie Books.

Nicholls, A. C. (1984). An introduction to school case law. Canada: British Columbia School Trustees' Association.

O'Neil, R. M. (1981), Classrooms in the crossfire. USA: Indiana University Press.

Patterson, A. (1976). Educational malpractice. University of Pennsylvania Law Review, 124, 755-805.

Patterson, A. H. (1980). Professional malpractice: Small cloud but growing bigger. Phi Delta Kappan, 62, 193-201.

Patterson, A. (1984). "How to avoid an educational malpractice suit. School Law Update. USA: NOPLE, pp. 69-93.

Plimpton, R. & Rosenberger, D. (1975). Teacher incompetence and the courts. 4Journal of Law and Education 469-493.

Povier, D. (1988). Educational rights of exceptional children in Canada. Toronto: Carswell Co. Ltd.

Prosser, W. L. (1971). The law of torts. St. Paul: West Publishing Co.

Roady, T. G. & Andersen, W. R. (1960). Professional negligence. USA: Vanderbilt University Press.

Saretsky, G. (1978). The strangely significant case of Peter Doe. Phi Delta Kappan, 54, 589-592.

Stern, D. N. (1981, April). Legal malpractice dimensions. Legal Law Review, pp. 3-26.

Stewart, D. (1971). Educational malpractices. USA: Geddes Press Printers.

Strickland, R., & Jones, D. (1976). Avoiding teacher malpractice. USA: Hawthorne Books Inc.

Sugarman, S. (1974, April). If Johnny can't read - Get yourself a lawyer. Learning, 2, p. 24.

Tarnopolsky, W. S. (1983). The equality rights in the Canadian Charter of Rights and Freedom. The Canadian Bar Review, 61, 242-264.

Tracy, D. S. (1980). Educational negligence: A student's cause of action for incompetent academic instruction. North Carolina Law Review, 58, 561-597.

Vacca, R. (1974). Teacher malpractice. 8University of Richmond Law Review 447-457.

Vickers, D. H. (1987, December). What is education? Paper presented at a conference in Victoria, British Columbia.

Wade, J. W. (1975). Professional negligence. USA: Geddes Press.

Wise, A. E. (1979). Legislated learning. USA: University of California Press.

Woods, N. L. (1978). Educational malfeasance: A new cause of action for failure to educate? Tulsa Law Journal, 14(338), 383-409.

Cases

Bales v. (Central Okanagan) School District 23 Board of School Trustees. (1984). 54 B.C.L.R. 203 (B.C.S.C.).

Barnes v. Hampshire County Council. (1969). A 11 E.R. 746.

Bellman v. San Francisco High School District. (1938). 11 Cal. Reptr. 2d 576, 81 p. 2d, 984.

Brown v. Board of Education. (1954). 74 S. Ct 686).

Peter W. v. San Francisco Unified School District. (1976). 131 Cal. Rptr. 854 (Ct. Appeal).

Donoghue v. Stevenson. (1932). AC 562.

Donohue v. Copiague Union Free School District. (1978). 407 N.Y.S. 2d 874. 47 N.Y.S. 2d 441 (1979).

Hoffman v. Board of Education of the City of New York. (1979). 410 NYS 2d 99 (Appeal Division, 1978), 424 N.Y.S., 2d 376.

James v. River East School District #9. (1966). 2 W.W.R. 577.

Keegstra v. The County of Lacombe Board of Education. (1983). 25 Alta. L.R. 2d 370.

Marchant v. Simcoe County Board of Education. (1986). 55 O.R. 2d 638 (Ontario H. C.)

R. v. Keegstra. (1988). 60 Alta L.R. 2d 1. (Alta C.A.)

Snow v. State of New York. (1984, December 17). 98 A.D. 2d 441. (New York Ct. App.)

Thornton v. Board of School Trustees of School District #37. (1978). 2 S.C.R. 267.

Williams vs. Eady. (1983). 10 T.L.R. 41.

Hedley, Bryne v. Heller and Partners. (1964). AC 465.