Educational Malpractice: Educate or Litigate

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No claims for educational malpractice have yet been submitted to the Canadian courts for adjudication. Those claims for educational malpractice which have been submitted to the courts in the United States have all been resolved in favour of the defendant educator or educational institution. However, it would be naive to believe either that claims for educational malpractice will not be initiated against educators in Canada or that the Canadian courts will emulate their American counterparts and hold that educators cannot be liable for harm caused by their malpractice to their students. In this paper, the author suggests that educators should be held accountable to their students for the quality and adequacy of the educational services they provide. The paper seeks to show, first, that the extension of liability for malpractice to the sphere of education can have a positive and beneficial impact on education and the participants in the educational process and, second, that the reasons relied on by the United States courts to extend to educators a protection from liability enjoyed by no other professional group are by no means compelling.

Aucun procès n'a encore été intenté au Canada contre un éducateur pour raison d'incompétence. Ceux qui ont poursuivi aux États-Unis des éducateurs ou des institutions d'enseignement ont tous été déboutés. Il serait toutefois prématuré d'en conclure qu'on n'intentera jamais de poursuite semblable au Canada ou que les tribunaux canadiens en disposeraient de la même façon en statuant que les éducateurs ne sont responsables envers les étudiants ni de la qualité et de la validité de leur enseignement, ni des effets néfastes qui peuvent en résulter. Dans cet article, l'auteur soutient qu'il faut sanctionner l'obligation des éducateurs de fournir des services de qualité. Il fait d'abord valoir qu'une reconnaissance de la responsabilité des éducateurs pour leur enseignement aurait des effets bénéfiques sur la qualité de l'enseignement de même que sur ceux qui le dispensent et ceux qui le reçoivent. Il démontre ensuite que les motifs auxquels les tribunaux américains ont eu recours pour exonérer les éducateurs ne sont invoqués à l'égard d'aucun autre groupe de professionnels et ne sont pas convaincants.

We sometimes hear of an action for damages against the unqualified medical practitioner who has deformed a broken limb in intending to heal it. But what of the hundreds of thousands of minds that have been deformed forever by the incapable pettifoggers who have pretended to form them! (Charles Dickens, Preface to *Nicholas Nickleby*)

INTRODUCTION

Canadian educational institutions and their staffs have never enjoyed immunity from civil liability for harm occasioned to students.[2] Nevertheless, the issue of liability for what is currently described as educational malpractice has not yet been the subject of litigation in this country. Nor has it been the subject of intensive published research by Canadian academics.[3] Rather, the attention of the courts, academics, and others has focussed on the liability of institutions and educators for physical harm sustained by students in a myriad of circumstances,[4] circumstances which have only occasionally necessitated court examination of the propriety and adequacy of the academic instruction and other academic services provided students.[5] Moreover, courts have never had to consider student claims for non-physical harm inflicted upon them by institutional or educator incompetence in the areas of academic programming, instruction, supervision, guidance, counselling, and the like.[6] Even in other jurisdictions – including the United States, that fertile breeding ground of litigation – there is very little case law on the subject.[7]

This situation has prompted the comment that of the three largest professional groups in modern society – namely, lawyers, doctors, and educators – only the latter are still unburdened by malpractice suits, (Strickland, Phillips, & Phillips, 1976). Nevertheless, it has been suggested that in this age of professional accountability there is a very real prospect that aggrieved students will ask the courts to determine the minimum level of professional competence of educators[8] – and some even assert "that educational malpractice suits loom as a great potential threat" for educational institutions and educators alike (Newell, 1978, p 4). After all, as Janisch has asked:

> Why in a society which holds engineers liable for badly built bridges, surgeons liable who do not measure up to a 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? (1975, p. 58)

An initial reaction is to say, "Indeed, why not?" Recent developments in other areas of the law support the conclusion that in new areas of activity persons will increasingly be liable for the loss or injury inflicted on others as a consequence of their failure to take care, unless it can be shown that some valid reason exists for exculpating them.[9] Indeed, two English cases provide some support for the extension of the law of professional responsibility into the arena of education.[10] However, a review of the educational malpractice litigation that exists in other jursidictions suggests that a more cautious response is called for. A slowly growing list of American decisions have, for policy considerations, refused to entertain the notion that educators should be liable for malpractice[11] – at least where the malpractice falls short of intentional wrongdoing or fraud.[12]

These cases disclose a catalogue of reasons for not holding educators liable to their students.

The purpose of this paper is twofold: first, to show that the law of professional responsibility may play a positive and beneficial role in the field of education; second, to suggest that, notwithstanding the judgments of the American courts, there are no compelling reasons which dictate that Canadian educators should enjoy a protection from liability for malpractice enjoyed by no other professional group in society.

SOME REASONS FOR EXTENDING LIABILITY FOR MALPRACTICE TO EDUCATORS

An examination of the legislation governing education supports the general conclusion that legislators have paid little more than lip service to the one feature of the educational system which is central to the existence of and need for educators – that is, the quality and effectiveness of the broad range of academic services provided.[13]

To date, the concern of legislators, in a manner of speaking, has been rather with quantity than quality: to ensure that all members of society receive an education for a specified minimum period, have equal access to an educational institution during that period, and have an equal opportunity to pursue higher education. In addition, within certain sectors of the educational system, more or less detailed guidance may have been provided as to the educational content given students. To meet these concerns and objectives, law makers have established institutional frameworks which, while implicitly recognizing the fundamental importance of an education to individual and societal well-being, are concerned more with equality of educational opportunities than with quality, more with "form" than with "substance." Then, as Henning, White, Sorgen, and Seltzer have observed:

> Once the law has erected a framework delimiting the acceptable perimeters of actual educational activity, it relies on a host of implicit assumptions about what occurs within the approved structure. The curriculum mandate that "history" be studied is largely implemented through confidence in certified teachers. The teacher is assumed capable of teaching the required course because he has completed a number of semester hours in history at an accedited college. The accrediting agency does not inspect the quality of instruction at the college but instead relies on the soundness of administrative organization, the number of volumes in the library, the expenditures per student and other concrete indicia of academic excellence. Thus all depends on a sequence of confidence, on a series of assumptions. The state relies on the teacher's preparatory program to provide good teachers for certification; it assumes that the district will require the teaching by that teacher of something called "history"; the district and community rely on the schools; and the schools in turn rely on the teacher. The chain is endless

because it is circular. Each link is forged by implicit and unquestioned assumptions. (1979, pp 292-293)

Perhaps legislators cannot, or should not, do more to monitor the content and quality – the substance – of the educational experience. They would risk stifling initiative and experimentation in education, imposing an unacceptable uniformity on the educational process and preventing its responsiveness to local, community and individual needs, and reducing the academic freedom of educators. For whatever reason, it must be accepted that present laws impose only nominal controls on instruction – the primary educational activity – and even more casual controls on the outcome of an education (Henning et al., 1979).

Yet merely obliging all members of society to partake of a prescribed minimum educational experience and providing them the equal opportunity to obtain higher education will not necessarily ensure an educated public. Education, like any other service, can be provided on a low, inadequate, and ineffective level, as well as on a high, adequate, and effective one (Kurland, 1972, p. 419). This realization has resulted in the critical scrutiny of the implicit and unquestionable assumptions which underlie the educational system by frustrated parents and students who feel that it has not produced the anticipated results. These individuals may not be prepared to accept existing formal institutional safeguards as a sufficient guarantee of the system's quality and efficacy. Nor may they be willing to accept that academic freedom means leaving educators free from all external control.

In fact, rightly or wrongly, it has been suggested that education should be viewed in the same light as other professional services – as a consumer item.[14] If this is accepted (and given that education is a non-returnable commodity), what recourses are open to parents or students wishing either to make educational institutions and their staffs more responsive to their concerns or to seek redress where, due to institutional or staff negligence, a student has not achieved that level of benefit or success he was capable of achieving or has been misled as to his academic progress? It is arguable that one recourse open to such persons should be a malpractice action.

While other courses of action, such as grievance and disciplinary procedures, public meetings, publicity campaigns, protest marches, boycotts, and the vote, are available to those dissatisfied with the educational system, they are unsatisfactory in a number of respects. First, it must be remembered that formal grievance or disciplinary procedures provided by an educational institution or system are internal quality control mechanisms dependent on the degree to which educators are prepared to police themselves. It is open to question whether educators would be more assiduous in this task than are the members of other professional groups. Second, the effectiveness of the remaining mechanisms depends generally on the depth and breadth of public dissatisfaction with, and support for change within, the system. Consequently, they would be inadequate, more often than not, for the purpose of rectifying isolated occurrences of educational malpractice. Finally, all of these alternatives to a malpractice action provide only prospective relief. None of them "make whole" students who have already suffered harm as a result of educational malpractice (*Comment*, 1976, p. 764).

In comparison, the law of professional responsibility would appear to provide a mechanism available to any student possibly suffering wrongful injury by an educator. It is also one which can render a student "whole" to the extent to which that can be achieved through an award of damages. In its operation it has the further advantage of shifting the responsibility for the harm onto the party who is negligent and better able to bear or distribute the losses.[15]

However, as Pritchard has observed:

> If the sole reason for professional civil liability were to provide compensation the civil suit would be of doubtful utility; the well-known failures of the tort system as a compensatory vehicle could be overcome (although not without some difficulty) by an insurance scheme unrelated to fault. It is only if one believes that the civil liability action has a role in ensuring acceptable levels of quality in the delivery of professional services that the civil suit may be justified. (1977, p. 380)[16]

This observation leads to a further justification for subjecting educators to malpractice liability. The law of professional responsibility can be viewed as playing a role in the area of education over and above that of providing compensation to students for negligently inflicted intellectual injury. Through the threat of an award of damages against institutions and educators and the professional and community disgrace which accompanies a judicial determination of fault, it can help ensure: (1) that educational institutions and educators *possess* at all times the minimum level of skill and expertise demanded of their profession; and (2) that educational institutions and educators *utilize* in the educational process the minimum level of skill and expertise demanded of members of their profession. As Pritchard had noted, the concern of the first is care and diligence; that of the second is with continuing competence and skill (1977, p. 381).

Thus, the malpractice action can be viewed as a flexible and individual control mechanism by which the validity of the assumptions underlying much of the educational system can be tested. It is concerned primarily with educators' performance within the educational system and not, as are initial professional certification or employment requirements and formal or informal continuing education requirements, mostly with compliance. The emphasis of civil liability is on the result (competence in one's chosen field) rather than the method by which that competence is supposed to be achieved (Pritchard, 1977). It is there to ensure that educators who possess all of the external indicia of competence do in fact perform competently. Recognition of a cause of action for educational malpractice, therefore, would serve to remind educators that students have certain rights to a quality education.

It is also arguable that the imposition of liability for educational malpractice would have a number of other beneficial effects, namely:

(1) It would mitigate the imbalance of power now existing in the student-educator relationship (Elson, 1978, p. 657). Many persons currently feel both frozen out of the educational decision-making processes that ultimately effect their or their children's futures, as well as feeling belittled by overbearing or condescending teachers and administrators who seem to trivialize their concerns or to adopt a *teacher-knows-best* attitude (Tataryn, 1984, p. 11). The knowledge that they may be held legally accountable for their decisions and actions should make educators more responsive to and co-operative with those persons concerned about the educational system.

(2) It would provide educational institutions with an incentive to develop effective in-house internal procedures to resolve conflicts over negligently inflicted educational injuries (Elson, 1978, p. 657). Recourse should be had to the courts as a last resort. This is perhaps even more important in the sphere of education than in other areas, as the cooperation, mutual trust, and respect of all involved are crucial to its full success. It has been said that "educators are concerned with growth and development and with fostering interpersonal relationships that lead to the resolution of problems and issues in a mutually supportive rather than an adversarial manner" and that if this approach is lost "education will be radically transformed into a disputatious [sic] arena in which enormous energy is wasted ... " (Hodder, 1984, p. 46). Both assertions may be correct. However, it does not appear that at present the victims of educational malpractice are assured that their claims will receive just and impartial treatment within the educational system, that appropriate and satisfactory remedies will be made available, or that appropriate action will be taken against educators guilty of malpractice. Until this situation is rectified, the malpractice action will be seen by some as their only effective recourse.

(3) It may spur a serious reconsideration of the notion of cause and a

rethinking of the concept of tenure and the security of employment provisions (which appear universally to be based primarily on seniority rather than on competence) in collective agreements; or it may be that a finding of malpractice against an educator could be invoked as cause for his dismissal in the appropriate case (*Comment*, 1976, p. 757).

(4) It would induce educators to explain experimental educational programs to parents or students in order to secure their formal voluntary and informed consent (*Comment*, 1976, pp. 763-764). No longer would the regular everyday classroom be the laboratory and the unsuspecting students the white mice for the testing of the many and varied new educational theories and practices being advanced.[17]

(5) It would dissuade wholly incompetent and uncaring individuals either from entering the profession in the first place or from continuing to teach (Elson, 1978, p. 745). Moreover, it would provide an impetus to upgrading the standards used for the hiring and evaluation of personnel and the development of effective and fair methods of on-going evaluation (Klein, 1979, p. 60).

(6) Finally, and most optimistically, it would "reinforce ... the respect good educators have for the individual rights and needs of their students and the respect such educators have for their own abilities as professionals to satisfy those rights and needs" (Elson, 1978, p. 745).

Whether the extension of the law of professional responsibility will have a beneficial impact on the educational system, however, is contingent on the threat of such liability acting as a deterrent. It must be accepted that the deterrent effect of the threat of a damage award is mitigated by the availability of liability insurance. Nevertheless, there still remains the publicity sanction which could adversely affect an educational institution or educator in three ways (see Linden, 1973). First, publicity of an adverse judgment could cost the defendant money over and above any damages he may have to pay (Linden, 1973, p. 157). For example, if an institution is successfully sued for malpractice the result may be that potential private and corporate benefactors will withhold donations, government and other agencies may withhold or suspend grants, and potential students may elect to attend other institutions thereby depriving the defendant institution of their fees or indeed threatening its survival in these days of falling student numbers. The institutional impact of the publicity sanction is likely to be felt most seriously in those sectors of the educational system in which institutional budgets are related to student enrolment and in which competitive market pressures exist as in the domains of private and, to a lesser degree, tertiary education.[18] In the event of a successful suit against an educator, his additional costs may be dismissal, difficulty in finding other employment as an educator, or prejudice to his chances of professional advancement.

The second adverse result of the publicity sanction is that it brings about a loss of prestige (Linden, 1973, p. 157). This, particularly in an educational context, can be very costly in terms of money and talent, and the repair of the tarnished image may require the expenditure of a great deal of time, money, and effort that could be utilized more profitably elsewhere (Linden, 1973, p. 157).

The final adverse effect is that it may provoke governmental intervention (Linden, 1973, p. 157) – something that most educational institutions and educators would prefer to avoid if at all possible.[19]

It should be noted that, even if an educational malpractice suit is lost by the student, it may nevertheless have an effect. It will have obliged the institution or educator to respond publicly to the allegations made and in the process, hopefully, to reflect on its goals and methodology. This perhaps will lead to the introduction of changes which will enhance the quality of the educational process (Elson, 1978, p. 666).

SOME REASONS FOR NOT EXTENDING LIABILITY FOR MALPRACTICE TO EDUCATORS

The reasons advanced from time to time by the American courts and others to support their stand that educators should not be liable for malpractice are many and varied. On the one hand, it has been said that the nature of the educational and learning processes renders it impossible to apply to educators the general principles of law governing civil liability. Moreover, it is argued that educators are not professionals and therefore cannot be subjected to the legal regime of professional responsibility. On the other hand, it has been contended that recognition of educational malpractice claims would: (1) result in a flood of real or imagined claims, (2) place an undue financial burden on educators, (3) unduly disrupt the educational process, (4) require the courts to make decisions both as to the acceptability of educational policies and the reasonableness of the day-to-day implementation of those policies – matters which the courts are not competent to handle and which therefore should be left to educators – and (5) undermine the social utility of the educational process.

What is surprising on a review of the case reports is that notwithstanding (or perhaps because of) the novelty of the claims for educational malpractice which have been advanced, American courts have not attempted to assess seriously the validity of the many reasons given to justify their refusal to hold educators accountable for the quality of the academic services they provide. Indeed, it is suggested that there are no reasons which dictate overwhelmingly that educators should enjoy the protection from liability afforded them by the courts.

Educators are not Professionals

"Implicit in the charge of educational malpractice is the assumption that teachers are professionals because malpractice only attaches to professionals."[20] But is this assumption correct? Are educators professionals?[21]

It has been suggested that a number of hallmarks exist for identifying a profession. Those pursuing the occupation or calling in question must: (1) have enjoyed historically the social status of a professional (Klein, 1979, p. 41); (2) have mastered a recognized and systematic body of abstract knowledge developed through a prescribed course of training (Elson, 1978, p. 729); (3) have rules and principles of practice which give them common guidance in treating and resolving specific problems and issues (Elson, 1978, p. 728); (4) be committed to certain moral principles (Jackson & Powell, 1982, p. 1); (5) make intellectual judgements in the course of their activities (Jackson & Powell, 1982, pp. 1-2; Klein, 1979, p. 41); and (6) be engaged in an activity where, because of factors beyond the professional's control, success cannot be achieved in every case (Jackson & Powell, 1982, pp. 3-4).

It has been said that educators as a group do not meet the first and third of these criteria. With respect to the first – that is status – it has been said that teachers are not accorded high social status because it is felt that the knowledge possessed by educators, unlike medical or legal knowledge,[22] is readily comprehensible by lay persons. Further, the majority of educators, unlike true professionals, are public servants employed in a tax-supported system (Tracy, 1980, pp. 568–569). They do not rely on status and reputation to attract clients and to determine their income-earning capacity, receiving instead a salary fixed by an external authority (Funston, 1981, p. 775). Accordingly, it is argued, educators, at least within the public educational system, are at best aspiring semi-professionals (Funston, 1981, p. 775).

As to the third criterion, it is of considerable debate whether either rules or principles exist which give guidance in treating and resolving specific problems and issues or whether educators agree as to what constitutes acceptable educational practices, let alone good teaching (Funston, 1981, pp. 773–775).

Even if it is accepted for present purposes that these assertions are correct, two points can be made. The first is that merely because educators do not correspond in all respects to the sociological model of the professional, it does not necessarily mean that they do not possess sufficient professional characteristics to warrant holding them legally accountable as professionals (Elson, 1978, p. 730). After all, as Lord Justice Du Parq has stated, the acid test in determining whether a particular calling qualifies as a profession is "would the ... ordinary reasonable man ... say now, in the time in which we live, of any particular occupation that it is properly described as a profession? (*Carr* v. *Inland Revenue Commissioners*, 1944, p. 167). In answering this question the ordinary reasonable man is unlikely to be overly concerned by sociological models of what constitutes a profession, witness the extensive list of occupations which in recent years have joined the ranks of the traditional professions.

The second point is that it would be erroneous for educators to think that they have much to gain by convincing the courts that they should be viewed as non-professionals. Indeed, classification as a non-professional will not in itself insulate them from liability and the consequences thereof. It is not essential that a calling, vocation, or trade qualify as a profession before its members are held legally accountable where their conduct deviates from the minimum level of acceptable conduct demanded of that particular occupational group. The only benefit to be derived from non-professional status is that the epithet *malpractice* would be viewed as inappropriate in describing actions instituted by students against educators.

Against this questionable benefit of being viewed as non-professionals, educators should weigh the advantages which flow from being classified as professionals. First, professionals are in the privileged position of establishing their own legal standards of conduct because, apart from extreme cases of misconduct, it is accepted that the layman is incapable of establishing appropriate standards of conduct in the absence of expert testimony (Prosser & Keeton, 1984, p. 189). Second, the use of a professional standard both offers educators protection against the possibly unrealistic expectations of the layman (Elson, 1978, pp. 700–701; Tracy, 1980, p. 573) and ensures that educators will or at least can reasonably be expected to have prior knowledge of the standard of conduct they are required to meet, as the requisite standard is determined by them. Third, in determining the professional standard there is also consideration of the special groups within a particular profession to which the defendant belongs (Linden, 1982, pp. 130–131), and, in the appropriate case, the standard may be adjusted on the basis of the locality or community in which the educator teaches (Linden, 1982, pp. 141–142; Picard, 1978, pp. 118–122; Prosser & Keeton, 1984, pp. 187–188). Fourth, in recognition of the fact that professionals, unlike others in society, are engaged in activities in which success cannot be guaranteed, as a general rule honest mistakes – errors in judgment – do not attract liability. Thus, there is much to be gained by educators from being accepted as professionals.

The Nature of the Educational Process

In the first, and perhaps the leading, case on educational malpractice, *Peter W. v. San Francisco Unified School District,*[23] the court advanced as one of its primary justifications for refusing to entertain malpractice actions against educators that:

> Unlike the activity of the highway or the market place, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might – and commonly does – have his own emphatic views on the subject. 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 ... . (pp. 860–861)

Therefore, the conclusion was reached by the court that it could:

> find in this situation no conceivable "workability of a rule of care" against which the defendants' alleged conduct may be measured ... no reasonable "degree of certainty that ... plaintiff suffered injury" within the meaning of the law of negligence ... and no such perceptible "connection between the defendants' conduct and the injury suffered" ... which would establish a causal link between them within the same meaning. (p. 861)

However, no attempt has been made to appraise seriously and realistically the matters of standard of care, cause, and injury and to identify why, in all cases of educational malpractice, they necessarily present such insurmountable obstacles. Without such an appraisal, reliance on the notion of judicial incompetency is unconvincing for the difficulty in "comprehending the issues in educational malpractice is unlikely to approach the difficulties ... [encountered] in deciding most medical malpractice, patent infringement, products liability ... cases to name but a few of the more complex areas of civil litigation."[24]

In fact, the court's conclusions concerning standard of care, cause, and injury are open to serious question in that they rest on a number of dubious and untenable assumptions. These assumptions are: (1) that the appropriate standard of care is that of the reasonable man on the street and not one drawn from the professional or occupational group to which educators belong; (2) that if no consensus exists about how best to engage in or pursue a certain activity, whether the activity should be undertaken at all, or the goals of the activity, then there can be no standard of care; (3) that the mere existence of additional factors possibly contributing to the harm suffered by a student will necessarily protect a defendant from liability irrespective of the extent of his personal contribution to that harm

(Elson, 1978, p. 696); and (4) that the non-physical harm occasioned by educational malpractice can never be classified as an injury within the meaning accorded the term *injury* in the law of negligence.

It cannot be denied that there may be certain difficulties in resolving the issues of standard of care, cause, and injury in a particular case. However, resort to these difficulties to justify adopting a broad rule of non-liability is totally unsatisfactory as it permits the courts to wash their hand of the entire question of educational malpractice. It precludes both a case-by-case determination of the issue and the possibility of recovery by a student even if the matters of standard of care, cause, and injury present no peculiar difficulties in his particular case. Indeed, subsequent American courts confronted with educational malpractice claims have tended not to adopt this line of reasoning to support their dismissal of the claims but rather have resorted to broader policy considerations.

Fear of a Flood of Litigation and of False Claims

The fear that a novel application of tort liability principles will result in a flood of cases which will unduly burden the courts and in fraudulent and frivolous claims, has been advanced from time to time as a reason for rejecting novel claims. It has been suggested, however, that these fears may well be realized in the field of educational malpractice because of the simple number of potential plaintiffs (Funston, 1981, p. 796). Compulsory education laws, the existence of a publicly financed school system, and the opportunities available to and exploited by many to pursue higher education ensure that many more individuals will be subjected to education than will ever consult or come into contact with another professional (Funston, 1981, p. 796). To this factor may be added two additonal considerations: first, educators form the largest group of professionals and, second, they are more directly and continuously in contact with their clients than any other group of professionals (Vacca, 1974, p. 448).

Even accepting the foregoing, fears of excessive and unmeritorious claims are unpersuasive grounds for dismissing a cause of action. For a court to deny relief on these grounds constitutes a pitiful confession of incompetence on its part.[25] As Prosser and Keeton have stated:

> It is the business of the law to remedy wrongs that deserve it even at the expense of a "flood of litigation". ... So far as distinguishing true claims from false ones is concerned what is required is rather a careful scrutiny of the evidence supporting the claim; and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law. (1984, p. 56)

At a more practical level, several factors militate against the realization of the fears expressed by the courts and others. To begin with, there is the requirement of *victim initiative*. Before litigation will arise, the student must recognize that he has been harmed and that his harm is the result of malpractice, not just a negative outcome of competent services (Pritchard, 1977, p. 385). It will only be in the rare case that this identification and evaluation can be made without the assistance of experts in the field of education who belong to the same professional group as the potential defendant. Such expert assistance may be difficult to obtain. If educators react as do members of other professional groups requested to testify against one of their own, the student may be confronted by the conspiracy of silence.[26] When these factors are coupled with the not negligible protection afforded educational institutions and educators who come within the compass of public authorities protection legislation,[27] it is unlikely that the fear of a flood of litigation emanating from at least the public education system will be realized.

It must also be remembered that a large number of students are minors who cannot initiate civil actions in their own names. They must have the active support of a guardian *ad litem* or next friend who is prepared to commence an educational malpractice suit on their behalf. To this extent, it will be ensured that the sole motivating force behind the lawsuit is not a student's immature impulses (Elson, 1978, p. 652).

Further, as Elson has noted, an educational malpractice action is likely to be expensive, requiring payment of court costs, the fees of expert witnesses and lawyers, and other associated expenses (Elson, 1978, p. 652). This coupled with the general rule in Canadian civil cases that the costs, or at least a portion thereof, of both sides must be borne by the losing party (Pritchard, 1977, pp. 385–386) will tend to discourage frivolous and fraudulent claims. Even in those Canadian jurisdictions in which contingency fees are available, it is likely that lawyers often would require a substantial retainer, not necessarily because of the likely expense associated with educational malpractice suits (which are unlikely to be greater than those incurred in other areas of malpractice litigation) but rather because, compared to other areas of personal injury litigation, chances of success would be more speculative, it is unlikely that substantial damage awards would be recovered, and the amount of time and effort necessary in preparing the case would be great (Elson, 1978, p. 652).

Finally, while it must be accepted that mental trauma can be more easily simulated than physical injury, it has been suggested that with respect to intellectual injury caused by educational malpractice, there exist both protection against false claims and standards for assessing the degree of harm which are unavailable in other claims for pure mental and emotional suffering for which redress is already provided by the law (Elson, 1978, pp. 756–757). Thus, for example, where the injury supposedly due to the negligence of educators is the failure to acquire knowledge of subject matter or basic skills, comparative methods of proof through the use of standardized achievement tests are available to assess the degree of harm. Or, if the harm alleged to have been caused by malpractice is the acquisition of various behavioural disorders, various commonly used diagnostic tools are available to identify the type of harm. Similarly, if the injury complained of is the failure to learn because of the omission to discover and deal with one of the many learning disabilities which may trouble students, again diagnostic tools are available to identify and evaluate the extent of the harm.

In view of the foregoing, it is highly improbable that the fears of excessive litigation and baseless claims would be realized if the courts do recognize educators as being under a legal duty of care to their students. But, even if these fears prove correct, it cannot be overlooked that it is courts' obligation to provide a remedy in meritorious cases. This duty should not be avoided merely because of administrative convenience (Woods, 1978, p. 395).

Economic Considerations

Will the recognition of a duty of care impose an intolerable and unacceptable financial burden on educational institutions and their staffs? Without, it appears, any analysis of this question, a number of courts have reached an affirmative conclusion.[28] However, this conclusion can be supported only if, first, there is a flood of successful educational malpractice suits (a highly unlikely occurrence for the reasons already stated), second, if substantial damage awards become the rule,[29] and, finally, if the normal avenues for loss distribution are unavailable, resulting in an institution or educator bearing the full loss.

Of the parties involved in an educational malpractice suit, clearly the institution and its staff are best placed to absorb the losses resulting from their negligence (*Comment*, 1976, pp. 762–763). On the one hand, a system of first party insurance providing students protection from intellectual harm caused by educational malpractice would seem to be entirely unfeasible. On the other hand, the costs of a successful negligence action can be passed on, directly or indirectly, by an educational institution to the general public by way of increased taxes, to the "consumers" of education through increased fees, to others engaged in the educational "enterprise" through liability insurance, or to those of its employees who were at fault in the particular case by use of the concepts of contribution and indemnity.[30] Similarly, individual educators could distribute the financial burden of a judgment through liability insurance, the cost of the premium for which, if need be, could be passed on to the public or consumers of education by way of increased salaries or benefits paid through taxes or fees.

It has been suggested that the use of loss distribution methods such as liability insurance serves a "double social purpose":

On the one hand, the serious strains that can arise if the random losses were left to lie where they fall are removed for the unfortunate and innocent victims. On the other hand, the opportunity for their wide distribution ... encourages savings in the form of premium reserves which can be used for the important purpose of supporting the economy generally [or, perhaps the educational system in particular]. (*Bowen* v. *Paramount Builders*, 1977, p. 419)

The availability of avenues of loss distribution undoubtedly take away from damage awards as effective deterrents but, as stated, there still remains the deterrent of the publicity sanction.[31] In addition, the availability of methods of loss distribution should minimize the need to divert funds from education budgets to meet the expenses associated with educational malpractice suits. If such expenses had to be borne directly by educational institutions, funding for educational services could be decreased with the result that successful plaintiffs would seem to benefit at the expense of the rest of the student population (Klein, 1979, pp. 60–61). Finally, although recourse to the various avenues of loss distribution will inevitably transfer much of the ultimate financial burden of educational malpractice onto the shoulders of the public, it must be borne in mind that the public already bears the cost, for an

uneducated or undereducated population fiscally burdens the country by reducing incomes and governmental revenues while increasing expenditures for crime and welfare. An educated individual has the potential to increase his opportunities for higher earnings and more desirable positions. Limited educational achievement on the other hand can adversely affect a person's motivation, confidence and aspirations. (Klein, 1979, p. 35)

Thus, it may well be asked whether the public interest, in fact, would not be better served by imposing a duty of care on educators. It would serve notice to them that they will be held publicly accountable not only to the particular victims of educational malpractice but to society as a whole for the quality of education provided.

Other "Cost" Considerations

The immediate financial burdens associated with the damage awards which may ensue with the recognition of educational malpractice suits are only some of the costs involved. Other costs which may be incurred through the imposition of a duty of care on educators are: (1) experimentation and innovation may be discouraged thereby prejudicing progress in education (*Comment*, 1976, p. 763; Funston, 1981, pp. 805–806; Klein, 1979, p. 60); (2) educators may be prompted to undertake "defensive" education (Funston, 1981, pp. 803–804; Klein, 1979, pp. 59–60); (3) qualified and competent individuals may be dissuaded from entering the profession (Funston, 1981, p. 804); or (4) it may result in legislative intervention, lowering or eliminating the standards by which student achievement is measured in those sectors, if any, of the educational system in which they exist (Abel, 1974, pp. 432–435).

Experimentation in education should not be adversely affected by the development of educational malpractice, for the risks of a suit being initiated can be minimized, if not negated, by allowing students to choose, after fully informing them of all material facts, enrollment in an experimental course or program. If this is done, the doctrine of *volenti non fit injuria* (i.e., voluntary assumption of risk) would afford reasonable protection to educators. In fact, in the absence of possible malpractice liability, there is little reason for educators to obtain student consent prior to subjecting them to educational experiments. It must be remembered that during the years of compulsory education students have no right to decline "treatment." They, therefore, should have the right at least to choose whether or not they wish to be subjected to innovative and experimental educational treatment which deviates from normal and accepted practices. Thus, the threat of malpractice liability would have the beneficial effect of inducing educators both to explain experimental programs to parents and students and to secure their formal and voluntary consent before subjecting students to them (*Comment*, 1976, pp. 763–764).

The issue of defensive education appears to pose a greater problem because the factors identified as giving rise to defensive medicine appear to be present in the sphere of education. These factors are:

> the absence of a competitive market in the delivery of ... services and, consequently, the use of custom as the standard of competence in professional negligence actions. The absence of market forces allows the ... [professional] to adopt the defensive practices without financial penalty or consumer disapproval and the customary practice standard incorporates the sub-optimal practices and, indeed, over time, may require them. (Pritchard, 1977, p. 391)

Accordingly, there is a risk that educators may bias education in a way adverse to public interest. Resources may be misapplied as, for example, by narrowing curricular offerings or concentrating on basic skills to the detriment of other areas. Or test-taking skills may be emphasized and, while test scores may improve, there may be no corresponding improvement in the students' educational levels (Funston 1981, pp. 803–804; Klein, 1979, p. 60). Further, educators would have no incentive to surpass the required minimum because they would fear resulting liability.

While it must be admitted that widespread recourse to defensive education could be detrimental to education and society, it is a matter of conjecture, as it still is in the field of medicine,[32] whether the courts' willingness to entertain malpractice actions would indeed unacceptably restrain educators and result in the adoption of defensive practices adversely affecting the overall quality of education. Therefore, the possibility – and it is only a possibility – that educational malpractice litigation may result in defensive educational practices should not in itself be viewed as a major impediment to the imposition of liability on educators. Indeed, many in society might well welcome judicial recognition of educational malpractice if it does prompt educators to pay more heed to basic academic skills.

It is even more a matter of conjecture to assert that the threat of liability, particularly when coupled with the limited income potential which faces nearly all educators, will discourage individuals having the capacity of becoming good and effective educators from entering the profession. It is equally arguable that such harm to the education process will be more than offset by (1) removing incompetent educators from the field, (2) discouraging those unsuited for the profession from entering it, and (3) upgrading the educational system which in turn may make the profession more attractive than it might be to persons possessing the necessary qualities.

It is possible that educational malpractice suits and the costs associated therewith might have a negative impact on formulating standards by which student achievement is measured. But again it is unlikely for a number of reasons. First, such a step would probably result in strong adverse public reaction given that many of its members are already concerned with the quality, effectiveness, and outcome of the educational system. Second, governments are beginning to acknowledge that they too are concerned with the unsatisfactory outcomes of the educational system, as shown by increasing the minimum level of acceptable achievement for graduation from schools or introducing or re-introducing minimum competency standards. An about-face, therefore, is improbable as it would be viewed as counter-productive and reactionary in this era of growing professional accountability. Third, the mere failure of a student to achieve the existing minimum acceptable standards of competency relevant to the particular sector of the educational system in which he is registered will not in itself result in liability being imposed on educators.

At most such a failure might constitute some evidence that he has suffered harm. He would still have to show malpractice on the part of the defendant and prove that the malpractice was the cause of the harm.

Judicial Intervention in the Educational Process

Another key policy reason for the judicial reluctance to provide redress for educational malpractice is that it would constitute an illegitimate judicial intrusion in the educational decision-making process at all levels. It has been said that imposing a duty of care on educators would require the courts both to review broad educational policies and to make judgments on the day-to-day implementation of those policies – the fulfillment of which would call for a level of resources and expertise unavailable to the courts and which, therefore, should be left to the appropriate educational authorities. It is they, after all, who have been given responsibility for the educational system.[33]

The issue here raised – the extent, if any, to which the courts legitimately may intrude upon, or control through the law of civil liability, the broad spectrum of activities undertaken by public bodies pursuant to their statutory powers – is not unique to the field of education. The courts have confronted and resolved it in other areas of activity in which the conduct of such bodies has been called into question.[34] The principles there enunciated can be used to assist in delineating the boundary between acceptable and unacceptable judicial interference in the educational process.

It has long been accepted that public bodies can incur tort liability for the negligent exercise of their statutory powers which result in damage to others.[35] However, the scope or extent of such liability has been clarified to a considerable degree only recently. In a number of recent decisions,[36] it has been recognized that an allegation of negligence made against a public body may relate either to what may be described as the policy or planning functions of the body or it may refer to the operational functions of the body,[37] and that the nature of the allegation will determine the extent of the courts' readiness to review the appropriateness of the conduct in question.

Thus, on the one hand, the courts have shown a marked hesitancy to intervene where it is the planning or policy functions of a public body which have been called into question. In other words, where a statute imposes a duty on, or empowers, a public body to do a certain thing but expresses it in such general terms that the body may act in one of several ways or by one of several means, then the courts are of the view that, as a general rule, the public body, and not the courts, must determine the ways or means by which performance of the statutory obligation should best be achieved. This is understandable, because at issue will be the correctness of "decisions that have general applicability beyond the immediate situation of the individual parties before the court" – that is, decisions reached only after a "broad-ranging freewheeling inquiry and deliberation" often entailing considerations "of ethical propositions, political judgments, historical interpretations, or empirical data" and the like (Elson, 1978, p. 671). Here, the courts appear prepared to defer to the experience and expertise of the policy maker because they are not competent, through the medium of a negligence action, to reassess effectively all relevant considerations and to strike the appropriate balance between the competing interests invariably involved in most policy decision-making processes. As Craig has commented,

> A public body should not be liable when the alleged negligence challenges the method of using scarce resources, of balancing thrift and efficiency, or when it results from a risk consciously taken by that body to achieve a policy pursuant to a discretionary power given by a statute. It is these determinations which should come within the heading 'planning' and be immune from an action in negligence. The court is in no position to ... 'second guess' the decision reached. (1978, p. 446)

However, it must be noted that the immunity accorded public bodies in their planning or policy-making function is not without its limits. It is only available to the extent that these bodies act in *bona fide* exercise of their discretion (*Annes* v. *London Borough of Merton*, 1977; *Home Office* v. *Dorset Yacht Co.*, 1970; *Kamloops* v. *Nielsen, Hughes and Hughes*, 1984). Thus, for example, liability may be imposed where, in their policy-making function, they act beyond the scope of their powers.[38]

On the other hand, where it is alleged that a public body has been negligent at the operational level, the courts are agreed that the issue falls to be determined in accordance with the ordinary principles of negligence law. That is, while the courts are not in general prepared to review the correctness of the policy decision, they will be prepared to ascertain, within the limits set by that decision, whether negligence was present in the administration and the manner of carrying out of that policy.

The policy/operation dichotomy can be utilized by the courts in the context of educational malpractice to preserve the integrity and independence of public educational authorities acting in *bona fide* exercise of their discretionary powers, while at the same time providing redress to students who have been harmed through negligence in the actual operation of the educational system.[39] Thus, for example, the courts should be slow to interfere in such planning decisions as the following: (1) the scale of financial, human, and physical resources which should be made available to a particular eductional activity; (2) whether a particular educational activity should be offered at all or the amount of formal instruction which should be provided for it; (3) the methods of instruction which will be utilized; (4) the degree of choice given students in the curriculum; (5) the method by which student progress is to be assessed, and if at all; (6) the nature and extent of testing undergone by students prior to or on entry into educational institutions, and so on. But, given the policy decision, say, to test the IQ, aptitude, and other abilities of all students entering the educational process for the first time, failure to administer the tests or carelessness in their administration or in evaluating their results (leading, for example, to the incorrect classifications of a student as mentally retarded as was alleged to have occured in *Hoffman* v. *Board of Education of the City of New York*, 1978)[40] should, if damage ensues, give rise to liability in negligence.

Undoubtedly, the inevitable grey areas will arise involving activities not easily placed in one side or other of the planning/operation dichotomy. Such would be the case where, for example, the policy is adopted to test the IQ, aptitude, and other abilities of all students but no decision is made as to the specific tests to be utilized or their number and timing, these matters being left to the discretion of the administrators of individual institutions. However, it is suggested, the adoption of an appropriate standard of care will facilitate the resolution of such problems.

Social Utility of the Defendant's Conduct

The social utility of an activity has rarely been invoked by the courts as a reason for refusing to impose a duty of care on those engaged in that activity. However, as Fleming has observed,

> exceptionally, the social utility of an activity may be valued so highly as to warrant the complete negation of *any* duty of care. ... More usually ... the importance of the interest the defendant is seeking to advance will only affect the standard of care or, rather, what is incumbent on him for meeting the standard. (1983, p. 110)

There can be no doubt about the great social importance of the educational system and the role played by educators. But is education so highly regarded as to justify the conclusion that it is in the public interest to absolve educators from liability for educational malpractice, thereby conferring on them an immunity enjoyed by no other professional or vocational group in Canada, at a time when courts in general are assaulting traditional immunities?

Of course, any such protection from liability accorded educators would be limited to non-physical harm inflicted by malpractice. In view of the acceptance that educators can incur liability for physical harm occasioned to their students through negligent instruction,[41] the immunity would only protect them from liability for intellectual harm caused to students as a result of subjecting them to an inadequate and incompetent educational experience. But is even such limited protection justified? An appropriate response perhaps is that given by Mr. Justice Krever to the question of whether a lawyer should enjoy immunity from suit for negligence arising out of his conduct of a civil case:

> I have come to the conclusion that the public interest ... does not require that our Courts recognize an immunity of a lawyer from action for negligence at the suit of his or her former client by reason of the conduct of a civil case in Court. It has not been, is not now, and should not be, public policy ... to confer exclusively on lawyers engaged in Court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned. Nor are there lawyers' values as opposed to the values shared by the rest of the community. In the law of professional negligence and the rising incidence of "malpractice" actions against physicians (and especially surgeons who may be thought to be to physicians what barristers are to solicitors), I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a Court will conclude that it is negligence.[42]

These sentiments, it is suggested, are equally pertinent to the issue considered and would support the view that Canadian courts, unlike their American counterparts, may well prefer not to accord even a limited protection to educators but would prefer to deal with the problems of educational malpractice as they arise on a case-by-case basis.

Additional factors militate against granting immunity to educators notwithstanding the importance attached to education. First, no positive evidence supports the view that the extension of malpractice liability to educators will unduly disrupt the substantive educational process or that, if some disruption does occur, its adverse effects would outweigh the positive effects of providing a remedy to students who have been harmed. Second, reasonable protection can be afforded educators through the adoption of a standard of care appropriate both to their status in society and to the perhaps unique conditions under which they must work. Third, the degree of social utility of the educational system must be related to the quality of the education provided. Given that educational institutions and educators are assured of their place in society, there is little incentive for self-regulation. For the courts to deny that educators owe students a legally enforceable duty of care could be seen as a judicial sanctioning of educational malpractice.[43]

CONCLUSIONS

As yet, no Canadian student has invoked the law of professional responsibility to recover compensation for the non-physical harm caused by educator incompetence or negligence resulting either in failure to attain that level of learning possible with a reasonably competent and adequate education or in his being misinformed as to the level of his academic abilities or achievements. However, it would appear that it is only a matter of time before Canadian educators are confronted by such claims. And it is entirely possible that the Canadian judiciary will be more imaginative, responsive, and adventuresome than their American brethren and be prepared to extend the scope of the law of professional responsibility to educators in appropriate circumstances – particularly given the lack of compelling reasons for not holding educators legally accountable.

Should this development occur, educators should not be unduly alarmed. While Canadian courts in malpractice actions brought against members of other professional groups have not hesitated to condemn unreasonable conduct, they have shown restraint. The courts have never imposed liability merely because a doctor failed to cure a patient or lawyer lost a case (Janisch, 1975, p. 58). Thus, educators need not fear that courts will impose liability simply because a student did not derive the full (or indeed any) benefit possible from his educational experience or because they failed to ensure equality of learning on the part of all of their students or because they were unsuccessful in imparting "wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, beauty and similar virtues and qualities ... " to their students (*Trustees of Columbia University* v. *Jacobsen*, 1959, p. 64). After all, you can lead a horse to water, but you cannot make him drink.

In essence, therefore, the concern of the courts in educational malpractice actions would not be to ensure that educators guarantee that all students succeed, let alone achieve the same level of learning. This could never be attained given all the variables involved. Rather, the concern of the courts would be to ensure that students receive the benefits of an education from teachers and educational institutions that meet a minimum acceptable level of competency. After all, "there is ... a critical difference between holding an educator directly accountable for his student's performance, and holding him liable for the quality of his influence in shaping that student's performance" (Elson, 1978, p. 754).

NOTES

[1] Portions of this paper have been derived from an extensive earlier article by the writer entitled "Educational Malpractice: A Tort for the Untaught," (1985), 19 *U.B.C.L. Rev.* 161.
I would like to acknowledge the assistance of the Social Sciences and Humanities Research Council. Also I acknowledge the assistance of Arthur Mandell for his comments on a draft of this article.

[2] Unlike their counterparts in the United States who did, and in some states still do, enjoy considerable protection from civil liability under the doctrines of sovereign and charitable immunity. See generally Annotation, "Modern Status of the Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning," 33 American Law Reports 3d 703.

[3] The subject has been treated either in a cursory manner (see e.g., Barnes, 1977, p. 211; MacKay, 1984, pp. 53-54, 159–61) or at a general level (see Janisch, 1975, p. 58; 1980, p. 491).

[4] See generally Barnes, 1977; McCurdy, 1968; Bargen, 1961; MacKay, 1984.

[5] Cases in which the alleged cause, in whole or in part, of the physical harm sustained by a student has been improper instruction are: *James* v. *River East School Division*, 1976; *McKay* v. *Board of Govan School Unit No. 29*, 1967; *Thornton* v. *School District No. 57 Board of Trustees*, 1976 (varied as to damages 1978); *Hoare* v. *Board of School Trustees, District 68 (Nanaimo)*, 1984; and see also *Smith* v. *Horizon Zero Sports Ltd.*, 1982.

[6] The circumstances which may give rise to an educational malpractice suit are many and varied: (1) failure to provide or maintain reasonably adequate instructional, orientation, and career counselling programs; (2) failure to provide or maintain reasonably adequate academic instruction, supervision, guidance, and counselling systems; (3) failure to provide or maintain reasonably adequate evaluation systems by which a student's progress is monitored; (4) failure to provide or maintain reasonably adequate means to identify and deal with exceptional students or initiate appropriate action when such a student is identified; (5) failure to provide reasonably adequate, qualified, and competent staff and to ensure their continued adequacy and competency; (6) misleading students as to their academic progress, level of achievement, or capabilities; (7) failure to maintain discipline in the classroom; and (8) failure to assign reasonably adequate and appropriate academic materials. (This list is not exhaustive, but it does serve to illustrate the great breadth of issues which may be the subject of student complaint.) Such incidents may be attributable to lack of care either in the administration of an educational institution or in the teaching of its courses and programs. Consequently, an aggrieved individual could seek to hold an individual educator or institution directly accountable for personal wrongdoing and/or the institution indirectly responsible under the principles of *respondeat superior* for the wrong-doing of its employees.

[7] The reported cases involving educational malpractice are (a) American cases: *Peter W.* v. *San Francisco Unified School District*, 1976; *Donohue* v. *Copiague Union Free School District*, 1978; *Hoffman* v. *Board of Education of the City of New York*, 1978; *Hunter* v. *Board of Education of Montgomery County*, 1981; *Doe* v. *Board of Education of Montgomery County*, 1982; *Paladino* v. *Adelphi University*, 1982; *Pietro* v. *St. Josephs' School*, 1979; (b) English cases, *Sammy* v. *Birbeck College*, 1964; *D'Mello* v. *Loughborough College of Technology*, 1970.

[8] Strickland, Phillips, & Phillips, 1976, pp. 63–64. And see Barnes, "The Spectre of Academic Malpractice," 1978.

[9] *Saif Ali* v. *Sydney Mitchell & Co.*, 1978, p. 1041 per Lord Diplock. And see generally, Smith, 1977.

[10] See *supra*, note 7.

[11] See *supra*, note 7.

[12] It appears to be accepted, at least in the United States, that where educational malpractice takes the form of intentional misconduct or fraud, liability will be imposed. As expressed by Digges J. in *Hunter* v. *Board of Education of Montomery County*, 1982, p. 587: "In declining to entertain the educational malpractice [action] ... we in no way intend to shield individual educators from liability for their intentional torts. It is our view that where an individual engaged in the educational process is shown to have willfully and maliciously injured a child entrusted to his educational care such outrageous conduct outweighs any public policy considerations which would otherwise preclude liability so as to authorize recovery." See also *Peter W.* v. *San Francisco Unified School District*, 1976; and *Pierce* v. *Board of Education of the City of Chicago*, 1976.

[13] Various education acts do, of course, demand that teachers "diligently and faithfully teach ... pupils," "plan and organize the learning activities of the class with due regard for the individual differences and needs of ... pupils," and so on. See The Education Act, R.S.S. 1978, c. E-0.1, s. 227. But one wonders what impact such exhortations have on actual educational practice.

[14] See Drushall, 1976; El-Khawas, 1977; Jung, 1979.

[15] See note 31, and Klein, 1979, pp. 60–61.

[16] No attempt is here made to canvass the desirability, let alone the feasibility, of establishing an insurance scheme to compensate the victims of educational malpractice.

[17] That educational experimentation may have adverse effects on its subjects appears to be recognized in The Education Act, R.S.S. 1978, c. E-0.1, which in s.228(2) provides: "No teacher engaged, under the supervision of the principal, in innovative or experimental projects related to teaching methodology or curriculum content that are approved by the board of education shall be liable for alleged malpractice as a teacher or for any other claim based on the results of such innovation or experimentation." (The protection afforded by this provision appears limited – it only applies to teachers when they are acting in the capacity of teachers.)

While on the subject of educational experimentation, it is interesting to note that it is of some concern to at least the Alberta Teachers' Association. In its *Members Handbook* (1984 ed.), p. 148 is found the following policy statement: "2.10 Experimental programs in teacher education should be conducted by Alberta universities, with the limitations that initial enrolment be voluntary, students should be permitted to transfer out of the program to the regular program at the end of any academic year, and there be a plan for evaluation and modification of the programs." No similar policy appears to have been adopted by the Association with respect to experimental programs in fields other than teacher education. This situation prompts the question, "why not?" Is it because it is someone else's responsibility? Whatever the reason, surely all students are deserving of equal treatment and protection where educational experimentation is involved!

[18] See Pritchard, 1977, pp. 389–93. In this era of declining student enrolments it is arguable that all sectors of the educational system are subjected to "competitive market pressures."

[19] Particularly if educators wish to achieve a degree of autonomy in the management of their affairs comparable to that enjoyed by the legal and medical professions.

[20] Klein, 1979, p. 41. Malpractice is defined as: "any *professional* misconduct, unreasonable lack of skill or fidelity in *professional* duties, evil practices or immoral conduct": *Black's Law Dictionary* (5th ed.), 1979; italics added.

[21] A considerable body of literature is devoted to these questions: Are educators professionals? If so, where on the spectrum of professionalization are or should educators be placed? However, it must be accepted from a legal viewpoint that, irrespective of the opinions of sociologists and others, educators must be accepted as professionals in those jurisdictions in which professional status expressly has been accorded them by legislation: see, for

example, Teaching Professions Act, R.S.A. 1980, c. T-3; Teaching Professions Act, R.S.O. 1980, c. 495. In those jurisdictions which have not so accorded professional status on educators, however, their place in society may still be relevant to the topic being discussed.

[22] See Funston, 1981, p. 775. Another writer has commented that few people "profess ignorance of the mysteries of teaching" – "indeed in no other field of endeavour are the professionals subject to as much non-professional advice and interference" (Proehl, 1959, p. 753).

[23] Note 6, above.

[24] Elson, 1978, p. 670. In another article (Foster, 1985), the writer seeks to show that the matters of standard of care, cause and injury do not present insurmountable obstacles to successful educational malpractice litigation.

[25] Prosser & Keeton, 1984, p. 56, note 58. And see *Donohue* v. *Copiague Union Free School District*, 1978, p. 883 per Suozzi J. (dissenting).

[26] If cases concerning the dismissal of educators for incompetence are any guide, it would appear that it is difficult to obtain testimony from, at least, fellow teachers. See Rosenberger and Plimpton, 1975, p. 483.

[27] This legislation, while not insulating those falling within its compass from civil liability, demands that a plaintiff institute his suit within a relatively short time of either the occurrence of the act complained of or the harm occurring as the case may be. See generally Barnes, 1977, pp. 191–192, and Goldenberg, 1973, pp. 403–408. However, it should be noted that since 1976, in Ontario at least, the six month limitation period for the commencement of actions against public authorities no longer starts running from "the act, neglect or default complained of" (see the Public Authorities Protection Act, R.S.O. 1970, c. 374, s. 11 (1) but from the time "the cause of action" arises (see *ibid.*, as amended by S.O. 1976, c. 19, s. 1 (1)). For a discussion of the Ontario enactment as amended, see Halfwight, 1979–81, p. 380.

[28] See e.g., *Peter W.* v. *San Francisco Unified School District*, 1976, p. 861; *Donohue* v. *Copiague Union Free School District*, 1978, p. 878; *Hunter* v. *Board of Education of Montgomery County*, 1982, p. 584.

[29] The claims advanced in the American cases have tended to be extravagant, and this has arguably worked to the plaintiffs' disadvantage particularly where the amount sought appeared to bear little relationship to a realistic estimate of the harm inflicted on the plaintiffs. In view of the novelty of educational malpractice suits, inflated claims may distract the courts from giving due consideration to the fundamental issues involved, confirm the feeling that it is impossible to evaluate educational harms in monetary terms, and raise the spectre of an undue financial burden being placed on the educational system (see Tracy, 1980, p. 580 and Elson, 1978, p. 761). Plaintiffs therefore should keep their claims within reasonable bounds.

Perhaps some guidance in assessing damages for educational malpractice can be derived from the fact that the harm can be attributed to the wrongful denial of a service of some value (Elson, 1978, p. 757). Thus, a damages award should at least cover the cost of remedial instruction, counselling, and other necessary services. In the appropriate case, an award may also be made for the time or income lost as a consequence of the plaintiff having to prolong his education. It has been suggested that a damage award "arguably should never exceed the cost of remedial instruction and earnings lost during the period of remedial instruction" (*Comment*, 1976, p. 759). This proposal, particularly if modified to encompass only the costs of remedial services actually utilized by a plaintiff, has merit as a general rule. It would minimize both the threat of fraudulent claims and any prejudicial impact of substantial damage awards on the finances of educational institutions. However, some flexibility would have to remain in assessing damages, for the above approach could work to the disadvantage of a plaintiff who has sustained irreparable harm as a consequence of the malpractice in question.

[30] One writer has commented that the suggestion that the American public would be prepared to accept tax increases to offset the effect of malpractice actions on educational budgets has "a faintly nostalgic ring. In the face of public resistance to tax increases, heightened competition for the remaining tax dollars available, and public hostility towards the schools, public education would almost certainly have to diminish still further the quality of its services. Nor would liability insurance provide a panacea for the premiums themselves would have to come from the public revenues" (Funston, 1981, p. 802).

[31] See note 18. Also *Comment*, 1976, p. 763; Elson, 1978, p. 745; Linden, 1973, pp. 155 and 157.

[32] Pritchard, 1977, p. 391, note 45. Cf. Funston, 1981, p. 804.

[33] See e.g., *Donohue* v. *Copiague Union Free School District*, 1978; *Doe* v. *Board of Education of Montgomery County*, 1982; *Hoffman* v. *Board of Education of the City of New York*, 1978.

[34] *Home Office* v. *Dorset Yacht Co.*, 1970; *Anns* v. *London Borough of Merton*, 1977; *Barrat* v. *North Vancouver*, 1978; *Pugliese* v. *National Capital Commission*, 1979; *Kwong* v. *R. in Right of Alberta*, 1979; *Kamloops* v. *Nielsen, Hughes and Hughes*, 1984. And see generally Bridge, 1978; Craig, 1978.

[35] See e.g., *Geddis* v. *Proprietors of Bann Reservoir*, 1878.

[36] See note 34.

[37] See generally Craig, 1978, pp. 431–437.

[38] Cf. *Meade* v. *Haringey London Borough Council*, 1979.

[39] Tracy, 1980, p. 591. And see *Mastrangelo* v. *West Side Union High School District of Merced County*, 1935.

[40] Cf. *Hunter* v. *Board of Education of Montgomery County*, 1981; *Doe* v. *Board of Education of Montgomery County*, 1982.

[41] See cases cited in note 5.

[42] *Demarco* v. *Ungaro*, 1979, pp. 404–405. See also *Park* v. *Chessin*, 1976 (modified on other grounds) in which the court observed: "What statute or theory of law grants preferential treatment or immunity to the medical profession? The court is the guardian of the rights of all the citizenry, not only a chosen few. ... To use the worn-out, rejected cliche of 'public policy' is to single out and grant preferential treatment to the medical profession over all other professions and enterprises where malpractice could result in payment of ensuing resultant damages. This was never truly contemplated by either the general public, the Legislature or the Court. This court further believes that contrary to the fear ... as to 'fraudulent claims' or a 'sensible stopping point,' that the Judiciary can intelligently sift the wheat from the chaff and that it has the ability to succinctly deal with any attempted fraudulent scheme or claim and make short shrift thereof" (p. 24).

[43] *Donohue* v. *Copiague Union Free School District*, 1978, p. 884 per Suozzi J. (dissenting).

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Bisher sind noch keine Ansprüche auf wissenschaftliche Erziehungskunstfehler bei den kanadischen Gerichtshöfen zur richterlichen Entscheidung eingereicht worden. Die Ansprüche auf Erziehungskunstfehler, die bei den USA Gerichtshöfen eingereicht wurden, sind alle zugunsten des angeklagten Erziehers oder Erziehungsinstitutes entschieden worden. Es wäre jedoch naiv zu glauben, daß weder Ansprüche auf Erziehungskunstfehler gegen Erzieher in Kanada eingereicht werden könnten, noch daß die kanadischen Gerichtshöfe ihren amerikanischen Gegenstücken nachahmen und entscheiden würden, daß Erzieher nicht für von ihren Erziehungsfehlern an ihren Schülern gerichteten Schäden verantwortlich gehalten werden könnten. In dieser Arbeit schlägt der Autor vor, daß Erzieher ihren Schülern gegenüber rechenschaftspflichtig für die Qualität und Genauigkeit der von ihnen gelieferten pädagogischen Dienste sein sollten. Die Arbeit versucht in erster Linie zu zeigen, daß die Ausbreitung von Haftung für Erziehungskunstfehler auf das Gebiet der Erziehung eine positive sowie eine vorteilhafte Einwirkung auf das Erziehungswesen und die Beteiligten des Erziehungsprozesses haben kann und zweitens, daß die von den US Gerichten berufenen Gründe, Erziehern einen Schutz vor Haftung zu gewähren, der von keiner anderen Berufsgruppe genossen wird, nicht unbedingt als genötigt anzusehen sind.

Aún no se han entablado pleitos por malpraxis educacional en las cortes canadienses. Los pleitos por malpraxis educacional que se han entablado en las cortes de los Estados Unidos se han resuelto a favor del educador o institucion educativa acusados. Sin embargo, seria necio creer que no se van a entablar pleitos contra educadores en Canada o que las cortes canadienses seguirán el ejemplo de sus contrapartes americanos en fallar que los educadores no son responsables del daño que su malpraxis hubiera causado a sus alumnos. En este articulo, el autor sugiere que los educadores deberian ser juzgados responsables ante sus alumnos por la calidad y adecuación de los servicios que proveen. El articulo trata de demostrar, primero, que la extension de la responsabilidad por malpraxis al campo de la educación puede tener un efecto positivo y benéfico sobre la educación y los participantes en el proceso educativo y, segundo, que las cortes estadounidenses no dieron razones apremiantes para otorgar a los educadores una protección contra la responsabilidad de la cual no gozan otros grupos profesionales.

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