

The Profession of Teaching: A Reply to Professor Foster

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In a very thought-provoking article, "Educational Malpractice: Educate or Litigate" [11(2)], Foster builds a powerful case for the liability of teachers in instances of malpractice causing nonphysical harm. In a carefully crafted text that draws on an extensive academic and legal bibliography, he discusses two separate but linked notions, claiming that teachers are professionals and that they should be held accountable for malpractice. Because, in Foster's view, it is not necessary for a teacher to be a professional in order to be held accountable, the article addresses separately two issues: whether teachers are professionals; and whether they can be held liable for malpractice even if they are not.

It is my contention that both concerns should be addressed by making reference to *autonomy*. Because professionals have a specialized understanding of a field vital to an ongoing society, they are granted professional status, and this necessarily includes an ability to judge policy and practice in their field. This autonomy comes mainly from their claim to an expertise which excludes others from making valid judgments in the professional field because only the professionals have that expertise. Professionals are granted greater autonomy than other occupational groups because only they can judge when the appropriate practice has been performed. Malpractice cases usually arise when a violation of the standard procedure becomes so obvious that even a lay person can detect the flaw. It is my claim that autonomy is essential to being a professional and that teachers without autonomy cannot be considered professionals.

Foster refers to the autonomy of professionals by citing two of Elson's comments on the subject. First, when speaking about the beneficial effects of imposing liability for educational malpractice, "It would provide educational institutions with an incentive to develop effective in-house internal procedures to resolve conflicts over negligently inflicted educational injuries" (p. 127). Again, in the list of hallmarks for identifying a profession, "Those pursuing the occupation or calling in question must: ... (3) have rules and principles of practice which give

them common guidance in treating and resolving specific problems and issues" (p. 130). Foster again emphasizes the importance of autonomy when he identifies the advantages in classifying teachers 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 Second, the use of a professional standard ... 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. (p. 131)

Evidently, Professor Foster considers professional autonomy to be important but not essential to the definition of a professional.

It is my claim that teachers lack autonomy because they are not granted control in matters of policy and employment which are vital to the operation of the profession. Rather, school boards make these decisions or, at least, have the power to veto professional judgments regarding school policy, curricular matters, and the employment of teachers. But school boards are composed of lay persons who have no special educational expertise even though they are empowered to make these critical judgments about those who are far more knowledgeable in the field. Professional autonomy ensures that the traditional professionals are not placed in a similar situation; and, in any occupational field, few would advocate that policy decisions be made by those less knowledgeable. As long as school boards exercise such control over teachers, it will be impossible to consider teachers as professionals. But, as well, such a lack of autonomy raises the question of whether teachers can be held liable for any of the instances that might lead to a malpractice suit, regardless of their professional status.

If this argument concerning professional autonomy is valid, then the Supreme Court ruling in the *Caldwell* case (see Parker-Jenkins & Osborne, 1985) adds a dimension unusual in other professions and indeed in most occupational situations. Justice McIntyre's ruling makes it legal to discriminate against a teacher for employment purposes on the basis of religious practices, for a Roman Catholic school board in British Columbia was permitted to dismiss an otherwise competent teacher for violating a religious practice. This dismissal constitutes an exception to the British Columbia Human Rights Code which prohibits discrimination against persons for their religious beliefs. I know of no similar professional situation where members of one profession (the clergy) can make a judgment about the expertise of another profession (teachers). The very fact that this is an exception indicates that similar grounds for dismissal

would not be condoned in other employment situations, regardless of the professional status of those involved.

Although education is a provincial matter, the precedent set by the Supreme Court of Canada has been applied to the teaching situation in Newfoundland. If, as the *Caldwell* case states, religious practices can serve as a bona fide qualification for teachers employed in religious schools, then certain religious practices could be used to judge the qualifications of all teachers in Newfoundland because all schools are religiously affiliated. Indeed, the *Caldwell* case is central to the arbitration ruling in the dismissal of Richard Walsh for failing to adhere to established religious practices. Walsh was employed by the Roman Catholic School Board of St. John's and, while teaching for the board, converted to the Salvation Army and then married within that church. The board of arbitration made its decision based on Justice McIntyre's ruling in the *Caldwell* case:

It is my opinion that objectively viewed, having in mind the special nature and objectives of the [Catholic] School, the requirements of religious conformance including the acceptance and observance of the Church's rules regarding marriage are reasonably necessary to assure the achievement of the objects of the school. (*Caldwell v. Stuart*, p. 27)

The *Walsh* case was appealed to the Supreme Court of Newfoundland. In upholding the arbitration board's ruling, Justice Noel referred to an 1886 ruling in *Pearce v. Foster*.

The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The *relation of master and servant* [italics added] implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate.

Justice Noel goes on to say:

While the words master and servant may have faded from popular use, the principles stated by Lord Esher remain as fresh as ever. *A teacher, in the employ of a school board* [italics added], who by his own act, puts himself into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, so that his continued employment is intolerable, may be dismissed for just cause pursuant to Section 12:01(e). (*Walsh v. The Roman Catholic School Board for St. John's*, p. 4)

It is difficult to see how professionals could have so little autonomy that they could be referred to as servants in this kind of a relationship. The

essence of professionals is the ability to make expert judgments about matters of policy in their field. If this master-servant relationship were to govern teaching matters, then it is difficult to see just what grounds for malpractice could be construed to hold the teacher rather than the school board liable. Teachers who can be dismissed for not performing their duty to the employer in a due and faithful manner would be loath to accept responsibility for acts that in their best judgment would run counter to board policy.

In order to be sued for malpractice, teachers must be knowledgeable about the established practices and responsible for establishing the standards of practice. If teachers are not responsible for establishing the standard practices, then they cannot be held accountable. So, even if teachers were not considered to be professionals, they still could not be held accountable for acts beyond their control. This is especially troubling when one is trying to establish grounds for malpractice.

Because of recent court rulings, teachers seem to be in a less autonomous position than any professional group. Teachers who gain certification by virtue of their expert knowledge are judged and controlled by persons who have less understanding about educational matters. School boards are legally permitted to dismiss otherwise competent teachers for failing to perform appropriate religious practices. A teacher as an employee, even a servant, of the school board may be dismissed for putting "himself into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner." This seems to be an undesirable situation for most occupational relationships, but it is certainly an untenable position for a professional. In order to hold a teacher accountable, there must be an appropriate level of responsibility. In order to sue a teacher for malpractice, there must be knowledge of and control over the established practices. It is my opinion, Foster's arguments notwithstanding, that recent court rulings have so limited the autonomy of teachers that it is unlikely that they can be considered to be liable for malpractice instances that might cause nonphysical harm.

REFERENCES

- Foster, W. F. (1986). Educational malpractice: Educate or litigate. *Canadian Journal of Education*, 11(2), 122-151.
- Parker-Jenkins, M., & Osborne, J. (1985). Rights in conflict: The case of Margaret Caldwell. *Canadian Journal of Education*, 10(1), 66-76.