

Educational Malpractice: *A Rejoinder*

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I am grateful for the opportunity to reply to Professor Covert's response to my article, "Educational Malpractice: Educate or Litigate" (*Canadian Journal of Education*, 11(2), pp. 122–151). This opportunity allows me to address his claims and to correct certain misconceptions which appear to exist concerning both the potential scope and operation of the principles of civil liability in the field of education and the legal meaning of certain commonly encountered terms.

Central to Covert's argument is his assertion – an assertion which I am prepared to accept as correct for present purposes – that teachers are not granted control over "matters of policy and employment which are vital to the operation of the profession. Rather, [lay] 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." Given this state of affairs, he makes three claims: that teachers lack autonomy; that "teachers without autonomy cannot be considered to be professionals" for, in his view, "autonomy is an essential feature of a professional"; and that "the lack of autonomy casts doubt upon the ability to hold teachers liable for any of the instances that might lead to a malpractice suit regardless of their professional status." These claims, at least when viewed from a legal perspective and in the absence of a clear and precise definition of the term "autonomy," which recurs throughout the response, are of questionable validity.

Teachers lack professional autonomy

This is a bold assertion to make, particularly in the absence of any express qualification to it. Insofar as teachers may lack control of entry to and exit from the profession, the terms and conditions of their employment, and matters of educational policy, it can be argued that they do not enjoy *full* professional autonomy. But implicitly to suggest, in view of this situation, that they lack autonomy in all matters of importance to the profession is patently incorrect for it ignores the critical fact that teachers have their

own "free and independent zone of decision making in the privacy of the classroom" (Legatt, 1970, p. 175).

It has been asserted that the teacher's functions (and skills) include: (a) diagnosis (the ability to "recognize the norms for the age and development of the children"; to identify "the needs related to and involved in the learning and development of each student"; to understand "the role and function of such available resources as administration, consultative and other professional services, and [to] utilize these so that the best possible progress of each child may be effected"); (b) prescription (the ability to "establish performance goals for each student"; and to "group students by related needs and goals where grouping is indicated by these needs and goals"); (c) presentation (the ability to "select educational programs, including materials, methods and techniques, designed to meet the needs and established goals for each student or group of students"; and to "present the selected programs to the students for whom they were designed"); and (d) evaluation (the ability to "evaluate the realism of the goals set, the suitability of selected programs, and the progress of each student"; and to "assess constantly and recurrently the needs, goals, grouping and programs for each student in the light of progress achieved") (Ontario Teachers' Federation, 1984, pp. 21–22).

In filling this role, it would appear that, of necessity, teachers must make professional judgments – often unique and special decisions based on the peculiarities of their classes and of individual students, decisions requiring a rational and intuitive ability to make creative extrapolations predicated on some collection of evidence (Daniels, 1973, p. 42), the knowledge and skill acquired through their formal preparation and experience, and the resources available to them. Thus, however the curriculum is defined, it would appear that the precise content and methodology to be utilized in the primary service delivered by the educational system to individuals and groups of students – namely, teaching and its various associated tasks – are the teacher's to determine.

This critical sphere of professional autonomy is jealously guarded: school administrators do not have the right to make unannounced visits to the classroom to assess the appropriateness or the quality of the service being provided, nor do the parents and guardians of students have such a right. It is within this sphere of autonomy that teachers as a group can develop and acquire knowledge of principles and rules which provide guidance in treating and resolving specific problems and issues which arise in the classroom and can develop a variety of teaching practices which, if not good, are at least acceptable. And it is for activities within this sphere of autonomy that individual teachers can incur civil liability, for

one of the purposes of the civil liability action is to ensure acceptable levels of quality in the *delivery* of professional and other services (Pritchard, 1978, p. 306). Thus it cannot be argued that civil liability is being imposed on teachers for acts they do not control.

Teachers without autonomy cannot be considered to be professionals

Even if one accepts a certain lack of professional autonomy in teachers, the validity of this claim, whether viewed from a sociological or a legal perspective, at best, is debatable. More importantly, as Covert appears to recognize, the outcome of the debate has no bearing on the answer to the very basic question whether a teacher can incur civil liability (however it is described) for harm caused to students by his failure to perform his various functions in a reasonably competent and adequate manner.

Undoubtedly teachers, at least in the public sector, given their lack of autonomy in certain professionally important matters, do not appear, from a sociological perspective, to qualify as *ideal-type* professionals – independent free practitioners who practice their calling in a purely entrepreneurial role (Harries-Jenkins, 1970, p. 53). However, Covert, given his second claim, appears to subscribe to the rather questionable notion that a neat, clear line can be drawn between professionals on the one hand and non-professionals on the other – the former being comprised of those who meet certain critical criteria used by various sociologists to identify the true professional, the latter being comprised of everyone else in society. To adopt such a stance – to accord professional status only to those persons who exhibit full professional autonomy and the other criteria – is to risk placing professionals on the list of endangered, if not extinct, species for, as has been observed, it is open to question whether any vocation or calling can or does conform to these criteria (Legatt, 1970, p. 156; Turner & Hodge, 1970, p. 25; Volmer & Mills, 1966, p. 2). This observation would appear specially pertinent in a society in which an increasing number of persons engaged in both the traditional and the newer professions are employed in large scale organizations as salaried employees performing their functions within the structural framework of bureaucratic hierarchies (Harries-Jenkins, 1970, p. 53). The lack of autonomy suffered by teachers is suffered also by these other professionals – yet there are few who would contend that the mere lack of autonomy in some professionally important matters (or the absence of one or more of the other many and varied elements which go into the make-up of the ideal-type professional) by and of itself automatically should disqualify a person both from holding a place on the continuum which forms the road to complete professionalization and

from appropriately being designated as a professional (albeit not as an ideal-type professional). After all, it cannot be overlooked that while "management" may control the terms and conditions of the professionals' employment, the professionals retain control of the work itself (Friedson, 1973, p. 24). Indeed, it has been suggested that a person, like a teacher, who is employed within a large scale organization is best described as an "ascriptive professional": "a work practitioner whose task is performed in a monopolistic organization which determines his status, evaluates his ability according to organizational requirements and delineates, through a process of selection and designation, the precise areas in which he will carry out his activities" (Harries-Jenkins, 1970, p. 55).

Thus it is to be seriously questioned whether the mere lack of teacher autonomy necessarily compels the conclusion, even within purely sociological terms of reference, that teachers cannot be considered professionals.

In addition, and most importantly for present purposes, it must not be overlooked that, merely because teachers do not correspond in all respects to the sociological model of the professional, it does not necessarily follow that they will not be accorded the status of professionals by the courts (Foster, 1986, p. 130). Rightly or wrongly, in a civil liability case involving a teacher as defendant, the courts, in determining the status to be accorded teachers, will pay greater heed to perceptions of three groups in society other than sociologists. The first group are the law-makers. How do legislators perceive teachers? Have teachers, directly (as, for example, in the *Teaching Professions Acts* of Alberta and Ontario) or indirectly (as, for example, in the *Newfoundland Teachers Association Act*, which, in section 4(b), declares as one of the objectives of the Association the elevation and unification of the "teaching profession"), been acknowledged as professionals in any pertinent legislation? The second group is the general public. How do laymen, personified in the law as the "reasonable man" (a creature who, like the ideal-type professional, arguably only has a notional existence), perceive teachers? Would the reasonable man, despite the fact that he may be critical of some teachers and not hold them in high esteem, still accord teachers the status of professionals? To this I would hazard a positive answer even though at present there may be a dearth of direct judicial authority to support it in Canada (Foster, 1985, pp. 205–24; Hoyano, 1984). And the third group are the teachers themselves. How do teachers perceive themselves? Do they publicly lay claim to the status of or profess to be professionals? That they do both is clearly evidenced in the handbooks and codes of ethics of nearly all, if not all, teacher associations and federations in Canada. Thus the courts, not unreasonably, are likely to take them at face

value and demand of them a level of performance in the exercise of their functions superior to that one would expect of a layman engaged in similar activities. After all, if teachers hold themselves out as experts and specialists in teaching and its associated tasks, is it inappropriate for the public and the courts to expect them reasonably to attempt to meet the expectations they thereby engender?

A number of other factors militate in favour of teachers being viewed as professionals. In addition to those already delineated (Foster, 1986, p. 131), two further factors may be mentioned. First, society would benefit from the superior performance that elevation to such status implies for teachers since the courts can then "help to assure that it is the right of all students either to gain the benefit of the special level of competence that is claimed to distinguish qualified teachers from laymen or to receive compensation for the harm caused by their teacher's departure from that expected level of competence" (Elson, 1978, p. 732); and, secondly, teachers may approach their duties more confidently if they can be assured that they would not be deemed negligent if they act in conformity with principles, rules, and practices developed by a responsible body of professional persons (Hoyano, 1984, pp. 31–32).

However, to reiterate a point already made, the outcome of the above debate has no bearing on the fundamental question of whether teachers can incur civil liability if they cause harm to their students by failing to perform one or more of their various functions in a reasonably adequate and competent manner. The short answer to this question is "Yes, they can incur civil liability." (It is perhaps pertinent to note at this juncture that no person or group of persons of sound mind and of full legal capacity, with the possible exception of members of the judiciary and of the federal and provincial legislative bodies while acting in their official capacities, is immune from suit at the instance of those on whom they wrongfully have inflicted harm merely because of their status or lack of it in society.) This liability is aptly described either by the broad rubric of "malpractice," if teachers are viewed as professionals, or more specifically as battery, assault, negligence, fraud, misrepresentation, or one of the other specific heads of civil liability, if they are not viewed as professionals.

Lack of teacher autonomy

Lack of teacher autonomy "casts doubts upon the ability to hold teachers liable for any of the instances that might lead to a malpractice suit, regardless of their professional status." In making this claim, Covert appears to have overlooked or failed to appreciate the significance of the distinction drawn by courts in civil liability litigation between the planning

or policy functions of public bodies (such as school boards), on the one hand, and their operational function, which involves the implementation and carrying out of their policies by employees (who, in the case of school boards, more often than not, are the teachers), on the other hand. This dichotomy and its relevance to the law of civil liability have already been discussed at some length (Foster, 1986, pp. 139–41).

There is no doubt that teachers employed by a school board, whatever their status, cannot be held legally accountable to students for harms which flow directly from the policy decisions of the school board over which the teachers have no control. And, to date, it appears that if the policy decision, erroneous though it might be, was reached through a *bona fide* exercise by the school board of its discretionary powers, the board also could not be held legally accountable to students for harms flowing from that policy decision. (However, it is now arguable that the legal accountability of public bodies for the quality of their policy decisions needs reassessment in light of the Canadian *Charter of Rights and Freedoms* – but this is an issue of no immediate relevance to teachers in the present context.)

Conversely, there is no doubt that teachers employed by a school board, whatever their status, and the board itself (through the operation of the principle of *respondeat superior*) can incur civil liability for negligence at the operational level. Though the teachers, personally or through their representatives, may have played no part in the formulation of educational policies and even though they, individually or collectively, may disagree with the policy decisions taken, they still are charged by the terms of their employment with the obligation of putting these policies into practice. As has been shown, it is in the sphere of practice – that is, in the actual delivery of educational services to students – that teachers assert and retain a high degree of autonomy; and it is in this sphere, at least, that the law will demand that teachers utilize the minimum level of care and skill associated with the reasonably competent member of their profession. Harm to a student caused by a deviation from this standard of conduct will result in liability being imposed on the teacher responsible (and on his employer). The emphasis of civil liability is on quality of the delivery of the service provided by the board and its employees – it seeks to ensure in the educational context that, if a student suffers harm as a consequence of teacher negligence, he will be compensated.

Up to this point, the standard of legally acceptable conduct to which teachers must conform has been formulated on the basis that they belong to a professional group. A standard so derived carries with it certain advantages for a member of a profession when sued for harm allegedly inflicted by him (Foster, 1986, p. 131). But what if, as Covert contends,

teachers are not professionals? How then does one derive an appropriate yardstick against which to measure the quality of their performance in teaching and its associated tasks? The courts may still derive a standard of conduct from their occupational group. A review of the authorities suggests that a critical factor in determining whether an individual's conduct should be measured according to a standard drawn from his occupational group is whether the group possesses or is seen to possess certain skills, competencies, and expertise which are not enjoyed by the layman (Foster, 1986, p. 131). However, this standard, unlike the former, is not determined to the same degree by the vocational group itself. Although the courts will hear evidence concerning the conduct of the activity in question from members of the group, the courts will not pay the same deference to that testimony; and, in determining the minimum level of acceptable conduct demanded of the occupational group, the courts will more readily impose a standard of conduct on them which departs from the customary manner for performing that activity (Pritchard, 1978, p. 308). And if, heaven forbid, the courts should subscribe to George Bernard Shaw's opinion of teachers and hold that they cannot be viewed as possessing unique skills, competencies, and expertise, then resort will be had by the courts to the standard of the "prudent parent" or, in the last resort, to that of the "reasonable man," to determine the acceptability of a particular teacher's conduct.

It must be noted, however, that, whatever the origin of the standard utilized, it is an objective and not a subjective standard. The law measures the individual behaviour in question against that which should be expected of a reasonably competent and skilled member of the relevant group in the same circumstances. And all individuals who profess to belong to that group must perform, as a minimum, in accordance with that standard. It matters not that they be novices, have been ill-trained and ill-equipped for their role, or lack the appropriate credentials in the eyes of other members of the group.

But again what if, as some would suggest, there does not exist any satisfactory evidence as to what educational practices are necessary for effective teaching or harmful to teaching in some situations? Despite a possible lack of established practice in some areas of teaching, a lack of agreement as to whether the primary goal of education is to develop thinking, stress basic skills, socialize the student, or achieve any combination of these or other ends, and a lack of consensus as to what teaching methods are the most effective, what constitutes good teaching, or how best to assess what has been taught, it would be surprising if most teachers would not agree that they do possess sufficient knowledge and experience to identify professionally unacceptable teaching practices (Foster, 1985,

p. 220–21). And in the event there is a conflict of opinion as to what the educator of reasonable competence and skill would have done in a particular situation, a defendant will only incur liability if he fails to act “in accordance with a practice accepted as proper by a responsible body of ... men skilled in that particular art” (*Bolam v. Friern Hospital Management Committee*, 1957, p. 582) or if, though adopting such an accepted practice, he fails to implement it in a reasonably competent and skillful manner.

To conclude my response to Covert’s third claim, it would appear that there is no doubt that, as a matter of principle, teachers can be held legally accountable for harm inflicted on students through the negligent performance of their duties. However, whether liability will be imposed on them in practice will turn on whether a plaintiff student can satisfy a court both that the teacher’s failure to comport himself in accordance with the appropriate standard of conduct was the cause in fact of the plaintiff’s alleged harm and that the harm suffered is one for which compensation or some other remedy should be available. In the appropriate case, this is not beyond the realm of probability.

Some miscellaneous matters

Finally, it is necessary to address three other matters in Covert’s response. The first is his observation that “malpractice cases usually arise when a violation of the standard procedures becomes so obvious that even a lay person can detect the flaw.” This observation does not reflect the reality. Most professional malpractice suits which in fact are decided by the courts involve deviations from accepted practices and procedures which can be identified and proved only through recourse to the expert testimony of other members of the profession. They involve complex and often technical issues about which the layman has little or no knowledge, let alone the ability to make an informed judgment about their merits. While a few cases do reach the courts involving wrongdoing that is so blatant that it is recognizable by the layman, most such extreme instances of malpractice will be settled by the parties without recourse to litigation.

Secondly, it is implicit in Covert’s remarks that he is offended by the court’s categorization of teachers as “servants” in the cases to which he refers. He can rest assured that the courts do not mean to offend. The problem here is that this word, like so many others in common usage, has a legal meaning which does not necessarily accord with that attributed to it by the layman. In law, *servant* is a generic term used to describe *any person of whatever rank or position* in the employ and subject to the direction or control of another, the *master*. Thus, in this sense, the terms *master* and *servant* are synonymous with *employer* and *employee*, and are

used to denote one of three main employment relationships recognized in law (the other two being principal and agent, and employer and independent contractor).

Thirdly, it is clear that Covert is unhappy with the fact that lay school boards have the power to determine appropriate job qualifications for their employees and to dismiss "otherwise" competent teachers for failing to maintain certain of these qualifications. Two discrete issues appear to be involved here. On the one hand is the right of an employer to establish job qualifications which persons seeking employment must meet and, if they wish to retain their employment, maintain. That all employers have this right cannot be questioned. They are under no obligation to employ or retain in their employment persons merely because they are members in good standing of a professional or vocational group and are "otherwise" competent if such persons do not exhibit at the relevant time all of the attributes which have been declared by the employer as necessary for the proper performance of their duties. Thus, if a teacher fails to maintain the qualifications demanded for his job, there would appear to be nothing objectionable about a school board dismissing him "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.'" Indeed I find it very difficult to appreciate how an employer's right to dismiss an employee in the circumstances quoted creates "an undesirable situation for most occupational relationships ... [and] certainly an untenable position for a professional." It must be remembered that at the end of the day employers are accountable (by virtue of the principle of *respondeat superior*) to third parties for the conduct of their employees. In some instances, school boards have agreed to forego their rights to seek indemnification from an employee whose negligence has resulted in a judgment against the board and to reimburse employees against whom a personal judgment has been rendered. Thus, to hold that a school board cannot dismiss a teacher unable to perform his duties in a due and faithful manner is to place the board in an untenable position.

On the other hand is the matter of the appropriateness of the job qualifications established by an employer. What are appropriate job qualifications in the educational context? In general they would appear to be qualifications designed to ensure that teachers (a) as a minimum, possess and exhibit the qualifications, skills, and competencies which can be found in a reasonable member of that profession and (b) possess and exhibit such additional skills, competencies, and attributes as are deemed necessary by a school board in light of such factors as the peculiarities of the work place or the student body to be served, the particular assignment

to be fulfilled by the teacher, and, last but not least, the special missions or goals of the board. Failure by a school board to establish and impose the first or the second (where the circumstances dictate that they are necessary for the proper provision of proper and appropriate educational services) would expose the board to litigation and, in some instances, civil liability.

It is of course possible that particular job qualifications in either category may be viewed as appropriate by a school board but inappropriate by actual or potential employees of that board. In such circumstances, the legality of these job qualifications can be tested in the courts, as occurred in the cases referred to by Covert. However, unless the job qualifications infringe an individual's fundamental rights and freedoms (as defined by the *Charter of Rights and Freedoms* and provincial human rights codes) or contravene the provisions of other pertinent legislation (such as education acts, teaching professions acts, labour codes and the like), it matters not that they are viewed as objectionable by some – their imposition is sanctioned by the law.

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