EDUCATIONAL NEGLIGENCE AND THE LEGALISATION OF EDUCATION

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I. INTRODUCTION

The categories of negligence are never closed.[1]

> This review of developments in the application of principles of negligence and vicarious liability to injuries suffered by students reveals a clear and continuing judicial trend in favour of imposition of liability upon teachers and school authorities.[2]

This article examines the possibility of establishing a claim for educational negligence in Australia. Educational negligence occurs when a student suffers harm as the result of incompetent or negligent teaching. There can be little doubt that the quality of education is a major concern of the community and a number of studies concerning the academic achievement of students in Australia are reviewed in the following section of this article.[3] The important issue is whether a student who suffers harm resulting from educational negligence should have a legal remedy. The prospects and the difficulties associated with such a claim are examined in this article. However, the aims of the article are more ambitious than simply discussing whether these types of claims can be established in Australia. The subject of educational negligence is used as a focus point to explore two issues. These are firstly, the policy considerations that need to be addressed when any question of establishing a new legal remedy, such as a claim in tort, arises and secondly, the role of legal remedies in educational policy making. While the idea that teachers or school authorities should be liable for educational negligence has been the subject of detailed discussion in the United States,[4] it has received

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1 *Donoghue* v. *Stevenson* [1932] AC 562, 619 *per* Lord Macmillan.

2 G. Lowe, "The Liability of Teachers and School Authorities for Injuries Suffered by Students" (1983) 13 *UQLJ* 28, 43.

3 See below, discussion accompanying notes 13-23.

4 See note 33, *infra*.

little attention in Australia.[5] Certainly, no court in Australia has yet had to examine this issue. Yet the subject is topical for a number of reasons. First, we have witnessed in the last few years increased scrutiny and analysis of the legal environment in Australia in which teachers operate.[6] This has been particularly evident with respect to the liability for physical injury occurring to students[7] but has also included subjects such as corporal punishment.[8] It is therefore appropriate to focus on the potential liability for non-physical injuries sustained by students.

The second reason why the subject of educational negligence is topical is that an increasing number of professions are being held accountable to their clients for negligence through the imposition of legal liability[9] and if teachers are to be excluded from this trend, this should not be done without careful consideration. Teachers are regarded as professionals[10] and an argument can be strongly asserted that a student who has had the misfortune to suffer incompetent teaching and thereby sustains injury, albeit not physical injury, should be able to sue that teacher or the teacher's employer.

This argument raises two further issues. The first is whether it is possible to establish a claim for educational negligence according to established legal principles. Thus, for a negligence claim to succeed, an initial question must be whether the teacher or school authority owes a duty of care to the student. In addition, it needs to be determined whether allowing an educational negligence claim to succeed satisfies sensitive policy considerations that are evident in such a claim. These include the issue of whether courts have the necessary expertise to assess educational negligence claims, whether disruption of the school environment would be a necessary result and whether allowing educational negligence claims would enhance educational standards.

The structure of this article is as follows. Part II outlines the results of published studies concerning the academic achievement of Australian students. Part III is a survey of Australian developments in the field of

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5 See notes 25 to 31 and accompanying text.

6 See A. Knott, K. Tronc and J. Middleton, *Australian Schools and the Law* (2nd ed. 1980); B. Boer and V. Gleeson, *The Law of Education* (1982); R. Chisholm (ed.), *Teachers, Schools and the Law in New South Wales* (1987).

7 Knott, Tronc and Middleton, *id.*, Ch. 4; Boer and Gleeson, *id.*, Ch. 6; G. Davis, "Accidents to Children: Who is Liable?" in Chisholm (ed.), *id.*; B. Collier, "Teachers and Negligence" (1980) 8 *Teacher Feedback* 25; G. Lowe, note 2 *supra*; K.G. Brown, "Is the Law Imposing a Greater Burden Upon School Principals in Cases of Accidents to Pupils?" (1984) 10 *Unicorn* 60. The most comprehensive analysis of the liability of Australian teachers and school authorities for physical injury sustained by students is by P. Heffey, "The Duty of Schools and Teachers to Protect Pupils from Injury" (1985) 11 *Mon L Rev* 1.

8 See G. McCarry, "Some Legal Aspects of Punishment in Schools" (1984) 58 *ALJ* 707; R. Chisholm, "Punishing Children at School: The Legal Limits" in Chisholm (ed.), note 6 *supra*.

9 See R.M. Jackson and J.L. Powell, *Professional Negligence* (1987); D.F. Partlett, *Professional Negligence* (1985); A.M. Dugdale and K.M. Stanton, *Professional Negligence* (1982); S. Charles, "Professional Liability and Lawyers" (1988) 62 *L Inst J.* 22.

10 See D. White, "The Profession of Teaching" in P. Boreham, A. Pemberton and P. Wilson (eds) *The Professions in Australia: A Critical Appraisal* (1976); J. Coates, "Defining Teacher Professionalism" (1983) 18 *Education News* 16. But compare, D. Lorton, *School Teacher: A Sociological Study* (1975).

educational negligence. Part IV discusses the significant United States cases in this area. It is indicated that although the cases that have sought to establish claims for educational negligence have not generally been successful, a recent court decision has held that school authorities owe students a duty of reasonable care in testing and placing students in appropriate special education programs.[11] In addition, there has occurred a blurring of the distinction between educational and medical negligence with one court classifying as medical negligence an action that could readily have been classified as educational negligence in order to permit the claim to succeed.[12] These developments may foreshadow the success of an educational negligence claim in the United States in the near future.

Part V examines the requirements for establishing a claim for educational negligence according to Australian common law principles. It is emphasised in this section of the article that it is essential to distinguish between educational negligence claims based on negligent evaluation and educational negligence claims arising out of incompetent teaching. It is the former category that has the most likelihood of success in establishing liability because it more readily fits within the common law requirements of negligence.

Part VI of the article is an evaluation of the policy considerations that are relevant to educational negligence. There is discussion of the trend of increased legal intervention in the school environment of which educational negligence claims form a part. One of the more significant arguments analysed in this section is that while legal intervention in the school environment is based upon the goals of remedying wrongs and deterring future harmful behaviour, such intervention can stifle, through the fear of legal liability, the creativity and innovation that it so vital to the educational process.

II. RECENT CONCERNS WITH ACADEMIC ACHIEVEMENT

The academic achievement of students is a subject that has generated significant controversy. Complaints are heard frequently about the quality of education in Australia yet statistical support for these claims is often not forthcoming. A number of reports have made recommendations with a view to improving the quality of education in Australia.[13] These reports do not contain statistical information that would allow a reader to assess whether educational standards are improving or declining in Australia although one of the reports was able to conclude on the basis of a survey of parental attitudes to schools that the more information parents have about schools and

11 *B.M.* v. *State*, 649 P2d 425 (1982).

12 *Snow* v. *State*, 98 AD 2d 442; 469 NYS 2d 959 (1983); *affirmed*, 64 NY 2d 745; 475 NE 2d 454; 485 NYS 2d 987 (1984).

13 See *Report of the National Inquiry into Teacher Education* (1980); NSW Department of Education, *Quality Education — Teacher Efficiency Review* (1985).

the more contact they have with the school their children attend, the higher is their satisfaction with the standard of education provided by that school.[14]

One study published in 1978 by the Australian Council for Educational Research endeavoured to estimate the number of students failing to obtain the basic skills of literacy and numeracy as assessed by performance tests.[15] The study evaluated the performance of students aged ten and fourteen years in schools across Australia. Some of the findings of the study included:

(i) Reading

(a) 7.4 per cent of ten year old students and 3.3 per cent of fourteen year old students were unable to supply missing letters in the alphabet. The authors of the report note:

> [l]ack of knowledge of the alphabet would prevent these students from using efficiently a dictionary, an alphabetical index, the pages of classified advertisements, or a telephone or street directory.[16]

(b) Three per cent of 10 year old students, or an estimated 7500 students across Australia, appeared to be unable to read very simple sentences correctly. This means that on average one child per classroom had not achieved this elementary level of performance by the age of 10 years. At the 14 year old level 0.8 per cent, or an estimated 2000 students across Australia, had not mastered the simplest skills of reading. Unless students had reached this threshold level by the age of 10 or 14 years, it seems likely that they would be severely handicapped in the future, both in the classroom and the world of work and in life in a modern society.[17]

(c) 28 per cent of students at the fourteen year old level, "an age when many will shortly be leaving school, have not achieved mastery of those basic skills of reading that will enable them to read effectively a reference book or to glean information from a simple newspaper".[18]

(ii) Writing

(a) Only 50 per cent of fourteen year old students were able to write a letter of application for a job satisfactorily.

(b) 48 per cent of fourteen year old students given a simple street map were unable to write the directions necessary for a person to drive to a specific place shown on the map. "It was evident that such tasks, which must be relatively common in everyday life, were ones which the students in Australian schools found hard to handle."[19]

(iii) Numeracy

(a) It was found that four per cent, or an estimated 10,000 of the 14 year old students across Australia, would complete the compulsory period of schooling unable to subtract and multiply effectively because they did not know their number facts, and twice as many would be unable to perform division at this age level for the same

14 *Report of the National Inquiry into Teacher Education*, *id.*, para 2.52. The Report notes that despite this level of satisfaction, "parents as well as students and teachers, see considerable room for improvement in schools' achievement in . . . high priority areas".

15 J.P. Keeves, J.K. Matthews and S.F. Bourke, *Educating for Literacy and Numeracy in Australian Schools* (1978).

16 *Id.*, 16.

17 *Id.*, 16-17.

18 *Id.*, 19.

19 *Id.*, 22.

> reason. In spite of the ready availability of calculating machines, these individuals would be severely handicapped in a very large number of the transactions they needed to undertake in daily life. With this level of performance on basic number facts, it was not surprising that 10 per cent of 14 year olds were unable to obtain the correct answer for subtraction and division tasks involving whole numbers.[20]

(b) 25 per cent of fourteen year old students were unable to perform basic tasks using the decimal system of notation.

(c) 29 per cent of ten year old students and 11 per cent of fourteen year old students could not record the time shown on the face of a watch.

One of the main conclusions of the study was that approximately 25 per cent of students of an age that would shortly allow them to leave school had not achieved mastery of fundamental tasks relating to literacy and numeracy.[21] As the authors of the study note, this is a matter of significant concern.[22] However, the study did not address the important question of changing standards of educational achievement over time. The results of a forthcoming study by the International Association for the Evaluation of Educational Achievement that does address this issue, *Science Achievement in 24 Countries*,[23] indicate that in the field of science, Australian fourteen year old students were ranked second in a 1970 survey of science achievement in ten countries but the ranking had fallen to sixth position in a 1983 survey.

One response to a perceived problem with the academic achievement of Australian students is a call for increased emphasis in education on the 'basics' of literacy and numeracy. An example of this emphasis is the regulations under the Education and Public Instruction Act 1987 (NSW). The regulations provide that in order for a school to be registered under the Act, the courses of instruction offered at the school must include:

> English expression (both written and oral, and including standardised spelling, punctuation and grammar) and reading, mathematics, aspects of social studies (including the study of Australia) and science and involvement in physical education, music and art or craft, or both.[24]

This article explores a different response to problems associated with the academic achievement of students and the quality of the educational process; namely, the introduction of a legal remedy for students who have suffered harm as the result of negligent or incompetent teaching.

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20 *Id.*, 23-24.

21 *Id.*, 28.

22 *Id.*, Ch. 4.

23 The preliminary results of this study, which will be published in 1989, are reported in M. Rosier, "International Comparisons of Science Achievement" (1988) 14 *Unicorn* 112. The author states at 115: "[t]hese are the most disappointing results for Australia. Although Australian 14 year old students performed quite well in the 1983-84 study, their performance did not match that of the corresponding Australian students in 1970 who ranked second on the bridge test among the 10 countries involved in that first study. This suggests that improvements that may have taken place in science education in Australia since 1970 have not been as large as those in other countries . . ." Further details of the international study are reported in M. Rosier, "Science Achievement in an International Context" (1988) 34 *Australian Science Teachers Journal* 13.

24 Education and Public Instruction Regulation 1987, clause 3(b)(i). Another approach that has been tried in the United States with limited success is merit pay for teachers: see *The New York Times* 3 August 1988, 21.

III. AUSTRALIAN DEVELOPMENTS CONCERNING EDUCATIONAL NEGLIGENCE

Addressing a group of educators in 1982, Justice M.D. Kirby stated:

> [i]f teachers claim full membership of the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents . . . In due course . . . we will see whether the teacher's legal duty of care goes beyond protecting pupils from physical injury in the playground and science laboratory to what is perhaps the more relevant and usually more profound professional injury that can result from indifferent, ill-motivated, incompetent or just plain lazy teaching . . . Such a test case [may be] a powerful agent for educational change and accountability of schools and teachers to the pupils and their parents.[25]

The response to this suggestion was not enthusiastic. *The Sydney Morning Herald* in an editorial stated that courts have "a poor record in solving social problems" and that the threat of legal liability could make the education system more resistant to changes that are needed.[26]

However, Justice Kirby has continued to raise the issue of educational negligence in Australian schools and he finds it ironic that while teachers and school authorities owe a duty of physical care to their students they do not owe a duty for the intellectual development of a student "despite the fact that this intellectual advancement is the primary professional duty assumed by teachers and educationalists".[27] Other Australian commentators have noted the failure of the law to recognise educational negligence claims particularly in the context of the education of retarded children.[28] It has been said that it should not be a material consideration in analysing the merits of educational negligence claims whether the injury to the student is physical or intellectual.[29]

A recent New South Wales case, although settled out of court, has implications for educational negligence claims.[30] The plaintiff was a candidate for the New South Wales Higher School Certificate whose results in a subject were wrongly calculated so that he received a lower score than that to which he was entitled. Because of the incorrect score, the plaintiff was not admitted to the tertiary institution of his choice. It can immediately be seen that this

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25 The Hon. Justice Kirby, "Legal and Social Responsibilities of Teachers", address at the Education Centre for Whyalla and Region, South Australia, 22 March 1982, 15.

26 *The Sydney Morning Herald*, 25 March 1982, editorial.

27 The Hon. Justice Kirby, "Legal Responsibility and Private Schools" (1984) 14 *Independent Education* 16, 19. In the same issue of *Independent Education*, V. Gleeson also raises the possibility of educational negligence claims in Australia, particularly in circumstances where teaching errors can be specifically identified, such as not teaching a novel specified by school authorities for an examination: see V. Gleeson, "Teacher Liability for 'Negligence': Who is Responsible?" (1984) 14 *Independent Teacher* 6, 9. See also P.W.F. Whalley, "Educational Malpractice: American Trends and Implications for Australian Schools" (1986) 12 *Unicorn* 203 and B. Thompson, "In a Class Apart: 'Educational Negligence' Claims Against Teachers" (1985) 1 *Qld Inst Technology L J* 85.

28 S. Hayes and R. Hayes, *Mental Retardation — Law, Policy and Administration* (1982) Ch. 4.

29 B. Boer, "Legal Rights and Obligations of Teachers" in Chisholm (ed), note 6 *supra*, 18.

30 The following discussion of the case is based upon the statement of claim outlined in Boer, note 29 *supra*, 20-21.

is one of the more easily established cases of educational negligence. There is a clearly identifiable wrong that has occurred. If the school authority had a duty to calculate accurately the student's results then as a consequence of the breach of this duty, the student suffered injury by not being admitted to the tertiary institution to which he was entitled.[31] This particular case does not reflect many of the practical problems associated with establishing an educational negligence claim. As we shall see in Part V, it is more difficult to succeed with a case based upon alleged incompetent teaching where an immediate hurdle is establishing a duty on the part of teachers to provide non-negligent instruction.

IV THE UNITED STATES EXPERIENCE

The suggestion that educational negligence actions might lie against teachers has been the subject of discussion in the United States since the first half of the 1970s.[32] Since then, although there has been extensive discussion of the possibility of this action in law reviews,[33] decided cases have been few in number. Moreover, the courts have almost uniformly rejected the idea of educational negligence as a cause of action. In this section, an historical survey of the case law is undertaken in order to provide the necessary background to analysing the elements required for a successful educational negligence claim in Australia.

The first reported case in the United States was *Peter W.* v. *San Francisco Unified School District*.[34] The plaintiff was an eighteen year old high school

31 According to Boer, note 29 *supra*, 20, the statement of claim alleged, inter alia, that the plaintiff was owed a duty by the Board of Senior School Studies and the NSW Department of Education "to exercise reasonable care, skill, diligence and competence in the conduct of the examination, the assessment of the plaintiff's papers, the calculation of the plaintiff's aggregate mark and the notification thereof".

32 See R. Vacca, "Teacher Malpractice" (1974) 8 *U Rich L Rev* 447.

33 E. Butler, "Educational Malpractice Update" (1985) 14 *Capital U L Rev* 609; T. Collingsworth, "Applying Negligence Doctrine to the Teaching Profession" (1982) 11 *J Law & Education* 479; F. Coultas, "Educational Malpractice and Special Education Law" (1979) 55 *Chicago-Kent L Rev* 685; J. Elson, "A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching" (1978) 73 *Northwestern U L Rev* 641; R. Funston, "Education Malpractice: A Cause of Action in Search of a Theory" (1981) 18 *San Diego L Rev* 743; R. Jerry, "Recovery in Tort for Educational Malpractice: Problems of Theory and Policy" (1981) 29 *Kansas L Rev* 195; T. Loscalzo, "Liability for Malpractice in Education" (1985) 14 *J Law & Education* 595; C. Masner, "Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?" (1982) 21 *Washburn LJ* 555; K. McArdle, "Creating an Implied Educational Malpractice Action for the Handicapped in New York" (1982) 46 *Alb L Rev* 520; C. Morgenstern, "Tort and Civil Rights Liability of Educators" (1983) 10 *Ohio Northern U L Rev* 21; D. Nelson, "Educational Malpractice" (1981) 42 *George Mason U L Rev* 261; Note, "Educational Malpractice" (1976) 124 *U Pa L Rev* 755; J. Pabian, "Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last" (1979) 15 *N Eng L Rev* 101; R. Rosenberg, "Comment — *Hoffman* v. *Board of Education*" (1981) 10 *Hoffstra L Rev* 279; J. Stull, "Why Johnny Can't Read — His Own Diploma" (1979) 10 *Pacific L J* 647; D. Tracy, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction" (1980) 58 *North Carolina L Rev* 561; R. Yoerges, "Educational Malpractice: Potentialities for Applying Procedural Due Process" (1984) 14 *Stetson L Rev* 103.

34 60 Ca App 3d 814; 131 Cal Rptr 854 (1976).

graduate who sued his school district because he could only read at a fifth grade level. He alleged in his statement of claim that school personnel had failed to exercise the degree of professional skill required of ordinary prudent educators and that this negligence was evident in the school district's failure to apprehend his reading disability, use of inadequate or incompetent instructors and allowing him to pass to a higher class each year despite his lack of the required abilities to progress.[35] The court affirmed the trial court's decision to dismiss the case because it failed to state a cause of action. The court stated that it was not possible to identify a workable standard of care applicable to teachers. The court also stressed the difficulty in isolating the cause of the plaintiff's failure to learn and concluded by expressing concern that allowing the action to succeed would result in a large number of similar suits which would place great strain in terms of time and money on already overburdened schools.[36]

Similar facts were alleged in *Donohue* v. *Copiague Union Free School District*.[37] Although the plaintiff graduated from high school, he lacked "even the rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications for employment".[38] The New York Court of Appeals observed that it may be possible to state a legally sufficient claim alleging educational negligence within the established principles of negligence and stated that the creation of a standard with which to judge a teacher's performance would not necessarily be an insurmountable obstacle. However, the court was unwilling to let the action succeed for explicit public policy reasons:

> [t]o entertain a cause of action for 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies — a course we have unalteringly eschewed in the past — but, more importantly, to sit in review of the day-to-day implementation of these policies.[39]

The third case, *Hoffman* v. *Board of Education*,[40] represents a case of negligent evaluation in the school environment. Shortly after entering kindergarten, the plaintiff was examined by a school psychologist who determined that he be placed in a special class for retarded children. But because the psychologist could not be certain of his findings, he recommended that the plaintiff be re-evaluated within two years. In fact, the

35 The problem of passing or even graduating students who are clearly deficient in their level of academic achievement is particularly evident in the United States in the case of talented athletes. There are cases where student athletes are passed in courses they never attended with the collusion of academic staff and sports staff so that the athlete can meet the school's minimum progress requirements and thereby continue in the school's sports team: see D. Johnson, "Educating Misguided Student Athletes: An Application of the Contract Theory" (1985) 85 *Colum L Rev* 96, 99.

36 Note 34 *supra*, 860-866.

37 64 AD 2d 29; 407 NYS 2d 874 (1978); *affirmed*, 47 NY 2d 440; 391 NE 2d 1352; 418 NYS 2d 375 (1979) (hereinafter *Donohue*).

38 391 NE 2d 1352, 1353 (1979).

39 *Id.*, 1354.

40 64 AD 2d 369; 410 NYS 2d 99 (1978); *reversed*, 49 NY 2d 121; 400 NE 2d 317; 424 NYS 2d 376 (1979) (hereinafter *Hoffman*).

plaintiff was not re-evaluated for 13 years at which time it was determined that he was not retarded. However, during those 13 years, the plaintiff had attended classes for retarded children and he alleged that this not only resulted in severe injury to his intellectual and emotional well-being but also reduced his ability to obtain employment. The jury awarded damages to the plaintiff which was affirmed by the New York Appellate Division. The New York Appeals Courts reversed this decision relying heavily on the public policy reasons enunciated in *Donohue*; specifically, that the legal system is not the proper forum to test the validity of educational decisions.[41]

More recently, in *Torres* v. *Little Flower Children's Services*,[42] the plaintiff alleged that the social services department and the child care agency with which he was placed were negligent in that he remained functionally illiterate despite having received a public education. It appears from the facts that the plaintiff was placed in public education, however the defendants failed to ascertain that the plaintiff, although being educated in an almost entirely English-speaking environment, was only fluent in Spanish.[43] The plaintiff attempted to distinguish *Donohue* and *Hoffman* on a number of grounds including the assertion that those decisions prevented suits only against educators whereas his action alleged negligence on the part of those agencies responsible for his upbringing.

In response, the court stated that the same policy considerations apply regardless of whether the defendant is a school or a child's legal custodian:

> [w]hat is at the root of the policy enunciated in *Hoffman* and *Donohue* is not the identity of the defendant but the nature of the determinations courts would be called upon to make . . . in either situation the court would be thrust into the position of reviewing the wisdom of educators' choices and evaluations. Here, for example, plaintiff's allegations would require the courts to assess the nature of his difficulty in learning, including such elusive factors as his own attitude, motivation, temperament, past experience and home environment.[44]

Apart from California and New York, a number of other States have rejected educational negligence claims. Thus, the Maryland Court of Special Appeals has acknowledged the criticisms of the teaching profession and the serious problems evident in the educational process when a student is systematically promoted through the school system from grade to grade without being able to read.[45] Yet the court concluded that "[t]he field of education is simply too fraught with unanswered questions for the courts to constitute themselves as a proper forum for resolution of those questions".[46] A similar result has been reached in Alaska.[47]

However, despite the almost uniform rejection of educational negligence

41 400 NE 2d 317, 320 (1979).
42 64 NY 2d 119; 485 NYS 2d 15 (1984).
43 *Id.*, 20.
44 *Id.*, 18.
45 *Hunter* v. *Board of Education of Montgomery County*, 425 A 2d 681 (1981).
46 *Id.*, 685.
47 *D.S.W.* v. *Fairbanks North Star Borough School District*, 628 P 2d 554 (1981).

claims in the United States, there are several cases that may foreshadow success in the future. In *B.M.* v. *State*,[48] the Supreme Court of Montana held that school authorities owe a child a duty of reasonable care in testing the child and placing him or her in an appropriate special education program. However, several qualifications should be emphasised in connection with this case. First, the case arose out of the context of special education for handicapped children and cannot necessarily be extended to have any application beyond this context. More importantly, the court found this duty to arise from the Montana Constitution and other statutes such that it cannot be said that the court held that there was a common law duty of care along the same lines as that required by the legislation under consideration.

Moreover, while the court held that the plaintiff was owed a duty of reasonable care, whether that duty of care was breached and, assuming a breach, whether the plaintiff was injured as a result of the breach, were questions that the court did not have to decide.[49] These further questions of course raise substantive evidentiary problems. The judgment is significant however because the court did not believe it necessary to deny the establishment of a duty of care for the policy reasons cited in the cases mentioned above.

A further reason why educational negligence claims may succeed in the near future is the blurring of the distinction between medical negligence and educational negligence claims. An example of this is the decision of the New York Appellate Division in *Snow* v. *State*.[50] In this case, the plaintiff was three years old when, based upon the results of an IQ test, he was placed in a special state school for the mentally retarded. In fact, the plaintiff was deaf, but this was not diagnosed and because the IQ test was inappropriate for deaf children, he was wrongly institutionalised. The court affirmed the trial court's judgment for the plaintiff but stated that the cause of action was based upon medical negligence rather than educational negligence.

Medical negligence is now clearly established as a common law action and while it is tempting to argue that the court categorised the facts as medical rather than educational in order to see a clearly wronged plaintiff compensated, at the same time it is difficult to perceive any logic in the distinction between medical negligence and educational negligence when both are based upon negligent evaluation. If a diagnostician employed by a public or private hospital can be liable for the negligent evaluation of a child, why should not a diagnostician, psychologist or counsellor employed by a school authority be liable also for a similar negligent evaluation?

It may be that the solution is to class all educational negligence claims arising from alleged negligent evaluation or classification as medical negligence in order to succeed. In any event, it is not easy to decipher the

48 649 P 2d 425 (1982).
49 The case was an appeal from an order of summary judgment.
50 Note 12 *supra*.

reasoning underlying the statement of the court in *Torres* v. *Little Flower Children's Services* that "[w]hile mistaken evaluations are central to both *Snow* and *Torres*, such factors as age of the child upon entry, nature of the institution and kind of care administered mark the difference between medical and educational malpractice claims".[51] Age of entry into an institution can hardly be significant unless it is thereby implied that a higher standard of care is owed with respect to evaluations of a child who is three years of age in comparison to a child who is evaluated at the age of six or seven which is the normal age of entry into kindergarten. However, attempting to draw such a distinction seems somewhat problematic.

Similarly, the idea that an examination of the nature of the institution will enable ready distinctions between educational and medical negligence seems dubious. Snow was institutionalised from the age of three until the age of nine and during this time he received educational training in a special state school yet the court was able to categorise the negligence as medical in nature. Perhaps the argument can be made that a student in a special institutional school such as the one Snow attended where students receive not only education but also medical and pyschological treatment is owed a higher standard of care than students in other schools. But in order to avoid confronting difficult issues such as the different standards of care owed by different institutions (and indeed, whether there should be any difference) courts have refused to recognise a *duty of care* in cases of negligent evaluation by schools other than special schools for students suffering some form of impairment. The result is a distinction lacking a logical basis and a consequent reliance by courts on deriving liability from classifications without substance in order to compensate wronged plaintiffs.

V. ESTABLISHING A CLAIM FOR EDUCATIONAL NEGLIGENCE

The most difficult task of those who argue in favour of allowing educational negligence claims is to bring such claims within established common law principles. While educational negligence is most often viewed by commentators as a claim in tort,[52] in this section attention is given to three common law principles, contract, misrepresentation and negligence, and the potential and difficulties that each holds for imposing liability for incompetent teaching.

A. CONTRACT

An initial problem with looking to contract as a means of imposing liability for incompetent teaching is that the relationship between teacher and student or teacher and parent is not governed by specific contractual terms. This is particularly so in the case of free public education although it would appear

51 485 NYS 2d 15, 18 (1984).
52 Collingsworth, note 33 *supra*.

that an educational negligence claim based on a contract theory is more plausible in the private school context.[53] In *Introvigne* v. *Commonwealth*[54] the Full Federal Court stated with reference to private schools:

> [i]n their case there may be delegation by the parents of the pupil of parental authority to the school council, trustees or other governing body of the school. The delegation would arise from the contract between the parents and the school authority and may be express or implied.[55]

With respect to public schools, it has been argued that there can exist implied contracts between teachers and students or school authorities and students, one of the terms of which is that students will not be taught negligently.[56] Yet, whether there is consideration to support the contract is a difficult question. Thus, consideration may be found in the decision of the student not to attend school elsewhere in reliance on the implied promise of non-negligent education. However, the 'bargained-for' element of consideration would seem to be lacking where the student attends school under a system of compulsory education.[57]

Furthermore, it is well established that a person who is already under a public duty to provide certain services does not furnish consideration by promising to discharge that duty.[58] Therefore, if teachers have a public duty to provide non-negligent education, this will not of itself constitute consideration for an implied contract to fulfill that duty. However, it is stated in the section that discusses tort principles that considerable doubt exists as to whether teachers are subject to a duty to provide non-negligent education.[59]

If it is concluded that a contract exists between a private school and the parents of a student at that school, in limited circumstances, Part V Division 2 of the Trade Practices Act 1974 (Cth) may apply to the contract. In particular, section 74 imports into contracts for services certain warranties. One such warranty is that the services "will be rendered with due care and skill . . .".[60] As a result of amendments to the Act in 1986 the definition of services applicable to section 74 has been broadened to include any rights, benefits, privileges or facilities that are provided under a contract for or in relation to "the provision of, or the use or enjoyment of facilities for . . . instruction".[61]

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53 Note, "Educational Malpractice", note 33 *supra*, 785.

54 (1980) 32 ALR 251.

55 *Id.*, 262.

56 Note 53 *supra*, 784.

57 *Id.*, 785.

58 *Collins* v. *Godefroy* (1831) 1B & Ad 950, 109 ER 1040.

59 See below, discussion accompanying notes 77-92.

60 Trade Practices Act 1974 (Cth), s. 74(1). S. 74(2) further provides that where a consumer makes known to the provider of services any particular purpose for which the services are required or the result that the consumer desires the services to achieve, then there is an implied warranty that the services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for the consumer to rely, on the service provider's skill or judgment.

61 *Id.*, s. 4(1).

In other words, assuming that a contract exists between a private school and the parents of a student then the school is obliged to ensure that the services provided pursuant to the contract, notably educational instruction, are undertaken with due care and skill. The most significant qualification with respect to this conclusion is that the school must be a corporation in order for the provisions of the Act to apply. While many private schools are incorporated, the Act applies only to corporations that can be classed, *inter alia*, as trading or financial corporations.[62] It is difficult to argue that an incorporated school operates as either a trading or financial corporation.

B. MISREPRESENTATION

It is possible to formulate a factual situation where an action for educational negligence based upon negligent misrepresentation may succeed. As this is an action based in tort it needs to be considered whether a duty of care is owed to the plaintiff.[63] In this respect, it is important to note a major distinction between negligent misrepresentation forming the basis of educational negligence claims and educational negligence claims based otherwise than on negligent misrepresentation. In the former case, the issue is whether there is a duty of care on the part of teachers and school authorities to provide non-negligent advice and information. In the latter case, the issue is whether there is a duty of care on the part of teachers and school authorities to provide non-negligent educational instruction.

In *M.L.C.* v. *Evatt*[64] the majority of the Judicial Committee of the Privy Council held that a person comes under a duty of care with respect to the provision of advice or information if that person carries on a business, profession or occupation and provides advice or information of a kind which requires skill or competence or if a person professes to possess skill and competence in the subject matter of the advice or information. In *Shaddock & Associates Pty Ltd* v. *Parramatta City Council*,[65] Mason and Aickin JJ. adopted the view of Barwick C.J. in *M.L.C.* v. *Evatt*[66] that a duty of care arises where a person provides information or advice of a serious or business nature in circumstances where the speaker realises or should realise that he or she is being trusted by the recipient to give information or advice in respect of which the recipient believes the speaker to possess a capacity or opportunity for judgment. In addition, the speaker must realise or should realise that the recipient intends to act upon the advice or information and the circumstances must be such that it is reasonable for the recipient to seek and to rely upon the advice or information.[67] The requirement of reliance by

62 *Ibid.*

63 See *Hedley Byrne* v. *Heller* [1964] AC 465; *M.L.C.* v. *Evatt* (1968) 122 CLR 556; *Shaddock & Associates Pty Ltd* v. *Parramatta City Council* (1981) 150 CLR 225; *San Sebastian Pty Ltd* v. *Minister Administering Environmental Planning and Assessment Act* (1986) 61 ALJR 41.

64 (1968) 122 CLR 556 (High Court); (1970) 122 CLR 628 (Privy Council).

65 (1981) 150 CLR 225, 255-256 (hereinafter *Shaddock*).

66 Note 64 *supra*, 572-573.

67 *Ibid.*

the recipient was emphasised by the High Court in the recent case of *San Sebastian Pty Ltd* v. *Minister Administering Environmental Planning and Assessment Act*.[68]

If a teacher provides a report to the parents of a student with respect to that student's progress then under the broad view expounded by Mason and Aickin JJ. in *Shaddock*,[69] provided that the teacher realises or should realise that the parents will act on the information (for example, by deciding not to enroll the student in another school) and provided that it is reasonable for the parents to rely on the advice, the teacher will be under a duty of care to provide a non-negligent report to the parents. This will be so even if the teacher is not held to possess special skill and competence. If the narrow view is adopted it can be argued, in support of imposing a duty of care, that as part of their duties, teachers are expected to provide information to parents on the progress of students and that teachers clearly possess skill and competence with respect to the subject matter of the advice.

If a teacher provides a false report to parents and the above conditions are satisfied then the duty of care may be held to be breached. This conclusion is subject to two qualifications. First, the decision in *Shaddock* extended liability for negligent advice or information from those persons and organisations who are in the business of giving such advice or information to bodies which discharge government or administrative responsibilities. Courts may, for the policy reasons discussed later in this article, decline to extend liability for negligent statements to those who are engaged in the teaching profession.

Secondly, the plaintiff in a negligent misrepresentation action must sustain damages which may be economic or non-economic in nature. Educational negligence claims may be based upon alleged economic loss, for example, the failure to obtain employment because of the skills not obtained because of negligent teaching. The High Court has, on a number of occasions, expressed its concern with the prospect of indeterminate liability in cases of pure economic loss. Thus, in *Caltex Oil (Australia) Pty Ltd* v. *The Dredge 'Willemstad'*,[70] Stephen J. stated that recovery of pure economic loss must be dependent upon the existence of proximity between the defendant and the plaintiff.[71] In the same case, Mason J. stated that a defendant will be liable for economic loss resulting from negligent conduct "when he can reasonably foresee that a specific individual, as distinct from a general class of persons,

68 *San Sebastian*, note 63, *supra*.
69 Note 65 *supra*, 251-252 *per* Mason J.
70 (1976) 136 CLR 529.
71 *Id.*, 575.

will suffer financial loss as a consequence of his conduct".[72] More recently, the High Court has stated that:

> [t]he notion of proximity, because it limits the loss that would otherwise be recoverable if foreseeability were used as an exclusive criterion of the duty of care, is of vital importance when the plaintiff's claim is for pure economic loss.[73]

As we shall see in the following section, proving loss in the context of a legal action based on educational negligence presents significant difficulties. Moreover, the relationship of proximity between the plaintiff and the defendant, being a constituent element of the duty of care,[74] is a flexible concept that can of course be employed by a court to either restrict or expand liability because of policy considerations. Thus, while proximity may readily be found between a solicitor and his or her client depending on the circumstances, including whether there has been reliance on the part of the client, it may be that a court will hesitate to find the necessary degree of proximity between a teacher and a particular student where that student is part of a large class such that it cannot be said that the student receives significant attention from the teacher.

An additional hurdle confronting a plaintiff in an educational negligence claim is the suggestion that where economic loss is alleged, liability should be limited to expenses actually incurred and should not extend to unrealised benefits or expectations.[75] Falling within this second category would be an allegation that lost employment opportunities resulted from negligent teaching. It has been said with respect to this suggested limitation on the type of economic loss that can be recovered that "the most that can be said is that the courts have not yet properly addressed this issue and that the arguments on both sides are inconclusive".[76]

C. NEGLIGENCE

In order for a claim based on educational negligence to succeed it must be established that the defendant teacher or school authority owes a duty of care to the plaintiff, that this duty has been breached by the defendant and that as a consequence, the plaintiff has suffered harm.

1. Duty of Care

The critical question is whether a duty of care is owed by teachers and school authorities to provide non-negligent educational instruction. The main obstacle is that it has been said that a school or government does not owe a duty to educate its students.[77] Therefore, if there is not a duty to educate

72 *Id.*, 593.
73 *San Sebastian*, note 63 *supra*, 45.
74 *Ibid.*
75 R. Hayes, "The Duty of Care and Liability for Purely Economic Loss" (1979-80) 12 *MULR* 79. For a response see P. Cane, "Economic Loss and the Tort of Negligence" (1979-80) 12 *MULR* 408.
76 F.A. Trindade and P. Cane, *The Law of Torts in Australia* (1985) 305.
77 In *Introvigne* v. *Commonwealth* (1980) 32 ALR 251, 267 the Federal Court stated: "[i]t is erroneous to say that the Commonwealth owes a duty to educate children . . ."

how can there be a duty to provide non-negligent education? This is quite different from any legal action resulting from physical harm occurring to students where it is clearly established that a student is owed a duty of care by teachers to protect him or her from the risk of reasonably foreseeable injury.[78]

One means of establishing a duty of non-negligent instruction is to argue by analogy from those cases that have extended the boundaries of the laws of negligence. The decision of the House of Lords in *Anns* v. *Merton London Borough Council*[79] has been said:

> [t]o represent the high water mark of a trend in the development of the law of negligence by your Lordship's House towards the elevation of the 'neighbourhood' principle derived from the speech of Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562 into one of general application from which a duty of care may always be derived unless there are clear countervailing considerations to exclude it.[80]

In that case, Lord Wilberforce formulated a two-stage test in order to ascertain whether a duty of care arises in a particular situation:

> [f]irst one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . .[81]

Later decisions have sought to limit the application of this test and have emphasised that foreseeability does not of itself impose a duty of care.[82] However, even if the test of Lord Wilberforce is applied to teachers and school authorities in educational negligence claims, while the first part of the test concerning reasonable foreseeability may be satisfied, (a student's failure to learn is one of the foreseeable risks of incompetent instruction),[83] with respect to the second part of the test, as we shall in Part VI of this article,

78 See *Richards* v. *Victoria* [1969] VR 136 and the references cited in note 7 *supra*.

79 [1978] AC 728.

80 *Curran* v. *Northern Ireland Co-ownership Housing Associates Ltd* [1987] 2 WLR 1043, 1047 *per* Lord Bridge of Harwich.

81 Note 79 *supra*, 751-752.

82 *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd* [1985] AC 210; *Yuen Kun Yeu* v. *Attorney-General of Hong Kong* [1987] 3 WLR 776.

83 This is subject to the comments concerning proximity expressed in the section on misrepresentation. Yet it is possible to argue, in seeking to have the common law impose a duty of non-negligent instruction on teachers and school authorities, that this duty can be established from the very existence of the relationship between the teacher (or school authority) and the student such that the application of the first step of the test formulated by Lord Wilberforce (requiring foreseeability based on "a sufficient relationship of proximity") is rendered unnecessary. In *Richards* v. *Victoria* [1969] VR 136, 140 the Supreme Court of Victoria stated that "the relationship of schoolmaster and pupil is [another] example of the class of case in which the duty springs from the relationship itself". The court further stated that foreseeability of harm is relevant to the determination of breach of duty but is not relevant to the question of whether a duty of care exists (140-141). See also *Geyer* v. *Downs* (1977) 17 ALR 408, 410 *per* Stephen J.

there are a number of policy considerations that can negative the scope of the alleged duty of non-negligent instruction.

Quite apart from seeking to import a duty of non-negligent instruction into the common law principles of negligence, a second means of establishing such a duty is to seek its foundation in either the statutes or regulations governing education in a particular jurisdiction or perhaps even in the stated objectives of school authorities. However, these may not provide assistance. For example, section 6(a) of the Public Instruction Act 1880 (NSW) provides that there shall be established primary schools "in which the main object shall be to afford the best primary education to all children without sectarian or class distinction". Reference to "the best primary education" does not, of course, establish a definable duty of care on the part of the Crown.[84] It could be argued however that at the very least, negligent instruction is inconsistent with the best primary education.

The New South Wales Department of Education Handbook has a section titled "Duties of Teachers", however the duties are stated in broad terms and do not address in any specific manner the standard of educational instruction.[85] In another publication, the New South Wales Department of Education states that the aims of primary education are "to guide individual development in the context of society through recognisable stages of development towards perceptive understanding, mature judgment, responsible self-direction and moral autonomy".[86] While these may be laudable objectives, it is difficult to see how they establish an enforceable duty on the part of those who espouse them to actually achieve the objectives. This is particularly so given the general content of the stated aims.

Yet it is possible to argue for a duty of care to provide non-negligent education on other grounds. First, in response to the statement that schools do not owe a duty to their students to provide education, the question needs

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84 See *Ex parte Cornford; re Minister for Education* [1962] SR (NSW) 220 for a discussion of whether this Act imposes public duties upon the Minister of Education in NSW. It is to be noted that any attempt to found an educational negligence claim on the alleged breach of a statutory duty is subject to the established rules concerning such an action including, the intention of the legislature, whether the plaintiff belongs to the class of individuals whom the statute is intended to protect (as opposed to the public as a whole) and whether the injury sustained by the plaintiff is of a kind which it is the object of the statute to prevent: see generally J.G.Fleming, *The Law of Torts* (7th ed. 1987) 113-124 and F.A.Trindade and P.Cane, note 76 *supra*, Ch. 22.

85 "3.1.1.3.1. Duties of Teachers
The duties of teachers are:
(a) To teach in accordance with the needs of the pupils under his care having regard also to any requirement of the curriculum.
(b) To safeguard the interests of the pupils at all times.
(c) To co-operate with the principal and heads of departments in the organisation and management of the school.
(d) To keep such records and make such returns as may be required by the principal and heads of departments."
NSW Department of Education Handbook Book 3 (1975).

86 NSW Department of Education, *Aims of Primary Education in New South Wales* (1977) 14.

to be asked what are the duties of teachers? Undoubtedly they have a number of duties (including the duty to protect their students from reasonably foreseeable physical harm) yet at the same time it seems implausible to deny that they have a duty to educate.[87] In fact, in a recent report of the New South Wales Department of Education,[88] "the fundamental ethic of the teaching profession" was said to be the "duty of care for students" and this duty of care was discussed in the following terms:

> '[d]uty of Care' is not limited to the teacher's concern for the safety of students, critical though this is. It also requires a teacher to exercise his or her authority in ways which continually promote the educational development and psychological well-being of children. When the teacher's concern is demonstrated through the preparation, development, implementation and evaluation of educational programs geared to student needs and which maximise student achievement, quality education is likely to result.[89]

Secondly, establishing a duty of care on the part of teachers and school authorities with respect to educational instruction would be part of a broader trend of imposing liability upon professionals for providing negligent service.[90] In *Donohue* v. *Copiague Union Free School District*,[91] the New York Court of Appeals affirmed the decision of a lower court which dismissed a claim alleging educational negligence but the court stated:

> [t]he imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students. If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators.[92]

2. Breach of the Duty of Care

In any discussion of the possibility of establishing an educational negligence claim it is necessary to ascertain what is the appropriate standard of care that is applicable to teachers and school authorities. A United States commentator[93] has stated that the reasonable person standard applies to physical injuries occurring to students but that this may be inapplicable to educational negligence claims where there should be a reasonable teacher standard.

In Australia, courts traditionally have described the standard of care

87 It is to be noted that a duty to provide education to certain children is not the same as saying that there is a right to receive education on the part of all children. The NSW Anti-Discrimination Board has recommended that the NSW Public Instruction Act (1880) "be amended to provide that education at both primary and secondary levels in NSW be available to all children as of right": *Discrimination and Political Conviction* (1980) 130.

88 NSW Department of Education, *Quality Education — Teacher Efficiency Review* (1985).

89 *Id.*, 6.

90 Note 9 *supra*.

91 Note 37 *supra*.

92 Note 38 *supra*, 1353.

93 D. Tracy, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction" (1980) *58 North Carolina L Rev* 561, 566, 573.

demanded of a teacher or school authority in physical injury claims as that of the reasonable parent.[94] However, it is now the case in Australia that:

> [t]he standard of care may be regarded today as higher than that of the reasonable parent . . . It seems appropriate that the reasonable parent test should be abandoned in favour of a reasonable teacher/school authority test.[95]

Other commentators have stated that the care required of teachers in Australia is "the care exercised by the reasonable teacher armed with all the attributes of the teaching profession".[96] This is the same standard as has been established generally for professionals.[97]

While it may be thought that the reasonable teacher standard provides a sounder base to establish an educational negligence claim than the reasonable person standard, a significant difficulty is ascertaining a precise teaching standard in order to prove that there has occurred a breach of the duty of care owed by a teacher or school authority to a student. In addition, in the absence of a specific act or omission of a teacher that leads to identifiable injury, it is difficult to conclude that a teacher has not attained the standard of teaching that is expected of the reasonable teacher.

In fact, one reason why ascertainable teaching standards are so difficult to define is the diversity of opinion concerning the very nature of the educational process. For example, one author has identified ten major learning theories that are reflected in school practice.[98] An Australian educationalist has posed the more fundamental question of what subjects and skills are the most useful for students to learn in schools.[99] There is of course no unanimity in the answers. Teachers and school authorities may make different decisions on the value of certain subjects and skills on the basis that students are not prepared in school for identical opportunities. The value judgments involved in such decisions inherently lead to imprecise standards.

However, this does not mean that it is impossible to conclude that a teacher or school authority has breached a duty of care owed to students. A school may have a rigid curriculum which all teachers are required to teach.

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94 Note 2 *supra*, 36.

95 Heffey, note 7 *supra*, 6-7.

96 Boer and Gleeson, note 6 *supra*, 134. It is to be noted that, in the view of a number of commentators, the application of 'the reasonable person' standard rather than 'the reasonable teacher' standard by those courts in the United States which have decided educational negligence claims has made the task of the plaintiffs more difficult. It is not surprising therefore that these commentators spend considerable time advocating the merits of the reasonable teacher standard. For example, Elson, note 33 *supra*, allocates 40 percent of his 130-page article on educational negligence claims to the argument that an occupational standard, such as that which applies to teachers in Australia, rather than the reasonable person standard, should govern the duty of care owed by teachers to their students.

97 "It is therefore suggested that the standard of skill and care which a professional man is required to exercise may be defined as follows: that degree of skill and care which is ordinarily exercised by reasonably competent members of the profession, who have the same rank and profess the same specialisation (if any) as the defendant." Jackson and Powell, note 9 *supra*, 17.

98 M.L. Bigge, *Learning Theories for Teachers* (4th ed. 1982).

99 M.A.B. Degenhardt, *Education and the Value of Knowledge* (1982). See also B. Crittendon, *Changing Ideas in Australian Education* (1981).

Frequently, this curriculum is geared to the requirements of a government-imposed examination such as that undertaken by students in New South Wales at the conclusion of their secondary education. A failure by a teacher to comply with the curriculum, for example, not studying a novel that is required for the examination, would constitute a breach of the duty of care. This can be regarded as a specific act of negligence.

The situation is markedly different when, in the absence of such specific acts, a student completes his or her education, with little reading ability. In these circumstances, is it reasonable to hold the school liable for the student's lack of academic achievement when educational theory is so problematic in terms of being able to establish teaching standards? In fact, one of the difficulties that will confront a plaintiff in an educational negligence claim is the conclusion of one commentator that "most successful actions against professionals involve a failure on their part of some mechanical function involving little professional skill and judgment".[100] Failure to teach part of the required curriculum may perhaps be classed as a 'mechanical' failure yet to the extent that teaching requires significant skill and judgment and therefore cannot be said to be a mechanical function, courts may hesitate to find negligence.

However, the existence of imprecise standards should not necessarily be a permanent bar to a judicially determinable standard of care. Professional negligence cases frequently involve difficult issues associated with determining an appropriate standard of care. Teaching is not the only profession where there exists a vigorous debate concerning the very nature of the professional process and the role of the professional in that process. Psychiatry is one such profession yet pyschiatrists have been held to owe a duty of care to their clients.[101] Moreover, it is a fundamental part of being a professional that complex matters requiring the exercise of skill and judgment are common place and therefore, professionals should not be liable for mere errors of judgment. Courts usually give wide latitude to the exercise of judgment by professionals in the course of their duties.[102]

While part of the argument thus far is that liability should be imposed upon teachers for educational negligence on the basis that they are professionals, the analogy between teachers and those professions which are traditionally the subject of negligence actions is not perfect. One of the more important differences is that a doctor, accountant or solicitor typically deals with one client or patient at any particular time. This is necessary as of course different clients have different needs. Similarly students, even students of the same age, have different educational needs.[103] It hardly needs to be said that all students do not learn at the same speed. Yet teachers cannot, unlike

100 Partlett, note 9 *supra*, 178.
101 *Landau* v. Werner (1961) 105 *SolJo* 1008 (C.A.).
102 See *Whitehouse* v. *Jordan* [1981] 1 WLR 246; *Greaves and Co (Contractors) Ltd* v. *Baynham Miekle & Partners* [1975] 1 WLR 1095.
103 See *Report of the National Inquiry into Teacher Education*, note 13 *supra*, para 2.63.

members of other professions, devote themselves exclusively for extended periods of time to the needs of particular students. Teachers are required usually to teach large groups of students employing uniform educational methods even when it may be readily apparent that this does not cater to the individual needs of students. Given the constraints of the educational process, teachers are incapable of devoting substantial attention to the needs of an individual student.

Moreover, it can be argued that teachers possess less discretion in the exercise of their duties than members of other professions. Frequently, teachers have little or no say in determining what they teach to students and are required to teach an externally imposed and rigid curriculum. What this may mean is not that a standard of care based on the teaching duties of teachers cannot be ascertained but rather that arguments in favour of establishing educational negligence claims based upon an analogy between teachers and other professionals should not be overly emphasised.

There are several other factors that need to be considered when assessing the standard of care imposed upon teachers in the exercise of their duties. The first is the test of foreseeability.[104] The plaintiff must come within the foreseeable range of injury. However, the test is not a high one where physical injury is sustained and it has been said in the context of liability for physical injury sustained by students that "an accident may be 'reasonably foreseeable' without being likely or probable".[105] This is subject to the qualification that where the plaintiff alleges pure economic loss, which can be alleged in an educational negligence claim based upon lost employment opportunities, the courts, in their endeavour to avoid indeterminate liability, will seek to limit the test of reasonable foreseeability by requiring the plaintiff to establish a relationship of proximity between himself and the defendant.[106] It is difficult to argue that a teacher who engages in educational negligence by not teaching a book required for an examination will not thereby foresee that injury will result to the students concerned.

The second factor to consider is the need to evaluate the magnitude of the risk of injury and the practicality of eliminating the risk.[107] A defendant teacher will have breached his or her duty of care only "if the reasonable teacher, in his position, considering all these factors, would have done more than the defendant did".[108] This becomes an important issue if a school authority or an individual teacher is aware that certain actions or omissions may constitute educational negligence but there is a high cost to eliminating the negligence. For example, a teacher realises that a student with learning difficulties is having his or her special needs ignored solely because the size of the class prevents the teacher from providing individual assistance to the

104 Note 78 *supra*, 141.
105 G. Davis, note 7 *supra*, 66.
106 See above, discussion accompanying notes 70-74.
107 *The Council of the Shire of Wyong* v.*Shirt* (1980) 146 CLR 40, 47, *per* Mason J.
108 Heffey, note 7 *supra*, 11.

student.[109] There are no special classes available for the student and the cost of establishing such a class is very high. This example is problematic for several reasons including the difficulty of identifying the harm to the student. Yet it does indicate the obstacles inherent in attempting to fit certain types of educational negligence claims within the required elements of a negligence action.[110]

The third factor is the need to consider the common practice of the teaching profession in order to ascertain whether there has been a breach of the duty of care. As one commentator has stated with respect to physical injuries occurring to students:

> [n]ormally a teacher (or teaching authority) who has complied with the common practice of the teaching profession in respect of safety measures will be cleared of negligence. Compliance with such practice is treated by the courts as prima facie evidence of due care.[111]

Thus, evidence of due compliance by a defendant with what is regarded as accepted practice in teaching would negate allegations of a lack of due care in an educational negligence claim. However, as Heffey observes, it may be that the 'common practice' does not conform to the standard of care required of a reasonably prudent teacher[112] and therefore a court may inquire into the standard of these practices.[113] It is in these circumstances that reservations are expressed concerning the expertise of courts to assess not just the question of whether a particular teacher has conformed to the common practice but whether the common practice in question is educationally sound.[114]

3. Causation and Proof of Injury

It is necessary for the success of an educational negligence claim for the plaintiff to prove that his or her injury was caused by the conduct of the teacher or school authority. This immediately raises the issue of identifying the injury suffered by the student. One commentator has suggested that there are three major types of educational injury that may be alleged in an educational negligence claim.[115] These are firstly, that the negligent teaching led to a failure to learn certain factual information; secondly, that there was a failure to learn certain basic skills and thirdly, that there occurred emotional as well as intellectual harm.

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109 It can be argued that the harm is that the student, by receiving an inferior education to the other students in the class by reason of the fact that his needs are different, will have less prospect of attaining his potential. See note 115 and accompanying text.

110 Of course, for a number of educational negligence claims, the question of evaluating the risk and practicality of eliminating it may not be significant. This is particularly so with respect to specific acts of negligence such as failing to teach required books or sending to parents incorrect reports concerning the progress of a student.

111 Heffey, note 7 *supra*, 15.

112 *Id.*, 16.

113 For examples of courts finding a practice to be negligent even where it was established that this was the usual or ordinary practice, see *Lloyds Bank Ltd* v. *E.B. Savoury & Co* [1933] AC 201 and *Goode* v. *Nash* (1979) 21 SASR 419.

114 See below, discussion accompanying notes 137-149.

115 Elson, note 33 *supra*, 755.

Proving certain of these injuries can be a significant obstacle. With respect to allegations of emotional harm, courts have demonstrated a marked reluctance to compensate mental injury although there are exceptions such as the negligent infliction of nervous shock.[116] If it is asserted that the failure to learn certain basic skills constitutes injury how is this valued for the purpose of compensation?[117] If the student claims that he or she failed to obtain a job, in what circumstances can it be said that this was solely or even mainly the result of educational negligence?

In other words, even if there is a compensable injury, there still remains the need to prove that the defendant's conduct caused the injury. This is difficult to establish because the learning and knowledge accumulated by a student is not limited to the classroom. It takes place in the home and in every area outside the classroom.[118] The learning process is such a complex matrix of variables which include the background and motivation of the student that it would be difficult to conclude that a student's failure to learn would not have occurred but for the negligent teaching.[119] In the words of one report on teacher education in Australia:

> [d]ifferences in the outcomes of formal schooling are not solely attributable to teaching but also reflect factors in the social environment and the home backgrounds of pupils, factors over which teachers and schools can have little control.[120]

The necessary causal relationship could be shown where there is a specific negligent act such as the failure to teach the required curriculum. A claim

116 See F.A. Trindade, "The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock" (1986) 45 *Cambridge LJ* 476.

117 With respect to compensation and remedies, the principle of damages is to place the victim in the same position that he or she would have been in had the injury not occurred. Clearly, one of the problems associated with educational negligence claims is assessing a monetary value for the injury sustained. A number of unsuccessful educational negligence claims in the United States have claimed very high damages (Elson, note 33 *supra*, 761). It may be that such claims only serve to detract from the merits of the suits because there may be severe doubts concerning the financial impact of successful suits on the education system. Therefore, a more appropriate remedy for a successful plaintiff may be some form of supplemental teaching. The difficulties with this remedy are first, that it may have little deterrent effect on incompetent teachers and secondly, that it may involve the student returning to the very education system that failed him or her in the first place.

118 The difficulty in establishing causation where there are a number of factors that may have caused the injury in question is revealed in a recent decision of the House of Lords concerning medical negligence: *Wilsher* v. *Essex Area Health Authority* [1988] 2 WLR 557.

119 A defendant may seek to argue in some circumstances that a student who failed to learn and does not avail himself or herself of educational opportunities is thereby contributorily negligent. The appropriate standard according to Fleming (Fleming, note 84 *supra*, 260) is that of children of like age, intelligence and experience although the author notes that there is a stricter view which objectifies the standard to that of normal children of like age.

120 *Report of the National Inquiry into Teacher Education*, note 13 *supra*, para 1.22. A number of published studies support this conclusion: see J.P. Keeves, *Educational Environment and Student Achievement* (1972). In a study concerned with the importance of various influences upon the academic achievement of students in their final year of secondary schooling (Year 12) in the States of Victoria, Western Australia and Queensland, the two authors concluded that while social origin and the type of school attended are significant factors in predicting Year 12 achievement, the most important predictors of achievement are the motivation and attitude of students, the influence of teachers and the type of courses studied: P.G. Carpenter and M. Hayden, "Academic Achievement Among Australian Youth" (1985) 29 *Aust J Education* 199.

based upon negligent evaluation can more readily point to a specific act of alleged negligence or, as in *Hoffman* v. *Board of Education*,[121] an alleged negligent omission to carry out a required evaluation.[122] A more problematic situation is where the students of a particular teacher consistently underachieve by a significant margin (as measured by standardised tests) in comparison to the students of other teachers. Here the issue of causation is complicated by a broad range of factors such as the alleged negligent teaching occurring over an extended period of time and the motivation and background of the students. It can only be expected that courts will approach these type of claims with a significant degree of caution.[123]

An important point arises from the preceding discussion. It has been stated that a claim based upon negligent evaluation is more likely to succeed than a claim alleging incompetent teaching. This is because in the former situation a specific act of negligence is more readily identifiable. A similar argument clearly applies to negligent misrepresentation.

It is not a coincidence that these activities are more readily established in an educational negligence claim because they are not the core of education. At the heart of education lies the process of instruction and it is in this area that the most obstacles are faced by plaintiffs alleging educational negligence. This is not to deny the significance of claims that allege negligent evaluation or misrepresentation. They are important precisely because they arise from the duty of teachers to evaluate accurately the progress of students and report accurately on that progress. Indeed, to the extent that, as we have seen, education takes place outside the classroom, assessments, evaluations and reports of students by teachers will not only influence the expectations held by parents of their children but will also influence the view of students held by those agencies other than school authorities that have a role to play in education and that have access to the reports or evaluations.

Yet instruction is the essence of education and because of its nebulous and indefinite nature and the lack of precise standards applicable to instruction it is, much more so than alleged negligent misrepresentation or evaluation, subject to the policy considerations discussed in the following section that weigh so heavily against recognising educational negligence claims.

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121 Note 40 *supra*.

122 Yet the very act of evaluation, even if done in a non-negligent manner, because of the classification of the student that necessarily results from the evaluation, will have important implications for the future of the student. Hayes and Hayes state: "[t]he implications of labelling and classification are significant indeed. The very process reduces the number of characteristics of an individual which are regarded as relevant to his or her life. Not only does the attachment of this label reduce the amount of information which professionals may have to bear in mind about the child, it also encourages assumptions that a skill in one area is linked with similar levels of skills in other areas and, further, may predispose professionals towards having certain expectations about the child's ultimate attainments. These expectations can be in danger of becoming self-fulfilling prophecies." S.C. Hayes and R. Hayes, *Mental Retardation — Law, Policy and Administration* (1982) 109.

123 It is to be further noted that the absence of a specific act of negligence creates difficulties for a plaintiff under any relevant statute of limitations (see, Limitations Act, 1969 (NSW) s. 14) namely, determining the date upon which the limitation period commences.

VI. POLICY CONSIDERATIONS AND THE LEGALISATION OF EDUCATION

It was noted in the previous section that in some circumstances it may be possible for an educational negligence claim to fall within the traditional requirements of a common law action. However, many such claims will meet significant if not insurmountable obstacles in satisfying these requirements. Because educational negligence claims are not automatically barred but can be regarded as problematic in terms of traditional negligence tests, courts must ultimately address the underlying policy questions as part of determining whether or not to permit an educational negligence claim. This is essential with respect to new tort claims regardless of whether it is an educational negligence claim under consideration or whether, for example, it involves the extension of a duty of care notwithstanding the absence of a contractual relationship between the plaintiff and the defendant.[124]

A. ECONOMIC ISSUES

In recent years there has occurred a steady expansion of tort liability. This has already been commented upon in connection with the liability of professionals.[125] According to the theory of 'enterprise liability' expanded tort liability serves three functions: it establishes incentives for injury prevention, it provides insurance for injuries that cannot be prevented and it regulates levels of activity by internalising costs.[126] Priest observes that a legal rule can have two economic effects. First, it can influence investment in loss prevention which will affect accident rates. Secondly, it can influence the provision of insurance for losses that cannot be prevented. The inter-relationship between the two effects is as follows:

> [a] liability rule can compel providers of products and services to make investments that reduce the accident rate up to the level of optimal (cost-effective) investments. After providers have invested optimally in prevention, however, any further assignment of liability affects only the provision of insurance. More extensive provider liability will generate more extensive provider insurance and nothing more.[127]

Courts are clearly cognizant of the fact that decisions that impose greater degrees of liability may necessitate insurance.[128] The problem is that with insurance being perceived as a panacea for many societal ills, there is a tendency to lose sight of the need for tort law to focus on the goal of injury reduction. Injury reduction is much easier to achieve where there is a specific act of negligence that can be readily identified. Yet, as we have seen, educational negligence claims frequently do not rely on one act of negligence. The process of teaching extends over a significant period of time.

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124 *Donoghue* v. *Stevenson* [1932] AC 562.

125 See above, discussion accompanying note 90.

126 G.L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law" (1985) 14 *J Legal Studies* 461.

127 G.L. Priest, "The Current Insurance Crisis and Modern Tort Law" (1987) 96 *Yale L J* 1521, 1538.

128 *Shaddock*, note 65 *supra*, 252, *per* Mason J.

What this may mean is that to the extent that such claims are successful, school authorities have a significant burden in identifying the precise changes required in the educational process in order to achieve the optimal level of injury prevention. It is no easy question as to whether the investment of additional resources beyond a certain level with the aim of improving the educational process will be cost effective. In these circumstances, it is illogical to impose liability with the knowledge that the defendant may not have an incentive to engage in injury prevention measures because of the inability to identify with any certainty what is the optimal level of such prevention and thereby rely solely on insurance to remedy not only the injury in the case under consideration but more importantly, future injuries that may occur as a result of educational negligence.

A related issue concerns the role of legal liability in achieving a balance between enhancing the duty of care of teachers and school authorities and at the same time not deterring talented individuals from entering the teaching profession because of the threat of legal liability. The imposition of legal liability for educational negligence could conceivably have these two effects. If educational negligence claims are successful, this may adversely affect teacher recruitment. The prospect of being sued by students for alleged incompetent teaching would clearly not encourage people to pursue teaching as a career. Yet at the same time it can also be argued that a positive effect of permitting educational negligence claims would be to improve teaching standards.

There are, of course, a number of forces that operate already to improve teaching standards apart from the prospect of the imposition of legal liability. The first is competition between schools for students. This is most evident between private schools and also between public and private schools. Parents will choose one school over another because of a perceived higher standard of teaching at the school chosen.[129] Secondly, both the disciplinary proceedings that apply to teachers[130] and the promotional system operate to at least maintain, and arguably improve, teaching standards.[131]

It can be asserted that these forces render irrelevant the need to impose liability through educational negligence claims. The opposing argument is that the very existence of an educational negligence claim in which the facts

129 Competition between public schools is minimised because students do not generally have a choice concerning which government school they will attend. Admission to a particular school is based upon whether a student resides in the geographical zone for that school. The principal of zoning has been unsuccessfully unchallenged in two cases: *Ex parte Cornford; re Minister for Education* [1962] SR (NSW) 220; *Pannifex* v. *Minister for Education* [1976] 1 NSWLR 449.

130 S. 83(c) of the Education Commission Act 1980 (NSW) provides that a teacher is guilty of a breach of discipline if that teacher "is negligent, careless, inefficient or incompetent in the discharge of his duties". The punishment that may be imposed upon a teacher who is guilty of a breach of discipline ranges from a caution to dismissal (s. 85).

131 The report of the NSW Department of Education, *Quality Education — Teacher Efficiency Review*, note 13 *supra*, 30, notes that the promotional system for teachers in that state has a number of deficiences including the fact that the least efficient teachers are unlikely to apply for promotion and thereby have the benefit of an external assessment of their work.

are not in doubt (but which may be unsuccessful for a number of policy reasons) means that there are serious problems with teaching standards that current mechanisms are inadequate to remedy.

A more fundamental question is whether educational negligence claims will in fact have a positive effect on teaching standards. It may be that such claims will have little effect on individual teachers by reason of the fact that the principle of vicarious liability operates to shift the risk of loss from the teacher to the employer provided that the negligence occurred in the course of the teacher's employment as a servant of the school authority.[132] Moreover, the right of an employer, such as a school authority, to seek an indemnity from a negligent teacher for the damages it has paid to an injured student (pursuant to the rule in *Lister* v. *Romford Ice Co.*[133]) has now been abolished in New South Wales.[134] In other words, the imposition of liability through educational negligence claims may not provide an adequate incentive for individual teachers to improve teaching standards if there is no prospect of personal liability but rather, the liability is shifted to the school authority.

Of course, the imposition of legal liability may have this effect on the school authority. However, it needs to be realised that this may not necessarily be the result. Education is a dynamic process constantly in need of creativity and innovation. Education is a field where stagnation in developing and applying learning and teaching theories cannot be allowed to occur. Yet it is possible that allowing educational negligence claims will lead to this unfortunate result. In a recent decision of the New South Wales Court of Appeal concerning an allegation of discrimination in education upon grounds of sex, two judges expressed the need for caution when determining the role that legal liability should play in the context of education. Street C.J. stated that the law should not:

> result in the educational system of this State being forced into a straightjacket of absolute uniformity. Indeed variation and texture in the range and balance of curricula offered at educational institutions at primary, secondary and tertiary levels are essential if the community is to be served by a well-rounded educational system.[135]

In the same case, Kirby P. stated:

> the simplest way of securing the absence of discrimination in curricula would be to impose upon the Minister the duty to ensure that all curricula in all schools for all boys and girls were absolutely the same. In such a case, he would avoid the charge of discrimination, but at the price of restoring an outmoded regime of conformity. It would remove the advantages of variety, responsiveness to local needs, involvement in curricula of parents and citizens at a school level and the development of new subjects to meet the requirements of changing times.[136]

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132 See generally on the principles of vicarious liability, Fleming, note 84 *supra*, Ch. 19.

133 [1957] AC 555.

134 Employee's Liability (Indemnification of Employer) Act 1982 (NSW); *McGrath* v. *Fairfield Municipal Council* (1985) 59 ALR 18. Heffey states, with respect to those jurisdictions that have not abolished the right of an employer to obtain indemnification from a negligent employee, that this right will rarely be exercised: Heffey, note 7 *supra*, 60.

135 *Haines* v. *Leves* (1987) 8 NSWLR 442, 458 *per* Street C.J.

136 *Id.*, 470-471 *per* Kirby P.

These comments were made in the context of legal liability for discrimination in the education system. However, they also apply to the possible consequences of successful educational negligence claims where teachers and school authorities may be less creative and inventive in teaching methods and in curricula planning and development because of the prospect of the imposition of legal liability.

B. EXPERTISE OF COURTS

A further policy issue which warrants discussion is whether courts possess the necessary expertise to adjudicate educational negligence claims. This must be a significant factor in any discussion of such claims because, as was observed earlier, there is no agreement as to what are the most appropriate educational theories of learning or teaching.[137] One commentator has stated the relationship between professional negligence and judicial expertise or competence in the following manner:

> in judging professional negligence the courts employ a continuum. At one end lies professional skill involving discretion; at the other lies the mechanical tasks involving little or no "professional" skills, and hence exercise of discretion. The closer the facts of a case move towards the former and away from the latter, the more reluctant will a court become to find negligence ... The issue is one of judicial competence. As a decision, whether of a public body or a professional, moves from the application of straightforward and simple principles to complex matters requiring close judgment or wide policy perspectives, the competence of the court to judge its reasonableness is reduced.
>
> The less skilled the task the easier it is for the court to judge its reasonableness and the less the risk of disrupting proper professional standards and the integrity of the professional and client relationship. The present tension in the law goes to the weight of the competing values in choosing the point of intervention in the continuum. In medical negligence cases the courts, because of the compensation imperative, have ventured the farthest.[138]

While this assessment of the relationship between professional negligence and judicial competence is undoubtedly true, caution is required before immediately proclaiming the undesirability of a legal action because of an alleged lack of expertise on the part of the judiciary. Courts are increasingly required to address complex factual issues and in such circumstances, seek the assistance of experts. One study of United States judicial decisions concerning educational policy-making concluded that "our data largely rebutted the criticism that the judiciary lacks the resources, expertise or comprehensive perspective needed to implement educational reform successfully".[139] More specifically, Federal Courts in the United States have had to address important and complex issues arising under the Education of the Handicapped Act,[140] and in recent decisions, these issues have included an

137 See above, discussion accompanying notes 98-99.

138 Partlett, note 9 *supra*, 181.

139 M.A. Rebell and A.R. Block, *Educational Policy Making and the Courts: An Empirical Study of Judicial Activism* (1982) 210.

140 20 USC ss 1400-1461 (1982).

evaluation of the merits of a particular educational program for a handicapped child,[141] a determination of whether a handicapped child received an education "reasonably calculated to enable him to receive educational benefits" having regard to the child's capabilities and intellectual progress,[142] and a determination of whether an 'appropriate education' was made available to a handicapped child.[143]

In the New South Wales decision of *Haines* v. *Leves*,[144] the Court of Appeal was able to conclude that the Equal Opportunity Tribunal had not erred in finding that the respondent, who attended a single-sex school for girls, was treated 'less favourably' than boys who attended an all-boys school because of differences in the curricula available at each school such that discrimination was proved pursuant to section 24 of the Anti-Discrimination Act 1977 (NSW).

In *Leves*, the Equal Opportunity Tribunal made extensive use of education experts as do courts hearing any type of professional negligence claim. However, a significant issue is whether courts would be as competent as specialist fact finding tribunals in professional negligence claims. Courts are restricted in their access to information by rules of evidence and in an educational negligence claim it may be that a broad ranging inquiry is required.[145] Further, an adversarial trial proceeding which has the result of finding whether or not a teacher provided incompetent instruction may be an inappropriate forum for determining educational standards. Finally, once a change in policy has been devised by a court in an educational negligence action (this would be accomplished by the court declaring a particular educational practice negligent) the court is in no position to monitor the change in policy and ascertain its effectiveness. One education report has noted that the "general implication for planning in education is that the continuing degree of uncertainty necessitates a flexible response".[146] It can be doubted whether judicially imposed standards in the area of educational policy-making have the required degree of flexibility.[147]

On the other hand, a new policy introduced by a school authority can be monitored closely and changes made if problems are encountered. What this

141 *Geis* v. *Board of Education of Parsipany — Troy Hills, Morris County*, 774 F 2d 575 (1985).

142 *Hall* v. *Vance County Board of Education*, 774 F 2d 629 (1985).

143 *Wexler* v. *Westfield Board of Education*, 784 F 2d 176 (1986).

144 (1987) 8 NSWLR 442 (hereinafter *Leves*).

145 By way of comparison to the rules of evidence applicable to courts, s. 108(1) of the Anti-Discrimination Act 1977 (NSW) provides that the Equal Opportunity Tribunal:
"(a) shall not be bound by the rules of evidence and may inform itself on any matter it thinks fit;
(b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms."

146 *Report of the National Inquiry into Teacher Education*, note 13 *supra*, para 2.9.

147 *The Report of the National Inquiry*, *id.*, states that to recommend changes in teacher education with the aim of improving the quality of teaching and learning in Australian schools involves "an attempt to foresee future circumstances in a rapidly changing society, and to identify desirable aims, directions and practices in those circumstances" (para 1.13). The ability of the judicial system to undertake these tasks must necessarily be limited.

means is that educational policy-making is usually best left in the hands of school officials rather than courts. Yet judicial decisions in educational negligence claims will possess the potential to have a far-reaching impact on such policy-making. This does not necessitate the conclusion that because of the expertise of school officials, judicial intervention is never warranted in matters of educational policy. The facts of *Leves* indicate the need for such intervention if the circumstances are appropriate. Moreover, some form of review of bodies that possess a high degree of expertise in an area is still warranted to ensure accountability and to safeguard against arbitrary decision-making.[148] One educationalist has stated with respect to accountability:

> [i]t would seem reasonable to assert that if the school principal and teachers specify certain educational goals and objectives to be achieved, that they may be held accountable for the achievement of these goals and objectives. To this assertion should be added the realisation that there are a number of variables in the education process over which the principal and teachers have little or no control, for example, the home environment of students, parental attitudes to school; and, that there are other agencies in society such as the family, the church, youth groups, which share the school's responsibility for achieving certain educational objectives. Nevertheless, teachers may be held accountable for helping to achieve the educational goals of the school and for facilitating the learning of each student.[149]

School authorities should not be immune from judicial scrutiny even when a matter of policy is at stake, however, the expertise they possess should necessitate a degree of deference by courts to the judgments of school officials.

C. EDUCATIONAL STANDARDS AND COMPULSORY EDUCATION

An argument proposed by commentators in the United States in support of educational negligence claims is that a State which compels students to attend school must provide a minimally adequate education in order to avoid

148 See generally, I. Thynne and J. Goldring, *Accountability and Control: Government Officials and the Exercise of Power* (1987).

149 P.J. Jones, "Dimensions of Teacher Accountability" (1980) 6 *Unicorn* 370, 374. The same author states, 376:

"[t]eachers may be held accountable for achieving the educational goals of the school through their professional competence in effectively —

1. facilitating the learning opportunities of each individual student through the techniques of lesson preparation and presentation (delivery) system;
2. planning and organising class activities and sequencing and pacing learning;
3. selecting course content and organising learning material;
4. motivating students in their learning activities and controlling the class;
5. linking lesson-connected activities with out-of-class learning activities;
6. evaluating the learning of students, diagnosing the learning problems of students, remedying learning difficulties and reporting student progress to appropriate parties;
7. using teacher aids and equipment to supplement instructions;
8. adjusting the physical conditions of the teaching-learning situation to the needs of the learners;
9. co-operating with administrative policies, directives and clerical requirements associated with facilitating learning;
10. continuing his/her efforts toward professional self-improvement."

a denial of substantive due process.[150] At first glance this argument seems tenuous. Compulsion is the essence of State regulation yet this does not necessarily mean that there is always a quid pro quo element. However, it is possible to identify areas of State compulsion that do in fact possess such an element.[151]

Two theories have developed to justify compulsory education.[152] According to the first, parents owe a duty to a child to educate him or her and the State may compel the performance of this duty as protector of the child's interest. The second theory is that parents owe a duty to the State to educate their children and the State can compel performance of this duty.[153] However, regardless of the question of to whom is owed the duty to educate children, compulsory education must have as its premise the idea that enforcing education is beneficial to society. Only competent education instructors will benefit society and appropriate remedies should be available to ensure that this is the case.

A related argument concerns the role that compulsory education plays in imparting those values to its citizens that are deemed essential by society. Schools play an important part in this process. Because they are "the primary agency for imparting the values, traditions, customs and modes of thought of the community [they are] both the agency of government closest to the day-to-day lives of people and the most inherently coercive".[154] The same author argues:

> [t]hat if educational institutions are not subject to the same constitutional constraints as other governmental agencies, students will not come to an understanding of the value of a democratic, participatory society, but instead will become a passive, alienated citizenry that believes that government is arbitrary.[155]

Once again, it is only competent instructors who can ensure that this important function is fulfilled adequately. However, the argument advanced by Levin loses force if it is the case that schools derive their authority from parents and not from the State. In other words, according to the doctrine of *in loco parentis*, teachers stand in place of parents when educating children.

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150 Masner, note 33 *supra*, 575. Compulsory education is enforced in New South Wales pursuant to s. 4(1) of the Education and Public Instruction Act 1987 which provides:
"It is the duty of the parent, guardian or other person having the custody or care of a child of or above the age of 6 and below the age of 15 to cause the child —
(a) to be enrolled at a State school or registered school; and
(b) to attend the school on each day on which instruction for the child is provided by the school."
Compulsory education has been the subject of much theoretical discussion. See, for example, I. Snook and C. Lankshear, *Education and Rights* (1979) who advocate limiting compulsory education to between the ages of seven and 13.

151 For example, s. 51(xxxi) of the Constitution allows Parliament to acquire property from persons and States but this must be on "just terms": see *Grace Bros Pty Ltd* v. *Commonwealth* (1946) 72 CLR 269 and *Bank of New South Wales* v. *Commonwealth* (1948) 76 CLR 1.

152 A.J. Kleinfeld, "The Balance of Power Among Infants, Their Parents and the State" (1971) 5 *Family Law Quarterly* 64, 93-94.

153 *Ibid.*

154 B. Levin, "Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School" (1986) 95 *Yale L J* 1647, 1652.

155 *Id.*, 1654.

There will be increased reluctance on the part of courts to intervene if the school/student relationship is derived from the parent/child relationship as the latter is seen as a private and not public sphere.[156]

Although some commentators in the United States see the *in loco parentis* doctrine as a significant force in that country,[157] in Australia, the doctrine was rejected by the High Court in *Ramsay* v. *Larsen*.[158] It may be that the doctrine has more force in the context of private education where there may be delegation by parents to the school by means of the contract between the parents and the school.[159] However, to the extent that the compulsory nature of education which is enforced by the State is a basis for rejecting the *in loco parentis* doctrine,[160] it can clearly be argued that compulsory education must entail minimally adequate education both because of the element of compulsion and consequent lack of freedom evident in such an educational process and also because of the important goals of education that are the very reason to make education compulsory.

D. THE LEGALISATION OF EDUCATION

In this section, a broader approach to the policy considerations relating to educational negligence claims is adopted. The objective is to examine the impact that increased legalisation will have on school functions. Legalisation has been defined in the following way:

> [w]e mean by legalization the disorderly introduction of legal authority into the educational order: instances of the exercise of authority which violate the routinized order and chain of command, which introduce new rules without their integration into the established set. We mean decisions of the courts or of administrative agencies, or of legislative bodies creating a specific program or compelling a specific line of action outside the routinized command structure. But we also mean any court or legislative actions legitimizing a new interest with specific rights within the system.[161]

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156 It has been said that the idea that it is possible to distinguish a public sphere, where due process protections apply, from a private sphere, where the legislature and not the courts should intervene must fail because the state itself creates the laws that define the private sphere: "[s]ince any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorisation at will, positivism potentially implicates the state in every 'private' action not prohibited by law." P.Brest, "State Action and Liberal Theory: A Casenote on *Flagg Brothers* v. *Brooks*" (1982) 130 *U Pa L Rev* 1296, 1301.

157 See P.A. Zirkel and H.F. Reichner, "Is the *In Loco Parentis* Doctrine Dead?" (1986) 15 *J Law & Education* 271.

158 (1964) 111 CLR 16.

159 *Introvigne*, note 77 *supra*, 262.

160 In *Larsen* v. *Ramsay* (1963) 80 WN (NSW) 1627, 1634 Ferguson J. of the Supreme Court of New South Wales stated: "[p]upils of the prescribed school age attending public schools have, during school hours, been compulsorily removed, by the authority of the Crown, from the protection and control of their parents. *In view of that compulsion*, by the establishment of public schools for the reception of such pupils, and the provision of teachers to impart instruction and maintain discipline, *the Crown must be regarded as having taken over, in respect of the pupils those obligations of which their parents have been deprived, including the obligation to take reasonable care for their safety* . . . [emphasis added]."

161 J.W. Meyer, "Organizational Factors Affecting Legalization in Education" in D.L. Kirp and D.N. Jensen (eds.), *School Days, Rule Days: The Legalization and Regulation of Education* (1986) 257.

Although the *in loco parentis* doctrine may no longer be applicable to schools in Australia, it is undoubtedly the case that teachers and other professionals now serve functions once provided by family members.[162] Increasing legalisation of relationships emerges as family members neglect their duties,[163] and people look to courts to establish principles because of the decline of other societal institutions:

> [b]ecause of the demise of traditional religious, communal, and familial value-creating institutions, it appears that contemporary [people] have increasingly come to look to the rational-analytic processes of the courts to satisfy their need for definitive clarification of basic values and principles.[164]

However, while this may be an historical trend, a careful evaluation of judicial intervention in each area of such intervention is warranted in order to ascertain the value of this trend. Courts have often affirmed the value of education:

> [education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[165]

Yet what is required is an analysis of the role that courts should play in the area of education and an examination of the potential disadvantages of increased legalisation of the school environment.

The aim of an educational negligence claim from the plaintiff's perspective is, of course, substantive justice. It was noted in an earlier section however that such a claim possesses significant ramifications for educational policy-making. The finding in one case has the potential to invalidate a particular teaching method. A further aim of legalisation, reflected in educational negligence claims, is the elimination of arbitrary decision-making. Yet arbitrary decisions are only the extreme application of discretion, an element that we desire in the education system. The *Report of the National Inquiry into Teacher Education* in Australia noted that teachers must be "capable of flexibility, initiative and creativity".[166] Therefore, judicial intervention must be premised on the need to achieve a balance between curtailing arbitrary decision-making yet at the same time encouraging the exercise of discretion and initiative in appropriate circumstances.

However, the establishment of educational negligence claims may result in more formalised rules and procedures in schools. Faced with the threat of educational negligence claims, teachers may endeavour to treat all students equally as a 'safe' response to potential liability rather than attempt to cater to the needs of particular students. This can be called "defensive

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162 M. Minow, "Beyond State Intervention in the Family: For Baby Jane Doe" (1985) 18 *U Mich J L Ref* 933, 950.

163 *Ibid.*

164 Note 139 *supra*, 215.

165 *Brown* v. *Board of Education*, 347 US 483, 493 (1954).

166 *Report of the National Inquiry into Teacher Education*, note 13 *supra*, para 2.99.

education".[167] Defensive education results in a formalistic approach in an area where diversity and flexibility are essential. Schools, like many organisations, are required to undertake the difficult task of balancing formality and informality:

> [i]f they rely too heavily on formalized procedures, they make the learning process even more impersonal; if authority relations remain too informal, disputes may lead to a perception of arbitrariness which also undermines trust. To avoid a vicious cycle of formalization and distrust, school officials must delicately balance formality and informality. Into that balance, the legal system is now intruding in rather uninformed ways, as the broad cultural trend toward legalization places pressures on the legal system to act.[168]

Formalism or defensive education is not educationally desirable. Indeed, to the extent that schools lessen creativity and innovation because of educational negligence claims, the value of education will decline. This reveals the two-edged sword of legalisation:

> [i]n its positive aspect, legalisation makes several promises. It is a vehicle by which individual citizens may redress the balance between themselves and the State or other powerful opposing interests. It provides access to individuals unable to summon the political resources needed to obtain a legislative majority in modern politics. It offers principled decision-making in an impartial, procedurally balanced forum. It emphasises accountability, administrative regularity and the reduction of arbitrariness. In its other face, legalization can turn into legalism, arid formality. Equality before the law is too often dependent on access to resources. It can also lead to the sorts of pathologies — defensiveness, delay, hostility, expense [previously] adverted to ... Emphasis on accountability and reduction of arbitrariness imply a mistrust of those administering policy; that in turn may inhibit the creative exercise of professional discretion and judgment.[169]

Yet by no means are these the only disadvantages that may result from increased legalisation of the school environment. Education is a co-operative process between teacher and student. However, education may become adversarial in nature as teachers come to see students as potential plaintiffs. In addition, it is possible that by focussing on one individual's claim, educational negligence actions may draw attention away from calls for broader reform in education. The demands of one plaintiff may be seen as the 'problem' the system needs to address rather than structural problems with the educational process such as inequality.[170]

VII. CONCLUSION

While there may not be common agreement among educationalists concerning all of the goals of the education system, there is agreement that

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167 M.G. Yudof, "Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools" (1981) *Wisconsin L Rev* 891, 917.

168 *Id.*, 898-899.

169 D. Neal and D.L. Kirp, "The Allure of Legalization Reconsidered: The Case of Special Education" in Kirp and Jensen (eds.), note 161 *supra*, 357.

170 For one study of inequality in Australian education see R.W. Connell, D.J. Ashenden, S. Kessler and G.W. Dowsett, *Making the Difference: Schools, Families and Social Division* (1982).

the most important objectives of a student's schooling should include competency in certain essential skills such as literacy and mathematics.[171] When the education system fails to provide a student with these skills the question arises whether a legal remedy, such as a claim sounding in educational negligence, should be available to the student. It is true that schools are not required to meet all of the needs of society for education.[172] It also needs to be recognised that there are a number of social and political constraints that affect the quality of education not the least of which is the level of funding provided to schools.[173] Yet if a school or individual teacher fails to impart knowledge deemed essential for a student to function in society should not that student have some form of legal redress? Schools and teachers have a major effect on the educational progress of students and it has been noted that students of comparable social and intellectual backgrounds achieve differently in different schools.[174]

This article has addressed the significant difficulties associated with enabling students to succeed in an educational negligence claim. These difficulties range from evidentiary problems to, at the broadest level, concerns about the impact of legal remedies in the sensitive area of educational policy-making. The law can be a 'blunt instrument' in matters of education.[175]

One argument is that schools and teachers should not be guarantors of the success of their students because other professionals, for example bankers and other financial advisers, are not required to guarantee the success of their clients' financial ventures. However, while teachers may not be taken to guarantee the success of their students in society, it can be asserted that the failure of a student to obtain basic skills will necessarily result in that student failing to achieve in society and that therefore, the attainment of these minimal skills should be guaranteed by schools and teachers. In other words, school authorities and teachers should be accountable to their students for a failure to impart these basic skills.

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171 *Report of the National Inquiry into Teacher Education*, note 13 *supra*, para 2.51. In the Report of the Committee of Inquiry into Education and Training, *Education, Training and Employment* (1979) 31, it is stated "[t]o function effectively in our society all children need to read, write and calculate at a basic level . . . The schools should ensure, to the best of their ability, that all students have mastered these essential skills by the time they are allowed to leave. This does not mean that the basic skills should be the only things taught, or even that they should necessarily be accorded the most time and importance within the curriculum. It simply means that every child should have access to the skills of literacy and numeracy and that where they are taught they should be taught well, so that as high a level of mastery as possible is guaranteed."

172 *Report of the National Inquiry into Teacher Education*, note 13 *supra*, para 2.79.

173 *Id.*, para 1.17. It is stated in the Report that there may only be political solutions to some of these constraints: para 1.18. One commentator has argued that courts should not necessarily hold off establishing a cause of action because it appears that political action is required: F.C. Zacharias, "The Politics of Torts" (1986) 95 *Yale L J* 698. Zacharias states that courts should decide certain categories of negligence cases with a view to the possibility of a political response and, in appropriate curcumstances, courts should allow new torts because it will focus attention on an issue that needs legislative action.

174 *Id.*, para 1.23.

175 Neal and Kirp, note 169 *supra*, 359.

If we view educational negligence claims on a continuum according to the ease of establishing such claims, a claim that alleges a failure to master basic skills would not be as readily established as a claim based upon a teacher or school authority failing to teach a required text for an examination. This is because the former claim may fail because of the difficulty in identifying the negligent event. Such a claim would, however, be easier to establish than a claim that alleges failure of the student to achieve personal and social skills because of negligent teaching. Yet even a claim concerning the failure to master basic skills raises a host of policy considerations that a court must address in deciding whether or not to establish liability on persons or organisations who were hitherto immune from such liability.

The courts must also examine the very nature and process of education in order to evaluate properly the consequences of imposing legal liability upon teachers or school authorities. The process of education, perhaps more so than any other professional/client relationship, requires not only extensive co-operation between the teacher and the student but also significant effort on the part of the student in order for him or her to achieve desired educational goals. Teaching and learning are not the same, but a lack of effort or motivation by either the teacher or the student must of necessity undercut the process of education.

Schools are required to be on the 'cutting edge' of social change,[176] and consequently, educational policies are in constant need of review. Educational negligence claims will insert the judicial system into this process. Courts have the potential to sensitise school authorities to the need for required change. At the same time, they could impose uniformity and formalism where creativity and diversity are required. At the very least, an awareness and understanding of the impact of permitting legal remedies in a new area is essential and the objective of this article has been to assist this process.

176 NSW Department of Education, *Quality Education — Teacher Efficiency Review* (1985), 9.