

## IN A CLASS APART?

### 'Educational Negligence' Claims Against Teachers.

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#### 1. The American and Australian Context

Consider these two cases:—

##### *Case 1: Peter W v. San Francisco Unified School District*

A student sues his school authorities for damages alleging that their negligent teaching is responsible for his functional illiteracy and corresponding loss of earning capacity. After twelve years of schooling and a high school diploma, he has the reading, writing and mathematical skills of a fifth grader and is unqualified for any employment other than labouring jobs which do not require him to read and write.<sup>1</sup>

##### *Case 2: Hoffman v. Board of Education of City of New York*

A five year old boy who has an apparent and serious speech defect is administered a primarily verbal IQ test in his first year at school. On that test he obtains a score of 74 which is one point below the 'normal' intelligence cut-off point of 75. On the results of that test, he is placed in a class for mentally retarded children with a recommendation that his intelligence be re-evaluated within two years. The boy's intelligence is not re-tested by the school. (Non-verbal tests taken outside school reveal that he has either 'normal' or possibly 'bright normal' intelligence.) He remains in classes for the retarded until he is seventeen years old. At the age of eighteen he learns that he has 'normal' intelligence. He sues the education authorities claiming that their negligence and incompetence caused him the following harm: diminished intellectual capacity, severe emotional and psychological injury, the expense of procuring remedial teaching, reduced opportunity to obtain employment and corresponding loss of opportunities in life.<sup>2</sup>

Is there any substantial difference between Case 1 and Case 2? In a succession of cases in the United States, public schools<sup>3</sup> have been sued for what has variously been termed their 'educational malpractice' or 'educational negligence'. Such cases pose the question: can educators be held professionally liable for the failure of their students to succeed academically?

That central question itself raises novel and complex issues: should the law recognize a duty of care owed by teachers for their students' intellectual advancement? What is the scope of such a duty? What would be an appropriate standard of care? How are problems of proving the causal connection between the teacher's negligence and the alleged harm to be

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1. 60 Cal. App. 3d 814.

1A. 131 Cal. Rptr. 854 (1976).

2. 410 N.Y.S. 2d 99 (1978).

2A. 49 N.Y.S. 2d 121 (1979).

3. This commentary refers throughout to public schools. The contractual nature of the relationship between students, parents and private schools gives rise to different issues.

overcome? What is the harm suffered? How are damages to be assessed? What alternatives are there for safeguarding students against negligent or incompetent academic instruction without recourse to the judicial process?

In Australia, the concept of negligence in schools is not new; but school litigation involving educators has centred on issues related to the care, safety and supervision of students. Thus the law as to liability for physical accidents in schools and on school excursions is well established.<sup>4</sup>

Paradoxically then, teachers and schools have an acknowledged duty for the physical safety and well-being of the children in their charge, but not for their intellectual advancement. Nonetheless, Mr. Justice Michael Kirby has recently said that there is no reason in principle why negligence actions against teachers should be confined to physical injuries.<sup>5</sup> It may be observed, however, that the standard of care so far applied to teachers has been that of reasonable persons concerned for the physical safety of children in their charge and not a professional liability akin to that of doctors, lawyers or architects, for example. Even so, teachers have begun to talk about the possible need for 'malpractice' insurance.<sup>6</sup>

Given the importance of the social role of education,<sup>7</sup> the threat to the functions and processes of education posed by the American claims, the significance of the impact on daily activities in the classroom should such claims be successful and the similarity of the issues posed in both the American and the Australian context, it seems timely to subject the American 'educational negligence' claims to closer scrutiny.

The purpose of this article is to review the relevant American cases, to introduce the legal and policy issues posed by 'educational negligence' claims, to suggest a narrow and limited basis upon which an 'educational negligence' claim might be recognized, and to consider some additional hurdles which might have to be overcome were such claims to be brought to Australia.

## 2. The American Cases Reviewed

At present, there are seven reported American cases of particular relevance. The following review of these cases is intended to provide the factual and legal background to the development of the 'educational negligence' concept, to present in context the judicial arguments for and against recognition of such claims and to provide a basis for the classification and possible validity of such claims.

### (a) *Peter W v. San Francisco Unified School District : A General Duty to Educate?*

The first claim framed in 'educational negligence' was *Peter W v. San Francisco Unified School District*, the facts of which were stated as case 1 (ante).

#### The Claim:

In his action against the school authorities, Peter claimed that the school district, in breach of their general duty to educate him, had negligently and inadequately educated him

4. E.g., *Commonwealth v. Introvigne* (1982) 56 A.L.J.R. 749; *Geyer v. Downs* (1977) 17 A.L.R. 408. For present purposes, cases involving injury as a result of negligent instruction in, e.g., the use of gymnasiums and the conduct of chemistry experiments, are regarded within the 'physical injuries' category — not the 'educational negligence' category: (T.J. Flygare, *Legal Rights of Teachers*, (1976.)

5. M. Kirby, *Education: The Lawyers Are Coming*, unpublished paper delivered at Australian Legal Education Council and Australasian Commerce and Economics Teachers' Association: National Conference on Legal Education in Schools; Perth, January, 1983.

6. K.E. Tronc (ed): *Consider Your Verdict — Case Studies and Other Simulation Exercises on School Law*, (1979).

7. Elsewhere described as of 'commanding importance' — *Peter W supra* n.1A at 858; Report of Select Committee on Education (Ahern Report), Queensland Government, 1979; *Brown v. Board of Education* 347 U.S. 483 (1954), at 493. 'Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and expenditures for education . . . demonstrate our recognition of the importance of education to our democratic society . . . It is the very foundation of good citizenship . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education'.

by failing to provide him with adequate instruction, guidance, counselling and/or supervision in basic skills such as reading and writing and failing to exercise that degree of skill required of an ordinary prudent educator.

In particular, Peter alleged that the school failed to diagnose his reading disability, failed to make remedial courses available to him, assigned him to classes in which he could not read the textual material, assigned him to classes in which the instructors were not qualified to teach the particular subject, assigned him to classes not directed towards students with his reading disabilities, promoted him with the knowledge that he had not acquired the skills necessary to comprehend the subsequent course work, and allowed him to graduate with only fifth grade reading ability when the State's Education Code required an eighth grade reading level before graduation.

As a direct and proximate result of this failure to educate, Peter claimed to have suffered a loss of earning capacity. His limited ability to read and write made him unfit for any employment other than that of a labourer and on the basis of his 'permanent disability and inability' to gain meaningful employment, he claimed \$500,000 general damages. Additionally, he claimed special damages to compensate for the cost of a private tutor.

The Decision:

(i) Trial:

The trial judge<sup>8</sup> dismissed Peter's claim for failure to disclose a cause of action known to the law.

(ii) On Appeal:

The appellate Court was concerned to decide whether there was a general duty to educate, breach of which could render school authorities liable for damages. Determining the existence of a duty of care was, the court observed, a question of law initially dictated or precluded by considerations of public policy. 'It should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection'.<sup>9</sup>

As a matter of public policy, the court concluded, the school district should not be regarded as owing Peter the requisite duty of care and it, therefore, should not be held liable for the injury he allegedly suffered.

Then, in an often cited landmark passage, Rattigan A.J. explained the judicial apprehension with which the court shrank from the recognition of a duty of care in these cases:

Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might — and commonly does — have his own emphatic views on the subject. The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, is influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

We find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct may be measured, no reasonable 'degree of certainty that... plaintiff suffered injury', within the meaning of the law of negligence and no such perceptible 'connection between the defendant's conduct and

8. Brown J, *supra* n.1.

9. *Supra* n.1A at 860, per Rattigan A.J. (with whom Caldecott P.J. and Christian J. concurred) citing W. Prosser *Handbook of the Law of Torts* at 325-26.

the injury suffered' as alleged which would establish a causal link between them within the same meaning.<sup>10</sup>

Peter W's action failed for three reasons. Policy considerations dictated that the teaching profession should not be overburdened by the recognition of a general duty to educate, there was no measurable standard of care and the harm alleged could not be readily recognized, assessed or proved.

**(b) *Donohue v. Copiague Union Free School District: A Statutory Duty to Educate?***

The following year, a similar action came before the New York Supreme Court.<sup>11</sup>

In *Donohue*, a high school graduate had received failing grades in several subjects and lacked even rudimentary ability to comprehend English. At the time of trial, the plaintiff claimed that he couldn't read menus, classified advertisements or clothing labels, that he had to take job applications home to his mother who completed them for him and that he had had to take his driver's test orally. After graduation he sought the assistance of a private tutor.

Although his reading problem began in first grade, he was promoted each year until his final year when special help from a learning disabilities specialist was given to him for the last six months.

A New York Statute<sup>12</sup> required the Board of Education to examine students who continuously failed<sup>13</sup> or under-achieved to determine the cause of their failure or underachievement. Aware that Donohue fell within the definition of students who should be examined, the school authorities had not examined him.

**The Claim:**

In a suit for \$5,000,000 damages, Donohue claimed that his functional illiteracy was caused by the school district's breach of its duty and obligation to educate him by: awarding him passing grades or minimal failing grades in various subjects; failing to evaluate his mental ability and capacity to comprehend the subjects being taught to him at school; failing to provide adequate school facilities, teachers, administrators, psychologists and other personnel trained to take necessary steps in testing and evaluation processes to ascertain his learning capacity, intelligence and intellectual absorption; failing to interview, discuss, evaluate or psychologically test him with regard to his ability to comprehend; failing to teach him in a manner such that he could reasonably understand what was necessary under the circumstances and qualify for a certificate of graduation; failing to properly supervise him; failing to adopt the accepted professional standards and methods to evaluate and cope with his problems — all of which amounted to 'educational malpractice'.

**The Decision:**

**(i) Trial**

Dismissing the claim, Baisley J. regarded the issues as parallel, if not identical to, the complaint in the *Peter W* case, found the reasoning of the intermediate appellate court in that case persuasive and dismissed the claim for want of precedent in New York State.<sup>14</sup>

10. *Ibid.*

11. *Donohue v. Copiague Union Free School District* 408 N.Y.S. 2d 584 (1977);

11A. *Donohue v. Copiague Union Free School District* 47 N.Y. 2d 440 (1979).

12. New York State Education Law — former section 4404: 'The Board of Education shall cause suitable examinations to be made to ascertain the physical, mental and social causes of . . . "under achievement" of every pupil in a public school, not attending a special class, who has failed continuously in his studies or is listed as an under achiever. Such examinations shall — determine — whether such child shall be expected to profit from special education facilities'.

13. 'Continuous failure' was defined in the regulations as failure in two or more subjects within one school year.

14. *Supra* n.11.

## (ii) On Appeal:

Similarly, in the New York Supreme Court (appellate Division),<sup>15</sup> Donohue's claim was unsuccessful (although he did receive strong support from the dissenting judgement of Suozzi J.).

Having outlined the elements of an educational malpractice claim, the majority relied heavily on the *Peter W* case. On policy grounds, there was no duty of care flowing from educators to their students the breach of which would render them liable in an educational malpractice claim.

Further, the relevant education statute was designed to confer the benefits of free education on what would otherwise be an uneducated public and its breach did not give rise to an action sounding in tort. 'Such enactments were not intended to protect against the "injury" of ignorance, for every student is born lacking knowledge, education and experience.'<sup>16</sup>

Finally, the court dismissed the complaint because, given the multitude of factors affecting the learning process, it would be 'impossible to prove that the acts or omissions of educators were the proximate cause of the student's illiteracy. The failure to learn does not bespeak a failure to teach. It is not alleged that the plaintiff's classmates who were exposed to the identical classroom instruction also failed to learn. From this it may reasonably be inferred that the plaintiff's illiteracy resulted from other causes.'<sup>17</sup>

Clearly the court, while anxious to emphasize the important public trust borne by educators and that shoddy professionalism would not be sanctioned, was content to leave the maintenance of educational standards to administrative procedures, the Commissioner of Education and such sanctions as demotion or the termination of the employment of those teachers who failed to meet the standard required. Individual suits against teachers would not lie.

By contrast, in a dissenting judgement (the first glimmer of judicial recognition for the educational negligence claim) Suozzi J. regarded the plaintiff's cause of action as valid and warned against sanctioning misfeasance in the educational system.

Suozzi J. compared educational malpractice with other malpractice and negligence claims recognized by the courts and drew a strong analogy with the 'intolerable' malpractice of a doctor who, confronted with a patient with a cancerous condition, fails to pursue medically accepted diagnosis and treatment procedures leaving the patient to suffer the inevitable consequences of the disease.

Donohue displayed through his failing grades a serious condition with respect to his ability to learn. Mindful of the learning disabilities, the school authorities made no attempt to diagnose the nature and extent of his learning problem or to take or recommend remedial measures to deal with it. The plaintiff, per Suozzi J., had shown there was a breach of a statutory duty of care. The fear of a new flood of litigation and difficulty in framing a measure of damages, arguments from the *Peter W* case, were not persuasive. As to whether the plaintiff's functional illiteracy was caused by the negligence of the school district or by other factors, that was really a question of proof to be resolved at trial.

## (iii) Further Appeal:

The spark of recognition in the judgement of Suozzi J. was extinguished on appeal when the six judges of the New York Court of Appeals dismissed Donohue's claim.<sup>18</sup>

Of particular interest, however, is the acknowledgement by these judges that they, like Suozzi J., did not regard the obstacles previously raised to bar recovery in such claims, as

15. 407 NYS 2d 874 (1978).

16. *Ibid.* at 880, citing *Peter W*.

17. *Ibid.* at 881.

18. *Supra* n.11A. In two separate judgements, Jasen J. (with whom Cooke C.J., Jones & Fuschberg JJ. concurred) and Wachtler J. (with whom Gabrielle J. concurred).

necessarily insurmountable. In passing, the majority noted that no one in good faith would deny that a functionally illiterate high school student had been, in some fashion injured, found that the establishment of a standard by which to judge on educators performance is not necessarily an insurmountable obstacle, stated that there was nothing in the law that prevented charging professional educators with the same duty to the public as that owed by doctors, lawyers, architects, engineers and other professionals and observed that it would be too presumptuous to conclude that proximate cause could never be proved.

Nevertheless, the heart of the matter, said the Court of Appeal, was whether the courts should, as a matter of public policy, entertain such claims. The Court held that they should not.<sup>19</sup>

Donohue failed in three courts because public policy again dictated that neither a general duty to educate nor a statutory duty to educate could be recognized or enforced by individual students against their teachers or education authorities.<sup>20</sup>

However, five out of ten judges in two of those courts<sup>21</sup> did consider it possible that most of the obstacles raised by the *Peter W* case against educational negligence claims could, in an appropriate case, be overcome. The outstanding exception, of course, is the policy barrier.

**(c) Loughron v. Flanders and DSW (and LAH) v. Fairbanks North Star Borough School District: A General Duty to Educate 'Learning Disabled' Students?**

The courts have similarly refused suits on behalf of 'learning disabled' students who require specialized educational attention.

In *Loughron*,<sup>22</sup> the plaintiff had, since first grade, suffered from an educational disability which greatly impaired his reading and writing skills and which was not recognized by the school until three years later when, upon re-evaluation, he was reclassified as 'learning disabled'. He sued the school seeking firstly, their implementation of an individualized course of instruction and secondly, \$1 million damages to compensate himself and his parents for the emotional trauma suffered as a result of the school's conduct. Loughran alleged that the school's negligence had made it virtually impossible for him to function at full intellectual capacity or to reap those personal, social and financial rewards commensurate with his intelligence.

**The Claim:**

The thrust of Loughran's claim was that through their negligence in failing to take effective steps towards diagnosing and remedying the plaintiff's learning disabilities, the defendants had breached a duty to provide the plaintiff with free and appropriate education.

**The Decision:**

The claim in the United States District Court was dismissed by Clarie C.J. in a judgement which centred on policy issues and the purpose and objectives of the relevant *Education for All Handicapped Children Act, 1975*. He concluded that the recognition of the plaintiff's claim would cause special education programmes to suffer since administrators would balk at implementing new curricula and techniques for fear of exposing themselves to liability should these innovations fail. Hence, the statute did not give rise to an independent cause of action. Moreover, judicial intervention in the sphere of education presented a myriad of intractable economic, social and even philosophical problems inappropriate for resolution by courts.

19. E.g., *ibid.* at 445 per Wachtler J.: 'The law does not provide a remedy for every injury'.

20. However, this action prompted the New York State Board of Regents to establish a new policy which required students to undergo basic competency testing before they could be promoted to higher levels of schooling. (Source: 'Education Abstract', Research Branch, Queensland Education Department No. 253.)

21. Suozzi J. (dissenting — Appellate Division) and in the Court of Appeal, Jasen J. and those who concurred with that judgement.

22. 470 F.Supp 110 (1979).



Similarly, in *DSW (and L.A.H.) v. Fairbanks North Star Borough School District*<sup>23</sup> the Supreme Court of Alaska refused to recognize a joint educational malpractice claim brought by two dyslexic students against a school district for its failure to discover learning disabilities and failure to provide an appropriate educational programme once the learning disabilities had been discovered.

Both LAH and DSW had attended the defendant's school from kindergarten through to fifth and sixth grade during which time the school had negligently failed to ascertain that they were suffering from dyslexia. In fifth and sixth grades respectively, when dyslexia was discovered, they were offered special education courses. Then, despite the school's awareness that they had not yet overcome their dyslexia, the special courses were negligently terminated and never to be resumed.

The plaintiffs failed both at trial and on appeal. The Alaskan Court found the policy reasons expressed in previous cases from other jurisdictions persuasive.

**(d) Hunter et al v. Board of Education of Montgomery County et al: Will intentional or malicious conduct overcome policy objections?**

*Hunter*<sup>24</sup> also concerned a normal student whose claim was defeated by public policy. Of particular interest, however, are firstly the suggested circumstances in which policy considerations may be 'outweighed' and secondly, the dissenting judgement of Davidson J. who recognized this cause of action.

**The Claim:**

The Plaintiff in *Hunter* claimed against his school district and three individual teachers for their educational malpractice, alleging that they had failed to teach him properly and had negligently evaluated his learning abilities thereby causing him to repeat first grade materials while in the second grade. This misplacement allegedly continued throughout subsequent grades causing the student to feel embarrassment, to develop learning deficiencies and to experience 'depletion of ego strength'.

**The Decision:**

**(i) Trial:**

At first instance, Cave J held that the action was barred on public policy grounds.

**(ii) On Appeal:**

In a wry judgement<sup>25</sup> the Court of Special Appeals of Maryland rejected the claim. Judicial intervention or supervision in education would be unworkable:

It is conceivable that, if allowed, suits for educational malpractice might arise every time a child failed a grade, subject or test . . . The opposite side of the matter is that if the teacher 'passed' the child, the teacher would likely find himself or herself defending a malpractice suit because the child was promoted when promotion was not warranted.<sup>26</sup>

**(iii) Further Appeal:**

On appeal to the Court of Appeals of Maryland<sup>27</sup> the plaintiff was confronted by the same public policy objections to success which had defeated the earlier cases.

Notably, however, this court conceded that individuals should be protected from what it termed 'outrageous conduct' and that public policy bars to such an action would be 'outweighed' if the cause of action was based on intentional or malicious conduct on the part

23. 628 P.2d 554 (1981, Alaska).

24. *Hunter v. Board of Education of Montgomery County* Md. App. 425 A 2d 681;

24A. *Hunter v. Board of Education of Montgomery County* 292 Md 481 (1982).

25. *Supra* n.24 at 682: 'In short, the teachers have been sued for failure to see that Hunter drank from the well of knowledge'.

26. *Ibid.* at 684, per Gilbert C.J. (with whom Wilner & Orth JJ. concurred).

27. *Supra* n.24A.

of schools. However, the court warned that the plaintiff would have a 'formidable burden' in establishing the necessary intent for such an action.

Equally interesting is the dissenting judgement of Davidson J. who recognized educational malpractice claims founded on negligent as well as intentional or malicious conduct. She opined that teachers should be regarded as professionals owing a 'professional duty of care' and that it should be possible to establish a causal relationship between the conduct of a teacher and the failure of a child to learn. Finally, Davidson J. disputed the adequacy of available administrative procedures. The delegation of authority to certain administrative agencies should not preclude judicial responsiveness to individuals injured by administrative functioning.<sup>28</sup>

(e) **Hoffman's Case and Smith v. Alameda County Social Services Agency et al.**

*Hoffman's Case — Are Teachers Immune?*

The facts of *Hoffman*<sup>29</sup> have been noted in outline as case 2 (ante). Some additional facts may be helpful:

Dr. Gottsegen, the school employed clinical psychologist who administered the IQ test to Hoffman and subsequently classified him as 'mentally retarded' could possibly have been negligent on the following counts:

(i) Administering an improper IQ test.

Hoffman had a speech defect. The Stanford-Binet IQ test used was a primarily oral test. Gottsegen had to 'guess' some of Hoffman's answers.

(ii) Improperly interpreting test scores.

Hoffman's score of 74 was 'borderline'. The Stanford-Binet test has a standard deviation of 15-16<sup>30</sup> so that a score of 74 could reflect a genuine IQ of 66-82 and a proper interpretation could be that Hoffman was normal. At trial, the defendants conceded, and on appeal Shapiro J. found as an indisputable fact, that Hoffman's intelligence had always been normal.

(iii) Lack of clarity in his direction to re-evaluate Hoffman's intelligence.

Whether this direction required Hoffman's IQ to be re-tested or his daily work to be evaluated was a moot point.

(iv) Failing to enquire about Hoffman's social and medical history.

Prior to starting school, Hoffman had scored a 'normal' IQ rating on a non-verbal test.

(v) Failing to inform properly Hoffman's parent of the borderline basis of the 'retarded' classification or that the school would only retest IQ levels if specifically requested to do so by parents or teachers.

Hoffman's teachers could possibly have been negligent on the following counts:-

(i) Failing to acquaint themselves with Hoffman's social and medical history

(ii) Failing to follow the psychologists' recommendation that Hoffman's intelligence should be re-evaluated within a two year period.

During his eleven years in class, Hoffman was not given another intelligence test although his academic achievement was tested semi-annually. Hoffman scored so poorly on these achievement tests (well below what would be expected of a normal child in a regular class) that the teachers assumed his IQ was no higher than originally indicated. They did not, therefore, suggest that his IQ should be re-tested. But the teachers 'apparently gave no consideration to the fact that his severe speech problem

28. *Ibid.* at 497-498.

29. *Supra* nn.2 and 2A.

30. This is not mentioned in the judgements. See E.J. Walleson, *Nonliability for Negligence in the Public Schools — Educational Malpractice from 'Peter W' to 'Hoffman'*, Notre Dame Lawyer, June 1980, at 815 n.8.



and the emotional fall-out therefrom might have masked a higher intelligence than indicated by the achievement tests.’<sup>31</sup>

Under the doctrine of *respondeat superior* the Board of Educators would be responsible for the negligent acts of its employees — its psychologist and its teachers.

The Claim:

Hoffman sought to recover damages for his diminished intellectual capacity, his intellectual, emotional and psychological injury and a reduced capacity to obtain employment which resulted firstly, from the negligent placement of a normal person in a mentally retarded class (which placement also deprived him of adequate speech therapy which would have improved his handicap) and secondly, from failing to or refusing to follow recommended testing procedures thus causing him to remain in those classes for eleven years.

The Decision:

(1) Trial:

The trial judge and jury found ‘educational negligence’ in the teachers’ failure to follow a recommended re-testing procedure and the jury awarded \$750,000 damages.

(ii) On Appeal:

Before the Appellate Division of the New York Supreme Court (the court which had rejected the *Donohue* claim), Hoffman succeeded and was awarded damages reduced to \$500,000.

Essentially, the majority<sup>32</sup> did three things. Firstly, they found on the facts that Gottsegen’s written recommendation that the plaintiff’s intelligence should be re-evaluated within a two year period could only mean that he was to be administered a new IQ test within that period. Any ambiguity or lack of clarity in that recommendation would be the responsibility of the Board of Educators under the doctrine of *respondeat superior*, would impose an obligation on school authorities to find out what their own employee meant and would impose on each teacher an obligation to enquire as to its true meaning. The teachers’ professional judgement as to when to recommend re-testing did not give them discretion to prevent the recommendation from being carried out. The school psychologist’s recommendations had been totally ignored. ‘Thus, the failure to follow Dr. Gottsegen’s recommendation — to determine so vital a matter as whether the plaintiff should be continued in a class for retarded children was an egregious error committed on a wholesale basis.’<sup>33</sup>

Secondly, the court rejected as inappropriate the policy arguments relied upon in the *Peter W* and *Donohue* cases. The court balanced the minimal administrative time and cost involved in administering a fresh IQ test to a child who only marginally qualified as retarded, against the serious and foreseeable consequences if that test were not carried out and concluded that policy could not bar recognition of this claim. ‘So little had to be done to avoid the awesome and devastating effect . . . on the plaintiff’s life, and that little was not done.’<sup>34</sup>

The second basis of rejection of the policy argument was that to uphold in this case, would afford educators a special and peculiar immunity from suit. ‘Defendant . . . suggests that . . . educational entities must be insulated from the legal responsibilities and obligations common to other governmental instrumentalities . . . I see no reason for such a “trade-off” on alleged policy grounds.’<sup>35</sup>

31. *Supra* n.2, per Shapiro J.

32. Shapiro, Cohalan and O’Connor JJ. The judges split 3:2.

33. *Supra* n.2 at 107.

34. *Ibid.* at 109.

35. *Ibid.* at 110.

The policy arguments were also rejected on the basis that *Peter W* and *Donohue* were non-feasance cases (involving the failure to detect and correct weaknesses in students and the failure to provide positive programmes for students), whereas the present case involved misfeasance (involving affirmative acts, the defendants' classification and subsequent failure to follow the psychologist's prescription, which placed the student in a worse position than he would have been in had nothing been done.) 'If the door to 'educational torts' for nonfeasance is to be opened it will not be by this case which involved misfeasance.'<sup>36</sup>

Thirdly, and most importantly, the court established a basis upon which educational negligence claims could be recognized. The defendants' affirmative act in placing Hoffman in a CRMD (Children with Retarded Mental Development) class, when it should have known that a mistake would have devastating consequences, created a relationship between itself and the plaintiff out of which arose a duty to take reasonable steps to ascertain, at least in borderline cases, that the placement was proper.

Then, noting that damages for psychological and emotional injury were recoverable, even without physical injury or contact, the court concluded that Hoffman should succeed: '*Fiat Justitia, Ruat Coelum*'.<sup>37</sup>

The two dissenting judges delivered separate judgements. Martuscello J. concluded that there had been no negligence and no misfeasance. Further, on policy grounds, courts ought not intrude upon the discretion and policy of the Board of Education.<sup>38</sup>

Damiani J. criticized the majority's attempt to distinguish the *Donohue* case as a nonfeasance case. Although he regarded the distinction as immaterial, he nevertheless defined the defendants' failure to retest the plaintiff as nonfeasance (the failure to perform an act which a person should perform) whereas the *Donohue* case, in which the defendant had instructed the plaintiff in reading, although not properly or effectively, was one of misfeasance (the improper performance of a lawful act).

Damiani J. also rejected the claim that the defendants' had caused Hoffman any harm. Hoffman's learning problems stemmed from his communication difficulties caused by his severe speech defect. He had commenced his education lacking knowledge, education and experience. The failure to teach him to speak properly had left him no worse off than when his schooling started. 'The Defendant . . . may have failed to remedy the plaintiff's speech problems, but it did not cause or aggravate them.'<sup>39</sup>

(iii) Further Appeal:

The decision of the Appellate Division was reversed on appeal to the New York Court of Appeals<sup>40</sup> by a four to three majority.

Even though it could 'quite possibly' be cognizable under traditional notions of tort law, the majority refused to recognize educational malpractice as a cause of action on policy grounds which applied regardless of whether one considered the allegations to be based on misfeasance or nonfeasance.<sup>41</sup>

We had thought it well settled that the Courts of the State may not substitute their judgement, or the judgement of a jury, for the professional judgement of educators and officials actually engaged in the complex and often delicate process of educating the many thousands of children in our schools . . . The courts will intervene in the

36. *Ibid.*

37. *Ibid.* at 111.

38. *Ibid.*

39. *Ibid.* at 118. One wonders whether, by analogy, doctors who negligently diagnose clients may escape liability provided they don't personally cause the patient to contract the disease in the first place. Damiani J. saw no distinction between leaving a speech-affected child in a normal class without correcting his speech defect, and plucking that speech-affected child from a normal class and placing him with mentally-retarded students.

40. *Supra* n.2A.

41. Per Jasen J. (with whom Cooke C.J., Gabrielle and Jones JJ. concurred)

administration of the public school system only in the most exceptional circumstances involving gross violations of defined public policy.<sup>42</sup>

The three dissenting judges<sup>43</sup> agreed with the conclusion of Shapiro J. in the court below. They found discernible affirmative negligence on the part of the Board of Education in failing to carry out the recommended re-evaluation. Being an integral part of the process by which Hoffman was placed in a CRMD class, this failure was readily identifiable as the proximate cause of the plaintiff's damage.

Apparently, the majority in the Appellate Division and the minority in the Court of Appeal considered the circumstances in *Hoffman's* case to be distinguishable from those of *Peter W* and *Donohue*.

Rather than simply denying the existence of any pre-existing special relationship creating a duty of care between teachers or students, or a duty of care arising once the task of teaching is undertaken, Shapiro J. posits that the duty arises on the happening of a particular event. 'The defendants affirmative act'<sup>44</sup> creates the duty.

Yet, in the Court of Appeals the majority drew no distinction whatsoever between *Hoffman's* case and the *Peter W* or *Donohue* cases. All were 'educational malpractice' cases which could not be recognized for policy reasons.

This approach has been severely criticized as setting a precedent that may effectively shield school administration from judicial enquiry, even when such enquiry would be warranted:

Daniel Hoffman was a victim of professional negligence, but he was denied recovery simply because his injury arose in an educational setting. This decision will undoubtedly shield many other negligent people from liability because it effectively establishes an immunity for school officials.<sup>45</sup>

*Smith v. Alameda County Social Services Agency et al*<sup>46</sup> was strikingly similar both in facts and in outcome to *Hoffman*. Like *Hoffman*, Smith had been placed in classes for the mentally retarded when his school district knew or should have known that he was not in fact retarded.

Both the trial judge and the Californian Court of Appeal (two members of which had decided the *Peter W* case) regarded *Peter W* as controlling authority and seemed willing, once the 'educational setting' was established, to discuss such claims cursorily. Ironically, in dismissing Smith's action, the trial judge<sup>46B</sup> observed: 'In [*Peter W*] it was alleged that the plaintiff did not receive an adequate education because he was not given proper remedial teaching: herein the plaintiff alleges that he did not receive an adequate education because he was improperly given remedial training'. Yet he failed to see that this may, in fact, distinguish the two cases.

### 3. Drawing a Distinction: 'Inadequate Education' v. 'Professional Error'

Analyses of the seven cases discussed above have sought to distinguish between cases involving 'normal' children and those of 'special' or 'learning disabled' children. Alternatively, an attempt has been made to distinguish 'misfeasance' from 'nonfeasance' cases.

42. *Supra* n.2A at 320.

43. Meyer J. with whom Wachtler and Fuschberg JJ. concurred.

44. *Supra* n.2 at 109.

45. E.J. Walleson, *supra* n.30 at 814.

46. 90 Cal. App. 3d, 929 (1978).

46A. 153 Cal. Rptr. 712 (1979).

46B. Hayes J.

The writer submits, however, that a salient and useful distinction can be made between what shall be termed 'inadequate education' claims, (*Peter W, Donohue, Loughran, DSW, Hunter*) and 'professional error' claims (*Hoffman, Smith*).

An 'inadequate education' claim rests on the alleged failure of a general duty to educate. The claimant appears to progress normally through the education system and the 'inadequate education' and 'incomplete teaching' allegations are directed at all of the student's teachers and the education system at large.

By contrast, a 'professional error' claimant can point specifically to negligent acts or omissions by specific teachers or professionals which caused him particular harm.

The possible distinction between these two suggested disparates has not been considered by the courts. Prior to *Hoffman* the term 'educational malpractice' had only been used in the context of a general inadequate education claim. When subsequently and significantly, the *Hoffman* case was classified by the New York Court of Appeals as an educational malpractice claim, these two arguably distinct types of action were fused under the educational malpractice umbrella and education malpractice became a generic term describing any plaintiff's questioning of public school administrative decisions, a trend strongly criticized as creating judicial immunity for all educators.<sup>47</sup>

If educational negligence were to be judicially recognized in Australia, this distinction may allow limited recognition of that small proportion of professional error claims which, relying upon specific and identifiable conduct, should not be as difficult to prove nor as susceptible to floodgate fears as the inadequate education claims.

In the five cases characterised as inadequate education claims, all but two of the judges<sup>48</sup> posit that where a student pursues such a claim, public policy dictates that the requisite duty of care should not be recognized.

The claims in each of these five cases can be analysed as follows :-

- (a) Failing to detect the existence, nature or effect of the plaintiff's particular learning difficulty — (failure to properly test, evaluate, assess);
- (b) Failing to correct the plaintiff's learning difficulty — (failure to provide a positive programme for that disability, providing inadequate instruction and/or inadequate supervision);
- (c) Failing to advise the plaintiff's parents of his learning difficulties;
- (d) Misassigning the plaintiff to classes too difficult for him; and
- (e) Promoting the student without his having acquired the necessary skills.

In fact, what happens in this kind of case is that a particular student with a particular learning difficulty is not noticed. He is simply treated on an equal footing with his peers, taught a normal programme and promoted by effluxion of time. The essence of the claim is the failure (a) to detect the plaintiff's particular learning deficiency. From (a) the other difficulties ((b)-(e)) flow consequentially. It is axiomatic that an undiagnosed problem cannot be cured, nor can parents be advised of a problem which has yet to be discovered. Hence, the negligence, stemming as it does from (a), continues throughout the plaintiff's school career because the failure at (a) is at no time recognized or realized. There is no particular time at which this negligence crystallizes or becomes specifically attributable to any one teacher. Thus, the plaintiff in such a case can only allege that his education, although the same as that of the rest of his class, was, for him, inadequate.

The primary thrust of the claim in each of these cases was that by negligent or incompetent schooling, the plaintiff remained functionally illiterate, suffered a consequential loss of earning capacity and incurred the expense of additional private tuition.

47. E.J. Walleson *supra* n.30 at 832.

48. Suozzi J. (dissenting), *Donohue supra* n.15;  
Davidson J. (dissenting) *Hunter, supra* n.24A.

Additionally, some claimants sought to recover for mental, emotional or psychological distress although it is not, perhaps, surprising that attempts to recover for such tenuous 'injuries' as further mental anguish,<sup>49</sup> parental emotional trauma<sup>50</sup>, embarrassment<sup>51</sup> and the depletion of ego strength<sup>52</sup> were unsuccessful. Even if claims of educational negligence were to be recognized, the plaintiff would presumably be required to demonstrate some measurable harm (not mere discomfort) actually suffered by him.

Broadly, the views of the American judges in these five cases can be divided into three strands: those prepared to recognize all educational malpractice claims, those prepared to recognize them only upon proof of specific conduct causing harm and those not prepared to recognize them at all.

The most receptive to educational malpractice claims were the dissenting judges Suozzi J. and Davidson J. who, without any limitation beyond that of having to prove the cause of action, were prepared to recognize a general duty to educate predicated on professional standards akin to those expected of the medical, legal, engineering and other professions. Both judges believed that the causal connection between teaching practice and a child's failure to learn could, in a proper case, be established.

The view taken by the majority in the Court of Appeals in *Hunter* arguably falls within a second category. They considered the policy objections to an educational malpractice claim to be outweighed in those limited cases when the plaintiff can prove 'outrageous' intentional or malicious conduct on the part of school officials. While acknowledging that the majority in this case expressly excluded negligence-based claims from recognition, it is suggested that this recognition and the recognition previously afforded to negligence-based claims by the lower courts in *Hoffman*, together fashion a second category of educational malpractice claims which the courts may be prepared to recognize — claims based upon specific acts or omissions by particular individuals, falling short of what the courts consider to be acceptable standards within the teaching profession.<sup>53</sup>

The remaining judges were simply not prepared to grant any recognition to any educational malpractice claim because public policy dictated that such an action should not lie. Recurrent objections to such a duty of care included the fear of a flood of litigation, the difficulties in assigning a workable standard of care, in proving a causal connection between the teachers' conduct and the student's alleged injury, and in the identification and measure of damage. There was an evident reluctance to intervene in or oversee the process of education and the courts' willingness to leave educational issues to the process of administrative review and administrative sanctions against individual teachers.

When confronted with an inadequate education claim, the courts' approach, sensitive to the social burden already carried by the teaching profession and anxious not to make it oppressive, has been cautious. However, it will be suggested that this justifiable caution in inadequate education claims ought not to be applied to professional error claims where the policy objections are less compelling and the other obstacles may conceivably be overcome.

The component parts of the claims in *Hoffman* and *Smith* can be analysed as follows:-

- (a) Negligently mis-classifying the plaintiff (negligently attributing to the plaintiff characteristics which he did not possess; negligent or improper evaluation, testing or interpretation of evaluations or tests);

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49. *DSW*, *supra* n.23.

50. *Loughran*, *supra* n.22.

51. *Hunter*, *supra* n.24.

52. *Ibid.*

53. Hence the 'professional error' category encompasses intentional or malicious or negligent conduct of which only negligent conduct is relevant for present purposes.



- (b) assigning the plaintiff to an inappropriate educational programme (e.g. placing the plaintiff in inappropriate classes; depriving the plaintiff of the possibility of a normal education), and
- (c) Failing to realize the error (failure to re-evaluate or re-test).

Arguably, therefore, both *Hoffman* and *Smith* presented a different type of educational negligence claim. In these 'professional error' claims, the difficulty is not a failure to detect or correct a weakness in a student, but a positive (a) misclassification of the plaintiff from which (b) misassigning the plaintiff flows consequentially. Thereafter, the problem persists because of additional negligence at (c) which causes the initial error to remain undiscovered. There are, therefore, two possible phases to this claim — negligence at (a) and negligence at (c).

The negligence at (c) is akin to the problem at (a) in the inadequate education claims. There is no particular time at which it crystallizes or becomes specifically attributable to any particular individual.

However, the heart of the distinction between the inadequate education claims and the professional error claims is that the latter may be described as falling within a broader type of claim involving the following elements:-

- (a) A particular disjunctive act or omission by a teacher (e.g. negligent classification);
- (b) which singles out or segregates<sup>54</sup> a student from his peers (e.g. placing him in a mentally retarded class);
- (c) treatment and a corresponding unreasonable and foreseeable risk of harm if due care is not taken in the provision of that treatment.

The act or omission at (a) is the event which gives rise to the special relationship from which, arguably, the duty of care arises.<sup>55</sup> The conduct occurs at a certain time, may be attributed to a particular individual or individuals and may be subjected to closer scrutiny than the more nebulous inadequate education claim that all teachers failed to detect or correct a weakness. In fact, what happens in this sort of case is that the student harmed is singled out from the crowd. He is not merely overlooked or treated on an equal footing with every other member of his class. He is marked for particular and deleterious attention and, unless due care is taken, placed in a comparatively worse position than he would have been in, had he been overlooked.

Why should not a claimant in such a case recover? To overlook one child in a class of thirty is poor practice but at times inevitable. To single one child out of a class of thirty, deal with him negligently and place him in a worse position than he would otherwise have been in, is another, more serious situation.

Why should not the negligent segregation of a child for particular attention be regarded as a 'professional error'? A special relationship has been created from which flows a duty of care to that child. Is such a case so different from that of a doctor who causes injury by his negligent diagnosis and subsequent incorrect treatment? Is the concept of a professional duty of care so unworkable in this situation?

Nonetheless, the extent of the suggested duty is very limited. It is to ensure that the plaintiff is not in a comparatively worse position than he would have been had he merely been overlooked. To put it any higher is to recognize a general duty to educate which is not here proposed. By way of illustration, consider again the facts of *DSW v. Fairbanks*.<sup>55A</sup>

54. 'Segregation' is not intended to refer only to placing the student in another class. Any particular treatment of the student which substantially varies from the treatment of the rest of the class, is regarded as 'segregation' for present purposes.

55. In *Hoffman* Shapiro J. limited his remarks to 'affirmative acts'. While there is no reason in theory for limiting this duty to affirmative acts, in practice it is difficult to imagine situations when segregation would result from something other than an affirmative act.

55A. *Supra* n.23.



While the dyslexia is undiscovered, there is no claim — there is no general duty to educate. Once classified as ‘dyslexic’ and placed on ‘special education’ programmes, a ‘special relationship’ exists to ensure that that classification and accompanying placement are proper. When the special programme is negligently terminated, can DSW claim? Arguably, no. He is no worse off than if he had been overlooked in the first place.

Finally, it is suggested that this distinction may be more useful than attempted distinctions between nonfeasance and misfeasance. Traditionally, nonfeasance involves passive inaction, failing to take positive steps to benefit others or to protect them from some impending harm, whereas misfeasance involves active misconduct working positive injury to others. As the *Hoffman* judgements show, the borderline between active misconduct and passive inaction is not always easy to draw. The usefulness of a misfeasance/nonfeasance distinction is questionable.

#### 4. The Duty of Care

##### (a) The Policy Barrier

Establishing the existence of a duty of care is, of course, an essential first step in the successful maintenance of a negligence claim. As discussed the judicial recognition of a duty of care in educational negligence claims took three forms: those prepared to recognize a general duty to educate; those not prepared to recognize any duty to educate in any circumstances and a middle ground of those prepared to recognize a duty of care arising upon the happening of a particular event.

To recognize any duty of care is, in such cases, to recognize a new tort or a new variation of an old tort — a process which involves measuring and balancing the interest that must be sacrificed to avoid the risk, against the likelihood and potential seriousness of injury to others if that risk is not avoided. ‘There is always a large amount of judicial policy and social expediency in the determination of the duty problem.’<sup>56</sup>

Are the public policy arguments raised against the recognition of a general duty to educate relevant when the proposed duty of care arises only on the happening of a particular event when a special relationship is created?

The policy objections raised against recognition of a general duty to educate can be grouped into four broad categories:—<sup>57</sup>

##### (i) Social and Moral Considerations:

Essentially, the courts’ fears in this regard were two-fold. There was an apparent conviction that the courts were an inappropriate forum to test the efficacy of educational programmes and pedagogical methods. It was inappropriate for courts to judge educational policies or their implementation, to decide the curricula, to dictate the proficiency needed for students to advance from grade to grade or to ‘second-guess’ the determination of each of the plaintiff’s teachers. These matters were more properly regarded as within the area of expertise of educators and to intervene would constitute ‘blatant interference with the responsibility . . . lodged by Constitution and statute in school administrative agencies’.<sup>58</sup>

Secondly, the courts were fearful lest recognition of educational negligence claims might have a negative social impact in discouraging competent teachers from entering a profession, inhibiting an individualized, experimental approach to teaching or freezing educational theories into tort standards precluding flexibility and reducing the quality of education to accepted minimum standards.

##### (ii) Administrative Considerations:

56. *Nova Mink v. Trans Canada Airlines* [1951] 2 D.L.R. 241, per MacDonald J.

57. These categories were adopted by the majority in the Appellate Division in *Donohue*, *supra* n.15. per Damiani J.

58. *Ibid.* at 879.

The court were particularly concerned with their ability to cope with a flood of new litigation, the probability of feigned claims and the difficulties inherent in proving the plaintiff's case, (including the lack of a workable standard of care, the foreseeability of harm to the plaintiff, the lack of certainty in establishing the cause and nature of any harm and the difficulty in measuring the plaintiff's damages). Clearly, each and every time a student fails to progress academically, it can be argued that he or she would have done better or received a greater benefit if another educational approach or diagnostic tool had been utilized.<sup>59</sup>

(iii) Economic Considerations:

In deciding who should bear the losses caused by teacher negligence or incompetence, the courts were reluctant to increase the financial burden on schools and on the community at large.

To hold [public schools] to an actionable "duty of care" in the discharge of their academic functions, would expose them to the tort claims, real or imagined, of disaffected students in countless numbers. The ultimate consequences, in terms of public time and money would burden them — and society — beyond calculation.

Even assuming the availability of liability insurance to ease the financial burden of adverse judgements, the complicated process of preparing and defending suits would itself drain time and resources which would otherwise be available for instruction. This would inevitably conflict with the needs of students as a whole and have a detrimental effect on the overall policy of public education.<sup>60</sup>

(iv) Preventative Considerations:

The courts were also concerned to balance the judicial policy of preventing future harm, the ability of the defendant to adopt practical means of preventing injury, and the availability of other non-judicial remedies to which a disaffected plaintiff might have recourse.

In general, the administrative procedures provided by the education system itself were considered adequate and recourse to private actions was considered inappropriate. Better to investigate an improper placement or classification of a student via the administrative procedures, than to attempt to quantify the value of his lost education in money terms. 'Prompt administrative and judicial review may correct erroneous action in time so that any educational shortcomings suffered by a student may be corrected. Money damages . . . are a poor and only tenuously related substitute for a proper education'.<sup>61</sup>

(b) Policy In The Balance:

Not all of these policy objections withstand close scrutiny. Many of them have been criticized by American commentators who argue that the courts' expertise in the field of education is no less than their expertise in medical matters, that expert witnesses could be used to make up the shortfall and that mere delegation of administrative power to educational authorities should not preclude judicial responsiveness to individuals who are injured by incompetent academic functioning,<sup>62</sup> that the existence of educational negligence claimants demonstrates that internal administrative procedures have been inadequate to prevent teacher negligence, that internal procedures (certification procedures, minimum teaching qualifications, supervising teaching behaviour, power to dismiss incompetent teachers) do not make whole the student injured by teacher negligence,<sup>63</sup> that the potential availability of liability insurance makes teachers, schools and education authorities much

59. *Hoffman supra* n.2A.

60. *Peter W supra* n.1A; and see also D.S. Tracy, 'Educational Negligence', (1980) 58 *Nth Carolina Law Review* 561.

61. *DSW v. Fairbanks supra* n.23.

62. Tracy, *supra* n.60 at 589, 591.

63. 'Educational Malpractice' (1976) 124 *Univ. Penn.L.R.* 760

better risk bearers than students and that imposing liability on educators might have the beneficial effects of deterring negligent teaching or the hiring of incompetent teachers and encouraging teachers to explain experimental educational programmes to students and parents.<sup>64</sup>

The floodgate argument has also been stigmatised as a 'concern with judicial efficiency . . . inimical to basic concepts of justice'<sup>65</sup> and a 'pitiful confession of incompetence on the part of any court.'<sup>66</sup> The deprived socio-economic background of many would-be litigants, their relative alienation from the legal system, the heavy burden of proving causal relationship and injury, and availability of standard defences including contributory negligence make 'the prediction that school boards and courts will be inundated with suits . . . speculative at best.'<sup>67</sup>

Nevertheless, the refusal to recognize a general duty to educate seems justified. Perhaps the most forceful policy argument bears upon the negative social impact that the recognition of such a duty may have. The recognition of a general duty to educate, rendering teachers in general liable for students who fail to learn, would be impractical, unworkable and unjust. The day-to-day activities in class would be unnecessarily restricted or impeded and even the most conscientious teachers could not ensure that all of their students would learn.

Assuming, then, for present purposes, that the courts ought not recognize a general duty to educate, does that necessarily mean that a claim by a student placed in a special relationship and exposed to a greater risk of harm by the conduct of his teachers should also be refused? The policy objections raised against an inadequate education claim are less persuasive when applied to a professional error claim.

It is hard to see how recognition of 'professional error' claims would result in a flood of litigation or a significant increase in the financial burden borne by schools and the community. By their nature such claims will be limited to comparatively rare factual situations. There is no reason why recognition of such claims should interfere with daily teaching programmes or normal class activities. This special obligation would only arise when a student is specially dealt with and the existence of any such claimant bespeaks the failure of internal administrative supervision or review. Finally, in these limited circumstances, why would not the court be an appropriate forum to consider whether certain conduct by identifiable parties fell below acceptable standards?

For these reasons it is suggested, at least in theory, that the courts should recognize a professional error-based educational negligence claim. There may be practical difficulties in identifying appropriate professional standards or in proving cause and effect; but the recognition of the existence of a duty of care arising at the moment when the student is segregated for special treatment should prove no obstacle.

### (c) The Scope Of The Duty

If, as suggested, an educator's professional duty of care arises only when he singles out a particular student for special treatment, it is axiomatic that the duty would be owed to that student. The teacher must take care to ensure that the decision to segregate that student and his continued special treatment was and is merited.

Recall *Loughran v. Flanders*<sup>67A</sup> in which the plaintiff sought to recover for his 'parents' emotional trauma'. Do parents fall within the scope of the teacher's duty of care? Ought

64. *Ibid.* and see also M. Morucci, 'Hunter v. Board of Education' — Educational Tort Law — Cause of Action for Educational Malpractice requires Intentional and Malicious Conduct by School Officials', (1982) 12 *Baltimore L.R.* 162.

65. Tracy, *supra* n.60 at 586.

66. *Supra* n.63 'Educational Malpractice' quoting W. Prosser, *Handbook on the Law of Torts* at 51.

67. Morucci, *supra* n.64 at 162-163.

67A. *Supra* n.22.

teachers have their students' parents in mind when they make decisions concerning their students' educational progress? It is suggested that such a proposition stretches the professional duty of care concept too far.

What of the abnormally sensitive student? Consider the following hypothetical example: an unusually shy or retiring child whose emotional balance ranges from 'delicate' to 'slightly disturbed' is negligently placed in a class of mentally retarded children where the peculiar and abnormal behaviour of classmates causes the child to regress psychologically and emotionally and to become so permanently anxious as to become physically seriously ill. Assume a well-balanced child would not have been so affected by the error.

Precedent suggests that whether a duty is owed depends on the knowledge of the defendant and whether he knew or ought to have known that the plaintiff could be so affected.<sup>68</sup>

Teachers are professionally conscious that their teaching has an emotional and psychological impact as well as an intellectual impact. It is difficult to imagine a situation in which a teacher could protest an absence of actual or constructive knowledge that his negligence would or could have serious emotional or psychological repercussions for the child concerned. Arguably, the abnormally affected child would fall within the scope of the teacher's duty.

Assuming, then, that a duty of care may be owed in the limited circumstances described above, what would be the standard of care required of teachers?

## 5. A Professional Standard Of Care?<sup>69</sup>

### (a) Is Teaching a Profession?

Two different standards present themselves. When, for example, a teacher is charged with the duty to act non-negligently in caring for the physical safety of students, he is held to the usual reasonable man standard of care.<sup>70</sup>

If, however, the teacher be charged with a duty in his academic instruction, should he be held to that professional standard of care which is imposed when an individual holds himself out as possessing certain skills such that people who use his services have a right to expect him to use that skill and knowledge with a minimum degree of competence? 'If doctors, lawyers, architects, engineers and other professionals are charged with a duty owed to the public whom they serve, it could be said that nothing in law precludes similar treatment of professional educators.'<sup>71</sup>

Whether teaching is a profession is a divisive question. Arguments for recognition of teachers as professionals include their specialized training, their certification or registration requirements pre-requisite to employment, the exercise of educated judgement and discretion in their calling (rather than mere mechanical application of knowledge), their recognition as professional by some courts, and their holding themselves out as having specialized skills and knowledge not shared by those outside their field.<sup>72</sup>

By contrast, those wary of treating teachers as professional point to the fact that they are not self-governing but rather are governed by hierarchical bureaucracies, the limitations on

68. *Levi v. Colgate Palmolive* [1941] 41 S.R.N.S.W. 48.

*Haley v London Electricity Board* [1965] A.C. 778.

69. 'It is the standard of care that most animates the law of malpractice and is probably the most crucial element in any malpractice claim based on negligence'. J.H. King *The Law of Medical Malpractice*, West Publishing Co. (1977), at 2.

70. *Commonwealth v. Introvigne supra* n.4.

71. *Donohue supra* n.11A at 441-42.

72. See e.g., Tracy, *supra* n.60 at 567-68; 'Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?' (1979) 13 *Suffolk U.L. Rev* 27; and Hunter *supra* n.24A at 496, Davidson J. (dissenting).

the discretion of individual members, the absence of trust or confidence such as is placed in a physician or lawyer, the probable absence of well-defined technical knowledge, the inability to define educational concepts (e.g. functional illiteracy) with precision, the absence of rigorously standardized educational practices or procedures, the participation by many teachers in the fragmented process of one child's education, and the interactive nature of the education process in which the child and parents also participate.<sup>73</sup>

Nevertheless, it does seem reasonable to conclude that teachers hold themselves out as possessing special skills and knowledge and that the general public expects them to perform accordingly. Indeed, the prospective errors contemplated by educational negligence cases are most likely to arise from the mis-application of particular and specialized professional skill and judgement which the ordinary person could not be said to possess.

**(b) How is the Professional Standard Assessed?**

The professional standard of care is that of one who possesses and professes special skill in circumstances which require the exercise of that skill. Hence, the standard for teachers would be established by the customary conduct of their professional peers.

As the standard in such cases is comparative, conformity to the norm or minimum standard in the professional community would be, by definition, non-negligent.

A difficulty in this regard is the apparent lack of custom and consensus in the educational field. Such concepts as are agreed upon are often too broadly stated to serve as reliable measures of breach. In such circumstances, it has been suggested that recourse may be had to relevant statutes, administrative regulations, certain teacher education programmes and the self-imposed procedures within a school system, in order to determine customary practice or acceptable professional behaviour.

**6. Problems of Proof and Causation**

Proof of educational negligence claims would involve proof of two things: firstly, that the teacher's behaviour fell below accepted professional levels and secondly, that the teacher's sub-standard behaviour caused the plaintiff harm.

**(a) Sub-Standard Behaviour**

To establish the former, courts may be able to rely upon expert testimony, evidence of failure to adhere to statutorily or administratively prescribed standards and circumstantial evidence. The courts need to look to the specific conduct of a particular teacher, the nature of the act, its method of performance and the subsequent conduct of the parties (e.g. attempts to review a particular classification, to re-test a particular child) to determine whether, in fact, the initial segregation of a student and his subsequent special treatment were performed with less than professional care.

**(b) Causing The Harm**

Proving that this behaviour caused the student harm would be even more difficult. What form might this harm take? The American cases suggest that a student might claim for mental, emotional or psychological distress, diminished intellectual capacity, failure to learn and consequential loss of earning capacity. Establishing the existence of all but the last of these, would require evidence from experts in such diverse fields as education, child psychology and psychiatry.

In particular, the harm of non-learning (failing to learn as much as one potentially could) would present difficult and unique problems. Here, a court would be confronted by 'factors

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73. See e.g. Halligan: *The Functions of Schools, the Status of Teachers and the Claims of the Handicapped: An Enquiry into Special Education Malpractice* (1980) 45 *Mo.L.Rev.* 667 at 675; Morucci *supra* n.64 at 161; Tracy *supra* n.60 at 568; S.G.Sugarman *Accountability through the Courts, School Review* Vol 2, (1974) 245; and D.G. Carter 'The Educator and Liability Law of Professional Malpractice: A Historical Analysis', Paper presented to AERA Annual Convention, San Francisco, California, at 8.



such as the student's attitude, motivation, temperament, past experience and home environment [which] may all play an essential and immeasurable (sic) role in learning. Indeed, proximate cause might be difficult, if not impossible, to prove'.<sup>74</sup>

It has been suggested that this obstacle might be overcome by evidence that the plaintiff's behaviour, diligence and attentiveness were at least average for students of his socio-economic background with his essential characteristics. This, it is said, would permit the inference that 'but for' the teacher's negligence, the plaintiff would have advanced at a normal rate.

Indeed, there is a comparable and strongly expressed judicial view in *Hunter*:

Common sense almost inevitably points to the conclusion that non-learning is a highly foreseeable result of negligent teaching—thus fulfilling the major test for proximate cause. The more remote the injuries the plaintiff claims, the greater his problems will be in establishing proximate cause.

There can be no question that negligent conduct on the part of an educator may damage a child . . . [F]rom the fact that educators purport to teach, it follows that some causal relationship may exist between the conduct of a teacher and the failure of a child to learn.<sup>75</sup>

Even so, establishing the causal relationship with sufficient precision to satisfy courts, will, in all probability, prove a difficult hurdle.

## 7. Compensable Harm?

### (a) Remoteness of Harm

Before a plaintiff can claim compensation for the defendant's negligence, he must demonstrate that the harm he suffered was not too remote from the alleged cause of the injury. That is, the harm was of the kind which a reasonable man would have foreseen. If so, the extent of the harm suffered becomes irrelevant. The harm is *prima facie* compensable.

The assertion in *Peter W* and subsequent cases was that academic injury is no less foreseeable and no less real than physical injury and a complaining student might argue that there is legally no significant distinction between physical injuries and the kinds of non-physical injuries caused by inadequate academic instruction.

As discussed, this academic injury might take the following forms: mental, emotional or psychological distress which in turn might or might not result in physical, mental, emotional or psychological illness or claims for non-learning or diminished intellectual capacity which may consequentially result in a loss of earning capacity and the need to employ remedial teachers.

### (b) Some Possible Remedies

It has been suggested that the relief sought in the school context might take the following forms:

#### (i) Removal of the Incompetent Teacher

A disaffected plaintiff might arguably seek an injunction against either the school officials or the teacher enjoining him or her from teaching.<sup>76</sup> The supposed advantages of such a remedy are its relative lack of expense and the ease with which it may be executed if the teaching contract contains a provision permitting dismissal 'for cause'.

However, such a remedy does nothing to make whole the student who suffered harm by reason of the teacher's negligence. Moreover it would not be a suitable remedy where the negligence of the teacher is not of a continuing nature such that there is no strong likelihood that the teacher's performance will continue to be unsatisfactory.

74. Note 'Educational Malpractice' *supra* n.63 at 791 et seq.

75. *Supra* n.24A at 496, per Davidson J.

76. 'Educational Malpractice' *supra* n.63 (Note however, that Australian courts have yet to grant an injunction to restrain negligence.)



**(ii) The Right to Additional Free Schooling**

Another suggestion is that a disaffected plaintiff should sue for the right to additional free schooling.<sup>77</sup> However, the logic in expecting a non-learner to continue his training with the public school system which has failed him in the past, is questionable.

**(iii) Provision of Payment for Remedial Instruction**

Unless a plaintiff has been tutored to the required level prior to bringing his suit, the difficulty here is one of quantum. How much tutoring will be needed? To what level is the plaintiff to be tutored? Moreover, this being a claim for economic loss, may be subject to additional difficulties.

**(iv) Monetary Compensation for Diminished Future Income and Loss of Amenities of Life**

Under this head, a plaintiff may encounter several difficulties, not least of which will be the quantum of damage.

In a 'professional error' claim, however, it is conceivable that a student subjected to negligent mis-classification might be able to establish that potential level of success by drawing a comparison between his own achievement and that of normal average students in normal classes. A suggested quantum of such damage would be the difference between the plaintiff's actual earnings from the time of leaving school and his probable earnings during the same period had he not had a teacher-caused educational deficiency. Probable earnings, it has been suggested, could be calculated by looking statistically at the average lifetime earnings of people on one educational level with the earnings of those on a lower educational level.<sup>77A</sup>

Even so, this particular head of damage may also be subjected to the additional difficulties inherent in proving an economic loss claim.

**(v) Damages for Emotional, Mental and Psychological Distress**

The particular difficulty under this head is whether the harm suffered will be regarded as compensable by Australian Courts.

Of these possible remedies, (iii), (iv) and (v) above seem best designed to secure compensation for a student harmed by his teacher's negligence. Each of these claims may, however, be defeated by the fact that Australian courts do not recognize the harm suffered for the purpose of granting relief.

**(c) Emotional, Mental and Psychological Distress — A Compensable Harm?<sup>78</sup>**

The law with regard to mental, psychological or emotional injuries remains developmental. In the past forty years, 'courts have come — slowly cautious step by cautious step' <sup>79</sup> from a refusal to recognize injuries which were not physical injuries, to its present acknowledgement that 'an illness of the mind . . . is not the less an injury because it is functional, not organic, and its progress is psychogenic'.<sup>80</sup>

The illnesses which courts may now be prepared to contemplate may be described as psychiatric, psychological, mental or emotional.<sup>81</sup>

77. Sugarman *supra* n.73 at 250.

77A. See note: 'Educational Malpractice', *supra* n.63. Another author suggests reference to national, state or salary surveys within various occupations — (See Morucci *supra* n.64 at 162). Such damages would, it seems, be necessarily speculative.

78. 'To my mind the great blemish on the law of torts is its failure to provide adequately for injury other than physical . . . This seems to me to be done simply to under-development' P. Devlin, *The Enforcement of Morals*, (1965) at 41-42.

79. *M.I.M. Ltd v. Pusey* (1971) 125 C.L.R. 383 per 403, per Windeyer J. (Recently applied in *Hoffmueller v. The Commonwealth* (1981) 54 A.L.R.48).

80. *M.I.M. Ltd v. Pusey*, *supra* n.79 at 395.

81. There is nothing restricting recognition of such harm to 'nervous shock' cases. In *Hinze v. Berry* [1970] 2 Q.B. 42, Lord Denning M.R. defined 'nervous shock' as 'any recognizable psychiatric illness caused by the breach by the defendants'.

But recognition is a question of degree dependant upon the severity of the complaint. The plaintiff must be able to demonstrate a significant or recognized illness or disturbance not merely a transient distress. Distress only becomes actionable when it is the 'starting point of a lasting disorder — some form of psychoneurosis or a psychosomatic illness'.<sup>82</sup>

Herein lies the disaffected student's greatest difficulty. Unless the distress of which he complains is of sufficient severity to be considered or recognized as an illness, the law will deny him redress. Merely being unhappy, upset, uncomfortable or suffering an emotional trauma not amounting to an illness will not suffice. Precisely where the line between diagnosable mental, psychological and mental illness and distress falls, will be a question of proof for the experts.

Recall, for example, *Hoffman* who suffered from 'defective self-image' and 'feelings of inadequacy'. Clearly, this does not amount to an illness and, as such, would not be actionable in Australia.

Although the implications of mis-labelling or mis-classification as mentally retarded are significant,<sup>83</sup> negligent misclassification seems unlikely (except in the case of an abnormally susceptible plaintiff, perhaps) to result in an illness or severe disorder.

Does such a legal conclusion work an injustice on the disaffected plaintiff? Perhaps law, in its march with medicine, is 'still in the rear and limping a little'.<sup>84</sup>

#### (d) Economic Loss — A Compensable Harm?

Assuming, for present purposes, that the cost of remedial tuition or compensation for diminished future income could be quantified, the question remains : will the courts regard that pecuniary loss as a compensable harm?

There is no doubt that economic loss may be recovered if such loss is consequential upon physical injury. Hence, if a student could demonstrate a physical, mental, emotional or psychological illness caused by professional negligence, he may be able to recover for his consequential loss of earnings, loss of the amenities of life and the cost of remedial teaching.

But in the absence of physical, mental, emotional or psychological illness, the plaintiff's claim would sound only in pure economic loss which the courts traditionally refuse to recognize.

However, both in Australia<sup>85</sup> and England<sup>86</sup> there has been such a substantial weakening of this tradition that perhaps 'the nomenclature of pure economic loss should now pass from the vocabulary of negligence law'.<sup>87</sup>

Whether economic loss, not consequential upon physical injury, can be recovered in Australia, may now depend upon whether the plaintiff is able to demonstrate a 'special and more intimate relationship'<sup>88</sup> than mere Atkinian 'proximity'. The occasions giving rise to such a relationship transcending mere proximity have been divided into two categories: 'careless action' and 'careless statement'.<sup>89</sup>

Dealing firstly with careless action, four judges of the High Court in *Caltex Oil (Australia) Pty. Ltd. v. The Dredge 'Willemstad'*<sup>90</sup> found that the consequential loss rule as traditionally posed was not the law in Australia whereas Gibbs J., as he then was, considered the traditional rule to be extant subject, however, to some exceptions.

82. *Supra* n.80 at 394, per Windeyer J.

83. See generally S. & R. Hayes *Mental Retardation — Law, Policy and Administration*, (1982).

84. *Supra* n.80 at 395, per Windeyer J.

85. *Caltex Oil (Australia) Pty. Ltd. v. The Dredge 'Willemstad'* (1976) 136 C.L.R. 529.

86. *Junior Books Ltd v. Veitchi Co. Ltd* [1982] 3 W.L.R. 477 — the English courts have been far more liberal in their recognition of 'economic loss' claims, than the Australian courts.

87. B. Partlett, *Recovery of Economic Loss for Negligence in Australia*, (1980) 9 *Syd.L.R.* 157. A detailed analysis of recent developments in this field is beyond the scope of this paper.

88. *Minister for Environment Planning v. San Sebastian* [1983] 2 N.S.W.L.R. 296 per Glass J.A.

89. *Ibid.*

90. *Supra* n.85, Stephen, Mason, Jacobs and Murphy JJ.

Although the reasons given by the five judges in this case varied, it is possible from the judgements of Gibbs, Mason and Stephen JJ.<sup>91</sup> to identify the kind of relationship from which a duty not to cause economic loss may arise. It seems that a defendant will incur a duty to take care that his actions do not cause financial loss to the plaintiff when he has knowledge (or means of knowledge) that the plaintiff, as an individual person and not as an undifferentiated member of a class, will probably suffer financial loss as a consequence of his careless conduct.<sup>92</sup> In lieu of actual or constructive knowledge, Murphy and Jacobs JJ. adopted a test of reasonable foreseeability that the plaintiff would suffer economic loss as a result of negligent conduct.

In the school context, given the nature of the special relationship which would give rise to a professional error claim, the issue would become: Did the teacher know or ought he to have known or could he reasonably have foreseen that a student isolated for special and negligent educational treatment, would probably suffer economic loss consequent upon his non-learning?

The answer, perhaps, will depend upon the facts of each case and the gravity of the professional error. The more serious the error, the more its probable long-term effects could have been anticipated or known. Clearly, in the case of a very grave error, it is arguable that a teacher ought to have foreseen or known or might actually have known that a professional error would have long term effects on the student's earning capacity and that the student might be put to the expense of private tuition.

A second possibility, though not, as yet, considered in the school context, is that the student might claim recovery for economic loss suffered as the result of negligent or careless statements or advice. Economic loss may be recoverable within the confines of the *Hedley Byrne*<sup>93</sup> doctrine.

The relevant authorities in Australia are *Mutual Life and Citizens Assurance Co. Ltd. v. Evatt*<sup>94</sup> and *L. Shaddock and Associates Pty. Ltd. v. Parramatta City Council*<sup>95</sup> which establish that the statement must give information or advice on a serious matter in circumstances in which the maker of the statement gives the advice willingly and knowing that the circumstances create a special relationship. The information or advice will be sought or accepted by a person on his own behalf or on behalf of another identified or identifiable person.

Using 'misclassification' by way of example, it may be possible to argue that the misclassification, when communicated to the student or the student's parents, took the form of negligent advice given in a situation when the teacher must have known that the parents and the student were reliant upon the teacher's skill and experience. The presence of the student at school may be sufficient to demonstrate that advice was sought as to the student's educational welfare.

Again recall *Hoffman*. Arguably the clinical psychologist was negligent in the nature of the advice (incorrect interpretation of test results) and the paucity of the information he gave to Hoffman's mother (failure to advise of borderline nature of classification). In the event Hoffman in fact suffered a long-term diminution in his earning capacity. Is not that economic loss consequent upon negligent advice?

## 8. Conclusions and Recommendations

What then are the prospects for 'educational negligence' claims in Australia? It is suggested that:

91. *Ibid.* at 555, 593 and 575 respectively.

92. Adopting the restatement of *Caltex* by Glass J.A., *Minister for Environment Planning v. San Sebastian supra* n.88.

93. *Hedley Byrne and Co Ltd v. Heller and Partners Ltd* [1964] A.C. 465.

94. (1968) 122 C.L.R. 556.

95. (1981) 55 A.L.J.R. 713.

- (i) 'Inadequate education' claims should not be recognized. It would be impracticable, unworkable and unjust to impose a 'general duty to educate' upon the teaching profession.
- (ii) By contrast, 'professional error' claims, not reliant on the concept of a general duty to educate but rather on a duty which arises upon the happening of a specific event placing the student and the teacher in a special relationship, should be recognized. The same policy objections do not apply to such a case.
- (iii) The extent and scope of the suggested 'professional error' duty would be very limited. The teacher must ensure that the student placed in a 'special relationship' is placed in no worse a position than if he had merely been overlooked. The student must not be positively disadvantaged.
- (iv) Teaching should be regarded as a profession since it involves the exercise of professional skill and judgement. The teacher must conduct himself according to customary or accepted professional standards — to be established as a matter of evidence in the event of professional disagreement.
- (v) Proof of both the existence of the harm and its cause in fact will be difficult and will probably require expert evidence. The student may also be required to show that he would otherwise have progressed at a normal rate.
- (vi) Academic injury (non-learning, diminished intellectual capacity, mental, emotional or psychological distress, consequential loss of earning capacity and the expense of remedial tuition) is the reasonably foreseeable consequence of teacher negligence.
- (vii) At present courts only allow recovery for emotional, mental or psychological distress of sufficient severity to amount to a recognizable illness.
- (viii) Damages for diminished future earnings, the loss of the amenities of life and the cost of remedial instruction would be difficult to quantify but may be recoverable if the loss is consequential upon an established physical, mental, emotional or psychological illness.
- (ix) In the absence of a physical, mental, emotional or psychological illness, economic loss might be recovered if a student could demonstrate the necessary careless action or careless statement in circumstances indicating that the teacher and the student were in a special relationship within the *Hedley Byrne* doctrine or the *Caltex Oil* doctrine.

In all, the picture is encouraging for teachers. While theoretically, liability for 'professional errors' as herein described should exist, in practice only a *minutiae* of cases would, on their facts, come within that category. Of those, the number that would have even a marginal chance of success seems insignificant.

For disaffected students however, the outlook is not so bright. 'The law in Australia would not appear at present to provide effective remedies for injury to a pupil through poor teaching or administrative misassignment.'<sup>96</sup>

As it seems that the disaffected student would have little or no prospect of legal relief, perhaps some procedural or administrative measures may serve to prevent such situations occurring in Australian schools. The likelihood of such claims arising may be reduced by, for example :—

- (i) improved communication with a student and his family regarding his progress and what he can expect from his schooling,
- (ii) increased efforts to identify the special needs of students and to provide counselling and instruction accordingly,
- (iii) frequent and periodic intelligence testing for students in 'mentally retarded', 'learning disabled' or 'special' classes,

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96. M. Kirby, *Education: The Lawyers Are Coming* supra n.6 at 13.

- (iv) Continued educational research in the field of learning difficulties,
- (v) periodic review of all student placement decisions,
- (vi) periodic review and assessment of teaching performance and competence,<sup>97</sup>
- (vii) enforcement of strict standards in teacher-training and qualification; and
- (viii) performance-based tenure in the teaching profession.

Of the thirteen judges who dealt with the *Hoffman* case, seven of them would have found for Daniel Hoffman. This paper has argued that in circumstances such as his a duty of care of a professional kind is applicable and, in a proper case, a plaintiff should recover. Nevertheless, a distinction should be made between particular professional errors of the sort which occurred in *Hoffman*, and the conduct of normal classroom teaching. This latter aspect of teacher-pupil relationships is not and ought not to be supervised by the law of torts. The Australian teaching profession should consider measures to prevent Hoffman's kind of harm occurring in this country, but they may be confident that the courts will not intervene in the day-to-day business of the classroom.

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97. Pursuant to the *Public Service Acts* 1922-65 (Qld), s.532, it is an offence if a teacher is . . .

- (iv) . . . negligent, careless or indolent in the discharge of his duties; or
- (v) . . . inefficient or incompetent in the discharge of his duties.