EDUCATIONAL MALPRACTICE
Implications for classroom teaching and school administration.

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DECLARATION OF ORIGINALITY.

This thesis contains no material which has been accepted for any other degree in any university. To the best of my knowledge and belief, this thesis contains no material previously published or written by any other person, except where due reference is given in the text.

Signature:

Date:
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ABSTRACT.

This thesis considers the concept of educational malpractice and its potential implications for teachers and schools in the Australian Government Systems.

The literature has a United States emphasis as, until very recently, it is the only jurisdiction to consider claims of this nature. It is noted in an examination of the United States court responses to this tort that they have refused to recognise that teachers and schools owe students a duty of care with respect to the quality of their education.

The applicability of the United States stance to the Australian legal situation is analysed and the differences in the legal systems noted.

Consideration of the duty owed in relation to physical injury along with the issues of professionalism and professional responsibility are also discussed.

In conclusion, guidelines are proposed that may assist schools and teachers to develop proactive measures, thus reducing the potential for
educational malpractice claims.

**ADDENDUM:**

The English House of Lords has recently decided that teachers owe a duty of care when assessing and advising on the special needs of children. I did not obtain a copy of this decision until after this thesis was written. I have included an Addendum, at the end of this thesis, summarising the decision and discussing its implications for Australia.
CHAPTER 1.

INTRODUCTION.

CONTEXT:

There appears to be a strange anomaly in the area of law and education. That anomaly is that, with regard to education, the law's emphasis seems to be focused solely in the area of physical injury. Rules, regulations and policies have been implemented to cover almost any foreseeable situation in which students may be exposed to physical danger (e.g. playground supervision and equipment, guidelines for camping and outdoor adventure activities, staffing ratios and procedures for excursions and swimming programs etc.), yet little attention has been given to the area of intellectual injury. The regulations do not acknowledge that there are situations where there is potential for damage to students' intellectual development.

Parents expect teachers and schools to care for and ensure the safety of their children. There have been a number of successful Australian tort actions reflecting this (Introvigne,

It is not disputed that teachers and schools have a legal responsibility for the safety of their charges, but this responsibility has not, as yet, been transferred to what may be taken to be the most important function of schools, and that is the education of children. The law is not denying the existence of responsibility, but as no action has arisen, the courts have yet to make a decision on this issue.

The whole notion of having compulsory education is to ensure that everyone has access to education. However, as was highlighted in the Introvigne case, "the Commonwealth did not owe a duty to educate children but, having received the children into the school, it did owe a duty to be careful for their physical safety." (Kirby, 1982, p6) The Education Acts of other states reflect similar views.

Australian schools ... do not have a duty to educate the children in them. ... the appropriate Education Acts of the various states impose an obligation on parents to send their children to school between certain ages, but nowhere do they actually say that the school has to educate these children. (Tronc &
Sleigh, 1989, p10)

The New South Wales *Education Reform Act (1990)* goes some way to rectifying this. The Act provides that, "every child has a right to receive an education" (s.4(a)) and that, "it is the duty of the State to ensure that every child receives an education of the highest quality" (s.4(c)). However, it seems that the Act does not create an entitlement to sue for damages (s.127).

Thus, children spend several years in compulsory education, yet it is not clearly enunciated in all states that they must be taught! This begs the question, just what is the role of schools?

**FOCUS:**

Current social, political and economic trends have impacted greatly upon education systems and are continuing to do so. With students remaining at school for a considerably longer time, the competition for tertiary places and employment being much more fierce, and the long term impact of unemployment being potentially socially divisive, greater emphasis will be placed upon schools to provide 'excellence in education'. This, together with changes to budgetry policy
may lead schools to develop a more business-like approach to service provision and consider concepts such as productivity and value for money. A greater responsibility and accountability to both the clients of educational services and the revenue sources may ensue and one way clients may seek to redress perceived unsatisfactory service is through litigation.

As the employing body, each state's education system is vicariously liable for physical injury caused to students through negligent actions of teachers. The concept of educational malpractice sees this same concept being extended into the area of intellectual injury. As Kirby (1982, p6) has argued,

[T]he long-recognised duty of care for the physical safety of students should apply by analogy to academic instruction.

This thesis will focus on issues surrounding educational malpractice. Firstly, discussing the potential for this to be a recognised action in law; secondly, the effects of the recognition of educational malpractice on schools, teachers
and teaching practices; and finally, what schools and teachers can do to protect themselves from potential litigation.

**DEFINITION OF KEY TERMS:**
In part, some of the confusion and misconceptions surrounding the area of negligence and malpractice is due to the esoteric nature of the technical terms in this area. The general public's definition and everyday usage of words may differ somewhat from that of the legal profession. The legal definitions and interpretations are more precise and specific. To confound matters further, there can be differences in meaning from country to country. With this in mind, legal dictionaries from Australia, the United States and Britain were referred to, to define and clarify the major terms used. These showed a general consistency in meaning of the key terms, definitions of which are given in the Glossary (Appendix 1). The references used were: the *Australian Legal Dictionary*, 2nd ed. (Marantelli & Tikotin, 1985), *A Concise Dictionary of Law* (Martin, 1983) and *Blacks Law Dictionary*, 6th ed. (Black, 1990).
METHODOLOGY:

This thesis will involve an analysis of reported cases and the literature on educational malpractice and will aim to develop the conclusions drawn from this analysis into proposals or considerations for policy guidelines and to enunciate proactive steps that may assist in reducing the potential for situations of educational malpractice occurring. The only guidelines for policy development in this area have been outlined by Patterson (1984). Other writers (Williams, 1991; Essex, 1986 & 1987; Leary, 1987) discuss actions which may or may not lead to negligence claims, but not in terms of school responses or policy development aimed at prevention.

Most of the literature considers educational malpractice from a legal perspective and contains analyses and interpretation of cases and discussion of future trends. This thesis is primarily considering educational malpractice from an educational perspective - how litigation, or the fear of the potential for litigation, may affect schools and teaching, either positively or negatively.
PROBLEM STATEMENT:

This thesis will consider the following questions:

1) Should educational malpractice be a recognisable cause of action?

2) What are the parameters of the concept? What are the conditions necessary for its recognition?

3) What are the implications of educational malpractice for educational administration?

More specifically: What policy guidelines for administration systems and curriculum, could be or need to be developed in order to prevent litigation occurring?

4) What would be the implications of educational malpractice for, and effects on, classroom teaching practices?

More specifically: What would the effect be in the area of teacher assessment and review?

and, what measures or processes could be implemented by teachers to intervene before litigation?

STRUCTURE OF STUDY:

The methodology for this study will utilise an analysis and critique of the current legal reasoning regarding educational
malpractice, which is mainly found in cases from the United States. Conclusions arising from this will be extrapolated to the Australian context to make predictions about the potential influences and impact of these on the Australian educational systems, with particular emphasis upon the Victorian government-school system, and the possible responses of the government systems. Considering these possibilities, suggestions for the development of policy guidelines will be proposed.

FOCUS OF THE STUDY:

To date, much of the research and commentary regarding educational malpractice has been limited to the analysis and interpretation of the legal decisions and the reasoning behind them. This thesis aims to consider educational malpractice from a teaching perspective rather than a legal one; to consider how legal decisions and their implications impinge upon schools and teaching practices and how schools and teachers can effectively respond.

The emphasis will be on mainstream government schools in
Australia. Special education schools, integration students and non-government schools will not be considered in this study as they present some unique characteristics and pose some problems that require different consideration which place them outside the scope of this thesis.

LIMITATIONS:
The author acknowledges the existence of fugitive data. Decisions of court cases are available, but information on out-of-court settlements, particularly in relation to the number of settlements and the costs, is unavailable. The literature does make reference to one NSW out-of-court settlement that was highlighted in the media (late '80s), where a student's results were miscalculated (Boer, in Chisholm, 1987, p20).

SUMMARY OF THESIS STRUCTURE:
This thesis aims to examine the concept of educational malpractice and its implications for classroom teaching within the Australian setting.

Chapter 2 will review the literature dealing with analysis of
the cases to date and also the implications and discussions arising from these analyses. Most of the literature emanates from the United States. Chapter 3 will discuss the legal concepts of negligence and malpractice, outlining tort law relating to establishing negligence and malpractice claims, then relating this to school settings. Chapter 4 will look at the decisions and reasoning in cases to date. The differences between the Australian and United States legal systems will also be noted. The discussion of the implications for schools and teachers will be presented in Chapter 5. Finally, Chapter 6 will summarise and conclude on the implications for classroom teaching.
CHAPTER 2

LITERATURE REVIEW

This chapter will review the literature related to this topic. As there are some significant differences in legal and educational systems, the American and Australian literature is discussed separately. Irrespective of the country of origin, the literature falls into two categories, the first is commentary and analysis of case law judgments and the second considers responses to the legal rulings and judgments and the implications of these for schools and teachers in reducing or eliminating the potential for litigation. After a review of the literature in these two categories, the relationship between this study and existing knowledge of educational malpractice will be noted.

NATURE OF SEARCH:

Because the topic of this thesis crosses academic boundaries, a variety of reference sources and data-bases were used.

Accessing data bases, both national and international, provides
both rapid and comprehensive lists of reference materials. The Australian data base, Austrom, was the initial source used; from this, the Australian Education Index (AEI), the Criminology data base and Ed-line were searched. Only the AEI produced any relevant references. Descriptors used included:- education, malpractice, liability, accountability, legal responsibilities, law, teachers. These descriptors were combined to refine the search; by utilising this process of cross-searching, material relating specifically to educational malpractice could be highlighted. The International data-base ERIC was also accessed. Using the descriptor 'educational malpractice' around 90 references were listed, of these some 30 were considered relevant. AEI and ERIC data-bases both have an educational perspective.

Law Library searches provided access to reports of court cases, references to the analysis of case-law relating to the topic, and articles on how this may be viewed and interpreted by the Australian legal system. Writings of key commentators, such as Justice Michael Kirby, were also sought.
PROBLEMS:
The main problem was in actually obtaining the articles. Many articles were only obtainable from inter-state libraries, others in the form of ERIC documents, still others only available from overseas. Locating some unpublished articles proved time consuming, frustrating and, at times, impossible.

REVIEW OF LITERATURE:
The literature search highlighted the dearth of information on this topic in Australia; the majority of the literature was sourced from United States publications. Even as far as case law goes, there is very little in the area of educational malpractice. There have been at least 30 reported cases citing the tort of educational malpractice, and all of these have been in the United States (Hopkins, 1992). The reason for this could be due to the fact that educational malpractice is a fairly recent phenomenon, with the first case, Peter W. v San Francisco being litigated in 1976 (Hammes, 1989, p1).

THE AMERICAN SCENE:
The American literature basically falls into two categories:
firstly, the analysis and interpretation of the case law to date and secondly, critiques of the legal reasoning behind the findings, including implications and courses of action for schools and teachers.

Because educational malpractice is a fairly new field and the United States is the only country to have had litigation in this area, much of the writing emanating from the United States covers the same ground. The articles that this author considers to be the most significant have been selected for this review.

As yet, there have been no successful educational malpractice cases. The reasons, both stated and unstated, that have influenced the courts' decision-making in these situations are the focus of discussion in many articles.

Hammes (1989) provides a concise summary of the courts' rationale in their refusal to find in favour of the plaintiff in educational malpractice cases. He considers that the first and foremost stumbling block is the apparent lack of any commonly
accepted standard of care in relation to teaching practices. As, "there appears to be no single pedagogical practice that is common to all teachers" (Hammes, 1989, p2), there is no benchmark against which alleged breaches can be determined.

The second point raised by Hammes (1989, p3) is that, "if the duty or standard is unclear, then it is virtually impossible to determine when that duty or standard has been breached or broken." So, until there is a recognition that there is a duty of care and this duty is defined, then proving that a breach has actually occurred will be tantamount to impossible.

The third element that the plaintiff must prove in a negligence action is the existence of an injury. Where the injury is non-physical there is an inherent difficulty in proving its existence and even more difficulty in proving that the injury was caused by a breach of a duty of care. Hammes notes (1989, p4) that a further concern of the courts is in determining appropriate compensation. The courts in Peter W. (1976), Donohue (1979), DSW v Fairbanks (1981) and Hunter (1982) have questioned the appropriateness of awarding monetary damages for this type
of action; and further, that redress which may include additional educational opportunities may be more valid.

Another contentious issue is that of 'proximate cause'. Hammes (1989, p4) comments on the opposing views. In the initial cases, the courts' viewpoint was that student achievement is influenced by a wide variety of factors from outside of, and beyond the control of, the school and the teachers. This had changed somewhat by the Hunter (1982) case, where the dissenting view was that, "because public educators purport to teach, some causal relation may exist between the conduct of a teacher and the failure of a child to learn." (Hammes, 1989, p4) This situation can be summed up by noting that in arguing a case for causation it need only be shown that the defendant's behavior was a substantial factor, not the only or even main factor, in causing the injury (Elson, 1978, p748; Collingsworth, 1982, p499; Hammes, 1989, p4).

These four points cover the legal elements of a negligence claim; the following points consider the other issues raised in judicial reasoning in cases to date.
The concept of 'Public Policy' takes into consideration the influences and impact of court rulings on the wider society. This includes the burden, both financial and in terms of time, placed on the legal and education systems. Acknowledging educational malpractice as an actionable tort may result in an increase in court 'waiting times' and costs to taxpayers. This has been referred to as the fear of a 'floodgate' of litigation (Epley, 1985, p60; Foster, 1986, p129).

Comments made by the courts in their decisions not to recognise educational malpractice claims have expressed the courts' concern regarding interference in educational matters. The courts hold that they should not be seen to be making substitute judgments (Hammes, 1989, p5). Finding for the plaintiff in an educational malpractice claim would, "involve an unjustifiable encroachment by the judiciary in the administration of public education." (D.S.W. v North Star Borough School District. (1981) at 556), a role that is not theirs and one that they do not want (Reilly, 1984, pp3-4).
The main reason for failure of educational malpractice claims appears to be the court systems' refusal to recognise educational malpractice as a cause of action; yet, courts have recognised malpractice actions in other professions (such as medical professionals, lawyers, accountants, engineers etc.), relying on professional standards and 'expert testimony' to assist in their deliberations (Reitz, 1984, p51; Reilly, 1984, p12; Collingsworth, 1982, pp497-8; Foster, 1986, p131).

Collingsworth's article (1982) analyses the court reasoning for non-recognition of claims and uses a hypothetical case to show that the reasons given by the courts do not justify refusing to recognise every action for educational malpractice. He concludes that the courts are not being asked to break new ground, just to apply existing doctrines to a different situation (Collingsworth, 1982, p505).

Rosenblum (1983, p26), on the point of whether acts of misfeasance can be a potential liability highlights the emergence of dissenting judgments. Dissenting judgments signal that educational malpractice claims will not be
rejected out of hand; that there are situations in which a claim may be successful. There appear to be, "faint judicial voices indicating that educational malpractice is a legal concept whose time has come." (Hammes, 1989, p6)

A second group of articles consider responses to the legal rulings and judgments and what teachers and schools can do to reduce or prevent litigation. Patterson's article (1984), "How to avoid an Educational Malpractice Suit." discusses the situation and emphasises the importance of an educational response to the problem. In doing this she proposes a series of guidelines for consideration. The guidelines proposed are modelled after those of other professions. These guidelines include: "identify good professional practices, improve present practices, and eliminate practices which have potential for liability for educational malpractice." (Patterson, 1984, p91). Patterson (1984) and Reilly (1984, pp17-19) both discuss some of the practical issues involved in implementing such guidelines.

Clear (1983) discusses the relevance of research on teacher
effectiveness in relation to the development of performance standards which could be used as a basis for establishing a standard of care. Essex (1986, 1987) and Leary (1987) propose a number of activities, some of an administrative nature, that can reduce the potential for litigation. These discussions of proactive educational solutions are important because, as Patterson (1984, p72) states,

It is generally wiser to solve problems rather than crises; to deal with those problems at the symptomatic stage rather than wait for the disease to become an epidemic.

THE AUSTRALIAN DEBATE:

The Australian debate and literature in this area has been influenced by the contributions of commentators such as Justice Michael Kirby. His contribution to the field has been two-fold: firstly, a 'lay person's' view on the standing of education and what it should be; and secondly, as Chairman of the Australian Law Reform Commission offering insight into, and legal interpretation of the current position and a prognosis of the future trends - how the courts, in future, may view the tort of educational malpractice.
Part of Kirby's influence is in opening up the debate; questioning and challenging the current attitudes of both the education and legal systems. He reviews the current attitude of the American courts to cases of educational malpractice and makes comparisons with the Australian legal system, noting some of the legal barriers in Australia which may inhibit suits being brought to court. These barriers include, "the rules governing 'standing to sue' and the principles limiting the class action or representative action, as well as the rules relating to professional costs" (Kirby, 1982, p6). The prevailing attitude of American courts in refusing to acknowledge educational malpractice as an actionable tort for reasons of 'public policy considerations' is also questioned. Kirby points out conditions that may reduce the significance of these public policy considerations in Australia. As mentioned above, there are already a number of barriers limiting legal actions in Australia. These barriers in themselves counter the 'floodgate' argument; cost rules are also different. That competent teachers may be discouraged from entering the profession or that there may be a regression back to safe, minimal standards may be countered by the Australian
principle of vicarious liability (Kirby, 1982, p6), whereby individual teachers would not themselves be held personally liable. So, in Australia, the issue of whether or not educational malpractice is an actionable tort is not one purely of public policy, but whether or not duty of care can be established. Kirby (1982, p6) states that there are enough precedents in existing law for this to be done.

Comments on education centre on the distinction between duty of care in relation to physical injury and intellectual injury. Kirby (1982, p6) comments that, "there is no legally significant distinction between physical injuries and the kind of non-physical injuries caused by inadequate academic instruction". He foresees the day when Australian courts will rule whether the teacher's legal duty of care extends beyond protecting pupils from physical injury alone, to encompass what he considers is the more relevant and more profound injury that may be caused by incompetent or indifferent teaching. For, as Kirby (1982, p6) has emphasised,

If teachers claim full membership of the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their
professional talents.

These remarks were made in the 1980's. More recently, Judge David Jones (1992) in, "Teacher Malpractice - a possible new area of liability?" reviews the current state of the law with regard to educational malpractice. Although there has not been much change in the area, he emphasises the emerging trends in workforce requirements and the current economic climate of recession and their potential impact.

Eighty per cent of the jobs emerging in the future will require a level of education of year 12 or higher. ... education is going to increasingly become a vital component of a persons ability to sell themselves in the labour market and will increasingly be perceived as an important economic asset. The corollary of this will be heightened expectations for consistently high quality education at all levels. When those expectations are dashed and on occasions they will be, there may be a desire to apportion blame and seek redress (raising) the possibility of an action in educational malpractice (Jones, 1992, p3).

Although Jones sees the factors that are raised as major concerns by United States courts as being relevant to Australia, he considers that there are three benefits that may be achieved by the recognition of educational malpractice. These benefits are: compensation for the victim; incentive for
injury prevention; and distribution of costs (Jones, 1992, p18-19). Further, that public policy considerations will play an important part in the success of educational malpractice cases. If any action does succeed, it will be a significant development in the growth of tort liability (Jones, 1992, p24).

Kirby and Jones have given brief synopses of the current standing and brought the discussion into the public domain. More detailed analyses have been undertaken by Thompson (1985) and Ramsay (1988). These articles review the existing case law and the significant judgments handed down, highlighting the complexity of the issue. The implications for Australia are also considered. Both writers analyse the policy issues that have consistently been raised by the courts and raise arguments for and against these issues. Both authors consider that there is a distinction between types of educational malpractice claims. As Thompson (1985, p96) notes,

[A] salient and useful distinction can be made between what shall be termed 'inadequate education' claims, ... and 'professional error' claims. An 'inadequate education' claim rests on the alleged failure of a general duty to educate. By contrast, a 'professional error' claimant can
point specifically to negligent acts or omissions by specific teachers or professionals which caused him particular harm.

Ramsay (1988) refers to 'professional error' as 'negligent evaluation'. He considers that a claim based upon negligent evaluation is more likely to succeed than one alleging incompetent teaching because it fits in more readily with the existing legal requirements of negligence (Ramsay, 1988, pp.186, 207). Being able to point to a specific act or omission helps to rule out the broad range of contributing factors such as the motivation and background of the students and the time span over which the alleged negligent teaching occurred (Ramsay, 1988, p.207). Thompson (1988, p.108) concludes that 'professional error claims' should be recognised but 'inadequate education' claims should not because, "[i]t would be impracticable, unworkable and unjust to impose a 'general duty to educate' upon the teaching profession." In limiting malpractice suits to instances of specific acts or omissions, these authors consider that many of the policy considerations, particularly that of a 'floodgate' of litigation, and the time and cost burden, would be virtually eliminated.
Two recent theses also consider educational litigation in Australia. de Ross (1988, p138) considers that the potential impact of educational malpractice litigation in Australia to be minimal, that there may be more appropriate measures to overcome the problems. He proposes the idea of a 'no fault compensation scheme' similar to Work-care as one solution (de Ross, 1988, pp143-5). Hopkins (1992) examines the applicability of relating the policy considerations underlying the U.S. court decisions to the Australian situation. Hopkins' discussion is a detailed analysis of the legal viewpoint and implications.

All the Australian literature discussed so far considers educational malpractice from a legal perspective - basically how and why courts have come to the decisions they have and how this may be viewed in the future. These authors have said little about the effects that this has on what happens in schools.

Looking at educational malpractice from a school perspective, Tronc & Sleigh (1989, p14) suggest six administrative steps
that can be implemented covering areas such as student-assessment procedures, content of school publications, staff supervision, and accuracy of advice and/or information given.

The area of negligent advice is also mentioned by Brown (1986, p219) highlighting the High Court ruling that, "a person negligently supplying information or advice can be liable in tort for financial losses suffered by another person relying on that advice." The implications this has for careers teachers in particular is noted.

Riley & Sungaila (1983, pp23 & 25) also consider the importance of the responsibility that administrators have in the maintenance of teaching standards, the assessment of teachers and the implementation of procedures to rectify problem situations. They emphasise (1983, p23) that the, "[d]evelopment of staff is a responsibility of administrators; all teachers are entitled to the opportunity of developing their potential."

A discussion paper by Williams (1991) considers some
implications for teachers. He notes actions and activities which may give cause for complaint. These include such things as: a lack of preparedness; using materials or tests that are unfamiliar; failure to implement remedial programs; and omitting topics and skills that will be tested. Maintaining professional development is considered important, this includes, keeping up to date through professional reading and courses, considering and trying alternative teaching methods, and encouraging the involvement and participation of parents in activities (Williams, 1991, p5).

One of the issues raised in many of the articles is that of greater accountability of schools and teachers. In acknowledging the importance of this area, literature on accountability, teacher effectiveness and competency standards was also examined but was considered beyond the scope of this thesis.

**CONCLUSION:**

Much of the literature provides optimism for both the future recognition of educational malpractice as an accepted area of
tort law and also for teachers and schools in carrying out their primary role of educating without undue fear of litigation. Rather than perceiving educational malpractice as a threat, it may be a means of increasing accountability and improving teaching and thereby enhancing professionalism.

The fact that as yet there has been no successful litigation in this area highlights the complexity of the issue. Expanding tort law to recognise a duty of care to educate is a process that involves weighing-up and balancing what must be sacrificed in order to avoid the risk with the likelihood and potential seriousness of injury if the risk is not avoided (Thompson, 1985, p99).

Because at this stage the parameters of what may constitute educational malpractice are still an unknown quantity, there is much conjecture and concern within the teaching profession. The literature highlights the complex nature of the subject and the problems that beset the legal profession and the courts in relation to this area. Some authors have considered the proactive measures that schools may implement to reduce the
potential for malpractice actions (Essex, 1986 & 1987; Patterson, 1984; Reilly, 1984; Tronc & Sleigh, 1989). This author will consider, whether or not teachers have anything to fear, what steps can be taken to reduce the potential for litigation, and what teachers can do to feel confident that they are not being negligent in the education of the students in their care.
CHAPTER 3.
CONCEPTS OF NEGLIGENCE AND MALPRACTICE.

This chapter will look at the concepts of negligence and malpractice from a legal perspective, how they are defined and interpreted in law. For a negligence action to succeed, certain elements must be met. These will be outlined, along with the problems and difficulties that arise in proving each element and other factors that can influence judicial decision making. The second part of this chapter will consider how the concept of negligence is currently applied in school settings and how the concept of malpractice fits in with the notion of compulsory education and teacher professionalism.

Negligence and malpractice are areas of the common law. Ackroyd (1986, p35) states that, "[t]he advantage of common law lies in the fact that it deals in broad principles which allows it to grow and change as circumstances of the society it is serving change.". Analysis of case law and the current stance on educational malpractice will give some insight into the potential for growth and change within the area of law.
under discussion.

**TORT LAW:**

The law relating to negligence forms part of an area of Common law known as Tort Law. Torts are more commonly referred to as 'civil wrongs', and result in the injured person bringing an action for damages against the person responsible for the injury in order to obtain compensation for his or her loss (Brown, 1986, p217). Hames (1989, p2) clarifies the definition further by stating that, "[a] tort is defined as a civil wrong, not involving contracts. Negligence is one type of tort, which is defined as an "unintentional" tort."

For a negligence claim to be established, three elements need to be proved and it is up to the plaintiff to prove the claim. Put simply, three major conditions must exist before liability can be proved; these are:

(a) a duty of care must exist;

(b) this duty must have been breached; and,

(c) as a result of this breach, the plaintiff must have been injured.
Further, the conditions of 'foreseeability' and 'proximity' must also be satisfied (Tronc and Sleigh, 1989, p11; Brown, 1986, pp217-8; Elson, 1978, p641). These conditions are components of the duty of care.

Fleming (1992, p103) expands this somewhat by stating that the following conditions must be proved.

1. A duty, recognised by law, requiring conformity to a certain standard of conduct for the protection of others against unreasonable risks. This is commonly known as the "duty issue".
2. Failure to conform to the required standard of care or, briefly, breach of that duty. This element usually passes under the name of "negligence".
3. Material injury resulting to the interests of the plaintiff. Since the modern action for negligence traces its descent from the old form of action on the cause, damage is of the gist of liability. Merely exposing someone to danger is not an actionable wrong if the hazard is averted in time. Nor is there any question here of vindicating mere dignitary interests or compensating fright or apprehension in the absence of ascertainable physical injury, such as traumatic shock.
4. A reasonably proximate connection between the defendant's conduct and the resulting injury, usually referred to as the question of "remoteness of damage" or "proximate cause".
5. The absence of any conduct by the injured party prejudicial to his recovering in full for the loss he has suffered. This involves a consideration of two specific defences, contributory negligence and a voluntary assumption of risk.
It is within the first area, that of 'duty of care', that the
distinction between negligence and malpractice arises.
Negligence is a general, societal duty summed up by the
'reasonable man' standard; whereas malpractice is associated
with occupational standards; "the former is based on intuition
and speculation, the latter is based on expert testimony from
peer professionals, which can also be implied in professional
codes of professional conduct." (Hammes, 1989, p2)

A breach of the duty is established either by the application of
the 'reasonable man' standard, "what would a reasonably
prudent person have done, or not have done, in a similar
situation?" (Hammes, 1989, p2), or expert testimony and/or
consideration of professional standards in the case of a
malpractice action.

The third aspect to be considered is that of injury. "A real and
obvious injury must be present and demonstrated to the court."
(Hammes, 1989, p2)

The final, and most important, criterion for establishing a
negligence claim is that of causality. That is, that a direct and causal relationship must be proved to exist between the breach of duty and the injury (Hammes, 1989, p2).

Hence, just because an injury or accident has occurred, this does not automatically imply negligence on the part of any party. This was clarified in a High Court judgment by Murphy & Aicken J.J. (Geyer v Downs (1978) at 143) stating that,

The duty of care owed (by the teacher) required only that he should take such measures as in all the circumstances were reasonable to prevent injury (to the pupil). This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which ... (the teacher) should have reasonably foreseen.

No one can ensure that injuries never occur, accidents do happen and this is acknowledged. "No liability in tort arises from what is purely an accident." (de Ross, 1988, p36)

Thus, the first step in establishing a claim for negligence is to prove that a duty of care was owed; it is not enough that an injury occurred - liability relies on the existence of a relationship between the parties. The second step is to prove
that a breach of the duty of care occurred, either through commission or omission; that is, that the defendant failed to act as the reasonable person would have acted. The third condition emphasises the fact that an injury needs to have occurred, not just the possibility of one. And finally, it must be proved to the satisfaction of the court that the breach of duty was the cause of the injury. There would be many times that the potential for injury arises through the breach of a duty of care, but 'luck' would have it that nothing eventuates - no injury, therefore no cause for a negligence claim.

As has been mentioned above, there is a differentiation between negligence and malpractice. Malpractice is a specific type of negligence pertaining to professionals in the conduct of their professional duties. To date, this has been confined mainly to the medical and legal professions, accountants and engineers. Malpractice does not mean that doctors are accountable for failing to cure some patients, and lawyers for losing some clients' cases, but both are regularly held accountable when their patient or client suffers due to carelessness or incompetence on their part (Riley & Sungaila,
1983, p20). It is interesting to note here that although lawyers are generally accountable under negligence law, the High Court has determined that for public policy reasons a case of negligence cannot be brought against barristers for their conduct of a case in court. "The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as his client. His duty to his client is subject to his overriding duty to the court." (Giannarelli v Wraith, (1988) at 555)

The duty of care is established through the client/professional relationship and established occupational standards. According to Clear (1983, p19),

Practitioners in professionalized occupations, by nature of their standards of professional preparation and performance, can have their work ... tested. ... because each has identifiable and stable performance standards by which individual practice can be assessed.

Jackson and Powell (in Ramsay, 1988, p202) argue that this professional standard is the exercise of,

[T]hat degree of skill and care which is ordinarily exercised by reasonably competent members of the profession, who have the same rank and profess the same specialisation (if any) as the defendant.
Through this mechanism, people who seek out the services of professionals - those who set themselves up as having special skills and/or knowledge not readily available to the general population - can have an expectation that the services rendered will be competent and meet the standards set down by the profession itself, if not, then recompense through the legal system may be sought. This is a method that protects both the client and the profession from the actions of incompetent or untrained practitioners. Professional standards usually include accreditation processes (which establish the academic requirements and practical experience necessary for entry into the profession), as well as the establishment of standards of conduct and ethical behavior, and the development and implementation of processes for removing from practice those who perform their work negligently (Patterson, 1984, p75).

It is from the existing body of malpractice case law that the concept of educational malpractice has been extrapolated. As stated by Reilly (1984, p11),

It was inevitable that this new tort of educational malpractice should be compared and contrasted
with other forms of professional malpractice already recognised by the courts. This is probably the strongest argument for liability, and many commentators agree that educators should be evaluated in the presently existing common law framework of professional principles. ...In order to successfully invoke this theory, two items must be established, first that an educator is indeed a professional, and second, that an educator's functions may be reasonably analysed in terms of established malpractice principles.

These two issues appear to be the crux of the matter. The debate centres around the issues of whether or not teachers are professionals and secondly establishing a workable standard of care.

In analysing the issue of professionalism, Foster (1986, pp130-1) considers the sociologically based criteria of professions. From this analysis it is apparent that teachers meet some of these criteria but not others; but even so, just because teachers do not meet all the criteria of the sociological model of the professional, this does not necessarily mean that they do not possess enough of these characteristics to be able to hold them legally accountable as professionals (Elson, in Foster, 1986, p130).
Whether or not teaching is a profession is a divisive and contentious issue, but, as Thompson (1985, p103) points out, irrespective of the arguments put forward,

[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.

A further argument against regarding teachers as professionals is that teachers are not self-employed but are employed, in the main, by governments and are thus public servants. The counter argument is that with the increase in public hospitals and even legal aid services, many other professionals are now also in the sphere of public employment.

Probably the more difficult issue in the realm of establishing educational malpractice is that of professional standards. Establishment of standards for teachers would be, as for other professions, by comparison to the customary conduct and practices of their professional peers. Conforming to the customary standards as established by the professional
community would be, by definition, non-negligent. With teaching, the difficulty is the apparent lack of custom and consensus (Thompson, 1985, p103). As Epley and Flowers (1984, p149) emphasise,

Professional practice is based on diverse theories, methods, and procedures and, because of the complexity of the teaching task and the variety of circumstances present in schools, few well defined, widely accepted rules of practice exist. Not everyone agrees as to what constitutes prudent professional action under all circumstances.

The issue of the difficulties regarding what constitutes good, sound professional practice is also noted by other writers (Ramsay, 1988, p202; Foster, 1986, p132; Clear, 1983, p21; Riley & Sungaila, 1983, p25, Reilly, 1984, p11-12).

This issue is further complicated by the lack of empirical evidence as to the relative effectiveness of the whole broad range of educational practices (Riley & Sungaila, 1983, p25). The research in the field of teacher effectiveness may, eventually, provide invaluable assistance in the development of professional competency standards. Results from the research in this area have led researchers to conclude that, 

"[w]e do have some relationships between teacher behavior and
pupil achievement and attitudes on which a scientific basis for the art of teaching may be erected." (Gage in Clear, 1983, p22) With this in mind, if dependable correlates of teaching behaviors and student achievement can be identified, then is it not incumbent upon teachers to use them, and student-teachers taught them? (Clear, 1983, p22) To take this further, if specific teacher behaviors can be correlated with student achievement and learning, is this not a basis for a core of professional practice which teachers should implement?

One of the most contentious issues is the diversity of teaching methods and how the validity of these differences can be encompassed within a legal framework. It is doubtful that there ever will be one agreed upon methodology. But, there already is legal precedent in other areas of malpractice to adequately and effectively deal with differences in methodology and practice. Collingsworth (1982, pp497-8) discusses a case (Chumbler v McClure) of medical malpractice where the fact that the therapy used was practised by a minority of doctors was considered by the court to be unimportant so long as it was a practice that was used by
other competent members of the profession. Extrapolated into the area of teaching, so long as a particular theoretical approach is espoused by significant and respected, albeit a minority portion of the profession, and it is recognised as such, then its use could not be inherently negligent. This recognition by professionals of the existence of various, and sometimes diverse, schools of thought could be applied to teaching, thus alleviating the perceived difficulty of developing an agreed standard of care in teaching. Collingsworth (1982, p497) continues this line of reasoning by emphasising the,

"[H]onest error of judgement rule" (which) protects the professional as long as there is room for an honest difference of opinion in the profession. ... professional malpractice doctrine does not require the professional to make the right choice, provided there is a reasonable basis for the choice made.

From this, it would appear that there already exists a legal framework that adequately caters for the problems perceived due to the diversity of theories and methodologies in teaching. The establishment within education of agreed standards and acceptable methods should be able to encompass the abundant changing opinions and philosophies.
One area that is perceived as being a potential issue for schools is the area of negligent advice. Once again, there are precedents in other areas of case law that may be used as arguments to extend this into the area of educational malpractice. The House of Lords decision in *Hedley Byrne v Heller* was the precedent case in establishing that a person can be liable in tort for negligent advice causing purely financial loss (Brown, 1986, p219). The High Court of Australia affirmed this stance in the 1981 decision in *Shaddock and Associates Pty Ltd v Parramatta City Council* whereby, a duty of care exists when a person gives advice or information in their professional role or when provision of advice or information is their business or a component of their employment duties.

[T]he existence of the duty of care does not depend upon knowledge on the part of the speaker of the precise use to which the information will be put. It is enough if he knows, or ought to know, that the inquirer is requesting it for a serious purpose, that he proposes to act upon it and that he may suffer loss if it proves to be inaccurate. (Mason & Aickin J.J. *Shaddock v Parramatta City Council*, (1981) at 253)

From this, it would be relatively easy to extrapolate this duty of care to the provision of information and advice to school
settings.

**NEGLIGENCE IN SCHOOL SETTINGS:**

Brown (1986, p217) notes,

> [T]hat teachers are concerned about the apparent vagueness of the law in the area of civil liability. Regrettably, given the very nature of law, positive and absolute statements about it are almost impossible, and universally dangerous. When disputes arise, it is for the courts to resolve those disputes, and, in such resolution, they usually apply existing legal principles.

In education, this has generally meant resolving disputes regarding liability for physical injury sustained by students.

**Negligence Causing Physical Injury:**

The duty of care in relation to the physical safety of students which has been established by the courts, has been clearly summarised in the Victorian School Information Manual: *School Operations*, (1991). As Section 5.2. outlines,

Whenever a student-teacher relationship exists, the teacher has a special duty of care. This is defined as follows:
A teacher is to take such measures as are reasonable in the circumstances to protect a student under the teacher's charge from risk of injury that the teacher should reasonably have foreseen.
As part of that duty teachers are required to
supervise children adequately. This requires not only protection from known hazards, but also protection from those that could arise and against which preventative measures could be taken.

Hence the duty of care is proactive in nature; it not only requires teachers to not do anything that may cause a student to be injured, but also to do things that can prevent injuries and/or reduce potential hazards. Thus, knowing that specific activities are dangerous or that a piece of equipment is in a state of disrepair, behoves the appropriate and necessary steps being taken to prevent injuries occurring (e.g. banning the use of equipment until it is repaired or replaced; ensuring the provision and use of appropriate safety gear; having adequate supervision of activities).

There are several factors which affect the level of care which would be judged as adequate. The age of the students is one, the younger the child, the higher the duty of care; the type of activity will also influence the amount of care required, excursions and camps necessitate a higher standard of care; finally, extra care is required with disabled and integration students (Tronc, 1982, p13). Although not noted by authors, a greater care would also be necessary with students with a
limited understanding of English. The duty of care exists in relation to the supervision of classroom activities as well as the playground. There are also several curriculum areas that are recognised as being 'high risk'; these are most notably science, physical education and sport, and the practical vocational subjects. The very nature of these subjects and the equipment used makes them inherently potentially dangerous, thus the teachers involved need to be aware of all safety procedures and alter their supervision in accordance with the risk of the particular activity and the age of the students involved.

The duty of care for students' physical welfare also extends to general classroom supervision and discipline. As summed up by Whalley (1986, p203),

This duty of care also operates in relation to negligent teaching activities within a classroom situation which result in physical injury. ... Similarly, a teacher who fails to maintain discipline in a classroom with the result that a pupil is injured in a fight may be held liable to compensate the injured pupil.

Within these parameters, teachers must weigh the risks
involved with the value of the activity. Obviously there needs to be a balance struck between protecting students from potential injuries and providing challenging experiences which allow them to explore and make decisions which will lead them to develop the necessary skills, both academic and social, to become independent and useful members of society (de Ross, 1988, p36). This attitude prevailed in the case *Kretschmar v The State of Queensland* (1989). The teachers were found not to have breached the duty of care even though the student, who was intellectually disabled, was injured during a game. The judgment was that the supervision and instructions were adequate (at 68,888) and that there was little that was inherently dangerous in the game (at 68,894) and that the game fulfilled an educational purpose (at 68,888).

Tronc (1982, p13) has summed up the teacher's duty of care by stating,

No court expects teachers to watch every child every second of the day. Teachers are human; they do not have eyes in the back of their heads. They should be reasonable in their behaviour, prudent in their care. They cannot insure that no injury will ever happen to children in their care—but they can, and should, avoid doing things that are dangerous; they should
be alert and ever-ready to intervene if they observe potentially dangerous behaviour by their pupils.

Negligent advice and information:

Another area that transposes from other fields is that of negligent advice. The Victorian School Information Manual: School Operations, (1991) Section 8.5 advises teachers to,

[L]imit their advice to areas within their own professional competence, and to give it where possible in situations arising from a role, such as that of careers teacher, level coordinator or subject teacher specified for them by the principal. Teachers must ensure that the advice they give is correct and, where appropriate, in line with the most recent available statements from institutions or employers. Careers teachers and coordinators at senior levels should keep contemporaneous notes of advice given to individuals. Teachers should not give advice in areas outside those related to their role where they may lack expertise.

As stated previously, there is already legal precedent in this area. Several authors (Brown, 1986, p219; Williams, 1991, pp2-3; Tronc & Sleigh, 1989, p3; de Ross, 1988, pp83-5) raise the issue that although there have been no reported cases relating to negligent advice in the educational context, by the very nature of advice given in the educational area, existing legal principles might easily be applied. The fact that the Victorian Directorate of School Education (DSE) gives the above advice
regarding this issue highlights the potential risk factor of this area.

In secondary schools in the areas of careers advice and more particularly, subject selection and entry requirements for tertiary courses, a great deal of reliance is placed upon teachers by both students and their parents. Teachers need to ensure that the advice that they give is the most current available, and if there are any doubts, to either make enquiries to clarify the position and to advise the student and/or their parents to discuss course prerequisites with the relevant tertiary institutions. Negligent advice in this area could lead students to seek compensation for economic or financial loss resulting from not being able to gain entry into the desired career or from delays in entering courses or from the costs incurred in repeating or undertaking the correct prerequisite studies. The potential for this situation occurring came to light in the 1993 VCE, where the students at one school had focused their studies on a book that had earlier been withdrawn from the reading list. The first they knew of this was when they sat their English exam and there was no
question on the book. The Board of Studies had notified schools of the changes in December 1992 (Herald Sun. 15/11/1993, p7).

Although this area is probably most relevant to the senior secondary area, reporting in all areas of schooling may come under this heading. Parents rely on accurate information on their child's progress and seek advice from teachers as to the 'best' course of action to take and to be made aware of any problems and what can and is being done about them.

Brown (1986, p219) also includes incorrect recording of results as a form of negligent misstatement, particularly if this 'error' causes the student to miss out on entry to a course to which they would have gained entry had the error not been made. This type of 'administrative error' has already had the potential for a litigation in Australia, but an out of court settlement was reached (Boer in Chisholm, 1987, pp20-1; Nelson, 1987, p229; Ramsay, 1988, pp189-90; Jones, 1992, p6). The implementation of the Victorian Certificate of Education and the associated changes to assessment may give
rise to claims of 'administrative errors', not so much through the miscalculation of marks, but the marking and validation system itself. The seemingly arbitrary nature of marking was apparent for many 1993 VCE language students when their marks were all downgraded, a decision was made not to count the oral-assessment marks. After complaints to the Equal Opportunity Board, marks were recalculated, but not fully reinstated (Herald Sun 22/12/93, p18 & 24/12/93, p6). Questions as to the objectivity and 'fairness' of internal marking and assessment procedures have been raised since the implementation of the VCE process was first mooted.

COMPULSORY EDUCATION - A DUTY TO EDUCATE?

Information issued by the Victorian Directorate of School Education, and litigation to date, emphasise the duty of care owed to pupils in relation to physical injury and advice. Originally, the teacher's role was conceptualised in the term in loco parentis; that the teacher was acting in the role of a prudent parent and that the authority to do this was delegated by the parent, but in the case, Ramsay v Larsen (1964), the High Court of Australia concluded that due to the nature of
compulsory education, the Crown assumes the parental obligations for the care, safety and discipline of children during the hours that they are 'forcibly' out of their parents care. Accordingly, the authority that teachers have is delegated to them by the employing authority, not by the parents (Nelson, 1987, p222).

The very nature of compulsory education itself is open to interpretation and debate. An interesting and intriguing issue is that, although parents are compelled to send their children to school between certain ages, and governments are obligated to provide facilities for their acceptance, there is no clear enunciation of what should occur. It is incongruous that children must compulsorily attend school, yet, once there there is no legal compulsion to educate. "None of the state education acts or equivalent legislation imposes upon teachers a duty to educate their students. The Victorian Education Act, (1958) is a case in point." (Nelson, 1987, p224) (Since then, a statutory duty to educate has been imposed in NSW, and this is discussed below.)
Although there is no statutory duty to educate in Victoria, other regulations and documents impose obligations on the Directorate, schools and teachers to provide educational programs. The *School Information Manual* (1991) Section 8.16.2 - Duties of Members, states that the role of the Principal includes implementation of educational policy, determination of the courses of study and allocation of teaching duties of the staff. This implies that teaching is to occur in schools, but does not provide recourse for parents to sue. New South Wales has taken this a step further creating an administrative statute (*Education Reform Act, 1990.*) with the intent of imposing a duty to educate, but has not created a statutory tort, thereby still denying the right to sue for negligence if this duty of care is breached.

Australia is not the only country where this situation exists, Reilly (1984, p10) comments on compulsory education in America by stating, "[i]f there is no recognized duty to educate, then it is inherently illogical to have such statutes."

If the purpose of schools is not to educate, then what is the
function of schools and why is so much time and money expended on them? Schools serve a primary social function, in that they are the means by which skills and knowledge are passed on and children are initiated into the cultural heritage of their society. From this, if society believes that the values of education are important enough to be the reason to make it compulsory, then this implies that some minimal standard needs to be achieved to make the expense of resources worthwhile.

As Justice Michael Kirby (1982, p6) said,

[T]he whole object of having the child at school, of accepting the principle of compulsory education, is to ensure that a child does receive tuition and instruction and does so at an appropriate level.

If this be the case, then, as has been noted by many writers (Kirby, 1982, p6; Nelson, 1987, p223; Collingsworth, 1982, p490; Reilly, 1984, p10; Thompson, 1985, p86) there is a well documented legal duty of care owed by teachers and schools in relation to the physical safety of students, yet whether this duty exists for the intellectual welfare or educational progress of students in their care is still unclear because it has not been tested in Australian courts.
Negligence Causing Intellectual Harm:

In attempting to establish a basis for the existence of a duty of care in the intellectual area, it has been noted that there is already a duty of care for the physical safety of students and this may by analogy be applied to the academic area (Kirby, 1982, p6). Precedent also exists whereby physical injuries caused by negligent instruction are actionable torts, examples of this include injuries arising during science classes, *Mastrangelo v West Side Union High School District* and also injuries occurring during physical education lessons, *Bellman v San Francisco High School District* (Collingsworth, 1982, pp481-483). Also, non-physical injuries have been recognised and successful malpractice actions have occurred, although to date, this has been in the area of medical malpractice (Kirby, 1982, p6).

Although there appears to be ample precedent which, when viewed superficially, appears to provide strong support for the duty of care in the intellectual area, this analogy may be overly simplistic in that there are many other factors involved
in teaching and learning. As Epley (1985, p59) states, "[i]ntellectual harm is difficult to verify and more difficult to connect with alleged teacher malfeasance." This difficulty arises from the presence of, what may be termed as, confounding variables. As has been noted by both writers and the judiciary (Williams, 1981, p107; Jones, 1980, pp37-8; Epley, 1985, pp59-60; Donohue, 1979) there is more to learning than teacher performance. Children bring to school many differences, some of them innate and others social and cultural; all of these impact upon the child's ability to learn and they are all outside of the teachers', and the schools', control. However, this does not mean that teachers are not responsible but rather that responsibility is not solely theirs (Elson, 1978, p642; Williams, 1981, pp107-8). This then, raises the complex issue of contributory negligence, how much has the child contributed to the alleged harm?

If recourse to a legal remedy is perceived as being too difficult or unlikely to succeed, what are the options for those who believe that an injury has occurred? Epley (1985, p63) considers alternatives to litigation; he suggests, "a quasi-
judicial appeals process for dissatisfied students within the school system with the board acting as final arbiter." A further alternative is the use of mediation and negotiation processes, with the option of litigation as a final recourse.

**CONCLUSION:**

This chapter has looked at the concepts of negligence and malpractice, first of all as legal concepts and secondly as they relate to school settings.

For a claim of negligence to be successful, the three elements of negligence must be satisfied by the plaintiff. Malpractice is an area of negligence concerned specifically with professionals in the conduct of their professional duties. Fitting somewhere between these is the area of negligent advice or misstatement.

The second part of this chapter considered negligence and malpractice in the realm of educational situations.

There is, currently, no distinct field of education law. What is
A term called education law draws on the totality of the law and applies those areas of law which are relevant to educational settings and situations. To date the main impact of law on education has been in the area of negligence causing physical injury. Negligent advice, although not yet having a precedent in educational settings in Australia, is considered a realistic probability.

Action for negligence causing intellectual injury in an educational setting has no legal precedent. Debate as to whether it is or should be an actionable tort continues. The problems associated with bringing an action for educational malpractice, the difficulty in proving the elements, and the reasons for the lack of success so far will be considered in greater detail in the next chapter.
CHAPTER 4.

COURT VIEWS - THE SITUATION SO FAR.

The previous chapter discussed the concepts of negligence and malpractice and the legal basis for establishing such claims, and how the concepts are currently applied in Australian schools.

This chapter will consider the court cases to date and analyse the judicial reasonings that support the decisions reached, and also dissenting judgments - looking at both the legal issues and the policy considerations that impact upon decision-making.

As the United States is currently the only source of litigation in this area, ramifications from the decisions reached there need to be interpreted and modified to fit the Australian context. There are a number of differences between the United States and Australia in social and cultural mores as well as the legal systems. Those differences that impact upon educational malpractice litigation will be discussed.
MALPRACTICE LITIGATION IN THE UNITED STATES:

The amount of money spent on educational facilities and programs and the compulsory nature of education supports the contention that the role of schools is more than 'baby sitting', that they are centres of learning. Unfortunately, some students move through the system without developing or obtaining adequate skills and knowledge in the areas necessary for effective functioning in society. Functional illiteracy raises questions as to the standard and quality of teaching and the appropriateness of programs received during schooling. This questioning has seen attempts in America over the last twenty years, "to extend principles of negligence law to cases involving negligent teaching." (Williams, 1991, p1.)

The first case that cited this claim was Peter W. v San Francisco Unified School District. in 1976 (App., 131 Cal. Rptr. 854). The plaintiff alleged that the school was, "responsible for his functional illiteracy and corresponding loss of earning capacity." (Thompson, 1985, p85) due to negligent teaching. He had been promoted through the grades and graduated from high
school, even though his literacy skills were only that of fifth grade level. Further, the plaintiff claimed that he had been promoted even though it was known, or should have been known, that he did not have the skills required for promotion and that the school was in breach of State Statutes in that the State's Education Code specified an eighth grade reading level as a prerequisite requirement for graduation (App., 131 Cal. Rptr. at 858).

At trial the judge, "dismissed Peter's claim for failure to disclose a cause of action known to the law." (Thompson, 1985, p87) As this was the first case of this kind, the judge was able to refuse to recognise educational malpractice as an acceptable course of action (Essex, 1986(a), p4). Peter W. had failed to convince the court that there was a legal basis for imposing a duty on educators to insure that students graduating from high school possessed the specified academic skills (Reilly, 1984, p2).

The ensuing appeal was centred around whether or not the school owed a duty of care to educate the plaintiff. This
appeal was dismissed because, the court concluded,

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. (Rattigan, J. App., 131 Cal. Rptr. at 860)

Irrespective of whether or not the defendant was negligent, if the public policy considerations are such as to override the duty of care, then the defendants will not be held liable for any alleged injuries. This was the conclusion of the appeals court in this case.

This initial knockback did not deter further attempts at litigating educational malpractice claims. In 1979 a claim for 5 million dollars damages was sought by the plaintiff in Donohue v Copiague Union Free School District. As with the Peter W. case, the plaintiff alleged that he had been promoted each year and graduated from high school even though he had received failing grades and was functionally illiterate in that he was unable to read and fill out job application forms. The school's failure to recognise or remedy his problem was the basis for the claim of educational malpractice. Donohue further claimed that the school was in breach of, "a
constitutionally imposed duty to educate." (418 N.Y.S. 2d at 377)

The results were the same as for the Peter W. case. The judge, considering the reasoning in the Peter W. case, dismissed the suit for failure to state a recognised cause of action (407 N.Y.S. 2d at 876). With regard to the statutory obligation to provide and maintain an education system, the court deemed that this did not impose a duty to ensure that individual students receive a minimum level of education, a breach of which would give a cause to sue for compensation (407 N.Y.S. 2d at 880). The appeal affirmed this decision. Although this case was dismissed, the dissenting judgment by Suozzi, J. gave rise to a further appeal, which was also unsuccessful. The final outcome of this case was the same as for Peter W., but of interest was the acknowledgement by several judges that they,

[D]id 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. (Thompson, 1985, p90)
The action in *Hunter v The Board of Education* (1982), was against the school and three specifically named teachers. In the initial trial and subsequent appeals, Hunter alleged that they had failed to teach him properly and had negligently evaluated his learning abilities thereby causing him to repeat first grade materials whilst in second grade. This misplacement continued throughout following years and was alleged to have caused the student embarrassment, learning deficiencies and to experience 'depletion of ego strength'. Further, it was claimed that the school intentionally and maliciously gave false information about his learning capability and altered school records to cover up these actions (Md., 439 A. 2d 582).

Initially, the suit was unsuccessful on public policy grounds. On appeal, the claim was rejected as unworkable. A further appeal was also unsuccessful, but notable for some comments. The first of these conceded that students should be protected from 'outrageous conduct' and that where there has seen to be willful and malicious injury of a child, this outweighs public policy considerations which would otherwise preclude
liability, but proving this would be a 'formidable burden' on the plaintiff (Md., 439 A. 2d at 587). In the single dissenting judgment, Davidson, J. contended that a claim for educational malpractice, encompassing negligent, intentional or malicious conduct, could be sustained and further, that teachers were professionals and as such owed a professional duty of care to their students (Md., 439 A. 2d at 588-9). She also disputed the adequacy of administrative procedures available to monitor student placements and provide internal solutions to problems (Md., 439 A. 2d at 590). As with the Donohue case, there was some support for Hunter's claims in the form of a dissenting judgment.

The cases above base their claim of negligence on the receipt of inadequate instruction. This is a general claim, not citing any specific negligible actions but a failure of the system, as a whole, to provide an adequate level of education or failure to detect and correct learning problems (Thompson, 1985, p96).

Hoffman v Board of Education (1979) presented quite a different case. Hoffman alleged that the school board was
negligent firstly in its original assessment of his intellectual ability and secondly in not following the psychologist's recommendations regarding his retesting (410 N.Y.S. 2d at 99-100).

On entering kindergarten the student, who suffered from a severe speech defect, was tested by the school psychologist. The results from this testing indicated borderline intelligence and resulted in the student being placed in classes for mentally retarded children. Because of the borderline score and his speech problems, the psychologist recommended that he be re-evaluated within two years. This re-evaluation never occurred and Hoffman remained in special classes until he was seventeen. On being transferred to an Occupational Training Centre he was given another I.Q. test. The results from this and consideration of his educational background were interpreted as indicating that his intellectual potential was at least, in the bright normal range (Reilly, 1985, p5). Because of this,

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 ... and secondly, from failing to or refusing to follow recommended testing procedures thus causing him to remain in those classes for eleven years. (Thompson, 1985, p93)

Several judges in the Donohue case stated that the obstacles to proving a claim of educational malpractice were not necessarily insurmountable (Thompson, 1985, p89-90). This appeared to be true in the case of Hoffman v Board of Education. The plaintiff was able to point to specific actions, which were claimed, led to his injury. The jury initially awarded $750 000 damages, the Appellate court agreed with this decision, but reduced the damages to $500 000. In a further appeal, the Court of Appeals, in a split decision, overturned the previous findings and dismissed the complaint reiterating the overriding public policy considerations (424 N.Y.S. 2d at 379-380). The Hoffman case cites professional error, specific actions or omissions on the part of the school or staff, that was claimed to be the cause of the injury sustained by the plaintiff. There was some support shown for the claim by the initial judgments and later in the dissenting judgments.
Thompson distinguishes between claims of inadequate education and professional error. She states (1985, p96) that,

An 'inadequate education' claim rests on the alleged failure of a general duty to educate. ...
By contrast, a 'professional error' claimant can point specifically to negligent acts or omissions by specific teachers or professionals which caused him particular harm.

This distinction may be important in future assessment of educational malpractice claims.

**WHY NOT SUCCESSFUL?**

At the present time, the student has no recourse against a teacher who negligently denies him the benefits of a proper education. Various courts have consistently held that a student has no cause of action against a teacher under a theory of negligence or "educational malpractice". ... While teachers and other officials remain liable for physical injury due to negligent supervisions, they are not judicially accountable for other injuries due to their teaching methods, no matter how careless. (Collingsworth, 1982, pp479-480)

As seen by the United States cases discussed above, there has, as yet, been no successful litigation in the area of educational malpractice. Suits have been rejected under the umbrella of public policy considerations; other obstacles have also been
mentioned in the rulings. Dissenting judgments regard these obstacles as not necessarily unsurmountable, but that "the plaintiff would have a 'formidable burden' in establishing the necessary intent" (Thompson, 1985, p92).

LEGAL ISSUES:

These obstacles are the legal issues raised by a novel suit. There being no definitive precedent, the court system is, understandably, wary of the consequences of decisions made. As with any negligence action, the plaintiff has to prove each of the elements of negligence in order for a case to be found. It is proving these elements that poses the major obstacle to success.

The first hurdle is that of establishing a duty of care. As Essex (1986a, p3) has stated,

Although an educator-pupil relationship is recognized by the courts as a special relationship, because of the diversified nature of education, the courts have fallen short of holding educators to a duty of care in the performance of a public service.

The United States courts have refused to recognize a legal duty of care because of the complex nature of pedagogy and for
public policy reasons. There are statutory obligations to provide educational facilities and support for programs, but this does not extend to a right to sue if there is a breach of this obligation (Thompson, 1985, p89). As Rattigan, J. (App. 131 Cal. Rptr, at 861) stated,

[T]he achievement of literacy in 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.

Thus, "the failure to learn does not bespeak a failure to teach" (Damiani, J. 407 N.Y.D. 2d at 881) or, just as you can lead a horse to water but can't make it drink, you can teach a child but can't make him/her learn!

If a duty of care could be established, the next step in the process is to prove that this duty has been breached. In doing this, the courts consider the standards of care applicable to the profession. The difficulty with teaching is that, unlike other professional practice such as medicine or law, there are no clearly defined procedures or standard practice (Epley, 1985, p58).
In the *Peter W.* case, part of the reasoning in the court's refusal to accept that a duty of care was owed was that it was not possible to identify a workable standard of care that can be applied to teachers (App., 131 Cal. Rptr. at 861). Thus, if there is no clearly defined standard, then it is virtually impossible to determine if there has been a breach of that standard (Hammes, 1989, p3). The complex and diverse nature of educational philosophies and practices, and theories concerning the nature of the learning process makes it difficult to define teaching standards. As Ramsay, (1988, pp 202-3) states, "[t]he value judgements involved in such decisions inherently lead to imprecise standards." but, he continues, "the existence of imprecise standards should not necessarily be a permanent bar to a judicially determinable standard of care."

Thirdly, the plaintiff must prove that the claimed breach has, in fact, caused an injury. In the area of physical injury, this is relatively easy to establish, but is much more difficult and complex in the area of intellectual or psychological damage. In cases such as *Peter W.*, *Donohue* and *Hunter* which claim
inadequate education, the courts have viewed that with 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 (407 N.Y.S. 2d at 881). Cases of professional error, such as Hoffman, where specific acts or omissions can be pointed to, may be more easily proved. As summed up by Ramsay (1988, p207),

[A] claim based upon negligent evaluation is more likely to succeed than a claim alleging incompetent teaching. This is because in the former situation a specific act of negligence is more readily identifiable.

Another factor that needs to be established to the satisfaction of the court is that of compensation. In claiming economic loss or a reduced earning capacity as part of the suit, the plaintiff would have some difficulty in proving what their potential would have been if the alleged injury had not occurred. Thompson (1985, p105) suggests that this could be measured as a comparison between the statistical average earnings of people of differing educational levels.
POLICY CONSIDERATIONS:

So far, the United States courts have refused to find in favour of the plaintiff in cases of educational malpractice claims, primarily by declaring that educational malpractice is not a recognised cause of action (Collingsworth, 1982, p483; Rosenblum, 1983, pp11,14,15,18,20; Thompson, 1985, p91; Ramsay, 1988, p190) and secondly on grounds of, what it terms as, public policy considerations. It is this concept of public policy that will now be considered.

The courts, in setting any precedent, must consider the effects of the decision on future litigants as well as the general public. As stated earlier, duty is not sacrosanct or a right, but can be out-weighed by what may be termed as 'public good' (Thompson, 1985, p87). The courts need to consider the potential impact of the decision and whether it is in the public interest.

Foster (1986, p129) has analysed the policy considerations given by the courts in refusing to accept the cause of educational malpractice, and has summed them up as follows,
[R]ecognition of educational malpractice claims would: (1) result in a flood of real or imagined claims, (2) place an undue financial burden on educators, (3) unduly disrupt the educational process, (4) require the courts to make decisions both as to the acceptability of educational policies and the reasonableness of the day-to-day implementation of those policies - matters which the courts are not competent to handle and which therefore should be left to educators - and (5) undermine the social utility of the educational process.

(1) Floodgate of litigation: The concern about a potential floodgate of litigation stemmed from the Peter W. case. In this case, the court considered that a recognition of a duty of care would expose schools and the courts to a barrage of claims, both real and imagined, from disaffected students and parents (App., 131 Cal. Rptr. at 861). The courts were concerned that this potential flood of cases would place an unnecessary burden on teachers and the school system and also greatly increase the burden on the court system by causing a backlog of cases. This potential effect was not considered in the public interest.

(2) Financial burden on educators: Hunter reiterated the rationale of the Peter W. ruling by
stating that one of the public policy considerations was the considerable burden compensation payments would place on the already strained financial resources of the public school system which ultimately, through taxes etc., would impact upon society in general (Thompson, 1985, p100; Hammes, 1989, p5). A consideration of the courts is the, "relative ability of parties to bear financial burden, and, in the public sector, budget constraints." (Hammes, 1989, p4)

(3) Unduly disrupt the educational process:
A third public policy consideration is the effects that court decisions would have on schools and teaching. The potential of litigation could inhibit experimentation and innovation in both teaching methodology and curriculum content. Conversely, there may be a tendency to adopt defensive practices which may adversely affect the overall quality of education (Thompson, 1985, p99; Foster, 1986, pp137-8). It has also been touted that the threat of liability may deter competent and effective teachers from entering the profession (Thompson, 1985, p99; Foster, 1986, p138).
The final issue raised concerns legislative intervention, which may result in the, "lowering or elimination of standards by which student achievement is measured" (Foster, 1986, p137) and also the effect of court involvement in decisions regarding the utilisation of resources. "Public education involves an inherent stress between taking action to satisfy the educational needs of the individual student and the needs of the student body as a whole." (Damiani, J. 407 N.Y.S. 2d at 879) The current view of the United States courts is that the best place for this decision making is within the school setting by the professionals involved.

(4) Judicial expertise in educational policies matters: In a number of the cases, it has been stated that the court is not the appropriate place for resolving the issue of educational malpractice; further, that the court did not wish to interfere with the education system. It was not deemed in the public interest for there to be an increase in, what Whalley (1986, p204) termed,

[The] judicial interference in matters of educational administration and policy for which judges were neither trained nor qualified and which were properly matters requiring expert attention
from appropriately qualified professionals.
The courts also did not want to be seen to be judging the
education system. This could look like one public authority
questioning the efficacy of another public authority.

(5) Social utility of education:
A further public policy consideration is the effect that
successful litigation would have on the public's perception of
education. It is considered by some that the social importance
of education is reason itself to afford it protection from
litigation that is not given to other professionals (Foster,
1986, p141), but it is a paradox that teachers and schools have
been found in the United States to be immune from legal
liability to students for carrying out their primary and
fundamental duty to educate them (Nelson, 1987, p234).

A final policy consideration was the benefit of an affirmative
decision for the plaintiff and the appropriate compensation.
The courts in Peter W., Donohue and Hunter commented that
monetary compensation would be an inappropriate remedy for
the injuries claimed in these actions, and further, that
administrative redress, such as remedial or extra tuition,
would be of greater long-term benefit to the plaintiff (Hammes, 1989, p4).

AUSTRALIA:

The above discussion has focused on the rationale behind the American court decisions not to, as yet, find for the plaintiff in an educational malpractice action. The remainder of this chapter will consider how these relate to the Australian educational and legal systems, and some of the differences that may be of relevance.

To date, there have been no reported cases in the area of educational malpractice in Australia, hence, how it would be viewed by the Australian courts is totally unknown. In the light of the U.S. court rationale and the debate in Australia, influenced by Justice Michael Kirby, some of the potential difficulties may not be such hurdles to recognition.

As de Ross (1988, p135) has noted, one of the difficulties in mounting an educational malpractice claim is the expense; costs would include the fees of lawyers and expert witnesses,
court costs and other associated expenses.

The differences between the United States and Australian legal systems present greater financial barriers for Australians. These differences are in two main areas: legal fees and awarding of costs. de Ross (1988, pp134-135) discusses these differences. In the United States, a 'contingent fee' may often be negotiated, whereby the lawyer receives an agreed percentage of the damages awarded as payment. If the case is unsuccessful, then no fees are paid. "As the contingent fee system allows cases to be heard regardless of the plaintiff's financial position it may encourage greater legal equality for all." (de Ross, 1988, p134) This form of payment is still unusual in Australia. The only form of assistance is through Legal Aid Services but because of their priorities and policies, obtaining legal aid for an educational malpractice case would, in all probability, be difficult (Whalley, 1986, p206; de Ross, 1988, p135, Hopkins, 1992, 5.11-12). Therefore the costs of bringing the case to court would fall solely on the plaintiff, at least initially.
The second difference is that of awarding costs. In Australia, the successful party may seek to recover their legal costs from the other party (de Ross, 1988, p135). In initiating any legal action the outcome is unknown, but in a situation, such as educational malpractice, where a new area is being tested, the risks of having costs awarded against the plaintiff would be considerable and may be a deterrent to pursuing the action. In the United States, awarding of costs in this manner is rare, each party, win or lose, bears their own costs (de Ross, 1988, p135). This factor of costs is likely to continue to be a major consideration for anyone contemplating pursuing an educational malpractice suit in Australia.

The financial costs are a matter of importance for all parties in a case and may be a factor in out-of-court settlements.

As commented by Boer (in Chisholm, 1987, pp20-1), Nelson (1987, p229), Ramsay (1988, pp189-90) and Jones (1992, p6), there has been at least one out-of-court settlement in Australia relating to the miscalculation of marks resulting in the student being given marks lower than were actually
achieved. The consequence of this was that he was denied access to a course for which he actually had the marks. Possible reasons for the New South Wales Department agreeing to the settlement, without admitting fault, may include the cost of defending the case, both in terms of money and time, and secondly, it avoided setting a legal precedent if the plaintiff had been successful.

How the Australian courts would respond to an educational malpractice claim remains speculative. As there is no precedent in Australia, the courts would look at how other countries have reacted to the same or similar situation. In the case of educational malpractice, the United States is the only country where this has been tried (de Ross, 1988, p136). The public policy issues that have concerned the United States courts may have some influence on Australian court decisions. Ramsay (1988, pp208-217) in discussing the 'legalisation of education' in Australia highlights the relevant public policy considerations. He lists these as: economic issues, expertise of the courts, educational standards and compulsory education and the legalisation of education. These are very similar to
those espoused by the United States courts. The effect of these public policy considerations on the final decision of any court is unknown, but two recent cases may shed some light on judicial attitude. A recent example of where the High Court refused to recognise a duty of care purely on policy grounds is *Gala v Preston* (1991). The case involved two young joy-riders who had an accident in a stolen vehicle. The court held that for policy reasons (i.e. given that the parties were involved in criminal activity at the time) the driver did not owe a duty of care to the passengers. Prior to this, in *Giannarelli v Wraith* (1988), the High Court found for policy reasons that barristers did not owe a duty of care for the conduct of criminal defense in court (165 CLR at 555).

**CONCLUSION:**

This chapter has considered the decisions reached by the United States courts in suits claiming educational malpractice and analysed the rationale given for these decisions. No tort actions claiming educational malpractice have yet been successful. Suits have been rejected outright under the umbrella of public policy considerations. The United States
courts do not believe that it is in the best interests of the public as a whole for such an action to be recognised.

Dissenting judgments have shed a ray of hope on the issue. Comments in the Donohue, Hoffman and Hunter cases stated that such actions were not impossible but emphasised that the plaintiff would face a 'formidable burden' in proving negligence. Even so the obstacles previously raised were not insurmountable (Thompson, 1985, pp89 & 91).

As yet, there have been no reported Australian cases of educational malpractice. In considering the influence of the United States legal responses to educational malpractice claims on any future Australian case, differences in the respective national legal system are relevant. The major factors which will influence the mounting of a case in Australia include the cost of litigation and the awarding of costs. However a case could be funded by a community group, such as a parents' organisation, or a legal firm could agree to waive costs unless the case was successful. Without the ability to negotiate contingent fees, litigation, particularly
where the chance of winning is remote, is very costly in Australia. Whether the public policy issues that have dominated the United States court rejection of educational malpractice actions will also be influential in Australian legal decisions is, as yet, unknown.

Claims citing educational malpractice have been around since the mid-1970's and even though there has been no successful litigation, it is still an issue of public debate and one about which schools and teachers are concerned.

The following chapter will consider implications for schools and teachers and effects on teaching that this issue raises.
CHAPTER 5.

IMPLICATIONS FOR SCHOOLS AND TEACHERS.

The previous chapter looked at the existing legal cases and the United States courts' attitudes to what has been referred to as a, "novel and troublesome question" (Peter W. 1976). Although as yet there have been no successful cases, the comments by dissenting judges raise the possibility of the acceptance of educational malpractice as a recognisable tort action. Court decisions rest on precedents, but precedents are themselves new decisions that emphasise the law's ability to change and develop in response to social and technological change. As Prosner stated (in Reilly, 1984, p16),

[T]he law of torts is anything but static, and the limits of its development are never set. ... [T]he mere fact that the claim is novel will not of itself operate as a bar to recovery.

With this in mind, this chapter will focus on the implications that arise from court judgments, as well as the academic and public debate in general, for teachers and educational systems; and what teachers and schools can do to deal proactively with this challenge. Further considerations include the effect that
these perceived implications may have on classroom teaching practices and also the effects of changes in the Victorian education system.

**BUREAUCRATIC RESPONSES:**

Each of the states' education systems formulates policies and guidelines for both curriculum and school administration. Although they are not law, these guidelines may have a bearing on a court's decision in a negligence claim as they indicate to the court what the state education department regards as appropriate behaviour for teachers.

**POLICY GUIDELINES:**

The contents of documents such as *School Information Manual: School Operations*, (Ministry of Education and Training, 1991) are often perceived by teachers as gospel, to be followed to the letter and without question. However, following the guidelines may not, in itself, protect teachers from liability for the following two reasons. Firstly, the courts can regard the guidelines as a key indicator of the standard of care, and a failure to comply with them may be evidence of a breach of the
duty of care (Coulson, 1994, p8). However, Coulson (1994, p8) makes the further point that guidelines which are overstrict may in fact create problems because in some situations it is impossible for all parts of the guidelines to be complied with. Hence, overstrict guidelines may result in teachers' liability where the court has uncritically regarded those guidelines as setting the appropriate standard. Secondly, and paradoxically following the guidelines does not automatically provide protection against a claim of malpractice, although doing so may be used as evidence to defend a charge of negligence. In assessing the individual factors of a case the court may rule that the unique circumstances of the particular situation render the guidelines inappropriate and thus do not provide an adequate standard of care. The case of Nicholas v Osborn (1985, at 18), highlights just such a judicial ruling where, even though the teacher-pupil ratio was better than stipulated in the guidelines, the judge concluded that because of the inherent dangers of the activity, the number of teachers present was not adequate and therefore negligence was found.

From this, it may be concluded that guidelines need to be
flexible enough to cater for a range of situations and student ability and detailed enough to encourage analysis of the specific variables of each situation (i.e. age, ability and experience of students and teachers; environmental conditions; safety factors - communication, transport) so that planning, activities and staffing are appropriate for each situation. For example, the needs and requirements for camping programs with year 2 are vastly different to that of year 12. All planning should be made with a knowledge and understanding of the applicable law.

IN - SERVICE / STAFF DEVELOPMENT:

A second area where the educational bureaucracy can assist schools and teachers in relation to avoiding educational malpractice suits is in the provision of in-service education and staff development.

As Kirby has stated (1982, p6),

If teachers claim full membership of the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents.
In responding effectively to this challenge teachers and schools will need to be aware of changes in the legal climate (Whalley, 1986, p207). To do this, teachers and schools are going to need a knowledge and understanding of the law and its impact on the everyday activities and situations that occur in schools, as well as an awareness of the areas where changes are occurring. Ackroyd (1986, p36) summed this up as,

[T]he teacher must be aware of all the implications of the law as it may apply to the situation and the rights, duties, obligations, and responsibilities in those situations.

For this awareness to be achieved, there must be some form of planned, systematic teacher education program, beginning during initial teacher training and on-going throughout the career. There is little value in providing optional, and often expensive courses that only the interested few will participate in. Information and awareness must reach all teachers, otherwise the concept of legal liability and malpractice in schools will remain esoteric.

RECENT CHANGES IN VICTORIAN EDUCATION :
The past few years have seen dramatic changes in the
Victorian Education System. These changes have included: the implementation of the 'Schools of the Future' project, whereby schools will become self-managing; local selection of staff at all levels; changes in curriculum, assessment and reporting; statutory changes such as mandatory reporting of child abuse; and also, economic rationalisation impacting on personnel and financial resourcing.

All of these changes have altered the relationship between the bureaucracy, schools, teachers and the legal system. Schools are now directly involved with areas of the law ranging from contract, administrative, commercial and taxation law, workcare, mandatory reporting, equal opportunity and anti-discrimination legislation, as well as tort law, including negligence.

These changes are exposing schools and teachers to situations for which their training gave scant, if any, attention. For this reason, there is a need for the development of risk-management strategies to deal with these new situations and also to prepare for future changes. Developing a proactive
attitude will enable schools to maintain some control over change; to be able to consider a wide range of scenarios and to formulate responses. These response strategies need to be built into a 'whole school planning and development policy'.

**STEPS TO AVOID MALPRACTICE CLAIMS:**

As has been stated repeatedly by the United States courts (*Peter W, Donohue, Hunter, Hoffman*) it is for the plaintiff to initially prove that a duty of care exists. This duty of care, as it applies to learning, is not clearly defined (chapter 4). But even considering the difficulties in proving the existence of a duty of care, there are a number of steps that teachers and schools may take to reduce the potential for litigation.

After an extensive literature search, only five articles were found that gave any consideration to the schools' role in preventing educational malpractice. One of these references is Australian; Tronc and Sleigh (1980, p14) briefly mention six administrative steps that should be implemented. Essex (1986, 1987) also considers an administrative approach in advising principals and teachers of ways to avoid malpractice.
suits. The only article that seriously considers preventative measures in any depth, and has prevention as its main focus, rather than as a subsidiary aspect, is the article by Arlene Patterson (1984) aptly titled, "How to Avoid an Educational Malpractice Suit." The guidelines proposed in this article are summarised in Reilly (1984, pp17-19).

In reducing the potential for claims of educational malpractice, teachers, schools and educational systems need to develop risk-management strategies; to consider the plethora of situations that could arise and develop and implement guidelines for dealing with them. Patterson (1984, p91) proposes guidelines aimed at providing educational solutions; her guidelines include identifying good professional practices, improving current practices, and eliminating those practices which have potential for liability for educational malpractice.

Aspects of educational malpractice impact in differing ways on all involved in the educational process. Each group, teachers, principals, school councils and the Directorate of
School Education (DSE), needs to develop and implement appropriate responses to these.

Steps that this author considers to be important in reducing both the individual and systems' potential for liability for educational malpractice are discussed below. In doing this, the contributions by Patterson, Essex, Tronc and Sleigh and Reilly will be reviewed and their applicability to the current Australian situation will be assessed. Their suggestions on how to reduce the potential for liability in educational malpractice have been important in providing the groundwork from which the following has been developed.

**STEPS IN RELATION TO SCHOOL DOCUMENTS:**

Tronc and Sleigh (1980, p14) comment that schools, "must be clear about what [they are] offering and the conditions under which it is being offered." With this in mind school publications need to consciously avoid implying that teachers will do things that they might in fact be unable to do.

School policies and charters are the prime documents of each
school. They are developed within the guidelines and policies of the DSE, and with input from both staff and the school community, to meet local needs. These documents need to be available and accessible to all members of the school community. The principal has the main role in ensuring the implementation of these documents.

The School Charter is the primary document of accountability in that it sets out clearly what the school will be doing in each of the various program areas, timelines for their implementation and how these policies and programs will be evaluated. As the School Charter has an important role in accountability, it is incumbent upon the principal to ensure that all aspects of the charter are met. If policies or programs are specified in the charter then all effort must be made to implement them within the time stipulated; this includes the allocation of appropriate staff and funds.

The School Charter needs to be supported by a wide range of school policy documents. These documents cover areas including: curriculum - such as key learning areas, student
assessment and reporting, referral and special programs; social - such as behavior management policies, codes of conduct, detention, camps, excursions; organisational - such as class structures and sizes, specialists, timetables; staffing - including selection, duties and role descriptions, conditions, performance appraisal, codes of conduct, professional development, employment contracts. As Patterson (1984, p84) points out these not only provide practical information to staff and parents, but also assist in communication and may play a role in providing evidence that information on school policies is disseminated.

Schools have policies in many areas and dealing with a plethora of issues, documenting these serves an important role in accountability. To assist with this school administrations need to develop detailed procedures for all services regularly handled (Patterson, 1984, p84). The documents do not need to be long, but they need to be clear and specific - detailing what is done, procedures to be followed, actions and consequences, who is responsible etc. They provide guidelines and ensure that all are treated equitably by stating the due process in
decision making. They can serve to protect against negligence by providing parameters within which the school functions. By being carefully thought out, they take into consideration legal issues and account for problems that may arise, or result from issues that have arisen and provide strategies for dealing with future occurrences, thus creating an environment that acknowledges issues that have the potential for malpractice and does something to reduce their likelihood. Patterson (1984, p77) states that schools may need to seek the expertise from the areas of law, business and public administration to do this.

Policy documents provide the school community (staff, students and parents) with a knowledge of expectations and procedures. Staff know what they are expected to do and students and parents are aware of the school's philosophy and the process for dealing with situations as may arise.

As stated earlier, developing charters and policies is an important component of accountability. But as Patterson (1984, p87) comments it is important that once rules and
guidelines are established, they are observed.

**STEPS IN RELATION TO RECORD KEEPING:**

Patterson (1984, p84) emphasises the importance of keeping good, accurate written records. These records range from lesson plans and evaluation to interviews and reports as well as phone calls and letters. As part of this, she suggests (p84) that advice given be confirmed in writing and a copy given to parents. Particularly when there is any chance of misunderstanding, she suggests that agreements be in writing and be signed by all involved (p83). Evaluation mechanisms, such as test results, observations and anecdotes, need to be formalised so that they can be used to support reports and interviews and enhance accurate reporting; they can also be used to individualise programs to meet student needs (Patterson, 1984, p81).

Tronc and Sleigh (1980, p14) comment on the necessity of not only administering adequate assessment procedures, but also ensuring results are followed up by appropriate action (i.e. reporting to parents, developing and implementing educational
plans, referrals etc.)

From the above, it is apparent that accurate and appropriate records are a key element in accountability. Decisions made, particularly those affecting students (eg. promotion, suspension or expulsion, referrals), must be based on clear, objective information. There must be written evidence to support the decisions made.

Record keeping is a responsibility at all levels of the school. The school administration maintains official documentation, including personnel and student records. With more of the personnel function being placed on the school, confidentiality is becoming a greater issue. Schools need to develop a greater awareness of the sensitivity of certain information and ensure that security procedures are implemented. The staff and the school community need to be aware of who has the right to access information and feel confident that security procedures are adequate and adhered to. Student records encompass enrollment details, year level reports and other relevant information, such as referrals and reports regarding academic,
social or behavioral issues, these would also include
documentation of meetings with parents regarding the specific
issue and the decisions reached. A copy of these should be
provided for the parents, it may even be worthwhile having all
parties sign such documents. This type of formal record
keeping confirms both the process and content of the
proceedings and provides what Patterson (1984, p83) refers to
as, "an air of professionalism to the endeavor."

Students' academic progress and achievement is recorded in
more detail within the classroom. Teachers utilise a variety
of tools for record keeping, these include: work programs
which detail the lesson plans, these should also reflect the
school charter and policies as well as noting how the differing
student abilities are being catered for; evaluation records,
which need to include not only the results of tests, but also
the test and some analysis of the results and follow-up plans;
anecdotal records, notes or diaries relating to student
academic progress or behavior are useful to support actions;
records of interviews and action plans are another way to
document actions taken; student files, these need to contain
relevant information for both the subsequent teachers and parents, these may include samples of work, tests, reports from other professional assessments, information on home background, they need to be relevant and objective. As with all school records, the need for confidentiality cannot be over-emphasised. Irrespective of the recording procedures individual teachers adopt, of paramount importance is that they accurately reflect what is occurring within the classroom and each student's progress and level of achievement. Although time-consuming they provide evidence to support the decisions made and actions taken. As Patterson (1984, p84) states, "[t]hey may provide a good defence by providing documentation that a sound educational program is operating."

STEPS IN RELATION TO REPORTING:

Reporting is a contentious issue and one which has led to educational malpractice claims. The Peter W, Donohue and Hunter cases all alleged that the parents' received erroneous information about the student's progress (Reitz, 1984, p51). Hunter (Md., 439 A. 2d at 583) further alleged that school records were altered to cover up school actions. The
dissenting judgment in *Donohue* stated that it may be feasible to sue for, "fraudulent misrepresentation of information about a student to his parents." (Reitz, 1984, p52)

A number of writers have focused on the issue of reporting. Essex (1986, p22; 1987, p214) emphasises firstly, the importance of providing accurate information on course requirements to both students and parents with an adequate timeframe and secondly, that academic achievement should be the main criterion for promotion. Patterson (1984, p82) supports this by saying that that 'social promotion' policies need to be resolved. Patterson continues (p82) that methods of reporting on student achievement and progress need to be improved. Part of the reporting procedure includes student placement. Student's rights in placement need to be safeguarded, procedures following a complaint may include access to appropriate records and review and appeal processes (Patterson, 1984, p83).

The above points need to be considered when reporting to parents. Schools and teachers need to comply with mandated
policy requirements, which may specify the frequency and type of reporting procedures to be used (written and/or interview). Written reports need to be clear and jargon free, informing parents of what has been taught and their child's understanding of this. Reporting to parents clearly and non-negligently requires objective and verifiable information, this harks back to the importance of accurate and reliable record keeping to support statements made. In keeping parents informed of student's progress and achievement, problems, difficulties, or special needs of the student may also need to be addressed. Particularly for students experiencing difficulties, any actions undertaken by the school need to be reported to parents so that they are clear about what is being done. If there is consensus regarding action, this reduces the potential for negligence claims, again reinforcing the importance of communication between the school and the parents and of having documentation of interviews, discussions and reports.

Teachers have the main responsibility for objectively and accurately informing parents of their child's academic and social progress. The principal's role is to ensure that there is
a consistency of reporting within the school and that written reports comply with DSE policy. The principal also needs to read all reports before they are given to parents so that he/she is aware of what is written and where necessary initiate appropriate actions. The principal maintains an overall view of student progress and achievement across the school and from this can gauge any anomalies, either individual students 'at risk' or discrepancies in teachers' assessments.

As mentioned above, copies of all reports should be kept by the school for reference. Confidentiality of student records needs to be considered when files are passed on to subsequent teachers to ensure that access is limited to those directly involved with the students concerned. Another point to be considered is the legal nature of reporting, what is written needs to be objective, supportable and also non-libellous. These documents could be called upon as evidence in a legal action.
STEPS IN RELATION TO INTRA-SCHOOL AND STAFF COMMUNICATION:

This area is not specifically mentioned by other authors, but this author views communication as being an important factor in reducing the potential for educational malpractice.

As with any organisation, as schools become larger, communication between individual staff members becomes more difficult. Yet the dissemination of information becomes correspondingly more important. A major difficulty is getting all staff together at the one time, other than at staff meetings, to pass on information and discuss issues as they arise. Problems arise when communication breaks down. When relevant information is not made available to all staff or someone is inadvertently 'missed out', this can lead to the formation of cliques and feelings of isolation and it can affect staff cohesion and unity. It may also have the potential for negligence if teachers have not been aware of information and thus not acted accordingly (for example: allowing students to continue using playground equipment declared out of bounds because it is unsafe; to custody and access disputes involving
students; to implementation of directives).

To enhance communication, formal and informal structures need to be created. Formal structures may include: daily news-sheet, staff meetings, committees, area, grade and curriculum meetings, timetabling time off together for planning etc.. Informal structures could include staff room 'get-togethers', announcements, and social gatherings.

Staff need to communicate within areas, such as grade/area levels to assure that there is unity in curriculum content and delivery as this may reduce parental comparisons of grades ("But the other grade 4 is doing ... why aren't you?") There also needs to be communication across grade levels to assure developmental progression through curriculum areas, and that nothing is repeated unnecessarily nor anything omitted; along with this, discussion with the previous teacher can supply information regarding students - incidental information that may provide insight into student performance but not considered relevant for inclusion in files.
Staff communication also broadens individual networks. Often colleagues know who to contact to assist with specific problems or to answer questions or supply information (e.g., community support groups, specialists in specific areas, curriculum information).

Effective communication can assist in reducing the potential for educational malpractice by increasing staff cohesion, disseminating information and assuring a unified approach. Ignorance is not a defence.

**STEPS IN RELATION TO PERFORMANCE APPRAISAL**

As Patterson, (1984, p85) states,

> The traditional methods of teacher evaluation with the principal visiting classrooms periodically might not be providing the diagnostic information that it should. ... Current methods seem to be unsatisfactory to all concerned providing little data and even less opportunity for teachers to improve their skills based upon constructive criticism.

In the past, teacher appraisal was for the purposes of assessing suitability for promotion. Along with many areas, this has undergone significant change. Formalising procedures
for performance appraisal has, until 1994, been a school-based initiative, but is now a DSE directive, and may have an impact on incremental salary adjustments and the payment of performance bonuses.

Performance appraisals may play a significant role in the area of educational malpractice in that positive reports may be the best defence against claims of negligence (Tronc and Sleigh, 1986, p14). They may also highlight areas of strengths and weaknesses and provide a focus for improvement and professional development.

The principal is responsible for the standard of the on-going teaching within the school. Essex (1986, p22) emphasises this responsibility by stating that where problems exist with a teacher's performance, it is for the principal to initiate efforts to improve performance and ensure competency. Therefore a method of monitoring the quality of teaching needs to be implemented. Formalising some method of performance appraisal that includes goalsetting, planning and professional development to improve teaching skills and thus the quality of
teaching, is required.

The principal needs to be proactive, to assist staff and intervene before major problems develop. The principal also needs to ensure that the stipulated curriculum and evaluation procedures are being followed. To ensure that the curriculum is being taught, and taught effectively, teaching staff need to be adequately supervised (Tronc and Sleigh, 1986, p14). Particularly in post-primary areas, where there is some external assessment, the required course material must be adequately covered.

The principal's performance appraisal program would utilise a structured approach. This would initially involve the formalisation of job descriptions and individual performance plans identifying performance targets to be met that year. Performance appraisal would focus firstly on the achievement of these targets; this would require the teacher to provide evidence that they have achieved these goals and secondly, on developing individual professional development plans to improve areas of weakness or to develop skills in a new area.
or new technologies. A good performance appraisal program should be positive in encouraging growth and development of all teachers, irrespective of their position or experience.

Effective performance appraisal requires confidence between the staff and the principal; confidence in the confidentiality and confidence in the objectivity - all staff need to be aware of the process and procedures. Performance appraisals may have a number of facets. As well as formalised annual or bi-annual reviews by the principal, a program of peer-evaluation and mentorship may also be provided.

Patterson (1984, p85) notes that peer-evaluation helps all involved, those doing the evaluating as well as those being evaluated. Particularly where there is team planning and strong team cohesion, a team approach to peer-evaluation may be less threatening and provide a supportive environment for discussion and problem-solving. Problems or difficulties may be more readily discussed in an informal atmosphere and may be acted upon as they arise. Teachers may feel more confident in discussing such issues with a trusted colleague.
Along with peer-assessment, implementing a mentor system for beginning teachers, as Patterson (1984, p82) suggests, can provide extra assistance and the support and encouragement that they may need.

A final aspect of performance appraisal links in with staff selection. The principal has the main responsibility for the selection of staff to fill vacancies as they arise. Following the procedures and guidelines stipulated by the DSE, the principal must ensure that selection is based on the principles of merit and equity to ensure that the most suitable person is selected. Senior appointments in schools (principal class and AST/SRP positions - now level 3 and 4) are for a set number of years, after this time there is a final performance review which will assess whether or not the incumbent retains the position. An evaluation of whether the person is performing the duties of the position satisfactorily will affect their retaining the job.
STEPS IN RELATION TO PROFESSIONAL DEVELOPMENT:

As stated above, performance appraisal is cyclic, it does not end with the appraisal but has outcomes in terms of actions to be taken, these then become part of future appraisals. These outcomes also form the basis of professional development plans; the needs of both the staff as a whole and individual teachers can be assessed and from this, a systematic program developed.

Patterson (1984, p85) raises the issue of complaints or questions concerning teacher effectiveness. She points out that when such allegations arise due process needs to be followed to protect the rights of all parties, that complaints need to be documented and substantiated. Teachers need to be made aware of any allegations and given the opportunity to defend their action. Performance appraisal procedures would be one method of dealing with any claim. Teachers identified as having specific difficulties or deficiencies need to be given the opportunity to undertake remediation programs to develop appropriate skills to reach the standard required.
Patterson (1984, p85) also comments that areas of instruction need to be matched with teachers certification, that there is little excuse for allowing teachers to work outside their area of certification. Qualifications in some areas (e.g. first aid, swimming, outdoor education activities) are valid for only specified periods, teachers with these qualifications may need to be re-accredited so that the qualifications remain valid. Undertaking certain activities without the appropriate accreditation could be considered negligent and lead to claims of negligence.

It is vital for teachers to keep up with changes in curriculum and learning theories and this requires access to specific professional development activities. New programs cannot be effectively implemented without the staff having adequate knowledge and expertise in that area. Particularly in the area of technology and computers, developments are so rapid that it can be difficult remaining up to date. To implement effective programs in schools, the teachers themselves need to learn appropriate knowledge and skills. Professional development programs in these areas may be formal courses, or peer-
support groups within schools. Technological advances also affect other areas of the school, such as administration and libraries, the staff in these areas also need access to training to effectively implement and utilise new systems.

For whole school professional development, both the review of performance appraisals and the school charter become a joint focus for planning. Goals set in the charter may require the development of specific skills, or the implementation of specific programs. In either case, teachers need the opportunity to develop the necessary skills and programs prior to implementation.

Professional development activities can take many forms, from formal academic courses, short courses leading to accreditation, seminars and workshops, to visiting and observing other teacher's classroom practice. Effective professional development assesses the most appropriate means of addressing the perceived needs of both the school as a whole and the individual staff.
A final area that professional development needs to address is the legal aspect of education. As Patterson (1984, p77) points out, teachers have few opportunities to acquire this information. To reiterate this author's earlier comments (p90), teachers need an understanding of how the law impacts on what they do to be able to make decisions that they can defend both educationally and legally.

STEPS IN RELATION TO TEACHER EDUCATION:

Teacher education courses need to impart appropriate pedagogical skills and knowledge; they also need to provide opportunities to practise these. Patterson (1984, p80) emphasises the need for education courses to require teachers to develop diagnostic and remediation skills in all areas of teaching, particularly reading, to enable teachers to provide for the wide range of abilities in their classes. One area though that appears to be lacking from initial teacher training courses is the legal aspect; responsibilities, liability, negligence and malpractice. It is difficult to analyse teaching practices to reduce the likelihood of malpractice if there is no awareness of these legal issues and their relevance to day to
day teaching. Williams (1991, p1) states that, "teachers must teach in a way that is both educationally sound and legally defensible." How can this be done if teachers have no knowledge or awareness of the legal implications of their actions? Ignorance is not a defence. Therefore it behoves tertiary institutions to include education law as part of the curriculum. (Patterson, 1984, p77)

**STEPS IN RELATION TO COMPETITIVE COMMERCIAL ENVIRONMENT:**

Patterson (1984, p86-7) discusses the need for the employment of public relations people now that schools are 'big business'. Further, that schools need to make effective use of the media to promote and advertise their superior product. School newsletter and newspaper articles promoting educators and educational activities should be on a regular rather than ad hoc basis.

The introduction of the 'Schools of the Future' program in Victoria has altered the culture of schools in relation to developing a more corporate image and approach to
advertising and promoting the unique qualities that sets them apart from other schools. This is important as parents no longer automatically send their children to the nearest school; they are more aware of what they want and tend to 'shop around' for a school that meets their requirements. Schools are finding themselves vying for clients, and for this reason, school brochures and other documents must accurately reflect what is actually occurring in the school.

Schools are now also responsible for the financial decisions and arrangements and have greater discretion over the allocation of funds and the funding of programs. Funding of programs needs to reflect charter and DSE priorities. Schools also have the opportunity to seek other sources of financial support. This may be as simple as paid advertisements in the school newsletter, income from the use of school facilities by other groups, to corporate sponsorship of certain activities (eg. bookclub sales where the school receives a commission; business support for school theatre/musical productions). Schools would need to consider carefully both the ethical and legal implications of any major financial sponsorship offers.
In outsourcing the provision of specialist programs (e.g. gymnastics, LOTE (languages other than English), computers), schools must be very conscious of any costs to parents. If the program is integral to curriculum implementation and occurs during school time, then its provision should be costed within the school budget and fees; charging a separate fee for participation in an aspect of the curriculum that the DSE states should be provided may expose the school to claims of discrimination if parents cannot afford to pay and may also be illegal. (This issue was raised in the Doncaster and Templestowe News, 28/9/94, p3 and 12/10/94, p27.) The provision of optional programs, such as instrumental music, is an exception to this. The use of the school and facilities for out of hours programs and tuition by commercial organisations is an area that could be explored.

Funding programs within schools for children with special needs, for example English as a second language, Reading Recovery, Gifted children, requires clear documentation and evaluation of the benefits. Patterson (1984, pp87-8) highlights that schools need to be critically aware that
allocating funds for specific programs can have the potential for creating liability. When there are programs provided for students with specific requirements, and selection for participation in these is based on some academic or achievement criteria, then the school must make this clearly understood and document the objectives and outcome measures used to evaluate the programs. This holds true in the current financial climate, schools must be able to justify the value of programs that benefit only a limited number of students.

Irrespective of the changes that are continuously occurring in education, attending to the issues discussed above will provide a basis for being proactive in developing guidelines for reducing the likelihood of claims of educational malpractice. Once procedures are established, then they need to be followed by all staff. All too often rules and guidelines are developed without follow up to ensure that they are, first of all understood by those who need to use them, and secondly, that they are enforced.

Procedures may be developed collaboratively by all the staff,
but it would be up to the principal to ensure that they are not only understood, but followed. Effective communication plays a vital role in this: communication with parents and the community; communication between teachers and communication between staff and the principal. All personnel involved in schools need to be conscious of the potential legal implications of their actions. As summed up by Patterson (1984, p88), "[d]ecisions made in education on legal issues should logically be based upon sound educational principles with all legal implications considered."

CONCLUSION :

This chapter has aimed to discuss what various members of the education system may do to reduce the potential for claims of educational malpractice occurring.

At a systems level, a revision of existing policies and guidelines taking into consideration legal issues and existing case law, and the provision of in-service training in the area of the law and education, would provide a basis for teachers to review and assess both school and individual practices.
Recent changes in Victorian education have seen schools becoming self-managing, thus being responsible for issues such as staff selection, financial planning and program priorities. Schools are now directly involved in areas of the law that used to be dealt with by regional or central authorities, thus there needs to be a greater awareness by all teachers of legal issues as they affect schools.

The main focus of the chapter is on issues that schools need to consider to avoid malpractice claims. Schools need to review their policies and procedures and assess the potential for negligence. From this, actions to reduce or eliminate practices that may lead to claims of negligence or malpractice can be developed. A conscious awareness of legal obligations and responsibilities needs to be established and become an integral part of the decision making process.

The main issues that schools need to consider are school documents, record keeping (both administrative and classroom based), reporting procedures, staff communication,
performance appraisal and staff selection, staff development, teacher training and the commercial environment.

Current developments in Victorian education emphasising accountability, reporting and performance appraisal are actually supportive of implementing procedures to reduce the potential for malpractice. Patterson (1984) emphasises the development of good professional practices, and these include among other things, increasing awareness of legal aspects of education, evaluation procedures, providing mentors, reporting, keeping good records, school policy documents, evaluating teachers and finally, observe your own rules.

All the issues raised reflect many of the current changes happening in schools. The emphasis on accountability may help teachers focus on the importance and relevance of some rather time-consuming activities by looking at them as ways of reducing the potential for malpractice and improving the quality of teaching. The important issue is the quality of teaching for, as Patterson (1984, p73) claims, "[w]ether or not suits will occur is really not the major issue. [U]ltimately
improving the quality of education is..."
CHAPTER 6.

CONCLUSION.

In 1982 Justice Michael Kirby (p29) concluded a speech by saying that,

Teachers have a great responsibility and a great opportunity. It is not an easy time today to be a teacher. The pressures come from all sides. Inquiries, reports and speeches bombard you. Now on the sidelines, the law nagging away threatens further complications. ...

Parents aside, no group in the community has the opportunity to have such a profound influence on the next generation. Their influence far transcends that of the politicians, the lawyers and the judges.

This observation is just as applicable today as when it was first made. Individual teachers, and schools in general, do have an enormous influence upon their students; after all, children spend almost one-quarter of their waking hours at school. Teaching is no easy task, and with the development of 'self-managing' schools, there is even greater responsibility and accountability placed on schools to provide the service that they purport to provide.

It used to be that teachers' decisions and actions regarding
students were sacrosanct; rarely questioned by parents and
definitely not by students. This attitude has changed
dramatically, particularly over the last twenty or so years.
Firstly, as people become better educated and knowledgeable,
they are more aware of their rights and are more prepared to
raise issues of accountability. Secondly, the legal obligations
of teachers and schools are well known and now, more than
ever, they are being asked to justify decisions made and what
they intend to do for students with particular needs. And
thirdly, with a general increasing public knowledge of, and
access to the legal system, parents and students who are not
satisfied may turn to the courts to seek compensation (Tronc,
1982, p10).

For a number of years, the term "Educational Malpractice" has
been used both within educational circles and by the public
without there being a consensus of what the concept means.
Some members of the public perceive it as a solution for
students who have failed to learn. Some teachers consider it
such a threat that it may affect what they do; for example, it
may prevent them from trying alternative teaching methods.
Both these viewpoints are firmly grounded in a lack of understanding of what establishing an educational malpractice claim would entail.

The aim of this thesis is to clarify this concept from a teaching perspective.

The literature search highlighted the dearth of information in this area. In reality, the concept is still hypothetical in that there has yet to be any successful litigation for a claim of educational malpractice. The United States has been the only country where cases of educational malpractice have been tried. The first case citing educational malpractice, *Peter W.* (App. 131 Cal. Rptr. at 854) was dismissed for a failure to state a recognised cause of action; because this was a new area the court could refuse to recognise it. In all cases to date, a major stumbling block has been proving the existence of a duty to educate (de Ross, 1988, p102). The primary element in any negligence claim is the existence of a duty of care; if a duty is not owed, then there are no grounds upon which to base a negligence claim.
Public policy considerations have been the overriding reason given for dismissing claims of educational malpractice. All actions brought have been unsuccessful, ultimately for what the courts' term 'policy considerations'. The United States courts have refused to recognise educational malpractice as a tort action because it is unknown what the long term consequences of this will be on both the legal and educational systems. Concern has been stated regarding: a potential floodgate of litigation and the consequential unnecessary burden of this on both the legal and educational systems (Hammes, 1989, pp4&5; Thompson, 1985, p100; Whalley, 1986, p204); the financial burden that compensation payments would place on education systems (Hammes, 1989, p5; Thompson, 1985, p100); the potential negative impact on teaching, such as inhibiting innovative approaches and deterring people from entering the profession (Foster, 1986, pp137-8; Thompson, 1985, p99); the appropriateness and expertise of courts in making decisions regarding educational matters (Whalley, 1986, p204); and finally, the appropriateness of compensation (Hammes, 1989, p4). So far, courts have decided that the
'public good' outweighs individual rights in this area and that claims citing educational malpractice will not be recognised.

The literature discussing the cases distinguishes between two distinct types of educational malpractice claims. Cases such as Peter W., Donohue and Hunter, base their malpractice claim on the receipt of an inadequate education whereas Hoffman cited specific incidents which were claimed to have led to his injury. This latter has been referred to as professional error claim (Thompson, 1985, p96). In assessing the distinction between these types of claims, Thompson (1985, p96) considers that claims based on professional error are more likely to succeed than those citing a generalised failure to educate as in the former, specific acts or omissions may be identified.

How Australian courts will view and interpret an educational malpractice claim when one arises is unknown. Factors that have influenced the decisions in the United States may or may not be relevant in the Australian context. A major hurdle in mounting an educational malpractice claim in Australia is a
financial one, the costs of mounting a case and awarding of costs may act as a deterrent to the majority of people. The influence of public policy considerations is also speculative. Due to so many unknown factors, "it would be foolish to conclude that malpractice actions will inevitably succeed, or fail, in Australia." (Hopkins, 1992, p7-1)

With this in mind, consideration of preventative measures which schools and teachers themselves can take is important. The notion of educational malpractice has been around for a number of years; instead of fearing it teachers need to consider it another challenge to be met proactively, and to analyse and reflect on their teaching to ensure that it is non-negligent. Teachers need to ensure that they implement the appropriate curriculum and record this implementation. Documentation of actions taken for specific students, interviews with parents, follow-up plans and their outcomes are ways in which teachers can support and, if necessary, defend their actions.

Recent changes in Victorian education emphasises
accountability at all levels. A by-product of this may be a reduction in the potential for malpractice claims. Schools and teachers can begin educative accountability by identifying good professional practices, improving present practices and eliminating practices which have potential for liability (Reilly, 1984, p17; Patterson, 1984, p91). The DSE can assist with this by developing and providing appropriate in-service education, policy and curriculum guidelines and support services.

Both teaching and the law are constantly changing. The response of Australian Courts to a claim citing educational malpractice is unknown. Teachers can pre-empt this perceived threat by ensuring that classroom practices are educationally sound, that appropriate curriculum is implemented and that documentation is such that actions are legally defensible.
BIBLIOGRAPHY.

TEXTS:


THESES:


ARTICLES :


Essex, Nathan L. "Teacher Malpractice - fact or fantasy?" Teacher Educator. v21, n4, Spring 1986(a), pp2-8.


Patterson, Arlene H. (1984) "How to Avoid an Educational


NEWSPAPER ARTICLES :


**CASES :**

**AUSTRALIAN :**

*Geyer v Downs* (1978) 52 ALJR 142.


*Nicholas v Osborn* unreported Victorian County Court decision 1.(1985)

*Ramsay v Larsen* (1964) 111 CLR 16.

*Shaddock and Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225.

**UNITED STATES :**


ACTS :

Education Act (1958) - Victoria (incorporating amendments)

Education Reform Act (1990) - New South Wales.
APPENDIX.

GLOSSARY.

CONTRIBUTORY NEGLIGENCE: "A person's carelessness for his own safety or interests, which contributes materially to damage suffered by him as a result partly of his own fault and partly of the fault of another person or persons." (Martin, 1983, p85)

DUTY OF CARE: Somewhat surprisingly, the Australian and American references have no entry for this! The British reference, Martin (1983, p124) defines duty of care as:

The legal obligation to take reasonable care to avoid causing damage. There is no liability in tort for negligence unless the act or omission that causes damage is a breach of a duty of care owed to the plaintiff. There is a duty to take care in most situations in which one can reasonably foresee that one's actions may cause damage to the person or property of others. The duty is owed to those people likely to be affected by the conduct in question.

IN LOCO PARENTIS: Literally, in the place of the parent. "Loco Parentis exists when person undertakes care and control of another in absence of such supervision by latter's natural
parents and in absence of formal legal approval, and is temporary in character," (Black, 1990, p787).

**LIABILITY**: What one is obliged to do or is responsible for.

**MALPRACTICE**: The Australian and British references make no specific entry for this term. Not surprisingly, the United States (seemingly at the forefront of malpractice actions) does make specific reference to this term. Black (1990, p959) defines malpractice as:

> Professional misconduct or unreasonable lack of skill. ... Failure of one rendering professional service to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice or illegal or immoral conduct.

Although there is no definition for 'professional negligence', it is generally viewed as synonymous with malpractice; both are concerned with the negligent actions of professionals in the performance of their duties.

Educational malpractice is not mentioned in the legal
dictionaries. The only definition that I could find was by Patterson (1984, p71), she has defined it as, "an intentional or negligent act or failure to act which constitutes a breach of duty to properly educate or place a student which results in an injury to that student."

**MISFEASANCE :** Doing something that may be lawfully done, or is required to be done, incorrectly. This is often referred to as 'commission'.

**NEGLIGENCE :** Negligence is the tort which protects people and their property from the careless behaviour of others.

A charge of negligence can result when an improper act or a failure to act results in an injury to another person. Negligence is established when one's actions fall below a standard of care expected of a reasonable person. The behavior expected of school personnel is measured against what a reasonable and prudent professional of similar training and experience would have done, or should have done, in the same or similar circumstances. (Evans, in Thomas, 1991, p121.)

Consequently, "If the defendant does not meet the standard, he or she is negligent. Conversely, if the defendant does meet the standard, he or she is not negligent." (Marantelli & Tikotin, 1985, p190)
NEGLIGENT MISSTATEMENT:

A false statement of fact made honestly but carelessly. A statement of opinion may be treated as a statement of fact if it carries the implication that the person making it has reasonable grounds for his opinion. A negligent misstatement is only actionable in tort if there has been a breach of a duty to take care in making the statement that has caused damage to the plaintiff. ... Responsibility for negligent misstatements is imposed only if they were made in circumstances that made it reasonable to rely on them. (Martin, 1983, p239)

NONFEASANCE: Not doing something which a person is obligated to do or has the responsibility to do. This is also referred to as 'omission'.

TORT: A civil wrong not involving contracts (Hammes, 1989, p2).

VICARIOUS LIABILITY: "The principle according to which 'A' (e.g. an employer, principal or parent) is held liable for the omissions or acts of 'B' (e.g. an employee or agent, or a son or daughter)." (Marantelli & Tikotin, 1985, p301).
ADDENDUM.

X and others (minors) v Bedfordshire County Council, M (a minor) and another v Newham London Borough Council and others and E (a minor) v Dorset County Council and other appeals. [1995] 3 All ER 353.

In a decision brought down by The House of Lords in June this year (1995) it was allowed that a duty of care was owed by the local authority for their students' education in some, limited circumstances.

This appeal involved claims of negligence against Local Authorities in the performance of their statutory duties under Child Welfare and Education Acts.

The three education cases being appealed all dealt specifically with students with learning difficulties. The negligence claimed was limited to the assessment and advice given on the appropriate educational placement for these students.

Although The House of Lords has allowed these cases to
proceed to trial, the ultimate outcome of them is still unknown. The House of Lords has ruled on points of law, deciding whether or not the plaintiffs' claims were justiciable. However, this, "failure to strike out the claim does not indicate any view as to the likelihood of success in the action." (at 396).

In his judgment, Lord Browne-Wilkinson has not given any lengthy discussion of the policy considerations that have so far dominated similar cases in the United States courts. He has focused purely on the distinction between statutory discretion and the exercise of professional standards of care in relation to the educational well-being of the students and the advice given to parents.

In the education cases the authorities were under no liability at common law for the negligent exercise of the statutory discretions conferred on them by the 1944 and 1981 Acts but could be liable, both directly and vicariously, for negligent advice given by their professional employees. (at 358)

Thus, by offering professional services, the Local Authority created a duty of care in respect of these services.
The Australian legal system has its origin in the British system and, until recently, the final appeal open to Australians was the Privy Council in Britain. For this reason, this decision by the House of Lords has the potential to have a greater impact on Australian legal decisions than the United States decisions examined in this thesis.

Both jurisdictions still hold that decisions made within the ambit of discretionary powers of the statute will not be entered by the courts. To date, in the United States negligence claims have been rejected outright on policy grounds, although comments by dissenting judges have opined that this may not always be the view. The decision by the House of Lords that there may be a common law duty of care in relation to the implementation of policy opens the way for actions to be tried.

The liability of schools is changing. This ruling establishes a duty of care but limits it to a narrow field of assessing and advising on the special needs of children with learning difficulties. This is a small, but significant, development in legal opinion.
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