Rethinking the Basis of Recovery for Educational Malpractice

By J. Paul R. Howard

It has now been more than 20 years since the California Appellate Court dismissed the first lawsuit commenced by a student for negligent breach of a duty to educate, the Court holding that claims of "educational malfeasance" were not capable of assessment within the judicial forum.[1] Since then, American courts have repeatedly dismissed actions for educational malpractice, citing reasons of public policy against the maintenance of such claims, judicial reluctance to interfere with the implementation of educational programs and policies, and other considerations.

Applying the American jurisprudence, Canadian courts have been equally vigilant in denying recovery for educational malpractice. No Canadian court has allowed an action for damages against a school board or its teachers for negligent provision of education or failure to provide an appropriate education. Indeed, most courts have struck out educational malpractice claims on a summary basis well before trial, as the British Columbia Supreme Court recently did in a judgment released October 30, 1998.[2]

Ironically, legal and pedagogical commentators have always been more optimistic than the judiciary itself in their hope that eventually the courts will recognize educational malpractice as a cause of action in tort law akin to professional negligence suits against doctors, lawyers, accountants and others. In fairness, there are certain aspects of the current climate in which educators find themselves that may facilitate the establishment of this tort claim. These "favourable conditions" include: (1) the increasing formalization of the teaching profession and the legal recognition, at least in some jurisdictions, of teaching as a self-regulated profession; (2) the ascendency of the notion of "accountability" throughout the public service, including government operations and education administration; (3) the practical realities created by the present fiscal climate, wherein budgetary constraints require school boards to provide "more with less"; and (4) an apparent willingness of the courts to expand the scope of contexts in which educators will be held to standards of legal liability, as reflected in the recent trilogy of Supreme Court of Canada judgments addressing teachers' off-duty conduct.[3]

Having said that, one of the fundamental difficulties with basing recovery of educational malpractice on negligence law is the thorny question of causation. Causation is a constituent element of an action for negligence: the plaintiff must demonstrate that the conduct of the defendant was the proximate cause of the plaintiff's injury. The student who alleges educational malpractice is faced with the seemingly insurmountable task of proving a causal link between the educator's conduct and the student's injury, that is, the failure to learn. The causation issue underscores a critical distinction between teaching and, say, the medical and legal professions, where clients usually bear little responsibility for the outcome of the professional services rendered. It is inherent in the very nature of education that the student is not a passive actor in the learning process.

Given the problems with tort law, those who advocate for the establishment of educational malpractice as a distinct cause of action might do well to consider an alternative basis for recovery, namely, legal rights theory. A rights-based theory of recovery seems alluring because of the power

which conventional rights discourse tends to appropriate for itself, but it immediately raises the issue of whether Canadian law recognizes a general right to education for all children. However, most of the educational malpractice cases to date have involved students with special needs, and I have argued elsewhere that the case for a legal right to an appropriate education is more easily advanced on behalf of exceptional pupils, at least under Ontario law.[4]

The use of rights theory for education malpractice recovery would, however, require a consensus on the purpose of education. Legal rights theory maintains that rights are the grounds on which some duties are based. The definition of a legal right, as offered by the theorist Joseph Raz, is based on this correlation between rights and duties: a person has a legal right if the interests of that person are a sufficient reason for holding another person to be under a duty.[5] Thus, it is not every duty that will ground a legal right: a right exists only when the correlative duty is imposed in order to promote the interests of the right-holder. That is, while some duties are imposed to promote the public interest, civic virtues, traditions, etc., those duties do not ground legal rights.

As some of the other articles in this edition demonstrate, the purpose of public education may be viewed from the perspective of both the individual student and society at large. The legal right to education arises if the duty to provide education is imposed for the sake of the individual student, and various cases have acknowledged that every child requires an education in order to succeed in life. On the other hand, one certainly cannot dismiss the argument that it is the public interest in an informed citizenry that mandates the state's duty to provide education. That public interest is reflected in the comment made by the Supreme Court of Canada in its very recent decision on search and seizure in the schools: "teachers and principals are responsible for the future of this country".[6] Thus, whether legal rights theory will provide a viable alternative basis for recovery in educational malpractice claims largely depends on whether we can settle upon the purpose of public education.

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1. *Peter W. v. San Francisco Unified School District*, 60 Cal. App. 3d 814 at 824-825 (1976).

2. *L.R. v. British Columbia*, [1998] B.C.J. No. 2588.

3. See *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *R. v. Audet (Y.)*, [1996] 2 S.C.R. 171; and *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15*, [1997] 1 S.C.R. 487.

4. See J.P.R. Howard, *The Special Education of Mentally Disabled Pupils: Full Inclusion's Use of Equality Rights Arguments* (LL.M. Thesis, Osgoode Hall Law School at York University, 1995) at 126-134.

5. J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 116.

6. *R. v. M. (M.R.)* (26 November 1998), (S.C.C.) at para. 35 [unreported].