Educational malpractice: a perspective of instructional negligence in Ontario

Sam Stajfer
University of Windsor

Follow this and additional works at: https://scholar.uwindsor.ca/etd

Recommended Citation
https://scholar.uwindsor.ca/etd/7325

This online database contains the full-text of PhD dissertations and Masters’ theses of University of Windsor students from 1954 forward. These documents are made available for personal study and research purposes only, in accordance with the Canadian Copyright Act and the Creative Commons license—CC BY-NC-ND (Attribution, Non-Commercial, No Derivative Works). Under this license, works must always be attributed to the copyright holder (original author), cannot be used for any commercial purposes, and may not be altered. Any other use would require the permission of the copyright holder. Students may inquire about withdrawing their dissertation and/or thesis from this database. For additional inquiries, please contact the repository administrator via email (scholarship@uwindsor.ca) or by telephone at 519-253-3000ext. 3208.
NAME OF AUTHOR/NOM DE L'AUTEUR: Sam Stajfer


UNIVERSITY/UNIVERSITÉ: University of Windsor, Windsor, Ontario

DEGREE FOR WHICH THESIS WAS PRESENTED/GRADÉ POUR LEQUEL CETTE THÈSE FUUT PRÉSENTÉE: M.Ed.

YEAR THIS DEGREE CONFERRED/ANNÉE D'OBTENTION DE CE GRADÉ: Fall 1987

NAME OF SUPERVISOR/NOM DU DIRECTEUR DE THÈSE: Professor A. S. Nease

Permission is hereby granted to the NATIONAL LIBRARY OF CANADA to microfilm this thesis and to lend or sell copies of the film.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without the author’s written permission.

DATED/DATÉ: Sept 17/87

SIGNED/SIGNÉ: Sam Stajfer

PERMANENT ADDRESS/RÉSIDENCE FIXÉ: 

L'autorisation est, par la présente, accordée à la BIBLIOTHÈQUE NATIONALE DU CANADA de microfilmer cette thèse et de prêter ou de vendre des exemplaires du film.

L’auteur se réserve les autres droits de publication; ni la thèse ni de longs extraits de celle-ci ne doivent être imprimés ou autrement reproduits sans l’autorisation écrite de l’auteur.
EDUCATIONAL MALPRACTICE:
A PERSPECTIVE OF INSTRUCTIONAL NEGLIGENCE IN ONTARIO

by
Sam Stajfer

A Thesis
submitted to the Faculty of Graduate Studies
through the Faculty of Education
In Partial Fulfillment of the requirements for the Degree
of Master of Education at
The University of Windsor

Windsor, Ontario, Canada

1987
A Thesis
submitted to the Faculty of Graduate Studies of
McMaster University as partial fulfillment of the requirements
for the degree of Master of Education

The University of
McMaster
Approval for this thesis has been granted by:

Professor A. S. Nease

Professor M. A. Awender

Professor D. C. James

September, 1987
In my final analysis, I wish to acknowledge my indebtedness to the many who directly or indirectly contributed to the preparation of this thesis. The few

words that follow may not represent all those teachers

and colleagues whose help I must express my gratitude for their

superintendence and guidance.

My special thanks go to Dr. W. A. Anderson and Professor

O. Ogura, whose key internal and external readers respectively, for their contributions to this study.

Last but not least I wish to acknowledge my indebtedness to the library staff at the faculty of

Education whose only enriched my understanding and

continuously thinking.
ACKNOWLEDGEMENTS

It is indeed a difficult task to acknowledge my indebtedness to all those who directly or indirectly contributed to the realization of this thesis. The few names which I am singling out represent all those teachers and friends to whom I wish to express my gratitude for their indispensable support.

My first thanks goes to my parents who from childhood have taught me the value of a good education.

I am particularly indebted to Professor A. S. Nease (my chief advisor and chairperson). I will treasure for the rest of my life the memory of the warm reception received and especially the example of moral integrity and dedicated scholarship demonstrated by him. His open-mindedness to new hypotheses as well as his valuable critiques and suggestions have provided me the academic freedom to study while at the same time have spared me from many blunders.

My special thanks go to Dr. M. A. Awender and Professor D. Charles James (my internal and external readers respectively) for their contributions to this study.

Last but not least I wish to acknowledge my indebtedness to the library staff at the Faculty of Education whose help enriched my understanding and challenged my thinking.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgements</td>
<td>ii</td>
</tr>
<tr>
<td>Abstract</td>
<td>iv</td>
</tr>
<tr>
<td>Chapter I - Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Chapter II - Educational Malpractice: The American Experience</td>
<td>25</td>
</tr>
<tr>
<td>Chapter III - Duty of Care and Public Policy:</td>
<td>60</td>
</tr>
<tr>
<td>Detriments to Educational Malpractice Suits in the United States--Possibilities For Ontario</td>
<td></td>
</tr>
<tr>
<td>Chapter IV - The Role of the Board of Reference in Precluding Educational Malpractice Suits</td>
<td>104</td>
</tr>
<tr>
<td>Chapter V - The Charter of Rights: Implication For Ontario Teachers</td>
<td>120</td>
</tr>
<tr>
<td>Chapter VI - Conclusions, Implications and Recommendations</td>
<td>134</td>
</tr>
<tr>
<td>Endnotes</td>
<td>149</td>
</tr>
<tr>
<td>Appendix</td>
<td>164</td>
</tr>
<tr>
<td>Bibliography</td>
<td>198</td>
</tr>
</tbody>
</table>
Abstract

The duty of care which a teacher owes to the student to teach non-negligently has become a matter of considerable public concern in recent years. More and more, teacher caused instructional negligence is being questioned mainly by students and educational critics, but also by parents who feel that Ontario schools are not serving the best interest of their children.

Educational malpractice has been for the past decade a familiar aspect of the American education picture. Until recently, it did not receive great public attention in Ontario. It is becoming apparent to educators that questions regarding the quality of education and instructional failures may well become the focus of provincial concern. When the Charter of Rights and Freedoms came into effect on April 17, 1985, the possibility of educational malpractice cases moving to Canada became a reality. As yet to be determined, the Canadian Charter of Rights and Freedoms may arm students with legal rights ensuring that students receive the benefit of an education from teachers and that educational institutions meet a "minimum acceptable level of competency."

This thesis will focus on the reasons the courts have
declined to subject the teachers to liability for educational malpractice, yet at the same time, it will attempt to show that the application of the law of negligence to educational malpractice in the United States compared with the application of the law of negligence to educational malpractice in Ontario may result in rendering the decision in favour of the plaintiff.

Since a student's suit for failure to learn because of teacher negligence or incompetence cannot be won with formal legal arguments alone, this thesis will try to use social policy arguments demonstrating why there might be liability.

This thesis, therefore, stresses the imperative, present need for the understanding of teachers' legal liability with respect to educational malpractice. Both teachers and school administrators are now acutely aware of the risks and costs, but they need much more comprehensive understanding of liability and of the policies and procedures essential to address this problem.
Chapter I

Introduction

The Problem and Objective of this Study

A 1976 judicial ruling on the first educational malpractice case in the United States aroused the interest of legal and educational scholars. The many articles which followed over the last decade are clear evidence of renewed interest and effort put forth to find a satisfactory answer to the ever intriguing problem of why educational malpractice cases have not succeeded in the United States and why none have occurred in Ontario.

Recent studies and court decisions state that educational malpractice should not be imposed as a liability on school districts. Yet, questions regarding instructional negligence—whether a student can recover damages from his/her school board for his/her failure to learn because of teacher negligence—remain to this day.

If one recognizes, as Terrence P. Collingsworth does, that "the school is a major force in the child's life and the experience can either be a springboard to a useful life or a devastating experience leaving permanent scars," one should expect that the problem of educational malpractice be remedied to the satisfaction of both the student and the
The focus of this study is the general question of whether a student can sue a teacher or a school board for educational malpractice in Ontario. In legal terminology, the core question is whether a teacher in Ontario owes the student a legal duty to educate, or more specifically, a "duty of care."

This study will examine two hypotheses. Hypothesis I proposes to examine the thesis that the duty of care, as outlined in Regulation 262 Subsection 21 (a) made under the Education Act, may be used under the law of torts successfully to launch an educational malpractice suit. Consideration will be given to the "duty of care" regarding teachers and their pupils. Is there a contractual or an implied relationship between teachers and their students? This verification of the "duty of care" is of great importance, since it may explicate not only the causes of malpractice but also its applicability to Ontario teachers today.

Hypothesis II proposes to examine the thesis that the role of the Board of Reference in Ontario precludes educational malpractice suits against teachers.

This study, then, is an attempt to prove both hypotheses in a search for a more exact picture of why, as
Bollinger states, "educators have failed to anticipate and correct deficiencies within their profession prior to public pressure to do so."

It is hoped that the present work may furnish for Ontario teachers and educators indispensable data necessary for reflections on educational malpractice, and that it may arouse the interest of Canadian judges to consider the question of educational malpractice in a different manner from that of their American counterparts.
The legal encyclopedia, digests, restatements, legal periodicals, and collections of annotated cases provide the starting points for this study. From the information gathered from these sources it is possible to progress through the periodical indexes to legal and educational periodicals, treatises on law and education. Research papers by the National Education Association, the Canadian Federation of Teachers and the National Organization on Legal Problems in Education were used to analyze the most recent issues in educational malpractice.

The following hypotheses, topics and questions were used as guides in the collection of data:

1) Hypothesis I: Regulation 262 s.21 (a) made under the Education Act imposes on the teacher a legal duty to educate in Ontario. The verification of this statement depended mainly on the application of negligence law in Ontario with that of the Education Act. The main purpose of Hypothesis I was to determine whether Ontario teachers owed a duty of care to their students to teach non-negligently. 2) Hypothesis II: The Board of Reference in Ontario precludes educational malpractice suits against teachers. In order to prove the validity of this statement Boards of Reference
decisions from 1972-1985 were examined. The main objective in analyzing the Boards of Reference cases was to search for evidence of instructional negligence. Once the evidence was discovered, the frequency of instructional negligence occurring in Ontario was documented as proof that instructional negligence occurs in Ontario. 3) This thesis was analyzed using the following key words and phrases: duty of care, instructional negligence, public policy, tort law, professional standards, negligence, malpractice, sovereign immunity, and liability.

In order to find out why educational malpractice has not occurred in Ontario the following questions were asked:

4) Why have there been no educational malpractice suits in Canada?
5) Do governmental or sovereign immunity protect school boards from lawsuits in Ontario?
6) What role does the Charter of Rights and Freedoms play with respect to student rights in a possible malpractice suit?
7) How is negligence law applied in the United States and in Ontario by the courts in adjudicating educational malpractice suits?
8) Would public policy considerations prevent educational malpractice suits in Ontario?
The Boards of Reference cases, Ministry of Education documents (Education Act and Regulations), educational malpractice cases, and adjudication are the primary sources that were investigated.

The secondary sources consisted of law reviews, periodicals, books, newspapers, and finally, reports from the Canadian Medical Association and the Upper Canada Law Society.

After examination of legal and educational principles, this study analyzed the material in consideration of both hypotheses. The analysis contains the implications of the study as well as conclusions and recommendations.
Significance of the Study

Ontario teachers need to be aware that the legal mechanism for determining educational malpractice does exist and that strict adherence to professional standards may be their only safeguard. Furthermore, the emerging possibilities for educational malpractice creates a demand for a new kind of teacher that will differ substantially from those presently enrolled in the Faculties of Education. If this demand is met in time, and if those who care about the academic output show imagination and courage, the new teacher can contribute greatly to the improvement of educational quality.

When a popular cause of action in the education field emerges and is given publicity, such as an educational malpractice suit, one can anticipate a series of similar actions arising. Not only does this cause great uncertainty for teachers but it creates enormous difficulties in carrying out their daily prescribed classroom duties. Important as the foregoing problems may be, by far the most important relates to the difficulty in assessing the duty of care which a teacher in Ontario owes to the student. Because of rapid progress in the educational field it can be exceedingly difficult for educators and courts to be fair
and equitable in assessing the degree of duty of care which a teacher owes the student especially in a possible educational malpractice suit.

This thesis can be used to assist educators as well as lawyers to prepare for a possible educational malpractice suit in Ontario. The conclusions reached in this thesis, as well as their implications are important because the thesis:

1. shows how an educational malpractice suit has a reasonable chance of succeeding in Ontario;

2. reveals how the Board of Reference in Ontario precludes educational malpractice suits against teachers;

3. demonstrates the fundamental differences in tort law or theory as it is applied in the United States and in Ontario;

4. is an updated report on the current status of educational malpractice in Ontario and in the United States.
Definition of Legal Terms


**action**
- a legal proceeding to enforce one's rights against another.

**appeal**
- a process whereby the decision of a lower court or board is reviewed by a court higher in the judicial structure.

**breach**
- to violate or break; for example, the breaking of a statutory provision or the term of the contract.

**Civil Law**
- a system of law based upon a code, such as the Civil Code of Quebec; or the branch of law that deals with private matters such as tort and contract rather than criminal law.

**Common Law**
- the system of law that originated in the United Kingdom and that is the basis for the legal systems of the Commonwealth countries and in the United States. Common law uses precedent for establishing legal rules and principles. It is continually developed through court decisions (as distinguished from the more static statutory law).

**damages**
- the amount of money awarded by a court to be paid by the defendant to the plaintiff as compensation for loss or damages suffered.

**defendant**
- the person against whom civil proceedings are brought by the plaintiff or the person who is accused of a crime in criminal proceedings.
dissent - the minority opinion rendered by judges in an appeal case. This opinion expresses disagreement with the conclusion of the judges in the majority. The dissenting opinion has no direct legal force but may be used persuasively.

due process - a doctrine that requires that all persons be treated in accordance with proper legal protections.

in loco parentis - literally, "in the place of the parent"; the term refers to a person, such as a teacher, who takes the place of the parent for certain purposes.

liability - an enforceable legal obligation. A person is liable for breaches of civil or private law but guilty of a breach of the criminal law.

litigation - the contesting of a matter in court; a lawsuit.

malpractice - the negligent misconduct of a professional person resulting in an injury to the client or to the court.

negligence - the failure to take reasonable care in the circumstances to prevent harm to another. In order for negligence to be actionable it is necessary that damage or loss actually result from the negligent act.

plaintiff - the party who commences legal proceedings by way of an action to recover damages to compensate for loss or harm caused them by the defendant.

precedent - a previous court decision that serves as an authority for a later case based on similar facts. The use of precedent is one of the distinguishing features of the common law.
regulations - secondary legislation passed by the government to help carry out purposes of the statute in question.

relief - the remedy sought for a civil wrong.

stare decisis - the practice of deciding present cases according to principles of previous cases; use of precedents.

statute - an act of legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.

statutory law - that which is introduced or governed by statute law, as opposed to the common law or equity. Thus, a court is said to have statutory jurisdiction when jurisdiction is given to it in certain matters by act of the legislature.

tort - civil wrong or injury, other than a breach of contract, for which the injured party is entitled to recover damages.

vicarious liability - the liability of one party for the fault of another.
Limitations

This study is concerned exclusively with potential educational malpractice suits involving teachers in Ontario. An evaluation of the merits or ethical concepts of this matter is beyond the scope of this study.

This thesis is not an attempt to solve all the problems of litigation or to give interpretative ideas concerning educational malpractice, although case studies are recorded which serve as a source of information for educational administrators, teachers, and the general public. This study provides an enumeration and representative summary of legal decisions rendered by the courts regarding educational malpractice suits in the United States and the possibility of their occurrence in Ontario.

Other limitations imposed are:

Major: 1) Educational malpractice cases used for this research are from 1976-1986.

2) Ontario Boards of Reference cases used for this research span from 1972 to 1986.

Minor: 1) Only principles of tort law (negligence and malpractice) in Canada and in the United States are examined in this study.

2) Cases and statutory material used have been those
reported through traditional legal sources as well as those from general reading of newspapers, magazines, and journals.

3) This study does not specifically concern itself with malpractice affecting university or college students.

4) The concentration of this research is in Ontario; however, U.S. cases are used to study educational malpractice trends.
Review of Literature

This section proposes to give some insight into the problem of educational malpractice through the review of current literature. A review of literature on educational malpractice reveals a wealth of contradictory themes. Many writers, and especially those whose views can be classified as essentially traditional, seem to approach educational malpractice cautiously.

Many writers point to the fact that in recent years medical and hospital and product liability insurance costs have dramatically escalated, resulting in greater risk taking in the public sector.\(^2\) The trend towards increasing numbers of lawsuits against teachers in the United States and the enormous increase in the size of court awards in Ontario should be matters of concern to the Ontario Federation of Teachers and to its members. As well, in Ontario the recent much publicized difficulties in the casualty insurance industry have led to a great deal of speculation and public debate about the high-cost of commercial insurance coverage.\(^3\) There are some who have questioned whether large court awards can be blamed but it is certainly the Ontario Teachers' Federations' experience with teachers' professional liability protection that
enormous judgements, along with steady increasing incidence of claims, are the most significant contributing factors.

Why the incidence of malpractice lawsuits against teachers in Ontario may continue to increase can only be a matter of speculation. Perhaps it is simply a part of the mood of antiprofessionalism which has manifested itself by an increase of litigation against all professionals.4

Every year, education in Ontario, like any other significant social enterprise of comparable magnitude, is affected by a considerable number of decisions of higher courts in the province. The rights of parents to control the education of their children is deeply engraved in the common law.5 Judicial precedent dictates that legislation which changes the common law is to be narrowly construed. Parents' rights must yield only when their exercise impedes general welfare.

Review of court decisions in the United States during the past century and a half reveal quite a change in the values of the people. These decisions may have a considerable impact on the educational process in Ontario. More specifically, the courts in the United States have evolved from a determination of the rights of adults to a determination of the rights of students. In 1955, the United States Supreme Court ruled that education is a
fundamental human right:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society. It is required for the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

As a result of this ruling, educational malpractice cases started springing up in the United States in the early 1970s. Public dissatisfaction with educational institutions has been well documented in the United States during the last decade and continues to be expressed.

Eugene T. J. Connors notes that there is apparently no published source that provides an accurate accounting of tort liability suits against educators. However, Connors does make an attempt to establish the number of educational malpractice cases: "The tort cases reported in the law
books are only those that have been appealed from a trial court. Obviously this is a small percentage. I estimate that one third of the suits brought against educators are settled out of court in the U.S.A. because the teachers were so obviously negligent that the insurance companies involved did not want to face the juries. I also estimate that approximately one third of the suits brought against educators are routinely dismissed as being trivial, because the teachers were obviously not negligent. That leaves 33% of the suits resulting in injury trials where the issue of negligence is real. Of that number, about one-half are appealed. There are between 200 and 500 appealed cases reported every year; this means that there are probably between 1,200 and 3,000 suits brought against teachers or administrators every year. Even though I estimate that only one third of that number are decided by juries, there is still a great number of litigation."9 Furthermore, there is a growing movement towards accountability of educational institutions. In the process of compensating and adjusting, the burden of responsibility for the academic success of students shifted subtly to the school and society. Failure used to be the student's fault; now increasingly, it seems, at least in part, to be the fault of the system. "Cries for cost effectiveness, for increased
productivity, and for greater student achievement" has given
rise to educational malpractice suits. Damage suits against
school districts are being discussed by education attorneys
and educators, based upon theories of educational
malpractice, fraud, misrepresentation, contractual
warrantees and other legal theories. Despite the cultural,
political, and social differences between Canada and the
United States, writers feel that the propensity of lawsuits
in the United States against teachers may ultimately
contribute to the development of a judicial revolution in
education policy of the same scope and magnitude in
Ontario.

There is some controversy over the practicality of
entertaining educational malpractice suits.10 Some
critics maintain that, in actuality, since there are very
few significant malpractice cases, and since none have
occurred in Ontario, there should be no immediate cause for
alarm.11 This situation, however, is ultimately an
empirical question that cannot fully be resolved on an
abstract or deductive basis. It is relatively clear that
educational malpractice cases will continue to arise and
that they present a formidable challenge to professional
educators and to the education system as a whole. The
important question, however, concerns criteria of
significance with which to analyze the existing educational malpractice cases. It is difficult to be very sure of such criteria in the absence of more extensive research of the concepts and hypotheses of general negligence theory. Nevertheless, educational malpractice suits have far-reaching implications since the notion of instructional negligence is very important to the evolving education system.

The law of torts is complicated, sometimes illogical, and frequently very technical. These technicalities have created difficulties for plaintiffs pursuing educational malpractice suits stemming from a variety of reasons focusing primarily on the court's reluctance to entertain novel tort concepts. This concern is reflected in the numerous articles and books currently appearing in the popular press and educational literature.

One of the more recent books on school law which sheds some light on "educational malpractice" is Wayne Mackay's Education and Law in Canada. (Toronto: Edmond Montgomery, 1984). Mackay's book provides an in depth examination of the relationship between law and education in Canada. With respect to educational malpractice, Mackay does not expect a flood of litigation even if educational malpractice suits were recognized by the Canadian courts as a cause of action.
To substantiate this claim, Mackay generalizes that Canadians are "reluctant to sue" and that they fear the "high cost of litigation."

The book falls short in that it does not devote more time to the issue of "educational malpractice." Mackay bases his prognosis on the fact that a) no educational malpractice cases have succeeded in the United States, and b) none have occurred in Canada. Had Mackay examined the Charter of Rights and Freedoms with respect to students' rights (i.e., the possibility of suing teachers for instructional negligence), he may have realized its considerable impact on future litigation in Canada.

William F. Foster's "Educational Malpractice: Educate or Litigate" (Canadian Journal of Education, 11:2, 1986) is a Canadian view of educational malpractice in the United States. Foster claims that "it would appear that it is only a matter of time before Canadian educators are confronted by such claims." Foster discusses educational malpractice in the United States and then forecasts possibilities for such action in Canada. He notes that educators are becoming aware of real possibilities of being sued for poor pedagogical performance. Moreover, Foster foresees the development of standards which will place teachers in a position similar to that of doctors and lawyers.
one would agree with Foster's conclusions or not, the deep experience which led Foster to those conclusions are worth the attention of anyone concerned with the serious problems he so well describes.

In addition to its readable style, the other strength of the article lies in its thorough but general treatment of educational malpractice. The only criticism of the article is that Foster does not explain why the "Canadian judiciary will be more imaginative, responsive, and adventurous than their American brethren" when rendering decisions for educational malpractice suits.

Foster's earlier article "Educational Malpractice: A Tort For The Untaught" (U.B.C. Law Review, Vol. 19:2, 1985) explores the evolution of educational malpractice in the United States. The issue of educational malpractice has been one of the most troublesome in the educational field. Foster's aim is to "assess the role, if any, the tort of negligence can play in providing redress to a student who suffers non-physical harm as a result of receiving, in whole or in part, an inadequate, incompetent and negligent education." Our society has provoked increasing concern about liability on the part of teachers. Foster's article outlines these concerns and as a result of his analysis he concludes that in Canada "no valid policy
reasons exist for the refusal to entertain educational malpractice suits." Unfortunately, Foster neglects to explore and compare Canadian legal theories with respect to educational malpractice with tort theory in the United States. Nevertheless, the article is certainly an invaluable resource for any teacher today.

H. N. Janisch's article "Legal Liability For Failure to Educate," (The Advocate, Vol. 38, Part 6, Oct.-Nov. 1980, p. 492) draws on general historical sources, leading educational theory, and judicial decisions to produce a thorough account of educational malpractice. Unlike treatises on the subject, this volume devotes a generous amount of time to discussing Trustees of Columbia University v. Jacobsen case in which Jacobsen sued Columbia University for misrepresentation. Subsequent pages, based on wide acquaintanceship with the sources, deal with the concept of educational malpractice and an implied contract between the student and the university.

A particularly valuable feature of the article is its presentation of malpractice in the form of case presentations and descriptions of tort law.

Perhaps the first major study, and certainly one of the most often cited studies is an article appearing in the "University of Pennsylvania Law Review," Vol. 124, 1976,
entitled Educational Malpractice. The author analyzes the problem of educational malpractice, and provides a step by step blueprint on how to launch successfully and win an educational malpractice suit. This article, however, does not take into consideration that, despite the existence of all the necessary legal ingredients needed in a successful educational malpractice suit, the basic concern of why malpractice suits have failed is not dealt with adequately.

Terrence P. Collingsworth's article on "Applying Negligence Doctrine to the Teaching Profession" (Journal of Law and Education, Vol. 11, No. 4, pp. 479-505, October 1982) reviews the current cases on teacher negligence and attempts to isolate the reasoning behind the courts' refusal to recognize a cause of action for educational malpractice. Furthermore, Collingsworth develops a hypothetical case to illustrate that ordinary principles of negligence can be applied to an educational malpractice case. Collingsworth, however, does not concern himself with the problem of trying to overcome the obstacles to a successful malpractice suit.

Dorothy L. Bollinger's Ph.D. dissertation "Educational Malpractice: The Legal Accountability of Educators" (1984) "examined the role the judicial system has played in the search for a standard for competent instruction in schools."
educational malpractice cases and concludes that

"if the purpose of the educational malpractice litigation is to prevent instructional injuries and improve the education received by students, it would seem less expensive, more humane and of greater benefit to children for educators to improve their professional ethics and performance so that poor quality instruction and student instructional failures do not occur and for non-educators to support the importance of education."\(^{15}\)

This ambitious intention is fulfilled by the author despite the large scope of the subject and the frequent changes in the field. Few books have specifically addressed the subject of educational malpractice which has given rise to controversial legal issues.
Chapter II

Educational Malpractice: The American Experience

The earliest recorded litigation case against teachers resembling educational malpractice occurred in the year 399 B.C. when Socrates, an eighty year old Athenian teacher, was charged with "corruption of the young." Moreover, "Socrates inculcated disrespect to parents and relations generally by pointing out that mere goodwill was useless without knowledge. One did not consult one’s relations in case of sickness or of legal difficulties, but the doctor or lawyer. The effect of such teaching, it was declared, was to make the associates of Socrates look so entirely to him, that no one else had any influence with them."¹⁶

Since then, "educational malpractice cases have been brought out of general frustration of parents, students and the public in regard to the quality of education received and the lack of diagnosis, misdiagnosis, and inappropriate placement of students in programs by educators."¹⁷

Parents have assumed a high correlation between educational attainments and social and economic success for several decades. In the minds of parents, success in the outside world has become so dependent upon school success that schools are thought of as the prime instruments of
social mobility. When these expectations of attaining social status are not met, dissatisfied parents in the United States (on behalf of their children) have turned to the courts to settle problems of functionally illiterate students.

Thus, the crisis of educational malpractice in the United States and potentially in Ontario appears to lie in the disparity between expectations and achievements. More specifically, can success in the basics (i.e., reading, writing and arithmetic) for several consecutive years assure success in life? In other words, can success in reading by itself assure economic and social success? While this may no doubt be true, it is in itself but a symptom of deeper causes. Courts, legislatures, and boards of education seem confident and sure of appropriate responses to educational malpractice. Presently, the courts in the United States seem to have devised uniform strategies to contain it and have acquired for the moment an understanding on a position of influencing educational policies.

In order to understand fully the current status of educational malpractice, it is significant to examine the various cases which have occurred in the United States and then to determine the impact which they may have in Ontario. The question here is: is there a cause of action for
failure to teach? Less than a decade ago, educational malpractice suits were virtually unknown, but since 1976 there have been at least three initial major cases and several minor cases before the courts. Malpractice is an area of tort law, one that refers to negligent practice in the rendering of professional services. A legal definition of educational malpractice is yet to be codified, but the term can be assumed to involve professional negligence or the failure to provide services that can be reasonably expected.22

Educational malpractice suits seek to redress students who have not received full educational benefits when teachers negligently or intentionally, "failed to conform to minimum standards of professional competence."23 All educational malpractice cases to date (except the Ryerson case in Ontario which has yet to be adjudicated) occurred in the United States and have been argued unsuccessfully before the courts.

While damage suits have been initiated in the United States against school districts when graduates have failed to acquire the basic skills, to date none has been successful. There are four basic reasons for denial of relief for educational malpractice in the United States:
1. no workable standard of care could be ascertained (no legal duty to educate);

2. the reason for the failure to learn could not be definitely identified;

3. the value of the harm was difficult to determine;

4. the spectre of a flood of similar suits which would overwhelm already strained courts and public school systems was envisioned (public policy considerations and governmental immunity).

Thus, the plaintiff's claim of negligent instruction and evaluation, i.e., educational malpractice, is not cognizable under the United States Constitution. In Donahue v. Copaigue Union Free School District the Courts of Appeals affirmed the order of the appellate Division holding that "there is no cognizable cause of action for breach of a constitutionally imposed duty to educate since the Constitution merely places the obligation of maintaining and supporting a system of public schools upon legislature." In the majority, if not all, of the educational malpractice suits, the courts citing public policy considerations have tended to render the judgement in favour of school officials. The following is a list of judicial decisions regarding educational malpractice cases launched in the United States since 1976.
<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>*Peter W. v. San Francisco Unified School District,</td>
<td>1976</td>
<td>Dismissed</td>
</tr>
<tr>
<td>*Donohue v. Copiague Union Free School District,</td>
<td>1979</td>
<td>Dismissed</td>
</tr>
<tr>
<td>391 N.E. 2d 1352 N.Y.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>*Hoffman v. Board of Ed.,</td>
<td>1979</td>
<td>Dismissed</td>
</tr>
<tr>
<td>*These initial educational malpractice suits remain essential and are</td>
<td></td>
<td></td>
</tr>
<tr>
<td>referred to by most courts when considering similar malpractice</td>
<td></td>
<td></td>
</tr>
<tr>
<td>claims against teachers.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loughran v. Flanders 470 F. Supp. 115.</td>
<td>1979</td>
<td>Dismissed</td>
</tr>
<tr>
<td>Deriso v. Cooper 272 S.E. 2d 273-275.</td>
<td>1980</td>
<td>Dismissed</td>
</tr>
<tr>
<td>Helm v. Professional Children's School, 431 N.Y.S. 2d 246.</td>
<td>1980</td>
<td>Dismissed</td>
</tr>
<tr>
<td>Sandlin v. Johnson 643 F. 2d 1027.</td>
<td>1981</td>
<td>Dismissed</td>
</tr>
<tr>
<td>Paladino v. Adelphi University 110 Misc. 2d 454 N.Y.S. 2d</td>
<td>1982</td>
<td>Dismissed</td>
</tr>
</tbody>
</table>


Tubell v. Dade County Public Schools 1982 Dismissed 419 So. 2d 389.


Snow v. State of New York 1983 The court granted damages ($1,500,000) based on the medical malpractice claim and refused damages based on the educational malpractice claim. 98 A.D. 2d 442.


The above cases reveal that the courts have been reluctant to recognize educational malpractice as a cause of action without legislative direction on the grounds of public policy. Moreover, courts have typically steered away from academic issues such as grading or promotion standards, regarding these matters as being properly within the area of expertise of educators.
"In the United States teachers once held the key to learning in their classrooms. They were the experts who, it was assumed, knew their classes and understood what was needed in the way of instruction." The educational history of the United States is replete with examples of stringent ordinances establishing high standards of conduct for those in charge of children. Since the formation of good character and citizenship have been historically dominant goals of schools, it has been a natural consequence to require moral excellence in those who staff them. In return for upholding public trust, teachers have been accorded singular and unquestionable status. Viewed in this light of contemporary developments, this attribution of status has increasingly become the subject of considerable controversy and scrutiny. "Teachers must satisfy not only the needs of the children but also legal directives. Specific competency and graduation standards have been mandated by the states." 

Educational malpractice is a relatively new concept in law but it is one which has been argued before the courts with vigor and conviction in recent years. John C. Hogan, taking the entire field of educational jurisprudence as his basis, concludes there has been a "major reform in outlook towards schools and that more and more citizens are bringing
the courts into the schools and the schools into the courts." Hogan establishes that in more than one hundred years between 1789 and 1896 there were "3,096 cases which have affected the organization, administration, and programs of the schools." By contrast in the five year period between 1967-1971, Hogan shows that there were 3,510 such cases. Almost five hundred more cases in this five year period (3,510) than in the previous one-hundred-year period (3,096). "Not all of these are suits by, for, or about teachers, but we believe those numbers reflect the trend in the classroom field and may, in fact, underestimate the magnitude of the problem." 

A suit for educational malpractice is an example of "tort action." A tort is considered to be "civil wrong other than a breach of contract which the law redresses by award of damages." The most common torts nowadays are those arising in automobile accidents, where one driver sues another for injuries or damage to his car. Cases of medical and legal malpractice are tort suits. 

The law of negligence, which comprises a large part of the law of torts, includes various kinds of wrongful actions that result in injury or damages. Over the centuries, the courts have developed firm guidelines for handling them. Though a tort always rests on one person having wronged
another, the harm itself is not enough to constitute a tort. In order for the courts to act, the wrong and its surrounding circumstances must also fit into the legal rules that define a tort. As a general legal principle, civil liability for negligence will accrue if one person causes damage to another through a breach of duty owed to that person. Thus, in order to hold a teacher liable in tort action for instructional negligence the plaintiff must prove these four elements:

1. that the defendant--the person whom he is suing--owed the plaintiff a duty of care;
2. that the defendant was negligent in performing that duty;
3. that the plaintiff was injured but not necessarily in body, for the injury can also be financial, to reputation, and the like;
4. that the negligence more or less directly caused the injury.

In educational malpractice, it could be argued that there appears to be no question as to injury, the third element of tort. A student who graduates from high school unable to read or write will be disadvantaged throughout life. And the fourth element is also satisfied, for the student's illiteracy has to be at least partly the school's fault especially, as sometimes happens, when the school seemed unaware that the student was having trouble. In that
situation, there can be little doubt as to the school's negligence, the second element.

Nevertheless, "all educational malpractice cases so far have failed." The obstacle each time has been the first element, the question whether it is the school's duty to educate the student. One of the reasons why educational malpractice suits have failed in the United States is because such a duty does not exist in the law.

Malpractice suits have occurred in higher education, in that students are claiming contract damages for universities' failure to provide bargained for services. The earliest recorded litigation case in the United States against a university or school resembling educational malpractice, contending that "the university is under a legal obligation to impart wisdom", occurred in 1959 and is known as the Columbia University Case.

The plaintiff, Ray G. Jacobsen, "sought not only to avoid paying the fees he owed to Columbia University, but counterclaimed for $7,000 damages." Jacobsen claimed that the University had promised that it would teach him "...wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, beauty, and similar virtues and qualities; that it would develop the whole man, maturity, well roundedness, objective thinking and the like;
and because it had failed to do so it was guilty of misrepresentation.\textsuperscript{40}

The court rendered the decision on behalf of the University. In analyzing this decision, Janisch states that "no matter how much one may agree with the court's holding that a university was not held liable for failing to teach wisdom, The Columbia University Case should also serve as a caution against the making of platitudes and promises which can come back to haunt."\textsuperscript{41} Two further examples are worth noting. Veronika Nicolas sued George Washington University claiming that the course which she took in architecture was "pure junk". She settled out of court for the balance of her tuition.\textsuperscript{42} The University of Bridgeport was sued by Irene Tanniello for monetary damages claiming that one of her required courses in secondary education was "worthless". Her case was dismissed on the grounds that "education was not a consumer service in the ordinary sense of the word."\textsuperscript{43}

In the famous case of \textit{Peter W. v. San Francisco Unified School District} (1976), the teachers and the board were sued because a high school graduate could barely read. It was contended that the school system, through the teachers, negligently and carelessly "failed to use reasonable care in the discharge of its duties to provide (him) with adequate
instruction, guidance, counselling and/or supervision in basic academic skills such as reading and writing...and to exercise the degree of professional skill required of an ordinary prudent educator."51 The plaintiff claimed that such conduct amounted to professional malpractice, and sought to hold the defendant liable for the foreseeable consequences of such negligence.

Peter W. claimed that he graduated from high school with a fifth-grade reading ability, an education that "fit him only for manual labor." The school failed to detect his reading problems and correct them, he said, and therefore, was negligent in its duty. The suit was based on three basic tort theories, negligence, false representation and breach of statutory duty. The grounds of the school's liability were cited as follows.

1. Defendants failed to provide the plaintiff with adequate instruction, guidance, counselling, and/or supervision in basic academic skills and negligently failed to ascertain accurate information as to plaintiff's educational progress and abilities. (General negligence).

2. Defendants falsely represented to the plaintiff's parents that he was performing at or near grade level in reading and writing and was not in need of special or remedial assistance, whereas the plaintiff was, in fact,
performing drastically below grade level and in great and severe need of special assistance. (Misrepresentation).

3. Defendants violated relevant provisions of the California Education Code charging school authorities with the duty of keeping parents accurately informed as to the educational progress of their children, and that without such accurate information plaintiff's parents were unable to take any action to protect their minor son from harm suffered. (Breach of statutory duty).

4. Defendants violated provisions of the California Constitution and Education Code charging defendants with the duty to educate the plaintiff and other students with basic skills of reading and writing. (Breach of statutory duty).

5. Defendants violated relevant provisions of the California Education Code providing that no student shall receive a diploma or graduation from high school without minimum standards of proficiency in basic academic skills. (Breach of statutory duty).

6. Defendants violated provisions of the California Education Code requiring inspection and revision of curriculum and cooperation of the schools to promote the education of pupils enrolled therein. (Breach of statutory duty).

7. Defendants violated relevant provisions of the
California Education Code requiring school districts to design the course of instruction to meet the needs of individual students. (Breach of statutory duty).

8. By the acts and omissions of the defendants, their agents, and employees, the plaintiff has been deprived of an education guaranteed by the U.S. Constitution and the laws and the constitution of the State of California. (Breach of constitutional duty).

9. The State Board of Education and its agents and employees failed to properly discharge their statutory duties, including promulgating a minimum of course of instruction to meet the needs of pupils, minimum standards of proficiency for graduation from high school, and administration and supervision of the educational system in California. (Breach of statutory duty).

In rendering its decision, the court decided that "classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might and commonly does have his own emphatic views on the subject. The injury claimed here is Peter W.'s inability to read or write. Substantial authority attests that achievement of literacy in the schools, or its failure,
are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental: they may be present but not perceived, recognized but not identified."46

The case which Peter W. lost on appeal failed in part because the duty of the school district had not been specified in as precise manner as it would be under a minimum competency law. The court held that "to hold (school officials) to an actionable "duty of care" in the discharge of their academic functions would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigations but for which permanent solution has yet appeared...the ultimate consequences, in terms of public time and money, would burden them and society beyond calculation."47

The court's decision implies that a person who has been adequately educated by the school system has no cause of action in tort against the public authorities who operate and administer the system. Moreover, the court ruled that there was no workable "duty of care" and no degree of
certainty that the plaintiff suffered injury within the meaning of the tort law of negligence. Thus, in order to prove negligence, a plaintiff must show that the defendant owed the plaintiff a legal duty to perform with reasonable care.

In Peter W., the appeals court concluded that the judicial recognition of a breach of duty to educate could only be established by public policy considerations. Among the factors that influence the court to establish such a duty to educate are the relative ability of the parties to meet the financial burden of damages resulting from a former student's injuries and the role imposed by statutes and school district policy upon the defendant school district. After assessing these factors, the court could find no state law or policy of the district that could conceivably be adduced to establish a duty to educate. Therefore, the Peter W. case failed because the court determined that, because of public policy, educational malpractice suits should not be permitted.

In a similar case, in New York, of Donahue v. Copiague Free School District (1979), the Appellate Division of the Supreme Court suggested that many factors account for educational achievement or lack of it, and they are not all within the responsibility or control of the school.
The court pointed out that "the practice problem raised by a cause of action sounding in educational malpractice are so formidable that...such a legal theory should not be cognizable in our courts. These problems...include the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning of deficiency of the plaintiff student."\(^{51}\)

There is one vital difference between the Peter W. and the Donahue decisions. The New York Supreme Court, Appellate Division, did not completely rule out the possibility of future malpractice suits. The courts suggested that if more than a single individual suffers injury as a result of educational malpractice, a negligent suit might be successful. "The determination does not mean that educators are not ethically and legally responsible for providing a meaningful public education for the youth of our State. Quite the contrary, all teachers and other officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does not mean, however, that they may not be sued for damages by an individual student for an alleged failure to learn to reach certain educational objectives."\(^{52}\)

The dissenting opinion contended that Donahue had stated a case for educational malpractice by arguing that
the school district had a duty to educate and qualify students for the high school diploma. The Donahue dissent emphasized that denial of the graduate's complaint, where the school district was in direct contravention of a statutory mandate, would only serve to sanction misfeasance in the educational system.53

The line of reasoning in the Donahue dissent suggests that statutory or public policies of a school district may give rise to a case of educational malpractice where the mandated responsibilities have not been met by a school district.

The main obstacles to the success of educational malpractice cases is the question of duty as well as public policy considerations. All educational malpractice cases in the United States have failed because nowhere in the U.S. law does it specify that it is the school's duty to educate the student. To find a legal duty in the Peter W. and Donahue cases would bring the cases squarely within tort law and would thus make schools liable for educational malpractice.54 The possibility of many such suits was anticipated by the court. Such suits would have considerable impact on the public, because a great many illiterate students might recover substantial damages from public funds. If doctors, lawyers, and other professionals
are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators.

The questions raised in introducing the concepts of malpractice into education are many: "Can we demonstrate a functional relationship between students' learning and their instruction? Can educators themselves, much less the courts, agree on a single set of professional standards of instructional competence? How valuable is a high-quality education, and can its value be translated into a dollar figure for the payment of damages."55

These questions are relevant when considering litigation for malpractice suits. "Yet, as the number of malpractice suits increases, the chances rise that these and other thorny questions must one day be addressed."56 Moreover, "the rate of increase in the number of cases of educational malpractice suggests that it may be only a matter of time before liability for malpractice becomes part of the U.S. education scene. The time to confront this issue is now."57

Educational malpractice cases, despite their failure, show that society has become increasingly aware in demanding compensation for those wrongfully injured. Despite the vague and often nebulous definition of incompetence, it is
evident that "a teacher who deliberately and continually humiliates students, who teaches clearly improper grammar, or who teaches in an incomprehensible manner obviously causes educational harm to students. To deny the effect of the teacher under these circumstances is also to ignore what the teacher accomplishes."58

Admittedly, the learning process is difficult to evaluate. It may be easier to find a doctor liable for malpractice than a teacher responsible for a student not reading at a prescribed level. The abstract quality of education has protected teachers for centuries and will ultimately curtail many actions for failing to teach. However, the old cliches that all the teacher can do is make education available simply will not protect the teacher any longer. Certainly no student should be cheated of opportunities to learn as efficiently as possible. Thus, courts in the United States are demanding that the teachers produce. And standardized tests can provide the courts with hard evidence of teacher production.59

"Teachers claim, and have been accorded the status and prerogatives of professionals with tenure, limited entry to their field, and pay that varies with academic training and experience. And most teachers would agree that by virtue of their training and experience they have certain skills not
generally shared by laymen which are essential to competent teaching." The movement for performance certification represents an inevitable demand by consumers and concerned educators for better teaching. The most humane, least punitive way of waging the campaign is to block access to those who are either unsuited or ill prepared for the art of teaching before they become permanently lodged in the system.

As the relationship between the student and the school is more specifically defined by statutes and regulations establishing testing and remedial programs, which dictate academic and life-skill competencies and set down requirements for the granting of diplomas and so on, the more it is likely that the school district will be held liable for a student's failure to achieve those specified competencies. Until 1978, the public policy arguments appeared to balanced in favour of the school districts. However, in 1978, a case representing a sufficiently gross breach of statutory duty to educate resulted in a judicial tipping of the scales towards school district liability.

Hoffman v. Board of Education of City of New York is a historical landmark in educational malpractice. When Hoffman was a child of five, he was administered a Standard-Binet Intelligence Test and scored 74, one point below the
cutoff score for placement in regular classes, and he was placed in a class for mentally retarded pupils. Although the school psychologist suggested that Hoffman be retested within two years, "he was not given another I.Q. test until he had spent eleven years in classes for the mentally retarded. At that time, Hoffman's tested I.Q. fell well within the normal range. There was some indication that his low score at age 5 might have been due to a severe speech problem." Originally, the Supreme Court, Trial Division, ruled in favour of Hoffman, awarding him $750,000 in damages because of the malpractice of the school officials. The Supreme Court, Appellate Division, in New York upheld the decision but ordered the jury verdict reduced to $500,000. The Court of Appeals (the highest court in the state) reversed the decision, however, and ordered the case dismissed. The court apparently chose to ignore the Appellate Division's observation that the harm was not caused by error in public policy formation. The court apparently believed that all educationally related actions were beyond judicial scrutiny. "The courts seem willing to subject the State treasury to the damages assessed in the supervision-physical injury case, but have expressed a fear that the educational malpractice cases would place an incalculable burden upon the states in terms
of time and money.\textsuperscript{67}

The Hoffman case appears to establish that a school district can be held liable for negligence where the negligence of the district is extreme and the duty to educate is sufficiently clear.\textsuperscript{68} It may go too far to say that minimum competency testing will establish a legal duty on the part of a school district to educate and qualify every student for a diploma. However, a minimum competency program will create statutory and school district policy standards that could be the basis for an educational malpractice suit.

As a result of the Hoffman case, the following standard for defining educational negligence/malpractice was set forth by the New York Supreme Court:

"Simply stated, negligence is lack of ordinary care. It is failure to exercise that degree of care which a reasonably prudent school system would have exercised under the same circumstances, (whether) from doing an act which a reasonably prudent school would not have done under the same circumstances...One who has had special training in the field of law and education has the duty, which acting in his professional capacity towards others who rely on his special skills, to exercise that skill and degree of care which others in the same profession in the community would ordinarily exercise under the same circumstances. If you find that the defendant through its employees failed to exercise that skill..."
and degree of care which other educators in the community would normally have exercised under the same circumstances, you will find the defendant negligent."69

Several recent educational malpractice suits reveal the courts' adamant stand in rejecting educational malpractice as a legal remedy for failing to educate.

In 1981, the Supreme Court of Alaska dismissed an educational malpractice case and refused to allow damages for an apparent misclassification of students with dyslexia.70 In its reasoning the court felt that "the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education. The level of success which might have been achieved had mistakes not been made, we believe, be necessarily incapable of assessment, rendering legal cause an imponderable which is beyond the ability of the courts to deal with in a reasoned way."71

During the same year, the Commonwealth Court of Pennsylvania discarded a complaint by a student that "she had suffered unduly when she failed in her senior year a health education class that included material dealing with human sexuality."72 Once again, the court ruled in favour of the school district justifying their decision on a 1949 ruling which held that "the discretion of the school
authorities will be interfered with only when there is a
clear abuse of it, and the burden of showing such abuse is a
heavy one."73

In a 1982 case in Maryland, a discontented plaintiff
complained that "he had been placed in a second grade class
while being forced to repeat first grade material."74 As
a consequence, the plaintiff complained that it caused,
"embarrassment, learning deficiencies, and depletion of ego
strength."75 Once again, the court relied on precedent
citing public policy considerations of the Peter W. case in
rendering its decision against educational malpractice.

In 1982, the Supreme Court of Montana heard an
educational malpractice case which "gives some credence to
judicial acceptance of educational malpractice."76 The
plaintiff claimed that "she had been damaged by placement
in a special education class." Initially, the court voted
4-3 in favour of the plaintiff, stating that schools do have
a duty of care in testing and placing exceptional students.
However, a concurring opinion filed by the "swing vote,"
that of Chief Justice Haswell, rationalized the difference
between this case and the Peter W. case. Haswell notes that
the issue in this case was "not a question of educational
malpractice but rather a denial of due process rights."77
Moreover, Haswell stated that "educational malpractice...is
not a ground for action." Furthermore, the judges cited public policy reasons as the major factor in precluding educational malpractice as a legal course of action.

The most recent decision handed down on educational malpractice occurred in New York in 1984. The plaintiff, Frank Torres, sued those responsible for his education for "misdiagnosing him as retarded when, in fact, his reading problems stemmed from his inability to understand English." Once again, the court ruled 4-3 against the plaintiff affirming that the court must avoid "reviewing the wisdom of educators' choices and evaluations."80

"To date there has been no successful suit for misclassification in the United States, and no such legal action has been launched in Canada." Perhaps the reason that malpractice suits fail to surface in Ontario is that the critical factor in case of teacher dismissal for incompetence may actually be the competency level of administrators involved and the way in which the "board of reference" (judicial review which ensures the propriety of dismissal) handles the entire process. Many educational malpractice suits against teachers fail to surface because of the administrator's reluctance to involve his board in a lawsuit. Malpractice suits against teachers are often long,
drawnout, complicated, and expensive affairs. As a result, most administrators would rather dismiss an incompetent teacher. Instead, teachers in Ontario are given a "reasonable time period" in which they must show that improvement in the teaching ability has been made. It is imperative, therefore, that the school board and administrators adhere strictly to the legal mandates in dismissal proceedings.

Although there exists some uncertainty in the courts with regard to dismissal of incompetent teachers, some teachers are being dismissed. Often a critical issue in a successful or unsuccessful dismissal case is the competence level of the board of education, more particularly, of its agents, the administrators who prepare the case. Mackay states that "these practical problems, coupled with the high cost of litigation and the general reluctance of Canadians to sue, suggest that there will not be a flood of educational malpractice cases even if such a cause of action were recognized by the Canadian courts. The floodgates of litigation simply are not likely to be opened." Despite Mackay's assertion, claims of malpractice in the legal and medical professions are filed some "ten to fifteen times more often than are education suits. But the rate of increase in their numbers parallels that of
education. Malpractice suits in law and medicine as in education, are multiplying 1.4 times every five years. 84

Because the teacher's effect on pupils is integral in the education process, malpractice suits will continue to grow in number and intensity in the United States and possibly emerge in Ontario. The importance of this effect has been commented upon recently by the Missouri Court of Appeals: "Teachers are unique in society. A teacher works in a sensitive area; in his environment he shapes the attitude of young people toward the society in which they live. He is afforded special privileges—academic tenure. But he also bears responsibilities. And with definite bounds, he is subject to certain reasonable controls of the board by whom he is employed, which has the responsibility for providing a good education for all young people within its jurisdiction." 85

Practitioners in professionalized occupations, by nature of their standards of professional preparation and performance, have their work tested. Medical, legal, and nursing professionals are often targets of such scrutiny, partially because of the dramatic and extremely personal impact of their decisions, but mostly because each has identifiable and stable performance standards by which individual practice can be assessed. The widespread
publicity that large medical malpractice awards have recently received undoubtedly contributes much to the popularity of educational malpractice as well. "Law suits tend to be epidemic; the more the public reads about them and knows about them, the more the right to sue will be directed against the educator. If the medical analogy holds, malpractice suits can be expected to affect education by stifling innovation, increasing paperwork, and making adversaries out of parents."86

Why is the teaching profession as well as other professions under so much public scrutiny? What is the impetus which incites the public's awareness? Donald H. Rogers, a Canadian lawyer from Toronto, suggests that there are several trends occurring within our society which in the process may lead to a considerable increase of litigation.

"First there is a continuing trend towards a reduction of individual-self reliance and an increasing dependence of the individual upon the state.

Second, our lives are increasingly dominated by large impersonal institutions. I speak not only of federal and provincial governments but also local government, school boards, and other institutions which effect
every conceivable aspect of our lives.

Third, as our population increases we are forced to live closer and closer together. Crowding brings contact and contact brings conflict.

Fourth, modern transportation and communication systems and other modern technology allows us to engage in many more activities and cover much more ground than used to be the case a few years ago. Our population is more mobile. Consequently, we come into contact with many more people and institutions, many of which are not known personally to us.

Fifth, there is an increasing presence and, perhaps just as important, an awareness of the presence of liability insurance protecting these impersonal and unknown institutions. They have large resources and we have no personal affection for them.\textsuperscript{87}

Thus, in Canada it appears that educators and the schools themselves may face the wrath of the public self-righteously assured that the professionals have failed
them because of unresponsiveness to the public demands. Educators will find they are expected to deliver the impossible, yet be blamed for not attaining it. The United States scenario has shifted to more extreme expectations. With more and more states implementing minimal competency tests as prerequisites for receiving a diploma (by June 1, 1979, 39 states have passed some kind of legislation) there is only one thing certain in the future: there will be more and more attempts by pupils to recover damages as a result of educational malpractice. Delbert Clear states that the current refuge provided to teacher educators by the lack of performance standards may not be nearly as secure in the future. "Research on teaching effectiveness throughout the decade of the 1970s contains the potential for bringing order into what, from a judicial point of view, has been the non-judicial chaos of teacher effectiveness standards." Standardized tests however, may not necessarily guarantee students will be competent in basic skills, because many basic skills are not measured and many others are not measurable, given the state of the art in testing. Establishing the validity of tests not only has legal ramifications but ethical ones as well. "If tests are to be used to screen individuals and potentially prevent them from entering a profession, then states and professional
associations should accept the commitment to verify that the tests are professionally designed to accomplish these specific purposes."90

Nevertheless, two recent dismissal cases have ominous overtones for the future if and when such malpractice suits become a successful trend. **Scheelbasse v. Woodbury Community School District** (349 F. Supp. 988 Refersed 488 F. 2nd 237, 1973) involves a teacher contract non-renewal because of low score made by the teacher's pupils on standardized test. The teacher's contract was not renewed because "below average performance on standardized tests by Scheelbasse's pupils was sufficient not to renew her contract."91

The second teacher dismissal case for educational malpractice is **Gilliland v. Board of Education** (365 N.E. 2nd 322, 1977). An Illinois school board dismissed a tenured elementary teacher because she had "ruined the students' attitudes toward school, had not established effective student/teacher rapport, constantly harrassed students, and gave unreasonable and irregular homework assignments."92

In the final analysis, "by hearing suits, then, for educational malpractice, the courts recognize society's reliance on a teacher's unique pedagogical skills. Teachers who wish their occupation to be a profession, in substance
as well as name, should assist the courts in identifying those competencies without which claims to professionalism are little more than pretense." The responsibility of today's teacher is paramount to the success of the student. School teachers as well as the administrators should be held responsible for their performance, and it is in their interest as well as in the interest of their pupils that they be held accountable.

The evolution of educational malpractice, born out of the exigency of the educational system, continues to fascinate as well as create anxiety for teachers. Yet, it survives and continues to grow in importance and stature within educational law. At the same time, it remains tied to the flexibility of the tort law:

"The progress of the common law is marked by many cases of first impressions, in which the court has struck out boldly to create a new cause of action, where none has been before... The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not itself, operate as a bar to recover."  

A review of legal history of the 20th century reveals
clear evidence that educational policy is made by court decisions. From decisions supporting the rights of teachers to organize and the rights of students to dissent, to those dealing with the fundamental rights of due process and legal protection of the law, court decisions in the United States (and in Canada) outline and detail the policies by which schools operate.

Most administrators accept the notion that a school board is no longer immune from the detrimental acts of its employees and that teachers have special obligations to their students to cause them to learn basic skills or refer those students who cannot to specialists for help.

"Given these responsibilities, administrators must be aware of the remediation a court could mandate for the future to meet such obligations, that is, replacement of incompetent teachers, payment of remedial instruction, or monetary compensation for loss of future income students deprived of educational benefits because of a teacher's negligence."95

In 1976 an article appeared in the University of Pennsylvania Law Review listing chronological procedure by which malpractice suits can be brought against school districts.96 It is a monumental first step which may open the "floodgates" to educational malpractice.
Competency-type malpractice suits seem to have the potential for creating the most litigation in this area of education. Once the door opens, an avalanche of litigation will probably ensue, with founded as well as unfounded actions. If every pupil who fails to master all of the survival skills of society should bring suit against his school board and its teachers for educational malpractice, the country's courtrooms would be immediately overwhelmed.
Chapter III

Duty of Care and Public Policy: Detriments To Educational Malpractice Suits in the United States - Possibilities For Ontario

The intrusion of courts into educational policy in the last two decades has been unprecedented. The role of the courts is to draw attention to educational inequalities after those pressing such claims had been unable to obtain the attention of the political system. In the United States, the increased scope and amount of judicial intervention in educational policy has resulted in the failure of educational malpractice suits. On grounds of "public policy" the courts have refused to recognize any course of action proclaiming educational malpractice.

Public policy considerations are the single most important barriers at the disposal of the school system to the charge of educational malpractice.

Public policy reasons given by the court in Peter W. against recognition of a legal duty of care for educational malpractice include: "social utility of the activity; the kind of person with whom the action is dealing; the workability of a rule of care; the ability of the parties to bear the financial burden of the injury (the availability of a means of payment and if the loss can be shifted), the
statutes and the case law that defines the parties' relationship; the preventive effect of the rule of liability; the extent of the powers, role and limitations imposed on a budget or the public agency; and the moral essentials judges share with citizens." The court held that, in view of what it called "public policy considerations," the school district as a matter of law does not owe the plaintiff a "duty of care" such that it would be liable for its breach.

Moreover, the court in the Peter W., case conclusively stated that educational malpractice should not be imposed on a school district. The public policy considerations given include: 1) a recognition of educational malpractice would open the door to a flood of countless and often frivolous student claims, and would overburden both the courts and the school district, 2) litigation of claims would inevitably lead to an inappropriate judicial interference in educational policy-making and in allocation of scarce resources, 3) there are already available administrative procedures for the satisfaction of complaints of incompetent instruction, and 4) both proof and damage would be difficult to assess. Thus, it appears that the obstacles to educational malpractice are insurmountable. What can the plaintiff do
to overcome public policy considerations in an educational malpractice suit? Can public policy once formulated by the judiciary be changed by means of the political system? Another important question needs to be considered here is whether public policy considerations would prevent educational malpractice suits in Ontario.

In order to come to grips with the role of public policy with respect to law and education, it is imperative to understand the fundamentals of public policy formation. According to C. J. Friedrich, public policy in the political sense "is a continuous process, the formation of which is inseparable from its execution. Public policy is being formed as it is being executed, and it is being executed as it being formed. Politics and administration plays a continuous role in both formation and execution, though there is probably more politics in the formation of policy, more administration in execution of it."

It is characteristic of our age that most legislation is looked upon as policy deciding. Hence, policy making in the broad sense is not supposed to be a part of administration. While these propositions are true in a general way, they tend to obscure two important facts, namely (1) that many policies are not ordained with a stroke of legislation or dictatorial pen but evolve slowly over
long periods of time, and (2) that administrative officials participate continuously and significantly in this process of evolving policy." 101

In all educational malpractice cases the court is emerging as a key source of educational policy. Thus, if a plaintiff can convince a court that there should be liability as a matter of policy, "the absence of formal legal precedents should not bar recovery in tort." 102 Courts have also become involved in accountability questions—whether a school system that fails to provide an average child with the basic reading, writing, and computational skills should be considered guilty of educational malpractice and held liable for damages. 103

In the Peter W. case, the court held that, in the view of what is called "public policy considerations" the school district as a matter of law does not owe the plaintiff a "duty of care" such that it would be liable for its breach. 104 The defendants argued that the "social importance" of free universal public education should bar recovery for negligence. What is important to note is that in Ontario this argument has not prevented courts from holding districts liable for physical injuries caused by teacher negligence. As a result, no reported case has allowed public school students to recover for loss of
educational benefits. Public policy considerations, rooted in the common law doctrine of sovereign immunity have prevented educational malpractice suits from succeeding. Moreover, the doctrine of sovereign or governmental immunity originated in the fiction that "the king could do no wrong" and also has been justified on the ground that money appropriated for governmental operations should not be dissipated by the payment of damages arising out of tort claims. The policy was that, since there was no fund out of which government could pay for a judgement, it was better for an individual to sustain an injury than the public should suffer inconvenience, and also that public employees should not be deterred from the performance of their duties by the fear of litigation. In Thomas v. Broadlands Community Consolidated School District No. 201, the court stated:

"The only justifiable reason for the immunity...is the sound and unobjectionable one that it is public policy to protect public funds and public property, to prevent the diversion of tax moneys, in this case school funds, to the payment of damage claims." 106

Interestingly enough, government immunity does not apply to the boards of education in Ontario. "Boards and
teachers in Canada have no general immunity in common law for tort action."107 As a result, government immunity may not be used as a reason to bar educational malpractice in Ontario.

Moreover, Frederick Enns notes that the school board is legally seen as a corporation and is "a legal person charged with certain duties and is given limited powers to perform the duties. In the exercise of these powers and the performance of these duties it has the same rights and liabilities as another person would have in similar circumstances...The corporation may be liable for any tort provided that: it is a tort in which action would lie against an individual; the person by whom it was committed was acting within the scope of his authority and in the course of his employment as a servant or agent of the corporation."108 Therefore, in Ontario the doctrine of "sovereign immunity" does not exist and as a result, the public policy justification for precluding lawsuits against boards of education as well as teachers appears to be an invalid application of the principle.

As a result, if a potential educational malpractice suit is initiated in Ontario, boards of education will not be able to use "sovereign immunity" as a shelter against litigation. Furthermore, there is evidence in the United
States that "public policy considerations" may be a thing of the past. "Recent statements of public policy, including the enactment of accountability legislation and the decisions of courts in school cases, indicate an emerging trend that offers support for an adventurous court to hold school districts accountable for a teacher's negligence in the discharge of instructional duties."109

Donald Horowitz believes that, with respect to education, the courts are not only inappropriate but also ineffectual policy makers, and that "by trying to make social policy, they have created more problems than they have solved."110 Furthermore, Horowitz argues that "in great many areas the courts have expanded doctrine beyond recognition, a process that has been facilitated by the abandonment of several time-honored restraints imposed by strict requirements of jurisdiction, ripeness, and standing."111 The net result, Horowitz argues, is that courts are now almost interchangeable with legislatures or other admittedly policy-making institutions.

The foregoing observations are intended to express reservations about the wisdom of the courts' reluctance to award damages in educational malpractice suits. This is not to suggest that the courts were erroneous in their decisions. On the contrary, there are situations in the
schools which can be corrected only by the immediate change in public policy. Indeed, the courts would be derelict in their duty if they do not move swiftly to remedy the present condition. In the past, the role of the courts in developing educational policy "has been essentially conservative, rooted in precedents, mindful of constitutional requirements, and respectful of the professional qualifications of educators."\textsuperscript{112}

The pressure on the courts to decide and interpret educational policy may well be increased in the future. Dissatisfied parents as well as students believe that injustices remain in the education system and seek their redress. To them, the courts are an important vehicle for achieving social change.

The impending conflict over public policy considerations as a detriment to educational malpractice and the public's expectations of social justice may ultimately be settled in the confines of the judicial system. How the courts will respond to this continual pressure upon them is not essentially clear. Mr. Justice Powell argues in his dissent to "Goss" that the willingness of the court to extend due process protections to the students who are suspended may logically lead to similar protections for the "student who is given a failing grade, who is not promoted,
who is excluded from certain extracurricular activities, who is assigned to a school reserved for children of less than average ability, or who is placed in a 'vocational' rather than a "college preparatory track." One effect of such dicta will undoubtedly be to encourage the filing of suits that test these and other points. On the other hand, the tendency of the court to reaffirm policy-making prerogatives of local officials in the Hortonville, Pasadena, and Austin decisions suggests that the courts will likely continue to respect the professional judgement of educators and perhaps even seek to disengage somewhat from educational matters.

The other reason for citing "public policy considerations" in precluding educational malpractice suits is that it will place an undue financial burden on the educational system. In order to succeed in an educational malpractice suit, the plaintiff must ensure that "public policy imperatives will not be undermined, but will be well served, by permitting recovery for failure to learn." Moreover, the plaintiff must demonstrate that the quality of educational services will be enhanced instead of lowered. Recent statements of public policy including the enactment by legislators of accountability legislation and the decisions of courts in
school cases indicate an emerging trend that offers support for an adventurous court to hold school districts accountable for instructional negligence. William Prosser notes that, "it is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'" and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds. The dilemma in all educational malpractice decisions is that the courts in choosing to protect public policy have neglected to protect the rights of the individual. In a just and democratic society where individual freedoms and rights are held as sacred, educational malpractice arguments should be entertained. Further research may reveal that the present rules for determining liabilities for injuries arising out of activities occurring in the education enterprise (including educational malpractice) are inequitable and unsuited to the conditions of modern education and that the losses from such injuries should be regarded as part of the cost of modern education, to be borne by educational enterprise rather than by students and/or teachers. However, in Donahue v. Copiague Union Free School District (1979) the court, in denying the existence of duty of care, pointed out that "the courts are an inappropriate forum to test the efficiency of
education programs and pedagogical methods. If the courts are reluctant in recognizing educational malpractice as a legal process, who then should deal with a student's failure to learn because of instructional negligence? It is apparent that the courts have drawn a somewhat tenuous line at best between the supervision-physical injury cases and the negligence-educational harm cases. The court in the Peter W. case hinted that in "the case of physical injury the teacher does have a duty of care, while in the educational harm cases, for reasons of public policy, there is no duty."

The courts' apparent indifference may stem from the fact that the procedures necessary to prevent instructional negligence are elusive at best. However, this indifference has not prevented educational malpractice suits from being launched. The most recent educational malpractice case occurred in New York in 1984 demonstrating that students continue to be hurt by instructional negligence.

It will be interesting to see how the courts in Ontario will handle the issue of "public policy" when and if educational malpractice suits become a norm. In November 20, 1985, the first potential educational malpractice case was initiated in Toronto. Chicoine, age 37, a photography student discontented with a course is suing
Ryerson Polytechnical Institute, for breach of contract. Having failed the photography course, Chicoine claims that "the instructor did not teach or follow the course outline as offered and advertised." Provincial Court Judge Pamela Thompson Sigurdson gave permission to Chicoine to sue Ryerson despite the pleas from the defence attorney that "allowing this action to process will open the floodgates to unhappy students." In Ontario there is an increase of litigation against professionals. For example, a severely disabled Brampton man was awarded 6.3 million dollars—the largest award of damages in Canadian history, escalating insurance premiums to unprecedented levels. The court, in awarding the large sum may, in fact, be eroding the whole basis for determining liability. "The problem of escalating damage awards, which follows an American trend, is compounded by the fact that Canadians are becoming more lawsuit-happy like their neighbours in the U.S. (where there was one civil lawsuit for every 15 people in 1984). Presently, the Windsor Separate School Board is facing a $3.5 million dollar claim in connection with a serious injury suffered by a teenage boy in an elementary school gymnasium in 1982. There is a growing awareness that
Canadians are willing to sue professionals for incompetence and negligence. The Canadian Medical Protective Association (CMPA), which provides malpractice protection for 85 percent of Canada's doctors "introduced major fee hikes after paying out a record $13.8 million in court awards and claim settlements in 1984. That was up from 10.9 million in 1983, when payouts nearly doubled from 5.9 million in 1982."130 "In Ontario, payments for claims against lawyers more than doubled between 1983 and 1985, rising to 10.6 million from 4.7 million."131

Litigation does not initiate an issue but reflects movements and trends in society.

The comprehensive review of the law relating to education clearly demonstrates that there is no lack of legal remedies for educational malpractice. Yet, educational malpractice is still regarded as an important problem in the United States and as a potential problem in Ontario. In view of the broad range of remedies available and number of levels at which legal action can be taken, it is readily apparent that educational malpractice continues to be a problem of major deficiencies in our system of legislation and legal rights.

The litigious tendencies reflected in medical and legal malpractice suits and consumer advocacy have their parallel
in educational affairs. Moreover, the public by following certain prescribed political processes may change "public policy" as formulated by the courts with respect to educational malpractice.

Educational policy making in the public sector can be viewed as "a process that usually unfolds in a fairly predictable series of stages through which desired changes move." By adopting Milstein's policy-making process model, the change in public policy with respect to educational malpractice as established by the courts may be changed politically by the dissatisfied parents.

According to Milstein, the initial stage of the policy-making process is marked by a period of dissatisfaction. As parental scrutiny of the educational system increases, the demand for accountability rises. Parents dissatisfied with the growing number of illiterate students as well as with the failure of the courts to do something seek to improve their plight by bringing their concerns into the political arena. If the dissatisfaction is prolonged over a long period of time and the courts fail to settle the controversy, a crystallization of attitudes begins to occur. In the second stage of the policy-making process, the problems of educational malpractice begin to acquire clarity and attitudes about dissatisfaction start to
focus. Leaders emerge to articulate the group's (community's) grievances so that its members, and others, fully understand the nature of the grievance. Parental involvement extends beyond discussion with teachers, principals, and school boards and enters the public forum.

If attitude crystallization is successful, a period of time follows that is dominated by idea formulation. In this, the third stage, a proposal of alternatives is drafted which may improve the situation. In the case of educational malpractice, demands for standardized tests, province wide examinations, as well as establishing standards of instruction for the teacher may be proposed. The ideas which emerge at this level of public policy formation are designed to raise the public's perception of the alternatives available to society.

Once the ideas of how to remedy the present condition are established the political policy-making process enters the debate stage. This is perhaps the most important step in the whole process because the group proposing the change must both demonstrate and convince influential individuals, groups, and organizations that "their platform is legitimate and timely." Moreover, this stage serves two significant purposes. In the first place, the opportunity to test the potential reception of specific
policy demands may reveal the viability of the proposals. Feedback from political, educational, as judicial experts may result in modification in the policy proposals. In the second place, "as a result of testing the ideas, the base of active involvement is often widened."¹³⁹ In the case of educational malpractice, the media may play an important role in educating the public of the possibility of launching malpractice suits against teachers for instructional negligence. Once the ideas are clarified, the proposals are submitted to a policy-making body at the legislative stage.¹⁴⁰ "Members of policy-making bodies are petitioned by representatives of the dissatisfied group to adopt their platform as a rule of law within its domain and control."¹⁴¹ Once the support of the petitioning group's position is gained, the chances of acquiring legitimacy becomes probable. After a series of complex steps the proposals must be approved by the legislative body.

"Those few policy proposals surviving this treacherous process to be granted the status of rule or law must then be implemented."¹⁴² In this, the last stage, implementation occurs. In the case of educational malpractice, the proposed standards of instruction have become law. As a result, teachers become liable for failure to educate.
However, this law may be subject to attacks if new groups view this particular policy as putting them at a disadvantage and, therefore, the process can begin all over again. Once the approved policy is implemented, the courts can either enforce the law as it stands or to modify its impact.

In the case of educational malpractice, it is the public which must resolve the problem of educational malpractice by political means even at the expense of present laws. As with other complex issues, full community effort and commitment is required in the struggle to deal with complex educational problems. Therefore, the community must be aware that apparent weaknesses of law relating to education may in fact be the weaknesses of the community itself. As soon as the problem of educational malpractice is confronted by a sufficient number of discontented parents, social change may begin. As educators have become more aware of legal factors, so also have students and citizens.

As public policy considerations continue to deter educational malpractice claims in the United States, so does the concept of "the duty of care." Tort law principles of negligence are the basis of malpractice. Bollinger states that the negligence "must be analyzed in regard to
the casual connection between the enactment violation and
the education injury.” Thus, in all malpractice
suits, the plaintiff—the person suing—must prove these
four elements:

1. that the defendant owed the plaintiff a duty of
care;
2. that the defendant was negligent in performing that
duty;
3. that the plaintiff was injured—but not necessarily
in body;
4. that the negligence more or less directly caused the
injury.

If these four elements are proven, then damages may be
awarded to the plaintiff. The standard of proof in a civil
case is the preponderance of the evidence (numerically, this
may be conceived of as a 51-49 split of evidence), a lower
standard than the criminal one of reasonable doubt. Damages
can be of two types—compensatory for the injury or punitive
as a punishment for wanton, reckless, or heinous acts.
Compensatory damages generally address the following areas:
(1) past earnings lost, (2) future earnings lost, (3) pain
and suffering, (4) restitution to undo the damage, and
(5) to cost of the therapy itself. Tort and
contracts are part of the civil law. They are derived from
statutes, constitutional and common law, or case law
precedents. They differ from criminal law in that they
pertain to acts offensive to an individual not society in
general.150

Tort is a type of harm done to an individual in such a manner that the law orders the person who does the harm to pay damages to the injured party.151 Torts may be intentional or unintentional. Of the unintentional, negligence is the author's main concern. Negligence pertains to the standard of care a reasonable person takes in his relationship with his fellow man so as not to increase unduly the risk of harm to him.152

One of the limitations on the liability for negligence in education is that the duty of the school has not been specified in a manner conducive to legal enforcement.153

What is the source of authoritative pronouncements on to the duty of the school? Possibilities include such items as the state constitution, state statutes, state regulations, compilations of goals.154

Litigation carried out against the teacher will involve the board. The relationship in legal terms is referred to as vicarious liability. McCurdy states this idea as follows:

"...the teacher has...[a] significant legal relationship, that of master and servant with his employer, the school board. Because of this relationship, liability occasioned by negligence tends to devolve upon the school board,
especially if the teacher in incurring such liability is acting within the scope of his duties."¹⁵⁵

Negligence and liability on the part of a teacher fall under the legal heading of torts, the definition of which follows:

Tort is a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than a breach of contract, for which a court of law will afford a remedy in the form of an action for damages. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable."¹⁵⁶

For further clarification the definition of negligence and liability are presented:

Negligence: "Negligence is the omission to do something which a reasonable man, guided upon those considerations that ordinarily regulate the conduct of human affairs, would do, or something which a prudent or reasonable man would do."¹⁵⁷

Liability: "Liability...arises out of negligence; for the most part what is known in law as 'ordinary negligence'; i.e., the failure to use ordinary care in a situation. Negligence is based on conduct, but an action founded upon negligence cannot ensue unless certain other conditions exist."¹⁵⁸

As it was pointed out earlier, the board and the teacher can face the same charge. The legal reason for this
is that a board of education is considered a statutory corporation and as such can be sued even though the suit arises at the teacher level of the organization.\textsuperscript{159}

In Ontario, a teacher's liability while acting within the bounds of the aforementioned lies within the bounds of negligence which may lead to tort action. It must be pointed out that:

1. boards and teachers in Canada have no general immunity in common law for tort action;
2. school boards are responsible for the acts of their servants if the latter act within the scope of their authority;
3. teachers are liable for their own negligence in school accidents, but they have some protection through the general practice of suing the board, as master in a master and servant relationship;
4. common law also requires that boards and teachers owe their pupils the same degree of care that a "careful parent" would give his/her children.\textsuperscript{160}

Moreover, a clarification needs to be made between negligence and incompetence. Compounding the problem is the operational definition of "incompetence". Some statutes attempt to give assistance in this area but even the best seem to leave a good bit to the judgement of those charged with implementation of the law. Courts have tended to define what is and what is not incompetence in light of the facts unique to the particular case, say Rosenberger and Plimpton. One of the better definitions of incompetence was
made by the state of Tennessee: "...being incapable; lacking adequate power, capacity or ability to carry out duties and responsibilities of the position. This may apply to physical, mental, educational, emotional or other personal conditions. It may include lack of training or experience. Evident unfitness for service; physical, mental or emotional condition unfitting teacher to instruct or associate with the children; or inability to command respect to subordinates or to secure cooperation of those with whom he must work." 161

There is obviously a good bit of room for interpretation and judgement within these requirements. From a strictly legal point of view, a clear, unambiguous definition would be best; but from an educational point of view, flexibility can be viewed as an asset. It does not mean that the statute is easy to interpret or enforce, but it does mean that with competence on the part of the administrator, a plan can be set up and utilized to improve teaching competence and to remove the incompetent teachers.

A very good definition of incompetence is the one offered by Chester Nolte. Nolte describes an incompetent teacher as "one the courts find to be performing at a sub-acceptable level after having been warned, helped, counseled, cajoled, threatened and/or urged to resign." 162
When a professional acts negligently towards a person within the parameters of the professional relationship, his action constitutes malpractice. However, in the teacher's relationship with his students more is required by the law. The teacher stands "in loco parentis" and must act as a careful parent would. A duty of care to pupils implies more. "A teacher is a professional who represents himself as possessing special skill, ability or experience, and this position carries a duty to exercise to a reasonable extent, the amount of skill, ability, or experience that his work demands."163

Standard of Care

A standard by which an educator can be judged is another element to be ascertained. Without the standard, the court cannot determine if an educator breached a duty. Two legal standards are applied to a plaintiff's charge—that of a "reasonable person" or that of a "professional person."164 The reasonable person standard is applied in physical injury cases because playground, cafeteria, and recess supervision is able to be assumed by members of society in general. But the reasonable person standard is not viewed as the standard by which educator's instructional conduct should be appraised because teaching requires special training and knowledge which are different from the
training and knowledge of the ordinary reasonable person. Thus, professional liability cannot be based on a reasonable person standard; it is exclusively a standard of care of a "professional person." The professional standard of care can be used only if a professional duty is established. The standard focuses on teacher behaviours.

"If a professional standard existed the violation of such a standard alone would still not be negligence. A proximate casual connection must occur between the breach of the duty and the injury." 

"The client must prove by a preponderance of evidence that the professional's breach of his duty of care was the proximate cause of the injury." To clarify this point, in legal malpractice claims the client must have suffered appreciable harm as a consequence of the attorney's negligence.

In an educational malpractice suit proximate cause appears to be present. "A student's failure to learn is clearly among the foreseeable risks of a teacher's poor classroom methods, thus satisfying one formulation of the term." Thus, proximate cause exists because a student's failure to learn is a direct consequence of the teacher's incompetent teaching.
The courts in the United States have not interpreted this duty to be absolute. The appellate court in rendering its decision in the Peter W. case noted:

"On occasion when the Supreme Court has opened or sanctioned new areas of tort liability, it has noted that the wrongs and injuries involved were both comprehensive and assessible within the existing judicial framework... This is simply not true of the wrongful conduct and injuries allegedly involved in educational malfeasance. Unlike the activity of the highway or market place, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught and any layman might and commonly does have his own emphatic views on the subject. The injury claimed here is the plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in schools, or its failure, are influenced by a host of factors which affect the pupil subjectively from outside the formal teaching process, and beyond the control of its ministries. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified."

On the basis of this rationale and under the circumstances described, the court concluded the school district owed no duty of care to the plaintiff within the meaning of existing tort law of negligence. The care
expected by the courts is "standardized" in terms of reasonableness. In the *Peter W.* case, the court concluded that in the absence of precedent that no cognizable legal action had been set forth in the plaintiff's complaint because teachers do not legally owe students a duty to teach non-negligently. Thus, the court felt that the school district owed no duty of care to the plaintiff within the meaning of existing tort law of negligence.\(^{172}\)

"Of course, no reasonable observer would be heard today that these facts did not impose upon [the school system] a "duty of care" within any common meaning of the term; given the commanding importance of public education in society, we state a truism in remarking that the public authorities who are duty bound to educate are also bound to do it with "care". But the truism does not answer the present inquiry, in which "duty of care" is not a term of common parlance; it is instead a legalistic concept of "duty" which will sustain liability for negligence in its breach, and it must be analyzed in that light."\(^{173}\)

What determines whether the duty of care in the *Peter W.* case is a legal duty? Clinging to precedent, the court concluded this to be a question of "public policy." By citing public policy reasons against educational malpractice, the court indicated that it planned to look
beyond the facts of the case before it and took into account the implications of its decision. Instead of determining whether schools have a legal duty to educate, the appellate court wanted to know whether making schools liable is a good idea. In disposing of the plaintiff’s appeal, the court declared: "Judicial recognition of [duty of care] in the defendant...is initially to be dictated or precluded by considerations of public policy." In this particular case, the duty to educate non-negligently is a conclusory term. Prosser writes:

"The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct...It is a shorthand statement of a conclusions rather than an aid to analysis in itself...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 the particular plaintiff is entitled to protection." Moreover, both Prosser and the Restatement (Second) of Torts assert that "when someone undertakes to render a service to another upon which the other relies, the actor assumes a duty to act non-negligently and will be liable for harm that results from negligent performance." Prosser writes, "Where performance clearly has begun,
there is no doubt that there is a duty of care."

When this principle is applied to education it becomes clear that once a teacher, school, and school board undertake to provide education, they assume a duty to educate non-negligently. Moreover, Prosser wisely declares that "if the defendant's conduct was a substantial factor in causing the plaintiff's injury...he will not be absolved from liability merely because other causes have contributed to the result."  

In Canadian Tort Law, one of the best explanations of the concept of duty was formulated by Mr. Justice V. C. MacDonald in Nova Mink v. Trans-Canada Airlines:

"It is the function of the judge to determine whether there is any duty of care imposed by the law upon the defendant and if so, to define the measure of its proper performance; it is for the jury to determine, by reference to the criterion so declared, whether the defendant has failed in his legal duty. In every case the judge must decide the question: Is there a duty of care in this case owing by the defendant to the plaintiff and, if so, how far does that duty extend?...The common law yields the conclusion that there is such a duty only where the circumstances of time, place and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result. This element of reasonable prevision of expectable harm soon came
to be associated with a fictional Reasonable Man whose apprehensions of harm become the touchstone of the existence of duty, in the same way as his conduct in the face of such apprehended harm become a standard of conformity to that duty...There is always a large element of judicial policy and social expediency involved in the determination of the duty-problem, however it may be obscured by use of the traditional formulae...[T]he existence of a legal duty of care by a defendant depends upon whether the hypothetical Reasonable Man would foresee the risk of harm to a person in the situation of the plaintiff vis-a-vis himself and his activities."181

Dale Gibson notes that "the duty notion is central to the traditional formulation. There can be no liability, it is said, for "negligence in the abstract;" a man's conduct no matter how negligent, is not tortious unless there is a "duty of care" owed by him to the plaintiff."182 When considering new tort theories Gibson notes that the courts "retain some control device to that the new idea will not result in a more rapid expansion of liability than public opinion is ready to accept."183

New Jersey has opened itself to two different malpractice suits. A student may sue if he fails to acquire the basic skills, and he may sue if the basic skills do not prepare him to function effectively in society. Robinson v. Cahill is a landmark case which may become a precedent for
creating a legal duty to educate. In the Robinson case, the New Jersey Supreme Court found that the state legislature failed to meet its constitutional obligation to define and establish "thorough and efficient" education system to meet the education needs of all students.

The results of this decision was the formulation of accountability legislation, "which also incorporated teacher inservice training, as a remedy for schools' failure to meet performance goals." As more and more states legislate minimal competencies, the courts may view these mandates as an expression of a state public policy in education and therefore recognize a "duty of care" flowing from the teacher to the student.

In Ontario, the general tone of the Education Act implies that teachers owe students a "duty of care". Section 235(1) a, b, c, e and g, are of particular interest:

Duties

235. (1) It is the duty of a teacher and a temporary teacher,

(a) to teach diligently and faithfully the classes or subjects assigned to him by the principal;

(b) to encourage the pupils in the pursuit of learning;
(c) to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, lover of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues;

(e) to maintain, under the direction of the principal proper order and discipline in his classroom and while on duty in the school and on the school ground;

(g) to conduct his class in accordance with a timetable which shall be accessible to pupils and to the principal and supervisory officers.

Although these duties seem nebulous and vague, the legal framework for launching an educational malpractice suit exists. Hypothesis I states that the "duty of care" as outlined by Regulation 262 s.21 (a) made under the Education Act, may be used under the law of torts to launch an educational malpractice suit in Ontario. Regulations derive their legal force solely from "an Act of Parliament...All such instruments derive their powers from the authority which creates the power, and not from executive body by which they are made."187

The Ontario Education Act and regulations deal very explicitly with many matters pertaining to the manner in which teachers are required to conduct school. The statutes not only help to maintain a standard of uniformity but they
also protect the teachers against malicious attacks from unreasonable parents. For the latter reason, every teacher should be thoroughly familiar with those statutes and regulations that deal not only with his/her responsibilities, but also with his/her rights.

The Regulations impose various special duties and responsibilities on teachers as well as certain prohibitions in the performance of their regular duties and responsibilities. Regulation 262 s.21 (a) outlines the duties of Ontario teachers which appear to fulfill the requirements of the first element of tort: that the defendant owes the plaintiff a duty of care. According to Regulation 262 s.21 (a) a teacher shall:

(a) be responsible for effective instruction, training and evaluation of the progress of pupils in the subjects assigned to the teacher and for the management of the class or classes and report to the principal of the progress of pupils on request.

Essentially, then, Regulation 262 s.21 (a) requires teachers to conform strictly to the rules of their profession. When the child is under the care of school authorities, the law requires that these authorities act in a reasonably prudent manner under the circumstances. The standard of care varies with the maturity of the child and the nature of the
activity in which the child is engaged. Professional personnel are held legally to a standard commensurate with their professional training. The expositors of these rules are the law courts, which perform their duties within the rigorous confines of common-law reasoning and principles. The legislature, and only the legislature may alter these rules. The implications of these sections of the present legislation are important because they set the terms under which teachers may be dealt with by the courts.

In addition to Regulation 262 s.21 (a) the Regulations made under the Teaching Profession Act establish professional standards by which teachers are likely to be judged. The following duties of a teacher to his pupils are listed in Section 14:

Duties of a Member to His Pupils

14. A Member shall,

(a) regard as his first duty the effective education of his pupils and the maintenance of a high degree of professional competence in his teaching;

(b) endeavour to develop in his pupils an appreciation of standards of excellence;

(c) endeavour to inculcate in his pupils an appreciation of the principles of democracy;
(d) show consistent justice and consideration in all his relations with pupils;

(e) refuse to divulge beyond his proper duty confidential information about a pupil; and

(f) concern himself with the welfare of his pupils while they are under his care.

Section 14(a) is of particular interest because it echos the "duty of care" requirements of Regulation 262 s.21 (a). Moreover, the Policy Resolutions of the Ontario Teachers' Federation Section 5(b) mention that the teacher's responsibilities and roles include:

B. Responsibilities

That a teacher's role include: (SB80)

1. Diagnosis
   (a) recognize the norms for the age and development of the children assigned to the teacher;

   (b) diagnose the needs related to and involved in the learning and development of each student;

   (c) be cognizant of the role and function of such available resources as administration, consultative and other professional services, and utilize these so that the best possible progress of each child may be effected;

2. Prescription
   (a) establish performance goals for each student;
(b) group students by related needs and goals where grouping is indicated by these needs and goals;

3. Presentation
   (a) select educational programs, including materials, methods and techniques, designed to meet the needs and established goals for each student or group of students;
   (b) present the selected programs to the students for whom they were designed;

4. Evaluation
   (a) evaluate the realism of the goals set, the suitability of selected programs, and the progress of each student;
   (b) assess constantly and recurrently, the needs, goals, grouping and programs for each student in the light of progress achieved. (WB74)

Therefore, in Ontario, Regulation 262 s.21(a), Teaching Profession Act, as well as the Policy Resolutions, explicitly outline the teachers' legal obligations to his/her students. The teacher, by practising his profession, implies that he will conduct himself in a skillful and responsible manner and that he will be held up to the standards of skill and care generally applied by teachers practicing in the teaching profession. It follows from this that in a potential educational malpractice suit
there exists a workable duty of care. Regulation 262 as well as the Teaching Profession Act indicate that the teacher is the key figure in the educational system in Ontario. It is the teacher's behaviour in the classroom that must eventually be the focus of attention if there is to be an understanding of how society through its agent, the school, and, in turn, the school through the person of the classroom teacher influences the lives of children.

The "duty of care" is vital in the contextual framework of the education system in Ontario. The school is a place in which there is a complex cognitive-affective interaction between teachers and students, an interaction which has an important influence on the student's personality, intellectual development, and present and future life satisfaction. As a result, it is the contention of Hypothesis I, that teachers in Ontario have a legal duty of care to their students to help them achieve skills which are vital to function within society. The teacher's duty arises as a matter of law out of his relationship to the student in view of the fact that his contractual obligations rest with the board of education. This is a legal duty which is defined as obligation arising contract between two parties on the operation of the law. It is a duty to which the law will question his obedience. Moreover, the Ministry of
Education is assuming a formal legal obligation to assure that the teachers whom it certifies will in fact be able to teach so that students can learn. Consequently, if an educational malpractice suit occur in Ontario, a plaintiff would have a clear legal standing in the courts to sue the board, should a student be given a teacher certified to teach, but who in fact is not competent to teach.

**Professionalism and Duty of Care**

In Ontario, professional standards of teachers are laid down by the **Teaching Profession Act**. Within the provisions of the Act, a member shall (a) "strive at all times to achieve and maintain the highest degree of professional competence and to uphold the honour, dignity, and ethical standards of the teaching profession," and (b) "concern himself with the welfare of his pupils while they are under his care." (Sec. 13). Teachers in Ontario proudly and justifiably proclaim themselves to be professionals. Deviation from professional standards whether by doctors or lawyers, accountants, or educators constitutes professional malpractice. The notion of the "duty of care" (an obligation either in common law or statute owed by one person to another) is closely tied to professionalism of teachers. Ballentine's **Law Dictionary** explains that
malpractice is the "violation of a professional duty to act with reasonable care and in good faith without fraud or collusion." Therefore, the teacher, like other professionals in law and medicine, is subject to legal action when conduct falls below accepted professional standards. But are teachers truly professionals or are they merely paraprofessionals? The answer to this question may determine the extent to which teachers owe a duty of care to students. Interestingly enough, in the Royal Commissions Inquiry into Civil Rights, The Honourable James Chalmers McRuer, LL.D., notes that in Ontario "there are twenty-two self-governing professions and occupations which have been given statutory power to licence, govern and control those persons engaged in them," yet teachers are not included.

The "teaching profession" in Ontario is excluded from the group because it is not seen as a "self governing" profession. Nevertheless, Ontario teachers see themselves as professionals and have established professional standards of competence. There are two tendencies present in most professional organizations. One is the tendency to be self-regulating and to attempt to win the support of the membership through the character and high standards of the organization; the other is to advance the professions' viewpoint and entrench and centralize its powers through
If professional standards are accepted as valid measurement of professionalism, it may be speculated that many professional persons and organizations fall short in one regard or another. Doctors, for instance, are often allergic to public criticism and opt to close ranks against it, and all individual doctors are not necessarily more devoted to service than to monetary reward. Nevertheless, it is impossible to bridge definitely the gap mentioned. This problem lies at the heart of the educational system and, therefore, demands continuous thought and consideration. No one can dispute the importance of acquiring the requisite skills outlined for literate functioning within society. And no one can deny that the importance of choosing the most competent professional teachers to educate the students in acquiring these skills. Proof of incompetence in education is difficult to determine because there is little agreement on what constitutes competent performance on the part of a teacher. A charge of malpractice requires that the profession have a set of minimum standards of performance such that an expert witness can describe them to a lay jury, which then can compare a specific behaviour with the norm. The professional is liable to a charge of malpractice when he fails to perform
in accordance with the norm.\textsuperscript{191}

The Teaching Profession Act in Ontario imposes strict guidelines for professional performance. If the teacher does not meet the minimum standards of competence, it then follows that a breach in the "duty of care" may result in an educational malpractice suit. The more closely a teacher adheres to the standards of performance and to the norms of the profession, the less liable to a lawsuit will he be. In the famous Thornton, Tanner et al. v. Board of School Trustees of School District No. 57 (Prince George), Edamura and Harrower, (1975) 3 W.W.R. 622 case Mr. Justice Andrews stated three standards that define the duty of care which teachers owe their students: (1) "to act as the careful parent of a large family" (p. 633), (2) "to provide a thing reasonably safe for the purpose for which it is intended" (p. 632), and (3) "to exercise to a reasonable extent, the amount of skill, ability and experience which it [the practice of the profession] demands" (p. 632). These three standards, when added to the duties required by the Education Act (Section 235) and Regulation 262 21(a), as well as to the general duties of members of the Ontario Teachers' Federation, constitute criteria by which to judge the professional practice and competence of any given teacher.\textsuperscript{192} Presently, teachers in Ontario are not
supported by any strong theory of instruction that can
direct their practice. This is a serious
professional flaw which affects the "duty of care"
relationship which the teacher owes to the student. The
paradox may be stated in this manner: "the more proficient
teachers become in defining what constitutes a professional
practice, the more likely they are to be sued for
malpractice." In order to be sued for educational
malpractice there must be some well established practice
based on a firm knowledge claim. In other words, competence
must at all times be established rather than assumed. It is
the teachers who do the educating. They are, or ought to
be, the ones who are competent in history, mathematics,
grammar, and the rest, and consequently in a position to
know what a given subject can be expected to contribute to
the formulation (education) of each student. If the schools
and the teaching profession had freedom to control their
work, much more reasonable standards could be developed.
The medical profession furnishes one comparison.

There are many standards which hospitals and doctors
have recognized and followed and there is infinitely more
real coordination among them than there is in educational
circles. It has been noted that one of the barriers
to malpractice lawsuits is that in the past the duty of the
school has not been precisely specified. Moreover, it is possible that as the province assumes a duty, the student gains a right. If teachers in their professional capacity fail to fulfill adequately this duty, they may become liable. Still, the most difficult task which faces the plaintiff in an educational malpractice suit is proving that a teacher's negligence caused his failure to learn. By using the "comparative method" the obstacle to the plaintiff's proof of causation might be avoided.

According to Collingsworth, the comparative method entails that the student demonstrate that a class of which he is a member performed significantly worse than did classes identical in all essential respects except that they were not taught by the defendant teacher, the plaintiff may have a reasonably successful chance at proving instructional negligence. "The casual effect of a teacher on the educational achievement of his/her students can be isolated by comparing the performance of the plaintiff's class with the performances, in the same subject, of students in the same or similar communities, in schools of the same socio-economic composition, with the same IQ groupings, or other characteristics identified by experts as determinants of educational success (comparison classes)." Furthermore, "class difference could be measured by the
average of the differences between the scores on achievement tests taken by each student upon entering and leaving the teachers' class.199

Thus, the possibility of a class action suit may exist. If the "cause in fact" and "harm" are proven on a class basis, relief may be granted. By making educational results more specific, failures would be more evident. Since failures could be easily known, presumably, the public could rectify the weaknesses by applying pressure to the professional educators.

What the public thinks about teachers depends to a great extent upon how they themselves regard the teaching profession and its relationship to the "duty of care."200 If they approach their tasks as one requiring exacting preparation, and proved by continued study and research that a high degree of skill be maintained, the public will probably be more willing to grant to teachers the professional status which they seek. In the meantime, and until evidence is in, common sense as well as the necessities of professional survival suggest that society not accept too readily students graduating from high school with less than acceptable reading and writing abilities.

By connecting the notion of a teacher's professional responsibility to the duty of care, teacher-caused
educational deficiencies may ultimately be minimized. Yet, as this thesis has tried to demonstrate, proof of incompetence in an educational malpractice suit is difficult to prove because there is little agreement on what constitutes competent performance on the part of the teacher. In Ontario, a charge of educational malpractice may fulfill the duty of care requirements because the teaching profession seems to possess a set of minimum standards of performance. Thus, a teacher may be liable to a charge of educational malpractice when he fails to perform in accordance with the standard thus breaching the duty of care.

The process to determine the teacher's liability to the "injured" student may involve numerous problems, but assuming that a connection between a teacher's conduct and the student's injury is shown, the student must go further and establish a duty of care and prove that: an injury has occurred; a violation of that duty with respect to the injury suffered; and the damages or the money value of the loss he suffered. Once the link between professionalism and duty of care is established, as well as being recognized by the courts, educational malpractice may become a reality in Ontario.
Chapter IV

The Role of the Board of Reference in Precluding Educational Malpractice Suits

The previous chapters demonstrate the possibility of launching and succeeding in an educational malpractice suit in Ontario. It would appear that the legal obstacles which have hindered educational malpractice claims in the United States may not obstruct similar claims in Ontario. This leads to an intriguing, yet vitally important question: Why have there been no educational malpractice suits in Ontario? The second hypothesis of this thesis is that the Board of Reference precludes educational malpractice suits in Ontario. Boards of Reference receive their statutory power from the Statutory Powers Procedure Act and their specifics from the Education Act. In Ontario, the body which hears and adjudicates teacher dismissal cases is called a "Board of Reference". When a teacher in Ontario is terminated by the school board and considers the reason for the termination to be insufficient, the teacher may demand that the matter be submitted to a Board of Reference. The Minister of Education may either grant or refuse to grant the Board of Reference.

If the Board of Reference is granted it is usually
composed of three persons: one representative appointed by the teacher, one representative appointed by the school board, and a judge appointed by the Minister to serve as the chairman. By examining the decisions handed down by the Boards of Reference from 1972 to 1985 inclusive, Hypothesis II may be tested.

In fact, the Boards of Reference in Ontario were established for the purpose of preventing law suits against teachers. Matthew J. Wilson states that "the basic intention of legislation enacted to establish Boards of Reference in Ontario is to remove cases involving the dismissal of teachers from the courts as much as possible."203

All proceedings are required to be conducted in a judicial manner and, having considered the evidence, the Board may allow or disallow the appeal, or hand down any decision it considers appropriate in the circumstances. The Board's decision, in its totality, may be appealed to the Ontario Court of Appeals or to the Supreme Court of Canada. Furthermore, Wilson comments that:

"Under the present rules teachers would be well advised to forget about applying for a Board of Reference if they had been neglectful in their duties since history indicates that their chances of winning a determination are very poor."204
Wilson also notes that between 1939 and 1971, there were 225 applicants seeking a board of reference from the Minister of Education. During this period, "only forty-eight were granted, and only thirty-one resulted in boards of reference." Therefore, on an average, "between 1939 and 1971 the number of boards of reference granted was less than one per year." The year 1972 marked a dramatic increase in the granting of the Boards of Reference—"in 1972, 10 were held and in 1973, 14 were granted." G. R. Allan suggests that the reasons for the increase are based on the following factors:

1. teaching positions are scarce;
2. new teachers know their position in law;
3. federations are more militant and usually support teachers in conflict;
4. the present civil rights stance is that every person must have his day in court;
5. when the Department of Education was responsible for supervision, the minister and the teacher accepted their version of incompetency readily;
6. labour has its grievance procedures, including arbitration.

A common problem shared by principals in schools throughout Ontario is deciding what to do about teachers who are not satisfactorily meeting job expectations. In Ontario, it is difficult to dismiss a teacher because of the
"complexity of the law". Yet, Board of Reference material is full of examples of professional incompetence (breach of professional standards). In the United States, the breach of professional would result in an educational malpractice suit. Donald S. Rosenberger and Richard A. Plimpton found in analyzing litigation cases in the United States that charges of incompetence against teachers often are based on:

1. **Teaching Methods**, including failure to maintain classroom control, failure to adopt to current teaching techniques, physical mistreatment of pupils, and poor lesson organization;

2. **Effects on Pupils**. Courts have upheld the dismissal of teachers who could not get along with pupils in their classes, who failed to keep self control, who caused low morale or fear among pupils and who related personal, financial, or sexual matters in class. In addition, several courts have upheld firings based on low pupil achievement as "his testing results were poor," "her pupils did not learn much" and "pupils have not progressed in your class in accordance with their abilities";

3. **Teacher's Personal Attitude**, including tardiness, refusal to teach, refusal to accept supervision and lack of concern or courtesy. A teacher who brought
a record player to class so she could doze while children listened to music was dismissed. So were others who refused to allow supervisory officers to enter the classroom, who failed to cooperate with other teachers and who showed a lack of self-restraint and tact in dealing with co-workers, pupils and parents;

4. Knowledge of Subject Matter. Teachers have been dismissed for specific errors of fact in history and geography and for lack of knowledge of English grammar, spelling and punctuation.²¹⁰

From 1972 to 1985 there have been approximately 61 Boards of Reference decisions in Ontario. A closer examination of these cases discloses a similarity with Rosenberger and Plimpton's findings. Evidence of "educational malpractice" or instructional negligence appear in approximately 26 of the 61 boards of reference between 1972 and 1985. The documentation of alleged teacher incompetence in the boards of reference cases clearly demonstrates a breach of professional standards.²¹¹ (See Appendix No. 3). Some of the most prevailing reasons given for the termination of a teacher's contract for cause may be described as follows:

1. serious lack of control of lessons;
2. inefficient utilization of various teaching strategies;

3. lack of purpose;

4. very serious lack of discipline and classroom management;

5. refusal to follow instructions;

6. insubordination;

7. complaints from students, parents;

8. lack of rapport with students.212

(For a detailed board of reference case reflecting a possibility for educational malpractice, see case #1 in Appendix No. 4.)213

The findings in the boards of reference cases is that there is a need for regular and adequate evaluation to establish a record of unsatisfactory performance and a record of admonitions to the teacher. This evaluation process is essential to the presentation of the case both intramurally and extramurally. Regular evaluations and documentation may help sort out the following questions:

How long has the teacher been incompetent? Were performance standards and expectations clearly communicated? Was the teacher adequately counselled about ways to improve? What evidence supports a decision to dismiss? Are other fellow teachers equally inept?

Boards of education have developed individual
procedures for dealing with the dismissal of incompetent teachers. In Ontario, Standard Procedure #45, for example, has been enucleated by the Toronto Board of Education for dealing with a teacher who is not meeting the minimum standards of professional competence.214 (See Appendix No. 5) The major focus of Standard Procedure #45 is to ensure that "due process" is accorded to the teacher and followed at all times.215 Central to "due process" is that the teacher is entitled to a hearing if he or she is dismissed and disagrees with the terms of the dismissal. Therefore, with respect to "due process" Boards of Reference serve a useful purpose as arbitrators in examining the evidence and rendering their decisions.

Surprisingly enough, parental involvement in boards of reference cases to date appears to be non-existent. It must be emphasized that Boards of Reference are internal and, as a result, parents may be unaware of what course of legal action is open to them. Does the Board of Reference preclude lawsuits against teachers by preventing the parents from taking legal action. This leads to a second interesting question: Can parents launch an educational malpractice suit once the teacher has been deemed incompetent and dismissed from his/her teaching position? Would this not open the way for litigation against the
school board as well for employing an incompetent teacher? If it can be proven that the student's failure to learn was the direct result of teacher incompetence, then the teacher and the board may be party to a lawsuit. The interesting legal issue presented when "standards" such as those imposed by the boards of education as well as professional standards are created is to what extent are teachers legally liable if they are unable or unwilling to meet them.216 (See Appendix No. 6) Can a teacher who insists on giving the same subject manner to all students, regardless of their abilities, be dismissed or brought to court in a malpractice suit?

Conduct that provides sufficient evidence of the teacher's incompetence is generally serious enough to justify revoking the certificate as well as terminating the employment contract. The Boards of Reference do not possess the power to revoke a teaching certificate in Ontario. They may, however, recommend its cancellation to the Minister of Education. This leads to another intriguing question: If the Minister of Education revokes a teacher's certificate, can the parents launch a lawsuit against the teacher and the board? Despite legislation enabling authorized officials or agencies to revoke teaching certificates, this penalty is not frequently imposed (see Appendix #7 for
actual number). Throughout the years, certificates were seldom revoked for teacher conduct that did not clearly fall within the grounds stated in the statutes. Consequently, the judicial challenges to the cancellation of Ontario teachers' certificates have not been numerous and the case law on which to base generalizations is not extensive.217

The educational law of the province of Ontario lists a number of grounds on which a teacher may lose his/her credentials or be dismissed. Typically, they include incompetency, conviction of a felony, moral turpitude, evident unfitness for service and dishonesty. Statistics on the cancellation, suspension, termination, and reinstatement of Ontario Teacher's Certificate reveal that from 1970 to 1985, 13 certificates were cancelled, 53 certificates were suspended, 26 certificates were terminated, and 26 were reinstated.218 Combining the number of cancelled certificates with those terminated reveals 39 potential educational malpractice suits in Ontario. This number is greater than the total number of educational malpractice cases in the United States.

It is evident that Ontario teachers can be dismissed, and are, regularly. There is evidence that some being dismissed might have retained their position if they had chosen to take a stand and prepare their case well, (the
Ontario Ministry of Education reinstated 26 teaching certificates from 1970 to 1985. Unfortunately for the students and parents, there are those who should not be retained who are being permitted to work because of the lack of knowledge, ability or courage on the part of those in administrative school board positions. Where there is educational harm occurring because of instructional negligence, a board cannot shirk its responsibility of dismissing those responsible.

The preponderance of evidence of instructional negligence in the Board of Reference cases suggest that a breach of professional standards is a common occurrence in Ontario. By examining case 1978-4, evidence of professional negligence will be used to demonstrate a potential malpractice suit against teachers. In case 1978-4, the principal indicated his concerns regarding the teaching methods of the plaintiff. More specifically, the plaintiff was encountering problems in the area of class management and control. As a result, "the lack of control was adversely affecting the academic program." The evidence suggests that every effort was made to help the plaintiff in rectifying the problem. However, the situation did not improve. Describing the situation as "chaotic" the principal testified that a) students were not producing in
the art program, b) the plaintiff kept no anecdotal reports,
c) there appeared to be a slavish adherence to and reliance
on the textbook and exercise book and, d) the plaintiff did
not follow accepted fundamental pedagogical principles.
Furthermore, "after 21 years of teaching experience, he is
still in the lowest second or third level (of the seven
levels of qualifications in the elementary school panel).
In fact, he was not even sure whether he was in Level 2 or
Level 3. He has shown virtually no initiative in upgrading
his academic qualifications."

From the evidence gathered it was clear that the
plaintiff had breached a legal duty to educate. Regulation
262 section 21(a) states, "a teacher shall be responsible
for effective instruction and training assigned to him and
for the management of his class or classes."

The evidence
indicates clearly that the plaintiff failed to discharge
these responsibilities satisfactorily. Furthermore, since
the first duty of the teacher is to "teach" non-negligently
and since this duty was not adhered to, the possibility of a
malpractice suit may be anticipated. If the students in the
plaintiff's class failed to obtain the average level of
performance for students with the same essential
characteristics, the plaintiff would be liable. Moreover,
if the principal or a supervisory officer rated the
plaintiff unsatisfactory but failed to dismiss the teacher "for cause" or rehired the teacher, the evidence would suggest that the principal or the supervisory officer was negligent. Thus, as this Board of Reference case suggests, the unexcused failure of a teacher or school official to conform to statutes or regulations enacted to protect students against the risk of not learning may constitute instructional negligence which in turn may result in a malpractice suit.

Based on the previous findings, it is the contention of this thesis that educational malpractice cases may become commonplace in Ontario within the next decade. What is difficult to predict, however, is whether students will suffer more from the conditions occasioning the malpractice suit in the first place or from the teacher paranoia and professional backlash that may result if teachers are routinely sued for failing to deal with individual differences among students.

The most realistic approach to educational malpractice suits in Ontario appears to be found in the analogy between "professional incompetency" and "professional standards." Boards of Reference require evidence of incompetent behaviour on the teacher's part before dismissal. Liability could be imposed for failure to educate once
instructional negligence is demonstrated and proven. A more logical rule would allow recovery when the teacher is dismissed because of incompetence and it can be proven that because of the teacher's instructional negligence a student had failed an English class. The general position taken by the courts in Ontario reviewing the exercise of school board powers seems to be delineated by judicial precedent. It appears that in Canada the courts "will not intervene in the peaceful exercise of those powers, unless there has been an invasion of someone's constitutional rights, or the board has acted in an ultra vires manner or has failed to act when it had the opportunity."221

Once the exclusive domain of professional educators, teacher incompetence has become a subject for legal debate.222 As the courts continue to weigh the need for educational outcome against the rights of individual students, the authority of educators may be pared away. The recognition of students' rights as a legal issue has caused a growing number of teachers to wonder whether they can carry out their classroom responsibilities. There are cases which have reached the courts in which classroom teachers have claimed that the board of education, or the administrative officer of the school system, have overstepped their legitimate sphere of authority and have,
in effect, violated the teacher's rights as a professional. Furthermore, if a teacher is deemed incompetent by the Board of Reference, it may be safe to suggest that the teacher may automatically be liable for educational malpractice.

While the concept of educational accountability may become increasingly popular in Ontario, there appears to be no general agreement about who should be held responsible. In the face of these apparent developments, the teacher's reaction is predictable. In the first place, law quite properly deals in generalities. It bases itself deliberately on a series of presumptions, and it is justified in doing so because, if these presumptions were invalid, social chaos would ensue. Unless Ontario teachers possess enough self-control and intelligence to be able to understand and deal with potential educational malpractice suits, teaching may become impossible in any form. Moreover, parental involvement in the educational process is on the increase thus escalating controversies with the education authorities. Perhaps an even more basic reason why controversies arise is a divergence of belief inherent in two fundamental common law principles, "namely the right of parents to guide their child's education, with primary concern presumably directed at the welfare of the
child, and the right of the board of education, as an arm of
the state, to direct the child's education for the primary
purpose of enhancing the welfare of the state."225

As parents become more involved in their children's
education and acquire an understanding of the decisions and
procedures of the Boards of Reference, litigation against
teachers and boards may ensue. The argument that teachers
should remain actively aware of the relevant developments in
their fields remains valid and crucial.226 Moreover, to
prevent the educational malpractice suits, relevant
developments must include not only further work in special
areas of expertise of the teachers, but also further work in
the pedagogy of teaching those special areas at appropriate
levels. It is difficult to be more specific about the
methods of achieving this continued legal active awareness;
however, it can be stated quite categorically that it is
essential for good effective teaching.

In the final analysis, Hypothesis II has shown that
Boards of Reference preclude lawsuits against teachers by
sheltering them from the public. They are successful to a
large extent because the public lacks knowledge and
awareness of their legal rights with respect to their
children's education. Nevertheless, it appears that some
advances may soon be made. On a carefully prepared
presentation, with adequate evidentiary support, and with a few changes in educational law (parental involvement in Board of Reference hearings) Boards of Reference may not be able to prevent educational malpractice suits against teachers and school boards. Unfortunately, the present trend appears to be in the opposite direction. Despite the evidence of instructional negligence in the Boards of Reference cases, some incompetent teachers are allowed to continue teaching (see Appendix no. 7 for the number of certificates reinstated). It must also be pointed out, for the benefit of those who insist on seeing education in purely utilitarian terms, that emphasis on teacher competence and acquisition of skills may not, in the context of a rapidly changing technology and a rapidly evolving society, lead to more academically competent students. Moreover, there are no adequate safeguards in a system where teachers are judged by administrators, parents, and the courts. Society must recognize education as a basic aim and understand that teachers' professional expertise is a crucial component to its success and that, without this professional expertise, the education system may be riddled with educational malpractice suits.
Chapter V

The Charter of Rights: Implication For Ontario Teachers

Legally and morally, Ontario teachers owe students the opportunity to learn. The legal implications of the Canadian Charter of Rights and Freedoms on educators may ultimately test this legal and moral obligation. Armed with new constitutional rights and guarantees, students may carry more of their grievances before the courts of law. "Mindful of the Charter mandate, the courts will then declare Canadian students in possession of constitutional rights no different from those given to adults."227

The development of constitutional rights for students has become sufficiently recognized to form the basis for both equitable and legal remedies, especially under Section 24(i) where the Charter assures an appropriate remedy to anyone whose chartered rights and freedoms are infringed or denied.228

Moreover, Section 7 is important in this contract because it provides the chartered right to life, liberty and security, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.229 A student graduating from high school unable to read and write at a competent level may seek redress in a court of
law by claiming that negligent instruction has condemned him to unemployment, marginal employment or welfare. The student may sue the board for unspecified damages because of the loss of his earning capacity. How these two important provisions are applied may well be based on the discretionary power given to judges "as to when they apply the Charter." There is no doubt that these sections raise the crucial question whether students can be treated differently from adults, and if so, upon what basis this differentiation can be made. At stake in the entire consideration is a definition of education. Moreover, the result of such possible judicial intervention of the function of education may lead to a loosening of the school's influence over the decisions and the conduct of its students.

Damage suits may be filed by students under the Charter of Rights and Freedoms against administrators and school board members claiming monetary compensation for violations of their constitutional rights. It is also important to note that an educational malpractice case is an expensive undertaking. "Requiring payment of court costs, expert witness fees, lawyers fees and other associated expenses" may deter some students who are in the position to sue.

"This expense, coupled with a general rule in Canadian civil
cases that the losing party must bear part of the full costs of both sides," will deter many students from pursuing "frivolous and fraudulent claims." As a result, "...serious concern for pupil's welfare rights should result in the specification of teacher and school accountability to forestall individual and/or institutional malpractice in relation to the central task of schooling. The right to the development, under normal circumstances, of cognitive capacities characteristic of the educationally initiated should be clearly delineated. By no means should schools and educators go scot free for shoving otherwise mentally and emotionally normal children through a diploma mill without having appropriate skill." It would seem that legislatures should be the agencies to enunciate new policy in this area--as legislators established workmen's compensation in derogation of the common law many decades ago. Yet there is far from complete consensus as how to handle the various situations which would develop were it possible to sue public bodies for negligence of employees.

Naturally, the classroom teacher does not want to be the scapegoat when the school system does not produce what parents, the board of education, or the administrators' demand. While they are likely the ones to be held accountable under the Charter, teachers often do not possess
the resources or power to alter policies or practices which affect learning. However, when an incompetent teacher is allowed to teach negligently, he/she is depriving the student the opportunity or "right" to an education and of acquiring security for the future. Since no educational malpractice cases have occurred in Ontario, it is difficult to determine how the courts will react. It may be argued that the actions of the courts and legislatures are simply reactions to changes and conditions in the provincial arena. Or more plausibly, it can be argued that there are multiple interactions among the legislatures, courts, schools, and the public. The directions of cause and effect are seldom clearly known and seldom consistent. What is known is that in the past, the courts in Canada have been reluctant to interfere in the judgement of professionals.233

Prior to the Canadian Charter of Rights and Freedoms, the Canadian education scene was "much less legally contentious than that of the United States..."234 Dr. Michael Manley-Casimir points out that "occasionally there are challenges in provincial courts, but the Canadian administrator can count on a more predictable legal environment. They can expect students to be more deferential, parents less likely to resort to legal challenges, and teachers more likely to protect their
professional interests through associations rather than through courts." Contrary to Dr. Michael Manley-Casimir's views, the Charter of Rights and Freedoms may disturb the confident and calm legal world of the Ontario education system. There appears to be a developing trend towards accountability and "an increasing number of lawsuits against school systems by students and parents alleging failure in basic skills such as reading." 

Emerging legal patterns are hazy due to complicated facts in specific cases and to the political and other non-legal ramifications of the situation. It does seem clear that the Charter raises cautionary signals that may presage a final decision.

What effect the Charter of Rights and Freedoms has on Canadian Tort Law remains to be seen. It appears that the rights of educational agencies, governmental and otherwise, may be becoming more constrained while the rights of individuals in their interaction with these agencies more specifically established. Mackay implied that, if any development in the area of teacher incompetence is to occur, it may have to begin in a forum other than the courtroom. Whether legislatures are willing to become involved in the sanctity of the education system is doubtful. It may well be that the courts and legislatures
will be satisfied to establish legal parameters for permissable teacher conduct and intervene or permit interventions only when there is reported gross incompetence or contravention of the professional standards of performance. "Protection of children's welfare rights with respect to the effects of school/classroom structures, arrangements, and practices also needs to be ensured. The harm wrought by haphazard assessment of students, by the use of classification procedures based on inappropriate standardized intelligence tests, and by careless implementation of certain practices such as grouping, special education placement, and the exclusion of 'ineducable' children ought no longer be tolerated."

The substantive legal problem here has been the framing of a constitutionally permissable standard of professional performance. The refinement of student's rights in school settings will continue to be a developing area of law but the emergence of minimum standards of performance for teachers represents the new horizon of legal action. Mackay notes that "if Canada's history is predictive, the courts may be willing to accept many reasonable limits on the rights of both teachers and students."

There are often areas where charges of educational malpractice appear to be a possibility because of the
Charter. The assignment of teachers to teach subjects in which they have not been certified is a common occurrence in Ontario. Section 235(1)(a) in the Education Act of Ontario states that it is the duty of the teacher "to teach diligently and faithfully the classes or subjects assigned to him by the principal." There is considerable confusion, in both teaching and legal circles, as to the duties of a teacher under his contract. It is clear that a teacher may be assigned to teach any subject for which he holds a certificate. Duties may encompass any aspect of that subject. Problems arise when teachers are asked to teach subjects for which they are not certified. The apparent misassignment of teachers in subjects which they lack appropriate qualifications may lead to educational malpractice suits. By way of illustration, a hypothetical case may be developed to show the possibility of launching an educational malpractice suit against a teacher and a board of education in Ontario. Because of the new OSIS document, which may result in the phasing out of certain technical programs, a teacher of twenty years of experience in the industrial arts area may find himself out of a job. Instead of releasing the industrial arts teacher, the principal, acting within the powers of the Education Act, decides to assign the industrial arts teacher to teach a
grade nine English class fully aware that he lacks teaching qualifications in English. Although the industrial arts teacher may be competent in the industrial arts field, his being assigned to teach grade nine English has resulted in students being denied a properly trained and qualified English teacher. This argument may be taken a step further. Should a student receive a failing grade in grade nine English because of a teacher's instructional negligence, a malpractice suit may become a strong possibility.

The student may claim that out-of-field teaching has resulted in his failure. It would appear that even though the industrial arts teacher may possess an Ontario Teacher's Certificate and status on a teaching team, he is still responsible for the learning climate and is accountable to any charge of nonperformance or misperformance of students. By assigning teachers to teach subjects for which they are not certified, boards of education may be opening themselves to a possible lawsuit. By not assigning properly trained teachers, the principals as well as the boards of education may be breaching section 24(1) of the Charter of Rights and Freedoms. Understanding the potential effects of out-of-field teaching on students may prevent potential malpractice suits against teachers. Despite the Courts' unwillingness to protect students from incompetent instructors in the
past, it is the contention of this thesis that the Charter of Rights and Freedoms provides students with clearly established constitutional rights. Consequently, it is difficult to predict how the courts will react to these new challenges. The Charter of Rights and Freedoms may serve as a starting point for developing a prediction of such a judicial response in a pending educational malpractice suit.

Such a suit as the one just sketched clearly invites the Court to become involved in an area fraught with controversy and touching upon one of the most important of the discretionary powers of the boards of education, the authority to control the hiring, placing, and evaluating of teachers. This is an area Canadian courts historically have tended to avoid, and it may very well be that the legal arguments in support of the boards of education in these matters ultimately may prove to be unavailing. Fischer states that "the safest prediction that one can make is that the courts will continue to act, by and large, as they are now acting. That is, judges will continue to respect state and local control of schools and the policy-making prerogatives of legislatures and local officials, while at the same time they will be ready to apply constitutional principles to school related controversies and to enforce
other laws related to schools."242

In Ontario, the new constitutional guarantees may force the courts to abandon their traditional "stare decisis" stance with respect to education and, more specifically, with educational malpractice. A possible educational malpractice case may have a reasonable prospect for success based on the Charter. However, this depends strictly on the attitude of the courts.

As a consequence, there is sometimes little confusion about where the legal authority actually resides for governing the many kinds of deeds that are supposed to add up to educating students. This confusion is further confounded by numerous pages of laws, rules, and regulations that constitute what is ordinarily referred to as the "Education Act". These laws and rules, having been accumulated over several decades, may be laced with any number of internal contradictions. As a result, the Charter may either help to clarify some of these contradictions or contribute to the existing dilemma. Therefore, any prediction on how the courts will react to educational malpractice suits in Ontario, and the effect the Charter might have on such a suit, remains uncertain. What is certain is that the litigation against professionals appears to be in the increase.243 Undoubtedly this trend is
merely a manifestation of what is taking place throughout our society.

Another area where educational malpractice may become a possibility concerns teacher organizations. Teacher federations may appear to be likely defendants in some kind of malpractice litigation, especially where specific curricula or program procedures have been negotiated as a part of a master contract. In such instances there is a possibility that the organization may be held liable or at least become co-defendants with a board of education for injuries suffered by students as a result of the implementation of the negotiated agreement.

The legal issues that attend the new special education provisions in Ontario, mainly Bill 82, may result in an increase of litigation against teachers. Essentially, Bill 82 requires the diagnosis of students with special needs and handicaps and submission of an annual report on the scope and results of the educational services provided to those youngsters. Section 15 of the Charter is important in this area and is intended to prevent discrimination. In effect, it imposes on the school boards the obligation to offer educational services to handicapped children. Denial of services to such children is discriminatory and the Charter prohibits discrimination based on physical or mental
Anne Keeton, notes that "fears about legal consequences have arisen because of three or four potential problems in Bill 82. A major source of concern especially for regular classroom teachers is the likelihood that they might be forced to cope with mainstreamed handicapped students about whom they have little expertise. Teachers may find it intimidating to receive their first wheel-chair bound, epileptic or enuretic student." It is becoming increasingly impossible that teachers may become more involved and more responsible for these "special pupils". By way of illustration, acting "in loco parentis" a teacher may be asked by the principal to give special attention to a child requiring additional assistance. When and if the inadequately trained teacher becomes "vicariously liable" for any liabilities incurred, as a result of negligence or is found to injure the education or the physical growth of the student, then both the teacher and the board of education may become co-defendants in malpractice litigation. Bill 82 is not merely making education available, it is assuring that the education provided will be effective. Moreover, Bill 82 also requires certain educational practices, procedures, and regulations to achieve this goal.
Bill 82 requires the school district to provide assurances that it will establish an individualized education program for each handicapped student, and postulates that its provisions be carried out. If these expected results are not met, a student or his/her parents may initiate a tort action against the board of education for monetary compensation. A teacher at the Alberta School for the Deaf, for example, was found negligent when a student was injured by a circular saw. The court found that the duty owed by a teacher of the handicapped was greater than that owed by a reasonable parent or by an employer to an employee. Although a tort action may be started for punishment or merely for revenge, this should not be done unless the plaintiff has suffered some damage or loss, since the main purpose of tort law is to compensate those who have suffered a loss with money to the extent that money can do that. Moreover, a student should ask the courts for help if he or she believes that basic rights are violated. Any departure from absolute regimentation may cause trouble. These considerations will undoubtedly play a prime role in the development by courts of a new attitude with respect to liability for damages in lawsuits claiming malpractice. It may be suggested that all of these vital legal programs are yet to be resolved. But it is obvious
from the scope of the Charter that the courts may become a de facto "legislative authority" to resolve these complex questions. "There is reason to believe that grieving students will positively respond to the psychological stimulus that the Charter provides. Realistically, unless educators are quick to establish new arrangements which will eliminate or minimize occasions for valid student grievances based on constitutional grounds, we can expect student test cases reaching the courts not long after the equality rights provision of the Charter operates in 1985."249

Teachers and other authorities are required to make many decisions that may have serious consequences for the student. They must decide, for example, how to grade the student's work, whether a student passes or fails, whether he is promoted. In these and many other similar situations claims of impairment of one's educational entitlement identical in principle to those enacted in the Charter can be asserted with equal or greater justification. Likewise, in many of these situations a pupil can claim an "injury" as a result of a breach and because of the Charter have a greater chance at succeeding in an educational malpractice suit.
Chapter VI
Conclusions, Implications and Recommendations

Having reached the end of this historical investigation, the author will summarize its results and consider its implications for the urgent questions of educational malpractice in Ontario. The author is aware that the conclusions which have emerged in the course of the present study still rest on an inevitable interpretation of the available evidence. Therefore, it will be the critical sieve that will eventually corroborate or challenge the validity of the findings. Nevertheless, the fact remains that the conclusions of this thesis represent the result of a serious effort which has been made to understand and interpret the available sources. The reader will in fact find in the preceding pages extensive discussion and precise reasons for every single conclusive statement which the author now submits. While most of the litigation in Ontario has focused on the teacher's negligence with respect to physical injuries, the primary reason for the teacher's presence in the classroom is to teach students. There are two basic duties related to instruction. The first is that instruction result in students' mastery of certain processes and basic skills. The second duty
is that students not participate in any activity without adequate and proper instructions from the teacher regarding the performance of the specific function. A student's failure to learn because of teacher negligence or incompetence "cannot be won with formal legal arguments alone." A part of any plaintiff's case will have to be social or public policy arguments demonstrating why there should be liability.

So far the argument against educational malpractice is based on public policy, and towards the individual boards of education, it may seem somewhat unfair and unjust. But there are also considerations of quite another kind which point in the same direction, considerations which appeal to the educator.

The desire to excuse incompetent teachers for educational malpractice, however kindly an intention, may be a cruel kindness, for in the long run it may impair their professional status in the community. In a well-meant endeavour to spare incompetent teachers, Boards of Reference may unwittingly inflict on them an injury deeper and more irremediable than any which educational malpractice suits threaten them. The present reluctance of the courts in the United States to find educational malpractice may change. This change may occur in Ontario before it does in the
United States because in Ontario, as shown by Hypothesis I, there appears to exist a legal duty to educate.

The statutory duties as defined in the Education Act and in its Regulations prescribe the obligations of a teacher in Ontario. However, these statutory duties do not specify the types of professional decisions and actions that fulfill these duties. It therefore rests with the courts to interpret the law and to decide, in the case of each individual claim presented to them, whether there are grounds for an educational malpractice suit. W. F. Foster notes that "...Canadian Courts, unlike their American counterparts, may well prefer not to accord even a limited protection to educators but could prefer to deal with the problems of educational malpractice as they arise on a case-by-case basis."254 The plaintiff must exhaust the administrative process before taking his cause to the courts. This implies that the plaintiff must ask for hearings in the schools and must attempt to get changes done through the administrative process before he goes to court.

Another significant discovery is that the courts in the United States have indicated that there has been no precise standard of care or standard of duty prescribed for the schools.255 Conversely, in Ontario the Education Act, its Regulations and the Teaching Profession Act prescribe
duties as well as standards by which a teacher's performance is judged. What is evident in all of the educational malpractice cases is that courts require some kind of standard duty the schools must follow before they can act. If Ontario teachers do not perform up to the standards of reasonably competent professionals in their area and if such a breach of duty injures the student, a suit for money damages is likely to succeed.

Another major discovery in the educational malpractice decisions is the courts' reluctance to question educational policies. However, there seems to be an indication that the courts may review day to day implementation of these policies and intervene in gross violations of defined public policies. Therefore, if a standard of care can be shown to exist and if it can be proven that the teacher, school, or school board violated a public policy, and if the plaintiff has gone through the administrative process, it would appear that all the road blocks are gone from launching an educational malpractice suit. The reasoning in all the educational malpractice cases in the United States illustrate that the question of educational malpractice hinges on whether or not the teacher was incompetent in performing his/her duties and whether the student's failure to learn was the direct result of teacher incompetence.
The real question concerning educational malpractice is not whether it is in principle a legitimate legal concept, but why in practice it so often fails to be recognized. The answer given by the U.S. courts is that it is based on a radical misconception of the mentality of those subjected to it. The nature of this misconception may be seen most clearly in Hoffman v. Board of Education.257

The impact which educational malpractice will have on boards of education in Ontario is difficult to measure. What is likely, however, is that in most cases there will be some damages awarded. In large damage cases, even a small degree of relative fault on the part of the defendant may yield a high award to the plaintiff.

If there are central threads to be seen in judicial decisions relating to educational malpractice, they reflect an attitude that public policy considerations and the impact upon the public's pursestrings are more important than the teachers' responsibility to teach non-negligently.

Sweeping criticism of tort law may be misplaced. If the interpretation of the Peter W., Hoffman, and Donahue decisions had developed consistent with legislative intent, the possible impact upon the boards of education would not be so catastrophic. However, the plaintiffs in the Peter W., Hoffman, and Donahue cases have never been given a
fair chance. Perhaps if they had, the tort system would work and provide reasonable compensation instead of creating intolerable burdens.

The weight of the evidence presented in this thesis strongly supports educational malpractice theory as a description of current patterns of educational developments in the United States as well as possibilities for Ontario, but also suggests that a closer approximation of the negligence theory as brought out in Ontario is both feasible and desirable. It is unrealistic to advocate litigation against all incompetent teachers with significant consequences for their lives; obvious limits on following professional standards of conduct must be adhered to.

Finally, educational malpractice may prove to be of value to society. Contrary to the educators' view, holding Ontario teachers to a legal duty of care is not likely to exacerbate existing cleavages or rend the fabric of the educator's authority. Imposing liability on teachers could prove to be a deterrent to negligent teaching and the hiring of incompetent teachers.

When and if an educational malpractice suit becomes ultimately successful in obtaining a ruling that a board of education is legally accountable for the adequacy of an education a student receives—that is, for the output rather
than the input--it could have a significant but mixed impact on education in Ontario. While it may deter "teacher-caused educational deficiencies" a successful educational malpractice suit might also deter university students from entering the teaching profession, discourage innovative and experimental ways of teaching, as the Peter W. court points out, and finally, reduce funds available for the classroom. The survival of public education depends on accommodation with changes in society. In higher education, for example, institutions must take the lead in defending their roles, missions and goals. In doing so, however, institutions have the responsibility to demonstrate that they are aware of changes taking place in society and in student needs.

Legislators want to see that institutions have good administrators and that policy decisions are relevant to today's society. Although far from perfect, Ontario law shows some signs of bridging the gap between the community's wishes and the legislature's willing response. What remains to be seen is how effective the courts can be in achieving that goal and at the same time ensure that those who receive help do so in a manner that does not stamp them with the label of "protected" individuals or groups.

In the course of this investigation various indicators have emerged which point to the "courts" in the United
States as well as the Board of Reference in Ontario as the ones primarily responsible for preventing educational malpractice suits. But the question could be raised, did the courts exert sufficient authority through the guise of precedent to influence and maintain public policy? To answer this question, it is necessary to verify the courts' stance with respect to tort law.

The process of affirmation of the primacy of the courts is difficult to trace. For the purpose of this study, the author has made no attempt to define the nature or extent of the jurisdiction authority of the courts in Ontario and in the United States, but simply to describe what appears to be the maintenance of status quo with respect to tort law.

The role that the courts play in causing the abandonment of liberalized tort theories and the adoption of traditional tort laws has been underestimated, if not totally neglected, in recent studies. If one recognizes, as admitted by Linden, that "tort law is not one-dimensional it serves several functions," then the court emerges as the most logical place for the liberalization of tort law. It is with the courts that both the circumstances and the authority necessary to accomplish such a liberal change exists.

The analysis of the Boards of Reference cases in
Ontario adduced as proof of negligence in educational malpractice suits has shown that this interpretation is warranted on several counts.

In the first place, in all the educational malpractice cases in the United States, the decisions rendered against the plaintiff, are based on the absence of a legal duty to educate. In Ontario as evidenced by the Boards of Reference, there is a legal duty to educate. The reproof of the misuse of the tort precept cannot be legitimately interpreted as the abrogation of the precept itself.

Secondly, the fact that the courts in the United States recommend the possibility of future educational malpractice suits, indicates that on the question of the flexibility of tort law the courts' reliance on precedence may change. If the courts had abandoned their traditional stance and rendered in favour of educational malpractice, they would have encountered opposition and endless disputes with educators. The absence of any trace of such a polemic is perhaps the most telling evidence of the courts' respect for the traditional concepts of tort law.

In the final analysis then, the courts' attitude towards educational malpractice must be determined not on the basis of its denunciation of heretical tort theories, but rather on the basis of its overall attitude toward the
law. The failure to distinguish between the law as a body of instruction and the law as a system of change is apparently the cause of much misunderstanding of the courts' attitude toward educational malpractice. There is no question that in Ontario there exists a legal means by which educational malpractice suits may succeed. On the other hand, whenever any of these educational malpractice suits occur, the court may render its decision in favour of the plaintiff. It might be stated, therefore, that the courts in the United States rejected educational malpractice suits but accepted them as a shadow pointing to the possibility of their success in the future.

In the light of these conclusions, Ontario educators ought to consider now those questions raised at the outset regarding the legal implications of educational malpractice and its relevancy for teachers today. The thesis has shown that the adoption of "new" tort theories (not previously recognized by the courts) may occur in Ontario. The analysis of the few available educational malpractice material has revealed the reasons malpractice cases against teachers have not succeeded. The author submitted to careful scrutiny "public policy considerations", "duty of care" and "governmental immunity", generally cited as roadblocks to educational malpractice. The thesis was able to
show, however, that these legal arguments provide no probative indication for educational malpractice cases not prevailing in the future in Ontario. The author discovered that both external pressures and internal needs encouraged the failure of educational malpractice suits in the United States and in Ontario. Externally, the pressures of public policy and governmental immunity made it necessary for the courts to rule in favour of the defendants in all educational malpractice suits. Internally, in Ontario, the boards of reference preclude malpractice suits by sheltering the incompetent teacher from the public.

Several indications emerged in the course of this study corroborating this hypothesis. In the course of this investigation several concomitant factors emerged suggesting that a break with traditional concepts of tort law may occur in Ontario as well as in the United States. Ontario teachers need to be made aware of their legal liabilities with respect to educational malpractice. In Ontario liability insurance taken by boards of education might cover teacher employees. Also in some jurisdictions teachers may have to band together to obtain group liability insurance. Of course, it is possible for an individual to get insurance covering his own liability. Attention should be drawn to the fact, however, that
insurance really does not affect the question of liability; rather it provides for paying judgements up to an amount specified in the policy after liability has been established. Thus, the purchasing of liability insurance itself will not protect the teacher from a malpractice suit or the student from instructional negligence.

In the final analysis, if the problem of educational malpractice is primarily legal, it is much wider in scope and it cannot be analysed exclusively in legal terms. Its political and even cultural aspects should not be neglected, because they may have an important bearing on its solution. The methods by which the Ontario educators will reach a more stable position must be derived from tort law, but they cannot be appraised on purely legal grounds without considering their political or social implications. Very often it happens that sound tort theories are not acceptable on the political level or that they need to be supported by social forces. On the other hand, the important influence that tort law may exert on the educational structure cannot be ignored. These close inter-relationships between educational and legal factors, which are evident in the problem under study, cannot be defined by pure academic analysis and require a more general treatment.
It is suggested that Ontario educators, haunted by memories of educational malpractice suits in the United States prepare for similar suits in the not too distant future. This is a point of much controversy; but perhaps the time has come to think in terms of improved educational quality output rather than in terms of controls and direction by the courts. The trend that has already set in will be hard to reverse, but there are signs among educators that the problem of educational malpractice is at least being considered. If this movement gains in momentum and is fortified by a determination to regain professional credibility, then it may be possible to accord Ontario teachers the professional status which they desire.

Thus, in the next decade, Ontario faces perhaps the most challenging and portentous years in its educational history. Among the positive evidences that successful solutions are being found will be the resumption of professional accountability on a substantial and accelerating scale. Other positive signs will be sought in balancing legal and educational responsibilities as teachers adapt themselves to meet the challenges of the next decade. Furthermore, the public would welcome a plan that leads to both more warranted instructional outcomes and higher achievement among larger numbers of students. To this end,
citizens are not antagonistic to provisions for making teachers more responsible for the quality of learning of pupils. There are teachers, however, who will resist the introduction of procedures by which they are held accountable for results. Yet, Ontario teachers who act in a reasonable manner, consistent with the standards of care and skill in their profession, should have no serious worries of lawsuits for instructional negligence. Finally, while the problem of educational malpractice may now appear insuperable, it is well to remember that the importance of professional growth is necessary and beneficial for the maintenance of desirable academic standards.

Thus, the present educational malpractice dilemma poses on the political level the choice between an individual's right to non-negligent teaching and the protection of public policy. It is a question forestalling Ontario's transition to a position in which it would be adopting new tort theories, in this case educational malpractice, by overcoming internal divisions and by developing genuine education policies. Certainly the present problems are solvable legally, but the political implications may render legal solutions inapplicable. In a word, educators must decide whether educational malpractice which, as at present understood, would imply the gradual weakening of the
teaching profession, is more susceptible of fostering greater academic achievements.

Suggestions for further study that would extend this thesis would be:

1. to ascertain why educational malpractice suits have not been launched in other provinces in Canada;

2. to ascertain the knowledge level of teachers and trustees in Ontario of their legal liability and rights with respect to educational malpractice;

3. international study of malpractice in England and Wales, Scotland and elsewhere;

4. to develop uniform standards of performance for Ontario teachers;

5. to monitor the legal developments of educational policies and their potential affect on educational malpractice in Ontario;

6. to research the effect educational malpractice suits have had on districts sued and consequently their effect on education in general.
ENDNOTES


9Ibid.


11Mackay, p. 162.


13Ibid., p. 242.


15Ibid., p. 239.

17 Bollinger, p. 187.


26 Donahue, 47 N.Y. 2d at 443.


29 Ibid.

31 Ibid.


34 Ibid., p. 6.

35 Ibid., p. 3.

36 Ibid., pp. 29, 79, 123.


40 H. N. Janisch, "Legal Liability For Failure To Educate", The University and the Law, Dalhousie Continuing Legal Education Series, No. 8, 1978, p. 64.


42 Baratz and Hartle, Malpractice in the Schools, 41 Progressive, June 1977, at 34.


44 Williams, p. 107.


46 Williams, p. 107.

47 Eg. 60 Cal. App. 2d at 825, 131 Cal. Rptr. at 861.

49 Ibid., p. 489.

50 Ibid., p. 485.

51 Williams, p. 106.

52 Connors, p. 152.

53 Donahue v. Copiague School District, 64 Ad. 2d, p. 44.


56 Ibid.

57 Ibid.


60 Instructor, p. 11.


62 Mackay, p. 160.

63 Flygare, p. 631.

64 Ibid.

65 Ibid.

66 Ibid.
67Collingsworth, p. 488.

68Ibid., p. 486.


72Epley, p. 61.


74Epley, p. 62.


77Ibid.

78Ibid.


80Ibid.

81Mackay, p. 160.

82Standard Procedure #45 General, Toronto Board of Education, p. 3.

83Mackay, p. 162.

84Sepler, p. 191.


91 Connors, p. 153.

92 Ibid.

93 Instructor, p. 38.


95 J. R. Braverman, p. 6.


99 Peter W., 131 Cal. Rptr. at 859.

100 Ibid.

102 Comment, p. 761.
103 Peter Doe v. San Francisco Unified School District.
104 Ibid.
105 Bollinger, p. 112.
111 Ibid.
117 Bollinger, pp. 129, 130.
118 Abel and Connor, p. 269.
119 Ibid.
121 Donahue v. Copiague Union Free School District, 64 A.D. 2d at 35, 407 NYS. 2d at 879.
122 Peter W. v. San Francisco Unified School District, 1d at 820.21, 131 Cal. Rptr. at 858.
126 Ibid.
128 Ibid.
129 Ibid.
130 Ibid.
134 Milstein, p. 18.
135 Ibid., p. 18.
136 Ibid., p. 18.
137 Ibid., p. 18.
138 Ibid., p. 19.
139 Ibid.
140 Ibid.
141 Ibid.
142 Ibid., p. 19.
143 Ibid.
144 Ibid.
145 Department of Justice Canada, Canada's System of Justice, 1986, p. 9.
146 Bollinger, p. 104.
147 Ibid., p. 25.
150 Ibid., p. 9.
151 Ibid., p. 59.
152 Ibid., p. 37.
156 Ibid., p. 131.
157 Ibid., p. 130.
158 Ibid., pp. 131-132.
159 McCurdy, op. cit., p. 132.
160 McCurdy, op. cit., pp. 132-133.
161 Tennessee Code Annotated, 49-1401.
163 M. Long, pp. 15-17.
165 Bollinger, pp. 98-99.
166 Tracy, pp. 573-574.
167 Bollinger, p. 189.
168 Ibid., p. 190.
169 Comment, p. 768.
170 Ibid.
172 Ibid.
173 Ibid.
175 Ibid., pp. 820-822.
177W. Prosser, Supra note 25 and 26, at 343-348; Restatement (Second) of Torts, 323 and Comment et al. 139 (1965).

178Ibid.

179Ibid.


183Ibid., p. 191.


185Ibid.


190Ibid., p. 1174.


194 Ibid.
195 Bollinger, p. 184.
196 Ibid.
197 Comment, p. 790.
199 Ibid., p. 791.
200 Bollinger, p. 235.
201 Ibid., p. 189.
204 Ibid., p. 29.
205 Ibid., p. 25.
206 Ibid.
208 Ibid.
209 Ibid.
211 See Appendix #3.
212 Board of Reference Case #1984-2, p. 2.

215 Ibid.

216 See Appendix #6. Ministry of Education Code 1983-1. These standards were established by a board of education to evaluate the performance of a teacher. Uniform Provincial standard have yet to be developed. Once this occurs, malpractice of teachers may become more commonplace.

217 M. Czuboka, Why It's Hard To Fire Johnny's Teacher, Winnipeg: Communigraphics, 1985, pp. 5-6.


219 See Appendix #37.

220 M. Czuboka, p. 219.


226 M. Czuboka, pp. 277-279.


228 The Charter of Rights and Freedoms, Sec. 24(1).
229Ibid.
230Mackay, p. 18.
231Foster, pp. 193, 194.
232R. F. Magsino, p. 5.
235Ibid., p. 13.
237Mackay, p. 18.
239R. F. Magsino, pp. 5-6.
240Mackay, p. 18.
241Informal discussion with Sue Zanin - Windsor Public Board of Education Representative to O.T.F. - March 1986.
243See Chapter II.
246 Ibid., p. 7.


248 Linden, p. 3.


251 Ibid., s.235(1)(b).

252 O.T.F. "Policy Resolutions Of The Ontario Teachers' Federation", We The Teachers of Ontario, 1984, pp. 21, 22.


255 Peter W., 131 Cal. Rtr. at 861.

256 D. L. Bollinger, p. 85.


259 Linden, p. 2.

260 Donahue, 47 N.Y. 2d at 443.

261 K. Cohl, pp. 72, 73.

262 Ibid.
### States Granting Sovereign Immunity to Schools by Statute or Case

<table>
<thead>
<tr>
<th>Judicially Abrogated</th>
<th>Statutorily Abrogated</th>
<th>Modified</th>
<th>Insurance Waiver Theory</th>
<th>Common Law</th>
<th>Tort Claims Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Delaware</td>
<td>Connecticut</td>
<td>Georgia</td>
<td>Alabama</td>
<td>Alaska</td>
</tr>
<tr>
<td>Arizona</td>
<td>Hawaii</td>
<td>Massachusetts</td>
<td>Mississippi</td>
<td>Arkansas</td>
<td>California</td>
</tr>
<tr>
<td>California</td>
<td>Iowa</td>
<td>South Carolina</td>
<td>North Carolina</td>
<td>South Dakota</td>
<td>Colorado</td>
</tr>
<tr>
<td>Colorado</td>
<td>Kansas</td>
<td>Texas</td>
<td>Ohio</td>
<td>Vermont</td>
<td>Hawaii</td>
</tr>
<tr>
<td>Florida</td>
<td>Maine</td>
<td></td>
<td>West Virginia</td>
<td></td>
<td>Illinois</td>
</tr>
<tr>
<td>Idaho</td>
<td>Maryland</td>
<td></td>
<td></td>
<td></td>
<td>Iowa</td>
</tr>
<tr>
<td>Illinois</td>
<td>Montana</td>
<td></td>
<td></td>
<td></td>
<td>Kansas</td>
</tr>
<tr>
<td>Kentucky</td>
<td>New Hampshire</td>
<td></td>
<td></td>
<td></td>
<td>Maine</td>
</tr>
<tr>
<td>Louisiana</td>
<td>New York</td>
<td></td>
<td></td>
<td></td>
<td>New Jersey</td>
</tr>
<tr>
<td>Michigan</td>
<td>Oklahoma</td>
<td></td>
<td></td>
<td></td>
<td>New Mexico</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Oregon</td>
<td></td>
<td></td>
<td></td>
<td>New York</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Tennessee</td>
<td></td>
<td></td>
<td></td>
<td>Oklahoma</td>
</tr>
<tr>
<td>Nevada</td>
<td>Utah</td>
<td></td>
<td></td>
<td></td>
<td>Oregon</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Washington</td>
<td></td>
<td></td>
<td></td>
<td>Pennsylvania</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Wyoming</td>
<td></td>
<td></td>
<td></td>
<td>Tennessee</td>
</tr>
<tr>
<td>North Dakota</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Texas</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Utah</td>
</tr>
<tr>
<td>Rhode Island</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Virginia</td>
</tr>
<tr>
<td>Wisconsin</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Wyoming</td>
</tr>
</tbody>
</table>

---

This compilation is based on state-by-state research of the statutes done by D. L. Dollinger in January through March 1983. The appendix in *Ayala v. Philadelphia Board of Public Education*, 305 A.2d 877 (1973) is used as a format.

359. Judicially abrogated but statutorily reinstated.
THE POLICY-MAKING PROCESS

Implementation

Legislation

Debate

Idea Formulation

Crystalization of Attitudes

Period of Dissatisfaction

THE STAGES OF POLICY

## APPENDIX #3

### Board Of Reference

<table>
<thead>
<tr>
<th>Code #</th>
<th>Concern</th>
<th>Evidence of Malpractice</th>
<th>Board of Reference Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972-1</td>
<td>Contract</td>
<td>Conduct of teacher may be open to question - on moral and ethical grounds</td>
<td>Continuance of Contract</td>
</tr>
<tr>
<td>1972-2</td>
<td>Contract</td>
<td>Lack of proper order and discipline and classroom management</td>
<td>Discontinuance of Contract</td>
</tr>
<tr>
<td>1972-3</td>
<td>Incompetence</td>
<td>Failed to maintain order and discipline - unjust corporal punishment</td>
<td>Discontinuance of Contract</td>
</tr>
<tr>
<td>1972-4</td>
<td>Contract</td>
<td>None</td>
<td>Discontinuance of Contract</td>
</tr>
<tr>
<td>1973-1</td>
<td>Incompetence</td>
<td>Failure to carry out duties and responsibilities</td>
<td>Discontinuance of Contract</td>
</tr>
<tr>
<td>1973-2</td>
<td>Contract</td>
<td>None</td>
<td>Continuance</td>
</tr>
<tr>
<td>1973-3</td>
<td>(Contract)</td>
<td>Abuse of Sick Leave Provisions</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1973-4</td>
<td>Incompetence</td>
<td>Teach diligently etc.</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1973-5</td>
<td>Dismissal - Just</td>
<td>Intolerance, Hostility etc.</td>
<td>Continuance</td>
</tr>
<tr>
<td>1974-1</td>
<td>Contract</td>
<td>—</td>
<td>Continuance</td>
</tr>
<tr>
<td>1974-2</td>
<td>Dismissal</td>
<td>Unprofessional Conduct</td>
<td>Discontinuance of Contract</td>
</tr>
<tr>
<td>1974-3</td>
<td>Contract</td>
<td>—</td>
<td>Continuance</td>
</tr>
<tr>
<td>Code #</td>
<td>Concern</td>
<td>Evidence of Malpractice</td>
<td>Board of Reference Decision</td>
</tr>
<tr>
<td>---------</td>
<td>---------------------------------</td>
<td>----------------------------------------------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td>1974-4</td>
<td>Dismissal - Review</td>
<td>Unsatisfactory Performance of Duties</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1974-5</td>
<td>Contract</td>
<td></td>
<td>Continuance of Contract</td>
</tr>
<tr>
<td>1974-6</td>
<td>Contract</td>
<td></td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1975-1</td>
<td>Contract - Dismissal Denominational</td>
<td>None</td>
<td>Continuance</td>
</tr>
<tr>
<td>1975-2</td>
<td>Denominational Dismissal</td>
<td>None</td>
<td>Continuance</td>
</tr>
<tr>
<td>1976-1</td>
<td>Contract</td>
<td></td>
<td>Continuance</td>
</tr>
<tr>
<td>1976-2</td>
<td>Contract</td>
<td></td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1977-1</td>
<td>Dismissal</td>
<td></td>
<td>Continuance</td>
</tr>
<tr>
<td>1977-2</td>
<td>Dismissal</td>
<td>For Cause - Drugs</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1977-3</td>
<td>Dismissal</td>
<td>Erratic and Irresponsible Behaviour</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1978-1</td>
<td>Contract</td>
<td>None</td>
<td>Continuance</td>
</tr>
<tr>
<td>1978-2</td>
<td>Contract</td>
<td>For Cause</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1978-3</td>
<td>Dismissal</td>
<td>Unsatisfactory Performance</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1978-4</td>
<td>Dismissal</td>
<td>Unsatisfactory Performance</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1978-5</td>
<td>Dismissal - Incompetence</td>
<td>Incompetence</td>
<td>Discontinuance of Contract</td>
</tr>
<tr>
<td>1978-6</td>
<td>Dismissal</td>
<td>Incompetence</td>
<td>Discontinuance of Contract</td>
</tr>
<tr>
<td>1979-1</td>
<td>Granting Board of Reference</td>
<td>None</td>
<td>Dissolve Board of Reference</td>
</tr>
<tr>
<td>1979-2</td>
<td>Dismissal</td>
<td>Incompetence</td>
<td>Reinstated</td>
</tr>
<tr>
<td>Code #</td>
<td>Concern</td>
<td>Evidence of Malpractice</td>
<td>Board of Reference Decision</td>
</tr>
<tr>
<td>--------</td>
<td>---------</td>
<td>-------------------------------------------------------------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td>1979-3</td>
<td>Contract</td>
<td>Commencement of Board of Reference</td>
<td>Each Party Pays Costs</td>
</tr>
<tr>
<td>1979-4</td>
<td>Contract</td>
<td>Incompetence</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1979-5</td>
<td>Dismissal</td>
<td>Competence Questioned</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1979-6</td>
<td>Contract</td>
<td>None - Illness</td>
<td>Continuance</td>
</tr>
<tr>
<td>1980-1</td>
<td>Contract</td>
<td>Denominational</td>
<td>Continuance</td>
</tr>
<tr>
<td>1980-2</td>
<td>Contract</td>
<td>----</td>
<td>Continuance</td>
</tr>
<tr>
<td>1980-3</td>
<td>Contract</td>
<td>----</td>
<td>Continuance</td>
</tr>
<tr>
<td>1980-4</td>
<td>Dismissal</td>
<td>Incompetence</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1980-5</td>
<td>Contract</td>
<td>----</td>
<td>Continuance</td>
</tr>
<tr>
<td>1980-6</td>
<td>Dismissal</td>
<td>Incompetence</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1980-7</td>
<td>Contract</td>
<td>----</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1980-8</td>
<td>Contract</td>
<td>----</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1981-1</td>
<td>Contract</td>
<td>Incompetence</td>
<td>Continuance</td>
</tr>
<tr>
<td>1981-2</td>
<td>Contract</td>
<td>Incompetence</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1981-3</td>
<td>Contract</td>
<td>----</td>
<td>Continuance</td>
</tr>
<tr>
<td>1981-4</td>
<td>Dismissal</td>
<td>Physical and Verbal Abuse - Lack of Evidence</td>
<td>Continuance</td>
</tr>
<tr>
<td>1981-5</td>
<td>Contract</td>
<td>----</td>
<td>Settlement - Discontinuance</td>
</tr>
<tr>
<td>1983-1</td>
<td>Contract</td>
<td>Incompetence, Failure to Maintain Order and Discipline</td>
<td>Continuance</td>
</tr>
<tr>
<td>1983-2</td>
<td>Dismissal</td>
<td>Physical Abuse of Students</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1983-3</td>
<td>Contract</td>
<td>----</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>Code #</td>
<td>Concern</td>
<td>Evidence of Malpractice</td>
<td>Board of Reference Decision</td>
</tr>
<tr>
<td>--------</td>
<td>-----------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>------------------------------</td>
</tr>
<tr>
<td>1983-4</td>
<td>Contract</td>
<td>-----</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1984-1</td>
<td>Early Retirement</td>
<td>-----</td>
<td>Upheld Retirement</td>
</tr>
<tr>
<td>1984-2</td>
<td>Contract</td>
<td>Lack of Control of Lessons, Discipline, Insubordination</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1984-3</td>
<td>Contract</td>
<td>(Fairness of Evaluation Process)</td>
<td>Continuance (Reinstated)</td>
</tr>
<tr>
<td>1984-4</td>
<td>Contract</td>
<td>Not Provided Effective Instruction - Poor Lesson Planning</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1985-1</td>
<td>Contract</td>
<td>Physical Force - Abuse</td>
<td>Discontinuance</td>
</tr>
<tr>
<td>1985-2</td>
<td>Contract</td>
<td>Failed In His Duty - Moral Example Sobriety; Supplied Alcohol To Students</td>
<td>Continuance</td>
</tr>
</tbody>
</table>
## Ontario Teachers' Federation
1260 Bay Street, Toronto M5S 2B5

**STATISTICAL DATA AS COMPILED FROM THE ANNUAL REPORTS MADE BY THE OTF RELATIONS AND DISCIPLINE COMMITTEE TO THE OTF ANNUAL MEETING 1971-72 THROUGH 1983-84 INCLUSIVE**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Meetings</td>
<td>9</td>
<td>8</td>
<td>8</td>
<td>5</td>
<td>7</td>
<td>5</td>
<td>10</td>
<td>8</td>
<td>6</td>
<td>7</td>
<td>8</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>New cases referred</td>
<td>22</td>
<td>33</td>
<td>21</td>
<td>15</td>
<td>28</td>
<td>16</td>
<td>12</td>
<td>8</td>
<td>9</td>
<td>7</td>
<td>5</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Outstanding cases from previous year</td>
<td>9</td>
<td>0</td>
<td>3</td>
<td>6</td>
<td>6</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Cases concluded</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>3</td>
<td>10</td>
<td>8</td>
<td>7</td>
<td>7</td>
<td>4</td>
<td>4</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Charges withdrawn</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Reinstatement requests</td>
<td>5</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

### Section 13 General Duties - Unethical Conduct
- Morals charges/improper conduct
  - 12 | 7 | 3 | 4 | 4 | 5 | 0 | 4 | 5 | 3 | 7 | 6 | 9 |

### Section 15 (Duties to Educational Authorities)
- Breach of Contract
  - 11 | 16 | 14 | 11 | 22 | 7 | 3 | 3 | 4 | 3 | 1 | 3 | 1 |

### Section 16 (Duties to the Public)
- 16(b) - Did not promote respect for human rights
  - 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 1 |

### Section 17 (Duties of a Member to the Federation)
- Did not promote the welfare of the profession
  - 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |

### Section 18 (Duties to Fellow Members)
- Adverse report
  - 0 | 0 | 0 | 0 | 0 | 3 | 6 | 4 | 2 | 0 | 2 |

### Other (Breach of Regulations)
  - 2 | 2 | 2 | 2 | 3 | 2 | 6 | 0 | 0 | 0 | 0 | 0 | 0
### Action Taken

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Recommended suspension of certificates and/or letters of standing</td>
<td>11</td>
<td>12</td>
<td>5</td>
<td>6</td>
<td>11</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Recommended no action be taken</td>
<td>9</td>
<td>9</td>
<td>3</td>
<td>3</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>5</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Recommended reprimand</td>
<td>0</td>
<td>0</td>
<td>7</td>
<td>4</td>
<td>13</td>
<td>10</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Recommended reinstatement</td>
<td>5</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Cases where decision pending</td>
<td>8</td>
<td>3</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>7</td>
<td>4</td>
<td>4</td>
<td>5</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Charges withdrawn</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX 4

Ministry of Education Code 1978-4

IN THE MATTER OF THE EDUCATION ACT, 1974,

AND IN THE MATTER OF A BOARD OF REFERENCE

BETWEEN:

APPLICANT

-and-

BOARD OF EDUCATION

RESPONDENT

REPORT OF CHAIRMAN
Introduction

On June 30, 1977, the Board of Education terminated, effective December 31, 1977, permanent contract for unsatisfactory performance in the classroom. In a letter of September 7, 1977 from Assistant Superintendent, it was pointed out that, "This unsatisfactory performance included your inability to provide a satisfactory academic program because you were unable to implement sound management techniques in your classroom."

Evidence in Support of the Board's Reasons for Termination

For the purposes of examining and relating the lengthy evidence of the witnesses, I have decided to report under the following headings: (1) Class Management and Control; (2) Planning and Organization; (3) The Art Program; (4) Housekeeping in the Art Room; (5) The French Program; (6) Communication; (7) Assistance Provided to and (8) Qualifications of Board Witnesses.

(1) Class Management and Control

Principal indicated his concerns regarding teaching methods started in 1973-74, who was given merit pay on the basis of seniority only (i.e., longevity at School), was informed in writing that he would have to improve to reach the second level of merit -- that more substance, more control and better housekeeping would be required.

During the 1975-76 school year, these same concerns were discussed with three or four times prior to the May 6, 1976 meeting of and At this meeting /Exhibit #1/ they discussed, future with him in the light of the repeated problems he has and is encountering in both French and art classes with control." In opinion, this lack of control was adversely affecting the academic program. It was also noted at this meeting that was in the staff room at 3:15 pm most days as soon as regular classes ended.

In order for to make a fresh start in September 1976, it was suggested to him that he, "make a complete about face in his mode of operation so that (i) his room is cleaned up (ii) he is teaching so that he is in control and the
pupils are learning. . . . For a beginning, must clean up and organize his classroom and start spending time in his room after 3:15 planning and organizing for his next day's classes."

After this meeting of May 6, 1976, we have written observations /Exhibit #2/ indicating no improvement occurred in May and June of that year. For example, described the situation as "bedlam" when, on May 20, he visited Form 5. He had been attracted to the room by the noise emanating. On June 18 both and visited at different times the same class of to quieten the students.

There is overwhelming evidence that classes were very noisy and the two V-Ps could identify classroom by noise which flooded into the hall even through closed doors. Students who wanted to learn complained to the school office. In Exhibit #4 we learn that spoke to the class over the noise... "that he did not seem aware of the aimless wandering and unnecessary chatter." testified that "too often I felt: student inattention was ignored. Teaching went on without students being with him."

On September 8, 1976, once again a conference was held with making a firm well-ordered start. It is make or break time."

On occasion made the following suggestions to re control:
(1) Get everyone's attention before you start. (2) Face the class. (3) Keep offenders in after 3:15. (4) Stop if there is inattention. (5) Require orderly entry and dismissal of students. All of these are simple basics that a first year teacher would be expected to know and implement. Yet testified that made no constructive suggestions. It is incongruous that a teacher of 21 years' experience would even need to be reminded of these.

However, the situation did not improve for, on January 25, 1977, observed Form 33 was "not in control" and on March 1, 1977 he observed that control in both an art class and a French class was still unsatisfactory. The fact that students were inattentive even when the principal was in the classroom is a significant indication of a teacher's problems with control. It has been my observation over the years that where there is respect for the teacher, students rally around him and support him when an observer (outsider) visits the classroom.

V-P also discussed discipline with He told "Get attention of all students before you start the lesson" and "make use of your home room (art) for detentions".
week in both 1975-76 and 1976-77, observed inattentive noisy students, with books and paper darts being thrown about. According to , "Kids were doing what they wanted" in French classes he observed while, in art "based on what was produced and the class control there was a lot of time wasted". Yet could not recall seeing have students report to his classroom -- either before or after school for class demeanours. He also reported that on occasion students would wander in the halls making unnecessary noise. On ascertaining they were from room he would direct them to return. concluded, "I felt he did not value suggestions."

V-P who in 1976-77 dropped in to classroom about twice a week, testified, "I would go in because there was so much racket as I learned walking in the hall -- so many students doing their own thing -- amazing he kept his sanity". She added, "in the midst of this lack of control, seemed unaware and/or unconcerned." She described the situation on occasion as "chaotic". In her opinion, did not implement sound management techniques in his classroom.

When , Consultant in French, talked with re student conduct in his classes, his reply was that he didn't want to teach French in the first place.

For the 1975-76 school year, requested a Home Room assignment which would entail the teaching of English and Mathematics. told that he couldn't trust him with a Home Room -- a very significant comment with respect to a teacher of 21 years' experience.

tested that it was embarrassing for a teacher to discipline a student when an observer was present. When asked whether he disciplined students when was there, he answered, "Probably not. I feel that the presence of the principal should be enough to inhibit them." inaction at these times would simply complicate matters for him when the principal was not present.

All the evidence indicates that did not recognize that class control and individual student control are closely related.

(2) Planning and Organization

In 1976-77, taught the following classes:

<table>
<thead>
<tr>
<th>Subject</th>
<th>Periods per 6-day cycle</th>
<th>Total Periods</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art</td>
<td>2 periods (a double)</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>5 Regular Grade 7 (No.2,3,4,5,7)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>6 New Canadian (TESOL) (No.31-36 incl.)</td>
<td>12</td>
</tr>
<tr>
<td>French</td>
<td>3 periods</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>5 Regular Grade 7 (No.1,5,6,8,9)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 New Canadian (Transition Class)(No.37)</td>
<td>3</td>
</tr>
</tbody>
</table>
It will be noted that taught 40 periods out of a possible 48 in the six-day cycle. He had 8 free periods, yet it is significant that never once on the witness stand did he indicate that he used any for planning and organization.

The fact that met 16 different class groups in a six-day cycle literally demanded careful planning. In order to keep track of this number of students he would need to organize, keep records, develop effective seating plans, and prepare lesson plans. Yet the evidence is that he devoted little, if any, time to the planning function. On most days he stayed in the staff rooms in the mornings until the 8:45 am warning bell, and returned to the staff room at 3:15 pm, as soon as regular classes ended for the day.

I knew that — lack of control stemmed to a significant degree from an ineffective and unstimulating program. He asked for a detailed daily plan hoping that this would force the teacher to prepare and organize his work in such a way that the program would improve. Unwillingness or inability to comply with this request is inexcusable. Regulation 191, section 34(b) includes among duties of teachers the following: "prepare for use in his class or classes such teaching plans and outlines as are required by the principal... and submit the plans and outlines to the principal... on request".

Exhibits #5 and #6 indicate very little attention to serious planning by. They are merely schedules — lacking significant detail. Certainly these exhibits reveal absolutely no consideration for the individual differences of classes. Exhibit #5 doesn't even designate the date, period, or class. Both the objective of the lesson and the amount of time required to cover a topic are omitted.

While there was an inordinate amount of time of the Board of Reference devoted to the daily plan book aspect, the evidence confirms that was unwilling to take the time to plan his classes in an acceptable fashion. When asked for detail, he procrastinated, did not respond, and had to be reminded a number of times /Exhibit #4/. In his testimony, claimed he had more detailed sheets then those exhibited, but threw them out in June 1977. In view of the confrontation and difference of opinion that arose over this matter — almost a cause célébre — I find statement difficult to accept.
stated that she didn't see a plan book or any evidence of planning. When she suggested he spend more time in the classroom before and after school in order to organize better, replied that "he was too tired". In fact, stated that he went to the staff room at 3:15 "to wind down from confrontation with children".

Also under cross examination, stated that when the French class came in he would say, "Where are we? I'd ask the children where we left off." A beginning teacher soon learns that this technique can quickly lead to control problems at the beginning of a class. In an experienced teacher it is inexcusable and evidence of inadequate planning.

claimed that planning and organizing was something that he was always doing — not necessarily written down. Yet all through the three days that he was on the witness stand he had trouble remembering details — a fact which would indicate his need for written daily plans.

Even the simple matter of seating plans became an issue. observed that when students entered the classroom there was a debate where they were going to sit. He noted, "If there was a seating plan there was little evidence of it." V-P claimed that she couldn't find the daily plan book or seating plans when a supply teacher was brought in to replace on those occasions when he was absent.

(3) The Art Program

The evidence indicated that and differed significantly regarding the art program. saw it "as a time for students to unwind and relax". Unfortunately, the observation of the Board witnesses indicated that the unwinding and relaxation went to excessive lengths.

read stories to students -- stories that had absolutely no relevance to the art program -- stories that frequently took 20 to 25 minutes. He continued to do so even after told him to cease. His rationale was that the story reading helped to calm the students.

Furthermore, played records during the art periods -- records that were brought to school by students and also had no relevance to the art program. told him to discontinue this practice, but under cross-examination indicated that the only reason he ceased was the fact that the record player became inoperative.
described program for senior students as "junior". He and the two vice-principals indicated that students showed very little respect for what they produced, throwing a lot of it in the garbage. On occasion noted that, "pupils wandered about aimlessly. Many pupils were simply playing. Some students worked on projects other than those assigned."

According to the art program lacked the variety that should characterize a senior school program. With the wide range of student abilities and interests in the regular and TESOL classes, there is no evidence of taking advantage of the different backgrounds of students.

In Exhibit #8, observed on January 31, 1977 teaching art to Form 31 (TESOL) indicated that the teacher "started them working without aim or guidance and thus they didn't know what they were supposed to be doing."

There appeared to be a singular lack of enrichment. arranged no field trips. His excuse: he didn't want to miss a French class. Yet a perusal of his 1976-77 timetable reveals that for a half-day field trip only one French class would have been 'inconvenienced'. Field trips require careful pre-planning and follow-up if they are to fulfill their educational objectives. I can only conclude that didn't wish to be bothered with the planning and organization involved.

Both and testified that students were not producing in the art program, that there was a great deal of wasted time, and that the quality of work did not measure up to acceptable senior school standards. Instead of different activities for different groups, which one might expect in art, all were doing the same activity in classroom. Evidence indicated that there was no grouping in art, although this is an accepted pattern in senior school classes. argued that the administration should group by classes rather than the teacher group students within a class. Of course the latter requires analysis, testing, organization and planning on the part of the teacher.

stated that she and decided to give Grade 7 art to rather than Grade 8, because Grade 8 students would expect a more demanding art program. indicated that he made no changes in his methodology in 1976-77. When questioned why he hadn't requested the assistance of the Art Consultant, he replied, "I was sure my program was ok."
testified he had the program for the next year always in mind, not necessarily in writing. He said that he would check back to the previous year and see what he’d like to change -- see what activities were successful and those unsuccessful. When challenged, he couldn’t remember one example of change, except the dropping of batik from Grade 7 art. Subsequently, he admitted the batik was dropped from the program because the school maintenance staff found the sink plugged with wax which fouled up the plumbing.

Amazingly with all the students he saw in a six-day cycle, kept no anecdotal reports. One wouldn’t expect these reports on all students, but surely some student achievement and/or behaviour required such comments. When asked why he didn’t keep anecdotal reports, made this revealing statement, "Then when would I have time to teach?" Incredible! Apparently he never referred to existing reports, including O.S.R. He claimed he discussed students with the Home Room teacher rather than using the records. Finally he denied that had ever suggested that he bring in the Art Consultant.

(4) Housekeeping in the Art Room

There is overwhelming evidence that left a great deal to be desired. stated it was so untidy that "in my opinion it did not lend itself to learning". said that it was "the dreariest art room" she had ever visited. added that "I don't think he was aware -- he seemed oblivious to what was going on". All emphasized that an attractive classroom makes the learning environment better.

In spite of admonitions from the principal, little or no change occurred. rationale was "that a certain amount of untidiness breaks down the student's fear of doing something -- students are not so afraid to make mistakes". He admitted that on occasion students told him he had a "messy classroom".

(5) The French Program

Evidence of the Board observers indicate that offered a bare-bones program. There appeared to be a slavish adherence to and reliance on the textbook and exercise book. He did not make use of the audio-visual material available -- material that is an integral component of C.S.F. Level 3. As late as October 20th, did not have the flash cards and charts. Subsequently, found them on top of a locker with some cards missing.
he relied heavily on the blackboards in lieu of the audio-visual material. Yet in other testimony he complained that the art room was unsuitable for French because there were only two blackboards. He said he was not impressed with the effectiveness of the component a/v material, expert witness to the contrary. He could not remember seeing using any of these "props" so integral to the French program.

observed that some students wrote while choral responses were in effect. Others refused to participate in the responses. There was the same lack of participation during the singing of French songs. Ignored this lack of participation by many students.

Both the principal and the French consultant testified that his question and answer techniques were unsatisfactory and did not follow accepted fundamental pedagogical principles. When directed a question to a specific individual, others would blurt out the answer. Excused this as "enthusiasm". Frequently directed questions in an obvious order going down one row of students at a time. Students, knowing that it will not be their turn, do not frame an answer in their mind. Boredom and inattention result.

All classes apparently received virtually the identical dosage of French each day. Even Form 37, the New Canadian Transitional Class, which had not received the exposure to French of the regular Grade 7 students, experienced the identical program on the same day. Obviously, there was no concession to individual and/or class differences. Challenged him regarding this matter, but he did not change. Objective seemed to be simply to cover the textbook pages. Whether the students were really mastering the material was inconsequential.

Much was made by and his counsel regarding the difficulty of teaching French in an art room. The evidence of Board witnesses, with specific reference to the current teacher of art and French at indicates that any handicaps posed by the art room were grossly exaggerated. Stated there is nothing wrong with an art room for the teaching of French. In fact, it should lead to the integration of these subjects which is desirable.

Further testified that she had concerns re French program when she first went to In 1975-76. Apparently, the Grade 8 teacher had concerns re students who had received their Grade 7 program from him. Concern is evidenced by the fact she visited an experienced teacher of 21 years ten times in the 1976-77 school year. It is significant that
Exhibit #5 shows covering four French exercises in one period — far too much material to digest in one period according to She did not see any evidence of planning in Exhibit #6. She could not recall seeing use the accepted and recommended lesson procedures of warm-up, review, presentation and reinforcement. Her observation was "that there was very little learning taking place because of the way that the program was handled".

It appears that depended solely on the text and exercise books, an approach that required little or no planning on his part. I conclude that was teaching a program more akin to that in effect prior to the introduction of C.S.F. Level 3.

It is significant that testified he saw every French class four times in a six-day cycle, yet his timetable for the year shows only three. Did he really know — or care? He further observed that he considered the reference to "lack of learning" in his classes as a "facetious" remark! In his words, "I didn't change because I considered them good methods. I've been teaching for a long time." When asked if he had changed anything in September of 1976, he replied, after a long pause, that he operated at a lower level of enthusiasm. He admitted that he was less effective but blamed that on his interpretation that he was not getting support from the top.

In spite of the fact that saw him ten times in 1976-77, he couldn't remember anything she suggested regarding methodology, control, daily planning or routines.

(6) Communication

All four Board witnesses testified regarding the difficulty of communicating with stated it was difficult — if well nigh impossible — to get any response from him. commented, "I attempted to have him discuss — to enter into a dialogue. I actively sought comments. I would say, 'What do you think, Bob?' — but there was little or no response."

claimed that a personality conflict existed between him and the principal and that was the basis of the problem. After weighing the evidence of the Board witnesses, their endeavours to help him, and their real concerns for him as an individual, I reject personality conflict as being the basis of the problems experienced.
(7) Assistance Provided for

(a) The administration assigned him Grade 7 Art and French rather than Grade 8. This action was taken in order to give him classes which would be easier for him to control. That is, the Grade 7 students would be new to Senior School and would less likely be aware of previous control problems.

He was assigned New Canadian (TESOL) rather than Special Education classes. The principal based this decision on the grounds that special education students would present more problems of control to.

It is significant that V-P testified that no other teachers at received the consideration that was given. It should be noted that is an experienced male teacher of 21 years' experience and should have been able to take any class assignment in the school.

(b) The principal suggested to that he get help from both the French and art consultants. did not follow this suggestion. Finally, the principal contacted the French consultant and invited her to visit and give him assistance. who knew his concept of the art program differed from that of the principal's, and who admitted he knew the art consultant personally, did not seek assistance in this area.

(c) The principal obtained copies of acceptable planning books from experienced teachers and loaned them to in an endeavour to assist him in the planning function.

(d) The principal, the two vice-principals, and the French consultant all made constructive suggestions to assist He seemed unwilling or unable to implement them.

(e) Sensing that was tense and uncomfortable during their discussions, the principal involved one of the V-Ps in an endeavour to get through to him.

(f) The principal and others of the administration suggested to that he take a leave of absence for a year in order that he might sort out things -- try something else -- and decide whether a career other than teaching might be more acceptable.

(g) Both and responded to calls by r to come to the classroom and help control classes that were out of control. told that if he were having problems, the Board had facilities that could help. said she
would back him up when it came to disciplining individual trouble-making
students, but that overall class control was the teacher's responsibility.
(h) All Board witnesses indicated that himself never requested any
assistance.

(8) Qualifications of Board Witnesses

I was impressed by the qualifications of the Board witnesses.
31 years' experience includes 12 years as principal and 5 years as vice-principal. In addition, he has distinguished himself as a member of Currently he
is of that organization's Personnel and Relations Committee.
45 years' experience includes 24 as a vice-principal, while has two years as vice-principal at -- 16 years' experience overall. is a specialist in French language and literature, who has taught teachers in training
in methodology and program at In this role she evaluated the practice teaching sessions of student teachers. For 8 years she taught the summer course in the teaching of French as a second language.

In contrast after Grade 13, attended in 1951-52 the one-year course. He audited art courses at L'Ecole des Beaux Arts in Paris for two years. In 1964 he attended a five-week Ministry course for the teaching of French. After 21 years of teaching experience, he is still in the lowest second or third level (of the seven levels of qualifications in the elementary school panel). In fact, he wasn't even sure whether he was in Level 2 or Level 3. He has shown virtually no initiative in upgrading his academic qualifications.

CONCLUSION

From the evidence brought forth at this Board of Reference there emerged the profile of a teacher who had lost his zest for teaching, who was content to go through the motions, who allowed his classes to get out of control, who was uninterested in upgrading and/or updating his qualifications, who was oblivious to much of what was happening in the classroom, who was unwilling or unable to implement constructive suggestions, who planned, if at all, on an ad hoc or hit-and-miss fashion, who offered little in the way of remedial assistance or counselling to his students, and who offered a bare-bones program.
Regulation 191, section 34(a) states, "a teacher shall be responsible for effective instruction and training in the subjects assigned to him and for the management of his class or classes". The evidence indicates that failed to discharge these responsibilities satisfactorily.

RECOMMENDATION

That this Board of Reference direct the discontinuance of the permanent contract.

Nominee of the Board of Education to the Board of Reference
STANDARD PROCEDURE #45, GENERAL (P.1)

TEACHER PERFORMANCE, PROCEDURE WHEN UNSATISFACTORY

The following procedures have been established for dealing with a teacher who is not carrying out his/her duties to the satisfaction of his/her supervisor(s). The responsibilities and duties of principals and teachers are set forth in The Education Act 1974, the Provincial Regulations, the policies of the Board of Education for the City of Toronto, and the current Collective Agreements. The Teaching Profession Act and the Education Act both provide legislation safeguarding the rights of teachers. Principals and other supervising teachers should familiarize themselves with this material as well as the relevant policies and procedures of the Ontario Teachers' Federation and its Branch Affiliates.

Regulation 704/78, 12(2)(d)(ii), issued by authority of the Minister of Education states that it is the duty of the principal to recommend to the board the demotion or dismissal of a teacher whose work or attitude is unsatisfactory but only after warning the teacher in writing, giving him assistance and allowing him a reasonable time to improve.

The principal is therefore obligated, before recommending demotion or dismissal, to provide written evaluations of the teacher's work, to give evidence of assistance and to provide time for improvement in the matters noted in the evaluations. It is imperative that a record of these be kept. A properly documented case (written communication and record) clarifies the situation for the teacher and protects the principal.

Ineffectiveness in the classroom and/or failure to assume responsibilities as a staff member are the most common causes for initiating these procedures. However, other problems may also necessitate this procedure. In all cases, it is essential that the reason for implementing these steps relate to the teacher's responsibilities and duties. Ultimately, should the teacher's performance remain unsatisfactory, his/her employment will be terminated. Should this termination be disputed, the case may be considered under law. Any documentation must withstand legal scrutiny.

Whenever a principal (Note 2, p.2) becomes aware that a teacher is encountering serious difficulty fulfilling his/her duties, the principal is to initiate the following steps which provide a guideline for remediation of the problem(s) and the necessary documentation required by the Director of Education. When a recommendation affecting a teacher's employment (e.g., his/her suspension, demotion and/or termination) is to be considered by the Board, this documentation will be required.

In fairness to all concerned, once those having responsibilities under this procedure become aware that a teacher, including teachers appointed to positions of responsibility (i.e., principal, vice-principal, consultant, etc.), is encountering serious difficulty fulfilling his/her duties, they should take the appropriate action forthwith but they should not act with unnecessary haste in order to expedite matters. They should give thoughtful consideration to what is reasonable in the circumstances and proceed accordingly. It is expected that, in most cases, remediation will follow very quickly. However, in some cases, the procedure will run its full course, culminating in termination of employment. In these cases, the length of the process will vary in accordance with the length and nature of the teacher's service. In the case of a

* Includes principals, vice-principals, co-ordinators, consultants, etc.
newly appointed probationary teacher, it is anticipated that the procedure will be
completed within the period September 1 to November 30, or January 1 to May 30. In
the case of a teacher with a long and faithful service, the procedure might take
or on the length of time the problem may be known and/or the teacher's response to
the direction(s) given.

Introductory Notes

1. The procedure outlined above may be modified in consultation with the Director or
Education. Given sufficient cause, demotion, suspension without pay and/or term-
ination of employment may be recommended at any step in the procedure. On the
other hand, in consideration of long and faithful service, a further demotion
and/or suspension without pay may be recommended before proceeding to termination
of employment.

2. The above procedure has been written for general application:

(a) In the case of a secondary school teacher, the principal should request the
teacher's department head to assist the teacher and to keep a record of the
visits made and suggestions for improvement.

(b) In the case of a special education teacher assigned to a school, the principal
should proceed in consultation with the Assistant Superintendent of Special
Education and the Area Superintendent.

(c) In the case of a teacher who is not assigned to a school, that teacher's
supervisor should proceed as would the principal under the above.

(d) In the case of a teacher who is not assigned to a school and reports to more
than one supervisor, that teacher's supervisors should consult and proceed
as would the principal under the above.

(e) In the case of a principal who reports only to the Assistant Superintendent
of Special Education, the Area Superintendent shall mean the Assistant
Superintendent of Special Education.

(f) In the case of a vice-principal, head, assistant head, or any other similar
position of responsibility within a school staff, the principal's responsibil-
ities are as set out above.

(g) In the case of a principal whose performance is unsatisfactory, the procedure
should be read with Area Superintendent replacing principal and Superintendent
of Personnel replacing Area Superintendent.

STEP ONE

(a) The principal is to observe the teacher in the performance of his/her duties
and identify specific problems. During this step, the principal is to make
notes which will form the basis for Step One (b). The principal is to prepare
a written report listing observations and suggestions.
STANDARD PROCEDURE #45, GENERAL

(b) The principal is to meet with the teacher and discuss the report prepared under Step One (a). While the focus of this meeting should be on improving the teacher's performance, the teacher must understand that his/her performance is unsatisfactory and that it must improve. During this review, resource(s) and/or program(s) available to assist the teacher are to be recommended to the teacher. Every effort should be made to establish goals to be met by the teacher by some specific time.

(c) The principal is to prepare a written summary of the matters discussed listing specifically the problem(s) observed, the advice given and any goals established at Step One (b). This summary should be both clear and precise. It should be dated and signed by the principal, then presented to the teacher for his/her comments and signature to indicate that the teacher has seen this document. Copies of the countersigned document are to be forwarded to the teacher, the Area Superintendent, and to the Assistant Superintendent of Personnel for inclusion in the teacher's personnel file. Where appropriate, a copy shall also be forwarded to the Assistant Superintendent of Special Education or the Superintendent of Curriculum and Program.

STEP TWO

Reasonable time should be allowed for the teacher to implement the principal's advice before commencing Step Three. The amount of time will depend upon the nature of the problem(s) the teacher is encountering or to the length of time the problems may have been known but not formally documented.

STEP THREE

(a) The principal is to resume observation of the teacher and to make notes for his/her use. Particular attention must be given to any goal established with the teacher at Step One and the degree to which that goal has been met. As in Step One (a), the principal is to prepare a written report listing his/her observations, suggestions and progress made.

(b) The principal should meet with the teacher again to review his/her written report. Should the principal now be satisfied with the teacher's performance, this should be clearly stated. Should the teacher's performance have shown only marginal improvement, remained unchanged or deteriorated further, this should be stated without equivocation. If the teacher's performance is unsatisfactory, it is essential that the teacher understand: (i) his/her performance is unacceptable, and, (ii) that, unless the performance improves adequately, a recommendation for suspension/demotion/dismissal may follow. Again, resources available to the teacher should be discussed. If the teacher is already aware of these resources and has not already availed him/herself of assistance, the principal should consider taking the initiative on behalf of the teacher.

(c) As in Step One, the principal is to prepare a written summary of the matters discussed listing specifically the problems observed, advice given and any progress made towards the goals established at Step One (b). Any additional goals which were discussed should be included. This summary must conclude by rating the teacher's overall performance in one of the following:

1. is now satisfactory;
2. has shown only marginal improvement but remains unsatisfactory, or
3. remains unsatisfactory.
Where performance remains unsatisfactory, the principal should include written notice that suspension/demotion/dismissal may be recommended unless performance improves adequately.

The summary should be dated, signed by the principal and presented to the teacher for his/her comments and signature to indicate that the teacher has seen this document. Copies of the countersigned document are to be forwarded to the teacher, the Area Superintendent and to the Assistant Superintendent of Personnel for inclusion in the teacher's personnel file. Where appropriate, a copy shall also be forwarded to the Assistant Superintendent of Special Education or the Superintendent of Curriculum and Program.

At this point, the principal may:

i. consult with the Area Superintendent;
ii. repeat Step Three, or
iii. request the Area Superintendent to commence Step Four.

Where applicable, throughout these procedures, references to the Area Superintendent shall mean the Area Superintendent in conjunction with either the Assistant Superintendent of Special Education or the Superintendent of Curriculum and Program (Note, p.2).

STEP FOUR

The Area Superintendent (Note 2, p.2) is to go through Step One (a), (b), (c) with the teacher. In this case, copies of any countersigned documents written by the Area Superintendent are to be forwarded to the teacher, the principal and the Assistant Superintendent of Personnel for inclusion in the teacher's personnel file. Where appropriate, a copy shall be forwarded to the Assistant Superintendent of Special Education or the Superintendent of Curriculum and Program.

STEP FIVE

Again, reasonable time should be allowed for the teacher to implement the Area Superintendent's advice before commencing Step Six. The amount of time will depend upon the nature of the problem(s) the teacher is encountering.

STEP SIX

The Area Superintendent is to go through Step Three (a), (b) and (c) with the teacher.

In the case of a probationary teacher whose performance remains unsatisfactory at Step Six, a recommendation for termination of employment should follow at this stage. Suspensions without pay or recommendations for demotion should only be made in the case of permanent teachers.

STEP SEVEN

The Area Superintendent, and, where appropriate, the Assistant Superintendent of Special Education or the Superintendent of Curriculum and Program, will consult with the principal to determine which one of the following steps is most appropriate:
1. No further action required at this time;
2. Repetition of Step Six;
3. Suspension without pay, or
4. Recommendation for demotion/dismissal.

**STEP EIGHT**

Following a suspension and after a reasonable period of time, the principal is to repeat Step Three (a). If the teacher's performance remains unsatisfactory, the principal is to recommend to the Area Superintendent demotion or dismissal and the teacher is to be advised by the principal, in writing, of this recommendation.
"Major Responsibilities:

1.0 Techniques of Instruction
2.0 Subject Competency
3.0 Planning and Preparation
4.0 Classroom Control
5.0 Teacher-Pupil Relationships
6.0 Classroom Management
7.0 Contribution to Total School Effort
8.0 Professional Growth
9.0 Curriculum Development
10.0 Teacher-Staff Relationships
11.0 Teacher-Parent Relationships
12.0 Christian Commitment

Major Responsibility No. 1.0 Techniques of Instruction

The Standard of Performance is met when the application of instructional techniques and the use of instructional materials stimulate and maintain pupil interest and promote learning.

Key Duties:

1.1 Uses effective and varied methods of presentation.
1.2 Experiments with varied teaching techniques to determine and use that which is most effective in his situation.
1.3 Familiarizes himself with and uses community resources where available and applicable.
1.4 Creates and maintains an atmosphere for learning in the classroom.
1.5 Provides opportunities for full pupil participation.
1.6 Encourages pupils in creative skills as well as the acquisition and application of facts.
1.7 Devises written and oral assignments and tests that require analytical and critical thinking as well as the reproduction of facts.
1.8 Develops desirable work habits and study skills.
1.9 Uses tests effectively as a method of teaching.
1.10 Uses effective and correct oral and written expression in lesson preparation.
1.11 Cooperates with and assists students in research problems relating to his field.
Major Responsibility No. 2.0  Subject Competency

The Standard of Performance for this responsibility is met when the teacher takes advantage of opportunities to enhance his knowledge and instructional qualifications in the subject or teaching areas for which he is responsible and when competency in his subject or teaching areas is demonstrated in the classroom situation.

Key Duties:

2.1  Keeps abreast of developments in techniques, philosophy and content in the professional literature relating to teaching practice and subject areas.

2.2  Takes advantage of courses and in-service training in his area of competence and specialization.

2.3  Demonstrates a knowledge, understanding and application of subject matter.

Major Responsibility No. 3.0  Planning and Preparation

The Standard of Performance for this responsibility is met when preparation for teaching insures that classes will operate effectively in relation to use of time and progress of students.

Key Duties:

3.1  Plans on daily and or long term basis.

3.2  Gathers and assembles necessary teaching materials beforehand for lesson presentation.

3.3  Arranges class activities and lesson presentation to meet the individual needs and differences of all students.

3.4  Budgets class time effectively.

3.5  Sets specific objectives, wherever possible in lesson preparation and carries through presentation to effectively achieve these objectives.

3.6  Administers tests to evaluate pupil achievement in knowledge and skills.

3.7  Preview visual aids, aural aids and reading matter before incorporating them into the lesson.

3.8  Re-evaluates periodically own methods of presentation.
Major Responsibility No. 4.0 Classroom Control

The Standard of Performance for this responsibility is met when the teacher establishes effective procedures of control to allow a maximum of teaching and a minimum of disciplinary action with due consideration given to the composition of the class.

Key Duties:

4.1 Establishes systematic or effective procedural class routines.
4.2 Starts classes promptly and concludes and dismisses classes in an orderly fashion.
4.3 Demands the use of decent and courteous language within the school and during all school activities.
4.4 Promotes student self-discipline by personal example.
4.5 Inculcates respect for rights, opinions, property and contributions of others.
4.6 Attempts to solve difficult classroom disciplinary problems through own methods; seeks the assistance of administration in those instances where needed.

Major Responsibility No. 5.0 Teacher - Pupil Relationship

The Standard of Performance for this responsibility is met when the teacher's personal demeanor creates respect of pupils and encourages pupils to view the teacher as one genuinely interested in the pupils' welfare.

Key Duties:

5.1 Understands, is sensitive to, and adjusts as necessary to differences among children and considers the overall well-being of the individual child.
5.2 Uses the personal conference technique to help students solve their problems.
5.3 Establishes and maintains the confidence and respect of students.
5.4 Behaves in a socially acceptable manner before pupils in and out of classroom.

Major Responsibility No. 6.0 Classroom Management

The Standard of Performance for this responsibility is met when adherence is given to regulations governing the teacher's responsibilities for reports, records and physical environment of the classroom to enhance learning.
Key Duties:

6.1 Prepares and maintains accurately registers, classbooks, and reports and submits them within designated time limits.

6.2 Maintains an up-to-date student identification system and learns names and identities of a new class of pupils as quickly as possible.

6.3 Maintains, within reason, the school room in a healthful and safe condition, assuring proper lighting, ventilation and general cleanliness.

6.4 Develops and maintains classroom material, displays and equipment and places them as needed to improve the learning situation.

6.5 Maintains an up-to-date record of basic information for the use of substitutes.

Major Responsibility No. 7.0 Contribution to Total School Effort

The Standard of Performance for this responsibility is met when assistance is given cooperatively to superiors and associates in any school activity in which this person has knowledge.

Key Duties:

7.1 Accepts and carries out required school regulations and assignments within designated time limits.

7.2 Contributes constructively to committees, faculty meetings and other school system groups.

7.3 Gives encouragement and lends assistance to groups or individuals promoting school-related projects.

Major Responsibility No. 8.0 Professional Growth

The Standard of Performance for this responsibility is met when use is made of opportunities for professional growth, and when knowledge and abilities gained are employed to the benefit of instruction and the school system.

Key Duties:

8.1 Assumes responsibility in and or actively participates in activities of professional organizations.

8.2 Displays evidence of growth through such things as professional study, reading, writing, travel and other professional endeavors.

8.3 Develops ways and means to applying newly acquired professional knowledge in day to day teaching in school environment.
Major Responsibility No. 9.0  Curriculum Development

The Standard of Performance for this responsibility is met when the teacher takes an active part in continuing curriculum evaluation and cooperates in its revision.

Key Duties:
9.1 Re-evaluates periodically the curriculum content.
9.2 Plans and tries experiments within the curriculum.
9.3 Presents ideas for revision and additions to programs of study.

Major Responsibility No. 10.0  Teacher-Staff Relationships

The Standard of Performance for this responsibility is met when relationships with members of the school staff promote cooperation at all levels of organization and contribute to the effective operation and administration of the school system.

Key Duties:
10.1 Cooperates with co-workers by sharing ideas and methods of instruction.
10.2 Exhibits professional and ethical attitude toward fellow teachers and co-workers.
10.3 Contributes effectively to staff efforts.
10.4 Seeks advice, assistance and guidance, as necessary, from own and other departments while at all times respecting administrative protocol.
10.5 Assists in helping new faculty members and student teachers adjust to school operations and procedures.
10.6 Works cooperatively with fellow teachers on the solution of pupil and classroom problems.
10.7 Recognizes the contributions of other staff members in all phases of the curriculum.
Major Responsibility No. 11.0 Teacher-Parent Relationships

The Standard of Performance for this responsibility is met when contacts with parents promote confidence in the school program and when an effective relationship is established, where possible, to further the learning process of pupils.

Key Duties:

11.1 Confers, as necessary and desirable, with parents to foster a constructive parent-teacher relationship in the interest of the pupil.

11.2 Develops in parents, through conferences and discussions, confidence in the school program.

11.3 Establishes and maintains a relationship with parents conducive to the frank and constructive reporting of pupil progress, problems and needs.

11.4 Cooperates with and participates in PTA activities and those of similar organizations.

Major Responsibility No. 12.0 Christian Commitment

The Standard of Performance for this responsibility is met when a person can be described as one who believes in and practises the Catholic expression of Christianity.

Key Duties:

12.1 Adheres to the philosophy of Catholic education.

12.2 Participates as an external witness in the liturgy and sacraments of the Church.

12.3 Fulfills his/her obligation to direct taxes to support the Separate School System.

12.4 Accepts responsibility to teach religion to students.

12.5 Indicates a willingness to upgrade in the area of religious education.
APPENDIX 7

January 20, 1986

Mr. A. S. Nease
Professor of Education
Faculty of Education
University of Windsor
600 Third Concession
Windsor, Ontario
N9E 1A5

Dear Professor Nease:

I am writing in reference to your letter addressed to Mr. R. G. Sheridan and your telephone conversation with Sherron Hibbitt of this branch.

Following is the only information which is available:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Cancelled</th>
<th>Suspended</th>
<th>Terminated*</th>
<th>Reinstated</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>4</td>
<td>10</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>1971</td>
<td>2</td>
<td>3</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>1972</td>
<td>-</td>
<td>7</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>1973</td>
<td>-</td>
<td>8</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>1974</td>
<td>-</td>
<td>4</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>1975</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>1976</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1977</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1978</td>
<td>1</td>
<td>1</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>1979</td>
<td>-</td>
<td>4</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1980</td>
<td>1</td>
<td>2</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>1981</td>
<td>-</td>
<td>4</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>1982</td>
<td>-</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1983</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1984</td>
<td>1</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1985</td>
<td>2</td>
<td>-</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>TOTALS</td>
<td>13</td>
<td>53</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>
Since 1979, graduates of Ontario's training institutes have not required successful teaching experience to qualify for permanent certification.

If clarification is required, please contact Sherron Hibbitt at (416) 965-6039.

Yours sincerely,

W. P. Lipischak
Director
Evaluation and Supervisory Services Branch
BIBLIOGRAPHY


Linden, A. Canadian Tort Law. 3rd Ed. Toronto: Butterworths, 1982.


OTF/FEO. *We The Teachers Of Ontario*. Ontario Teachers' Federation, 1984.


