TEACHER LIABILITY AND TENURE WITH SPECIAL REFERENCE TO NEWFOUNDLAND

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by

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ABSTRACT

This study examines the legal responsibilities of educators for the supervision and care of students, and the legal rights of teachers in the field of tenure. The overall purpose of the study is to identify, in these two areas, consistent principles of law relative to educational personnel.

The writer examines the sources of law which define the responsibilities and rights of educators. The sources include relevant statutes, contractual agreements, and subordinate legislation in the form of school board by-laws, rules and regulations. Much of Canadian law is unwritten so that legal principles have evolved through the common law. These principles are identified and illustrated by an examination of more than one hundred court cases. Pertinent Newfoundland legislation, some comparative legislation, and British and Canadian court cases form the basic source of the writer's data.

Under the topic of Teacher Liability, the tort of negligence is defined and explained. The legal duties that educators, in their respective roles, owe to students are examined with specific reference to their supervisory duties on and off school premises, before and after school hours, and while transporting students. The duty owed to keep premises, facilities and equipment in a

safe condition is reviewed. The writer examines the defences to a charge of negligence and the measures that educators can take to protect themselves against such a charge or against the possible ensuing financial consequences. Through an examination of the by-laws of Newfoundland school boards and the procedural methods of a selected number of schools, the writer attempts to comment on the adequacy of prevailing supervisory practices.

Under the topic of Teacher Tenure, the writer reviews the procedures for acquiring tenure, the causes for dismissal, the procedures for dismissal and the procedural rights that accrue to teachers.

As a result of his findings, the writer classifies a number of basic legal principles that apply to educators generally across Canada. The most important implication of the study, in the writer's view, is that much needs to be done to make educators more aware of their legal rights and duties. He suggests some methods whereby this need might be satisfied.

ACKNOWLEDGEMENTS

My greatest debt is to my supervisors. Dr. Ken Wallace, my chief supervisor, despite his heavy commitments as Head of the Department of Educational Administration at Memorial University of Newfoundland, gave willingly of his time to offer constant encouragement and guidance. His incisive comments and suggestions on both content and style have helped to make this study much better than it would otherwise have been. Dr. Philip Warren, my second internal supervisor, also offered invaluable advice and assistance at all times. Since my own legal background is British, without the help and assistance of the Honourable Robert Wells, Q.C., my task would have been even more difficult.

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My wife, Audrey, who was working on her own thesis, gave freely of her time to lend an ear, to find that illusive word that so frequently escapes writers, to type much of the script, to act as proof reader, and always to encourage.

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ABBREVIATIONS

Alta.	Alberta
B.C.	British Columbia
C.A., and C. of A.	Court of Appeal
C.J.	Chief Justice
Co.Ct.J.	County Court Judge
J.	Justice, Judge
J.A.	Justice of Appeal
L.C.	Lord Chancellor
L.J.	Lord Justice
L.Q.R.	Law Quarterly Review
Man.	Manitoba
M.R.	Master of the Rolls, originally the senior judge in the Courts of Chancery (U.K.).
N.B.	New Brunswick
Nfld.	Newfoundland
N.S.	Nova Scotia
N.T.A.	Newfoundland Teachers' Association
Ont.	Ontario
P.E.I.	Prince Edward Island
Q.B.D.	Queen's Bench Division
Q.C.	Queen's Counsel
Que.	Quebec
R.S.	Revised statutes of, so ...
R.S.N.	Revised statutes of Newfoundland
R.S.S.	Revised statutes of Saskatchewan
Sask.	Saskatchewan
U.K.	United Kingdom
U.S.	United States of America.

GLOSSARY OF LEGAL TERMS

Absolute: complete; unconditional; not relative or qualified.

Action: a proceeding taken in a court of law.

Appeal: an application by an appellant to a higher court to rectify an order of the court below.

Bona fide: in good faith; without fraud or unfair dealing.

Breach: a breaking; the violation of a duty.

Causa causans: the immediate, effective or proximate cause of an occurrence.

Causa sine qua non: something without which the occurrence would not have happened, but not its immediate or effective cause.

Certiorari: an original writ whereby a case is removed from a tribunal or an inferior court to a superior court of law so that it might be quashed.

Civil action: an action between citizens which has for its object the recovery of private or civil rights, or compensation for their infraction.

Contributory negligence: negligence of the plaintiff which, combined with the negligence of the defendant, was the proximate cause of the injury.

Damage: an injury to person, property or reputation caused by the negligence of another, or by accident.

Damages: the amount claimed or allowed as compensation for injuries sustained through the negligence of another.

De facto: in fact.

De iure, de lege: by right; legally.

Equity: fairness. The system of jurisprudence which grew up in and was first used by the English Courts of Chancery to correct inequalities before the law.

Ignorantia iuris non excusat: ignorance of the law is no excuse/defence.

In camera: a closed session; a judicial hearing that is not open to the public.

In loco parentis: in place of a parent; the common law authority of a teacher.

Inter alia: among other things.

Licence: permission or authority to do something which would otherwise be illegal.

Liquidated: fixed; ascertainable. e.g. liquidated or special damages represent the amount ascertained to have been lost by the plaintiff, as for example, fees for medical expenses or the repair of a motor car.

Mandamus: an original writ to direct an official or an inferior court to carry out a duty imposed by law.

Mandatory: compulsory; the result of a judicial command.

Negligence: want of care; a failure to act or not act as would be reasonable.

Plaintiff: one who brings an action.

Prohibition: an original writ to prevent an official or an inferior court from acting improperly.

Quash: to annul or discharge.

Quasi: as if; almost.

Res ipsa loquitur: the thing speaks for itself. In actions concerning negligence, the expression suggests that no further proof is needed once it is established that the mishap occurred; that is, it could not have happened if there had been no negligence.

Respondeat superior: 'let the superior be responsible'; the responsibility of a master for the negligent acts of his servants; vicarious liability.

Statute: a law created by the legislative body of a country or province.

Tenure: the mode of holding office; permanent position.

Tort: injury or wrong leading to a civil action.

Ultra vires: to exceed the stated powers.

Unliquidated: not fixed, e.g. unliquidated damages are assessed by the court in each case and take into account such matters as the plaintiff's loss of earning power (whether by death or injury) and its effects on his dependants, loss of expectation of marriage, and so forth.

Vicarious liability: see Respondeat superior.

Void: of no force or effect; cancelled, as if it never existed.

Volenti non fit iniuria: 'injury is not done to a willing person'; that to which a man consents cannot be an injury in the eyes of the law.

CHAPTER I

THE PROBLEM

I. INTRODUCTION

In The Legal Status of the Canadian Teacher, Sherburne G. McCurdy concluded his research by observing:

> One of the major problems confronting the student of the teacher's legal status in Canada is the lack of data and of research at the provincial level.[1]

The lack of data and of research in this field is particularly pertinent to Newfoundland, for, although the Province has its own legislature and judiciary, there is no law reporting agency. A few cases involving education have been before the courts, but no reports of them exist. Such cases are, for the most part, only known to those who took part in them.[2] It is not possible, therefore, to refer to any direct legal precedent or judgements to discover how the law of the Province could be interpreted.

No research peculiar to Newfoundland has been done. The legal status of teachers, pupils and school boards, respectively, has been researched across Canada by McCurdy,

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[1] S.G.McCurdy, The Legal Status of the Canadian Teacher (Toronto: The Macmillan Co. of Canada Ltd., 1968),p.170.

[2] Interview with Robert Wells, Q.C., St. John's, Newfoundland, May 1975.

Bargen,[1] and Enns.[2] They make little reference to Newfoundland, however, apart from stating, where pertinent, the law as enacted, for the very obvious reason that there is little else to report.

It is possible to hypothesise many reasons for this lack of court action. Financial considerations might have prevented teachers and/or parents from seeking redress at law. It is probably true to say that many potential cases never reached the courts because of skilful negotiation and diplomacy beforehand. Settlement could have taken place in the office of the principal or the superintendent when action might have been brought by a parent; it could have taken place at the board level or through the offices of the Newfoundland Teachers' Association,[3] when action might have been brought by a teacher or a school board. Undoubtedly, lawyers have helped to settle complaints out of court,[4] as has the Department of Education through its officials. At the same time, a limited number of disputes have been settled by arbitration, some of which have been considered in the course of this study.

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1 P.F.Bargen, The Legal Status of the Canadian Public School Pupil (Toronto: The Macmillan Co. of Canada Ltd., 1961).

2 F.Enns, The Legal Status of the Canadian School Board (Toronto: The Macmillan Co. of Canada Ltd., 1963).

3 Interview with William O'Driscoll, Executive Secretary, Newfoundland Teachers' Association, St. John's, May 1975.

4 Interview with Robert Wells, Q.C., St. John's, May 1975.

It is also possible to speculate that many cases were not brought before the courts because of ignorance of the law. How much of the 'skilful negotiation and diplomacy' mentioned above has resulted in parents, students and educators being denied justice through the legal process? McCurdy writes:

> It is doubtful, however, if teachers generally realize the extent to which the legislation determines their rights, duties, powers, privileges and responsibilities. Nor would many be aware of the interpretations given to this legislation by the courts. Perhaps even less would they realize the increasingly important influence that various administrative or quasi-judicial bodies are having on their legal status.[1]

The reasons for the dearth of legal cases in Newfoundland are outside the scope of this study, but surely it would be unreasonable to imagine that no cases have ever been brought because of the perfection of those involved in the educational process. Educators, being human, are fallible. It is the belief of the author that we are entering an era of much greater accountability, when teachers will be more publicly responsible for their actions and indeed lack of actions, and when they, at the same time, are going to seek a greater accountability to themselves as professionals. The influence of other provinces and countries is making itself felt in the communities and staffrooms of Newfoundland. It is essential,

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[1] McCurdy, op.cit., p.3.

therefore, as McCurdy has pointed out, that teachers, who, as a result of their profession, are the guardians of the youth for much of each year, should know their responsibilities and liabilities in the eyes of the law. It is also essential that they, as professionals, should know their rights, powers and privileges. McCurdy concludes his book with the following:

> Steps should also be taken to make the membership of teacher organizations more aware of their rights and responsibilities as far as the law is concerned. Litigation is expensive, time-consuming, and often the source of long-term hostility between the disputing parties. There seems little doubt also that much needless litigation occurs as a result of ignorance of the law. Any contribution that teachers and teacher organizations can make to dispel such ignorance, both among teachers and among the general public, is to be applauded.[1]

The teacher, therefore, to be a true professional must know the law to the best of his ability. Ignorantia iuris non excusat[2] is a legal maxim that applies to all citizens of legal age.

This study examines teachers' responsibilities for the supervision and care of students and their rights in the field of tenure.

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[1] McCurdy, op.cit., p.171.

[2] Ignorance of the law is no excuse/defence.

II. STATEMENT OF THE MAIN PROBLEM

In January 1975, The Supreme Court of British Columbia awarded over one and a half million dollars ($1,534,058.93) in damages to a student who, as a result of an accident in his school's gymnasium, is now a complete quadriplegic. Both the school board and the physical education teacher were found liable, but the suit against the school principal was dismissed.[1]

In 1968, The Supreme Court of Saskatchewan ruled a school board liable for one-hundred and eighty-three thousand and nine-hundred dollars ($183,900) in damages to a student injured in a school gymnasium.[2]

In 1972, The Supreme Court of Canada awarded ten-thousand, seven-hundred and sixteen dollars and sixty cents ($10,716.60) to a deaf mute student injured in the workshop of a School for the Deaf operated by the Government of Alberta. The teacher and the Crown were found liable.[3]

In all three cases it is interesting to note that a teacher was on duty and present at the time of the accidents. Why, then, were the school authorities found liable? It

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[1] Thornton v. Board of School Trustees of School District #57 (St. George) and David Edamura (B.C.)(1975). Photocopy of judgement of Andrews, J.

[2] McKay and McKay v. Govan School Unit No.29 and Molesky (Sask.)(1968) 64 W.W.R. 301.

[3] Dziwenka et al. v. The Queen and Mapplebeck (Alta.) (1972) W.W.R. (Vol.1) 350.

will be seen, in the following chapters, that the courts recognise that accidents do happen. It will be seen that the courts do not expect students to be supervised all the time. It will also be seen that school personnel are expected to exercise the same degree of care towards their pupils as would a 'reasonable and prudent father'.

In a more detailed examination of the above and other cases, it will be seen that the mere presence of a teacher does not legally constitute supervision. Through an examination of other cases, it will be shown that the degree of supervision is sometimes considered adequate even when no teacher is present. The basic problem, therefore, has been to determine what supervision is in the eyes of the law.

In 1974, The Alberta Supreme Court ruled that tenured teachers who had been dismissed without sufficient notice were entitled to one year's salary by way of damages and costs.[1]

In 1973, the Ontario High Court held that the findings of a Board of Reference had to be set aside as officials of the board of education had been allowed to remain in the room while teachers were giving evidence.[2]

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[1] Michaels and Finn v. Red Deer College (Alta.)(1974) 2 W.W.R. 416.

[2] Re Thompson and Lambton Board of Education (No.2) (Ont.)(1973) 32 D.L.R. (3d) 339.

In 1971, The House of Lords ruled that a teacher's dismissal was unjust because he had not been allowed to present his case to his employers prior to his dismissal.[1]

Of the seven most recent disputes, involving dismissal of teachers, that have been decided by boards of reference or arbitration in Newfoundland, five were ruled in favour of the teachers rather than the school boards.

Obviously, there are decisions of the courts and of arbitration boards that find in favour of school boards, but why are such cases as those referred to above lost by school boards? Do school boards act maliciously when they dismiss teachers or are they procedurally incompetent?

In a later examination of the cases, it will be shown that the cause of the dismissal is rarely the major source of contention. For the most part, decisions have gone against the school boards because they have dismissed teachers arbitrarily, for causes outside those permitted by statute or contract and with no proof of a detailed, documented evaluation of the teachers prior to dismissal, or because of a failure of natural justice which demands that the person to be dismissed be given a hearing - audi alteram partem - prior to dismissal. This is not to suggest that any of the teachers involved in disputes deserved to

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[1] Malloch v. Aberdeen Corporation (U.K.)(1971) All E.R. Vol. 2, 1278.

be dismissed, but it does illustrate that school boards will not be able to remove incompetent teachers unless they fully understand the procedures to be followed. For the most part, principals and superintendents are the personnel responsible for the implementation of the procedures. The problem, therefore, has been to determine the causes for dismissal and the proper procedures to be followed.

The cases referred to above, some involving substantial financial awards, indicate that today a working knowledge of the principles of school law has become more important to school personnel than ever before. In the introduction to this chapter it was shown that educational personnel in Newfoundland are handicapped by a lack of readily available and appropriate materials to guide them in the daily conduct of their work. This study has been an attempt to remedy this defect.

The problem which the author has attempted to examine is two-fold, namely, what does the law state about the legal rights and responsibilities of teachers? and, how could that legislation be interpreted by the courts? These questions have been answered by the following procedures:

1. an identification of consistent principles of law relative to professional educational personnel;

2. a selection and analysis of cases in which the decisions rendered by the courts and by

boards of arbitration have demonstrated the applicability of these principles;

3. the documentation of the statutes and other legislation relevant to the cases;

4. the interpretation of the findings so that the application of the principles of law relevant to the cases might be clarified and made more functionally valuable to professional personnel in the field of education.[1]

III. STATEMENT OF THE SUB-PROBLEMS

As ignorance of the law is no defence, those involved with education need to know the law. They also need an understanding of what the law means, since often the legal terminology is couched in diffuse terms. For example, section 80.2(r) of The Schools Act (R.S.N.) 1970, states, "Every Principal in a school shall arrange for the regular supervision of pupils on the premises of his school." Such terminology as this illustrates the formal enactment, of which the principal might be aware. To protect himself, his staff and the school board against litigation, however, he needs to ask the questions, "What is meant by 'arrange'?", "What is meant by 'regular'?", and, "What is meant by 'premises'?" As no formal, specific, enacted definitions are given for these terms, the diffuseness can be resolved by an examination of the basic

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[1] This format was developed from that used by W.A. Grice in his work, "Legal Bases for Decision Making Relative to Professional School Personnel" (unpublished Doctoral dissertation, McNeese State University, 1974).

principles of law as determined by the decisions of the courts.

At the same time, much can be done at the local level to define such terms more specifically. School boards, through their by-laws, can clarify the steps to be taken by themselves and their employees. Individual schools, through their regulations, can be more specific in order to meet their peculiar needs.

Professor D.J. Mullan, speaking on The Modern Law of Tenure at Dalhousie University on March 1st. 1975, said:

> Our courts seem to hold that dismissal of tenured staff brings with it the obligation to follow the rules of natural justice ... The lesson to be learnt is to avoid the courts at all costs and to concentrate on internal procedures.

Both in the field of supervision and in the field of tenure, court actions can be avoided if procedures are established to protect the interests of those who, in the absence of the procedures, could become plaintiffs at law.

The sub-problems of this study, therefore, were embedded in the following questions:

1. Do school boards have policies and regulations which clarify the enacted legislation?
2. Do schools have regulations specific to their own needs?
3. Do such policies and regulations appear to be adequate to protect the school boards and their employees from litigation?

CHAPTER II

THE THEORETICAL BACKGROUND

I. INTRODUCTION

Before determining the rights and responsibilities of teachers, it is necessary first to define the sources of Newfoundland law. Enacted legislation pertinent to the supervision and care of students and to the tenure rights of teachers is stated and examined in later chapters. Relevant case law is also examined to infer how the law could be interpreted.

Newfoundland law, and indeed Canadian law generally, is an offspring of British law and as such has two main sources, namely, written law and unwritten law. Written or enacted laws can most easily be classified as those laws that have been passed by the legislature in the form of Acts of Parliament, referred to as Statutes. Such laws can also be enacted, through delegated legislative authority, in the form of Orders-in-Council and local by-laws. Unwritten laws evolved, through the common law, from usage and customs, conventions, case law and precedent. In the early days of the British judicial system, decisions at law tended to follow customs and usage. In time these customs became so accepted that they assumed the status

of conventions which were, in effect, more binding on the courts of the land.

> Certain customs became the accepted basis of proper conduct. These customs became crystallized into principles which in cases of controversy were enunciated by the courts ... The courts then tended to follow their earlier decisions and there came into being the doctrine of *stare decisis*, "let the decision stand".[1]

The areas of unwritten law which so evolved encompassed what are now known as Constitutional Law, The Law of Contract and The Law of Torts. At the same time, judges followed the decisions of higher courts in cases involving similar facts, so that the doctrine of precedent evolved. From such precedents, case law emerged as a source of law in its own right. Case law, however, is only binding on lower courts under the same jurisdiction.

II. WRITTEN LAW

1. Federal Legislation

(a) *The British North America Act*, 1867.

The B.N.A. Act, in section 93, assigned to the provinces the exclusive right to make laws respecting education. Its sub-sections protected denominational minority rights against the encroachment of provincial legislatures.

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[1] R.R.Hamilton and P.R.Mort, *The Law and Public Education* (Brooklyn: The Foundation Press, Inc., 1959), p.3.

(b) An Act to Approve the Terms of Union of Newfoundland with Canada, 1949.[1]

Section 17 states:

> In lieu of section 93 of the British North America Act, 1867, the following terms shall apply in respect of the province of Newfoundland,
> In and for the province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the time of Union ...

The section continues by stating that all schools and colleges shall have a share of the public funds provided for education on a non-discriminatory basis.[2]

(c) The Criminal Code of Canada

Section 63 of The Criminal Code confers on teachers the right to discipline students within the framework of the law. 'The law' referred to in this context is the law of the province.

The B.N.A. Act 1867, as interpreted by The Act of Union 1949, and The Criminal Code of Canada are the only federal enactments relevant to this study.

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[1] Hereinafter referred to as, The Act of Union 1949.

[2] Ibid., section 17 (a) and (b).

2. Provincial Legislation

(a) The Schools Act 1969, as amended 1970.

Subject to the provisions of The Act of Union, the main source of law enacted for education in the Province of Newfoundland is that laid down in The Schools Act.[1]

For the purpose of this study, in the field of supervision, the relevant sections are 12, 80 and 81.

In the field of tenure, the relevant sections of the Act are 75, 76, 77 and 78. These are only relevant, however, for actions taken prior to the signing of the first Collective Agreement in 1973. These sections were repealed in 1974.[2]

(b) The Newfoundland Teachers' Association Act 1957, as amended 1970.[3]

Section 16 of this Act states:

> There shall be a committee to be called "The Newfoundland Teachers' Association Disciplinary Committee" consisting of five members ...

Sub-section 13 states that the Disciplinary Committee may recommend to the Executive that it, among other

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[1] All references to The Schools Act will be from the Revised Statutes of Newfoundland 1970, Chapter 346, An Act Respecting the Operating of Schools and Colleges in the Province, short title, The Schools Act (R.S.N.) 1970.

[2] May 21 1974, Act No.28.

[3] Hereinafter referred to as The N.T.A. Act (R.S.N.) 1970.

things, expel from membership any member who has been guilty of unprofessional conduct, negligence or misconduct or has been convicted of a criminal offence by a court of competent jurisdiction. This section is relevant to tenure and is examined in a later chapter.

3. School Boards

Legislative authority is assigned to school boards by the provincial legislature. Such authority is either mandatory or discretionary, but must not contravene the general or specific terms of parliamentary enacted legislation. Mandatory authority indicates the express will of the legislature. Such duties are usually indicated by the obligatory 'shall', as in section 12 of The Schools Act (R.S.N.) 1970, which begins:

> Subject to this Act and the regulations, every School Board shall ...

Sub-section (s) of section 12 states:

> (... every School Board shall ...) subject to the approval of the Minister, make regulations, rules or by-laws.

This sub-section aptly demonstrates the legislative power of school boards, while also showing that in many instances the approval of the Minister (of Education) is needed.

Discretionary authority, on the other hand, indicates the powers of school boards which they may exercise if

they so wish, and are usually prefaced by the operative word 'may'. Section 13 of The Schools Act (R.S.N.) 1970, commences:

> Every School Board may ...

It is of interest to note the The Schools Act designates mandatory duties only to business managers,[1] superintendents,[2] principals,[3] teachers[4] and pupils,[5] while the Minister of Education and School Boards, who are not actively involved in the field, have discretionary powers. This should suggest that the responsibilities, at least, of teachers would be clear cut. This study shows that they are not sufficiently precise.

4. Quasi-Judicial Jurisdiction

   (a) The Disciplinary Committee of the N.T.A.
   This Committee, already referred to,[6] as an offspring of the N.T.A. Act, has quasi-judicial authority as it can pass judgements. It takes as its guidelines the Code of Ethics of the N.T.A.

   (b) The Collective Agreement between the N.T.A., the Provincial Government and The Newfoundland Federation of School Boards, 1975.

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1 The Schools Act (R.S.N.) 1970, section 16.
2 Ibid., section 19.
3 Ibid., section 80.
4 Ibid., section 81.
5 Ibid., section 82.
6 Supra, pp.14-15.

This agreement,[1] although binding on the signatories, is an agreement only and not an Act of Parliament. It, therefore, falls into the category of quasi-judicial jurisdiction. It is a most important document, not only as it has superceded some of the sections of The Schools Act (R.S.N.) 1970,[2] but also because it is only the second collective agreement designed to protect the rights of Newfoundland teachers.[3]

Article 33 allows for the grievance procedure, which can result in a hearing before an Arbitration Board, and Article 34.09 provides for the decision of the Arbitration Board to be binding on 'all parties bound by this Agreement'.

Tenure is discussed by examining the relevant articles of The Collective Agreement 1975, especially Article 12 which covers Termination of Contracts.

III. UNWRITTEN LAW

Case law establishes precedent. As there are no reported cases, involving education, from the Newfoundland courts there is no provincial precedent to be followed. It is pertinent, however, to discuss briefly the role of case law and precedent as it applies to the Newfoundland

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[1] Hereinafter referred to as The Collective Agreement 1975.

[2] Article 12 supercedes ss.75-79 of The Schools Act (R.S.N.) 1970. Supra, p.14 footnote 2.

[3] The first Collective Agreement was signed in 1973.

judiciary.

Decisions of Newfoundland courts are adhered to by the lower courts of the province. Decisions of the Newfoundland Supreme Court are binding on all other courts of the province. Decisions of The Supreme Court of Canada, the highest court in the land and also the final court of appeal, are binding on all courts in Canada.[1]

Decisions reached by any other court, however high and in whatever country, are not binding on the Newfoundland judiciary. Judgements passed in other provinces, in Great Britain, and in other Commonwealth countries are often quoted and can have an influence on the court's decision, but an influence only. Decisions of the courts of the United States of America are rarely quoted and have little influence.[2]

Findings of quasi-judicial bodies, however, as, for example, those of Disciplinary Committees or Arbitration Boards, are not binding on subsequent judgements, as such bodies are not courts of law. In fact, such cases are usually kept confidential, but the facts and decisions, if known, may have an influence on subsequent hearings.[3]

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[1] For a more detailed examination of the roles of the courts see the following section, p.19 et seqq.

[2] Interview with Robert Wells, Q.C., May 1975.

[3] Idem.

IV. THE JUDICIAL PROCESS

A teacher could find himself involved in a court action at any time during his career. If the case involved a charge of negligence, he would be the defendant. If he were suing his school board for wrongful dismissal or any other breach of contract, he would be the plaintiff.

A brief explanation of the procedures involved in both instances follows. Although the procedures are similar in all Canadian provinces, they are not identical. The procedures explained herein are those that operate in Newfoundland.

The section concludes with a brief explanation of the law reporting procedure.

1. Liability

(a) Trials

If a student is injured in school or during school-related activities, he can bring an action in tort against those whom he considers liable for the injury. He will attempt to show that his injury was caused by their negligence. Frequently, the student will be too young to bring the action personally. A parent, a guardian or a close relative will join with him in the action as 'his next friend'. Occasionally, the adult will sue jointly with the student on the grounds that the injury has caused him (the adult) a direct financial burden. When the action

is brought, the amount of the damages being sought is stated in the writ.

Newfoundland has five District Courts.[1] If the claim being made is for less than ten thousand dollars ($10,000), the case will be heard in a district court before a judge. He hears the evidence, decides if negligence has been proven, and decides on the amount of the damages to be awarded. He also determines whether legal costs should be awarded to one or other of the parties. The judge, therefore, is sole arbiter of law and fact.

If the claim being made is for more than ten thousand dollars ($10,000), the case has to be heard, in the first instance, in the Trial Division of The Supreme Court of Newfoundland. If, after a preliminary perusal of the facts, the judge decides that damages in excess of ten thousand dollars ($10,000) are not justified, he may return the case to a district court. At the same time, the lawyers representing the parties, if they think the amount excessive, may ask for the case to be returned to a district court.

The role of the judge in The Supreme Court is similar to that of a district court judge. He is sole arbiter of law and fact. It is possible, however, for a

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[1] District Courts are situated in St. John's East, St. John's West, Grand Falls, Humber and Trinity-Conception.

civil action in the Trial Division of The Supreme Court to be heard before a jury, if one of the parties so requests. The judge has the right to refuse the request. Civil actions before judge and jury are extremely rare in Newfoundland, possibly less than one per cent (1%) of the total.[1] If a jury is used, it decides, by examining the facts, if negligence has been proven. The judge guides them in the law and decides the amount of the damages and costs to be awarded.

(b) Appeals

An appeal from a district court or from the Trial Division of The Supreme Court is made to the Appeal Division of The Supreme Court of Newfoundland. Either party may appeal the decision of the trial court regarding liability or the amount of damages awarded or both.

Appeals can only be on points of law. They are, therefore, heard by judges only. The appellant will attempt to show that, due to a misinterpretation of the law or of a failure to conduct the case within the rules of evidence, justice was not done in the court of first instance. The court of appeal will determine whether the appeal is justified. It may confirm the finding of the trial court, adjust it or overrule it. It may confirm the award of damages and costs already made or increase or decrease

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[1] Interview with Robert Wells, Q.C., July 1975.

the amount. It is empowered, therefore, to substitute its own ruling for that of the trial court.

Either party to the action might decide to appeal further, in which case the appeal will be taken to The Supreme Court of Canada. The role of this final court of appeal is similar to any other appeal court.

2. Tenure

(a) Hearings

Statutes and other contractual agreements, such as The Collective Agreement (Newfoundland) 1975, provide for grievance procedures by which teachers may dispute actions taken against them by their employers. The final stage in a grievance procedure is a hearing before a board of reference or a board of arbitration.

The powers of such boards are stated in the legislation which creates them. The boards have to interpret law and decide on fact. Either party in a dispute before a board of reference or arbitration, who considers that the board has misinterpreted the law or has exceeded its powers, may appeal to a court of law. Usually the writ that seeks the appeal will be one of certiorari - 'to make more certain or clear'. In effect, therefore, the court is being asked to clear up the doubt that exists and, if it finds the appeal justified, to quash the decision of the board.

(b) Appeals

Appeals from tribunals, boards of reference or boards of arbitration in Newfoundland are made to the Trial Division of The Supreme Court and are heard by a judge of that court. Appeals may be only on points of law. The court may confirm the finding of the board or quash it. If it quashes the ruling, the case must be sent back to the board which first heard it, with a direction of how the law has to be interpreted or of how the board must conduct itself. The court will not substitute its own finding for that of a board, as it acts in a supervisory capacity only.

Lord Justice Denning in R. v. Northumberland Compensation Appeal Tribunal (U.K.)(1952)[1] summarised the role of the court as follows:

> There is formidable argument against any intervention on the part of the (Court) at all. The statutory tribunals ... are often made the judges of both fact and law, with no appeal to the ... Court. If, then, the (Court) should interfere when a tribunal makes a mistake of law, the (Court) may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court ... has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction,

[1] 1 All E.R. 122, at p.127.

> but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The (Court) does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the (Court) exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

Either party may appeal from the ruling of the court to the Appeal Division of The Supreme Court of Newfoundland, and, if necessary, from there to The Supreme Court of Canada. The role of these courts is identical to that expounded by Lord Denning.

3. The Power Of The Courts

Courts of law are bound by legislation, if it exists. Statutory law, therefore, supercedes all other sources of law. If an article in a collective agreement or a regulation in the by-laws of a school board is contrary to the statutory enactment, courts are bound to follow the law as stated in the statute.

If there is no specific legislation to guide them, the courts follow common law principles and precedent.

Rulings of The Supreme Court of Canada apply to the whole of Canada, unless the ruling is contrary to

the specific statutory enactments of individual provinces. Within the provinces, lower courts are bound by the rulings of the higher courts. In Britain, appeals are made to The Court of Appeal and, if necessary, to The House of Lords, the highest court in the land. Courts in one country are not bound by the statutes or precedents of other countries.

Courts of law, therefore, interpret statutes and develop the common law. The development has sometimes been so extensive as to be called new law.

4. Law Reports

Agencies report on a national and provincial scale. Newfoundland and Prince Edward Island report conjointly.

Law reports are records of the judgements handed down in a selection of cases. They act as a means of conveying to lawyers and students of the law the rulings of the courts. Accordingly, they form, for the most part, the practical source by which interpretations of the courts and the development of legal principles may be discovered. They are, in effect, the means of discovering precedents.

All cases cited in this study are referenced. The names of the parties and the year in which the case was heard are indicated. The capital letters in the reference indicate the name of the law report in which the case may be found. Any number that might precede the capital

letters indicates the volume number of the law report. The final number in the reference indicates the page of the law report on which the report of the case commences.

A case that is cited in subsequent chapters on more than one occasion is Brost v. Tilley School District (1955) 15 W.W.R. 241 (C.A.). Brost is the name of the person bringing the action, legally termed the plaintiff; Tilley School District is the defendant. Although the event which led to the court action might have occurred at any earlier time, the date 1955 indicates the year in which the case was heard. The report can be found in volume 15 of the Western Weekly Reports, and it begins on page 241. Occasionally, as in this case, final letters appear in brackets. These name the court in which the case was heard. In this instance C.A. indicates the Court of Appeal.

To help the reader understand where the case was first heard, the author has inserted the abbreviated name of the province immediately before the date in all cases cited in this work. British cases are indicated by the letters U.K., while cases from the United States are shown by the letters U.S. An indication of the geographical location in not normally shown in law reports. Any reader, therefore, who quotes directly from this work, should, for greater accuracy, omit the abbreviated geographical notations.

Frequently, cases are referenced by citing a number of law reports after the names of the parties. This indicates, either that the case has been reported by more than one agency, or that the case has been appealed through the courts. In the latter situation, the references indicate where the judgements of the various courts might be found as the case ascended through the appeal process. So in Gray et al. v. McGonegal and Trustees of Leeds and Lansdowne Front Township School Area (Ont.) (1949) 4 D.L.R. 344; (1950) 4 D.L.R. 395; (1952) 2 S.C.R. 274, the trial case was heard in 1949 and was reported in volume 4 of Dominion Law Reports, commencing at page 344; the appeal, which was heard a year later in 1950, was reported in volume 4 of Dominion Law Reports, commencing at page 395; finally, the case was heard by The Supreme Court of Canada in 1952 and reported in volume 2 of the Supreme Court Reports, commencing at page 274.

With only a few exceptions, the writer of this work cites only the reference to the judgement of the court in which the case was finally heard.

Arbitration cases are not reported. The details of such cases are taken from the transcripts. The cases referred to in this work have been given the names of colours as pseudonyms, the alphabetical sequence of colours corresponding to the chronological order in which the cases were heard. So The Amber Case (1971) precedes

The Brown Case (1971) through to The Violet Case (1975).

V. SUMMARY

The main sources of law are written and unwritten. Written law includes all enacted legislation, the principal Acts for this study being The Act of Union 1949, and The Schools Act (R.S.N.) 1970. Written law also encompasses delegated authority which includes the mandatory and discretionary duties and powers of school boards and their employees. Other quasi-judicial jurisdictions include the Disciplinary Committee of the N.T.A. and the Boards of Arbitration establishable as a result of The Collective Agreement 1975.

The Newfoundland judiciary is autonomous, bound only by decisions of The Supreme Court of Canada.

This study primarily examines the duties that educators owe to students to protect them from injury. Such duties are outlined in various sections of The Schools Act (R.S.N.) 1970.[1] Tenure is examined through a scrutiny of the various sections of The Schools Act (R.S.N.) 1970,[2] and the articles of The Collective Agreement 1975.[3] Through an examination of cases decided in Canada, Britain and the Commonwealth, an attempt has been made to determine how the courts could interpret

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[1] Supra, p.14.
[2] Ibid.
[3] Supra, pp.16-17.

the enacted legislation. An analysis of such cases has also helped to identify consistent principles of law relative to professional educational personnel.

CHAPTER III

THE RESEARCH DESIGN

I. INTRODUCTION

There are seven general determinants which influenced the structuring of the research design of the study: its purposes; the methodology; the definition of terms; the assumptions; the delimitations; the limitations; and the significance of the study. Each of the determinants is outlined in the following sections.

II. THE RESEARCH PURPOSES

The purposes of this study are contained in the statements of the problem and the sub-problems outlined in chapter I. To review, the study has attempted to determine what the law states regarding the duty of care that is owed to students by school boards, principals and teachers, and, by an examination of court cases, to determine how the courts could interpret the enacted legislation. The study has also attempted to determine whether school boards and/or individual schools in Newfoundland have regulations, further to the enacted legislation, for the protection of students.

In the field of tenure, the pertinent legislation has been examined, and, by an analysis of relevant

decisions of the courts and of boards of arbitration, an attempt has been made to identify consistent principles of law relative to professional personnel.

The overall purpose of this study is to offer to both professional and lay educators some guidelines which might protect them from unnecessary, expensive and time-consuming litigation.

III. METHODOLOGY

The methodology was that generally used in the documentary analysis type of descriptive research, namely, gathering of data, analysis of data, and interpretation of findings in a readable form.

1. Gathering of Data

   (a) Legislation

   The relevant statutes and agreements were examined. These included The British North America Act 1867, The Act of Union 1949, The Criminal Code of Canada, The Schools Act (R.S.N.) 1970, The Contributory Negligence Act (R.S.N.) 1970, The Limitation of Actions (Personal) and Guarantees Act (R.S.N.) 1974, and The Collective Agreements 1973 and 1975. The Schools Acts, or the equivalent, of five other provinces were also examined for purposes of comparison and as sources for possible recommendations.

(b) School Board Regulations and By-Laws

All school boards in the province were asked to provide either copies of their by-laws or extracts from their by-laws pertinent to the problem. (Appendix A).

(c) Insurance

A further questionnaire was sent to school boards to determine the extent of their insurance coverage. (Appendix F).

(d) Case Law

Each provincial teachers' association was asked to provide case references, an outline of the facts and the judgements of all cases that have appeared before the courts of their province or The Supreme Court of Canada subsequent to 1968. (This date was chosen because, so far as could be determined, no pertinent research has been conducted in Canada since the publication of McCurdy's book in 1968.[1]) (Appendix B).

The two major teacher unions in Britain, namely, The National Union of Teachers and The National Schoolmasters Association, were approached for similar information pertinent to Britain. (Appendix C).

Research by the author was conducted into the Law

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[1] McCurdy, supra, p.1.

Reports available in the main library of Memorial University, and a three day visit was made to the Law Faculty Library of Dalhousie University. Use was also made of the law library in the St. John's Court House.

(e) The N.T.A., on the writer's behalf, sought permission from teachers who had taken disputes to arbitration prior to The Collective Agreement 1973, to use the facts of their cases. Subject to the protection of anonymity, all the teachers involved gave their permission. The N.T.A. also approached the teachers and the school boards involved in two arbitration cases subsequent to The Collective Agreement 1973. Both teachers granted permission for the facts to be quoted. Both superintendents withheld their permission. (Appendix D).

(f) The author read extensively from all available literature.

(g) One high school principal and one elementary school principal from each school board in the province were asked to complete a questionnaire for the purpose of determining whether specific regulations existed in their own school policy handbooks for the supervision of students. (Appendix E).

(h) Interviews were held with representatives of the legal profession, the insurance profession and the

Newfoundland Teachers' Association.

2. Analysis of Data

When the data were collected they were analysed and divided into two main sections. All data relevant to teacher liability form two chapters in the study; the data relevant to teacher tenure form a third chapter.

3. Interpretation of Findings

It is hoped that each chapter has been written in language comprehensible to the layman. It should be emphasised that the findings do no more than indicate what could happen in Newfoundland.

The study concludes with a summation based on the findings of the research.

IV. DEFINITION OF TERMS

Because the layman knows little about the technical involvements of the law, it is hoped that this work is as straightforward as possible. It is necessary, however, to define briefly such terms as teacher, tenure, criminal and civil proceedings, contract, tort, negligence and vicarious liability. A more detailed explanation of some of the terms follows in subsequent chapters.

Teacher

The Schools Act (R.S.N.) 1970, defines teacher as:

> Section 2 (ff) "teacher means a person holding a certificate of grade as defined

> by paragraph (f) of this Section 2 and is deemed to include emergency supply but does not include a Superintendent or an Assistant District Superintendent.

Section 2(f) states:

> "certificate of grade" includes a licence to teach issued under the authority of The Education (Teacher Training) Act, 1963, the Act No. 24 of 1963 or The Education (Teacher Training) Act.

It will be noted that superintendents and assistant superintendents are excluded from the definition of 'teacher'. They are also excluded from the terms of The Collective Agreement 1975. They do not come within our terms of reference for liability or tenure purposes.

Tenure

Teacher tenure has been defined as:

> ... a set of rights, conveyed and protected by law, whereby a teacher cannot be dismissed from his position except under procedures laid down by statute. 'Tenure teacher' means one who lawfully enjoys such rights, one who therefore can be said to possess 'tenure status'.[1]

This definition encompasses the full meaning of the term and aptly emphasises that a tenured teacher cannot be dismissed except by the statutory method so prescribed. In effect, therefore, in Newfoundland, a

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[1] J.F. Swan, "Historical Survey of the Board of Reference in Alberta" (unpublished Master's thesis, University of Alberta, 1961), p.3, cited by McCurdy, op.cit.,p.23.

qualified teacher, once he has acquired tenure according to the terms of his contract within the scope of The Collective Agreement 1975,[1] cannot be summarily dismissed outside the scope of The Collective Agreement.[2]

Criminal and Civil Proceedings

Criminal proceedings are brought by the police or by an individual exercising his citizen's rights in a court of law against a defendant on a charge of committing a criminal act contrary to the law of the land. Such proceedings may be tried before a magistrate, a judge, or a judge and jury. A guilty verdict carries a sentence which can involve a warning, probation, a conditional discharge, a fine, or imprisonment, any of which may be suspended. The proceedings involve a prosecution on behalf of the state.

Such proceedings are not pertinent to this study except that it must be borne in mind that, if a law has been broken and a civil injury has been suffered at the same time, criminal proceedings may be initiated while civil proceedings are also being pursued.

Civil proceedings involve one party, the plaintiff, suing another, the defendant, at law for some injury or wrong. The proceedings are civil as they are brought

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[1] The Collective Agreement 1975, Article 7.

[2] Ibid., Article 12.

between citizens and encompass actions that are not necessarily criminal in themselves. Breach of contract, most insurance cases, defamation, divorce and a whole realm of tort, fall within this category. One person or a group of persons use the law to put right a wrong perpetrated on them by another person or group of persons. In civil actions neither imprisonment, probation nor fines are the outcome. Usually the judgements involve an award of money (compensation or damages), a decree, a court order to prevent (injunction) or to quash (certiorari) or to stop (estoppel) some action, or a command to perform some act (mandamus).

The legal actions examined in this study, in the realms of liability or tenure, are civil proceedings as, in both examples, one person is trying to correct, what he considers, a wrong perpetrated on him by another.

Contract

The Law of Contract has developed through the common law. Basically a contract is an agreement, enforceable at law, between two or more persons, to do or not do something.

The agreement must be legal, so that the inclusion of any clause in a teacher's contract that was at variance with the law of the land or of any other legislation that applied in the place where the teacher was resident, would make the contract illegal and therefore void.

The parties to the contract must be competent, that is, neither drunk, insane nor minors at the time of the making of the agreement. The contract must also be between the parties to the agreement, unless they are officially acting as agents of others who are the de lege principals to the contract.

Although the initial requirements of the status of the parties, their competency, and the legality of the agreement must be met, the major elements of offer, acceptance and consideration must be present to make a valid contract.

> An offer consists of any definite indication by one person to another that he is willing to enter into a contract with him on certain specified terms.[1]
>
> Acceptance consists of any act which signifies final consent of the offeree to the terms of the offer.[2]

There are various legal implications to both offer and acceptance, but for the purposes of this study the definitions given above suffice.

Consideration is one of the complexities of English law. Mr. Justice Patteson defined it in these terms:

> Consideration means something which is of some value in the eye of the law, moving from the plaintiff. It may be

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[1] J.F. Wilson, The Law of Contract (London: Sweet and Maxwell Ltd., 1957), p.14.

[2] Ibid., p.23.

> of some benefit to the plaintiff, or some detriment to the defendant.[1]

A gratuitous agreement does not constitute a contract, since the law requires that the consideration must be of some value. An apple, one dollar or a thousand dollars are 'of some value'. Consideration, therefore, must be sufficient, but need not be adequate.

> The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced.[2]

A teacher, therefore, who signs a contract and receives some form of payment, cannot later complain, at law, that his payment is inadequate.

Offer, acceptance and consideration are essential elements of a contract. A learned writer has described the common law position in the following way:

> Consideration, offer and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain.[3]

A school board is a corporation and may sue and be sued in its own right.[4] When tenure is discussed in a later chapter, it will be noted that, in case of dispute,

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[1] Thomas v. Thomas (U.K.)(1842) 2 Q.B. 851.

[2] Justice Blackburn in Bolton v. Madden (U.K.)(1873) 9 Q.B.55.

[3] C.J. Hanson, "The Reform of Consideration," 54 L.Q.R. 234, quoted by Wilson, op.cit., p. 41.

[4] The Schools Act (R.S.N.) 1970, section 32.

a teacher may bring an action against his school board, the body which engaged him under contract.

Tort

The Law of Torts has developed through the common law. Basically a tort is a 'wrong'.

> Tort is a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than 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.[1]

Negligence

For the purpose of this study, the tort of negligence is pertinent, since in actions for failure to adequately supervise students so that injuries have occurred, negligence has to be shown. Negligence was defined by Justice Alderson in 1856 as follows:

> 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 doing something which a prudent and reasonable man would not do.[2]

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[1] W.L. Prosser, Handbook of the Law of Torts (2nd ed.; St. Paul, Minn.: West Publishing Co., 1955), p.124.

[2] Blyth v. Birmingham Waterworks Co. (U.K.)(1856) 11 Exch. 784.

Vicarious Liability

It is an accepted legal maxim that a master is responsible for the acts of his servant, if such are performed in the furtherance of the servant's duty. If, under these circumstances, a servant commits a wrong (tort), the master can be held to be vicariously liable - respondeat superior - literally, 'let the superior be responsible'.

In the teaching profession, the school board, as the employer, can be held liable for the negligent acts of its teachers.

V. ASSUMPTIONS

The assumptions underlying this study were:

1. The cases examined would re-affirm and clarify the basic principles of law;
2. The cases, therefore, would provide a frame of reference for interpreting their general implications for decision making on the part of professional school personnel and school boards;
3. The wording of pertinent enacted legislation in Newfoundland is vague;
4. Little has been done at the local level to clarify the vagaries in the enacted legislation.

VI. DELIMITATIONS

Both of the topics examined in this study, namely, teacher liability and teacher tenure, fall into the category of civil actions. The former is in that area of

the law known as torts, which give rise to common law actions for liquidated damages for ascertainable costs, and for unliquidated damages which are ascertained by the judge as an assessment for compensation for injury. The latter is in that area of the law known as contract which gives rise to common law actions for damages, which are usually specific, and for specific performance. Although it is possible for a person to be prosecuted for a criminal action and to be sued at civil law for the same offence, this study does not examine the realm of criminal law.

Although the study makes special reference to Newfoundland, the basic principles of law, the analysis of cases which demonstrate the applicability of these principles, and the interpretations of the findings apply equally to the whole of Canada. Only an analysis of some of the statutes and agreements, namely, The Schools Act (R.S.N.) 1970, and The Collective Agreement (Nfld.) 1975, delimit the study to Newfoundland.

All local arbitration cases examined are delimited in that pseudonyms are used instead of the names of the parties concerned. This is common practice to protect the character and reputation of the parties involved. Apart from the use of pseudonyms, the cases reported are factual.

VII. LIMITATIONS

An obvious weakness in the study is the lack of reported court cases and the limited number of arbitration decisions that have been decided in Newfoundland. In fact, no interpretation of the relevant statutes has been made in the Newfoundland courts, while decisions of quasi-judicial bodies, such as arbitration boards, are not binding on subsequent boards of reference.

The Newfoundland judiciary is autonomous and not bound by the decisions of any other courts, except The Supreme Court of Canada. It is impossible, consequently, to state with any certainty what could be the findings of a Newfoundland court for any actions or non-actions by an individual or a group, unless a case, with identical facts and in breach of an identical legislative enactment, had been decided by The Supreme Court of Canada. The possibility of such an occurrence is extremely remote. The cases examined in this study, therefore, must be considered as illustrative only. They are intended to show how courts have identified what have come to be accepted as basic principles of law. The Newfoundland courts, however, must operate within the framework of these legal principles and, accordingly, some insight might be offered to professional educators and lay members of school boards of what could be potentially dangerous situations so that they, being warned, might ensure that adequate steps are taken to

avoid unnecessary litigation.

The cases examined, in the main body of the study, are limited to Canadian and Commonwealth decisions as they, although not binding, unless Supreme Court of Canada decisions, do influence the Newfoundland judiciary. Decisions from courts of the United States are only cited when they illustrate principles of law which apply in Canada but for which there is a paucity of Canadian cases.

In view of the above, readers of this work are warned not to quote any inferences made as, 'The Law'. The law is that enacted in legislation, and, although there is a body of the law known as case law, the interpretations of the courts apply to the facts and the peculiarities of each individual case. A judge of the Manitoba Supreme Court exemplified the situation when he stated in a 1959 case:

> The courts' realization of the necessity of developing a sense of responsibility has led to a changing attitude and a practical approach to the question of supervision by school authorities. While there is a duty to supervise certain activities, such duty bears some relation to the age of the pupils, the special circumstances of each case and particularly the type of activity.[1]

VIII. SIGNIFICANCE OF THE STUDY

Through an examination of the problems, the purposes, and some of the assumptions, the significance of the study

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[1] Schade v. Winnipeg School District No. 1 and Ducharme (Man.)(1959) 19 D.L.R. (2d) 299.

can be summarised as follows:

1. An acknowledgement by many educators of the inadequacy of their grounding in the law.
2. A knowledge of the law would enhance the professional stature of all such professional personnel.
3. Professional personnel should become better qualified to avoid litigation.
4. An absence of any similar study in Newfoundland.
5. A growing awareness by citizens of their legal rights, enhanced by the publicity of such cases as the million and a half dollar award in British Columbia.[1]
6. Subsequent to The Collective Agreement 1973, a growing awareness by Newfoundland teachers of their rights to tenure.
7. The absence of court decisions and the paucity of arbitration decisions in Newfoundland.
8. The author's own interest. His background in law and education has made him particularly aware of the problem.

A brief comment needs to be made to justify the combination of the two topics in the title, namely, liability and tenure. Primarily, the writer believes that the two topics are of major importance to the legal status of the teacher. In addition, the writer entertains a suspicion that, at some time in the future, principals and/or teachers, after being found liable in a court of law for damages as a result of negligent supervision, might be dismissed on the grounds of incompetency or insubordination - incompetency, in that through their negligence

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[1] Thornton v. Board of School Trustees (B.C.)(1975) supra, p.5.

they allowed a student to be injured, and insubordination, in that they failed to carry out their supervisory duties as instructed. A teacher's dismissal, therefore, could be a direct result of his being found liable at law.

The Supreme Court of Louisiana in 1953 did hold that a school board was justified in dismissing as incompetent a principal who had been charged in a district court for administering excessive corporal punishment.[1] The charge, in the district court, was a criminal action, while cases involving negligence are civil actions, so that no direct parallel can be claimed. But, the principal was dismissed as incompetent. If a teacher fails to adequately supervise his students, so that injury results, is he not equally incompetent?

Although the courts have distinguished between incompetency and errors of judgement, the writer justifies the combination of topics on the ground that they could be closely interrelated.

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[1] Houeye v. St. Helena Parish School Board (U.S.)(1953) 223 La. 966, 67 So. 2d. 553.

CHAPTER IV

TEACHER LIABILITY - THE LEGAL FRAMEWORK

I. INTRODUCTION

The possibility of students being injured at school-related activities is considerable. Some accidents are unavoidable; some are the result of faulty facilities or equipment; some are caused by the injured person's own carelessness; some are the result of the negligence of others.

Cases decided in Britain and Canada, which will be examined in the course of this and the next chapter, illustrate the wide range of accidents that have resulted in litigation before the courts. Students have been injured in gymnasiums, on playgrounds, in laboratories, in workshops, in kitchens, in staffrooms, on buses, on trucks, in swimming pools, in dormitories, on roofs, in washrooms, and off school premises. Students have been injured through contact with a variety of inanimate objects, including, gunpowder, arrows, knives, stones, paper pellets, hockey sticks, golf balls, scissors, pens, glass windows, swing-doors, slippery floors, chemicals, fires, electric saws, icy steps, broken swings, vehicles, thorn bushes, cooking stoves, and oilcans.

The injuries suffered, in the cases reported, have varied in gravity, resulting in death in extreme cases. Although minor injuries rarely have resulted in court action, possibly because they have not warranted the necessary expenditure of time or money, their comparative triviality would not automatically constitute a bar to litigation. Any injury can lead to a tortious action. Salmond summarised the position neatly when he wrote, "Harm is the tort signature."[1]

The majority of disputes are settled out-of-court. This is especially true when liability is admitted or when an insurance settlement is adequate.[2] When liability is denied, however, or when the compensatory offer is unacceptable, court action can follow. This study will briefly consider financial settlements. The major portion of this chapter will be concerned with liability.

Although any injury can lead to a tortious action, the courts will not find defendants liable unless their negligence has been proven. This chapter, in considering the roles of school boards, principals, teachers and students, will examine the tort of negligence and the principles of law that have evolved from it, with special reference to the duty of care owed to children and to the liability of school boards for the negligent acts of their

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[1] Salmond on Torts, ed. R.F.V. Heuston (14th ed.; London: Sweet and Maxwell, 1965), p. 15.

[2] Interview with Robert Wells, Q.C., May 1975.

employees.

The duties and responsibilities of those involved in education can be found in enacted legislation and in common law. Enacted legislation, encompassing statutes and school board by-laws, can be mandatory or discretionary, definitive or diffuse. The common law, which is unwritten law and which has evolved through custom and precedent, has established the standard of care demanded of educators. Both the statutory and the common law duty will be examined.

II. NEGLIGENCE

If a person is injured, and he believes the injury is not his own fault, he can bring an action in tort against the person or persons whom he considers responsible. Since the injured person will claim that the injury is due to the negligence of some other person or persons, the action will be for 'negligence'. Negligence was defined by Justice Alderson in 1856 in the English case of Blyth v. Birmingham Waterworks Co. (U.K.)[1] as follows:

> 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 doing something which a prudent and reasonable man would not do.

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[1] 11 Exch. 784.

It will be noted that action and non-action can constitute negligence.

Even if an injury has been suffered, there are certain components that have to be met before a successful action for negligence can be brought. Lord Wright, M.R., recognised three components, namely, duty, breach and damage, when he said:

> In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damages thereby suffered by the person to whom the duty was owing.[1]

Salmond qualified these elements by stating that the damage must be a direct result of the breach of duty.[2] Prosser, however, classified causality itself as a component of negligence. He wrote that before a successful action can be brought for negligence, there must be:[3]

(a) A legal duty to conform to a standard of conduct for the protection of others against unreasonable risks;

(b) A failure to conform to the standard;

(c) A reasonable close causal connection between the conduct and the resulting injury;

(d) Actual loss or damage resulting to the interests of another.

Both the triple concept as stated by Lord Wright

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[1] Lochgelly Iron and Coal Co. v. M'Mullan (U.K.)(1934) A.C. 1, at p. 25.

[2] Salmond, op.cit., p.298.

[3] Prosser, op.cit., p.165.

and Salmond, and the division of the essential elements as promulgated by Prosser, indicate clearly to the student of the tort of negligence that for a successful action to be brought a legal duty governing the behaviour of the defendant must have been breached, and the plaintiff must have suffered a loss or injury as a result of that breach. Lord Goddard, Chief Justice of England, summarised the position as follows:

> It is not for every injury that a person may sustain in the course of everyday life that he or she can recover compensation; it can only be recovered if that injury is due to the fault of someone who owes a duty to that person.[1]

III. LEGAL DUTY

The legal duty owed by school personnel is derived from two sources. It may be created by statute or it may be the common law duty of care. For the most part the statutes state a duty; the common law not only determines how that duty should be carried out, but also, in the absence of a statutory duty, it imposes its own duty of care.

1. Statutory Duty

If school personnel have to 'conform to a standard of conduct' to meet the legal duty imposed upon them, they must first have the authority to so act. A school board,

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[1] Bell v. Travco Hotels Ltd. (U.K.)(1953) 1 Q.B. 473, at p.478.

being a creature of statute, derives its authority from the statute that creates it. It has already been illustrated[1] that this authority can be mandatory, introduced in the statutes by the operative word 'shall', or discretionary, introduced by 'may'. The mandatory authority can be illustrated by section 12 of The Schools Act (R.S.N.) 1970, which states:

> ... every School Board shall ... (n) provide fire escapes for all school buildings ...

The school board, therefore, has the authority to provide fire escapes, but the authority carries with it the absolute duty to provide the fire escapes. Or, put another way, the statute imposes on the school board the duty to provide fire escapes and the imposition of the duty automatically creates the authority needed to expedite the duty. If any student were injured because of the absence of a fire escape, the school board would be liable for breach of its legal duty.

The discretionary authority of the school board may be illustrated by section 13 of The Schools Act (R.S.N.) 1970, which states:

> Every School Board may ... (q) ... keep any school under its control open during the whole or any specified portion of the summer vacation.

Once a school exercises its discretionary powers it cannot escape liability for any injuries suffered

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[1] Supra, pp.15-16.

merely because the duty was only a discretionary one. If a school board in Newfoundland were to keep a school open during the summer vacation, the duty it would owe to the students would be no different from the duty owed during the normal school year. If, therefore, a student were injured while attending school during the summer vacation, as the result of the absence of a fire escape, the provision of which, as we have seen, is a mandatory duty, the school board could not claim that it owed no duty as it was only exercising its discretionary authority. This legal principle, established in many cases, is well illustrated by Shripton v. Hertfordshire County Council (U.K.)(1911):[1]

> The House of Lords held that the local education authority was liable for the injury to a child when she fell off a school conveyance. The education authority had a statutory duty to provide transportation for all children who lived two miles or more from the school. It had the discretionary authority to transport students who lived less than two miles from the school. As the injured child lived only one mile from the school, the education authority claimed that it had no duty towards her and she was using the conveyance only with its permission. Lord Loreburn, L.C. stated:
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> > I agree with the learned counsel for the respondents that there was no duty or obligation whatsoever on the county council to provide for the carriage of

[1] 104 L.T. 145.

> this child, but if they did agree to do so, and did provide a vehicle, then it is clear to my mind that their duty was also to provide a reasonably safe mode of conveyance.

The authority of principals and teachers is also found in statute. In Newfoundland, such authority is mandatory and, therefore, imposes upon these personnel an absolute duty.[1] As these personnel are employees of school boards, they also have authority delegated to them by school boards in the form of by-laws and regulations.[2] Such delegated authority is as binding on the personnel as statutory authority, provided it does not contravene any specific statutory regulations.

At times a distinction can be drawn between authority and the administrative role. Ward et al. v. Board of Blaine Lake School Unit (Sask.)(1971):[3]

> An eleven-year old grade six student was suspended by his principal until he cut his hair in conformity with a resolution of the school board. An application by the boy and his mother to quash the suspension and the resolution was rejected by the Saskatchewan Court. It ruled that the school board had the statutory authority to pass the resolution and to suspend. The principal's actions were purely ministerial, not judicial nor quasi-judicial, and were effecting the school board's statutory ruling.

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[1] Supra, p.16.

[2] Supra, p.15.

[3] W.W.R. Vol.4 161.

It could be argued that if the actions of school board employees, when carrying out the orders of the school boards, are no more than ministerial, then principals and teachers have no real authority themselves. They, therefore, act only by the grace of the school boards. Although there might be some truth in this argument, it must remain academic at this stage. The courts have ruled that principals and teachers will be liable for injuries suffered if they carry our these delegated duties negligently. At the same time, school boards, as employers, will be vicariously liable for the negligent acts of their employees. Vicarious liability is an important topic which will be examined later in this chapter.[1]

2. The Common Law Duty

The courts, in determining whether negligence exists, have asked whether the defendant, if his conduct had been that of a reasonable man, could have prevented the accident. The accident must have been the result of the way the defendant behaved. Negligence, therefore, is a conduct, not a state of mind.[2] The injury and the conduct are relative. The definition of negligence given in Blyth v. Birmingham Waterworks Co.(U.K.)(1856)[3] has been quoted in many cases. The problem to be resolved has

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1 Infra, p.86 et seqq.

2 Salmond, op.cit., p.268.

3 Supra, p.49.

been the interpretation of the word 'reasonable'; and this difficulty has been especially relevant to the duties of teachers.

Halsbury,[1] writing on the standard and degree of care ordinarily required, emphasises that there is an increase in the degree of care in relation to children. His section on this topic concludes with the single sentence, "The standard of care to be observed by a schoolmaster towards pupils in his care is that of a reasonable father." Many judgements of the courts have quoted Lord Esher in Williams v. Eady (U.K.)(1893),[2] who said:

> ... as to the law on the subject there can be no doubt; and it was correctly laid down ... that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way.

Just as the courts have recognised that coupled with the statutory duty imposed on educators is the legal authority to implement the duty, so likewise they have ruled that coupled with the common law duty to take care of students as would a careful and reasonable father, is

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[1] Halsbury's Laws of England, ed. Viscount Hailsham, Vol. 23, Section 836 (2d ed.; London: Butterworth & Co. (Publishers) Ltd., 1934).

[2] 10 T.L.R. 42.

the authority needed to so act. This authority is found in the concept of the teacher being in loco parentis - in place of the parent. As early as 1865, Chief Justice Cockburn could state:[1]

> Now, as to this, I have to tell you, that the authority of the schoolmaster is, while it exists, the same as that of the parent. A parent, when he places his child with a schoolmaster, delegates to him all his own authority as far as is necessary for the welfare of the child.

The teacher, accordingly, during the execution of his pedagogical duties, acts 'in place of the parent' and has the authority of the parent.* This authority permits the teacher to prohibit or to order the student to undertake activities which, as a reasonable parent, concerned with the safety of children, he would prohibit or order his own children to undertake. And, if the teacher fails

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* Courts in Britain and Canada recognise the principle of in loco parentis and the authority that it confers on schoolteachers. It is of interest that the United States Supreme Court in the last decade has moved towards a recognition of students as 'persons' with all the rights accruing to citizens. The Tinker Case exemplifies this position:[2]

> A school forbade the wearing of black armbands on school premises to protest Vietnam hostilities. Students sued the school authorities for damages and an injunction to stop the ruling. The Supreme Court held that, as there was no evidence to suggest that the students' actions were liable to create a disturbance or

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[1] Fitzgerald v. Northcote (U.K.)(1865) 4 F. & F. 656.

[2] Tinker v. Des Moines Independent Community School District (U.S.)(1969) 89 S.Ct. 733.

to exercise this authority, so that injury is suffered by a student, he will be liable for a breach of the common law duty of care. Provided his actions are reasonable and not malicious, the teacher is similarly allowed to discipline students, as he would so discipline his own children.

Although the common law duty of care is that of a 'reasonable' man, and the duty of care owed by a teacher has to be that of a 'reasonable and prudent' father, there

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> disorder or disruption in the school, the school regulation was an unconstitutional denial of the students' right of expression of opinion.

The Court's decision was by a majority only, those in the minority maintaining that the courts should not interfere with the authority of the schools. This seems to be the opinion of the British and Canadian courts, an opinion expressed by Mr. Justice Black, one of the minority judges in The Tinker Case. In a long dissenting judgement, he said:

> The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected officials of state supported public schools in the United States is in ultimate effect transferred to the Supreme Court ... I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.

The Tinker Case (1969) has been referred to to illustrate that the authority derived from the principle in loco parentis is not universally sacrosanct, and to warn that, with the growing pressures of student militantism and the demands for students' rights in general, such a ruling as that brought down by the United States Supreme Court might in time be applied in our courts. On the other hand, the foreseeable consequences of such rulings could cause our courts to re-affirm the principle in loco parentis with deliberate determination.

has to be some measure for determining the standard of care that a reasonable man would exercise.

For many years negligence formed a part of the general area of torts, being an offshoot of the old action of 'trespass against the person'. As Salmond points out, however, negligence became recognised as a tort in itself in 1932:[1]

> But the decision of the House of Lords in Donoghue v. Stevenson "treats negligence, where there is a duty to take care, as a specific tort in itself."

It was in his judgement in Donoghue v. Stevenson that Lord Atkin formulated the principle which has come to be generally known as "the neighbour principle". He said:[2]

> ... And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist ... There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. ... The liability for negligence ... is no doubt based upon a general public sentiment or moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you love your neighbour becomes in law, you

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[1] Salmond, op.cit., p.268. The quotation cited by Salmond is from Grant v. Australian Knitting Mills (U.K.)(1936) A.C. 85, at p.103, per Lord Wright,M.R.

[2] (U.K.)(1932) A.C. 562, at p.579.

> must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Foresight now became a criterion of liability and it governed acts or omissions which a reasonable man knew or ought to have known could cause injury or harm. Educators, accordingly, must take reasonable care to avoid acts or omissions which they, bearing in mind their position in loco parentis, could or ought to reasonably foresee would be likely to injure their students. The student is neighbour to the teacher, and the teacher must consider how his acts or omissions might affect the student.

Before proceeding further, it is necessary to consolidate the legal principles so far resolved. This will be done by putting some of the questions that courts ask in determining liability and illustrating them with cases.

(a) "Would a reasonable father have acted this way?"

Gard v. Duncan Board of School Trustees (B.C.)(1946):[1]

> While playing field hockey unsupervised, but with the teacher's permission, an eleven-year

[1] 1 W.W.R. 305.

old boy lost the sight of one eye when he was unintentionally hit with a hockey stick by another boy. It was shown that the players had received practically no instruction in the game. The trial judge found the teacher negligent. On appeal, however, the British Columbia Supreme Court reversed the ruling. Robertson, J. said:

> It has been laid down that it is the duty of a school board to take such care as a reasonably careful parent would take of his boy, and the duty of their teacher is to take reasonable care to protect children under her charge from danger. No doubt the extent of the supervision depends upon the age of the pupils and what they are doing at the material time. ... it is not the law, and never has been the law, that a schoolmaster must keep boys under supervision during every minute of their school lives. The duty should not be determined from the happening of the extraordinary accident in this case, but from the danger that was reasonably foreseeable before the game ... It seems to me that a 'careful father' would not hesitate to allow his boy of eleven years of age to engage in a game of grass hockey without supervision.

Although it could be argued that accidents in games of field hockey ought to be foreseeable, especially as injuries in this sport are not uncommon, the court adopted the view that a reasonable father would allow his son to partake in the game unsupervised. To deny this premise would be to suggest that every game played by children should be supervised, and that, every time a group of students asked to borrow a football or a baseball bat

or any other item of sports equipment, a teacher should accompany them as supervisor. This would have a stifling effect on the natural exuberance of children and on their natural development as individuals. As children grow up and play games they do suffer injuries as the courts have recognised. Sellers, L.J. summed up the position when he said in the British Court of Appeal:

> The judge applied the right standard when he said that it would be a disservice to the community if schools were required to exercise permanent or continuous supervision of normal games played by schoolboys.[1]

Hudson v. Governors of Rotherham Grammar School (U.K.)(1938):[2]

A ten-year old boy was injured when he slipped under a grass roller that he was pushing with two others. The teacher in charge had been absent for about four minutes. The school authorities were found not liable. Hilbery, J. said in his summing up:

> If boys were kept in cotton wool some of them would choke themselves with it. They would manage to have accidents. We always did, members of the jury - we did not always have actions at law afterwards. You have to consider whether or not you would expect a headmaster to exercise such a degree of care that boys could never get into mischief. Has any reasonable parent yet succeeded in exercising such care as to prevent a boy getting into mischief, and, if he did, what sort of boys should we produce?

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[1] Price v. Caernarvonshire County Council (U.K.)(1960) The Times, February 11.

[2] Yorkshire Post, March 24 and 25,1938, West Riding Assizes.

There is a difference between allowing students to partake of activities that are inherent to the nature of children and permitting involvement in activities that are fraught with danger. Any reasonable parent would allow his offspring to join his or her friends in a team game; most reasonable parents would allow their ten-year old children to push grass rollers. But, a reasonably prudent parent would not allow his child, who was a non-swimmer or only an average swimmer, to swim in an area that had foreseeable risks, unless a competent adult, who was able to swim, was in attendance. These were the events in Moddejonge v. Huron County Board of Education (Ont.) (1972):[1]

> An Ontario court found the school board and its teacher liable for the negligent deaths by drowning of two students. The teacher, who allowed them to swim in an area that he knew was potentially dangerous, was unable to swim himself. The court ruled that a prudent father, in similar circumstances, would not have allowed the swimming outing.

(b) "Could the educator have reasonably foreseen the danger?"

> Jeffery v. London County Council (U.K.)(1954):[2]
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> When school closed at the end of the day, children under five years of age were supervised until they were collected by their

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[1] 2 O.R. 437.

[2] 52 L.G.R. 521.

parents. Children over five years of age were allowed to disperse into the playground to await their parents. These children knew the procedure and if they were not collected within a minute or two they re-entered the school and reported to a teacher. On the day in question, a five-year old boy, whose mother was a little late, climbed nine feet on to the glass roof of a lavatory, supposedly to retrieve a toy motor car that had been thrown there. He fell through the glass roof and died. His father sued the school authorities alleging that the school ought to have had some person on supervisory duty until all the children left the premises. In finding for the school authorities Mr. Justice McNair said:

> The question whether the school authorities were at fault in this case can be decided by asking whether, on the facts here, there should have been any reasonable anticipation, if these children were allowed to disperse on their own without supervision, that they would meet this or some similar hurt if they were not supervised. It being conceded that it is not, and never has been the law that every minute of time the children have to be under the actual eye of a master or mistress, it seems to me that school authorities, when they are considering the care of children, must strike some balance between the meticulous supervision of children every moment of the time when they are under their care, and the very desirable object of encouraging the sturdy independence of children as they grow up; and I think sturdy independence and the ability to get on without detailed supervision must start at quite an early age.

No-one would expect a five year old child to climb a nine foot drainpipe while awaiting his mother, and, although young children have a great propensity for adventure and an apparent disregard for danger, such an accident obviously was unforeseeable. In the following case, however, it was argued that a reasonable person ought to foresee that accidents can occur when young students play on swings.

Brost v. Tilley School District (Alta.)(1955):[1]

> A six-year old student was injured while being pushed on a swing. The Alberta Supreme Court found the school board and the principal liable. The accident was foreseeable, the degree of care demanded of them was to safeguard the small children, and, as it was their duty to provide supervision, they should have instructed the teachers to supervise the use of the swings and to direct the pupils with regard to their use.

(c) "Would greater care have prevented the injury?"

The Brost v. Tilley Case above is a good example of where greater care could have prevented the accident. The courts, however, have consistently recognised that accidents do happen at school and that many of them happen on the spur of the moment and could not be prevented even by optimum care. So in Gard v. Duncan Board of

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[1] 15 W.W.R. 241; 3 D.L.R. 159. This case is also cited as Brost v. Board of Trustees of Eastern Irrigation School Division No. 44 et al.

School Trustees (B.C.)(1946)[1] the boy would probably have still been hit by the hockey stick even if twenty teachers had been supervising. In Price v. Caernarvonshire County Council (U.K.)(1960)[2] the Court of Appeal ruled that even the best of supervision would not have prevented a bat flying accidentally out of a boy's hand and hitting another in the eye.

In Newton v. Mayor and Corporation of West Ham (U.K.) (1963)[3] the Court of Queen's Bench ruled that the education authority was not liable for an injury suffered by a pupil in the course of rough play in the playground merely because there was insufficient supervision to watch all parts of the playground all the time.

This principle that 'children are children' is further illustrated by the Nova Scotian case of Adams v. Board of School Commissioners for Halifax (N.S.)(1951):[4]

> An eight-year old student was injured by a stone thrown by another boy at recess. The officially designated supervisor was occupied with another group of students. It was held that no amount of supervision or warning could prevent stone throwing, and, even if the supervisor had been present, the accident would probably still have happened. The learned judge concluded, "There was no duty of continuous supervision over the pupils in the school yard."

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1 Supra, pp.60-61.

2 Supra, p.62.

3 The Guardian, July 11, 1963.

4 2 D.L.R. 816.

The following tragic case demonstrates that the severity of the injury will not influence the court.

Clarke v. Monmouthshire County Council (U.K.)(1954):[1]

> During a sudden scuffle in the playground at recess, a boy drew a sheath knife which accidently struck a vulnerable part of the plaintiff's leg, which later had to be amputated. A teacher was on duty and had passed through the playground twice during the recess. The trial judge found for the plaintiff. The Court of Appeal overruled his judgement and found that there was no negligence. It was shown that knives were not allowed at the school and that there was no evidence to suggest that the teachers knew of the presence of the sheath knife. Denning, L.J. said:
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> > Only reasonable supervision is required ... The accident happened in a flash. There was just a scuffle between two boys trying to get a knife from a third boy. It was the sort of scuffle which would pass unnoticed in a playground in the ordinary way. The incident would take place in the fraction of a second which the presence of prefects, or indeed of a master, would not have done anything to prevent at all.

In this case, the plaintiff contended that the teachers ought to have known about the knife and to have guarded against its use. This is a most impractical argument. Students carry a variety of articles in their pockets or handbags, including knives, nail files,

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1 52 L.G.R. 246.

scissors, matches and elastic bands. All such articles are potentially dangerous. Teachers do know that students carry such articles, but to suggest that they should know what each individual student carries would necessitate searching each student at the beginning of each school session, a practice too demeaning to entertain seriously.

(d) "Did the educator take reasonable precautions to avoid the danger?" "Was the care exercised reasonable, bearing in mind the age, the number and the maturity of the students?"

Reffell v. Surrey County Council (U.K.)(1964):[1]

A twelve-year old girl injured her hand when it went through the glass of a swing door. The defendants were held liable as (i) they had an absolute duty imposed upon them by statute under The Education Act 1944, s.1 and the Standards for School Premises Regulations 1959 to see that 'the safety of occupants shall be reasonably assured', and (ii) they were in breach of the common law duty of care. Veale, J. of the Queen's Bench said:

> Were the premises ... with this one-eighth inch glass in the cloak-room door, at a height of four feet, reasonably safe? I have no hesitation in saying they were not. This one-eighth inch glass in a cloak-room door was, in my view, asking for trouble ... Not only, in my judgement, was the risk of accident a real risk, but it was both a foreseeable risk and one which was in fact foreseen. If it had not been foreseen there would not have been the policy of replacing broken one-eighth glass with toughened glass.

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[1] 1 All E.R. 743.

In this case the school authorities knew of the danger and took no precautions to avoid it. To warn the students of the thin glass and to caution them to take care would obviously not be sufficient supervision since the students would constantly be using the cloak-room door. The only way the authorities could fulfil both their statutory and their common law duty would be to replace all the thin glass with which the students could come in contact. Practical action, therefore, was demanded of the school authorities.

The courts have recognised that there are circumstances when little more can be done than to warn the students of the danger. The following case, before the Manitoba Court of Appeal, illustrates this principle.

Schade v. Winnipeg School District No.1 (Man.)(1959):[1]

A fourteen-year old boy was injured while playing in the unauthorised area of the schoolyard where building construction was going on. The students had been repeatedly warned by the school authorities to keep away from the area. At the noon recess, while chasing a fly ball, the plaintiff tripped over a stake and was injured. The Manitoba Court of Appeal held that neither the school authorities nor the contractor were liable. Neither by common law nor by statutory regulations was a supervisory duty imposed upon the school authorities. The injury was due to the boy's

[1] 28 W.W.R. 577; 19 D.L.R.(2d) 299.

own negligence. Schultz, J.A. said in his judgement:

> While it must be recognized there is a duty on teachers to supervise certain school activities, a duty that of necessity bears some relation to the age of the pupils, the special circumstances of each case and, in particular, the type of activity engaged in, nevertheless it must also be recognized that one of the most important aims of education is to develop a sense of responsibility on the part of pupils, personal responsibility for their individual actions, and a realization of the personal consequences of such actions.

The school authorities, in this case, could foresee the dangers associated with the construction site, but they had done all that could be reasonably expected of them. The situation is analagous to the mother who consistently warns her young child not to touch the electric range. Apart from locking the child out of the kitchen or never herself leaving the range, there is no further practical action she can take.

It will be noted that various judgements, already cited, encourage the independence of children. The courts recognise that as students get older they need less supervision. Two cases, one from Saskatchewan and one from Ontario, will be cited to illustrate this point.

Scrimageour v. Board of Management of Canadian District of American Lutheran Church (Sask.)(1947):[1]

An eighteen-year old boarding school pupil was

[1] 1 D.L.R. 677; 1 W.W.R. 120.

> injured by a faulty light fixture while climbing down from his bunk. It was held that the facilities were safe in themselves and not an unreasonable hazard. Also " ... the duty of supervision diminishes as the child grows older and in this case the student was a young man nearly eighteen years of age."

Butterworth et al. v. Collegiate Institute Board of Ottawa (Ont.)(1940):[1]

> A fourteen-year old boy injured his elbow in the gymnasium. The teacher had left the class under the care of two senior boys. In dismissing the action, the court held that the senior boys were capable of supervising the activity. It was also held that the plaintiff was sciens et volens[2] - knowing and willing - and that fourteen-year olds must exercise reasonable and intelligent care for their own safety.

Now that these four questions have been examined, the common law duty of care can be summarised as follows:

> Educational personnel, bearing in mind the characteristics of the students concerned and the peculiarities of the particular circumstances, must exercise the care that a reasonable and prudent parent would exercise to protect his children from dangers known and reasonably foreseeable.

At the beginning of this section it was stated that "the problem to be resolved has been the interpretation of

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[1] 3 D.L.R. 446.

[2] For a more detailed examination of this maxim see page 177.

the word 'reasonable'."[1] A careful examination of the cases already reviewed will show that there is no common denominator by which to measure reasonableness. What might be reasonable to one person, will be unreasonable to another. Whether the actions of defendants are reasonable or not must be decided by the facts of each case. Indeed, Mr. Justice Ritchie of The Supreme Court of Canada has stated:

> The duty of supervision which a school authority owes to its pupils while they are at play must of necessity vary from school to school and even from day to day, and it is, therefore, not possible to elicit from the decided cases any guiding principle for the exact measurement of the degree of care to which any particular set of circumstances may give rise.[2]

For many centuries there was a separate branch of the law known as equity, whose function was to remedy injustices or imperfections in the common law. This was only possible because the principles of law were unwritten. Today equity and the common law work hand in hand under the guiding principle that justice must be fair and equitable. It might be said that the British legal system and systems that are derived from it are more concerned with justice than with exactness. For this reason, the attitude of the courts towards what is 'reasonable' can change with changing climates and conditions. A much-cited

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[1] Supra, pp.55-56.

[2] Higgs and Higgs v. J.C.Hunt and Toronto Board of Education (Ont.)(1960) S.C.R. 174.

passage from the judgement of Lord Macmillan in Donoghue v. Stevenson reads:[1]

> The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgement must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.

Just as the courts recognise that social conditions change, so they recognise that the standard of care needed to meet these changing conditions might need to be adapted. Our educational institutions have undergone change over the last fifty years. Schools have become larger, catering, in some instances, to thousands of students in a single building; the curriculum has changed, with some programmes involving the use of potentially dangerous materials and equipment; more students are transported by buses than ever before; teachers have become more specialised; and, a significant point, in the writer's opinion, the concept of discipline is undergoing fundamental changes. These changes have created more complex organisations in which the chance of serious injury has become increasingly more threatening.

The courts have been well aware of the changes in the schools and, since the early sixties, they have demanded a higher duty of care than that expounded in

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[1] Supra, p.59.

Donoghue v. Stevenson (U.K.)(1932).[1] It has been illustrated that the standard of care so expounded was to protect one's neighbour from 'known and foreseeable accidents', to warn of dangers that were 'known or ought to have been known'. This is the duty of care owed to the class of persons known legally as 'invitees'. A simple explanation of 'invitee' is that he is one who receives permission from the occupier to enter premises as a matter of business and not as a matter of grace. He enters, therefore, for the mutual advantage of the occupier and himself.[2] Formerly students were classed as invitees because they entered schools for the business of education and for their own and their teachers' advantage.

But most students are not merely permitted, or invited, to come to school; they are required to do so. The courts, both in Britain and Canada, have begun to think of students as belonging to that class of persons sometimes known as 'obligatees' or 'compulsees'. The standard of care owed to such a class of persons is similar to that owed to 'contractees', - a standard of care higher than that stated in Donoghue v. Stevenson. The duty of care owed to contractees was well stated in 1870 in Francis v. Cockrell (U.K.):[3]

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1 Supra, pp.59-60.

2 Professor M. Chloros, Lecturer in "The Law of Torts", University College of Wales, Aberystwyth, 1958-59.

3 5 Q.B. 501.

> When one man engages for pecuniary benefit to provide another with a particular article adapted to a particular purpose, he enters into an implied contract that the article or thing will be reasonably fit for the purpose to which it is to be applied. This is a leading principle of the law applicable at all times with the exception of undiscoverable defects.

This higher standard of care can be illustrated by the example of an hotel guest. When a person registers into an hotel he expects not to be injured. There is an implied contract between him and the hotel owner that he will not be injured, and, if he is hurt, the hotel management will be liable regardless of whether it knew or ought to have known that the injury might take place. The duty of the management is to see that the premises are as safe as reasonable care and skill can make them, and the only defence would be that the accident was caused by an undiscoverable defect - that is, a defect that reasonable care and skill could not have discovered.

There is a subtle difference between behaving as a reasonable man and making things 'as safe as reasonable care and skill can make them'. This is the standard of care that the courts seem to be demanding of educators. To claim that the education authorities have behaved as reasonable parents might no longer suffice. The authorities will have to show that everything in the school was as safe as could be expected. At the risk of repetition, one more example will be given to illustrate the difference

between the standards of care.

If a boy sat on a chair and it collapsed injuring him, the school authorities, when the courts classified students as invitees, might escape liability if they could show that the chair had very recently been checked by the school carpenter. The injury, in this instance, would not be foreseeable and they had taken precautions. The higher duty of care, however, would make them liable, as the student had the right to expect the chair to be reasonably safe to sit on. If the injury was caused by three boys sitting on the chair simultaneously, the authorities would not be liable as reasonable care would not make a chair strong enough for such a weight.

> Lamarche et al. v. Board of Trustees of the Roman Catholic Separate Schools for the Village of L'Orignal (Ont.)(1956):[1]
>
> While an eleven-year old boy was using a swing, other students upset it. The boy became partially paralysed and mentally impaired as a result of the accident. A supervisor was present. It was shown that the swing had been upset previously. The defendants argued that the students were being properly supervised and that they had exercised their duty as 'a reasonable parent'.
> The Ontario court held that the student, being required to attend school, was not an invitee, and if injured by neglect of a statutory duty

[1] 33 O.W.N. 686.

which required 'assiduous attention' to the care of all apparatus, was entitled to recover from those on whom the statute placed the responsibility. The judge said:

> The duty of the board of trustees is to see that the premises provided for the accommodation of the school-children are as safe as reasonable care and skill can make them. School-children should not be exposed to unnecessary danger in the school, or while playing in the school yard.

The Board of Trustees were found liable for damages in excess of $30,000.

In Lyes v. Middlesex County Council (U.K.)(1962), Mr. Justice Edmund Davies of the Queen's Bench stated:[1]

> (Counsel for the plaintiff) ... at one time said that the duty of the defendants to the plaintiff was that of invitor to invitee, and accordingly that they had to warn him of any unusual danger of which they knew or ought to have known. The duty, in my judgement, is higher than that.

In Jacques v. Oxfordshire County Council and another (U.K.)(1968), a case involving an injury on a school bus, Mr. Justice Waller said:[2]

> What is the duty of the local authority in these circumstances? They owe a duty to see that the bus is reasonably safe and that includes a duty to see that it is reasonably safe for the children who are going on the bus including the provision of supervision if it is necessary.

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[1] 61 L.G.R. 443.

[2] 66 L.G.R. 440. (Oxford Assizes).

The principle that a schoolmaster is under a duty to exercise the same standard of care over children as would be exercised by a good parent with a large family,[1] has also been found to be inadequate in today's larger schools. When a fifteen-year old boy lost the use of an eye after being hit by a piece of elastic at recess, Mr. Justice Geoffrey Lane said in Beaumont v. Surrey County Council (U.K.)(1968):[2]

> It is unrealistic, if not unhelpful to say a standard of care owed by the headmaster of a school of nine hundred pupils is that of the reasonably careful and prudent father towards his own children.

The elastic which caused the injury was off a trampoline. The physical education teacher, who had been repairing the trampoline, left the elastic, rolled in a ball, at the bottom of a garbage can. The next day some boys found the elastic and, while playing with it, hit the plaintiff in the eye.

Under the duty of care owed to an invitee, it could be argued that, as the teacher had deposited the elastic in the garbage can, expecting it to be removed at the end of the day, he had behaved as a reasonable person should. This is indeed what a careful father would probably have done.

> The court ruled, in view of the higher duty of care, that the student should not have

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[1] Jeffery v. London County Council (U.K.)(1954), supra, p.63, per McNair, J.

[2] 66 L.G.R. 580. (Q.B.D.)

been exposed to such a danger and that the authorities were liable. The possibility of the elastic being found and used dangerously could have been foreseen.

The defendants also claimed that as there were two teachers, four prefects, four subprefects and four monitors on duty, the supervision for the nine hundred pupils was adequate. The court ruled that there was an insufficient number of teachers on duty to measure up to the high standard of care demanded of the school. Mr. Justice Geoffrey Lane said:

> ... it is a headmaster's duty, bearing in mind the known propensities of boys and indeed girls between the ages of eleven and seventeen or eighteen, to take all reasonable and proper steps to prevent any of the pupils under his care from suffering injury from inanimate objects, from the actions of their fellow pupils, or from a combination of the two. That is a high standard.

Obviously two teachers for nine hundred students do not constitute 'reasonable and proper steps'.

The higher standard of care seems to place on educators the onus of guarding against dangers that would appear unforeseeable to the reasonable man in ordinary circumstances. The ordinary standard of care suggests that, if the educator really thought about the matter, he would foresee the danger. Salmond, writing on this duty, said:

> The wrongdoer may not desire or intend the consequences but may yet be perfectly conscious of the risk of it. He does not intentionally cause the harm, but he

> intentionally and consciously exposes others to the risk of it. This has been described (by Eve, J.[1]) as "an attitude of mental indifference to obvious risks".[2]

Educators are probably willing to accept liability for such 'mental indifference', and can admit that they might have prevented the injury with more care and foresight. It is hard, however, to accept liability for accidents which might not even be foreseeable, at least by a reasonable man. Surely, a teacher is entitled to expect a garbage can to be emptied at night? If not, is a science teacher never to deposit chemicals in a garbage container? Is a shop instructor never to throw away a broken hack-saw blade? Is a handicraft teacher never to throw away a broken scissors? Are teachers never to place broken glass in garbage containers? Should every piece of furniture and equipment be checked daily? Must all teachers supervise the playground at recess? What is a 'reasonable' ratio of teachers to students? And, what about the 'encouragement of the sturdy independence of students' advocated in earlier cases?

There obviously is no complete and perfect answer, except to warn that educational personnel, from the school board chairman to the classroom teacher, should question all their actions as to their possible consequences. Not all court decisions in the last decade have demanded the

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[1] Hudson v. Viney (U.K.)(1921) 1 Ch. 98, at p.104.
[2] Salmond, op.cit., p.267.

higher duty of care. In Newfoundland and many parts of Canada there are still small village schools where the duty expected of the teacher might be no more than that of a prudent father. Educational personnel are urged, however, to be extremely cautious, to recognise and to plan for changing conditions, and to realise that the law is not finite and that events around them can often cause different interpretations of the law. It was Plato who said, "Human beings do not ever make laws; it is the accidents and catastrophes of all kinds happening in every conceivable way, that make laws for us."[1]

IV. LOSS AND CAUSALITY

Although a legal duty might have been breached, a charge of negligence will fail unless actual loss or damage has been suffered, and that loss or damage is a direct result of the breach.[2]

1. Loss or Damage

All the cases cited in this chapter involve some form of physical injury. These injuries have obviously caused pain and suffering to the plaintiffs. Financial expenses, medical and/or legal, have also been incurred. If the injured person had been employed, a loss of salary might have resulted. All these physical and financial

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[1] Laws IV, 709.

[2] Prosser, supra, p.50.

inconveniences fall within the category of loss or damage. Accordingly, if pain, suffering, injury, financial expenses or loss of earnings can be shown, this component of the tort of negligence will be satisfied.

A breach of a legal duty without the accompanying loss cannot lead to an action in negligence even to prevent an injury that might occur. A parent, who knows that a school board has a legal duty to provide fire escapes, cannot sue the school board in negligence in case her offspring is injured. Neither can a parent sue a principal or a teacher for negligently allowing pupils to swim unsupervised, unless an injury has been suffered. For a successful action in negligence, the parents would first have to wait for an accident to befall their children.[1]

The reasoning for this component in the tort of negligence is found in the definition of tort given by Salmond:

> We may define a tort as a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.[2]

The remedy for negligence, therefore, is unliquidated damages. Unliquidated damages are financial awards that

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[1] In the examples given in this paragraph, there would fortunately be other legal avenues open to the parents.

[2] Salmond, op.cit., p.15.

are not pre-determined. They are awarded by the courts to "put back (the plaintiff) into the position both in terms of finance and health that he would have been had he not been so injured."[1] The amount of the award will vary according to the degree of the suffering. If there is no loss, no award can be made, and an action for negligence will fail.

2. Causality

If an injury is suffered, it must be shown that there was a reasonably close causal connection between it and the breach of the legal duty. The breach, therefore, must be the causa causans - the immediate, the effective or the proximate cause of the occurrence.

> Sweet v. Drummondville School Trustees (Que.)(1947):[2]
>
> The Quebec Supreme Court found the school trustees liable when a pupil fell from some steps which were not guarded by bannisters. The trustees had the duty of ensuring that the school premises were safe. The accident would not have happened if the breach of duty had not occurred.

If it is claimed that a teacher has been negligent in performing his duties, the plaintiff must show that, if he had been doing his duty, the accident would have been prevented. In Gard v. Duncan Board of School Trustees (B.C.),[3]

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1 Thornton v. Board of School Trustees of School District #57 (St.George) and David Edamura (B.C.)(1975), per Andrews, J., supra, p.5.

2 Que S.C. 444.

3 (1946), supra, pp.60-61.

although the teacher might have been negligent in allowing the boys to play hockey unsupervised, negligence was not proven as his presence would not have prevented the injury.

The onus of proving that the injury was a result of the breach of the legal duty falls on the plaintiff. Occasionally, the plea res ipsa loquitur - the thing speaks for itself - can be employed. This is used when the negligence is so obvious there is no need to prove it. It is a procedural device which saves the plaintiff the onus of proving the negligence, and can save the time of the court. The defendant, however, might deny that the negligence is indisputable. The burden of proof then shifts to him, and if the plea res ipsa loquitur fails, the burden of proof shifts back to the plaintiff.

> Scott v. London and St. Katherine Docks (U.K.)(1865):[1]
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> The injured party was a customs officer. It was held that the only way in which a bag of sugar could have fallen on his head was from a crane. It was, therefore, obviously the crane driver's fault.

The breach must be a direct cause of the negligence and not merely one in a chain of causes. An action for negligence will fail if the breach of duty is causa sine qua non - something without which the accident would not have happened, but not its immediate or effective cause.

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[1] 3 H & C 596.

If a student were to cut his finger on a protruding nail in a classroom wall and, while being taken to hospital for a tetanus injection, he was further injured in an accident, the school authorities would not be liable for the injuries sustained in the road accident. Although it could be argued that he would not have been involved in the road accident if it had not been for the injury suffered in the school, the school authorities could not have reasonably foreseen the road accident. The road accident was not a direct result of their negligence.

Emergencies seem to constitute an exception to the causa sine qua non rule. Lord Wright said in 1943, "To break the chain of causation there must be something outside the exigencies of emergency."[1]

> Moddejonge v. Huron County Board of Education (Ont.)(1972):[2]
>
> Two girls drowned while being negligently allowed to swim in a dangerous area. The first girl G was a non-swimmer. The second girl M drowned while trying to rescue her. It was argued by the defendants that the second girl's death was not the teacher's fault. The Ontario court held that when a person, by his negligence, exposes another to danger, it is a foreseeable consequence that a third party will attempt to rescue the one in danger and the attempted rescue is part of the

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1 Oropesa (U.K.)(1943) 1 All E.R. 211.

2 Supra, p.63.

chain of causation started by the negligent act. Pennell, J. said:

> The initial act that set the events in motion was the negligence of the defendant. One of the links of causation was that someone might thereby be exposed to danger and that someone else might react to the impulse to rescue.

V. VICARIOUS LIABILITY

It has been stated earlier that a school board can delegate its authority to its employees.[1] The duty that accompanies the authority is also delegated. It might appear a sound argument to state that the delegation of the authority and the duty should free the school board from liability for accident, if the accident were a direct result of the negligent exercise of the authority by an employee. The legal principle in Britain and Canada, however, is that an employer is vicariously liable at law for the negligent acts of his servants, if such are performed in the furtherance of the servants' duties. The rationale for this principle, founded in the legal maxim respondeat superior - let the superior answer - is that no person should be allowed to sign away his responsibility. An employer, therefore, can delegate his authority, but he cannot abrogate it. On more practical grounds, the principle developed for social reasons, since the employer

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[1] Supra, pp.15 and 54.

was usually rich enough to meet the cost of the damages, whereas the servant was not.* Devlin is cited by Salmond as writing:

> ... the real wrongdoer hardly ever pays for the damage he does. He is usually not worth suing. The payer is either his employer or an insurance company.[1]

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* In the United States, school boards have escaped liability for the negligent acts of teachers on the premise that school boards, being governmental institutions, are immune from civil actions. Gauerke has written:

> As reasons to justify the theory (of governmental non-liability in tort) courts have said, (1) that school districts should not be charged with liability since they receive no advantage from operating schools; (2) that school districts have only those powers given them by the legislature and state school offices, not including permission to commit legal errors; (3) that school taxes are trust funds, not to be used to pay claims; (4) that school property is exempt from attachment; and (5) that the personal interest of private citizens must give way to the idea of public good.[2]

The doctrine of governmental immunity prevails with strict application in most states. The financial burden of meeting any court award for damages falls directly on teachers and principals. Criticism of the doctrine has mounted in the last twenty years and some states have followed the example of the Illinois Supreme Court who overturned the doctrine in 1959 as 'resting on a rotten foundation'.[3]

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1 Devlin, Law and Morals (1961), Birmingham, p.18, cited by Salmond, op.cit., p.30.

2 Warren E. Gauerke, School Law (New York: The Center for Applied Research, 1965), pp.83-84.

3 Molitor v. Kaneland Community Unit District #302 (U.S.) (1959) 163 N.E. 89.

Despite the fact that a teacher might not be worth suing, especially if the award of damages is high, the practice seems to be to jointly sue the school board, the principal and the teacher, on the premise that if you do not recover from one, you might recover from the other.

Even if there has been a breach of a legal duty directly resulting in an injury, there are still two pre-requisites necessary before a school board can be held vicariously liable for the negligent acts of its employees. First, it must be shown that the relationship of master and servant existed; secondly, it must be established that the action of the servant was within the scope of his employment.[1]

1. The Master-Servant Relationship

In the nineteenth century the test of whether a person was a servant depended on whether the 'master' could tell him what to do and how to do it. This test still applies today in certain circumstances.

> Baldwin v. Lyons and Erin District High School Board (Ont.)(1961):[2]
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> Three high school students were injured when a school bus was in collision with a train. The school board had no statutory obligation to

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[1] Robert L. Lamb, Legal Liability of School Boards and Teachers for School Accidents (Ottawa: Canadian Teachers' Federation, March 1959), p.47.

[2] 26 D.L.R. 437.

provide transportation, but had done so under its discretionary powers. Lyons was the owner of the buses and had a written contract with the school board. As the bus entered a crossing one student was standing in the door well although there was room for him to sit. This was in breach of the statutory provisions of the Public Vehicle Act. Leitch, the driver, an employee of Lyons, was found guilty of negligence. It was argued that Leitch and Lyons were servants of the school board, therefore, respondeat superior. The school board, however, argued that it was not liable as it had no statutory obligation to provide transportation and Lyons was an independent contractor. The Ontario court found that, as the school board and the principal gave instructions to Lyons and his drivers, in the form of smoking and other regulations, Lyons was not an independent contractor. The school board and Lyons were found liable for $52,282.

With the increase in specialised knowledge, such a test is not always practical. A school board might be able to tell its teachers what to do, but it is doubtful if it could tell them how to do it. Accordingly, the test today, in most cases, is whether the servant is within the organisation of the master. The 'organisation test' is satisfied if the master has the power to select or appoint the servant, if he pays the wages or remuneration of the servant, and if he has the right to suspend or dismiss the servant. Principals and teachers obviously fall within this category.

An exception to this general rule involves the hiring of professional experts who would normally be outside the organisation. In Davis v. London County Council (U.K.)(1914),[1] it was held that the education authority was not liable for the negligence of a medical officer hired under statutory authority to perform operations on children, provided "they engage competent professional persons to perform it." It could, therefore, be presumed that school boards would not be liable for accidents caused by such professionals as electricians, carpenters and plumbers, hired to work in or on school premises. The test, in such circumstances, seems to hinge on the level of the 'professional expertise' of the person hired.

> Woodward v. Mayor of Hastings (U.K.)(1944):[2]
>
> A cleaning lady, who was a sub-contractee, failed to clear frozen snow properly off school steps. No sand or ashes had been placed on the frozen snow and no warning given of the danger. A child was injured. The Court of Appeal held that as the cleaning lady was entrusted with the performance of a duty incumbent upon the governors of the school, the governors were liable for her negligence, although she was not their immediate servant. Du Parcq, L.J. said:

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1 30 T.L.R. 275.

2 2 All E.R. 565; (1945) K.B. 17.

> It is idle to suggest that she was not authorised to brush snow from the steps. It was clearly part of her duty to do so, and no one in her position would have been likely to omit the task. Negligence having been established against her, it follows that the defendants are responsible for their agent's failure to take reasonable care for the safety of their invitee. It does not avail them to say that they did not know of the danger. ... The craft of the charwoman may have its mysteries but there is no esoteric quality in the nature of the work which the clearing of the snow-covered step demanded.

The principle enunciated in this case suggests that school boards will not escape liability for acts or omissions of janitors. Many school boards hire janitors themselves; some school boards subcontract the janitorial duties to professional firms. In either instance, the precedent established in Woodward v. Mayor of Hastings would make the school boards liable as 'there is no esoteric quality in the nature of the work'.

Occasionally janitors are paid to do work outside their normal janitorial duties. Such work includes repairs in and around the school. It could be argued that on such occasions the janitors are independent contractors. If, by his negligence, a janitor were to cause an accident in such circumstances, it is probable that the court would decide on the facts whether he was a 'competent professional person'. If he were doing electrical work and could show that he held a Journeyman's or Master's Certificate in electrical repairs, then he might be classed as an expert.

If he were self-taught, however, the school board would probably be liable. The issue is not clear and the alternatives are purely speculative on the writer's part.

A mandatory duty imposed on school boards in Newfoundland, under section 12(d) of The Schools Act (R.S.N.) 1970, reads:

> ... (shall) provide safe drinking water, adequate sanitary facilities and proper lighting, heat, ventilation and cleaning for the schools under its control.

Students have suffered illnesses as a result of unclean and unhygienic drinking water. It would be interesting to discover whom the courts would hold liable if an injured student sued in negligence. Would the school board escape liability because those who installed the water pipes were expert plumbers? Would it escape liability since the water supply is under the jurisdiction of a local authority? Or, would the school board be liable as the duty, being mandatory, is absolute?

A discretionary power of school boards in Newfoundland, under section 13(d) of The Schools Act (R.S.N.) 1970, reads:

> ... (may) arrange with the Department of Health for the appointment of a qualified nurse to work in any school or schools under its control in its district.

If a school board exercised this discretionary power, and if a student suffered injury due to the negligence of the nurse, would the school board escape liability on the

grounds that she was an 'expert'? Would the Department of Health be liable? Or, would the courts rule that the nurse had joined the 'organisation' of the school board and therefore hold the school board vicariously liable?

2. The Servant Acting Within The Scope Of His Employment

An employer is vicariously liable for the negligent acts of his servants if those acts are performed within the scope of the servants' employment. As a general rule, it can be said that acts which employees would normally do to fulfil their roles will fall within the scope of their employment. In determining whether a master-servant relationship exists, the courts appear more interested in the acts of the servant rather than the consequences. As an example, a student would not normally be expected to injure himself when using chemicals, but it would be quite natural for a science teacher to use chemicals in the execution of his role. A school board, therefore, could not escape liability on the grounds that the way the teacher had allowed the student to handle the chemicals was outside the scope of his employment.

Hall v. Thompson et al. (Ont.)(1952):[1]

A boy was injured in a wrestling contest which was part of the physical education training activities in the school. The Ontario Court of Appeal held that a master-

[1] 4 D.L.R. 139.

> servant relationship existed. The lesson was within the scope of the employment of the teacher. He was only doing his job. As he was supervising the class correctly, he was not negligent and therefore the school board was not liable either. It was argued by the plaintiff that wrestling was inherently dangerous and therefore not part of the normal physical education activities. Treleaven, J. said:
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> > It may, of course, be true that in all games or contests of skill involving the testing and development of physical strength, accidents will happen, but it does not follow, in my opinion, that they should therefore be classed as inherently dangerous.

In this case, if the teacher had been found negligent, the school board would have been found liable also. Indeed, once the court is satisfied that the teacher was acting within the scope of his employment, if the teacher is found negligent, there is little, if anything, the school board can do to escape liability. Salmond summarises the position as follows:

> Even the express prohibition of the wrongful act is no defence to the master, if that act was merely a mode of doing what the servant was employed to do ... The question is whether it was a wrongful mode of carrying out employment.[1]

Only one case has been found to illustrate 'a wrongful mode of carrying out employment'.

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[1] Salmond, op.cit., p.662.

Beauparlant et al. v. Board of Trustees of Separate School Section No.1 of Appleby et al. (Ont.)(1955):[1]

Teachers arranged an excursion for their students without the knowledge or permission of the school board. Sixty-six students were transported on a truck. The sides of the truck gave way and many students were thrown out and injured. The Ontario court held that the school board was not liable as the actions of the teachers were outside their official duties.
(It is ironic that, in this case, the plaintiffs did not follow the general practice of suing the teachers, principal and school board jointly. They only sued the school board and, therefore, recovered nothing. If they had taken an action against the teachers they would probably have been successful.)

Although this case might suggest that no field trips or excursions should be undertaken without the knowledge and permission of the school board, it is doubtful if principals and teachers are completely denied the right to make judgements. The courts would consider whether the outing fell within the scope of normal employment, that is, would it be educationally beneficial. In the Beauparlant Case the excursion was to attend a birthday concert in another school, the educational value of which is doubtful. On the other hand, a visit to a museum, an art gallery or a local industry would probably be considered a good educational exercise. As in many prior illustrations,

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[1] 4 D.L.R. 558; O.W.N. 286.

each case would be considered on its merit. For the best protection, therefore, school personnel are advised to seek the prior approval of their employers.

If a teacher is judged to have acted within the scope of his employment, it is presupposed that he has the authority to so act. Such authority, vested in the role, might be derived from statute or from the express rules, regulations or by-laws of his school board. The legislation does not cover all the specifics of the teaching role; much has to be left to the professional judgement of the individual teacher. The courts have interpreted the scope of a teacher's authority quite liberally and, unless he has flagrantly or maliciously misused his power, school boards have not escaped vicarious liability.

There are cases where, although the teacher might have overstepped his authority, school boards have been found liable because of their tacit or implicit approval.

> Walton v. Vancouver Board of School Trustees and Thomas (B.C.)(1924):[1]
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> The school board set a date for the annual sports day of all its schools. Principals were authorised to plan the programmes for their own schools. Thomas arranged a shooting contest at his school. Walton lost an eye when a faulty gun exploded in his face. The school board claimed that the shooting contest was outside its powers and that

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[1] 2 D.L.R. 387; 34 B.C.R. 38.

Thomas had acted outside his authority. The British Columbia court held that the school board knew that shooting contests had been held for several years. It was their duty either to stop them or to see that they were properly supervised. The school board was found liable for $2,000; the action against the principal was dismissed.

Gray et al. v. McGonegal and Trustees of Leeds and Lansdowne Front Township School Area (Ont.) (1952):[1]

A boy was severely burnt when lighting a stove to heat soup. He was acting on the orders of his teacher. The teacher and the school board pleaded section 11 of the Public Authorities Protection Act (R.S.O.) 1937, which said that all actions in respect of any alleged neglect must be brought within six months for any act done in pursuance or execution or intended execution of any statutory or other public duty. The school board had no statutory duty to provide hot lunches. It was only fulfilling its public duty and, as more than six months had passed since the accident, the action should be dismissed.

The Supreme Court of Canada, in upholding the decision of the Ontario court, ruled that section 11 did not apply. The school board knew and encouraged the practice of serving hot lunches and had provided money for the purpose. The injuries were, therefore, due to the teacher's act of negligence within the course of her employment, so she and the school board were liable. The act which resulted in the injury

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[1] 2 S.C.R. 274.

was not one in the course of exercising any direct public purpose for the children; it was an authorised act in a private aspect. Damages were assessed at $8,000.

It should not be presupposed that a school board will escape liability merely because the court dismisses an action against its employee who was acting within the scope of his employment. There have been cases where the school board and the principal have been found liable, but the case against the teacher dismissed; there have been cases where the school board and the teacher have been found liable, but the case against the principal dismissed; there have been cases where the school board has been found liable alone. This might appear illogical to the lay reader, but the rationale for such decisions depends on the duty of care imposed upon the various parties.

Brost v. Tilley School District (Alta.)(1955):[1]

A six-year old student was injured when being pushed on a swing. The supervising teacher was not present. The Alberta Supreme Court held that the teacher was not liable. She had not been instructed to supervise the swings nor placed under a responsibility to direct the pupils with regard to their use. The duty to provide the supervision rested on the principal and the school board who were found liable.

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[1] Supra, p.65. For a more detailed examination of this very important case see infra, p.122.

Thornton v. Board of School Trustees of School District #57 (St.George) and David Edamura (B.C.) (1975):[1]

A student was injured in the gymnasium due to the negligent supervision of the teacher. The school board and the teacher were found liable for damages totalling $1,534,058.93. The case against the principal was dismissed. Andrews, J. said:

> There is no suggestion or evidence that leads to any causal connection between the accident in question and any acts or omissions on the part of the principal.

If, in this case, the principal, as agent of the school board, had exercised the correct standard of care in organising the supervisory duties of his staff, it might be asked why the school board was found liable. It was because the teacher was not an employee of the principal; he was an employee of the school board and the injury was a direct result of his conduct while acting within the scope of his employment. The school board, accordingly, was vicariously liable.

McKay and McKay v. Govan School Unit No.29 and Molesky (Sask.)(1967):[2]

The infant plaintiff was injured in a fall off parallel bars. The supervising teacher was present. After a lengthy legal dialogue the action against the teacher was withdrawn. The school board was held liable for $183,900.

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[1] Supra, p.5. For more detail see infra, p.142.

[2] Supra, p.5.

In this case the teacher was protected by legislation. Section 242 of The School Act (R.S.S.) 1966, states:

> Where the board, the principal or the teacher approves or sponsors activities during the school hours or at other times, the teacher responsible for the conduct of the pupils shall not be liable for damage caused by pupils to property or for personal injury suffered by pupils during such activities.

Similar, but not identical, legislation applies in some other Canadian provinces. In British Columbia, school boards and their employees are exempt from liability for injuries sustained, if they were acting under the authority of the Public Schools Act or of any regulation, rule or order made under the Act,[1] or if the injuries were a result of the operation of school patrols.[2] In Prince Edward Island, no civil action may be brought against a teacher for 'improper treatment' of a pupil, unless the complaint has first been lodged with the superintendent and then the school board.[3]

When such legislation as this exists, the teacher is protected. It does not prevent an action being brought against the teacher, but it does mean that the action would probably be dismissed. If an action is brought, the teacher may be confronted by legal expenses. Also, not all provinces have legislation designed to protect school

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[1] R.S.B.C. 1960, section 104(3).

[2] Ibid., section 105.

[3] School Act (P.E.I.) 1971, section 47.

boards and/or their employees from legal suits. Teachers, therefore, may find themselves confronted with considerable expenses in the form of damages and/or legal costs. It is necessary to consider briefly the financial implications to teachers of court actions.

VI. FINANCIAL IMPLICATIONS

In The McKay Case (1967),[1] the action against the teacher was dismissed. In a letter to the Saskatchewan Teachers' Federation a firm of solicitors wrote:

> Since damages as well as costs in the McKay and Molesky case were over $200,000, the legal costs are accordingly tremendously high. In effect we suggest that if the Teachers' Federation was not looking after the interests of the teacher, the costs in itself may well be prohibitive to any teacher to fight such a law suit because even if the teacher is released pursuant to the above mentioned authorities from legal liability, the efforts that his solicitors will have to put into this case are well beyond what the teacher will ever recover in legal costs from his opposing sides, even if he wins.[2]

Without the protection of the Teachers' Federation the teacher, although the case against him was dismissed, could have incurred considerable expense.

In cases of negligence, a teacher might find financial demands being made upon him in the form of (1) legal

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[1] Supra, p.99.

[2] Letter from Francis, Gauley, Dierker and Dahlem, Barristers and Solicitors, February 22, 1965, cited by T.E. Giles, Educational Administration in Canada (Calgary: Detselig Enterprises, 1974), p.77.

costs and expenses, (2) damages, and (3) indemnity.

1. Legal Costs and Expenses

Most disputes do not reach the courts. In such circumstances, the actions are either dropped or settlement is made out of court. On these occasions, the decisions are usually made in lawyers' offices. A teacher involved in such a dispute, will have lawyer's fees to pay.

If a dispute reaches the courts, the teacher can be found liable or not liable. If he is found liable, not only will he have his own costs to pay, but often he will have to bear all or a portion of the plaintiff's costs. If he is found not liable, he may be able to recover all or some of his costs from the plaintiff.

2. Damages

If a settlement is reached out of court or if a court awards damages, the teacher will be liable for the payment adjudged against his negligence. When a school board and a principal and a teacher are sued jointly, the court will proportion the damages severally or jointly among those found liable.

Protection

Rarely do teachers today find themselves personally responsible for costs and/or damages. They are usually protected by insurance policies or by statutory

indemnification.

(a) Insurance protection.

In most provinces, teachers will be represented by teachers' associations. The general practice is for the teachers' association to carry liability insurance on behalf of its members. The terms of such policies vary according to the needs of the individual provinces.

In 1975, The Newfoundland Teachers' Association purchased a million dollar policy to protect its members. This policy is tailor-made to meet local needs. Under its clauses, it will pay all damages and expenses incurred by a teacher up to one million dollars, whether the teacher is liable or not. Coverage also includes all legal expenses incurred out of court.[1]

School boards are also protected by insurance coverage which, in most provinces, is mandatory. Section 12 of The Schools Act (R.S.N.) 1970, reads:

> ... every School Board shall ... (k) insure and keep insured all its buildings and equipment (l) (as amended 1974) effect insurance indemnifying it against liability in respect of any claim for damages or personal injury.

Many schools carry general accident insurance on their pupils. In some instances the schools or the school boards meet the policy payments; in other instances the

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[1] For information regarding the insurance policy held by the N.T.A. I am grateful to Len Stirling, Vice President, Johnsons Insurance Ltd., St. John's, Newfoundland.

pupils contribute themselves.[1]

Some teachers carry their own insurance. This is a wise precaution if they consider the protection offered by their association is inadequate.

(b) Indemnification.

Section 104(5) of The Public Schools Act (R.S.B.C.) 1960, reads:

> The Board of Trustees may, by an affirmative vote of not less than two-thirds of all its members, pay any sum required for the protection, defence, or indemnification of a trustee, an officer or employee of the school district where an action or prosecution is brought against him in connection with the performance of his school district duties ...

In Thornton v. Board of School Trustees of School District #57 (St.George) and David Edamura (B.C.)(1975),[2] the school trustees and the teacher, Edamura, were found liable for $1,534,058.93. The school trustees, despite the fact that its insurance coverage was only for one million dollars, exercised its discretionary power under section 104(5). Edamura, therefore, has to pay nothing.

Such legislation as this is not common. It is indeed most commendable of school boards to indemnify their employees, but as more use is made of liability insurance, the need for such action will be minimum.

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[1] For more information on school board and school insurance coverage, see pp.186,189-190.

[2] Supra, p.5.

3. Indemnity

A third area where a teacher might find financial demands being made upon him is for indemnity. In the context of this section, 'indemnity' means to pay compensation for a wrong - more specifically, to compensate the school board for charges laid against it because of the teacher's negligence.

It has been shown that an employer is vicariously liable for the negligent acts of his servants if such acts are performed within the scope of their employment. Coupled with the principle of vicarious liability, are three duties that the servant owes to the employer. (a) The servant has a duty to exercise reasonable care. (b) The servant has a duty to indemnify the master at common law. (c) Usually, the servant has a statutory duty to provide indemnity or compensation.

(a) Reasonable care.

A leading case is Lister v. Romford Cold Storage Co. (U.K.)(1957):[1]

> A truck driver, through negligent driving, caused injuries to his 'mate', who happened to be his father. His father successfully sued the company. The company then sued the driver, claiming that, as a joint-tortfeasor, it was entitled to contributions from him and damages for a breach of an implied term in

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[1] 2 W.L.R.

> his contract to drive carefully. The House of Lords held that the driver was under an obligation of care when driving and that the company was entitled to recover.

(b) Indemnity at common law.

Salmond has written:

> It seems clear on principle that in all cases of vicarious liability the person held vicariously liable for the tort of another must have a right of indemnity as against that other. Thus a master who has paid for the negligence of his servant can doubtless sue that servant for indemnity.[1]

Accordingly, if a school board is held vicariously liable and it can show that the teacher did not exercise reasonable care in the execution of his duty, it will be entitled to recover contributions from the teacher.

(c) A statutory duty to provide indemnity.

This duty is illustrated by section 3 of The Contributory Negligence Act (R.S.N.) 1970, which reads: (Underlining mine.)

> Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree in which each was at fault, and where two or more persons are found at fault they shall be jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of any contract express or implied, they shall be liable to make contributions to and indemnify each other in the degree in which they are respectively found to have been at fault.

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[1] Salmond, op.cit., p.685.

School boards in Newfoundland, therefore, have the statutory right to seek contributions from negligent employees.

Protection

Fortunately for teachers, insurance policies are often constructed to cover them for indemnity contributions. The policy held by the N.T.A. on behalf of its members would pay the teacher's contribution. In case of dispute between the teacher and the school board over such contribution, the insurance company would also defend the teacher, meet all costs and expenses, and pay any award made against him.

VII. SUMMARY

Before educational personnel can be sued for negligence, it must be shown that they have breached a legal duty and that the injury suffered was a direct result of the breach. They have a legal duty imposed upon them by enacted legislation, which states what their duty is, and by the common law, which determines how they should have carried out their duty, and, in the absence of a statutory duty, imposes its own duty of care. The legal duty confers on educators the authority needed to fulfil the duty. Enacted legislation can convey mandatory or discretionary duties. If mandatory, the duty is absolute; if the discretionary duty is assumed, it becomes as binding as a mandatory duty.

The common law duty of care is to take reasonable precautions to protect students, as would a reasonable and prudent father, from dangers known and foreseeable. The standard of care demanded will vary according to the particular circumstances, including the age, the number and the maturity of the students.

As social conditions change and schools become larger and more complex, the courts tend to demand a higher standard of care, similar to that owed to contractees. School personnel are expected to keep their students as free from injury as reasonable care and skill would warrant. Students have the right to expect not to be injured.

Principals and teachers are employees of their school boards. School boards will be held vicariously liable for the negligent acts of all their employees if such acts are performed within the scope of their normal employment. Provided employees have not flagrantly or maliciously abused their authority, the courts interpret 'the scope of normal employment' quite liberally. School boards have been held liable for acts which would normally be outside the scope of employment, when it has been shown that they have implicitly or explicitly condoned or encouraged them. Employees do not escape liability for their negligent acts merely because school boards are held to be vicariously liable.

Employees have to meet expenses and to pay damages for injuries suffered. They may be liable to pay contributions to their employers for awards made against them. In some provinces, employees may find statutory protection from the financial payments resulting from litigation. Most insurance policies provide the coverage necessary to meet legal costs and expenses, to pay awards made by the courts, and to indemnify school boards.

CHAPTER V

TEACHER LIABILITY - THE SCHOOL SETTING

I. INTRODUCTION

In chapter IV, it was shown that school personnel will be liable for accidents which occur as a result of their negligence. They have a duty of care towards students to ensure that accidents do not take place. The duty they owe can be found in statute and in the common law.

Robert L. Lamb, in his dissertation, concluded that:

> Most actions for negligence arise because:
> (1) School boards are negligent in not providing safe facilities and equipment.
> (2) School boards are negligent in not providing supervision comparable to that provided by a 'careful father' through its agents or servants.[1]

A third area of importance involves transportation.

In this chapter the statutory duties imposed upon educators in these three areas will be examined. The legal principles that have evolved through the common law with regard to these statutory duties will be illustrated by court cases. The defences to a charge of negligence will be explained and illustrated by reference to relevant court

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[1] Lamb, op.cit., p.29.

decisions. Finally, some precautionary measures that school personnel can take to protect themselves from litigation and from the financial consequences of litigation will be reviewed.

II. THE DUTY TO EXERCISE SUPERVISION

There can be little doubt that the supervision of students forms an integral part of the duties of educational personnel. There can also be little doubt that the practical supervision of students can be exercised only by those who are employed in the schools. School boards might have a responsibility for seeing that supervision takes place, but school board members cannot supervise the students personally. The duties of educational personnel in a school district, therefore, vary according to the status of the individuals concerned.

An educator will be liable for any injuries suffered as a result of his failure to fulfil his supervisory duty as a 'reasonable and prudent parent'. Before he can fulfil this duty, however, it must be imposed upon him - that is, he must be put in a position of authority to supervise students. The common law states a duty; the statutes, school boards' by-laws and schools' handbooks state a duty. But, it would appear to be a valid assumption that, if the educator is not put in a position where he has a duty to supervise, then there can be no breach of the duty. No

man can be liable for a breach of something he never had. If the supervision of students forms an integral part of the duties of educational personnel, and if the personnel can only be liable for a breach of a duty that has been imposed upon them, it is necessary to determine how the supervisory duties are defined.

1. The School Board

The duty imposed upon school boards by statute is, of necessity, diffuse. Section 12 of The Schools Act (R.S.N.) 1970, states:

> Every School Board shall ... (t) with respect to every school operated by it, cause sufficient classrooms or other rooms at the school to be made available under proper supervision (i) for the use of students at least fifteen minutes before the commencement of each school session, (ii) for the use of students during lunch hour, where it is necessary for students to take their lunch at the school, and (iii) for the use of students who travel from the school to their homes by bus or other vehicle until the arrival of the bus or vehicle, even though the school session has been concluded.

Although the duty to provide classrooms and the specificity of times when supervision must take place are fairly explicit, the use of the term 'proper supervision' is vague. What is 'proper' must be relative to the peculiar needs of the individual school districts and individual schools within the districts. The statute, therefore, does little more than tell the school boards that they have the

responsibility of seeing that supervision is provided. To assist them to carry out their duty, the statutes give them the opportunity to make by-laws and regulations.

School boards in British Columbia must "delegate those specific and general administrative duties which require delegation to one or more than one employee of the Board,"[1] and may "make by-laws ... relative to ... any matter over which power or authority is ... vested exclusively in the Board."[2] Section 13 of The Schools Act (R.S.N.) 1970, states:

> Every School Board may ... (o) subject to the approval of the Minister, make regulations, rules and by-laws ... (ii) providing for all things necessary for or incidental to the carrying out of its objects and the exercise and performance of its powers and duties.

School boards, therefore, may make by-laws to help them carry out their duties. By exercising this discretionary power, school boards can specify in more detail the duties of those who are more closely involved with the students. But, if school boards fail to exercise this power, then they can only rely on the statutory duties imposed upon principals and teachers to ensure that effective supervision is carried out. Unfortunately, the duties that the statutes impose upon these school

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1 R.S.B.C. section 97(c).

2 Ibid., section 98(a).

personnel are often equally diffuse.

2. The Principal

The principal has the responsibility of organising the supervision of students in his school. The Ontario legislation reads:[1]

> Section 14(2) A principal shall ... (d) subject to the approval of the Board, appoint one or more of the teachers for supervision duty at any time during the period beginning one-half hour before classes begin for the day and ending fifteen minutes after classes end for the day when the school building and the playgrounds are open to the pupils and classes are not in session, and arrange for the supervision of any other school activity authorized by the Board.

Section 80(2) of The Schools Act (R.S.N.) 1970, states:

> Every principal in a school shall ... (r) arrange for the regular supervision of pupils on the premises of his school.

In 'arranging' for the supervision of students, the principal obviously has to appoint teachers to the role. This duty is mandatory and, if a principal fails to fulfil it, he will be liable for any accident that might occur due to his negligence. If he does arrange for the supervision of students and if the supervision is considered adequate in the eyes of the law, the

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[1] School Administration Act (R.S.O.) 1970, Regulation 191.

principal will escape liability. In Thornton v. Board of School Trustees of School District #57 (St.George) and David Edamura (1975)[1] the principal was held not liable. He had delegated supervisory duties and "there was no suggestion nor evidence that led to any causal connection between the accident in question and any acts or omissions on his part."

The principal appoints teachers to classrooms for specific periods of time. Although a teacher is appointed to instruct a particular class for a particular period of time, he is obviously responsible for the supervision of the students in the classroom for the duration of the lesson. The principal, therefore, fulfils part of his legal duty every time he constructs a school timetable.

The principal is also responsible for arranging for the supervision of students outside the classroom. The statutes make school personnel responsible for the safety of students on school premises. They also state the length of time when students must be supervised before school opens and after school closes. In Newfoundland this duty is fifteen minutes before the commencement of each school session and until the last bus or vehicle has arrived at the conclusion of the school session. Principals should not assume that their responsibility ends when the last

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[1] Supra, p.5.

vehicle arrives. They will be responsible 'as reasonable parents' for any students allowed to remain in the school. The duty ends only when all the students are safely off the premises.

School boards, in their by-laws, sometimes indicate longer times when teachers have to report to or leave school. The by-laws of some Newfoundland school boards state that teachers must remain thirty minutes after school has been dismissed.[1] Such regulations assist the principal as they ensure that teachers are on the school premises after the closure of school even if the last vehicle has arrived. Supervisory duties can be allocated during this time. Unless the school has its own regulations to detain teachers after the time detailed by statute or by the local school board by-laws, the principal should ensure that all pupils have vacated the school premises within the time limit. He may, of course, supervise the remaining students himself, or use the services of a volunteer teacher.

If an injury is suffered in a school, the principal, to escape liability, will have to show that he has fulfilled his legal duty of arranging for and appointing teachers to supervision. He will also have to show that the

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[1] An example of such regulations are found in Article 8 of the By-laws of Bonavista-Trinity-Placentia Integrated Board.

supervision was adequate. The adequacy of the supervision will depend not only on the circumstances surrounding the accident and on the age, number and maturity of the students, but also upon the instructions that the teachers had received regarding their supervisory role. The question of adequacy is most important and will be examined after the statutory duty of teachers has been determined.

3. The Teacher

For the most part, the statutes examined do not place a direct supervisory duty on teachers. The statutes are more concerned with their roles as disciplinarians.

The Ontario legislation states:[1]

> Section 22(1) It is the duty of a teacher ... (d) to maintain proper order and discipline in his classroom and while on duty in the school and on the playground under direction.

The legislation of Prince Edward Island reads:[2]

> Section 36 Every teacher ... (b) shall maintain proper order and discipline on the school property.

Section 81 of The Schools Act (R.S.N.) 1970, states:

> Every teacher in a school shall ... (d) maintain proper order and discipline in carrying out his duties.

Although it might be argued that good discipline can be an effective deterrent against accidents, and that

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1 School Administration Act (R.S.O.) 1970, Regulation 191.
2 School Act, 1971.

discipline and supervision are complementary to each other, it is contended that the statutory clauses cited above do not place a legal duty on teachers to take reasonable precautions to prevent accidents. Statutory duties imposed on principals often use the words 'supervision of students'. No such terminology occurs in the clauses cited above. A teacher might prevent a student running down the corridor, which is a disciplinary function, and by such action he might prevent an accident, but is his prime concern for the safety of the students or for keeping order and control in the school? The difference can be illustrated by the School Act of Prince Edward Island. Whereas section 36(b) is concerned with 'proper order and discipline', section 36(c) states:

> (Every teacher) ... shall have a care to the health and comfort of those for whom he is responsible.

It has already been shown that negligence involves a breach of a legal duty to 'protect' others against unreasonable risks.[1] It has already been shown that the duty of a teacher is to take 'care' of his students as a reasonable and careful parent.[2] 'Protection' and 'care' are very different from keeping 'order and discipline'. Accordingly, it is contended that when statutes only impose a disciplinary duty on teachers, they will not be liable

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[1] Supra, p.50.

[2] Supra, p.56.

for injuries suffered, unless the injuries were a direct result of a breach of that duty. And, if a teacher were sued for an injury which was caused by his failure to care for the students as 'a reasonable parent', he could claim that nowhere was there a direct duty of supervision imposed upon him.

A direct duty can be imposed upon teachers, however, by the regulations of their school boards or of their own schools. A principal is responsible for arranging supervision, so that whenever he appoints a teacher to that role, the duty is delegated with the appointment. This duty is as binding as a statutory duty, for when a teacher accepts an appointment with a school board, he enters into a contractual agreement to carry out the duties that accompany his appointment, whether those duties are detailed in statutes or in the by-laws of his school board or in the regulations of the school to which he is appointed. The contractual status of teachers was well illustrated in Winnipeg School Division No.1 v. Winnipeg Teachers' Association No.1 of Manitoba Teachers' Society and Manitoba Teachers' Society (Man.)(1973):[1]

> During collective bargaining negotiations, the Teachers' Association ordered its members to 'work to rule'. As part of the order, teachers withheld their supervisory duties at the noon

[1] 4 W.W.R. 623. (C.A.)

hour. At a considerable cost the School Division was compelled to hire others to supervise the noon hour. The question was whether the teachers were under a duty, arising from a contractual obligation, to provide noon-hour supervision, or whether this was a voluntary activity. The code of rules and regulations of the Division, under Duties of Principals, read:

> ... shall include, 1. the assignment and supervision of teachers ... 6. the organisation of the supervision of pupil activities in school buildings and on school grounds. He shall make provision for the supervision of the school during the noon recess.

Under Duties of Teachers, Section 3.4 read:

> Teachers shall carry out their duties in accordance with the regulations of the Department of Education and of the school system under the direction of the principal.

Section 13 read:

> Under the direction of the principal, it shall be the duty of the teachers of each school to maintain regular supervision of the playground.

The Manitoba Court of Appeal held that the teachers were under a contractual obligation to provide noon-hour supervision and, therefore, they were liable in damages, both at common law and by statute, for a breach of a binding agreement. They had to meet the expense of the additional supervisory personnel.

The statutes often make provision for the imposition of direct duties on school personnel. Section 152 of the Public Schools Act (R.S.B.C.) 1960, states:

> Every teacher ... shall ... (a) perform such teaching and other educational services as may be required or assigned by a Board or the Department.

Section 81 of The Schools Act (R.S.N.) 1970, states:

> Every teacher in a school shall ... (v) perform such other duties as are prescribed in the regulations, rules or by-laws of his School Board.

Regulations from three school boards in Newfoundland are illustrative of this point.

The Labrador West Integrated:

> IV Duties of Teachers. Every teacher shall ... (c) Carry out such duties as may from time to time be delegated by the Principal, including, without limitation: the patroling of corridors and inspection of washrooms to ensure the good behaviour of students and the protection of school property; and supervise children boarding school buses.

Avalon North Integrated:

> Supervision by Staff: ... to seek maximum efficiency and safety.
> 1. Supervisory duties shall be co-operatively arranged by the administration and staff of each school. 2. The teacher-pupil ratio for supervision of activities shall be left to the discretion of the staff and administration of each school ... 4. Whenever students are engaged in any school activity they shall be supervised by a teacher or teachers.

Roman Catholic School Board for St. John's:[1]

> 3.04 Supervision of Pupils on School Premises.
> 'Premises of the school' include, of course, all building areas in addition to classrooms, and the outside play or other areas used by pupils for recess or assembly prior to entering school.
> 1. Pupils shall at no time be in a classroom,

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[1] Port aux Port Roman Catholic School Board has an identical regulation.

laboratory, gymnasium etc. without a teacher.
2. When pupils are moving ... adequate supervision should be provided at strategic points, e.g. stairways, which can be extremely dangerous for young children moving in groups.
3. During recess, at least one teacher per reasonable play area should supervise the activity of the children.

4. The Adequacy of Supervision

A careful examination of the regulations quoted will show that some are concerned with the safety aspect of supervision, which is the common law duty of care, others are more concerned with the disciplinary aspect of supervision. In an important and illuminating case, the Supreme Court of Alberta made a distinction between these aspects. This case also supports the contention propounded by the writer in the previous section that when statutory duties are related to discipline they do not impose a supervisory duty on teachers.[1]

Brost v. Tilley School District (Alberta) (1955):[2]

A six-year old girl, who was being pushed on a swing during recess, fell off and was injured. The teacher on supervisory duty was not present. On appeal, it was held that the Board of Trustees and the Principal were liable. The teacher was held not liable. The court found that the Trustees and the Principal had failed to exercise the degree of care that the law required of them to safeguard the small pupils. The accident was foreseeable, but

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1 Supra, p.118.

2 15 W.W.R. 241. See also supra, pp.65 and 98.

> the teacher had not been instructed to supervise the use of the swings, nor placed under a responsibility to direct the pupils with regard to their use. The duty to provide the supervision rested on the Principal and the School Board. Such supervision must be on a planned, organised basis. The local handbook of the School Board was more concerned with supervision for discipline rather than with supervision for safety.[1] The Board and the Principal were found liable for damages of $1,000 and $160.25 respectively.

This case emphasises the onus that is placed on school principals. They must delegate supervisory duties on a planned, organised basis with instructions to watch for potential danger areas around the school. The teacher must know what he has to do when he is on supervisory duty. One criterion of 'adequate' supervision, therefore, seems to be that the duties must be specified. A supervisory schedule which merely lists names and times will be inadequate. Instructions to 'keep the students orderly and quiet' and to 'stop them damaging the school' will be inadequate. Principals, accordingly, are advised to construct written instructions, detailing the duties to be performed by teachers when on supervision. The Roman Catholic School Board for St. John's, under its regulation 3.04 "Supervision of Pupils on School Premises," states: "It is assumed that ... most principals have established a

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[1] Underlining mine.

schedule to ensure adequate supervision of pupils and that all staff members are fully aware of their particular responsibilities in this regard."

An assumption made at the beginning of this section was that if a teacher has not been appointed to supervise or if he does not know what his supervisory duty is, he cannot be held liable for a breach of the duty. A failure to advise teachers thus will make principals liable for any injuries suffered, as was the case in Brost v. Tilley School District. School boards will also be liable under the principle of respondeat superior. The onus on the school board, therefore, is to see that supervision is provided; the onus on the principal is to arrange the supervision; the onus on the teacher is to carry out the supervision. Once the teacher knows the scope of his supervisory role, he must perform it 'as a reasonable and prudent parent', taking care to avoid accidents that he knows or ought to know might occur.

The second criterion of the adequacy of supervision seems to be the ratio of teachers to students.

Higgs and Higgs v. J.C.Hunt and Toronto Board of Education (Ontario) (1960):[1]

> During recess a fifteen-year old student was picked up by another and dropped on ice. Four

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[1] S.C.R. 174.

teachers were on duty, but they did not see the accident. When a teacher went to the boy he refused help. He was ordered into line and re-entered the school, although he was limping. It was later discovered that he had a displaced hip-bone. The trial judge found that (a) there was an insufficient number of teachers on duty for the wintry conditions and the number and ages of the students, and (b) the negligence had aggravated the injury. The Ontario Court of Appeal concurred and awarded $10,000 damages to the boy and $510 to his mother.

The Supreme Court of Canada reversed finding (a), but confirmed finding (b). The court stated that the weather was not unusual and continued, "... it is not the duty of school authorities to keep pupils under supervision every moment while they are in attendance at school." As the Public Schools Act, section 108(g) imposed a duty on every teacher 'to give assiduous attention to the health and comfort of the pupils', making the boy walk in line did not constitute 'assiduous attention', which was a statutory duty, despite his refusal of aid. The award of damages was therefore unchanged. Mr. Justice Ritchie commented on the difficulty of determining the duty of care:

> The duty of supervision which a school authority owes to its pupils while they are at play must of necessity vary from school to school and even from day to day, and it is, therefore, not possible to elicit from the decided cases any guiding principle for the exact measurement of the degree of care to which any particular set of circumstances may give rise.

Although it is not possible to determine an exact measurement of the degree of care which must be provided, the courts ask whether supervision could reasonably be expected, and whether the supervision was sufficiently reasonable to prevent foreseeable hazards. The Supreme Court of Canada in The Higgs Case[1] found that the weather was not unusual and, therefore, four teachers were adequate. This ruling suggests that if the weather had been unusual more teachers might have been needed as the chance of injury could have been greater. In a small school with few students and with a compact playground area, one teacher might be adequate. In a large school, however, with many students, with much floor space and with a large playground area, one teacher would not be adequate. Also, the younger the students, the greater the need for supervision. A possible guideline would be that all the areas of the school should be overviewed at regular intervals. In a large school, during a fifteen minute recess, one teacher could hardly patrol the whole building and the adjoining grounds. The adequacy of the ratio of teachers to students, therefore, must be relative to the size of the school, the number of the students and the age of the students. Too much supervision is better than too little, as too little could be interpreted as no supervision.

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[1] Supra, p.124.

It is also necessary to bear in mind the high duty of care owed to contractees. In Beaumont v. Surrey County Council (1968)[1] it was held that two teachers assisted by twelve student prefects were inadequate for nine hundred students. Although senior students have been held to be adequate for the supervision of some activities,[2] the duty owed generally seems to suggest that the adequacy of the supervision will depend upon the number of responsible adults on duty. Grice summarised the position as follows:

> The principle in loco parentis is not taken to imply that school personnel are required to guarantee that no child under its care and supervision at school will be injured. It does mean that the natural parent may legally assume that during the time the child is absent from home under the state's compulsory school attendance statute he is in a safe place, that his interests and welfare are watched over by responsible adults, and that he will be returned safely home when his educational pursuits for the day have been completed.[3]

Many cases already cited illustrate that the courts will not hold school personnel responsible for all accidents. Liability depends on whether supervision or better supervision could have prevented the accident,

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1 Supra, p.78.

2 Butterworth et al. v. Collegiate Institute Board of Ottawa (1940), supra, p.71; Jacques v. Oxfordshire County Council (1968), infra, p.167.

3 W.A.Grice, "Legal Bases for Decision Making Relative to Professional School Personnel" (unpublished Doctoral Dissertation, McNeese State University, Louisiana, 1974), pp. 103-104.

whether the danger was foreseeable, and, under the higher duty of care, whether the student had the right to expect not to be injured in the circumstances which caused the injury. Supervision, therefore, does not have to be continuous to be adequate.

> Ricketts v. Erith Borough Council (U.K.) (1943):[1]
>
> A six-year old pupil went through the school gate to a shop where he purchased a bow and arrow. On his return, he shot the arrow in the playground and hit the plaintiff in the eye. A teacher would from time to time go into the playground to see that all was well. It was held that it was not incumbent on the Council to have a teacher continuously present. The supervision was adequate.

5. Supervision Before and After School

The statutes state the times that teachers have to be present in school. In Newfoundland, as has been shown,[2] supervision has to be provided fifteen minutes before school opens and continue until the last bus or vehicle has arrived at the end of each session. The by-laws of school boards can extend these times; some have clauses that enable the school doors to be opened earlier than that stated by statute. Article 9 of Cape Freels Integrated School Board By-Laws reads:

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[1] 2 A.E.R. 629.

[2] Supra, p.112.

> The doors of the school shall be open at least fifteen minutes before classes begin at all times and, in cases of inclement weather, a teacher in each school building may decide to open them earlier in order to provide shelter for those who arrive early. Pupils from out of town who arrive by bus shall be admitted upon arrival.

The courts have held that school personnel will not normally be liable for accidents that occur outside school hours. School hours are those during which supervision has to be provided, either as a result of a statutory obligation or as a result of a local regulation. When local regulations are enforced, which extend the hours beyond those stated in the statutes, teachers charged with negligence will not be able to claim that they are only responsible for the times stated in the statutes. Educators in the Cape Freels District, therefore, will be liable for the safety of all bus students from the moment they arrive at the school, and any teacher who opens the school doors early because of inclement weather will likewise be responsible for the safety of the students. It could be argued that, if a teacher opens the doors early, he is performing a voluntary activity and is, therefore, under no legal duty. But, the assumption of a discretionary power carries with it the same obligation as that of a mandatory duty.[1]

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[1] Supra, pp.52-53.

If a teacher arrives late for school when he should be on supervisory duty, he will not only be liable for any injury that might be suffered as a result of his negligence, but also will be in breach of his contractual obligation.[1] The duty to supervise students during the regulatory times before classes actually begin is especially important for teachers in one and two-roomed schools. In larger schools, a teacher who arrives late can be replaced; in the smaller schools the teacher is irreplaceable.

If an accident occurs outside the hours within which the duty to supervise is stated, school personnel will usually escape liability.

> Scoffield v. Public School Board of North York (Ont.):[2]
>
> A student was injured while tobogganing on school property at 8.45 a.m. The Ontario court held that the school board was not liable as the student had failed to show that the slide was dangerous in itself, and the teachers had no responsibility of supervision at 8.45 a.m.

Students injured on school grounds before and after school hours are considered to have the legal status of licensees, if their presence on the grounds is tolerated.[3] The duty owed to such persons is not as high as that owed

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[1] The contractual status of teachers was illustrated in the Winnipeg Teachers' Case, supra, p.119.

[2] (1942) O.W.N. 458.

[3] For a more detailed explanation of licensees see infra, pp.156-157.

to contractees. In Britain, prior to the Occupiers' Liability Act 1958, the duty was merely to warn them of dangers known, as compared to the duty to invitees, which called for protection from dangers which were known or ought to have been known. Foreseeability, therefore, was not a criterion of the duty owed to licensees. Since 1958, the duty owed to licensees is similar to that owed to invitees. A 1920 case illustrates the duty that was owed to licensees when foreseeability was not a criterion.

Edmondson v. Moose Jaw School Trustees (Sask.) (1920):[1]

> After school hours an eight year-old boy, who was blind in one eye, was hit by a faulty cross-bar, while watching his brother practicing high jump. He lost the sight of his good eye in the accident. The trial court found the school board liable, and awarded damages of $7,200. On appeal, it was held that the boy was a licensee, not an invitee, as the injury occurred after school hours. The duty was to warn him of known dangers. The fact that the crossbar would hit him in the eye was not known. The award of the trial court was quashed.

It is not always easy to prove that a danger ought to be recognised, as was shown in Ward v. Hertfordshire County Council (U.K.) (1970):[2]

> Children were unsupervised before school opened until 8.55 a.m. The playground had a flint wall.

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[1] 3 W.W.R. 979; 55 D.L.R. 563 (C. of A.)

[2] 1 All E.R. 535.

> While running to the wall, a child cut his head. It was held by the British Court of Appeal that (1) the fact that accidents had previously occurred in play did not prove the wall to be dangerous, especially as no complaints had been made before, and (2) as the accident occurred in the ordinary course of play, the lack of supervision was irrelevant as it was impossible to supervise children so that they never fall down and hurt themselves.

The duty of care owed to students during school hours is absolute and if principals and teachers 'bend the regulations' they must be prepared to accept the consequences. This principle was well illustrated in a leading British case that went, on appeal, to the House of Lords.

> Barnes v. Hampshire County Council (U.K.) (1969):[1]
>
> A five-year old pupil was let out of school five minutes early on the last day of term. His mother normally met him when school closed at 3.30 p.m. The child was knocked over and injured on a main road, 250 yards from the school gates. The mother arrived at 3.31 p.m. The child suffered partial paralysis of the left arm and foot.
> The House of Lords found the school negligent, and awarded damages in excess of ten thousand pounds. In the circumstances five minutes was not a negligible one. Teachers were ordered not

[1] 3 A.E.R. 746.

to release the students until 3.30 p.m. Lord Pearson said:

> Although a premature release would very seldom cause an accident, it foreseeably could, and in this case it did cause the accident to the plaintiff.

In this case, foreseeability was relevant, so that, although the student was released from school, because the release was early, he still had the status of an invitee. This raises some pertinent questions for Newfoundland schools. It is not uncommon to release students early on the last day of the school term. It is not uncommon to release students early during inclement weather. When such occasions arise it would be most adviseable for school personnel to make every effort to inform parents that the students are being released, especially the parents who normally collect their young children. It is uncertain whom the courts would hold liable if a student was lost under such circumstances in a violent blizzard. Presumably principals are expected to use their judgement to get students home before they become stranded at schools. But, parents have the right to expect their children not to be exposed to danger when they would normally be under the care of their teachers. School boards and/or individual schools must develop systems of advising parents when schools will close early. Many schools have such procedures, as is illustrated by the Handbook of Gander Collegiate.

This states that on stormy days announcements regarding closing and reopening will be made on all local radio stations. Such a system should be adequate if parents are made fully aware of the practice.

6. Supervision Off School Premises

The duty of care owed to students who are off school premises because they are being taken on a school excursion or because they have been allowed to leave unsupervised during school hours, will be different from that owed to students who have left the premises because the school session is over.

(a) School excursions

There is no doubt that, while on school excursions, students are owed the same degree of care as they should receive while in the school. Any educational activity outside the school is considered as an extension of the classroom. Accordingly, the duty owed is that of a prudent father. In Moddejonge et al. v. Huron County Board of Education et al (Ont.) (1972)[1], it was held that the duty of care owed by a teacher who was supervising a swimming party was that of a careful and prudent father and he, like such a father, should have guarded against the foreseeable risks.

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[1] Supra, p.63.

Some school boards have constructed specific regulations for the safety of students on such occasions. The Roman Catholic School Board for St. John's has such a regulation:

> 3.06 Field Trips. The obligation of the school towards the safety and welfare of children is just as great on these trips as it is in regular classroom activities ... (2) It is suggested that for primary children especially one adult supervisor should be provided for every twelve children ... (6) ... Where axes, knives and/or other similar instruments or tools are required for curriculum purposes, they are to be used by the teachers or responsible students. Extreme caution is urged. (7) A First-Aid Kit should be taken along.

In New Brunswick a statutory clause reads:

> The local school arranging the extra-curricular trip must provide supervision at the minimum rate of one supervisor for every twenty students being conveyed.[1]

A school excursion takes the students outside the known environment of their school and classroom. They might come into contact with dangers that are completely unforeseeable when the excursion is planned. The duty owed to them is high and, therefore, steps must be taken to ensure that the supervision is adequate bearing in mind not only the age, the number and the maturity of the students, but also the circumstances surrounding the excursion.

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[1] Regulations under the Schools Act (R.S.N.B.) 1974, section 166(3).

It is a common misapprehension among educators and parents that a signed parental note giving permission for the student to take part on the excursion will excuse the school authorities from liability for any injuries. Although such a practice is worthwhile, as it indicates care, planning and concern by the school authorities, it has no legal foundation. The basic premise is that no parent can sign away his child's right to legal protection. In Moddejonge et al. v. Huron County Board of Education et al. (Ont.) (1972),[1] the school personnel did not escape liability although the parents of all the students had given written permission for the field trip and had even paid a registration fee of $7.00.

(b) During school hours

There is strong indication that school personnel will be liable for accidents that occur as a result of students being out of school during school hours due to the negligence of the school personnel. In Barnes v. Hampshire County Council (U.K.) (1969),[2] the injury was suffered off the school premises, but it was due to the negligence of the teacher who allowed the student to leave early.

Carmarthenshire County Council v. Lewis (U.K.) (1955):[3]

A four-year old toddler escaped from an infants'

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[1] Supra, p.63.
[2] Supra, p.132.
[3] A.C. 549, (House of Lords).

> school on to the highway and caused the death of the respondent's husband, a truck driver, who had swerved to avoid the child and collided with a tree. Although Romer L.J. said in the Court of Appeal that "almost superhuman vision" would have been required to foresee such an accident, the House of Lords found the school authorities liable.

This important case emphasises that the duty of school authorities to care for students in their charge during school hours is extremely high. Salmond also points out that the case illustrates the need for a prudent schoolteacher to take precautions 'against his boys causing injury to persons unconnected with the school.'[1] The child was not injured, but the school authorities were liable because the death of the truck driver was a direct result of their negligent supervision of the child.

Parents have a right to expect their children to be under the care of the school authorities during school hours. Occasionally, students leave the school early at the request of their parents. Occasionally, they are sent off the premises on errands for teachers. When the former occurs, it is assumed that the school authorities would not be liable if an injury was suffered, as the parent had requested and knew of the early departure. In the

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[1] Salmond, op.cit., p.309.

latter situation, however, school personnel should be cautious. The age and maturity of the students must be considered. It is doubtful, for example, if a prudent parent would send a primary student on an errand through heavy traffic. Indeed, since teachers must protect students from potential dangers, it is recommended that, if a primary student has to leave the school during school hours, unaccompanied by a responsible adult, the principal or teacher should send, if possible, an older student to accompany the younger student.

The circumstances of the errand have also to be considered. It is very probable that the courts would consider the educational value of the errand. To send the treasurer of the student council to the local bank to deposit money or to send the members of an economics class to a store to survey current prices would be very different from sending a student to a store to buy a bar of chocolate for his teacher.

(c) Outside school hours

In 1929, Chief Justice of Appeal MacDonald, of the British Columbia Court of Appeal, said:

> I have been unable to find any case, and we have been referred to none, which would impose upon the school board the duty of protecting the plaintiff from injury on the highway after he left the school premises.[1]

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[1] Patterson v. North Vancouver School Trustees (B.C.) (1929) 3 D.L.R. 33 (C.A.).

This view was supported six years later by another British Columbia case.

Ritchie v. Gale and Vancouver Board of School Trustees (B.C.) (1935):[1]

> A fourteen-year old boy, while catching a ball, walked backwards out of the school entrance into the street. He was injured by a car. The trial judge found the driver of the car and the school board liable. On appeal, however, the British Columbia Supreme Court held that the school board was not liable "because land outside of school property was beyond the board's jurisdiction."

No cases have been found that would make school personnel liable for injuries suffered off the school premises outside of school hours.

7. Classroom Supervision

When a principal schedules teachers for classroom instruction he fulfils part of his statutory duty of 'arranging for the regular supervision of students'. Within the classroom setting, the teacher has to fulfil the common law duty of caring for the safety of the students as 'a prudent and reasonable parent'. The teacher has to protect the students from dangers that could reasonably be foreseeable. If he is using equipment that

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[1] 1 D.L.R. 362.

he knows is dangerous, he must take even greater care. But, if the teacher has done all that could reasonably be expected and has instructed the students on how to conduct themselves, the courts have ruled that he does not have to interfere with his normal instructional procedure.

Butt v. Cambridgeshire and Isle of Ely County Council (U.K.)(1969):[1]

> The plaintiff, a child of nine years of age, accidentally lost an eye as a result of her class-mate waving about in the air a pair of pointed scissors with which she was supposed to be cutting out some paper illustrations. It was held that the teacher was not under a duty of care to require all work to cease in the class, while she gave individual attention to a particular child.

Crouch v. Essex County Council (U.K.)(1966):[2]

> A fifteen-year old boy in a chemistry class of twenty-five students was struck in the face by a strong solution of caustic soda being squirted at him through a pipette by another pupil. It was held that neither the teacher nor the school authorities were liable. The standard of discipline maintained was sufficient from the safety point of view, even if it did not succeed in putting down all impertinence and high spirits.

Although the duty of care owed by a teacher is that

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[1] 119 New L.J. 1118.

[2] 64 L.G.R. 240.

of a prudent and reasonable parent, there are indications that the degree of care has to be greater if the teacher claims or possesses special skill. The special skill demands special care. The concept applies equally to those outside the teaching profession. The attitudes of the courts are so important that they need to be examined in detail in two cases, both decided in 1975.

Dowey v. Rothwell and Associates (1975):[1]

A patient, anticipating an epileptic fit, was placed on a table by a nurse, who left her for about sixty seconds, during which time the patient fell off the table and broke her arm severely. It was shown that the general and recommended practice was never to leave alone someone undergoing an epileptic fit. The nurse was found negligent and damages were assessed at $7,500. Cullen J., in his judgement, said:

> I think we can apply to nurses as well as to doctors the quotation from the judgement of Crits and Crits v. Sylvester et al. (1956) S.C.R. 991, 'Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care ... and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not possess to be so qualified by special training or ability.' The test laid down by The Supreme Court of Canada as quoted by Riley J. in Challand v. Bell (1959) 18 D.L.R. (2d) 154, is as follows: (1) The surgeon undertakes that he possesses the skill, knowledge and judgement of the average. (2) In judging the average, regard must

[1] 49 D.L.R. (3d) 82.

> be had to the special group to which he belongs ... (3) If the decision was the result of exercising that average standard, there is no liability for an error of judgement.

This case raises some valid questions for teachers. (1) Is the duty of care demanded of physical education teachers, industrial arts teachers, science teachers, home economic teachers, teachers in special schools, and others with special training, greater than that demanded of academic classroom teachers? Or, (2) do all teachers possess special knowledge? (3) What is the average standard of care exercised by each special group? (4) Are our teachers up to 'the average'? (5) If the standards of care are not up to 'the average', can teachers claim error of judgement as a defence? If a case is taken to court, questions (3) and (4) are often answered by calling expert witnesses, as was done in Thornton v. Board of School Trustees of School District #57 (St.George) and David Edamura (B.C.) (1975).[1] This case dealt extensively with question (1).

> Edamura, the physical education instructor, offered his class of fifteen-year olds the choice of floor hockey, weight-lifting or gymnastics. Gary Thornton and six others chose gymnastics. The floor hockey group used the gymnasium floor, the weight-lifters and the gymnasts used the stage.

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[1] Supra, p.5.

Edamura sat at a desk on the stage angled in such a way that he could see the floor hockey and, by looking right and slightly over his right shoulder behind him, he could see the gymnasts. He busied himself filling out students' reports. The gymnasts, finding the space on the stage inadequate for their run up to vault a box horse, with Edamura's approval, moved the box horse to jump off it on to the spring board so as to do somersaults on to foam chunks. The court found the foam chunks inadequate and the exercise ' ... more in the nature of a circus stunt.' One boy, attempting a double somersault, hurt his wrist. Edamura examined it and sent him to put it under a cold tap. It was later discovered that he had broken his wrist. The judge said, "Accordingly, in my opinion, the 'configuration' should have been recognised by any reasonable physical education teacher as one fraught with danger." Edamura provided some extra matting around the foam chunks and returned to his desk. Within minutes Gary Thornton jumped, landed completely off the foam mats, broke his neck, and is now a complete quadriplegic. No 'spotters' were provided to catch the gymnasts. The judge said:

> The specific duty of a person, such as Edamura, with his training, skills and knowledge, can be found in 28 Halsbury 3d Ed. p.19, '17 ... the practice of a profession, art or calling which, from its nature, demands some special skill, ability, or experience carries with it a duty to exercise, to a reasonable extent, the amount of skill, ability and experience which it demands.'

He continued by quoting Lord Wright M.R. in Wray v. Essex County Council (1936) 3 All E.R. 97, who said:

> But in every case (where) ... there has been a breach of duty, it is necessary to consider whether there is something which the schoolmaster ought to have anticipated, something reasonably foreseeable and something, therefore, which, because it is foreseeable, the master ought to have guarded against.

Edamura, after the first boy's injury, ought to have anticipated the danger. The learned judge found both Edamura and the school board, as his employer, negligent. The case against the principal was dismissed. The judge said, "Gary is, in essence, just a living head, attached to a metabolic machine that provides nutrition for his head." In assessing damages, he held that the plaintiff should be 'put back into the position in terms of finance and health that he would have been had he not been so injured'. He assessed damages at $1,534,058.93![1](This case is being appealed to The Supreme Court of Canada.)

This case illustrates that teachers, who possess some special training or skill, must exercise the care

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[1] The damages were assessed as follows:

1. Special damages for expenses to date	42,128.87
2. Cost of future basic needs - 49 years life expectancy	1,188,071.80
3. Loss of earning potential @ $850 per mensem	103,858,26
4. Compensation of pain and loss of amenities, enjoyment and expectation of life	200,000.00
	$1,534,058.93

for which their training has prepared them, if they use their ability to place students in a position which teachers, without the special training, would be unable to safely control.

Since the duty of care expounded in Donoghue v. Stevenson (1932)[1] is to protect students from injuries that are known or ought to be known, principals and teachers must be pragmatic and ask themselves such questions as, "What could be the result of my leaving the classroom?" "What could be the result of my giving out scissors to this class?" "What could be the result of my allowing these students into the laboratory on their own?" "What could be the result of my allowing the girls to cook the hamburgers today?" "What could be the result of my allowing these students to continue on the trampoline on their own while I have a cup of coffee?" And finally, teachers must ask themselves the question, "Is the duty of care expected of me greater than the normal because of my special skill or training and the type of activity in which my students engage?"

III. SCHOOL PREMISES, FACILITIES AND EQUIPMENT

The statutes usually provide an absolute duty on school authorities to maintain and keep in a state of repair school premises, facilities and equipment. In

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[1] Supra, p.59.

British Columbia, each school board is responsible 'for the custody of all school property ... and to provide for its safe-keeping'.[1] In New Brunswick, each school board 'shall arrange for adequate maintenance of buildings and equipment',[2] and it is the duty of each teacher 'subject to the arrangements of the school board, to see that the school is kept in proper order with respect to cleanliness, neatness, heating and ventilation'.[3] In Ontario, each principal 'shall inspect the school premises regularly and report promptly to the secretary of the board ... any repairs required'.[4] In addition, it is the duty of a principal:

> ... to give assiduous attention to the health and comfort of the pupils, to the cleanliness, temperature and ventilation of the schoolhouse, to the care of all maps, apparatus and other school property, to the preservation of shade trees and the orderly arrangement and neat appearance of the playgrounds.[5]

The Education Act in Britain states:

> ... it shall be the duty of a local education authority to secure that the premises of every school maintained by them conform to the standards prescribed for schools of the description to which the school belongs.[6]

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1 R.S.B.C. 1960, section 177(g).
2 R.S.N.B. 1974, section 18(4).
3 Ibid., section 29(j).
4 R.S.O. 1970, section 14 (2)(b)(i).
5 Ibid., section 21 (2)(i).
6 1944, section 10(2).

The Newfoundland legislation places a similar duty on school boards, principals and teachers. The Schools Act (R.S.N.) 1970, states:

> Section 12 ... every School Board shall (a) provide, furnish and keep in good order and condition schools designed for the teaching of elementary and secondary grades, ... (k) insure and keep insured all its buildings and equipment, ... (n) provide fire escapes for all school buildings satisfactory to and in accordance with all provisions of law, provincial, municipal or otherwise applicable thereunto.
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> Section 80 (2) Every principal in a school shall ... (c) report in writing to his School Board the need of apparatus, materials, repair and fuel.
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> Section 81 Every teacher in a school shall ... (e) see that the premises and other property of the school are, as far as possible, preserved from damage and injury.

It is clear from the examples cited that school authorities are responsible for ensuring the safety of the premises of their schools and anything provided in the schools for the education of students. The personnel in the schools are responsible for reporting to the school authorities the need for repairs. Occasionally, school boards emphasise this duty in their regulations. The Roman Catholic School Board for St. John's has the following regulation:

> The principal and janitor should make frequent inspections of the school to determine the relative safety of the

> building ... And potential hazardous conditions should be reported in writing to the Board.

Some school boards in Newfoundland place the responsibility for maintenance on local school committees.[1] When such a provision exists, principals and teachers should not assume that their responsibilities in this area cease. Their duties, stated in The Schools Act, are absolute and cannot be avoided.

The common law stresses that the condition of anything made available for the use of others must be reasonably safe. This general duty is expressed in Shripton v. Hertfordshire County Council (U.K.) (1911).[2] The judgement of the House of Lords read as follows:

> A person who provides anything for the use of another is bound to provide a thing reasonably safe for the purpose for which it is intended, even though the person using it uses it only by the permission or consent of the person providing it and has no legal claim to the use of it.

It has already been shown that school authorities have been found liable for injuries caused by faulty swings,[3] by thin glass in a swing door,[4] by ice on a

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1 As illustrated by Burin Peninsula Integrated School Board, By-Law 11(a).

2 104 L.T. 145.

3 Lamarche et al. v. Board of Trustees for L'Orignal, supra, p.76.

4 Reffell v. Surrey County Council (1964), supra, p.68.

school step,[1] and by the lack of bannisters on a staircase.[2] On these occasions the school authorities had a statutory duty to provide safe facilities and equipment and were also liable for a breach of their common law duty to ensure that the facilities and equipment were reasonably safe for the purpose for which they were intended. For similar reasons a faulty teeter-totter led to the liability of a school board in Alberta.

Schultz v. Grasswold School Trustees (Alta.) (1930):[3]

> A child was injured playing on a teeter-totter in the school playground. The school board had a statutory duty to keep all school property in order. It was held that the injury was due to the disrepair of the teeter-totter, coupled with its faulty construction. The school board, being negligent, was liable in damages.

The learned judge pointed out in Lamarche et al. v. Board of Trustees of the Roman Catholic Separate Schools for the Village of L'Orignal (1956),[4] that schoolchildren should not be exposed to unnecessary danger in the school, or while playing in the playground. The following case

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1 Woodward v. Mayor of Hastings (1944), supra, p.90.
2 Sweet v. Drummondville School Trustees (1947), supra, p.83.
3 3 D.L.R. 600.
4 Supra, p.76.

illustrates the extent to which school authorities have to go to keep school premises safe.

> Pook v. Ernesttown School Trustees (Ont.) (1944):[1] A fourteen-year old student injured his leg in the playground during a recreation period. The ground had been littered with stones and brickbats for some time. Under sections 89 and 103 of the Public School Act, the school authorities were under a duty to keep the school property in repair and to give assiduous attention to the health and comfort of the pupils. It was held that the defendants were negligent in this duty which was a direct cause of the injury. The student was lawfully and properly playing in the schoolground.

The duty to protect students from injury in the playground poses a real problem in Newfoundland. Very few schools have paved playgrounds and such inanimate objects as stones are commonplace in most. No principal could be expected to arrange for his teachers and pupils to regularly pick up all the stones and gravel. They are not in a position to change the natural structure of Newfoundland playgrounds. Reasonable care, however, can ensure that no foreign objects, such as broken bottles and rusty drink cans, are allowed to remain on the premises.

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[1] 4 D.L.R. 268.

Many injuries are caused in schools by contact with glass. The important case of Lyes v. Middlesex County Council (U.K.) (1962)[1] illustrates the high duty of care that is owed:

> The plaintiff injured his hand when it went through the glass pane of a swing door. It was shown that there was a statutory duty to 'secure that the premises of every school ... conform to the standards prescribed'. It was stated that the common law duty of a schoolmaster to his pupils is that of a prudent parent bound to take notice of boys and their tendency to do mischievous acts, not in the context of the home, but in the circumstances of school life, and extends not only to how the pupils conduct themselves, but also to the state and condition of the school premises. The glass was one-eighth of an inch thick. For a school, this was dangerously thin. Mr. Justice Edmund Davies said, "The bigger the pane, the greater the need for tough glass." The school authorities were found liable.

When students are handling equipment or other objects, "the greater the danger, the higher is the standard of the diligence which the law enacts."[2] The amount of care owed to the students depends, to a great

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[1] 61 L.G.R. 443 (Q.B.D.).

[2] Sullivan v. Creed (1904) I.R. 317, per Gibson, J.

extent, on whether the object they are handling is inherently dangerous or potentially dangerous. The difference between these categories was defined by Lord Wright M.R. in Wray v. Essex County Council (U.K.) (1936):[1]

> A teacher sent a thirteen-year old student to the handicraft room with an oil-can with a six-inch spout. In the corridor, twelve-year old Wray, who was 'trotting' ahead of his classmates going from one classroom to another, collided with the thirteen-year old and the spout of the oil-can hit him in the eye. The Court of Appeal held that the teacher was not negligent for not telling the boy how to carry the oil-can, as no reasonable man could foresee such an accident. Also, the oil-can was not an inherently dangerous thing. Lord Wright said:
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> > When you are dealing with a dangerous thing you are dealing with something which, if left, may at any moment and under modern circumstances cause damage ... Things like a naked sword or a hatchet or a loaded gun or an explosive are clearly inherently dangerous - that is to say, they cannot be handled without a serious risk. On the other hand, you have things in ordinary use which are only what is called 'potentially dangerous'; that is to say, if there is negligence or if there is some mischance or misadventure then the thing may be a source of danger; but that source of danger is something which is not

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[1] 3 All E.R. 97, (C. of A.).

> essential to their ordinary character; it merely depends on the concurrence of certain circumstances - in particular, generally, negligence on the part of someone. I feel, I am bound to say with no doubt at all, that this oil-can does not come within the category of inherently dangerous articles.

Since the oil-can was judged to be outside the category of inherently dangerous articles, the teacher only had to show that he was not negligent in allowing the student to carry it. In Beaumont v. Surrey County Council (1968),[1] the elastic off the trampoline could not be classed as inherently dangerous, but the school authorities were found liable because they, by their negligence, allowed it to be used in a dangerous manner resulting in an accident which could be foreseeable.

Machines in workshops are inherently dangerous objects and strict precautions must be taken to ensure that safety regulations are enforced and that students are instructed carefully in their use.

Butt v. Inner London Education Authority (U.K.) (1968):[2]

> A seventeen-year old student injured his fingers in a machine at a School of Arts and Crafts. There was no guard on the machine as in factories. The Court of Appeal held that the Education Authority

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[1] Supra, p.78.

[2] 66 L.G.R. 379.

> had a duty to provide for the safety of the pupils even though a college of further education is not a factory and does not come under the provisions of the Factories Act.

What things are dangerous, however, is a question of degree, depending on the nature of the thing and the age of the pupils. Mr. Justice Cave, in Williams v. Eady (1893),[1] said, "To leave a knife about where a child of four could get at it would amount to negligence, but it would not if boys of eighteen had access to it." In this case, it was found to be dangerous to leave phosphorus lying about in a laboratory. In another case, it was held that it was not dangerous for children in a primary class to be playing with toy soldiers.[2] The courts have found school authorities negligent, however, when they allowed young children to play with fireworks without supervision.[3] Charlesworth summarised the position as follows:

> It would seem that the test is: Is the thing one of a class which children of that age are, in the ordinary course of things, not allowed to use without supervision?[4]

A recent Canadian decision suggests that if the students have some special characteristics higher care

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1 Supra, p.56.

2 Chilvers v. London County Council (1916) 32 T.L.R. 363.

3 King v. Ford (1816) 1 Stark N.P. 421.

4 Charlesworth, op.cit., p. 301.

should be taken.

Dziwenka et al. v. The Queen and Mapplebeck (Alta.)(1972):[1]

> An eighteen-year old deaf mute in the Alberta School for the Deaf injured his hand when using a power saw. The teacher was competent and had shown the student how to use the saw. At the time of the accident, the teacher was helping another group, but keeping a general eye on the remainder of the class. Although the student was held to have contributed to his injury by his own negligence, the teacher and the Crown were found liable for $10,716. The Appellate Division of Alberta reversed this decision, but The Supreme Court of Canada upheld the ruling of the trial judge.

This decision might appear hard and in complete contradiction to the principle expounded in Butt v. Cambridgeshire and Isle of Ely County Council (U.K.) (1969),[2] but it does further support the theory that a higher duty of care is owed to pupils than that expounded in Donoghue v. Stevenson.[3] Students, being obligatees, have a right to be protected and not to expect to be injured. Critics of The Dziwenka Case would be justified, however, in asking how, in view of the finding of the court, any teacher, under similar circumstances, could, in the future, ever expect to supervise more than one machine at a time?

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1 W.W.R. (Vol.1) 350.

2 Supra, p.140.

3 Supra, p.59.

School authorities have a duty to see that school premises, facilities and equipment are safe for the purpose for which they are intended. The duty they owe to people using the premises and equipment, however, varies, depending upon the legal status of the user. The duty expounded in this section so far has been that owed to students lawfully on the premises. A similar duty is owed to employees of school boards. Principals, teachers, other professional staff, non-professional staff and other employees lawfully on the premises have a right to be protected from injury, and, subject to any contributory negligence on their part, they can recover compensation for any injury caused by the defective state of the school premises or equipment, even if they knew of the defect. In 1920, a teacher was held entitled to recover damages for injuries he suffered when a defective heating pipe exploded. The school authorities knew of the defect and were in breach of their statutory duty.[1]

After they have been dismissed from school, students do not enjoy the status of obligatees, and the duty owed to them depends upon whether they are classed as licensees or trespassers.

A simple definition of a licensee is that he is someone who visits premises for social, as compared with

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[1] Abbott v. Isham (1920) 90 L.J.K.B. 309.

business, reasons. His presence is of no advantage to the occupier, but it is tolerated by him. So in Edmondson v. Moose Jaw School Trustees (1920),[1] the Saskatchewan Court of Appeal classed a student, who was injured after school while watching his brother practicing high jump, as a licensee. He was there for his own pleasure, not as part of his educational activity, and his presence was tolerated by the supervisors. Today the duty owed to licensees is that expounded in Donoghue v. Stevenson.[2] They must be protected from dangers that are known or reasonably foreseeable.

A trespasser is someone who visits premises against the express wishes of the occupier. A very slight duty of care is owed to trespassers generally. Occupiers of premises, however, must not set deliberate, dangerous traps, and they have a duty to give warning of any dangers on their land which they know might injure trespassers.

Robert Addie & Sons v. Dumbreck (U.K.) (1929):[3]

> Colliery officers warned children before setting in motion an endless wire cable. They had repeatedly warned children not to trespass on the land, but to no avail. One of the children was killed when being drawn into the haulage machinery. The House

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1 Supra, p.131.

2 Supra, p.59.

3 A.C. 358.

of Lords held that the defendants were not liable as they had fulfilled their duty to give 'adequate warning'.

Storms v. Winnipeg School District No.1 (Man.)(1964):[1]

During school holidays, a young boy was playing on school grounds with the tacit permission of the school authorities. He had been expressly forbidden, however, to play on a fire escape. He was injured on the fire escape. The Manitoba Court of Appeal held that he was a trespasser on the fire escape and he could not recover damages.

When, however, an occupier habitually and knowingly allows children to trespass on his property, they assume the status of licensees and are owed the duty of care normally granted to such persons.

Lynch et al. v. Brewers' Warehousing Co.,Ltd. (1974):[2]

A young girl was injured while playing on premises she was occasionally ordered to leave. As the occupier knew she regularly played there, it was held that he owed her the duty of care of a licensee. He had a duty to act with reasonable care to avoid injury to children. Killeen, Co.Ct.J., quoted Lord Denning M.R. as follows:

> The true principle is this: In the ordinary way the duty to use reasonable care extends to all persons lawfully on the land, but

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[1] 41 D.L.R. (2d) 216.

[2] 44 D.L.R. 677.

> it does not extend to trespassers, for the simple reason that he cannot ordinarily be expected to foresee the presence of a trespasser. But the circumstances may be such that he ought to foresee even the presence of a trespasser; and then the duty of care extends to the trespasser also.

It is virtually impossible, and would probably be undiplomatic, to keep students off school grounds after school hours and during school holidays. As their presence is tolerated, school authorities have a duty to see that the grounds are free of dangerous hazards and to warn those who use the grounds of any dangers of which they know.

IV. TRANSPORTATION

Students may be transported in school buses, in taxis, or in private cars. These three areas will be examined.

1. School Buses

If students are injured while travelling on school buses, they have a legal right to recover compensation for their injuries. The cases examined indicate that the main disputes before the courts have been to determine whether they should recover from their school boards or from the owners of the buses. This area of dispute can be illustrated best by distinguishing between the mandatory and discretionary duties of school boards.

(a) Mandatory duties

When the statutes place a mandatory duty on school boards to transport students, usually those who live outside a certain radius of the school, there is also a duty to provide safe transportation - a duty that can be implied through the common law or stated in statute.

Because mandatory duties are absolute, school boards, who are placed under such a duty, will not escape liability for injuries suffered by students on school transportation, once negligence has been established.

> Cochrane v. Elgin Consolidated School District (Man.) (1934):[1]
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> The plaintiff broke his arm when the horse-drawn van on a sleigh in which he was travelling to school overturned. It was shown that the sleigh was old, it was too narrow and easily upset, and the horses were going too fast for the conditions of the road. The negligence of the owner was established, but, as the statute placed a mandatory duty on the school board to provide transportation, the liability was the school board's. The owner was not an independent contractor.

Because the owner was not an independent contractor, a master-servant relationship existed. It was shown in chapter IV,[2] that when a master-servant relationship exists,

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[1] 2 W.W.R. 409.

[2] Supra, pp.105-107.

the servant is under a duty to perform his duties with reasonable care and, if by a failure to exercise reasonable care, he is found to be negligent, he is also under a duty to indemnify the master for his negligence. This principle was illustrated in Sleeman v. Foothills School Division (Alta.)(1946):[1]

> A child was injured when the school bus in which he was travelling collided with a farm truck. Both drivers were found negligent, and damages for $5,539 were assessed equally against both drivers, the school board and the farmer who owned the truck. The school board was found liable as it had a statutory duty to provide transportation. The driver of the bus was not, in fact, liable for his act, but as he was negligent, it was held that the school board was entitled to receive compensation from him for any sums it was liable to pay. As he had professed to have the skill needed for the job, he should have performed it with reasonable care.

(b) Discretionary duties

If the transportation of students is left to the discretion of school boards, then they are under no legal obligation to provide transportation. Once they take up their option, however, they are under the same duty of care

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[1] 1 W.W.R. 145.

as if the duty were a mandatory one. This principle was illustrated when the facts and judgement of Shripton v. Hertfordshire County Council (U.K.) (1911) were cited.[1] The judgement of Lord Loreburn, L.C., is quoted again as it summarises the principle well:

> I agree with the learned counsel for the respondents that there was no duty or obligation whatsoever on the county council to provide for the carriage of this child, but if they did agree to do so, and did provide a vehicle, then it is clear to my mind that their duty was also to provide a reasonably safe mode of conveyance.

The Ontario case of Baldwin v. Lyons and Erin District High School Board (1961),[2] further illustrates this principle.

> The school board, since it was not under a statutory obligation to provide transportation, but had done so under its discretionary powers, argued that the bus owner was an independent contractor and, therefore, liable alone for the injuries suffered. The court, however, found that, because the school board and the principal often gave instructions to the bus contractor and his drivers regarding smoking and other regulations, he was not an independent contractor, but a servant of the school board. Liability was placed on the school board and the contractor.

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[1] Supra, p.53.

[2] Supra, p.88.

When vicarious liability was examined in chapter IV[1], it was shown that a master-servant relationship exists if the 'master' can tell the servant what to do, or if the 'master' can hire, pay and dismiss him. In The Baldwin Case, it was shown that the bus contractor received orders from the school board. A master-servant relationship, therefore, existed. Such a relationship seems to exist in all contracts between school boards and bus contractors. The school boards engage the contractors, they pay them and, if the contractor is in breach of his contract, they can terminate the contract. Within the terms of the contract, the school boards determine the number of buses that will operate, the routes to be taken, the schedule to be followed and even the number of occasions that the buses will run in a school year. It is doubtful, therefore, if a school board could ever escape liability for an injury suffered by a student due to the negligence of the driver, unless the contractor or his driver was acting flagrantly outside the scope of his contract.

School boards in Newfoundland do not have a mandatory duty to provide bus transportation. Section 3 of The Schools Act (Transportation of Pupils) Regulations, 1975, reads:

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[1] Supra, pp.88-89.

> ... the Minister may from monies voted for the purpose of education in schools ... allocate to a school board each year ... (a) ... ninety-five per cent of the cost to a school board of the transportation to and from a school of a pupil who resides more than one mile from that school ...

There is in Newfoundland, accordingly, what could be called a double discretionary power. First, a school board has to decide that it wishes to provide transportation for pupils who live more than a mile from a school and then make application for funds to the Minister; secondly, the Minister has the discretionary power to award the funds or refuse them. Once the funds are awarded and the buses provided, the duty on the school board is to take all reasonable care to protect the students, as if they were fulfilling a mandatory duty. This is the common law duty, but school boards in Newfoundland also have a statutory duty for the mechanical safety of school buses. Section 12 of The Schools Act (R.S.N.) 1970, states:

> Every School Board shall ... (m) where arrangements are made by it for the transportation of pupils, ensure that all vehicles engaged in carrying children to and from schools are in good mechanical condition and have adequate liability insurance.

The safety of the buses is further ensured by the statutory duty imposed on all bus owners to have their vehicles examined by an impartial and competent mechanic in April, August and December of each year.[1]

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[1] Section 26.2 of The Highway Traffic (Bus) Regulations, 1970, as amended 1973.

There is no legislation to prohibit a school board from transporting students in buses for which funding has been refused or from transporting students who live within one mile of the school. In such circumstances a similar duty of care will be owed to the students.

The cases examined in this section have illustrated the basis of liability when vehicles have been involved in accidents. A duty is also owed to protect students who travel in school buses from injuries resulting from occurrences other than road accidents. There are often rules which regulate the conduct of students on school buses. School boards and school principals occasionally enforce their own regulations. Since a school bus is, for all intents and purposes, an extension of the school, who is responsible for the supervision of the students while they are on the vehicle?

In New Brunswick, bus drivers have a statutory responsibility for the supervision of students. Section 152 of the Schools Act (R.S.N.B.) 1974, reads:

> (1) Every driver (a) shall be responsible for the care of school pupils while they are in a vehicle under his care; ... (c) shall report to the principal any misconduct ...

The responsibility for the loading and unloading of students, however, falls on the school personnel. Section 154 of the Schools Act (R.S.N.B.) 1974, reads:

> (1) The loading or unloading of a vehicle

> at a school shall be under the personal supervision of the principal or a staff member designated by him to act on his behalf. (2) A plan for loading and unloading on school grounds shall be prepared by the principal. (3) No driver shall back a vehicle on the school grounds when children are present except under supervision of the principal or a staff member designated.

No such duty is imposed by statute in Newfoundland. The Department of Education, however, has constructed a contract which it recommends for use by school boards and bus contractors. Twenty-five of the twenty-six school boards who replied to a questionnaire (Appendix F) indicated that they use the recommended contract. Clause 1(n) reads:

> (The contractor covenants) ... to take all necessary precautions for the safety of passengers entering, alighting from and being transported in any bus in the use of the transportation service.

Occasionally the by-laws of school boards vest authority in the drivers. Article 8(d) of the By-Laws of Notre Dame Integrated School Board states, "The bus driver shall be vested with complete authority by the Board for supervision of behaviour on his bus." The Humber-St.Barbe Roman Catholic School Board, under its regulation 'Pupil Behaviour on Buses', authorises the driver to report disciplinary problems to the principal who may take appropriate action. When the safety of the bus and its passengers is endangered, the driver may put older children

off the bus, but "even in such cases their safety and well-being must be taken into consideration."

Bus drivers, accordingly, seem to be responsible for the supervision of students on school buses. This does not excuse school boards from responsibility, for since the driver is a 'servant' of the bus contractor and the bus contractor is a 'servant' of the school board, the school board can be vicariously liable for the negligent acts of drivers.

Placing the responsibility for the supervision of students on bus drivers, appears to the writer to be an unsatisfactory position. Their prime responsibility should be to drive their buses safely. They should not have to distract their attention from the road to supervise students on their buses. Such actions can only impede the effectiveness of their prime responsibility. It would, however, be quite impractical for a teacher to travel on each school bus. The only alternative would appear to be to use senior students, where possible, as prefects.

Jacques v. Oxfordshire County Council (U.K.) (1968):[1]

> A fourteen-year old boy was hit in the eye by a paper or lead pellet. There were forty-two students on the bus under the supervision of two prefects. It was held that, bearing in mind the duty to make reasonable provision for

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[1] 66 L.G.R. 440.

the safety of schoolchildren, and that the standard of care is that of a reasonably prudent parent applying his mind to school life where there is a greater risk of sky-larking, it was not negligent to leave the supervision of secondary school children in the hands of prefects. Waller, J. said:

> What is the duty of the local authority in these circumstances? They owe a duty to see that the bus is reasonably safe and that includes a duty to see that it is reasonably safe for the children who are going on the bus including the provision of supervision if it is necessary ... So I come to the conclusion that ... it was perfectly reasonable on the part of the local education authority to leave the supervision of the bus to ... senior children appointed as bus prefects.

The prime concern of schools and school boards should be for the safety of students. The appointment of bus prefects might prevent dangerous sky-larking on school buses and should make the bus drivers' task easier. It would also indicate that school personnel had taken steps to arrange for the supervision of the students.

2. Taxis

There are occasions when students have to be sent home by taxi or when a taxi has to be hired to take a group of students to a school event. On such occasions, it would appear that the taxi owners are considered as independent contractors and that school authorities

would escape liability for any injuries caused by the negligence of the taxi drivers. Only one case could be found to illustrate this principle:

> Finbow v. Domino (Man.) (1957-8):[1]
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> Arrangements were made between the Association for Retarded Children in Winnipeg and a taxi company to transport certain children to and from school. Finbow, an eight-year old pupil, with the mental age of three and a half, was being taken home in the taxi accompanied by a teacher as supervisor. The boy was allowed to get out of the taxi at his home and to cross the street himself. He was struck by a truck and had a leg amputated. It was held that the two drivers and the companies they worked for were negligent. The Association, however, was found not liable. It had discharged its obligation by selecting a licenced and competent taxi company; it had arranged for a teacher to accompany the children; it had made the taxi company aware of its general and special responsibilities; its relationship to the taxi company was as an independent contractor.

It is unclear whether school authorities would escape liability if they used a taxi company on a regular basis in place of a school bus. Under The Schools Act (Transportation of Pupils) Regulations, 1975, a school board will not be subsidised by the Newfoundland government to provide a bus for less than twelve students. If a school

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[1] 23 W.W.R. 97.

board, in such circumstances, contracted with a taxi company to transport a small group of students on a regular basis, would there really be any difference between the roles of the taxi driver and a bus driver? Probably, the taxi driver would have to follow a schedule and a route. He would, in effect, lose the discretionary power normally associated with an independent contractor. The situation is unclear. It is suggested that school boards, in such circumstances, should seek further legal advice.

3. Private Cars

Teachers and parents are frequently called upon to transport students to sports and other school events.

If the students are gratuitous passengers and do not contribute in any way towards the cost of the journey, the driver will be liable only for injuries suffered as a result of his 'gross' negligence. Gross negligence can be defined as negligence of an extreme kind over and above ordinary negligence. It results from a breach of the law, such as speeding or drunken driving. If the car, while being driven carefully and within the speed limit, suddenly skidded, causing an injury, the driver would not be liable. Such an accident would not be foreseeable.

If the students are fare-paying passengers, then the driver is in the same position as a taxi driver, and he will be liable for any injuries suffered, regardless

of the degree of his negligence. The students, by becoming fare-paying passengers, assume the legal status of contractees, and have the right to expect not to be injured. It is accidents in this latter situation that can cause problems.

The conditions of the insurance policies of most private cars do not allow for fare-paying passengers. If a student is injured while being a fare-paying passenger, the driver will have to meet personally any charges for damages made against him. He can, however, purchase an endorsement clause to his policy allowing him to carry fare-paying passengers regularly or for specific journeys.

Unless an endorsement has been purchased, the normal terms of the insurance coverage will apply. There is a statutory exception, however. The Standard Automobile Policy Owners Form (1969) - Canada, under General Provisions Number 8, states that a vehicle will not be deemed to be used as a taxi or for compensation or hire when:

> (c)(v) The occasional or infrequent use by the insured of his automobile for the transportation of children to and from school or school activities conducted within the educational programme.

If a parent or teacher, therefore, helps with the transporting of students once or twice a year, he will be able to charge the students if he so wishes. If he takes a fare-paying student to school in his car everyday, however, he will not be covered by his insurance policy.

When there is uncertainty whether the journey will fall within the provisions of the statutory exception, car owners are advised to seek the advice of their insurance companies.

V. DEFENCES TO A CHARGE OF NEGLIGENCE

If a person is sued in tort for negligence, there are certain defences open to him. He may be able to show that there was no legal duty imposed upon him, or, if there was a legal duty, that he was not in breach of that duty. He may be able to show that the injured person freely participated in the action which caused the injury, so that the injury was his own fault. He may be able to claim that he had statutory protection and was, therefore, immune from liability. He may be able to show that his own liability should be diminished since the injured person contributed to the accident by his own negligence. Each of these defences will be examined.

1. No Legal Duty

School personnel have a legal duty towards those who are under their care. Students are deemed to be under the care of their teachers during normal school hours and during school sponsored events outside of school hours. Educational personnel are also vicariously responsible for students travelling on school buses.

Educators, therefore, can claim that they owe no

legal duty to students outside of school hours, unless they are participating in school sponsored activities. It has been seen that no duty is owed to students on school premises before school opens,[1] or off school premises,[2] unless the accident is a direct result of the negligence of a teacher.[3]

Normally no duty is owed to trespassers other than to warn them of known dangers.[4] If trespassers are tolerated, however, they assume the legal status of licensees and a duty of care is owed.[5]

School boards will not be liable if their employees flagrantly or maliciously abuse their powers and act outside the scope of their authority.[6]

Although school boards have a legal duty towards students on school buses, it would appear that they owe no duty of care towards those who travel by taxi.[7]

2. No Breach of Legal Duty

A careful examination of the cases cited in this and the preceeding chapter will show that, in the majority

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1 Scoffield v. Public School Board of North York (1942), supra, p.130.

2 Ritchie v. Gale & Vancouver Board of School Trustees (1934), supra, p.139.

3 Barnes v. Hampshire C.C. (1969), supra, p.132.

4 Storms v. Winnipeg School District #1 (1963), supra, p.158.

5 Lynch v. Brewers' Warehousing Co. (1974), supra, p.158.

6 Beauparlant v. Board of Appleby (1955), supra, p.95.

7 Finbow v. Domino (1957-8), supra, p.169.

of cases in which school personnel have escaped liability, the courts have been satisfied that the personnel responsible for the safety of the students have not been in breach of their legal duty. In this defence it must be shown that the care has been exercised which the law requires.

If school personnel can show that they have acted as 'reasonable and prudent parents' they may avoid liability. It has been shown that a reasonable parent would not forbid his child to partake in a team game;[1] neither would a reasonable parent be able to prevent occasional horse-play in the playground.[2]

Portelance v. Board of Trustees Roman Catholic Separate School of Grantham (Ont.) (1962):[3]

> Two twelve-year old boys, while playing a game at school, ran into a dense bush area adjoining the grounds and were blinded by sharp thorns. It was held by the trial judge that the school board was liable as it had failed to protect the pupils from the danger and to supervise their activities. On appeal, it was held that the school board was not liable. The Court of Appeal found that the pupils were in the same position as invitees. The duty to them was to

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1 Gard v. Duncan Board of School Trustees (1946), supra, p.60.

2 Newton v. Mayor and Corporation of West Ham (1963), supra, p.66; Clarke v. Monmouthshire County Council (1954), supra, p.67.

3 O.R. 365; 32 D.L.R. (2d) 337, (C. of A.).

> take reasonable care to prevent damage from any unusual danger which was or ought to have been known. Thorn bushes were not unusual and the area was known to the boys. They had been instructed to stay clear of the area. The supervision was found to be adequate. The duty was to provide only as much supervision as a reasonable and careful parent who would not have prevented the boys playing in the area.

If school personnel can show that their method of supervision has been effective for some time, they may escape liability. In Higgs and Higgs v. J.C.Hunt and Toronto Board of Education (1960),[1] the Supreme Court of Canada was satisfied that four teachers were adequate for playground supervision, since, inter alia, this was the method which had been used successfully for many years. In Adams v. Board of School Commissioners for Halifax (N.S.) (1951),[2] the court dismissed an action brought because a boy had been hit by a stone at recess. The learned judge said:

> There was no duty of continuous supervision over the pupils in the schoolyard. A basis for the Board's liability could be found only in the negligence of the principal when the system of supervision provided by him had been sufficient over many years and was that in use in other schools.

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1 Supra, p.72.

2 2 D.L.R. 816.

Two cases that went to the British Court of Appeal further illustrate this principle.

Jones v. London County Council (U.K.) (1932):[1]

> A student was injured while playing a game in the gymnasium. It was held that when a game has been played without serious accident for many years, it is not, by reason of its dangers, negligent to order a boy to play it.

Wright v. Cheshire County Council (U.K.) (1952):[2]

> After learning to vault a 'buck' with the teacher as catcher, students were then allowed and encouraged to catch each other. The practice was recommended by the Ministry of Education. When a boy was injured, the case against the school authorities was dismissed. It was held that what is reasonable in ordinary everyday affairs may well be answered by experience arising from practices adopted generally and followed successfully for many years.

If school personnel can show that they have adequately warned students of potential dangers they may be held to have fulfilled their duty.[3]

Provided reasonable care has been taken against all known and foreseeable dangers, and provided the students have not been allowed to partake in inherently dangerous activities, the defence of no breach of a legal duty is

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[1] 96 J.P. 371.

[2] 2 All E.R. 789.

[3] Schade v. Winnipeg School District #1 (1959), supra, p.69.

acceptable. Charlesworth has written:

> It is no part of the duty of a schoolmaster to foresee every act of stupidity that might take place, but at the same time it is necessary to strike a proper balance between too strict a supervision of children at every waking moment of their school life and the desirable object of encouraging the sturdy independence of children whilst they grow up, which, after all, is an important facet of their education.[1]

When he exonerated the defendant from blame for striking a fourteen-year old boy with a clod of earth while ragging about, Lord Goddard, in Camkin v. Bishop(1941) said:[2]

> If every master is to take precautions to see that there is never ragging or horseplay among his pupils, his school would indeed be too awful a place to contemplate.

3. Voluntary Assumption of Risk

The legal maxim volenti non fit iniuria - harm is not done to a willing person - applies when the plaintiff was a willing participant and he knew or ought to have known of the risk involved.

Students who partake in team sports are generally classed as voluntary participants in that they recognise that they risk injury. If a student was compelled, however,

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[1] Charlesworth, op.cit., p.195.

[2] 2 All E.R. 713, at p.716.

to represent his school in a team sport, and he was injured because of the negligence of a teacher, it is doubtful if the plea of volenti non fit iniuria would be acceptable.

The courts have recognised that the plea can sometimes apply to school activities in gymnasiums. In Butterworth v. Collegiate Institute Board of Ottawa (1940),[1] it was held, inter alia, that the injured pupil was sciens et volens - knowing and willing - when he injured his elbow while being supervised by two senior students.

To successfully use this defence, educational personnel will usually have to show that the injured student was well aware of the danger and that he had been warned of the risk.

> Smerkinich v. Newport Corporation (U.K.) (1912):[2]
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> A student asked permission to use a machine that had no guard. He was told to be careful. His thumb had to be amputated as a result of the accident. Volenti non fit iniuria was held to apply.

4. Immunity

Statutory immunity can either be absolute or governed by limitations of actions.

(a) Absolute immunity

In British Columbia no action for negligence may be

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[1] Supra, p.71.

[2] 76 J.P. 454.

brought against educational personnel for any injury sustained 'out of the operation of school patrols'.[1]

In Saskatchewan, no teacher will be liable for personal injury suffered by pupils, if the activity is approved or sponsored by the school board, the principal or the teacher.[2]

No such immunity exists in Newfoundland. In fact, section 32 of The Schools Act (R.S.N.) 1970, states, "(1) Every School Board is a corporation. (2) Any School Board may sue or be sued in the name of the School Board."

(b) Limitation of actions

The legislation often states a time limit within which actions must be brought before the courts. In British Columbia, no action may be brought against a school board twelve months 'after the date upon which a cause of action arises'.[3]

In Newfoundland, The Limitation of Actions (Personal) and Guarantees Act (R.S.N.) 1974, states in section 2:

> ... all actions for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force, shall be commenced and sued ... within two years after the cause of such action ...

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1 R.S.B.C. 1960, section 105.

2 The School Act 1966, section 242.

3 R.S.B.C. 1960, section 104(1).

Section 4 reads:

> If any person who is or shall be entitled to any such action or suit is, or shall be at the time of any such cause of action accrued, within the age of twenty-one years ... then such person may bring the same action, so as such person commences the same within such time after coming to or being of full age ...

In Newfoundland, therefore, all actions for damages must be brought within two years of the accident, except that persons under twenty-one years of age may bring the action within two years of attaining their majority.

5. Contributory Negligence

Until 1930, if it could be shown that the injured person had contributed to his injury through his own lack of reasonable care, his action for damages would fail. Since the introduction of contributory negligence acts, however, actions are not dismissed, but the damages are awarded in relationship to the degree of negligence of the various parties to the action. Contributory negligence, therefore, is not a defence as such, but it does, if proven, save the defendants financially. Salmond wrote, "Contributory negligence is not a complete bar to recovery, but the loss is apportioned between the parties according to their respective degrees of fault."[1]

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[1] Salmond, op.cit., p.55.

Section 2 of The Contributory Negligence Act (Nfld.) 1952, reads:

> Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault.

When an eighteen-year old deaf mute in the Alberta School for the Deaf injured his hand on a power saw which he had been shown how to use, he was held to have contributed forty per cent (40%) of the negligence.[1] The award he received, therefore, was forty per cent less than he would have received had he not contributed to the accident.

Contributory negligence is not an easy thing to prove. Although Phipson writes, " ... in civil actions the evidential burden may be satisfied by any species of evidence sufficient to raise a prima facie case,"[2] usually the onus is on the defendant to prove that the injured person had contributed to his own hurt. In The Thornton Case,[3] it was held that it was the defendants' duty to show contributory negligence, but that they had failed to do so.

It is especially difficult to prove the contributory negligence of young children. While writing on this topic,

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1 Dziwenka v. The Queen and Mapplebeck (1972), supra, p.5.

2 Phipson on Evidence, (London: Sweet & Maxwell, 11th ed., 1970), par. 103, p. 101.

3 Supra, p.5.

Salmond quotes at length[1] from the judgement of O'Byrne J., in Fleming v. Kerry County Council (Eire) (1959):[2]

> In the case of a child of tender years there must be some age up to which the child cannot be guilty of contributory negligence. In other words, there is some age up to which a child cannot be expected to take any precautions for his own safety. In cases where contributory negligence is alleged against a child, it is the duty of the trial judge to rule, in each particular case, whether the plaintiff, having regard to his age and mental development, may properly be expected to take some precautions for his own safety and consequently be capable of being guilty of contributory negligence. Having ruled in the affirmative, it becomes a question of fact for the jury, on the evidence, to determine whether he has fallen short of the standard which might reasonably be expected from him having regard to his age and development. In the case of an ordinary adult person the standard is what should be expected from a reasonable person. In the case of a child, the standard is what may reasonably be expected, having regard to the age and mental development of the child and the other circumstances of the case.

This principle is illustrated by Yachuk v. Oliver Blais Co. (U.K.) (1949):[3]

> A nine-year old boy obtained gasoline from the defendants by untruly stating the purpose for which he wanted it. It was held that the plea of contributory negligence had to fail as there was no evidence to show that he was aware of the peculiarly dangerous quality of gasoline.

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[1] Salmond, op.cit., pp. 340-341.

[2] Ir. Jur. Rep. 71, at p. 72.

[3] A.C. 386.

VI. PROTECTORY MEASURES

There are measures that school boards and school personnel can take to protect themselves against litigation. Such measures are attempts to prevent accidents, or, in the case of accidents, to offer protection against a charge of negligence. These measures take the form of rules, regulations and guidelines.

There are also measures that educators can take to insure themselves against any monetary charges for damages in the event that negligence is proven. These measures involve insurance policies and indemnity clauses.

1. Rules and Regulations

It has been shown that the duties imposed upon educators by statutes are rarely specific. Usually, the statutes do little more than inform the personnel that they have a duty. The terminology used is often vague and diffuse. In Newfoundland, for example, a school board has to arrange for 'proper' supervision,[1] and a principal has to arrange for 'regular' supervision.[2] The statute states what the duty is, but gives no suggestion of how it should be carried out. This is quite understandable, for what is 'proper' and 'regular' must be relative to the individual school board and individual school. But, in view of the

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[1] The Schools Act (R.S.N.) 1970, section 12(t).
[2] Ibid., section 80(2)(r).

rulings in many cases, especially Brost v. Tilley (1955)[1] and Beaumont v. Surrey County Council (1968),[2] it would be tempting fate for school boards and individual schools not to expand on the statutory duties. These two cases helped to define the measure of the 'adequacy' of supervision and showed that it has to be on a planned, organised basis and suggested that the ratio of supervisors to students must be such that all students can be overviewed at regular intervals.

School boards have a duty to see that school premises are kept in 'good order and condition'.[3] The statute, however, does not tell the school boards how thick the glass in schools should be, nor does it tell them how to keep the premises in a state of repair. The practicalities are left to the individual school boards. This is only right and proper, but the courts would look for proof that the school boards had made provisions to protect the safety of their students.

Accordingly, school boards and school principals are urged to construct rules and regulations designed to protect their students from injury. Accidents might happen, but by constructing such regulations, not only should educators be able to keep the accidents to a minimum, but

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1 Supra, p.65.

2 Supra, p.78.

3 The Schools Act (R.S.N.) 1970, section 12(a).

also they will be able to show that they have attempted to construct a regulatory system so as to exercise a standard of care towards their students as would reasonable and prudent parents.

It might be argued that school personnel are intelligent people with a sense of responsibility, and that the construction of specific regulations would be an insult to their intelligence. Suffice it to say that accidents do happen at school, that school personnel have been held to be negligent and that, in many cases, the regulations in force appeared at face value to be perfectly adequate. However intelligent the individual, he should not reject guidance when the safety of children is involved.

2. Insurance and Indemnity

It has been shown that the legislation occasionally authorises school boards to indemnify teachers for any financial sums placed upon them by the courts.[1] The bus contract recommended by the Department of Education in Newfoundland has a clause which indemnifies school boards from claims arising out of accidents on school buses. Article 1 of the recommended contract reads:

> The Contractor covenants with the Board ... (j) to indemnify and keep indemnified the Board from and against all claims and demands, actions, suits, and proceedings

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[1] R.S.B.C. 1960, section 104(5), supra, p.104.

> by any person, firm, company or other legal entity for or in respect of any injuries to persons or property arising out of the operation of any bus used in the transportation service ...

Clauses of indemnity only come into effect after the court proceedings have been completed. An educator, who must be indemnified, must first be found liable for negligence. After an award has been made against him, he can seek to recover the sum from the person or persons who have contracted to indemnify him.

Such a contract might be disputed. If a school board in Newfoundland ordered a driver to take his bus over a dangerous road in treacherous weather, the insurance company representing the bus contractor would undoubtedly dispute the indemnity clause if an accident resulted.

Those who do contract such clauses are recommended to insist that the person covenanting the clause purchases an insurance policy which will assume the liability contracted. Such a policy is usually known as a Contractual Liability Policy. Under this policy the indemnity will be met.

Insurance policies will not protect educators from liability if negligence is proven, but they will meet all financial charges up to and including the extent of the coverage. It has already been shown that some policies

can be tailor-made to meet the peculiar needs of the insuror. Such is the policy currently held by the N.T.A. on behalf of its members.[1]

Since an insurance policy is protection against financial charges that might be incurred, it is most advisable that policy holders, to ensure the fullest protection, should understand fully the conditions of each policy.

3. Protection in Newfoundland

(a) Rules and regulations.

A survey of school boards and school principals in Newfoundland suggests that much still needs to be done to construct adequate protectory measures.

Twenty-eight school boards replied to a questionnaire which asked whether they had specific regulations for the supervision of students (Appendix A). Sixty-eight per cent (68%) of these either had no regulations or merely re-iterated the duties expressed in statute. Most of the remainder were more specific in some areas, but probably not adequate overall. Since it is impossible to measure precisely the adequacy of such regulations, the criticism levelled can be no more than a subjective judgement at this juncture. As a guideline, the writer considered the

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[1] Supra, p.103.

cases reviewed in this and the preceeding chapter, and considered the terminology expressed in the by-laws examined. What appeared to be noticeably absent were specific instructions to principals and the lack of procedures for maintaining school buildings and premises.

Seventy-three per cent (73%) of the school principals who were surveyed replied to a questionnaire which asked whether their schools had specific regulations for the supervision of students (Appendix E). Of these, sixty-three per cent (63%) stated that their school boards did not have specific regulations, but sixty-nine per cent (69%) stated that their schools did. Of these, seventy per cent (70%) enclosed copies of their regulations. These regulations which, because of the low number of schools approached, cannot be taken as significant of the whole province, were illuminating nevertheless. Half of the regulations received could be considered as 'printed' material; the other half were handwritten regulations or copies of supervisory schedules. A third were concerned with discipline only, while the remainder were very general in nature. Examples read, "Teachers will supervise at recess", "Teachers will supervise the corridors". The regulations neither specified what teachers were to do while on supervision nor referred to any danger areas around the school.

The purpose of the questionnaires was not to show

the inadequacies of any individual school board or school, but rather it was an attempt to determine whether educators generally were aware of their legal duties and whether they had taken any steps which would indicate such an awareness. Undoubtedly, many are aware, and presumably instructions are given informally in many schools, but it is questionable if the steps taken would demonstrate to the satisfaction of the courts that adequate precautions had been taken to protect students from reasonably foreseeable accidents.

(b) Insurance and indemnity.

All the school boards in Newfoundland, who replied to a questionnaire regarding bus contracts, indicated that they include an indemnity clause in all their bus contracts[1] (Appendix F).

In Newfoundland, a mandatory duty is imposed upon school boards by statute to insure all buildings and equipment.[2] All twenty-six school boards who replied to a questionnaire on this point indicated that they carried such insurance (Appendix F).

A mandatory duty is also imposed on school boards to effect insurance indemnifying them 'against liability in respect of any claim for damages or personal injury'.[3]

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[1] Supra, pp.185-186.

[2] The Schools Act (R.S.N.) 1970, section 12(k).

[3] Ibid., section 12(l).

Two of the school boards indicated that they are in breach of this statutory duty. (This might be due to the fact that the duty was a discretionary one until 1974.) The insurance coverage carried by school boards varied from one hundred thousand dollars ($100,000) to two million dollars ($2,000,000) (Appendix F).

Nineteen of the school boards indicated that they carried general accident insurance. This is a useful type of insurance as it usually meets medical expenses when no negligence is involved (Appendix F).

There is no duty on schools to insure their students or to urge the students to insure themselves. Fifty-nine per cent (59%) of the principals questioned, however, indicated that insurance plans of this nature operated in their schools (Appendix E). In fifty per cent (50%) of the cases the students paid their own contributions; in the other instances, the school or the school board met the contributions.

VII. SUMMARY

An educator will be liable for any injury suffered as a result of his failure to exercise care towards his students as 'a reasonable and prudent parent'.

School boards have a statutory duty to see that supervision is provided and have the statutory authority to make by-laws and regulations to assist them in

fulfilling their duty.

School principals have the statutory responsibility of organising the supervision of students in their schools and on school related activities. They must organise the supervision in such a way that it is considered adequate in the eyes of the law. They must delegate duties on a planned, organised basis with instructions of what must be done by a teacher while on supervisory duty. They must also ensure that the ratio of teachers to students is such that all students may be overviewed at regular intervals.

A distinction has been made between the disciplinary and the protective roles of teachers. The legal duty of teachers is to protect their students from dangers of which they know or which they ought to reasonably foresee. When a teacher enters the employ of a school board he is contractually bound not only to carry out his statutory duties, but also those placed upon him by the regulations of his school board or his own school. When appointed to teach a class, the teacher is responsible for the safety of the students. The duty owed by teachers with special skill or training is probably higher than the ordinary if their skill or training enables them to instruct in potentially dangerous areas or to use potentially dangerous material.

School personnel are responsible for the safety

of their students during the hours in which they have a duty to provide supervision. The hours are those stated in statute or as extended by local regulations. This duty is absolute. Any injury suffered off school premises but during school hours will place liability on school personnel if the injury is a direct result of their negligence.

The duty owed to students on school excursions is high. Parental notes permitting the students to take part on excursions will not free school personnel from liability.

No duty is owed to pupils before or after school hours or at the completion of educational activities which take place outside the normal school hours, except that students must be warned of known dangers or hazards on school premises.

Educators have a duty to see that the premises, the facilities and the equipment in their schools are safe for the use of students and any others who might use them in the lawful execution of their educational roles.

Court cases examined indicate that bus contractors are employees of school boards. School boards, therefore, will be vicariously liable for any injuries suffered by students on school buses due to the negligence of

bus drivers. This liability will apply whether the school boards are fulfilling a mandatory duty to provide transportation or exercising their discretionary power to do so.

Taxi drivers are normally considered as independent contractors and school boards will escape liability for injuries sustained as a result of a taxi driver's negligence.

The owner of a private car who uses it to transport students infrequently or occasionally will be indemnified by his insurance company for any financial charges made as a result of injuries suffered due to his negligence, whether his passengers are fare-paying or not. But if he uses his car regularly to transport fare-paying students then he must purchase an endorsement to his insurance policy to cover such a use of his car.

A defendant, charged with negligence, will escape liability if he can show that he owes no legal duty to the injured person. He will also escape liability if he can show that he is not in breach of a legal duty. This can be done by illustrating that reasonable care has been exercised or that a similar standard of care has prevented accidents in the past or that adequate warning has been given to the students of the potential dangers. A defendant will escape liability if it can be shown that the injured person voluntarily and knowingly

participated in the event that caused the accident. The damages that a defendant might have to pay may be diminished if it can be shown that the plaintiff, by his own negligence, has contributed towards the injury.

In some provinces and under certain circumstances school personnel are granted statutory immunity from liability. Defendants can also escape liability if actions are not brought to law within a statutory time limit. Occasionally, school personnel are indemnified for any charges laid against them. Liability insurance protection will meet charges made on educators up to and including the amount of the policy.

Educators can do much to prevent accidents by constructing protectory measures governing the supervision of their students and the safety of their schools. Such measures are also means of indicating to the courts that the safety of the students is of prime importance.

CHAPTER VI

TEACHER TENURE

I. INTRODUCTION

Teacher tenure is a contentious issue which tends to polarise the thinking of those involved in education.

The advocates of teacher tenure consider that it improves the professional status of teachers and protects competent teachers from arbitrary dismissal. It is claimed that the resulting security leads to the ultimate benefit of the students. It is seen, therefore, as a means of improving education generally.

The critics of teacher tenure maintain that it strengthens teacher militancy and protects incompetent teachers and administrators, to the general detriment of education. It is frequently alleged that academic and moral standards in schools are declining and that an unsatisfactory return is received for the financial input to education. The blame is placed on the schools, and it is believed that there will be no improvement in the situation while the educators responsible can hide behind the cloak of tenure. But, Lang claims that " ... to eliminate tenure as a reaction to the thrust for school accountability is to make scapegoats of

teachers."[1]

Teacher tenure can indeed produce the results that both its advocates and its critics foresee, but the outcome depends upon the effectiveness of its procedures. 'Procedure' is the operative word. If the procedure is adequate and is effected correctly, competent teachers will be protected while the incompetent will be removed. It is when the procedure is misunderstood and effected badly that the incompetent may be protected. The procedure, and all that it encompasses, is found in tenure laws. William A. Hazard has written:

> Tenure laws set forth the terms and conditions by which the status is acquired, the causes for dismissal, the procedures required by the school board to dismiss or demote those teachers covered by the statutes, and the teachers' procedural rights.[2]

In this chapter, an examination will be made of the principles of law that govern teacher tenure. Reference will be made to statutes and to The Collective Agreement (Nfld.) 1975. Decisions of the courts and of boards of reference and arbitration that have interpreted the enacted legislation will also be examined. The format of the chapter will be that suggested by Hazard's statement. How

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[1] Theodore H. Lang, "Teacher Tenure As A Management Problem," Phi Delta Kappan, Vol LVI, No.7, March, 1975, p.460.

[2] William A. Hazard, "Tenure Laws in Theory and Practice," Phi Delta Kappan, Vol LVI, No.7, March, 1975, p.451.

tenure status is acquired, the causes for dismissal, the procedures for dismissal and the rights of teachers threatened with dismissal, will be reviewed. At the outset, however, it is necessary to define teacher tenure.

II. WHAT IS TEACHER TENURE?

Teacher tenure has been defined as:

> ... a set of rights, conveyed and protected by law, whereby a teacher cannot be dismissed from his position except under procedures laid down by statute. 'Tenure teacher' means one who lawfully enjoys such rights, one who therefore can be said to possess 'tenure status'.[1]

A tenure law has been defined as:

> ... one which (a) provides for continuing employment of teachers, who under its terms have acquired permanent, tenure, or continuing contract status; and (b) requires boards to comply with prescribed procedural provisions of notice, statement of charges, and right to a hearing before a tenure teacher can be dismissed, or before nonrenewal of the teacher's contract of employment can be effective.[2]

Two points in these definitions need emphasising. First, tenure is the result of a legal enactment which not only creates it, but also protects it. Second, the definitions make no reference to the causes for dismissal, only to the procedures as laid down by law. There may

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[1] J.F. Swan as cited by McCurdy, supra, p.35.

[2] N.E.A. Research Bulletin, Vol.38, 1960, p.81.

be a sufficient ground for dismissing a teacher, but the correct procedure must be followed if the dismissal is to be supported at law. The enactment of tenure laws does not prohibit school boards from dismissing inefficient teachers, but rather, through a statement of the procedures, it affords to employers the means by which they can lawfully dismiss teachers. Tenure laws, consequently, specify the reasons for dismissal and the method of making dismissal effective. Garber sums up the position well when he writes:

> (The purpose of tenure is) ... to protect competent and qualified teachers in the security of their positions during good behaviour, and to protect them, after they have undergone a probationary period, against removal for unfounded, flimsy, or political reasons.[1]

Tenure, therefore, can be defined as a position of permanent employment which cannot be terminated without following the procedures laid down by law.

III. THE ACQUISITION OF TENURE

An important distinction, made by Garber, is that tenure rights accrue to teachers 'after they have undergone a probationary period'.[2] The probationary period is stated in the relevant statutes or agreements and until a teacher has completed this period he does not enjoy

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[1] Lee O. Garber, The Yearbook of School Law, 1964.

[2] Ibid.

tenure status.

The period of probation varies in time, usually from one to three years. In Britain, the period of probationary service of a teacher is one year if he has completed a course of teacher training, and two years if he has not completed the training.[1] In Saskatchewan, the period is two complete and consecutive academic years, or four complete and consecutive terms, or a period in which the teacher has received the equivalent of two years' salary.[2] Teachers in Prince Edward Island have recently attained tenure status for the first time.

> All teachers in P.E.I. are presently concluding a third consecutive probationary year with the Five Regional Administrative Boards. As of April 31st. 1975 teachers who are recommended will receive a P.E.I. Contract B. This contract is a tenure contract.[3]

In Newfoundland, The Schools Act (R.S.N.) 1970, reads:[4]

> Section 77(a) ... the contract of employment of a teacher who has previously taught for more than one year may be terminated ... during his first year of employment with that School Board, by ...
>
> (b) ... the contract of employment of a teacher whose

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1 Schools Regulation 1959 (incorporating 1968 amendments), schedule 11.2(a).

2 The Teacher Tenure Act (R.S.S.) 1965, section 3(1)(a)(b)(c).

3 Letter from General Secretary, Prince Edward Island Teachers' Federation, February 11, 1975.

4 Sections 75-78 of The Schools Act (R.S.N.) 1970 were repealed May 21, 1974 (Act No.28).

> employment with the School Board as a teacher is his first employment as a teacher may be terminated ... during his first two years ...

The present position in Newfoundland is governed by Article 7 of The Collective Agreement 1975, entitled, Probationary Period and Tenure:

> 7.01 Subject to .02 and .03, teachers who have no previous teaching experience in the province or teachers who have never been tenured with a School Board will be hired on a probationary contract until they have completed two years' service with the same School Board.
>
> 7.02 A teacher who previously was a tenured teacher with a School Board and who subsequently is hired by another School Board may be required by the new Board to enter into a probationary period of one year or may have the probationary period waived by that Board.
>
> 7.03 Subject to .05, a teacher who successfully completes his probationary period and then enters into continuous employment with the same School Board shall be deemed to have a continuing contract and tenure as a teacher with that Board.
>
> 7.04 A teacher who has entered into a continuing contract with a School Board but who subsequently leaves the teaching profession for a period in excess of five years and does not work in a professional field related to education, may, if he returns to the profession, be required by the Board to enter into a probationary period of one year or may have the probationary period waived by the Board.
>
> 7.05 Subject to .06, a Board shall not enter into a Contract other than a probationary contract with a teacher who does not hold a certificate of grade.
>
> 7.06 The provisions of Clause .05 of this Article do not apply to any teacher whose licence was issued prior to April 1, 1975, and who was under contract as of that date.

It will be noticed that the terms of The Collective Agreement, 1975, do not diminish or increase the period of probation from that stated in The Schools Act (R.S.N.) 1970. Since this section of The Schools Act has now been repealed, future collective agreements could create new time periods. However, in jurisdictions where the terms of collective agreements or other forms of contracts conflict with statutory dicta, it would appear that the statutory regulations prevail.

> Cormier v. Board of School Trustees District 19, (N.B.)(1974):[1]
> The collective agreement provided for a two-year probationary period. It was held by the New Brunswick Court of Appeal that the three-year statutory period could not be waived or varied by the collective agreement because the probationary period was for the benefit of the school children and the public educational system.

Basically the courts have held that tenure accrues to a person who has the status of being under a permanent contract. Conversely, a person who does not have a permanent contract does not enjoy tenure rights. This point is well illustrated in the case of MacLeod v. Dominion (Town) School Commissioners (N.S.)(1958):[2]

> MacLeod was appointed by letter on a one year's trial basis. There was no contract

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[1] 8 N.B.R. (2d.) 330, (C. of A.).
[2] 16 D.L.R. (2d.) 587.

between her and the school board. In February, she received a stencilled letter that had been sent to all the teachers in the district asking them to advise the school board if they intended to resign at the end of the school year. She replied, in writing, indicating her desire to continue in the school board's employ. In May, she was advised that her services would not be required after the end of the term. Under the Nova Scotia Education Act, notice had to be given by March 31st to those under contract. MacLeod sued for unlawful dismissal. The court held that she had no claim as she had no contract. The judge said:

> The question is as to the right of the plaintiff to recover damages for breach of a contract that was not made, and I must hold that the plaintiff has no such right.

The courts have held, however, that the length of the service rendered by the teacher can imply tenure even if no contract exists.

Commissionaires d'Ecole d'Outremont v. Chicoine (Que.):[1]

Chicoine had a certificate issued by the Superintendent of Public Education for the Province of Quebec. He served in a school as the physical education teacher from 1928 - 1936. During the period 1936 - 1948 the subject was discontinued. In 1948 he was re-engaged by letter. In September 1949, when he reported for work, he was told that another person had been

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[1] (1954) R.L. 376.

engaged. He sued for his salary in lieu of notice. The Commission claimed that he was not a certified teacher and that there was no contract of employment. The Quebec Court of Appeal found for the teacher both on the question of certification and of tenure. Article 68 of The Education Act (R.S.Q.) 1941, recognised diplomas obtained 'in virtue of some provision of this Act'. There was a provision for the Superintendent of Public Instruction to issue certificates. The court held that the exchange of letters was equivalent to a contract, and, in any case, it was the duty of the Commission to provide a written contract and, if it had not done so, it could not blame the teacher. Chicoine, therefore, had tenure and was entitled to recover his salary.

The courts have also held that statutes can have a retroactive effect, if that clearly was the intention of the statute.

re Walker and West Hants Municipal School Board (N.S.)(1974):[1]

Walker, who did not have a written contract, received a letter from his school board on March 22nd. 1972, which stated that, " ... it has been decided to terminate your contract ..." No reason was given apart from the need for " ... some changes (to) take place in the arranging for teaching personnel." Walker had taught for the school board for five years.

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[1] 42 D.L.R. (3d.) 105.

On May 15th. 1972 revisions to the Education Act received royal assent. The revisions stated that 'permanent contract' applied, inter alia, to those who had been employed by a school board for two or more years and that the termination of a permanent contract had to be for 'just cause'. The Appeal (Arbitration) Board found that the provisions did not apply to Walker as his services had been terminated prior to the act receiving royal assent. The Supreme Court of Nova Scotia granted a writ of certiorari to quash the decision of the appeal board, finding that Walker did have a permanent contract and that he could only be dismissed for just cause. The Appeal Division of The Supreme Court concurred. Cooper, J.A. said:

> It was submitted that so to interpret s-s (16) and (18) would result in giving the legislation retroactive effect. Whilst the general rule is that statutes are to be construed as having prospective operation only, if the words used clearly indicate a retroactive operation they will be given effect to as expressing the intention of the legislature.

The status of being in permanent employment, therefore, can be expressly stated in a contract or letter of appointment, or expressly understood as a result of enacted legislation, or stated in the provisions of collective agreements, or implied through regular and continuous employment. It is not the duty of a teacher to insist upon a written contract.

IV. CAUSES FOR DISMISSAL

The statutes and/or collective agreements state specific reasons for dismissals or terminations of contracts. In addition they often include an 'open' clause, which can be distinguished by such phrases as 'adequate reason','such other cause', and 'any similar just cause'.

1. Specific Reasons

Examples of the causes for dismissal from Saskatchewan, British Columbia and Newfoundland will illustrate that there is little difference in the specific reasons between the various jurisdictions.

The Teacher Tenure Act(R.S.S.) 1965, reads:

> Section 4. (1) A notice of termination of contract given by a school board to a teacher shall be in form A and shall state the reasons for the board's action which may include professional incompetency, neglect of duty, unprofessional conduct, immorality, physical or mental disability and such other cause as in the opinion of the school board renders the teacher unsuitable for teaching service in the position then held by him.

The Public Schools Act (R.S.B.C.) 1974, reads:

> Section 130 (1) A Board may at any time suspend a teacher from the performance of his duties (a) for misconduct, neglect of duty, or refusal or neglect to obey a lawful order of the Board; or (b) where the teacher has been charged with a criminal offence and, in the opinion of the Board, the circumstances thereby created render it inadvisable for him to continue his duties.

Terminations of teachers' contracts in Newfoundland are governed solely by The Collective Agreement 1975.

> Article 12.01 A contract of employment made between a School Board and a teacher may be terminated: ...
> (c) with thirty days' notice in writing ... that the teacher is incompetent;
> (d) without notice ... when the certificate of grade or licence ... has been suspended or cancelled;
> (e) without notice ... when there is gross misconduct, insubordination or neglect of duty on the part of the teacher, or any similar just cause;
> (f) without notice ... when the teacher refuses to undergo a medical examination ...
>
> Article 9.01 For the purpose of this Agreement "lay-off" means the termination of a teacher's contract because his position has become redundant ...
>
> 9.02 No teacher shall be laid off until the School Board has determined that the teacher cannot be accommodated elsewhere within its jurisdiction.

Unless the legislation or agreement contains such phrases as 'any similar just cause' or 'an adequate reason', the courts have held that a teacher cannot be dismissed for a cause not covered in the legislation. An excellent illustration is the case of Price v. Sunderland Corporation (U.K.)(1956):[1]

> The local association of the National Association of Schoolmasters decided that its members should no longer collect meal money, which they had previously done voluntarily. Section 49 of the Education

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[1] 3 All E.R. 153, (Q.B.D.).

> Act 1944, empowered the Ministry of Education to make regulations for the provision of meals " ... so, however, that such regulations shall not impose upon teachers ... duties in respect of meals other than the supervision of pupils ... " The Sunderland Borough Council said that collection of money was a term of the employment of teachers. Five teachers were dismissed for refusing to collect monies. It was held that the action of the Corporation was ultra vires - beyond its statutory power - and the teachers were reinstated.

The judgement of Mr. Justice Barry in this case indicates clearly the respective roles and limitations of the courts and statutory bodies. He said:

> It has long been held that the courts will not inquire into or interfere with the decisions and actions of local authorities and other statutory bodies so long as their decisions are reached bona fide and within their statutory powers ... A local authority or any statutory body cannot either employ or dismiss servants except under statutory authority: their powers are derived from the statute or statutes under which they are created. And it is a very well-known principle of law that statutory powers can only be exercised for the purpose for which they are granted ... The burden rests on those who call into question any decision of a local authority, and it is a heavy burden ... It cannot be within the powers of the local authority to resolve to take an action which the Act of Parliament under which their powers are derived clearly prohibits.

Article 12.01(e) of The Collective Agreement 1975, allows for the termination of a teacher's contract, without notice, for 'insubordination or neglect of duty'. The Price Case[1] demonstrates that teachers cannot be ordered to perform duties that are outside the authority of their employers, or their agents, to give. School boards and principals, therefore, have to be certain that any orders they give are within the scope of their authority, although, as Mr. Justice Barry stated, the burden of proving the illegality of any order will fall on the complaining teacher.

A teacher, however, has little or no recourse if he refuses to perform duties that fall within the terms of his employment. Batt has written:

> The first duty of the servant is to obey those orders which the master is justified in giving under the terms of the agreement; all orders concerning the work which the servant is to do and the time, manner, and place of performing it are presumably, and in the absence of special circumstances, within the control of the master.[2]

Halsbury wrote:

> Wilful disobedience to the lawful and reasonable order of the master justifies summary dismissal.[3]

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[1] Supra, p.206.

[2] Batt, Law of Master and Servant, 4th.ed., 1950, p.154.

[3] 25 Halsbury, 3rd. ed., p.485, para. 933.

One British and two Canadian cases illustrate that the influence of outside agencies, such as teachers' associations or unions, cannot supercede the legitimate orders of school authorities.

Gorse v. Durham County Council (U.K.)(1971):[1]

> On the orders of his union, The National Union of Teachers, a British teacher refused to supervise school meals during the collective bargaining process. The County Council warned all teachers that this duty formed part of their contract. The Council deducted the pay of teachers who refused the duty. Gorse claimed that, as he had not been dismissed, the loss of earnings only constituted suspension. As all duties had been resumed after three and a half days and he had been paid thereafter, he had accordingly the status of a reinstated teacher. His contract specifically stated that if a teacher was reinstated following suspension, he was entitled to recover all salary lost during the suspension. Gorse was, therefore, suing for the salary deducted by the Council. It was held that (i) the County Council had the authority to require teachers to supervise meals and therefore any refusal amounted to a direct repudiation of the contract which the County Council could accept if they so wished, (ii) as they had paid the

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[1] All E.R. Vol.2 666, (Q.B.D.).

> teacher his normal salary after the duties were resumed, they had only suspended him, (iii) the plaintiff was entitled to his salary.

The important point to note in this case is that, if they had so wished, the Council could have dismissed the teacher.

In Winnipeg School Division No 1 v. Winnipeg Teachers' Association No 1 of Manitoba Teachers' Society and Manitoba Teachers' Society (Man.)(1973),[1] it was held that, since the teachers had withdrawn their supervisory duties at the noon-hour, which were both statutory and contractual duties, they were liable to meet the cost of hiring additional supervisory personnel to do their work.

Broadview School Board v. Saskatchewan Teachers' Federation (Sask.)(1973):[2]

> It was held that teacher representatives were justified in counselling and inducing other teachers to withdraw their services during an official strike. The teachers did not induce others to break their contracts, as the teachers had already decided on strike action. The strike was lawful and was motivated solely by a desire to forward their position.

The implication of this case is that, if the strike

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[1] For the full facts of this case see supra, p.119.

[2] 1 W.W.R. 152.

had not been lawful, the withdrawal of services could have amounted to a breach of contract.

A long and involved series of Saskatchewan cases, which began in 1971 and ended in 1973, further illustrate the protection that the courts give to teachers when they are dismissed for causes not stated in statute.

> Placsko v. Board of Humboldt School Unit No 47 of Saskatchewan (1971):[1]
>
> The Teacher Tenure Act 1965, Section 4(1),[2] states the reasons whereby a teacher's contract can be terminated. There is no mention of redundancy. The School Act (R.S.S.), section 237(1), on Dismissal of Teachers, begins, 'Subject to The Teacher Tenure Act ...' In this case, Mrs. Placsko, who had tenure, was given notice, under section 237(1), that her contract was being terminated due to the necessity of reducing the number of teachers in the school board's employ as the result of a government order. She sued for reinstatement or damages since her termination was outside the scope of section 4(1) of The Teacher Tenure Act. The Saskatchewan Court of Queen's Bench found that her contract had been unjustly terminated without cause. As there was no statutory provision, the termination was null and void and she was still in the

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1 22 D.L.R. (3d) 663.

2 Supra, p.205.

> employ of the school board and entitled to her salary. The Court of Appeal confirmed this finding and awarded her six months' salary. The school board, at first, refused to pay, but a further order of the Court of Appeal in 1972 ensured that Mrs. Placsko received her compensation.

During the same period, nine other teachers, laid-off at the same time as Mrs. Placsko as a result of the government order, were reinstated by the courts with full salary entitlement, less salary earned from employment during the period in question.

> As a result of her reinstatement Mrs. Placsko was employed by the school board for a short time. Her contract was then terminated under section 237(2) of The School Act, which read:
>
> > A board may terminate its agreement with a teacher ... by giving the teacher not less than thirty days' notice in writing with its intention to do so; but in such case the reason for the board's action shall be set forth in the notice.
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> It will be noticed that this section does not begin, 'Subject to The Teacher Tenure Act ...' The school board gave redundancy as the reason; the court accepted this reason and upheld the termination. The Court of Appeal concurred with this finding.[1]

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[1] (1973) C.C.L. 572.

As a result of the original case and those of the other nine teachers, section 237(2A) was added to The School Act (R.S.S.) 1965. It reads:

> Notwithstanding anything in The Teacher Tenure Act, where a teacher to whom The Teacher Tenure Act applies occupies a teaching position that is no longer necessary for the teaching requirements or programs in a district, the board may terminate its agreement with the teacher ...

2. Other Reasons

Legislation often provides for dismissals on grounds other than those specifically mentioned, but such dismissals must state 'adequate' reasons. Such a provision is stated in The Collective Agreement 1975:

> Article 12.01 A contract of employment ... may be terminated:
>
> (a) by giving three months' notice in writing by the School Board (or pay in lieu of notice), if the contract is to be terminated during the school year and two months' notice in writing (or pay in lieu of notice), if it is to be terminated at the end of the school year, provided an adequate reason for termination is stated by the School Board in writing, and the contract is a continuous one;

Two cases illustrate the importance of giving reasons that are adequate.

> Belanger v. Commissaires d'Ecoles pour Municipalité Scolaire de St. Gervais (Que.)(1970):[1]
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> A Quebec teacher was dismissed without reason. A 1963 Quebec statute states that if a teacher has served two years with a board, he is

[1] S.C.R. 948.

entitled, after he has sent a written personal request, to a reason for his dismissal. Belanger asked for a reason for her dismissal, was unsatisfied with it, and took her case to arbitration. The Board of Arbitration ruled in her favour. The Supreme Court of Canada supported the ruling and held that the action of the school board, being without due cause, was null and void. The teacher was, therefore, still in its employ and entitled to her salary.

Mahoney v. Newcastle Board of School Trustees (N.B.)[1]

Mahoney, who had been teaching for nine years, being pregnant, arranged for a supply teacher, who was fully licenced and qualified, to take her place. She advised the school board of her actions. The school board requested her to apply for sick leave and said that it would engage a supply teacher. It then found out that she had accumulated sick leave entitlements in excess of the amount required and refused her application for sick leave. It also advised her that she would be replaced. After her confinement, she reported for work but was refused. The trial judge held that her dismissal was unlawful as no reason had been given. Section 63A (7) of the Schools Act was imperative. It read, " ... shall not terminate the contract except in accordance with this Act and the School Trustees' and Teachers' Board of Reference Act." He held that she was entitled to an action for damages only, since the dismissal, being on terms not

[1] (1967) 61 D.L.R. (2d.) 77.

provided for in the contract, effectively terminated the contract. West, J.A. of The Appeal Division of The Supreme Court of New Brunswick, however, said, on appeal:

> I take it to be a question of law that where a board acts improperly but within its jurisdiction, the notice or decision is voidable only, but where it acts without jurisdiction, its action is void. In my opinion, the board, in giving the so-called notice of termination in this case, acted wholly without jurisdiction, and also in a manner which offended the rules of natural justice, as well as arbitrarily ... The board is a creature of statute and one must look to the statute or statutes for the authority of the board.

He ordered that the teacher was to be paid full remuneration. (If she had not already resigned from the board and found another post, she would probably have been reinstated also.)

An interesting problem is presented when teachers are expelled or suspended from their teachers' associations. Would such an action constitute an adequate reason for the termination of a contract? There is no consistent ruling throughout the provinces. British Columbia considers that it would be a sufficient cause and makes it a specific reason for termination in its legislation. Saskatchewan considers unprofessional conduct sufficient cause to legislate for it specifically. Newfoundland is not specific in this area.

Public Schools Act (R.S.B.C.) 1960:

> Section 144 (1)(b) ... a teacher shall be, or immediately become, a member of the British Columbia Teachers' Federation, and it shall be a condition of his employment that he be and continue to be a member.
>
> Section 146 (1) The executive committee of the British Columbia Teachers' Federation may suspend or expel a teacher from membership in the British Columbia Teachers' Federation, and no person so suspended or expelled shall be employed as a teacher in any public school until he has been reinstated as a member ...
>
> (4) Where the Board so determines, a suspension or expulsion shall not have the effect of terminating employment in a school before a date to be fixed by the Board; but the date shall not be later than the end of the current school year.

The Teacher Tenure Act(Saskatchewan) 1965:

> Section 4(1) A notice of termination ... may include ... unprofessional conduct.

Although The Collective Agreement 1975, does not specifically cover this topic, The Newfoundland Teachers' Association Act 1974, provides for the establishment of a Disciplinary Committee under section 16(1). The section continues:

> Section 16(9) Upon receiving a written complaint that any active or other member of the Association is guilty of unprofessional conduct, negligence or misconduct or has been convicted of a criminal offence by a court of a competent jurisdiction ...
>
> (13) If a complaint referred to in sub-section (9) ... is proven to its satisfaction the Disciplinary Committee may, ... recommend in writing to the Executive that the member be
>
> (a) reprimanded,
> (b) censured,
> (c) suspended from membership, or
> (d) expelled from membership, and

> the Executive may, ... take any one or more of the actions recommended by the Disciplinary Committee.

A member of the N.T.A., therefore, may be expelled from membership, but this does not necessitate his losing his job. Section 16(23) of The N.T.A. Act 1974, states:

> A reprimand, censure, suspension or expulsion made under this section does not, of itself, affect the competency of the person affected by such reprimand, censure, suspension or expulsion to continue or resume his employment as a teacher.

A school board, however, might consider that the causes leading up to the disciplining of a teacher would constitute an adequate reason for termination of contract. Furthermore, it might be hypothesised that a school board would be acting unethically if it continued in its employ, or engaged, a teacher suspended or expelled from his own association. As it is doubtful if the N.T.A. would so punish a teacher unless the action which warranted the punishment was directly related to his job suitability or to his association membership, the courts would probably support any dismissal by a school board as being within the terms of Article 10.01 of The Collective Agreement 1975, which states, " ... no teacher shall be suspended, dismissed or otherwise disciplined except for just cause."

3. Transfer and Demotion

It is necessary at this stage to consider the position of those who are transferred or demoted. When a person is engaged as a teacher in school X, does a transfer to school Y constitute termination of his original contract? When a person is engaged by a school board as a principal, is his contract terminated if he is demoted to a teaching position?

The position of the courts seems to be that, since a contract is between the school board and the teacher, what the school board does with the teacher is its own concern. The teacher does not have tenure as a principal or with a particular school. The tenure is with the school board, and it is as a teacher. McCurdy found that, under the Alberta legislation, while termination of a teacher's contract also terminated his designation, termination of his designation did not terminate his contract as a teacher. Furthermore, he found that in both Alberta and British Columbia, termination of designation was not subject to appeal to a board of reference.[1]

Two cases illustrate that teachers do not lose their status as teachers on being appointed to administrative positions.

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[1] McCurdy, op.cit., p.159.

Reilly v. Protestant School Commissioners of Lachine (Que.)(1930):[1]

It was held that a school teacher who had been promoted to the principalship of a high school and then to the position of Superintendent of Schools had not ceased to be a school teacher merely because he had ceased to have classes.

re Clarke and The Board of Education of Toronto (1947):[2]

Clarke, who had been teaching for the board for thirty-three years, was demoted from the post of principal. The Board of Reference found that his demotion did not constitute dismissal and therefore the provisions of the Teachers' Board of Reference Act had not been contravened. The Ontario Court of Appeal confirmed the decision. Clarke had argued that, as he did no teaching, he was not only demoted but dismissed unjustly from the job he held. Of interest is the comment of the judge who stated that, if Clarke was not a teacher because he did no teaching, then the Board of Reference Act did not apply to him as it dealt only with teachers.

There is no distinction made in Newfoundland between the designation of teachers and that of school administrators either in The Schools Act or in The Collective Agreement 1975. The Schools Act (R.S.N.) 1970, defines teacher as:

Section 2(ff) "teacher" means a person holding a certificate of grade as

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[1] 3 Q.P.R. 265.

[2] O.W.N. 878, (C.A.).

> defined by paragraph (f) of this Section 2 and is deemed to include emergency supply but does not include a Superintendent or an Assistant District Superintendent.
>
> Section 2(f) "certificate of grade" includes a licence to teach issued under ... authority.

All principals, vice-principals and department heads, therefore, are teachers within the definition of the Act.

School administrators, accordingly, have no legal status as such, and their positions are not protected by statute. The question that has to be resolved is whether they are protected by other means or whether school boards can demote or transfer their employees arbitrarily.

> Gill v. Leyton Corporation (U.K.) (1933):[1]
>
> Gill, who was headmaster of a school, was charged in court and found guilty of administering excessive corporal punishment. On appeal, his conviction was quashed and he was awarded all his costs.
> The local education authority first suspended him and then offered him a subordinate position. When he appealed, it was held that, as the education authority had not acted in bad faith or maliciously, the courts would not interfere with the authority's ruling.

The important aspect of this case is that, although Gill was innocent in the eyes of the law, the education authority had the power to discipline him, provided it

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[1] "Education," April 14th. 1933, (K.B.D.).

acted in good faith and without malice. The education authority had shown that his demotion was in the best interests of the school. His competency, therefore, was measured in relation to his administrative role. A decision of the courts of the United States illustrates this principle further.

> Rathe v. Jefferson Parish School Board (U.S.)(1944):[1]
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> The Louisiana Supreme Court held that a principal can be demoted to the position of classroom teacher if it can be shown that he is lacking in qualifications to perform the administrative and executive work. His incompetency as a leader, however, must be shown.

The courts, therefore, will protect educators against malicious or unreasonable acts of their employers. The provisions of collective agreements can offer further protection.

Whereas section 77(k)[2] of The Schools Act (R.S.N.) 1970, permitted school boards to transfer teachers arbitrarily within their districts, from one position to another, and such transfers could not be interpreted as terminations of contracts, The Collective Agreement 1975, limits the power of school boards in this area.

> Article 13.01 A teacher may be transferred to a comparable position within the same

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[1] 206, La., 317; 19 So., 2d. 153.

[2] Repealed, May 1974.

> community when it is deemed necessary but shall not be transferred from one community to another without his consent.

The transfer must be within the same community. The Board of Arbitration in The Violet Case 1975, found that a transfer outside a community in which a teacher lived and worked to another community some miles away, but in the same school district, was in breach of this Article.

The transfer must also be a lateral one, 'to a comparable position'. This provision, therefore, prohibits demotion. The courts have held that a transfer is acceptable provided it is not in breach of any statutory or contractual provision and provided there is no element of removal or lowering of professional standing or any reduction of salary. In brief, there must be no suggestion of a 'blot' on the character of the teacher. But, does not a demotion constitute a lowering of the teacher's professional standing, even if there is no reduction in salary?

> Taylor v. Kent County Council (U.K.)(1969):[1]
>
> Taylor had for ten years been headmaster of a Secondary School for Boys when the education authority decided that it should be amalgamated with the Girls' School. The Boys' School as such ceased to exist and Taylor's appointment was terminated. He was not chosen as head-master of the new school, but was offered, in

[1] 67 L.G.R. 483, (Q.B.D.).

> writing, a post, at a safeguarded headmaster's salary, in the mobile pool of teachers, which he refused. As a teacher in the mobile pool he would be required to serve in schools in the County for short periods, and to undertake duties assigned to him by the headmasters of the schools to which he was sent. It was held that this was not suitable alternative employment and that Taylor's age, qualifications and experience negated the suitability of the offer, even at the same salary as before, as it required him to go to any place in the County and to undertake any duties assigned to him. In the words of the Lord Chief Justice of England:
>
> > This man was being asked to do something utterly different: as I have said, just as if a director under a service agreement was being asked to do a workman's job albeit at the same salary.

A teacher, therefore, cannot be transferred or demoted arbitrarily. In both instances adequate reasons must be given, and, in Newfoundland, under Article 10.01 of The Collective Agreement 1975, 'just cause' must be shown for any dismissal, termination or other disciplinary action. If a teacher feels that his new position is not comparable to his old or that the school board has acted maliciously or that any other clause of The Collective Agreement has been violated, he can grieve the action. The fact that he has not been dismissed by the school board is not, in itself, a bar to grievance. Article 33.01

of The Collective Agreement 1975, states:

> A grievance means a dispute over the interpretation, application, administration or alleged violation of any Article or clause in this Collective Agreement.

Due to the paucity of Canadian cases, another decision from the courts of the United States is cited to illustrate the principle.

Blair et al. v. Mayo et al (U.S.)(1970):[1]

> Mayo, who had served for nine years as a teacher and for three years as a principal, was demoted to the position of classroom teacher. Harris, who had served for eighteen years as a teacher and for two years as the assistant principal, was demoted to the post of basketball coach. The Supreme Court of Tennessee found for the teachers. As both had been summarily demoted without any reasons given, the demotions constituted dismissals from their existing positions and violated their rights under the Tennessee Teachers' Tenure Act.

A Board of Reference case in Newfoundland needs examination. It has been named The Orange Case 1974.

> The grievant contested the decision of his school board to transfer him, after three years employment, from the position of subject director with the board and part-time teacher in the subject, to a position as full-time teacher with a school. He contested that the 'transfer', given under section 77(k) of The Schools Act,[2]

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[1] 450 S.W. 2d. 582.

[2] Supra, p.221.

was not a transfer but a termination of contract with an option of accepting an inferior position. He claimed that the school board's action was illegal and that, if justifiable, it should have come under section 77(f) of The Schools Act, which provided for 'any case not specifically provided for'. The school board claimed that it was acting in the best interests of all concerned and was transferring the teacher because of the redundancy of his former position as subject director. This position it had created itself and funded over and above any supervisory salary units provided by the Department of Education. There was evidence to indicate dissatisfaction with the grievant's work as subject director, but not with his work as a teacher.

The Board of Reference held (1) that the school board had the right to declare a position redundant which it had seen fit to create itself when such a position was no longer warranted, and (2) that the school board would have been justified in terminating the grievant's position because of his unsatisfactory performance as a subject director.

The Board of Reference also found (3) that the school board was at fault in attempting to 'transfer' the teacher under section 77(k). It held that transfer involves a lateral movement in an organisation and not a vertical one. In this case the grievant was being moved vertically.

Despite the fact that the school board had

> evoked the wrong section of the Act, because of the first two findings, and because the school board's action was well-founded and could not be perceived as 'a capricious act', the Board of Reference ruled that the grievant's services as subject director were justly terminated.

This 1974 decision raises some pertinent and important questions as it appears to contradict the principle enunciated in The Placsko Case (1971):[1]

1. Can a school board declare a position it finances redundant, when it feels so justified?
2. If so, do the laws of tenure have no application to teachers filling such positions?
3. Should school boards be allowed to invoke any clause of the legislation, without penalty, if they can show that they have not acted maliciously or capriciously?

This writer would contend that the answers to all three questions should be 'No'. Tenure cannot be denied to teachers merely because they fill positions that are the creations of local employers. The contract is with the school board not with the government that finances the position. The Placsko Case illustrates that, without statutory provision, school boards cannot claim as a defence that the government has arbitrarily declared positions redundant. No more so, should school boards be

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[1] Supra, pp.211-212.

allowed to arbitrarily declare as redundant positions that they have created. In such situations, a clear understanding should exist between the employer and the employee. Special contracts, with terms covering the eventuality of redundancy, might be the solution. Unfortunately, in the case referred to, there is no indication that such was the procedure.

The law creates procedures to enable citizens to discover more lucidly their duties and their rights. It is for this reason that appeals from boards of reference and boards of arbitration are allowed to the courts on points of law. Points of law include actions taken under the wrong sections of the legislation. In The Orange Case, the wrong section of The Schools Act, that is, the wrong law, was invoked by the school board. The Board of Reference overlooked the legal inaccuracy as the act of the school board was not 'capricious'. While the refusal of boards of reference to be hampered by 'red tape' is to be applauded, especially if such refusal ensures that justice is done, the haphazard and indiscriminate use of legal enactments should be strongly opposed. If such uses were allowed, it would be simpler for school boards, when dismissing their employees, to state, "You are dismissed under some provision or other of the law." This, however, would be completely contrary to the spirit of tenure legislation. Fortunately, greater exactness is

demanded, as will be indicated in the next section.

V. THE PROCEDURES FOR DISMISSAL

Article 10.01 of The Collective Agreement (Nfld.)1975, states:

> Subject to 12.01(b), no teacher shall be suspended, dismissed or otherwise disciplined except for just cause.

Article 10.02 states:

> Any teacher who is suspended or dismissed shall be provided written notification within five days of any oral notification. Such written notification shall state the precise reason(s) for the suspension or dismissal and no reasons other than those stated in that notice may subsequently be advanced against the teacher in that particular disciplinary action.

Article 12.01(b) states that no reason has to be given when the contract of a probationary teacher is terminated. But, it does not say that a probationary teacher can be dismissed without just cause, and it does allow the teacher the opportunity to discuss the reason for his dismissal with his superintendent. He can, therefore, discover whether the cause is a just one. Under Article 12.01(b), a probationary teacher is denied relief through the grievance or arbitration process.

These Articles illustrate that 'just cause' must be shown for any dismissal or termination of contract, and that the employer must be exact in his reasons. These two procedural prerequisites will be examined.

1. Just Cause

Whether a teacher is dismissed under a clause specifically stated in the legislation or under the more open 'adequate reason' clause, the reason put forward for the dismissal must be a just one. Mr. Justice Hart, in the Nova Scotia Supreme Court (Trial Division), in the case re Walker and West Hants Municipal School Board (1974) said:[1]

> The expression "just cause" and many other similar phrases have been the subject of much judicial interpretation over the years ... it is recognised that each case must be considered in the light of its own facts. The type of thing that has been found to amount to "just cause" for dismissal or termination of employment in the past usually comes within the following type of classification: misconduct, conduct incompatible with duty, drunkenness, insolence, disobedience, immorality, incompetency, disloyalty, dishonesty or prolonged absence or sickness ... it is apparent that the determination of "just cause" ... is partly a question of law and partly a question of fact. A board of appeal would have to look at the statutory and the contractual obligations placed on the teacners ... and assess whether or not the applicant was carrying out his duties and responsibilities. They would also have to consider any complaints about the activities of the applicant that had been communicated to him and determine whether or not the School Board had any substantial reason for terminating the employment. They must look at all the circumstances before reaching their conclusion.

A just termination of contract, therefore, must be one for which statutory or contractual provision is

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[1] Supra, p.203.

provided and must also be relative to the way in which the teacher performs his job.

This principle applies even to those who have lost their tenure.

Michaels and Finn v. Red Deer College (Alta.)(1974):[1]

> Tenured teachers were summarily dismissed without cause. The Contractual Agreement between the college and the teachers expired on June 30th. 1972. The teachers were given notice, with one month's salary, on July 31st. 1972, that is, one month after the expiry of the Agreement which granted them tenure. The Alberta Supreme Court held that as the Agreement had expired, the ordinary rule in cases of wrongful dismissal must apply. They were awarded one year's salary by way of damages and costs. Tenure formed part of the Agreement which had expired, but paragraph 7.2.2. of the Agreement had stipulated that a tenured teacher whose services were being terminated would be given a full year's prior notice in writing. The fact that the teachers lost their tenure should not deprive them of the rights they would have enjoyed ordinarily.

It would also appear that, despite Article 12.01(b) of The Collective Agreement 1975,[2] this principle applies to probationary teachers.

Markey v. Port Weller Dry Docks Ltd.(Ont.)(1974):[3]

> In supporting the discharge of a probationary

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[1] 2 W.W.R. 416.

[2] Supra, p. 228.

[3] 47 D.L.R. (3d.) 7.

employee without notice or reason, Mr. Justice Scott, an Ontario County Court judge, said:

> The plaintiff was a probationary employee and the defendant during such period of probation was entitled to discharge him without notice or reason. So long as the defendant was satisfied (that) the plaintiff, in its opinion, was unlikely to meet the company's standards in all respects and in addition its rights to ascertain his suitability as a permanent employee, the decision was the company's alone as to whether or not to terminate his services. This is the very essence of having a probationary period. On this issue, if I thought for a moment the plaintiff was discharged for alleged union activities, the result could quite conceivably be entirely different.

This judgement, although it found against the probationary employee, intimated that, if he had been discharged for activities which were not directly related to his efficiency at his work, the judgement might have been different. The worker's competency was judged in relation to his job, and his dismissal was justifiable because of the way he performed his job.

Halsbury wrote:

> When a skilled servant is engaged, there is on his part an implied warranty that he is reasonably competent for the work which he is employed to undertake, and if he proves to be incompetent the employer is not bound to continue

> him in his service for the term for which he was engaged.[1]

The greatest difficulty arises when incompetency has to be proven. One digest's definition of incompetency is:[2]

> A relative term without technical meaning, but having a common and approved usage. The term may include something more than physical and mental attributes; it may include want of qualifications generally, such as habitual carelessness, indisposition and temperament; and may be defined or employed as meaning disqualification; inability; incapacity; general lack of capacity or fitness; or lack of special qualities required for a particular purpose ... the want of ability or fitness as a matter of fact, as distinguished from eligibility or status as a matter of law ...

When used to describe an employee, therefore, 'incompetent', in the view of Robbins, always refers to the kind of work for which he is engaged, that is, relative to job fitness.[3] In an unreported case, heard before an Industrial Tribunal in May 1975, in Britain, a local education authority was held to have been perfectly justified in dismissing a teacher who spoke 'utter pornography' to pupils and used obscene language in the classroom.[4]

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1 25 Halsbury, 3rd. ed., p.486, para.936.

2 42 C.J.S. 539 -40, cited by Jerry H. Robbins, Teacher Dismissal for Incompetency (1973, ERIC ED 084 634).

3 Idem.

4 The Daily Telegraph (London), May 22, 1975.

> The teacher, Manuel Moreno, 'shouted obscenities at his pupils, told the headmaster to ignore a case of a fourteen-year old boy sleeping with a twelve-year old girl, permitted four-letter words to be scrawled on the blackboard and a tailor's dummy to be covered in obscene graffiti.' He discussed the sex act with his pupils and left lying on a shelf a document which he had written describing his own love affairs and his sexual performances. The Chairman of the Tribunal said:
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> > ... he (Moreno) taught in a way unacceptable to the local authority ... Who knows in a number of years his views might gain more support, but he was disillusioned with institutionalised education. He was a square peg in a round hole and showed a lack of judgement inconsistent with his role as a teacher.

Moreno might have been a perfectly competent and capable classroom teacher, but he was dismissed because the way he conducted his classes indicated a lack of those qualities required for the position.

Although not directly relevant to this study, two decisions from the United States exemplify the principle of relativity to job fitness.

> State ex rel. Wasilewski v. Board of School Directors of the City of Milwaukee (U.S.)(1961):[1]
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> A tenure teacher was discharged on the grounds of

[1] 111 N.W. (2d) 198.

immorality for conducting a discussion in his high school class on the price range of prostitutes. Although there was no express statute permitting dismissal on these grounds, the court upheld his discharge as it related to his job fitness.

Beilan v. Board of Public Education (U.S.)(1958):[1]

A teacher was dismissed under the Pennsylvania Public School Code for statutory 'incompetence' based on his refusal to answer a question regarding past Communist Party activity put to him by his superintendent and later by a congressional committee. The Supreme Court of the United States upheld the dismissal. It said that, although it had ruled in an earlier case that job holders, protected by statutory rights of tenure, were not subject to arbitrary dismissal, if a dismissal is to be based on a refusal to answer, the question must be relevant to job fitness in a general sense. Membership of the Communist Party and job fitness were relative.

In a 1971 Board of Reference case in Newfoundland, to be called The Brown Case, a very interesting minority report was submitted by one of the Board members.

A teacher, prior to The Collective Agreement 1973, was dismissed under section 77(f) of The Schools Act (R.S.N.) 1970. The notice was validly given. Under this section no reason had to be given for the

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[1] 357 U.S. 399.

termination of contract. The majority held that the notice was valid and served within the time limit prescribed. The dissenting member, however, maintained that the Board of Reference had been appointed by the Minister under section 78(2 and 3) of The Schools Act to hear parties on the 'matter in dispute'. The teacher was grieving her dismissal, and the 'matter in dispute' was the dismissal. The dissenting member wrote in the report:

> ... I also consider that Section 78(2) of The Schools Act provides the avenue through which the teacher, who feels that the decision to terminate the contract was unjustified, can seek justice by appealing for a Board of Reference. I consider that the Board of Reference was set up to weigh the evidence as to whether the ... School Board was justified in giving (the grievant) notice ... and that since the Board of Reference has not given both parties a reasonable opportunity to be heard, ... the Board of Reference has not completed its work and has prevented (the grievant) from obtaining justice.

The secrecy which surrounds hearings before boards of reference and the principle that no precedent is established by such boards is well illustrated by this case. The arguments put forward in this minority report were the very arguments adopted by the entire Board of Reference in a case heard only six months earlier. In this latter case, referred to as The Amber Case(1971), the grievant was dismissed under section 77(a) of The Schools Act 1970, without reason. The grievance was based on the

premise that he had been given no 'satisfactory explanation' for his termination, 'or, at least, an evaluation of his performance'. Although the School Board protested any inquiry into the causes for the dismissal, as under section 77(a) no reason had to be given, the Board of Reference agreed to hear the arguments on the very grounds that the minority report outlined in The Brown Case.[1]

Subsequent boards of reference have examined the adequacy of the reason for dismissal or termination of contract, and, as has been seen, The Collective Agreement 1975, now demands a statement of the precise reason for dismissal.[2]

2. Exact Reasons

In order to dispel any fears that employers might have that they might be liable for defamation if they state all the reasons for an employee's dismissal, it can be stated at the outset that any action for libel or slander will fail, provided no malice is indicated. A leading decision of The Supreme Court of Canada illustrates this point.

Lacarte v. Board of Education of Toronto (Ont.)(1959):[3]

Lacarte, after eight years of teaching, was dismissed on the recommendation of an Advisory Committee for 'lack of co-operation with the

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1 Supra, p.234.
2 Supra, p.228.
3 S.C.R. 465.

> principal and certain members of the staff.' He sued for libel. The Board of Reference Act, 1964, required all notices of termination to be in writing, indicating the reasons for such dismissal. The trial judge and jury held that the publication had qualified privilege (which is a defence to a charge of defamation) and did not indicate malice on the part of the Board of Education. The Ontario Court of Appeal and The Supreme Court of Canada affirmed the original decision.

Not only must employers state the precise reasons for the suspension or dismissal of teachers,[1] but, as part of these precise reasons, they must indicate the clause(s) under which a teacher is being disciplined.

Prior to The Collective Agreement 1973, disputes, such as The Orange Case,[2] indicated that boards of reference in Newfoundland accepted the principle that actions need not necessarily fail because of a legal technical error. It can be argued that, if the intent of the school board is clear, then the teacher, who might be incompetent, should not be allowed to hide behind the skirts of the law. But neither should school boards be allowed this privilege. The wrong section of The School Act (R.S.N.) 1970 was given, not only in The Orange Case, but also in The Green Case (1972) and The Lemon Case (1973).

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[1] Article 10.02 of The Collective Agreement, 1975.

[2] Supra, p.224.

A more detailed examination of these cases is needed.

The Green Case (1972):

> A first-year teacher was advised in writing on April 27th 1972 that his services were being terminated, but the letter of termination did not specify any particular section of The Schools Act 1970. The letter did, however, contain the words, " ... but we feel it is in the best interests of all concerned."

(Section 77(c) of The Schools Act stated that a teacher could be dismissed if the school board was satisfied, ' ... that a teacher is incompetent or that his continued employment ... would be detrimental to the best interests of the school concerned.(Underlining mine.) An aggrieved teacher could only appeal from this section to the Minister and the Minister's decision was binding. There was, therefore, no provision for a Board of Reference to review any action taken under section 77(c).)

> The N.T.A. sought from the school board an indication of which section of the Act it was invoking. On May 25th., the superintendent indicated, in writing, to the N.T.A. that the teacher's contract was terminated under section 77(b). But, this section stated that notice had to be given by April 30th. The school board contended, before the Board of Reference, that incompetence was not the issue, but rather teaching effectiveness and classroom control (maintenance of discipline) were the major points of concern. The Board of Reference, in the rationale for its

decision and award, stated, inter alia:

> ... It was difficult for this Board to accept the idea that a teacher's inability to control his class is apart from competence. Seemingly, being able to lead, direct, motivate, and control the behaviour of people are components of competence. In further reviewing the testimony and letters in evidence, it becomes apparent that the question of competency is a factor in this case.

The school board failed to substantiate its charges against the teacher because it had insufficient documentary evidence and had failed to adequately supervise the new teacher. In finding for the teacher, the Board of Reference ordered his record to be cleared of any suggestions of incompetency.

Because the teacher was not dismissed under section 77(c), the question of competency should not have arisen. Once it did become an issue, it might be hypothesised that the Board of Reference should have ruled that the issue was beyond its jurisdiction and returned the case to the Minister in accordance with section 78(1) of The Schools Act (R.S.N.) 1970.

Incompetency is a difficult thing to prove which would probably explain why school boards did not resort to section 77(c) of the Act. But, if incompetency really was the issue, were not school boards, by using the other sections or provisions of the legislation, doing education generally a disservice, since teachers who might have

been dismissed by one school board, could continue teaching with another school board who would have no indication from their records that they were, in effect, incompetent.

The Lemon Case (1973):

The grievant was originally given notice on April 30th, under section 12(b) and 77(a) of The Schools Act 1970. When he pointed out that section 12(b) had to do with 'land and property' and that section 77(a) applied to first-year teachers, while he had been with the school board for four and a half years, a subsequent letter of May 28th quoted sections 12(c) and 77(f). As notice had to be given by April 30th, if the contract was to be terminated at the end of the school year, this second letter stated that his contract would be terminated on October 2nd. The grievant argued that his contract was to be terminated during the year when prospects of employment were slight, and that he was forbidden to accept another position in September. Also no adequate reason had been given.
The school board stated that his position had become redundant, but that the real issue was a lack of self-control on the part of the grievant. It contended that it had acted 'in the best interests of all concerned.'
The Board of Reference stated, inter alia, in its rationale for finding for the grievant:

> It is difficult for the Board to accept the idea that self-control is not a part of competence. After reviewing the testimony and letters

> in evidence, it is the view of this Board that the question of competency is a factor in this case.

Again, therefore, we have a suggestion of incompetency and 'even the best interests of all concerned', the two causes for the use of section 77(c).[1] Why, therefore, did the school board not invoke this section?

In The Brown Case (1971),[2] the correct section was adhered to and notice was given in sufficient time. By the majority report of the Board of Reference, therefore, the termination was held valid.

The provisions of the collective agreements in 1973 and 1975 have overcome these inadequacies. Articles covering Lay-Offs, Disciplinary Action, Termination of Contracts, Transfer of Teachers, Grievance Procedure and Arbitration, have established procedures to be followed. A case heard subsequent to The Collective Agreement 1973, illustrates the point.

The Red Case (1974):

> A grievant, a school principal with tenure, was advised, in writing, on April 11th. that his position was being eliminated due to re-organisation in the school district. He was advised that he had been assigned the position of Department Head. A further letter of April 18th. confirmed the "offer" of this position and requested an acknowledgement of his

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1 Supra, p.238.

2 Supra, p.234.

acceptance. He submitted a grievance claiming that the actions of the school board were in contravention of Articles 8 and 11 of The Collective Agreement 1973. In finding for the grievant, the Board of Arbitration ruled that if the termination resulted from 'transfer' it should have been governed by Article 11, which called for a 'comparable position'. If the termination resulted from redundancy it should have been governed by Article 8.05, which called for notice in writing by February 15th. Also Article 8.06 stated that, 'When a teacher is notified of a lay-off after the fifteenth day of February of his contract year, the lay-off shall not become effective until the end of the subsequent contract year.' Accordingly, the Board of Arbitration ruled that the grievant be paid the bonus and salary he would have received had he remained in the position of principal.

To substantiate dismissals, demotions or terminations, therefore, just cause must be shown, the cause must be relative to the job fitness, the precise reasons for the dismissal must be stated, the correct clauses of the legislation or contract must be cited, and actions must be taken within the time limits specified. It will be shown, in the next section, that the cause must be substantiated by adequate and reasonable documentary evidence.

VI. THE TEACHERS' PROCEDURAL RIGHTS

In addition to his right to be shown 'just cause' for his dismissal, a teacher has the right (1) to be given an opportunity to improve, when his competency is in question, (2) to be given a hearing prior to his dismissal becoming effective, and (3) to appeal the decision if he is aggrieved. These procedural rights will be examined.

1. The Right to Supervision and Guidance

H.C. Hudgins, writing on "The Law and Teacher Dismissals: Ten Commandments You Better Not Break," stated:[1]

> Generally speaking, incompetency assumes a recurring or continuous inability to do the job. And to make that inability stick as a cause for dismissal, administrators must prove an effort was made to help the teacher overcome the problem.

It has been shown that a teacher threatened with dismissal or termination of his contract has a right to be informed of a 'just cause' why he should be so treated. But, during his employment, prior to receiving his notice of dismissal or termination, he has a similar right to just treatment. If a teacher receives notice that his services are to be discontinued because he is not a good and efficient teacher, which, in effect, means that he

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[1] Nation's Schools, March 1974, p.42.

lacks competency, he has a prior right to have received some indication of his inadequacy. Lang puts the position thus:[1]

> A discharge may be reversed because of failure of school officials to evaluate the teacher constructively, to alert him when improvements are considered essential to satisfactory service, and to train and counsel him in order for him to have a fair opportunity to improve his teaching performance. In a sense, this is a form of notice essential to fairness. Thus a teacher who performs poorly in the judgement of the principal, but never is informed of it, naturally assumes that his performance has been at least adequate. How, then, can he be expected to improve himself? And how should he know what would be considered an improvement?

The decision of two boards of reference in Newfoundland indicate that the board members considered that a special duty of supervision and assistance was owed to both probationary and experienced teachers.

The Green Case (1972):

A first-year teacher's contract was terminated at the end of the school year. The school board stated that he lacked effectiveness and classroom control. It was shown that the principal had visited the teacher's classroom three times during the course of the year, two of the visits being on the same day. He had also had three ad hoc discussions with the teacher. The school board supervisor had

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[1] Lang, op.cit., p.461.

visited the teacher's classroom three times and held one discussion session when he kept no notes and offered no criticisms. In finding for the teacher, the Board of Reference, in its rationale, stated, inter alia:

> It appeared to this Board that School Districts (sic) Boards of Education have a responsibility for improving instruction. Part of this responsibility lies in working with new inexperienced teachers. It was apparent to this Board of Reference that (the grievant) did not receive adequate assistance from the supervisory team to improve his instructional ability.

The Lemon Case (1973):

The contract of a teacher, who had been with the school board for four and a half years, was terminated on the grounds of redundancy. The school board later stated that the real reason was the teacher's 'lack of self-control'. It was shown that no formal supervision or evaluation had taken place nor had any warning been given to the teacher that improvement was needed. In finding for the teacher, the Board of Reference, in its rationale, stated, inter alia:

> 4 ... Surely the supervisory staff of the Central Office could have been mobilized to help identify the real problem, if one existed, and to offer suggestions for its solution through their supervisory activities.
>
> 5. It appeared to this Board of Reference, that school boards through their administrative teams have a responsibility for the improvement of instruction. Part of this responsibility lies in working with experienced and inexperienced teachers. It became apparent to this Board of Reference that (the grievant) did not receive adequate assistance from the

> supervisory team to improve his instructional abilities.
>
> 6. This Board of Reference took cognizance of the fact that the grievant had not been warned to the effect that his contract would be terminated should his performance not improve. To this Board, it seemed only reasonable that the grievant ought to have been given a chance to improve his performance.

Newfoundland has no statutory legislation imposing upon school boards the duty to supervise experienced or inexperienced teachers. The boards of reference evidently considered this duty so obvious that a failure to perform it showed negligence on the part of the school boards. It is interesting to note some specific legislation which could provide sources for those without such regulations.

Britain. Extract from the Schools Regulation 1959, incorporating 1968 amendments:

> Schedule 11. 2(b) During his probationary period a teacher shall be employed in such school and under such supervision and conditions of work as shall be suitable for a teacher on probation.

Ontario. School Administration Act (R.S.O.) 1970:

> Section 14.9(d) ... a secondary school principal shall ... (ii) 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 London Board of Education (secondary) 1972-73

Collective Agreement (Ontario):

Section 2.22.2. Before recommending the demotion or dismissal of a teacher, the principal shall carry out the following procedures:

Section 2.22.2.1. See the probationary teacher in action during the first few weeks after school begins in September. If the teacher is on permanent contract, he should begin documentation whenever he notes unsatisfactory work or attitude.

Section 2.22.2.2. Make recommendations in writing to the teacher to help him overcome the difficulties he may be experiencing. He should file such recommendations and supply the teacher with a copy of them.

Section 2.22.2.3. Request the department head to help the teacher, and ask him to list the times he saw the teacher and the recommendations he made on each visit. This procedure does not constitute an adverse report but is a form of in-service training.

Section 2.22.2.4. Within a reasonable time, visit the teacher again to see if his previous recommendations are being followed. He should again give the teacher a written copy of his report and file the original.

Section 2.22.2.5. Should the teacher's unsatisfactory work or attitude continue, inform him of the seriousness in a letter which presents a clearly detailed analysis of the areas of unsatisfactory performance, lays down a specific interval after which he will make a final re-assessment, and indicates that a recommendation to the Board for termination of contract is a possibility. He should retain a copy of this letter in the teacher's file.

Section 2.22.2.6. If, after a reasonable interval, the teacher's performance is still unsatisfactory, notify him in writing that he will recommend his demotion or dismissal to the Board, which may confirm the recommendation by 30 November, to take effect on 31 December immediately following; or by 31 May to take effect on 31 August immediately following.

The Roman Catholic School Board for St. John's, Newfoundland, Principals Manual:

> Section 5.04 Unsatisfactory Teacher Performance.
>
> 1. The principal of the school will notify the teacher in writing not later than the end of December of any school year stating the reasons for dissatisfaction ... It is assumed, of course, that unsatisfactory performance would have been obvious for some considerable time prior to December 31st. and that the appropriate supervisor had been called in for consultation with the principal and the teacher.
>
> 2. The teacher may be given a three-month probationary period to improve his work with the aid of frequent assistance from the principal and Board Supervisor.
>
> 5. The teacher is to be given every reasonable opportunity to improve himself with the frequent helpful assistance, advice and encouragement of his principal and supervisor. This, of course, is especially important to beginning teachers who frequently encounter difficulties in the first months of teaching.

A greater onus on school boards and principals in Newfoundland to assist teachers in handling their problems can be inferred from more recent legislation. The Teacher (Certification) Regulations, 1972, indicate that beginning teachers are initially awarded interim certificates. These become permanent after two years' satisfactory teaching experience, on the recommendation of a superintendent or school board supervisor. Since the signing of The Collective Agreement 1973, more school boards have constructed regulations for teacher evaluation.

If such evaluation is not carried out, any teacher, who is dismissed or demoted, might be able to claim, in

his defence, that he received inadequate supervision, guidance or assistance.

Finally, it is apparent that a thorough system of teacher evaluation will not only make teacher tenure more relevant, but will also answer the critics who maintain that tenure protects the incompetent. Standards, however, have to be developed in order to measure the effectiveness of a teacher's performance. Lang has written, "In the absence of standards, there is great difficulty in proving 'just cause'."[1] The standards must be of such a nature that the measurement of the performance can be documented. Article 10.03 of The Collective Agreement 1975, states in part:

> No occurrence or event, which is not documented in the teacher's personal file, except a culminating occurrence or event, shall be used against the teacher in any case of suspension, dismissal or other disciplinary action.

2. The Right To A Hearing

The courts have ruled overwhelmingly that a teacher has a right to be heard. The law of natural justice demands audi alteram partem - hear the other part.[2] This fundamental right is incorporated into the Canadian Bill of Rights 1960. Section 2 states that no law of Canada shall be construed or applied so as to:

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1 Lang, op.cit. p.460.

2 The phrase 'natural justice' is termed 'due process' in The United States of America.

> ... (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

Richards v. Athabasca School Trustees (Alta.)(1931):[1]

The Alberta School Act stated that, in cases of termination of contract, thirty days' notice had to be given by either party, but a teacher had to be given the privilege of attending a Board meeting 'to hear and discuss reasons for proposing to terminate the agreement'. In this case, this provision was not observed. The Supreme Court of Canada held that the school board was liable and that the teacher could recover damages for wrongful dismissal.

A leading United States case illustrates the principle in relation to non-tenured staff.

Board of Regents of State Colleges et al. v. Roth (U.S.)(1972):[2]

An assistant professor, who did not have tenure, sued the board when he was informed that he was not to be rehired. He claimed that his rights under the 14th Amendment were being infringed. The 14th Amendment protects a person 'where his good name, reputation, honour or integrity are at stake and gives him a right to a hearing first'. The District Court and The Court of Appeal found for the professor. The Supreme Court of The United States reversed their finding on the grounds that he had no

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[1] S.C.R. 161.

[2] 92 S.Ct. 2701.

> tenure, and, as he was as free as he was before to seek another job, and, as there was no malice or bad mark against him, the 14th Amendment had not been infringed.

Although this non-tenured teacher was not granted a hearing first, the ruling of The Supreme Court suggests that, if his dismissal had warranted a bad mark against him, he would have been entitled to a hearing.

Article 12.01(b) of The Collective Agreement 1975, states that a probationary teacher may not make use of the grievance or arbitration procedures if his contract is terminated. The same Article, however, does grant the teacher the right to a hearing.

> When a School Board terminates the contract of a teacher who is on a probationary contract, the teacher shall be given an opportunity to discuss the reason with the Superintendent.

The recommendations of a joint conference of related committees, corporations, associations and teacher unions in Britain, on Conditions of Tenure of Teachers, 1946, included:

> It is generally recognised that it should be a condition of service of every teacher in the maintained schools that before any decision relating to dismissal is taken he should have the right to be heard and to be represented before the local education authority in whose service the teacher is employed or whose consent is required to the dismissal of the teacher.

This recommendation was adopted in 1968 and included

in the document entitled, "Teachers' Conditions of Service (1968)." Malloch v. Aberdeen Corporation (U.K.)(1971),[1] is illustrative:

> A teacher who was dismissed by the Corporation after refusing to register with the General Teaching Council for Scotland, a new body which, inter alia, compiled lists of registered teachers, contended that he had a right to present his case to the Corporation. On appeal to The House of Lords, it was held that he did have the right and therefore his dismissal was unjust and was ordered to be overruled.

The Teacher Tenure Act (Saskatchewan) 1965, states in section 4(1) that notice of termination shall be in form A.[2] Section 5(1) of the Act reads:

> Where a school board gives notice of termination of contract to a teacher the school board shall within fifteen days from the date of the notice provide an opportunity for the teacher to be present at a regular or special meeting of the board and to give reasons why his contract ought not to be terminated.

Form A, referred to in section 4(1), takes a statutory form. It is detailed in An Act to Amend The Teacher Tenure Act 1972, in section 3. Form A is to be

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[1] All E.R. Vol.2. 1278.

[2] Supra, p.205.

recommended. It is specific, it details the reasons for the termination of contract, and it states a time for a hearing. It also ensures, through its signatory, that the school board is aware of the dismissal and that it is not an arbitrary act of the superintendent.

Figure 6.1.

Form A. Notice of Termination of Contract.
Saskatchewan Legislation

I have been instructed to inform you that by resolution of the Board of the School Unit (or School District) Number adopted at a special (or regular) meeting held on the day of , 19 , your contract with the board as teacher in the School District Number will terminate on the day , 19 .

The reasons for the termination of your contract are:

In the opinion of the Board of the School Unit (or School District) Number you are for reasons above stated unsuitable for teaching service in the School District Number .

In accordance with section 5 of The Teacher Tenure Act, this is to notify you that you may attend a meeting of the board to be held at (description of place) on the day of , 19 , at the hour of o'clock in the noon, and give reasons why your contract ought not to be terminated.

Secretary

A hearing need not take place prior to termination of contract or dismissal. Provided an opportunity exists for a hearing and that the hearing takes place as soon as possible, the courts will be satisfied that justice has been done. This is well illustrated by a New Zealand case that was decided, on appeal, by the Privy Council in London.

Furnell v. Whangarei High Schools Board (N.Z.)(1973):[1]

> A teacher was told that there were complaints against him and that he was temporarily suspended pending an investigation. He asked for and was sent a complete list of the complaints against him, to which he replied. He was told the date of the investigation and that he could either present his own case or be represented. Before the investigation began, he brought legal proceedings. He claimed an injunction to the board to reinstate him and to remove the suspension, a writ of prohibition to stop the hearing and a writ of certiorari to quash the decision of the school board. He claimed that he had been denied natural justice in that he had not been allowed to present his side of the case before the suspension. The Privy Council held that the school board had done everything correctly in the procedure it had adopted. The principle laid down by natural justice that a man be given a fair opportunity of correcting

[1] 1 A.E.R. 400.

or contradicting the charges had not been violated.

The report of the dissenting member of the Board of Reference in The Brown Case (1971) is quoted once again:[1]

> ... and that since the Board of Reference has not given both parties a reasonable opportunity to be heard, ... the Board of Reference has not completed its work and has prevented (the grievant) from obtaining justice.

Finally, the writer refers to a statement of Professor D.J. Mullan:[2]

> Our courts seem to hold that dismissal of tenured staff brings with it the obligation to follow the rules of natural justice ... The lesson to be learnt is to ... concentrate on internal procedures and ensure that a hearing committee is appointed.

3. The Right To Appeal

The right of appeal is so fundamental to the legal process that, even if a teacher appears by his conduct to accept the school board's decision and takes steps to acquire alternative employment, he may still appeal when he discovers that he has such a right.

Knight v. Board of Yorkton School Unit No.36 (Sask.)(1973):[3]

A teacher's contract was terminated with no reasons given. The termination was therefore

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1 Supra, p.235.

2 Supra, p.10.

3 34 D.L.R. (3d) 592.

defective as it was contrary to section 4(1) of The Teacher Tenure Act (Saskatchewan).[1] The teacher sought employment with her own board and with other school boards. Later she found out that she could challenge the termination of her contract. The Court of Appeal held that she was entitled to her full salary, less anything she had earned in the meantime, as the termination was invalid. By her conduct she did not waive her rights. The court said:

> Waiver requires both a knowledge of the existence of a right and a clear intention of foregoing the exercise of the right.

She had challenged the termination as soon as she knew she could.

It would appear, therefore, that the principle ignorantia iuris non excusat - ignorance of the law is no excuse - does not apply in civil cases if it denies justice to the individual. The onus, however, is upon the grievant to prove that he did not know of the right and that he had not waived the right.

The right to appeal a decision of a school board is governed by statute or by collective agreements. The provisions vary in different jurisdictions. For the purpose of this study, the principle will be illustrated by an examination of the procedures that are applicable to Newfoundland.

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[1] Supra, p.205.

Prior to The Collective Agreement 1973, the teacher's rights were governed by The Schools Act (R.S.N.) 1970. Within the provisions of the Act, appeals could be made to the Minister of Education, within thirty days of receipt of the notice of termination, against dismissal under section 77(c) (for incompetency) or section 77(d) (for gross misconduct, neglect of duty, insubordination or mental incapacity). No board of reference could be appointed for dismissal on these grounds and the decision of the Minister was binding, except that, if the dismissal was under section 77(d), an appeal could be lodged to The Supreme Court of Newfoundland on a point of law only. Cases of incompetency, therefore, were decided by the Minister, and his decision was binding.

If a teacher was dismissed for any other reason, the Minister was under a mandatory duty to establish a board of reference, if the teacher requested one.[1] The teacher had the right to a hearing before the board of reference,[2] and to appeal its decision, on points of law, to The Supreme Court of Newfoundland.[3]

Since April 1973, the teacher's right to a hearing has been guaranteed, first by The Collective Agreement 1973, and latterly by The Collective Agreement 1975. Both

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[1] The Schools Act (R.S.N.) 1970, section 78(2).
[2] Ibid., section 78(5).
[3] Ibid., section 78(6).

Agreements provide for grievance procedures. Article 33.01 of The Collective Agreement 1975, states:

> A grievance means a dispute over the interpretation, application, administration or alleged violation of any Article or clause in this Collective Agreement.

Accordingly, when a teacher wishes to contest a transfer, a demotion, a lay-off or a dismissal, he may appeal the ruling of his employer. The appeal process grants to him a series of avenues in which to present his case. In some instances he may present his case personally; in others, he must appeal in writing. This appeal process is in three stages.

(a) The first stage

A teacher, who is aggrieved, must appeal within ten days of being advised of the occurrence which causes the dispute, to his superintendent, if the grievance is with the school board,[1] or to the Divisional Head in the Department of Education, if the grievance is with the Department of Education.[2]

When the appeal is to the superintendent, he must meet with the aggrieved teacher within ten days of receiving the grievance,[3] and, within five days of the meeting, he must transmit, in writing, his decision to

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[1] The Collective Agreement 1975, Article 33.03.
[2] Ibid., Article 33.09.
[3] Ibid., Article 33.04.

the teacher, with a copy to the N.T.A.[1]

If the appeal is to the Divisional Head, he need not meet with the teacher, but, within ten days of receiving the grievance, he must report, in writing, his decision on the grievance to the teacher, with a copy to the N.T.A.[2]

Since the signing of the first Collective Agreement in April 1973, over one-hundred disputes have been satisfactorily resolved at this stage of the grievance procedure.[3] This represents approximately eighty-five per cent (85%) of the disputes grieved. The high proportion of successful settlements reached at this stage of the appeal process is indicative that The Collective Agreements have laid down a workable procedural process. In no small measure, the attitude of the participants, who worked within that process, contributed to the high proportion of successful settlements.[4] It might also be hypothesised that educators are becoming more aware of the legal implications of teacher tenure and of the importance of the procedural process.

(b) The second stage

When the decision of the superintendent or the

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1 The Collective Agreement 1975, Article 33.05.

2 Ibid., Article 33.10.

3 Interview with William O'Driscoll, Executive Secretary, N.T.A., May 1975.

4 Idem.

Divisional Head does not result in settlement of the grievance, the teacher, within ten days of receiving the decision, may submit his grievance, in writing, to the Chairman of the School Board, if his grievance is with the school board,[1] or to the Deputy Minister of Education, if his grievance is with the Department of Education.[2] These gentlemen have a further ten days to submit their decision, in writing, to the teacher, with a copy to the N.T.A.[3]

Since the signing of the first Collective Agreement in April 1973, approximately fifteen disputes have been settled at this stage of the grievance procedure.[4]

(c) The third stage

If the decision of the Chairman of the School Board or of the Deputy Minister of Education fails to settle the grievance, the teacher, within seven days, with the written consent of the N.T.A., may submit the grievance to arbitration.[5]

An arbitration board consists of three members, one appointed by the employer, one by the teacher, usually with the advice and on the recommendation of the N.T.A., and a third member appointed, within ten days of their own

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1 The Collective Agreement 1975, Article 33.06.
2 Ibid., Article 33.11.
3 Ibid., Articles 33.07, 33.12.
4 Interview with William O'Driscoll, N.T.A., May 1975.
5 The Collective Agreement 1975, Articles 33.08, 33.13.

appointment, by the other two arbitrators. The third appointee becomes the Chairman of the Arbitration Board. Within fifteen days of being constituted, the Board must hold the hearing and render its decision. Within a further ten days it must communicate its decision to the parties concerned.[1]

Since April 1973, three disputes have been settled at this stage of the appeal process.[2]

Article 34.05 of The Collective Agreement 1975, grants to both parties in the dispute the right to present evidence. It reads:

> Both parties to a grievance shall be afforded the opportunity of presenting evidence and argument thereon and may employ counsel or any other person for this purpose.

In allowing the presentation of evidence, boards of arbitration must conduct hearings justly and not permit any bias or undue influence to interfere with the proceedings.

re Thompson and Lambton Board of Education (Ont.):[3]

Under the Ontario School Administration Act a board of reference was appointed to inquire in camera into the dismissal of a teacher. The secretary of the board of education and the

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1 The Collective Agreement 1975, Article 34.07.

2 Interview with William O'Driscoll, Executive Secretary, N.T.A., May 1975.

3 (1973) 32 D.L.R. (3d) 339.

> director of education were allowed to remain in the room while other teachers were giving evidence. The Ontario High Court ruled that the findings of the board of reference had to be set aside as it had failed to deal openly and justly with the matter so that natural justice had not been followed. The teachers, who were witnesses, had not been able to openly and freely give evidence in the presence of their employers.

At the same time, any decision of the arbitration board will be set aside if it is shown that the arbitrators themselves are partial or biased. Mr. Justice Pigeon commented on this issue in The Supreme Court of Canada when he said in Blanchette v. C.I.S. Ltd. (1973):[1]

> In my view, the principle to be applied is the same for Judges as for arbitrators. A reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification.

This quotation and the ruling in re Thompson[2] indicate that there is a fourth stage of appeal outside the provisions of the arbitration process. This stage is an appeal to a court of law.

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[1] S.C.R. 833.

[2] Supra, p.261.

4. The Courts

An appeal to a court of law may result from a decision of a board of arbitration or it may be a direct process by-passing all or part of the grievance procedure. Both avenues need to be examined.

(a) Appeals from a board of arbitration

Occasionally statutes specify that appeals can be made to courts of law. Prior to the repeal of section 78 of The Schools Act (R.S.N.) 1970, in May 1974, appeals could be made to The Supreme Court of Newfoundland or a judge of the Court from certain decisions of the Minister of Education or from decisions of boards of reference.[1]

Appeals of this nature can only be on points of law, not on questions of fact. The reasoning for this distinction is that the individuals concerned, whether they be ministers of state or members of boards of reference or arbitration, since they are not trained in the law, might misinterpret the meaning of a legal enactment or principle. They might, for example, misinterpret the intent of a clause of the legislation, such as the meaning of 'permanent' or of 'just cause'.[2] They might be at fault in their procedure, as in re Thompson,[3] a fault that can

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1 Supra, p.257.

2 re Walker and West Hants Municipal School Board, supra, p.203.

3 Supra, p.261.

lead to a denial of natural justice.

The powers of boards of arbitration are defined in the statutes or collective agreements that create them. If the boards exceed their powers, an appeal can be made to a court of law, since the interpretation of the scope of their powers is a legal, as compared to factual, question.

The power of boards of arbitration in Newfoundland is stated in Article 34.12 of The Collective Agreement 1975:

> In any case, including, cases arising out of suspension, dismissal or other discipline, or the loss or any remuneration, benefits or privilege, the Board of Arbitration shall have full power to direct payment of compensation, vary the penalty, or to direct reinstatement of a benefit or privilege, or to affirm the taking away of such benefit or privilege as the Board may determine appropriate to settle the issues between the parties, and may give retroactive effect to its decision.

This Article gives wide powers to a board of arbitration. It would appear, however, from the following case, that any order made by a board of arbitration must be related to and arising out of the contractual relationship that previously existed between the parties.

Board of Lloydminster School Unit No.60 of Saskatchewan v. Graham et al.(Sask.)(1973):[1]

Section 238(10) of The Schools Act (Saskatchewan) states:

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[1] 6 W.W.R. 883.

> The board of reference may confirm the termination of the agreement or order the reinstatement of the teacher or make such other order as, in its opinion, the circumstances warrant.

The Board of Reference, hearing the grievance of a teacher whose contract had been terminated, made an order for reinstatement subject to a number of specific conditions or terms. The teacher was redundant, and within the terms of The Tenure Act, the dismissal was in order. The Board of Reference, however, had the following conditions:

> ... a period of leave of absence without pay followed by a full restoration of salary, subject to possible substitute teaching duties for a period of time which might be extensive, and taking into consideration her then place of residence, followed by a requirement to place her in a classroom in the Unit up to and including Grade 8 level in which a vacancy occurs.

Maguire, J.A. of the Saskatchewan Court of Appeal, held that the Board of Reference had acted beyond its jurisdiction as the imposition on both parties of the conditions was, in effect, a new contract embodying new terms. The order of the Board of Reference was, accordingly, quashed.

Although The Collective Agreement 1975 does not mention an appeal to The Supreme Court on a point of law, it is an accepted principle of the law that the existence of a board of arbitration does not take away a teacher's right to a remedy through the courts if such an appeal is justified. If, however, boards of arbitration have not exceeded their powers, misinterpreted any other points of law, or denied justice to either of the

contending parties, then their decisions are binding. The courts do not interfere with interpretations of fact.

Jennings v. Caddo Parish School Board (U.S.)(1973):[1]

> The Louisiana Court of Appeal held that it would not substitute its judgement for that of a board of arbitration, nor interfere with the board's bona fide exercise of discretion. Only points of law could be appealed to the court.

Article 34.09 of The Collective Agreement 1975, states:

> All parties bound by this Agreement ... shall comply with the decisions of an arbitration board appointed ... and do or, as the case may be, abstain from doing anything required by that decision.

A leading case on this subject is Belanger v. Commissaires d'Ecoles pour Municipalité Scolaire de St. Gervais (Que.)(1970):[2]

> After a board of arbitration ruled in favour of the teacher and ordered her reinstated, the school board refused to re-engage her. The Quebec Court of Appeal held that a school board cannot be forced to re-engage a teacher it deemed unsuitable. There was no legislation forcing it to do so. The

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[1] 276 So. 2d. 386.

[2] Supra, p.213.

Supreme Court of Canada, however, overruled the Quebec court and held that the action of the school board, if supported, would negate any benefit the legislature intended to confer on teachers to protect their rights.

(b) Appeals outside the grievance procedure

A teacher might not be able to make use of the grievance procedure because of a procedural error on his part. The error may be deliberate or accidental. No clear principle seems to have been established to determine whether such an error will deprive a teacher of his right to sue for unlawful dismissal.

Murray v. Ponaka School District (Alta.)(1929):[1]

The Alberta Court of Appeal dismissed an action by a teacher for damages for wrongful dismissal as he had failed to appeal to the Minister and thus exhaust the administrative remedy open to him.

This 1929 decision is at variance with a more recent decision.

Wagstaffe v. Public School Board of Section 8 of Raglan (Ont.)(1948):[2]

The Ontario Court of Appeal held that the Teachers' Board of Reference Act did not take

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[1] D.L.R. 425.

[2] O.W.N. 120, (C. of A.).

> away the right of a teacher to sue through the courts in case of dismissal. The school board argued that the Act obligated a teacher to take his case to the Minister rather than sue through the courts. The court held, however, that the section of the Act did not deny such a remedy. Also a reason for dismissal had to be given before an appeal could be made to the Minister. In this case the teacher had not been given a reason by the school board.

This case suggests that where an appeal is denied to the Minister, it can be taken to the courts, and even if an appeal is possible to the Minister, the appellant can still sue through the courts.

Many of the clauses in Articles 33 and 34 of The Collective Agreement 1975, covering Grievance Procedure and Arbitration, specify time limits within which proceedings must be taken. Although Articles 33.18 and 34.11 specify that the time limits may be extended by the mutual agreement of all the parties concerned, if no such agreement is reached, Article 33.17 will prevail. It states:

> If advantage of the provisions of this Article has not been taken within the time limits specified herein, the alleged grievance shall be deemed to be abandoned and cannot be reopened.

The grievance procedure is terminated by such a technical breach, but does it deny a hearing before the

courts? It could be argued that no man should be denied justice because of a procedural technicality. The decision in Knight v. Board of Yorkton School Unit No.36 (1973),[1] suggests that a teacher will not be denied justice before the courts if he can show that he did not know of his legal rights. He will not be able to use the law indiscriminately, however.

> Kowalchuk v. Rolling River School Division, No. 39 (Man.)(1975):[2]
>
> A teacher, who had eight years service with the school board, was given notice on March 23rd. 1972 that his services were to be terminated due to decreasing enrolment. On April 5th.1972 he replied that the reason given was unacceptable and requested a board of arbitration. Section 281(3) of the Public School Act (R.S.M.) 1970, stated that such a challenge had to be made within seven days of receiving notice of termination. The Manitoba Court of Queen's Bench rejected his appeal. Dewar, C.J.Q.B., said:
>
> > Failure to ... take advantage of the statutory provisions does not permit plaintiff the alternative of questioning the reason for termination in this Court in this action, when the sole issue is whether or not the contract was lawfully terminated in accordance with the terms permitting termination. I find it was.

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1 Supra, p.255

2 48 D.L.R. (3d) 254, (Q.B.D.).

The implication of this judgement is clear. The court was prepared to hear appeals on points of law but not to act as a determinant of fact. A procedural device existed, namely a board of arbitration, by which the teacher could question the validity of his termination, which was a question of fact. The school board had followed the correct legal procedure; there was, therefore, nothing for the court to consider further. It is probable that, if the school board had not followed the correct procedure, the court would have heard the action.

The overall position is not clear. Teachers, principals and school boards, accordingly, are urged to familiarise themselves with the procedures to be followed in all cases of demotion, suspension, termination of contract or dismissal.

VII. SUMMARY

In the absence of a statutory provision to the contrary, the power to employ teachers and other school officials presupposes the power of dismissal. The right to dismiss is statutory and absolute. It cannot be bargained away or limited by contract. It is, however, subject to constitutional limitations. This chapter has been an attempt to examine those limitations.

Tenure laws grant continuity of employment to

those who enjoy tenure status. The status can be acquired on the completion of a satisfactory period of probation, which is usually defined in statute or in contractual agreements, or it may be implied through length of service. A tenured teacher has a permanent contract.

Tenure laws ensure that no teacher may be dismissed, demoted or transferred except for causes specified in statute or contractual agreements. The precise reasons for the action must be stated and there must be evidence of just cause, which must be relative to the job fitness of the teacher concerned. Employers must indicate the clauses of the legislation which are being invoked and must operate within the specified time limits.

Tenure laws grant certain procedural rights to teachers. If a teacher is being disciplined for any inadequacy on his part, he must first be given an opportunity to correct his weaknesses. Before any action against him is finalised, he must be given an opportunity to present arguments on his own behalf. If there is a dispute over the action taken, the teacher has a right, through the grievance procedure, to appeal to his superiors, to his employers and, if necessary, to a board of arbitration.

Boards of arbitration must act impartially, without prejudice or bias, and operate within their stated powers.

If they supercede their powers, misinterpret any legal enactments or prevent justice being done, appeals may be made to a court of law. The courts will examine points of law, not questions of fact.It is probable, however, that, if a teacher by-passes the grievance procedure and appeals directly to a court of law, the court will entertain his plea if it is satisfied that the action taken by the school board was illegal. If the school board has followed the correct procedures, the teacher should use the grievance procedures available to him.

Teacher tenure gives continuity of employment which cannot be severed arbitrarily. Only within the provisions of the law may the contract of a tenured teacher be terminated. The provisions of the law allow for the personal habits and capabilities of the teacher to be taken into consideration. The provisions allow for the needs of the employers to be taken into consideration. Basically, it can be said that if the teacher does his work satisfactorily and the school board is not compelled to make him redundant, the teacher's position will be guaranteed.

CHAPTER VII

SUMMARY, FINDINGS AND IMPLICATIONS

I. SUMMARY

This study has attempted to identify, through an examination of relevant legislation and court decisions, consistent principles of law relative to professional educational personnel. Specifically, the study has examined the legal responsibilities of educators for the safety and welfare of students, and the legal rights of teachers in the field of tenure. Although the legislation of Newfoundland has been examined in greater detail than the legislation of other provinces or countries, the principles of law identified apply equally across Canada and in Britain.

The writer has reviewed the sources of the law relevant to this study. The written law examined includes federal and provincial legislation, school boards' by-laws and regulations, and contractual agreements. In reviewing the principles that have evolved from unwritten law, the writer has perused a wide selection of court cases. The roles of the courts and of quasi-judicial bodies have been examined to determine their places in the judicial process.

The study has examined the legal principles that have evolved from the tort of negligence, including its characteristics, the duty of care that is owed to students, and the concept of vicarious liability which determines the liability of school boards for the negligent acts of their employees. The writer has examined the specific legal duties that are imposed upon school boards, principals, and teachers, respectively, with regard to the supervision of students on and off school premises, before and after school hours, and on school excursions. The responsibilities of educators for the safety of school premises, facilities and equipment have been reviewed. The respective duty of care owed to students being transported on school buses, in taxis or in private cars has been defined. The defences to a charge of negligence have been reviewed, as have measures that educators can take to protect themselves against charges of negligence or against financial awards that may be made against them. Through an examination of the by-laws of Newfoundland school boards and the handbooks or regulations of a selected number of schools, the writer has attempted to comment on the adequacy of prevailing supervisory practices at the local level.

In the field of tenure, the writer has reviewed the procedures for acquiring tenure, the causes for dismissal, the procedures for dismissal and the procedural rights that accrue to teachers.

II. THE FINDINGS

In this study it has been impossible to dwell only on the status of the classroom teacher since his legal role is closely interrelated with that of school boards and school principals. Accordingly, the findings apply to educational personnel generally.

1. Legal Background

The legal status of educators is derived from the statutes, from the common law, from subordinate legislation in the form of school board by-laws and regulations, from contractual agreements, from the rules of natural justice, and from the interpretations given by the courts and quasi-judicial bodies to all of the above.

The statutes state the legal rights and responsibilities of educators. So, in Newfoundland, school boards have a statutory duty to provide supervision, to ensure that school buildings, equipment and all vehicles used for transporting students are in a safe condition, to insure all buildings and equipment, and to effect insurance indemnity in respect of any claim for damages or personal injury. School principals have a statutory duty to arrange for the regular supervision of students and to report to their school boards the need for repairs to buildings and equipment. Teachers have a statutory duty to care for the premises and property of the school and to perform such

other duties as are prescribed by the regulations, rules or by-laws of their school boards.

The common law duty of educational personnel is to care for their students as would reasonable and prudent parents. The common law, therefore, serves a dual purpose. In the absence of a statutory duty, it imposes its own duty; when a statutory duty exists, it expands upon it by stating 'how' the duty is to be performed, that is, as a 'reasonable and prudent parent'.

School boards have statutory authority to make regulations, rules and by-laws. The duties imposed upon employees by such regulations are as binding as statutory duties, unless they are in direct contravention of any statutory regulations. They may not contract the scope of duties enacted by the legislature, but they may expand upon them and may elucidate the duties more specifically.

Contractual agreements, provided they do not contravene existing statutory enactments, are binding on the signatories. Such agreements state the rights and duties of the parties involved. Teachers under permanent contract are protected from arbitrary dismissal or termination of contract upon unreasonable or malicious grounds. The causes for dismissal and the procedures for such dismissal are stated. Provisions are made for teachers, who are grieved by the decisions of their employers, to appeal the decisions. The status of probationary teachers

and those not under permanent contract are defined.

Before any form of action is taken against a teacher which might affect his status as an employee, the rules of natural justice demand that he be given due notice of the action being taken, the reasons for such action, and an opportunity of a hearing.

Courts of law interpret the statutes and develop the common law. As such, the interpretations they make and the way in which they develop the common law enable them to mete out justice in accordance with the basic rules of equity as they apply to the needs of modern society. As schools have moved into the technological age with larger buildings, greater numbers and more diversified programmes, so the courts have ruled that the duty of care owed to students must be equal to the internal changes and the inherent dangers that accompany such developments. The duty of care owed by educators is a high one. Basically students have come to be considered as obligatees and, as such, they have a right to expect not to be injured. The courts have ruled that, to meet this high standard of care, educators must effect adequate procedures for the supervision of students and for the upkeep of school premises, facilities and equipment.

Although the courts do not interfere with findings of quasi-judicial bodies (such as boards of arbitration), or with the rulings of school boards, they insist that

the procedures adopted by such bodies be both legal and just. Accordingly, they exercise a supervisory role to correct errors of law and procedure and, when such errors exist, they quash the rulings of the bodies. If the ruling so quashed is one from a board of arbitration, the courts order the board to hear the dispute again and to operate within the ruling that they have handed down. Provided the actions of school boards and quasi-judicial bodies are legal and have followed the procedures laid down by law, the courts do not interfere.

2. Summary of Findings

A study of the various sources from which the status of educators is derived has resulted in the following conclusions:

(a) As to liability:

1. School boards are responsible for ensuring that supervision is provided.
2. School principals are responsible for arranging and organising the supervision.
3. Teachers are responsible for carrying out the supervision as directed by their principals.
4. Supervision of students should be on a planned, organised basis.
5. Students do not have to be supervised at all times. The amount of supervision that should be provided will depend upon the age, the number and the maturity of the students, and upon the particular circumstances of the event to be

supervised. The younger the students, the greater the number of the students, or the more hazardous the event, the greater the amount of supervision needed.

6. The standard of care demanded of teachers with special training or skills who operate in potentially dangerous areas, such as laboratories, gymnasiums and workshops, or with potentially dangerous equipment, is probably higher than the average.

7. School personnel are responsible for the safety of their students during school hours. School hours are those stated in statute or as extended by local regulations.

8. School personnel are responsible for the safety of their students on school-related activities outside of normal school hours.

9. Educational personnel have a duty to see that the premises, the facilities and the equipment of their schools are safe for the purpose for which they are intended.

10. School boards will be vicariously liable for the negligent acts of their employees, if such are performed in the furtherance of the employees' duties.

11. Bus contractors are considered employees of school boards.

12. Taxi owners are usually considered as independent contractors.

13. Drivers of private cars will be indemnified by their normal automobile insurance policies for injuries suffered by fare-paying students,

provided such excursions are infrequent or occasional and are on school or school-related business.

14. Parental notes granting permission for students to take part on school excursions do not release educators from liability for injuries sustained due to their negligence. Parents cannot sign away their children's rights to the legal process.

15. If a student is injured due to the negligent exercise of the duty of care owed by educators, those found negligent may be liable for damages to compensate the injured person.

16. Liability will only ensue if the injury is a direct result of the negligence.

17. School board employees may be liable to indemnify their school boards for any financial charges made on the boards because of the negligence of the employees.

18. If the injured person knows of the danger and voluntarily assumes the risk, he may fail to recover damages.

19. If the injured person contributes to his hurt by his own negligence, the award of damages may be decreased in proportion to the degree of his negligence.

(b) As to tenure:

1. Probationary periods are defined in statute or in contractual agreements or may be implied through length of service.

2. A tenured teacher has a permanent contract.

3. No teacher may be dismissed, demoted or transferred except for causes specified in statute or contractual agreements.
4. Precise reasons must be stated for actions taken against teachers.
5. Just cause must be shown for such actions.
6. Teachers must be given an opportunity to correct their weaknesses prior to dismissal.
7. Teachers must be given a hearing prior to or within a reasonable time of any actions being taken against them.
8. Employers and teachers should follow the procedures specified in the statutes or contractual agreements. Failure to follow the stated procedures might cause any action taken to be declared void.
9. All hearings in the grievance procedure must be just and impartial.
10. Tribunals, boards of reference and boards of arbitration must not exceed their stated powers.

III. IMPLICATIONS

It was stated in chapter III in the section headed 'Significance of the Study', that a 'knowledge of the law would enhance the professional stature of professional personnel' and that 'professional personnel should become better qualified to avoid litigation'.[1] This study has illustrated that, in many, if not the majority, of cases,

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[1] Supra, p.45.

educational personnel have found themselves before the courts or before quasi-judicial bodies because of their ignorance of school law. The word 'ignorance' is not used in a derogatory sense, but in its literal meaning of 'lacking knowledge'. The most important implication of this study is that, until educators acquire knowledge of their legal rights and responsibilities, they might continue to appear unnecessarily in expensive and time-consuming legal disputes. They might also continue to care for their students irresponsibly and to conduct their relationships among themselves in an unprofessional manner. Disputes will occur and accidents will happen but, if educators were made more conversant with school law, much needless litigation could be avoided.

Universities and teacher training colleges have a role to play in this area. It is recommended that steps should be taken to ensure that no new teachers are granted certificates until they have studied a basic course on school law. This need not be an in-depth study. It should, however, examine the legislation of the province in which the teacher resides; it should examine any contractual agreements which might be in force; and it should cover the basic principles of law regarding, at least, liability and tenure.

Once teachers move into the schools they should be kept informed of prevailing trends and new legislation.

Much can be done in this area by provincial teachers' associations. The Law and Tenure Department of the National Union of Teachers in Britain employs two full-time solicitors. One of the duties performed by these persons is to send to the members of the union not only extracts of new legislation but also circulars explaining in straightforward terms the legal rights and duties of educators. Recent circulars include Conditions of Tenure, Employment of Teachers, Appointment and Dismissal of Head Master, Supervision Duty at Recess, Supervision of Pupils on School Premises Before and After School Hours, Supervision of Pupils Awaiting Transportation, School Crossing Patrols - The Teacher's Responsibilities, School Journeys and Excursions, Memorandum on Swimming, Legal Responsibility of Teachers in Physical Education, and Playground Supervision. The Newfoundland Teachers' Association has made a start in this area; much still needs to be done.

Communication is also essential at the local level. How many teachers have read or even seen the by-laws of their school boards? How many teachers know the rules and regulations of their own schools? How frequently are teachers informed of new legislation or amendments to existing legislation?

There is a danger of educators relying on good fortune and on protectory measures such as indemnity clauses and insurance policies. Litigation, however, can

do much harm to the professional image of teachers generally. Therefore, local rules and regulations must be consistently re-examined and upgraded to ensure that the greatest possible protection is afforded to students and to the professional stature of educators.

It cannot be emphasised too strongly that a basic understanding of the law and a knowledge of legal rights and responsibilities are essential if educators are to become sufficiently professional to answer the demands of accountability that increasingly are being made upon them.

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Wells, Q.C., Robert. Personal interviews. May-July, 1975.

E. OTHER SOURCES

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APPENDIX A

NAME OF SCHOOL BOARD: _____

NUMBER OF SCHOOLS IN DISTRICT: _____

NUMBER OF STUDENTS IN DISTRICT: _____

NUMBER OF TEACHERS, INCLUDING PRINCIPALS, IN DISTRICT: _____

The Board has specific regulations regarding the supervision of students. YES/NO.

I enclose a copy of the Board By-Laws. YES/NO.

I enclose extracts of the By-Laws only. YES/NO.

Would you like a resume of my findings? YES/NO.

COMMENTS:

Please return to:

Mike Parry
Department of Educational Administration
Memorial University of Newfoundland
St. John's, Nfld.

APPENDIX B

MEMORIAL UNIVERSITY OF NEWFOUNDLAND
St. John's, Newfoundland, Canada A1C 5S7

Department of Educational Administration

January 23, 1975

The Administrative Secretary

Dear Sir:

I am reading for my Master's Degree in Educational Administration at this University. My proposed thesis is:

> "The Legal Status of the Newfoundland Teacher with particular reference to his Rights in Field of Tenure and to his Responsibilities for the Supervision of Students."

Unfortunately no case involving either of these areas has ever appeared before the courts of Newfoundland. To interpret the legislation therefore, I have to look to decisions of the Supreme Court of Canada which would be binding in the Newfoundland Courts, and to decisions of Provincial Supreme Courts which could have an influence on Newfoundland Courts.

The C.T.F. has been unable to assist me in my research. Would you be able to send me the names, legal references, resume of facts and decisions of any cases relevant to my research that have appeared before the courts of your Province since 1968. I have read the works of McCurdy, Fargen and Enns for the legal status of the Canadian Teacher, Pupil and School Board respectively. I particularly seek information on cases subsequent to the publication of McCurdy's book.

Please excuse this duplicated letter, but it is being sent to all Provincial Teacher Associations.

Yours sincerely,

D.M. Parry, Ll.B.

APPENDIX C

The National Union of Teachers,
Legal Department,
Hamilton House,
Mabledon Place,
London. W.C.1.

January 24, 1975

Dear Sir,

I am a British subject, obtained my Honours Law Degree from the University College of Wales, Aberystwyth in 1960, and am currently reading for my Master's Degree in Educational Administration at this University. My proposed thesis is:

> The Legal Status of the Newfoundland Teacher, with Particular Reference to his Responsibilities in the Field of Pupil Supervision and his Rights in the Field of Tenure.

Unfortunately, no cases in either field have ever appeared before the Newfoundland courts. A few cases from other Canadian provinces have reached the Supreme Court of Canada, and these are binding on Newfoundland courts. British cases, although no longer binding, are still influential in our courts.

I am trying to find relevant British cases in my two areas and am writing in the hope that you might be able to assist me. Would you be able to send me the names, legal references, an outline of the facts and the judgement of, what you consider, the most relevant cases?

If you could also send me transcripts of the most relevant sections from enacted legislation, I would be most grateful.

I still operate an account at Lloyds Bank, Milford Haven and would be pleased to pay for any charges that this research might entail.

Yours sincerely,

3 KENMOUNT ROAD, ST. JOHN'S, NFLD. A1B 1W1
PHONE 726-3223 (AREA CODE 709)

Newfoundland Teachers' Association

March 20, 1975.

Mr. D. M. Parry,
Department of Education,
Memorial University,
St. John's, Nfld.

Dear Mike:

This is to confirm that I have now heard from all the teachers who had cases decided by Boards of Reference prior to the Collective Agreement 1973. All the teachers have given permission for you to use the facts of their cases subject to the protection of anonymity.

Yours sincerely,

N. Ray Wight,
Secretary-Treasurer.

NRW/de

APPENDIX E

Type of School: _____
Primary, Elementary, Junior High, Senior High, Central High, All-grade, or Regional High.

Number of Students: _____

Number of Staff, including Principal: _____

1. Does you school board have specific regulations for the supervision of students? _____
Yes or No

2. Does your school have specific regulations for the supervision of students? _____
Yes or No

3. If the school does have specific regulations, please enclose either the regulations in toto, or relevant extracts.

I enclose regulations in toto: _____
Yes or No

I enclose extracts only: _____
Yes or No

4. Does the school contribute to any insurance plan for the coverage of the students? _____
Yes or No

If Yes, does the school pay the contributions? _____

or, do the students pay the contributions? _____

APPENDIX F

Name of School Board: _____

1. Are all your buildings and equipment insured? _____
Yes or No

2. Does the School Board carry general accident insurance? _____
Yes or No

3. Does the School Board carry comprehensive liability insurance? _____
Yes or No

If Yes, what is the extent of the coverage? _____

4. If the School Board operates buses, in its agreement with the bus contractors, does it use the contract recommended by the Department of Education? _____
Yes or No

5. If No: (i) does your contract include a clause indemnifying the School Board from and against all claims and demands, actions and suits, for and in respect of any injuries to persons or property arising out of the operations of any bus? (Section 1 (j) of the recommended contract). _____
Yes or No

(ii) does your contract have a clause imposing on the bus contractor the responsibility for the safety of passengers, entering, alighting from and being transported in any bus? (Section 1 (n) of the recommended contract). _____
Yes or No