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## Educational Malpractice: A Tort Is Born

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## EDUCATIONAL MALPRACTICE: A TORT IS BORN

JOHNNY C. PARKER\*

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So much has been written about proximate cause that any professor who feels an article coming on would do well to coil it and sit on it and hold his peace. Everything worth saying on the subject has been said many times, as well as a great deal more that was not worth saying. Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze, and the very bewildering abundance of the literature defeats its own purpose and adds its smoke to the fog.<sup>1</sup>

Rather than heed the words of so noted a legal scholar, I, armed with pen and pad, again attack the pinnacles of proximate cause. Though I lack the profundity of the men who first assailed these "walls of Jericho<sup>2</sup>," I am moved to embattle so ubiquitous a concept not by personal ambition but rather by the growing number of judicial opinions which utilize proximate cause to retard the recognition and development of new fields of tort liability.

While much disagreement and confusion surround the concept of proximate cause, there are some issues upon which most legal scholars and commentators agree. Among these are that: (1) some reasonable (causal) connection between the defendant's act or omission and the injuries for which the plaintiff seeks compensation must exist;<sup>3</sup> (2) the plaintiff bears the burden of proof on the issue of causation;<sup>4</sup> (3) proximate cause is a

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<sup>1</sup> William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 389 (1950).

<sup>2</sup> The Biblical walls of Jericho were believed to protect the inhabitants of the city from their enemies. Although the strength of Jericho's walls was renowned throughout the land, they fell before a shout from the people of Israel who put their faith and trust in the power of God. *Joshua* 6:1-27.

<sup>3</sup> Most lawyers were introduced to proximate cause as first-year law students in the context of analyzing the prima facie case requirements for negligence. Proximate cause or legal cause is not only an essential element of a negligence action but a causal connection must also exist prior to recovery for any tort whether based on negligence, intent or strict liability.

<sup>4</sup> The burden of the proof observation is significant to the focus of this article. There are a number of instances in which courts have relied on public policy to carve out exceptions to this rule. See, e.g., *Summers v. Tice*, 199 P.2d 1 (Cal. 1948); *Hall v. E.I. DuPont de Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972); *Abel v. Eli Lilly & Co.*, 343 N.W.2d 164 (Mich. 1984), cert. denied, 469 U.S. 833 (1984).

question of fact to be determined by the jury;<sup>5</sup> and, (4) issues such as causation in fact, apportionment of damages, liability for unforeseeable consequences, superseding causes, shifting responsibility, duty to plaintiff, and plaintiff's fault may come within the rubric of proximate cause.<sup>6</sup>

This article examines the judicial justification for the nonrecognition of educational malpractice as a theory of tort liability. Section I focuses on the various factual contexts in which educational malpractice claims have arisen and analyzes the concept of duty and proximate cause in the different factual contexts. Section II discusses the common law principles which demonstrate that the analytical problems associated with educational malpractice are not new to the law. Section III examines public policy as a distinct component of the duty-proximate cause inquiry. Section IV also focuses on public policy as expressed by various state legislatures regarding the teaching profession and teacher accountability. This article concludes that educational malpractice is a viable theory of tort liability and that traditional negligence analysis and public policy support the recognition of such a cause of action. Teachers, like other professionals, should be subject to legal action when their conduct falls below an acceptable standard.

## I. PROXIMATE CAUSE AND THE TORT OF EDUCATIONAL MALPRACTICE

Educational malpractice has historically lacked recognition in the law of torts. The notion of educational malpractice as a cause of action has been overwhelmingly resisted by American courts which have addressed it.<sup>7</sup> Courts have reasoned that such actions do not conveniently fit into the typical negligence framework of duty, breach, proximate cause, and damages.<sup>8</sup>

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<sup>5</sup> Even this issue is not without disagreement. An overwhelming majority of jurisdictions are in accord; however, Prosser seemingly suggests that the question of proximate cause is a question of law for the trial judge to determine. See W. PAGE KEETON, et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 42, at 273 (5th ed. 1984).

<sup>6</sup> See *id.*, at 279; Prosser, *supra* note 2, at 374.

<sup>7</sup> See *Peter W. v. San Francisco Unified School District*, 131 Cal. Rptr. 854 (Ct. App. 1976); *Donahue v. Copiague Union Free School District*, 391 N.E.2d 1352 (N.Y. 1979); *DSW v. Fairbanks North Star Borough School District*, 628 P.2d 554 (Alaska 1981); *Tubell v. Dade County Public School*, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); *Hunter v. Board of Education of Montgomery County*, 453 A.2d 814 (Md. 1982). *Cf. B.M. v. State*, 649 P.2d 425 (Mont. 1982) (cause of action recognized for educational malpractice where state failed to comply with statute. The court specifically noted that the claim at issue was of a different genre than other educational malpractice claims.).

<sup>8</sup> See cases cited, *supra* note 7. Courts have generally treated claims for individual injury from educational malpractice essentially as claims of negligence. *But see Hunter v. Board of Education of Montgomery County*, 439 A.2d 582 (Md. 1982) (court refused to recognize educational malpractice claim based on negligence but expressed willingness to recognize action on an intentional tort theory).

At least one commentator has classified educational malpractice claims into four distinct tort actions:

(1) failure to adequately counsel or educate students. This classification arises in an educational malpractice claim where the plaintiffs argue that the public school failed to adequately teach a student basic academic skills.<sup>9</sup> The plaintiffs claim that the public school district breached a duty owed to them under the common law, the constitution, or statutory provisions. They also allege that the public school district is liable for negligently representing that a student was performing at or near grade level in basic academic skills.<sup>10</sup>

(2) failure to make proper evaluation and placement of students into suitable educational programs and facilities. These claims by students maintain that they were improperly placed in, removed from, or negligently failed to be placed in, a special education program.<sup>11</sup>

(3) failure to provide proper medical diagnoses or treatment. This classification appears in a case where a medical student was sued as a defendant in a medical malpractice action for his participation in the delivery of a baby. The student brought a subsequent action against the director of medical education at the hospital alleging that he was negligently supervised and as a proximate result was sued for malpractice.<sup>12</sup> Another example involves a plaintiff who was allegedly injured due to the negligence of a chiropractor. The plaintiff sought to join the institution as a party based on the theory that it had inadequately trained and instructed one of its former students.<sup>13</sup>

(4) failure to warn or protect students from another's illness-related dangerous proclivity.<sup>14</sup> The factual differences between these various claims support the view that more than four causes of action may exist under the auspice of educational malpractice because of the ambiguous nature of the concept. This type of educational malpractice claim does not fit into any of the four distinct subclasses. This fact is illustrated in a claim involving a student-athlete whom a university knew was unable to succeed in college-level courses. The university advised the student-athlete to take "soft" courses to maintain his eligibility to compete in sports. At the end of four years, and after his eligibility had expired, the

<sup>9</sup> See, e.g., *Peter W. v. San Francisco Unified School District*, 131 Cal. Rptr. 854 (Ct. App. 1976); *Hunter v. Board of Education of Montgomery County*, 439 A.2d 582 (Md. 1982); *Donahue v. Copiague Union Free School District*, 391 N.E.2d 1352 (N.Y. 1979).

<sup>10</sup> See cases cited, *supra* note 9.

<sup>11</sup> See, e.g., *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979); *DSW v. Fairbanks North Star Borough School District*, 628 P.2d 554 (Alaska 1981); *Tubell v. Dade County Public Schools*, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); *Doe v. Board of Education*, 453 A.2d 814 (Md. 1982); *B.M. v. State*, 649 P.2d 425 (Mont. 1982); *Helm v. Professional Children's School*, 431 N.Y.S.2d 246 (N.Y. 1980).

<sup>12</sup> See, e.g., *Swidryk v. Saint Michael's Medical Center*, 493 A.2d 641 (N.J. Super. Ct. Law Div. 1985).

<sup>13</sup> *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986).

<sup>14</sup> WILLIAM D. VALENTE, *EDUCATION LAW: PUBLIC AND PRIVATE*, § 19.71 at 269 (1985).

student's reading and language skills were comparable to those of a seventh and fourth grader, respectively.<sup>15</sup>

Judicial adherence to the notion of a traditional negligence framework and analysis has resulted in the factual differences in educational malpractice claims being treated as irrelevant. This shortcoming in itself may be subjected to criticism. The legal concepts of duty and proximate cause are, however, most often cited as the factors limiting the development and recognition of educational malpractice as a theory of tort liability. It should be noted from the outset that while duty and proximate cause are sometimes treated as distinct analytical inquiries, such is not always the case.<sup>16</sup> Duty is not sacrosanct in and of itself, "[b]ut only an expression of the sum total of these considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."<sup>17</sup> The same policy concerns and considerations which are examined in the context of whether a duty of care is owed are more often than not duplicated in the proximate cause inquiry. The significant distinction between duty and proximate cause is the role each concept plays in the analysis of a negligence action. The duty inquiry is traditionally utilized to determine whether a relationship exists that imposes upon the defendant a legal obligation for the benefit of the plaintiff.<sup>18</sup>

The typical duty-proximate cause analysis in an educational malpractice claim can be illustrated by the facts of *Ross v. Creighton University*.<sup>19</sup> In *Ross*, the United States District Court of Illinois was confronted with the following facts. In July 1987, Kevin Ross, a former college basketball player, barricaded himself in a high-rise hotel room in downtown Chicago and threw assorted pieces of furniture out of the window. As Ross recalled it, the furniture "symbolized" the employees of Creighton University, whose alleged misdeeds he blamed for the onset of this "major depressive episode."<sup>20</sup> Ross's amended complaint claimed that Creighton caused this episode and otherwise injured him by recruiting him to attend the school on a basketball scholarship with knowledge that Ross, who scored nine points out of a possible thirty-six on the American College Test, was pitifully unprepared to attend Creighton, a private school whose average student in 1978, the year Ross matriculated, scored 23.2 points on the ACT.<sup>21</sup>

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<sup>15</sup> *Ross v. Creighton University*, 740 F. Supp. 1319 (N.D. Ill. 1990); see also *Wilson v. Continental Ins. Co.*, 274 N.W.2d 679 (Wis. 1979) (court rejected a claim by a law student against Marquette University whereby the university encouraged the student to take a course in "mind control" before beginning law school. Plaintiff alleged that the course caused him severe psychological disorders, resulting in his having to drop out of school. The words educational malpractice were not used in the opinion.)

<sup>16</sup> See *supra* note 5, and accompanying text.

<sup>17</sup> WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 332-33 (3rd ed. 1964).

<sup>18</sup> KEETON, et al., *supra* note 5, § 53.

<sup>19</sup> 740 F. Supp. 1319 (N.D. Ill. 1990).

<sup>20</sup> *Id.* at 1322.

<sup>21</sup> *Id.*

Ross was a high school basketball star in Kansas City, Kansas when Creighton recruited him. Creighton knew that Ross was highly unlikely to succeed in college-level studies but kept him eligible for the basketball team by recommending that he enroll in "bonehead" (Ross's description) courses such as ceramics, marksmanship, and the respective theories of basketball, track and field, and football.<sup>22</sup> Under University rules, Creighton would not have accepted the pursuit of this esoteric curriculum by a non-athlete. "After four years, when his basketball eligibility expired, Ross had earned only 96 of the 128 credits required to graduate, maintaining a 'D' average. His reading skills were those of a seventh-grader; his overall language skills, those of a fourth-grader."<sup>23</sup>

The first count of Ross's three-count complaint asserted elements of negligent infliction of emotional distress and educational malpractice.<sup>24</sup> Judge Nordberg, author of the opinion, noted that educational malpractice claims have been repeatedly rejected by American courts.<sup>25</sup> The conclusion of the court in *Ross* not to recognize a cause of action for educational malpractice was based on three considerations: (1) the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency complained of;<sup>26</sup> (2) the question of whether there is a duty owed to such plaintiffs;<sup>27</sup> and, (3) public policy.<sup>28</sup>

The *Ross* court analyzed the educational malpractice issue from a unified duty-proximate cause perspective.<sup>29</sup> Under this approach, the concept of foreseeability blends these otherwise distinct inquiries into an overall consideration of whether tort recovery should be permitted as a matter of policy.<sup>30</sup> The unified duty-proximate cause analysis obscures the fact that duty, as a distinct legal concept, is primarily concerned with whether a special relation exists between the plaintiff and the defendant which gives rise to an obligation of conduct. In other words, do the interests of the plaintiff merit legal protection against the invasion which has in fact occurred?<sup>31</sup>

Ordinarily, a defendant's conduct constitutes negligence if it involves an unreasonable risk of harm. The reasonableness of the risk—whether expressed in terms of duty or proximate cause, or regarded as a question of law or fact—turns on how the utility of the conduct or the manner in

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Ross v. Creighton University*, 740 F. Supp. 1319, 1323 (N.D. Ill. 1990).

<sup>25</sup> *Id.* at 1327.

<sup>26</sup> *Id.* at 1328.

<sup>27</sup> *Id.*

<sup>28</sup> *Ross*, 740 F. Supp. at 1329. See also *Felty v. New Berlin Transit, Inc.*, 374 N.E.2d 203 (Ill. 1978); *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 493 N.E.2d 1022 (Ill. 1986).

<sup>29</sup> *Ross*, 740 F. Supp. at 1328.

<sup>30</sup> *Id.*

<sup>31</sup> See KEETON, et al., *supra* note 5, § 42.

which it is done is viewed in relation to the magnitude of the risk.<sup>32</sup> The balancing of the magnitude of the risk with the utility of the defendant's conduct requires a consideration by the court and jury of the societal interests involved.

The Restatement (Second) of Torts suggests a number of factors which should be considered in determining the utility of the defendant's conduct.<sup>33</sup> Factors which are included are the social value that the law attaches to the interest to be advanced or protected by the conduct; the extent of the chance that this interest will be advanced or protected by the particular course of conduct; and the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.<sup>34</sup> Application of these factors to the facts of *Ross* reveals a startling reality in regard to the claim of educational malpractice.

Education is a professional service with a high utility. It is the prime characteristic of American society<sup>35</sup> and a significant factor in determining the social and economic successes a child will experience in life. The question under the facts of *Ross*, however, is whether education is the sole or even predominant interest advanced by Creighton University's conduct. A strong argument can be made that Creighton's interest was the well-being of its athletic program.<sup>36</sup> Consequently, the social value of the conduct diminishes. Creighton's interest in recruiting athletes, rather than education, should be weighed against the magnitude of the risk of harm. The Restatement Second of Torts suggests that the following factors should be considered in measuring the magnitude of the risk of harm: the social value which the law attaches to the interests which are imperiled; the extent of the chance that the actor's conduct will cause an invasion of any interest of another member; the extent of the harm likely to be caused to the interests imperiled; and the number of persons whose interests are likely to be invaded if the risk takes effect in harm.<sup>37</sup> The interest of the plaintiff is placed on the scale in analyzing the magnitude of the risk.

Although education has yet to be recognized as a constitutionally protected right,<sup>38</sup> its social value and import has elevated it to the level of

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<sup>32</sup> RESTATEMENT (SECOND) OF TORTS § 291 (1965) provides:

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

<sup>33</sup> *Id.* at § 292.

<sup>34</sup> *Id.*

<sup>35</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>36</sup> This argument is supported by the following facts: Creighton knew that Ross was incapable of doing college-level studies; Creighton undertook to keep him eligible by recommending that he take "bonehead courses"; and Creighton violated its own academic policy by allowing Ross to enroll in such courses. *Ross v. Creighton University*, 740 F. Supp. 1319 (N.D. Ill. 1990).

<sup>37</sup> See RESTATEMENT (SECOND) OF TORTS, *supra* note 32.

<sup>38</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

a "legitimate entitlement"<sup>39</sup> and "a right which must be made available to all on equal terms."<sup>40</sup> Renowned judges and laymen alike agree that education is very important in today's society.<sup>41</sup> A child's ability to acquire a decent job and income and to provide his or her children with these opportunities are all determined, in part, by the quality of his education. The utility of Creighton's conduct when compared to the magnitude of the risk falls short of that which should be protected by public policy.

The facts of *Ross* when compared to the other factual contexts of educational malpractice claims are clearly outrageous. Consequently, it is only fair to examine the duty-proximate cause problem in a more typical educational malpractice fact pattern. Assume, for example, that a former high school student is suing his high school for failure to teach basic academic skills such as reading and writing. The question of whether the teacher and school owed the student a duty to teach arises. The Restatement (Second) of Torts, referred to above, certainly supports an affirmative response. More important, however, is the fact that the other generally accepted analytical standards for duty support the same conclusion. For example, if the risks inherent in a failure to properly educate are examined, it is reasonable to conclude that a failure to educate in our high-tech society creates an unreasonable risk of harm to both the individual and society.

Likewise, the concept of nonfeasance<sup>42</sup> may be utilized to create an affirmative duty where one did not originally exist. The principle of nonfeasance permits the law to impose a duty where there has been some holding out, special relationship, promise, or undertaking by the defendant.

When the duty inquiry is properly undertaken, several things become apparent. First, the duty inquiry directs the focus to policy issues which in turn determine the extent of the original obligation and its continuance. In this context, the creation of a special relationship between the plaintiff and defendant serves as the foundation for the imposition of

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<sup>39</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>40</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>41</sup> *See, e.g., Brown*, 347 U.S. 483. Chief Justice Warren stated that:

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

*Id.* at 493. *See also* THE SCHOOL IN THE SOCIAL ORDER: A SOCIOLOGICAL INTRODUCTION TO EDUCATIONAL UNDERSTANDING, (Francesco Cordasco et al. eds., 1970).

<sup>42</sup> Nonfeasance is "a failure to perform a duty. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1220 (2d ed. 1983).



legal responsibility. Second, if public policy supports the recognition of a duty, it is illogical to conclude that a tort does not exist when the breach of such a duty occurs. Under these circumstances, the reality is that the tort exists, but the plaintiff, for whatever reason, cannot recover. From an analytical viewpoint, however, resolution of the duty inquiry, in the affirmative, operates to pass the question of negligence to the jury for its determination of whether a breach has occurred.<sup>43</sup>

Courts which base their decisions not to recognize educational malpractice as a theory of tort liability solely on the difficulty or presumed impossibility of proving duty-proximate cause are trapped within a conceptual vortex whose depth and diameter are based solely on the most primitive form of legal reasoning. This conclusion is supported by the following excerpt on the effects of legal concepts on legal reasoning:

If the society has begun to see certain significant similarities or differences, the comparison emerges as a word [duty-proximate cause]. When the word is finally accepted it becomes a legal concept. Its meaning continues to change. But the comparison is not only between the instances which have been included under it and the actual case at hand, but also in terms of hypothetical instances which the word by itself suggests. Thus the connotation of the word for a time has a limiting influence—so much so that the reasoning may even appear to be simply deductive.

The first stage is the creation of the legal concept which is built up as cases are compared. This period is one [in] which the court fumble[s] for a phrase . . . The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved far ahead as to make it clear that the suggestive influence of the word is no longer desired.<sup>44</sup>

The validity of this excerpt is supported by the fact that in all but one instance educational malpractice claims have been summarily dismissed solely on the basis of a presumed impossibility of proving duty-proximate cause.<sup>45</sup>

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<sup>43</sup> It is uniformly agreed that the issue of whether a duty exists is for the court to decide and whether that duty has been breached is a question for the jury. The issue of negligence can be removed from the jury's consideration if the court determines overriding public policy consideration requires that a particular view be adopted and applied in all cases. See, e.g., *Moning v. Alfonso*, 254 N.W.2d 759 (Mich. 1977); *Lannon v. Taco Bell, Inc.*, 708 P.2d 1370 (Col. App. 1985).

<sup>44</sup> EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING, 8-9 (1949). Legal concepts are conservative and less amenable to change. See VILHELM AUBERT, CONTINUITY AND DEVELOPMENT IN LAW AND SOCIETY, 131-32 (1989).

<sup>45</sup> See cases cited, *supra* note 7.

The argument that courts have placed far too much reliance on presumed conceptual impossibilities is further strengthened by the case of *Donahue v. Copiague Union Free School District*.<sup>46</sup> In *Donahue*, the plaintiff was a 1976 graduate of Copiague Senior High School. Plaintiff's claim was that although he received a certificate of graduation, he lacked even the rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications for employment.

Plaintiff attributed this deficiency to the failure of the school to perform its duties and obligations to educate him. Specifically, Donahue alleged that the school, through its employees:

[G]ave passing grades and/or minimal or failing grades in various subjects; failed to evaluate [his] mental ability and capacity to comprehend the subjects being taught to him at said school; failed to take proper means and precautions that they reasonably should have taken under the circumstances; failed to interview, discuss, evaluate, and/or psychologically test [him] in order to comprehend and understand such matter; failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as [he] is concerned in order to ascertain the learning capacity, intelligence and intellectual absorption on the part of [plaintiff].<sup>47</sup>

Unlike Judge Nordberg in *Ross*, Judge Jasen, in the *Donahue* opinion, did not tax his analysis by relying on legal concepts such as duty and proximate cause to justify his conclusion that a proper educational malpractice case was not before the court. Rather, Judge Jasen concluded that the facts before the court were not such as would entitle the plaintiff to relief under any circumstances. He further noted that even within the structures of traditional negligence, a complaint sounding in educational malpractice may be made.<sup>48</sup> He further expressed that it is not far-fetched to assume that a duty of care is owing "from educators, if viewed as professionals, to their students."<sup>49</sup> Regarding proximate cause, it was expressed that "while this element may be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude that it could never be established."<sup>50</sup>

*Donahue* draws a distinction between the ability to plead a cause of action and the public policy concern of whether such claim should be

<sup>46</sup> 391 N.E.2d 1352 (N.Y. 1979).

<sup>47</sup> *Id.* at 1353.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1353-54.

entertained. This approach, while rendering a similar result as in *Ross*, is totally devoid of reliance on legal concepts such as duty and proximate cause. Furthermore, this approach to the problem recognizes that there may be instances in which the violation is so gross that courts, fulfilling their proper function, would be obliged to recognize and correct the wrong.

The conclusion that educational malpractice claims should be heard on a case-by-case basis is supported by *B.M. v. State*.<sup>51</sup> The plaintiff's complaint in *B.M.* alleged that the state of Montana negligently classified her as retarded and later negligently placed her in a special education program when she was six years old. The trial court entered summary judgment for the defendant concluding that the state owed no legal duty of care to students negligently classified and placed in special education programs. Judge Shea, writing for the Supreme Court of Montana, reversed this finding, noting that "we have no difficulty in finding a duty of care owed to special education students. The general tenor of education for all citizens in Montana is stated in Art. X, section 1, 1972 Mont. Const."<sup>52</sup>

Judge Shea, relying on Montana education statutes, applied a violation-of-statute analysis to the question of duty. Under this approach, the statutes establish the existence of a special relationship between plaintiff and defendant and also define the level of care owed. The facts of *B.M.* were judicially observed to be distinguishable from other educational malpractice claims.<sup>53</sup>

## II. ANALOGOUS COMMON LAW PRECEPTS

Basic common law principles support recognition of the tort of educational malpractice. The American common law tradition can be traced as far back as the Declaration of Rights of the Continental Congress.<sup>54</sup> Since that time, American common law has served as the outline for an ideal order of society and as a body of ideals to which conduct should be required to conform. The ideals, their interpretations and application have been guided and shaped by legislation, judicial reasoning and doctrinal writings.

The common law tradition is well accepted in current analytical jurisprudence. Jurists who utilize it seek to organize the ideal element of the law to furnish a critique of old received ideals and give a basis for formulating new ones, and to yield a reasoned canon of values and a technique of applying it.<sup>55</sup>

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<sup>51</sup> 649 P.2d 425 (Mont. 1982).

<sup>52</sup> *Id.* at 427.

<sup>53</sup> *Id.* at 428.

<sup>54</sup> In the Declaration of Rights, the common law of England was asserted as the measure of rights of Americans. See HENRY S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY, document # 56, 82-84 (1943).

<sup>55</sup> *Id.* at 49.

Contrary to belief, legislation has had little effect on the common law tradition.<sup>56</sup> Legislation or statutory law has had its most significant impact in the areas of federal and state constitutions, bill of rights, criminal laws, and estates and trusts. Legislation in the civil arena, on the other hand, has basically taken the form of codification of judicially created "common law" precepts. Consequently, judicial deference to the legislature is without significant historical precedence.<sup>57</sup> Furthermore, legislation receives little, if any, attention in our system of traditional legal education,<sup>58</sup> thus undermining the notion that a wrongfully injured person should first seek redress from the legislative body.

The common law is a system of law which originated and developed in England. It is based on custom, doctrines, and usages found in court opinions.<sup>59</sup> More than half a century ago Roscoe Pound noted that:

The pressure of new interests has required that the taught tradition be made to serve new purposes as old doctrines were called on to solve new problems. There has been a gradual shaping of obstinate traditional precepts and traditional doctrines through the need of applying them to new economic conditions in the light of reshaping ideals of the legal order. Old analogies are developed by the traditional technique to meet problems arising from newly pressing unrecognized and unsecured interests.<sup>60</sup>

The presumption that duty-proximate cause will be difficult or impossible to prove is not unique to educational malpractice claims, nor is it novel to the common law. This presumption hindered the recognition and development of the common law tort of infliction of emotional distress for a number of years. As early as 1861, Lord Wensleydale in *Lynch v. Knight*<sup>61</sup> expressed that "[m]ental pain or anxiety the law cannot value, and does not pretend to redress. . . ."<sup>62</sup> The conclusion that mental anguish had no place in the law soon found its way into American jurisprudence where one learned jurist noted:

If the right [to recover] in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned

<sup>56</sup> See R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW*, 38-45 (1938); Cf. G. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION*, 14-27 (1986).

<sup>57</sup> See authorities cited, *supra* note 56.

<sup>58</sup> Law schools uniformly teach law, not laws. The teaching of law is in "the spirit of the common legal heritage of English speaking people." R. POUND, *supra* note 56, at 83.

<sup>59</sup> See G. POSTEMA, *SUPRA* note 56, at 14; see also BLACK'S LAW DICTIONARY 276-77 (6th ed. 1990).

<sup>60</sup> R. POUND, *supra* note 56, at 83-84.

<sup>61</sup> 11 Eng. Rep. 854 (1861).

<sup>62</sup> *Id.* at 863.

without detection, [and] where the damages must rest upon mere conjecture and speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a [claim] would be contrary to principles of public policy.<sup>63</sup>

As late as 1934, the common law had still not come to grips with the idea that a person had a protectable interest in mental and emotional tranquility.<sup>64</sup> Inroads were, however, being made and, by 1950, a large body of doctrinal writings<sup>65</sup> and case law<sup>66</sup> had developed supporting the position that the law should protect emotional and mental tranquility. In recognition of this development, the American Law Institute amended § 46 of the Restatement of Torts in 1947 to provide: "One who without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such distress, and (b) for bodily harm resulting from it."<sup>67</sup> This event marked the acceptance of emotional distress or mental anguish as a distinct theory of tort liability.<sup>68</sup> Since that time, competent

<sup>63</sup> *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 354-55 (N.Y. 1896) (overruled by *Battalla v. State*, 45 N.E. 354 (1896)).

<sup>64</sup> See RESTATEMENT OF TORTS § 46 (1934). The interest in mental and emotional tranquility and, therefore, in freedom from mental and emotional disturbance is not, as a thing in itself, regarded as of sufficient importance as to require others to refrain from conduct intended to cause such a disturbance. *Id.* at comment c.

<sup>65</sup> See, e.g., Herbert F. Goodrich, *Emotional Disturbance as Legal Damages*, 20 MICH. L. REV. 497 (1921); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

<sup>66</sup> See, e.g., *Wilkinson v. Downton*, 2 Q. B. 57 (1897); *Barnett v. Collection Ser. Co.*, 242 N.W. 25 (Iowa 1932); *Richardson v. Pridmore*, 217 P.2d 113 (Cal. Ct. App. 1950); see also cases cited in W. J. Dunn, Annotation, *Civil Liability for Insulting or Abusive Language Not Amounting to Defamation*, 15 A.L.R.2d 108 (1951).

<sup>67</sup> The American Law Institute, in explanation of the amendment, stated: The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. . . . The injury suffered by the one whose interest is invaded is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other protected interest. In the absence of a privilege the actor's conduct has no social utility. . . . No reason or policy requires such an actor to be protected from liability. . . .

Comment d.

<sup>68</sup> It should be noted that a number of restrictions existed initially regarding recovery for infliction of emotional distress. For example, the majority of courts allowed recovery only where plaintiff was able to show a manifestation of physical consequences or physical impact. These restrictions have been abolished in a majority of jurisdictions. See, e.g., *First Nat'l Bank v. Langley*, 314 So. 2d 324 (Miss. 1974) (authority cited therein). Common law restrictions regarding to recovery by third parties for emotional disturbances still remain. See, e.g., *Taylor v. Vallelunga*, 339 P.2d 910 (Cal. Ct. App. 1959); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Dillion v. Legg*, 441 P.2d 912 (Cal. 1968).

jurists and jurors have obscured the presumed proximate cause dilemma. It is also significant that many jurists, during the early development of infliction of emotional distress, espoused policy concerns<sup>69</sup> similar to those being asserted by contemporary jurists with regards to educational malpractice.<sup>70</sup>

At common law, school districts were accorded preferential treatment. Early cases uniformly held that school districts, boards and agencies, in the absence of an express statute to the contrary, were not liable for injuries resulting from their negligence.<sup>71</sup> The rule of nonliability was generally premised on the fact that school districts were agencies of the state established for the promotion of education for which they derived no benefit in their corporate capacity.<sup>72</sup> A secondary rationale for the nonliability rule was that public school funds should not be used to satisfy damage claims occasioned by the negligence or wrongful act of agents or servants of the school district.<sup>73</sup> A number of exceptions and limitations developed along with the governmental immunity (nonliability) rule. For example, school districts could be held liable for: (1) a tort arising out of, or committed in the performance of a proprietary as distinguished from a governmental function or activity;<sup>74</sup> (2) personal injury or death caused by the creation or maintenance of a nuisance;<sup>75</sup> (3) injury or death caused by a positive wrong or a willful or intentional act;<sup>76</sup> and, (4) the taking of private property for public use without compensation.<sup>77</sup> The nonliability rule was never extended to protect the agents or employees of schools, such as teachers, for their personal liabilities.<sup>78</sup>

Governmental immunity originated as a creature of the common law. Accordingly, the doctrine could be judicially abolished or limited. In *Molitor v. Kaneland Community School District*<sup>79</sup> the Supreme Court of Illinois rejected the various reasons for the nonliability rule as unjust and erroneous. Since that time the majority of states have judicially abolished

<sup>69</sup> See *supra* note 62 and accompanying text.

<sup>70</sup> See *infra* note 80 and accompanying text.

<sup>71</sup> See, e.g., *Clark v. Nicholasville*, 87 S.W. 300 (Ky. 1905); *State Use of Weddle v. Bd. of Sch. Comm'rs*, 51 A. 289 (Md. 1902); *Whitehead v. Board of Educ.*, 102 N.W. 1028 (Mich. 1905); *Folk v. Milwaukee*, 84 N.W. 420 (Wis. 1900); *Wiest v. School Dist. No. 24*, 137 P. 749 (Or. 1914).

<sup>72</sup> See *supra* note 71.

<sup>73</sup> See, e.g., *Ernst v. West Covington*, 76 S.W. 1089 (Ky. 1903); *Board of Educ. v. Volk*, 74 N.E. 646 (Ok. 1905).

<sup>74</sup> See *Riddoch v. State*, 123 P. 450 (Wash. 1912); *Holzworth v. State*, 298 N.W. 163 (Wis. 1941).

<sup>75</sup> See *Bush v. City of Norwalk*, 189 A. 608 (Conn. 1937); *Jones v. Kansas City*, 271 P.2d 803 (Kan. 1954); *Molinari v. Boston*, 130 N.E.2d 925 (Mass. 1955).

<sup>76</sup> See *Meyer v. Board of Educ.*, 86 A.2d 761 (N.J. 1952).

<sup>77</sup> See *Griswold v. Town Sch. Dist.*, 88 A.2d 829 (Vt. 1952).

<sup>78</sup> See, e.g., *Woodman v. Hemet Union School District*, 29 P.2d 257 (Cal. Ct. App. 1934); *Gaincott v. Davis*, 275 N.W. 229 (Mich. 1937).  
229 (Mich. 1937).

<sup>79</sup> 163 N.E.2d 89 (Ill. 1959).

the doctrine of sovereign immunity reasoning that the doctrine: (1) was manifestly unfair to injured persons; (2) tends toward governmental irresponsibility; and, (3) is an unnecessary exception to the policies of the state.<sup>80</sup> State legislatures have responded to the abolition of judicially created sovereign immunity by enacting statutes dealing specifically with the tort liability of all or certain governmental entities. Consequently, where the legislature has failed to provide an immunity for schools there are no factors counseling against the imposition of liability.

### III. PUBLIC POLICY AND THE TORT OF EDUCATIONAL MALPRACTICE

Public policy considerations are an integral part of the duty-proximate cause inquiry. Public policy, in the literal sense, is an expression of the “[c]ommunity common sense and common conscience . . . and well-settled public opinion relating to man’s plain and palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation.”<sup>81</sup> The arbiters of public policy are judges and legislators.

The public policy concerns inherent in educational malpractice claims were judicially expressed in the often quoted passage from *Peter W. v. San Francisco Unified School District*:<sup>82</sup>

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

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<sup>80</sup> See *Pruett v. City of Rosedale*, 421 So. 2d 1046 (Miss. 1982) (authority cited therein).

<sup>81</sup> BLACK’S LAW DICTIONARY 1231 (6th ed. 1990).

<sup>82</sup> 131 Cal. Rptr. 854 (Ct. App. 1976).

These recognized policy considerations alone negate an actionable duty of care in persons and agencies who administer the academic phases of the public education process. Others, which are even more important in practical terms, command the same result. Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey. To hold them to an actionable "duty of care," in the discharge of their academic functions, would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.<sup>83</sup>

Judicially expressed public policy concerns may be paraphrased as follows: that courts will be inundated with law suits; courts will have to monitor the internal affairs of schools and school boards; and educational malpractice actions will unduly burden a school's limited resources. These judicial concerns, no matter how expressed, fail to recognize the nature of professionalism and legislative reaction to problems in education in general.

Professionalism entails the notion of malpractice which may be described as "professional misconduct or unreasonable lack of skill."<sup>84</sup> Malpractice is the "failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services or to those entitled to rely upon them."<sup>85</sup>

Are teachers professionals? Commentators are split on this critical issue.<sup>86</sup> Resolution of the issue of whether teachers are professionals plays

<sup>83</sup> *Id.* at 860-861.

<sup>84</sup> BLACK'S LAW DICTIONARY 959 (6th ed. 1990).

<sup>85</sup> *Id.*

<sup>86</sup> See Alice J. Klein, Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U. L. REV. 27 (1979). "Although definitions of a profession often exclude education, courts have described educators as professionals, and public policy considerations support this proposition." *Id.* at 41. But see Patrick D. Halligan, *The Function of Schools, the*



an important role in the quest for teacher accountability because it determines the appropriate standard of care to be applied under the circumstances. In most of the cases involving educational malpractice, the majority opinions did not address this issue.<sup>87</sup> Judge Davidson, dissenting in *Hunter v. Board of Education of Montgomery County*,<sup>88</sup> expressed that teachers are professionals based on the fact that they have special training, are certified by the state, and hold themselves out as possessing superior skill, training and knowledge not possessed by ordinary members of the community.<sup>89</sup> Judge Davidson also stated that "as professionals they [educators] owe a professional duty of care to children who receive their services and a standard of care based upon customary conduct is appropriate."<sup>90</sup>

The term professionalism further illustrates the spurious nature of judicial arguments in regards to proof of duty. In *Peter W. v. San Francisco School District*<sup>91</sup> and *Donohue v. Copiague Union Free School District*,<sup>92</sup> the courts rather dubiously expressed some trepidation with regard to the standard of care. In both cases the courts were concerned with a presumed inability of laymen to determine how reasonable persons would have acted in the context of education. This concern was, however, unjustified because the complaints in both cases alleged violations of professional conduct, which necessitates an inquiry into the custom of the profession as opposed to the reasonable person.

Because of the abstract nature of education, courts have been reluctant to impose liability on teachers and school districts for their failure to teach. Teachers, schools and universities stand *in loco parentis*<sup>93</sup> for the benefit of both the child and his or her parents. This relationship was the foundation for the trial of Socrates, the most famous teacher trial in

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*Status of Teachers and the Claims of the Handicapped: An Inquiry into Special Education Malpractice*, 45 MO. L. REV. 667 (1980). Halligan notes that:

The role of a teacher is important, even critical. But it is not professional in the sense intended by malpractice law. It is not a learned profession. It is a role in which the discretion of individual performing members is closely limited and does not require trust and confidence in the same manner that the work of a physician or lawyer requires them. . . . [T]he duty of a teacher is to follow the orders of superiors.

*Id.* at 676-77.

<sup>87</sup> See *supra* note 8.

<sup>88</sup> 439 A.2d 582 (Md. 1982).

<sup>89</sup> *Id.* at 589.

<sup>90</sup> *Id.*

<sup>91</sup> 131 Cal. Rptr. 854 (Ct. App. 1976).

<sup>92</sup> 391 N.E. 2d 1352 (N.Y. 1979).

<sup>93</sup> "In the place of a parent; instead of a parent; charged, factitiously with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 787 (6th ed. 1990). As originally conceived, the doctrine of *in loco parentis* was intended to treat disciplinary matters; however, it has been expanded to include other areas of the schooling process.

history.<sup>94</sup> It also led then President Richard M. Nixon to state that "schools, administrators and teachers alike are responsible for their performance, and it is in their best interest as well as the interests of their pupils that they be held accountable."<sup>95</sup>

Since the Nixon era, state legislators have reacted to the subject of education with a vast array of statutes dealing with the broader concerns of education in general. These statutes express national, state, and community interest and commitment to quality education. They evince the societal scrutiny to which the education profession has been subjected and reflect legislative views of public policy in regard to education. These statutes also serve as authoritative pronouncements on the duty of schools. Included among these statutory provisions are those pertaining to the qualifications,<sup>96</sup> duties,<sup>97</sup> and dismissal of teachers.<sup>98</sup>

Most statutes refer to teachers as professionals. The Georgia legislature has gone one step further and statutorily expressed that teaching is a professional service, with all similar rights, responsibilities, and privileges accorded other recognized professions.<sup>99</sup> The implication of such a provision is that teachers, like physicians, attorneys and accountants, owe a duty to those who rely on their services and are to be held to the same standards as other professionals.

Some state legislatures have also created Professional Teaching Practices Commissions that are responsible for developing, through the teaching profession, criteria of professional practice, including ethical and

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<sup>94</sup> 25 AMERICANA ENCYCLOPEDIA, 165-168 (1979). In 399 B.C. Socrates, an 80-year-old Athenian philosopher-educator, was charged with corruption of the young and brought before a jury of 501 of his fellow citizens, who found him guilty.

<sup>95</sup> RENNARD STRICKLAND, ET AL., AVOIDING TEACHER MALPRACTICE: A PRACTICAL LEGAL HANDBOOK FOR THE TEACHING PROFESSION, 63 (1976). See also Scheelhaase v. Woodberry Community Central Sch. Dist., 488 F.2d 237 (8th Cir. 1973) (upholding a teacher's dismissal for her students having scored low on standardized achievement tests) *cert. denied*, 417 U.S. 969 (1974).

<sup>96</sup> All states have statutes that require teachers to possess a teaching license, which is often referred to as a teaching certificate, issued by the state board of education or similar agency. See WILLIAM D. VALENTE, EDUCATION LAW: PUBLIC AND PRIVATE, App. Tbl. 18, at 498 (1985).

<sup>97</sup> The obligation of particular positions, as specified in written contracts, project a range of implied duties including those that are reasonably incidental to the contract terms. *Id.* § 12.22, at 242.

<sup>98</sup> State statutes uniformly provide that teachers may be dismissed for reasons such as immorality, incompetency, neglect of duty, misconduct, and insubordination. See, e.g., ALA. CODE § 16-11-17 (1990); ALASKA STAT. § 14.20.030 (1990); ARIZ. REV. STAT. ANN. § 15-508 (1990); CAL. [EDUC.] CODE § 44932 (West 1991); COLO. REV. STAT. § 22-63-301 (1990); DEL. CODE ANN., tit. 14, §§ 1204 & 1420 (1990); GA. CODE ANN. § 20-2-940 (Michie 1991); HAW. REV. STAT. § 297-11 (1990); IDAHO CODE § 33-1208 (1990).

<sup>99</sup> GA. CODE ANN. § 20-2-792 (Michie 1991).

professional performance.<sup>100</sup> These commissions, much like state medical and bar associations, are empowered to conduct investigations and hearings on alleged violations of ethical or professional teaching performance or professional misconduct.<sup>101</sup> These commissions can warn, reprimand, suspend or revoke the certificate of a member of the profession.<sup>102</sup> These statutes reinforce the generally accepted policy that a profession is responsible for creating the standard by which professional conduct is to be judged.

The fact that disagreement exists within the teaching profession as to a proper standard of care for educators is not unusual in the law of professional malpractice. This, and similar problems, led to the development of the customary practice and locality rules in the medical profession.<sup>103</sup> The questions of whether a teacher has engaged in professional misconduct or lacks the skill of the ordinary member of the profession are not, in light of other types of professional malpractice claims, insurmountable barriers. Resolution of the problem may be found in the rule that plaintiff put on expert testimony to establish the standard in the community in question.

Several statutes authorize the board of education or a similar agency to procure liability insurance to indemnify and protect teachers and other employees against damages arising out of their employment whether based on negligence, common law or violation of contract rights.<sup>104</sup> The comprehensive nature of education statutes suggests that public policy supports the notion that teachers should be held professionally accountable for incompetency.

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<sup>100</sup> See, e.g., ALASKA STAT. § 14.20.440 (1990); COLO. REV. STAT. § 22-65-105 (1990); FLA. STAT. ANN. § 231.261 (West 1990); GA. CODE ANN. § 20-2-795 (Michie 1991); IDAHO CODE § 33-1252, 1254 (1990).

<sup>101</sup> See, e.g., ALASKA STAT. § 14.20.460 (1990); COLO. REV. STAT. § 22-65-105 (1990); FLA. STAT. ANN. § 231.546 (West 1990); GA. CODE ANN. § 20-2-795 (Michie 1991).

<sup>102</sup> See, e.g., ALASKA STAT. § 14.20.470 (1990); COLO. REV. STAT. § 22-65-105 (1990); GA. CODE ANN. § 20-2-796 (Michie 1991).

<sup>103</sup> Evidence of customary practice is relevant and admissible in malpractice actions against physicians, accountants and attorneys and may prove influential with the jury. Customary practice is very significant in medical malpractice actions because the jury is usually instructed that the plaintiff cannot recover unless he proves that the defendant's conduct was not consistent with recognized medical practices. It is not enough that another physician states that he would have proceeded otherwise. The plaintiff must establish that the physician in question actually violated the recognized standard of the profession. See *Keeton*, et al. *supra* note 5, at § 32.

The locality rule further requires that the plaintiff show the standard of learning and skill of the community in which the defendant practices. Satisfaction of these rules often necessitates expert testimony by a local physician or one familiar with the community standards. KEETON, et al., *supra* note 5, at 186-88.

<sup>104</sup> See GA. CODE ANN. § 20-2-991 (Michie 1991); ILL. REV. STAT. ch. 122, Para. 10-22.3 (1991); COLO. REV. STAT. § 22-32-110 (1991).

The prima facie requirement for an action in negligence requires the complaining party to prove some legally recognized duty owing from defendant, a breach of that duty or a failure to act in accordance with a standard of care, and proximate cause which is the causal relationship between breach and injury. Proof of causation in educational malpractice claims may prove extremely difficult in all but the most egregious cases. This is not to say that causation can never be proven, nor does it support a presumption of an impossibility of proving causation. Rather, the difficulty in proving causation operates as a built-in dam which curbs the flood gates of litigation. The teacher-student relationship supports the view that some causal relationship may exist between the conduct of a teacher and the failure of a student to learn.

The preceding discussion negates the judicially expressed public policy concerns noted earlier in this section. Recognition of miseducation claims will not cause a tidal wave of litigation. The proximate cause requirement will serve to distinguish between legitimate and illegitimate claims and consequently, restrain the latter. Miseducation claims will not unduly burden a school's resources since most governmental agencies are required, by law, to be insured. Furthermore, teachers and other professional school employees can procure malpractice insurance much like physicians and lawyers. Insurance is not novel to school boards, districts or teachers. It has been used extensively to provide protection against student claims for physical injury.

Judicial concern that courts will have to monitor the internal affairs of schools and school boards is invalid. It is an established principle that schools are primarily a state's responsibility.<sup>105</sup> Courts, however, have traditionally invaded the state's educational domain to resolve legal issues involving segregation<sup>106</sup>, due process<sup>107</sup>, funding<sup>108</sup> and physical injury to students.<sup>109</sup> Courts will frequently act when other branches of government are unable, unwilling, or do not know how to act. Courts are responsible for formulating solutions in order to assure that identified harm is remedied.

No better statement of the harm that results from miseducation can be found than that made by the Select Committee on Equal Education Opportunity in 1974. The committee noted:

The costs of inadequate education are, for the most part, immeasurable. For the individual, educational failure means a lifetime of lost opportunities. But the effects are visited on the Nation as well, for society as a whole also pays for the under-education of a significant segment of the population.

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<sup>105</sup> ARTHUR E. WISE, *RICH SCHOOLS, POOR SCHOOLS*, 165-67 (1968).

<sup>106</sup> See *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>107</sup> See *Wood v. Strickland*, 420 U.S. 308 (1975); *Carey v. Piphus*, 435 U.S. 247 (1978).

<sup>108</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>109</sup> See, e.g., *Carbone v. Overfield*, 451 N.E.2d 1229 (Ohio 1983); *Thigpen v. McDuffie County Bd. of Educ.*, 355 S.E.2d 112 (Ga. 1985).

Unemployment and underemployment due to low levels of educational attainment and underachievement reduce many citizens' earning power. Reduced earnings translate into fewer total goods and services, less tax support for Government, and require the use of public budgets to pay for services that would otherwise be provided through personal resources. Families whose incomes are below the poverty line must be supported with tax dollars to pay for food, housing, health services, job training, remedial education, income maintenance and other services. Low educational attainment is an important contributor to crime; the costs of crime prevention and control and our judicial and penal systems are higher to the extent that higher educational attainment and achievement would result in reduced juvenile delinquency and adult crime. . . .

Finally, the costs of poor education are not just limited to the present generation. The children of persons with inadequate education are themselves more likely to suffer the same educational and social consequences as their parents.<sup>110</sup>

#### IV. CONCLUSION

The consequences of miseducation are clearly identifiable and judicially remediable. Nonetheless, judicial unwillingness to recognize the tort of educational malpractice has provided the teaching profession with a governmental immunity of sorts.<sup>111</sup> This result is manifestly unfair to persons who are wrongfully injured due to the incompetence of others and fosters irresponsibility. Accountability is a fertile area of litigation in the medical, legal and accounting professions. The analytical standards and concepts developed in these areas should be applied to the teaching profession.<sup>112</sup>

The concept of proximate cause was not developed as a tool to hinder tort law development. Rather, this concept was merely intended to set the bounds beyond which the defendant would not be legally responsible for the consequences of his acts. Whether a defendant proximately caused injury for which he may be held legally responsible depends upon whether his conduct was so significant and important a cause that he should be held liable. The significance and importance of the defendant's conduct in turn depends upon public policy.

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<sup>110</sup> FRANCESCO CORDASCO, U.S. SENATE SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY: TOWARD EQUAL EDUCATIONAL OPPORTUNITY, 92nd Cong., 2d Sess. 171 (1974) (commonly referred to as "The Coleman Report").

<sup>111</sup> KEETON et al., *supra* note 5, at 1047-48.

<sup>112</sup> "The basic pattern of legal reasoning is reasoning by example. . . . It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation." EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING, 1-2 (1949).

Duty and proximate cause have come to be the words from the past that are much spoken of, that have acquired a dignity of their own, and to a considerable degree, control results. In the context of educational malpractice, however, judicial opinions that rely upon these two inter-related concepts do so without engaging in long-established and universally-accepted methods of legal analysis.

Public policy does not prohibit recognition of the tort of educational malpractice. The failure of schools to achieve educational objectives has reached epidemic proportions. Not only are many individuals deprived of the learning they so desperately need, but society as a whole is beset with social problems each time an improperly educated youth is passed into the mainstream of American society. Available procedures do not adequately deal with the problems created by incompetent teaching nor do they provide adequate relief to wrongfully injured individuals. Therefore, recognition of the tort of educational malpractice is consistent with the common law tradition of providing a remedy to a person who has been harmed by the conduct of another.

