Teachers' Knowledge of the Law in
New South Wales

Diane G. Harapin

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ABSTRACT

This study explores the issue of teachers' and school administrators' knowledge of key legal issues affecting schools. In the Australian educational arena, legal issues are having a greater impact on educational policy and practice. This phenomenon is a reflection of a worldwide change in attitudes towards many areas including the rights of children, professional accountability, consumer satisfaction and a general increase in interest in legal rights.

Although numerous writers have discussed at length the legal situation in relation to many issues, quoting and commenting on hundreds of cases, similar attention has not been given to determining the level of administrators' and teachers' understanding of the legal issues which face them daily.

This research examines the level of school administrators' and teachers' awareness of specific legal issues faced in schools, focussing upon the full extent of their responsibilities to students. The ever-increasing areas of education law are many, in fact, they are simply beyond the realms of a study such as this. Therefore, to ensure a focussed study, the issues included are primarily those affecting the daily operation of the school, often discussed in the literature and the media.

A questionnaire was developed based on common legal issues and cases that impact upon schools. These issues included duty of care, standard of care, educational malpractice, accidents to students in the school environment, mandatory notification of abuse and custody or residence. School personnel from both government and independent schools participated in this study by completing this questionnaire.

The research indicated that many principals and teachers had incomplete knowledge of legal situations that affect them. In some instances, a large group of participants were uncertain as to their legal obligations. Data obtained indicated a lack of agreement among teachers on this subject. In particular, there were areas of case law in which the majority of respondents did not understand the issue and their responsibilities.
Administrators who participated displayed a statistically significant greater knowledge of case law and legislation than teachers. A school that recently undertook group in-service on this topic also exhibited a better understanding of school law. Other factors such as gender, amount of teaching experience and school system or type did not display a significant statistical difference.

Data indicated the need for greater provision in pre-service education of teachers on current legal obligations. As the law is constantly changing, there is also a need for continuing professional development in this area. It is particularly important that school administrators remain informed of current developments. It is also apparent that risk management procedures and legal policies are needed to ensure an ongoing literacy in legal issues for all staff. Access to accurate and current legal advice for teachers and principals is also becoming fundamental in the increasingly litigious Australian school environment.
STATEMENT OF ORIGINAL AUTHORSHIP

This thesis is the original product of several years of research and study by Diane G. Harapin. This work has never been published or submitted for examination at any institution previously.

To the best of my knowledge no written matter contained herein has been published before except for that which is quoted and referenced in a suitable manner.

Signed: ____________________________

Date: ________________________________
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CHAPTER ONE

INTRODUCTION

The law impacts upon every aspect of society, including education. A recent steady increase in litigation in education throughout the world has heightened the legal influence on education. This is certainly the situation in Australia, where an ever-increasing number of documented cases face the courts each year. The focus of this study is to determine whether teachers and school administrators are equipped to deal with this phenomenon.

In fact, the law influences classroom practice through the statutes that apply in educational contexts and the common law principles which affect educational practice. Statute law refers to laws made by parliament, it includes all crimes and some civil matters. Common law may be defined as law determined by the courts. An examination of common law involves delving into the judgements made in court cases.

Although not all cases make it to court, they may be a source of considerable distress to those involved. Indeed, much has been written regarding the impact involvement in legal proceedings has on educators and school administrators. Concern is widely felt by those involved in education that the law should exist to support the educational system not to hinder educational practice and purpose, and generally make life difficult for those educating the young.

This study is concerned with specific aspects of education and the law. Central to this study is teachers' and school administrators' knowledge of the law and, in particular, knowledge of negligence and the duty of care. To ensure a focussed study, this research work is concerned with the cases and issues often discussed in the media and most likely to affect teachers in Australian schools.

The concept of the duty of care of students is explored through pertinent issues such as accidents to students, educational malpractice, and supervision outside school hours and outside the school premises. Other areas explored are accidents during
sport, child custody issues and the use of potentially dangerous equipment. The central aim of this work is to determine the extent of an educator's knowledge of these topics. Issues relating to corporal punishment, giving negligent advice, assaulting students and sexual assault are beyond the scope of this project.

As Williams writes (1994, p. 5):

The legalisation of Australian Education has begun. A new suing mentality in Australian society, coupled with the growing awareness of rights and a greater willingness on the part of students in schools to pursue what they perceive to be their rights, has meant that many practices traditionally carried out by teachers free of legal scrutiny are now under the microscope.

David White, a solicitor of the Supreme Court of NSW, quoted in Spencer and Nolan (1997, p. 21) agrees that Australians have become more litigious. There has been an increase in litigation in schools, in particular, student claims against their teachers or principal. Bransgrove (1990, p. 112) states that this is due to an increase in the public's awareness of its legal rights, easier access to legal advice and an increase in consumerism.

The litigation arising from accidents occurring to students as well as other issues in schools is proof of the ever-increasing level of accountability of teachers, principals and other school staff. It is true that at times, 'accidents do happen', and during the six or so hours per day that students generally attend school, the probability of having an accident of some kind maybe quite high. Often the fault lies with the injured party as they have injured themselves in one way or another, however, there are times when the injured party feels that their accident was somewhat attributed to the action or inaction of another party, often a teacher.

Schools are now dynamic places facilitated by teachers and principals attempting to provide diverse and challenging learning experiences for the children they supervise. The school has found itself providing the roles originally covered by the family, resulting in teachers' roles encompassing those of social worker, police person, minister and counsellor. Add to this the roles of entertainers and private tutors of individual programs and one discovers that today's school teachers are often trying to maintain a balance between offering enriching experiences to students and providing for their safety and security.
Schools have evolved to become more democratic in their processes and policies. In New South Wales this is termed the 'democratisation of schools' and has led to the inclusion of students, parents and the community in making decisions regarding the school. Logically this has given people access to knowledge about the school and education that for the most part was previously unavailable.

Increased access to the school has resulted in an overall increase in community expectations and levels of accountability as indicated in chart 1.1. Accountability in schools occurs in many forms however Australian schools have recently seen a steady increase in legal responsibilities and obligations. In attempting to address such legal responsibilities the school has become "legalised". Chart 1.1 shows the relationship of these principles in the educational environment.

Chart 1.1 – Legalisation of the school

- Increase in democracy in society
  - Democratisation of schools
    - Increased community expectations
      - Increased levels of accountability
        - Increased legal responsibilities
          - The legalisation of the School
The attitude in society toward teachers has altered from those times where a teacher was revered and their opinions and beliefs seldom challenged. The educated, informed public of today has certain expectations of educational professionals and will often take action if their expectations are not fulfilled.

The concept of accountability in education is a relatively new one. Previously accountability was in the form of financial accountability, such as school budgets, rather than educational standards. "It appears there is a recent emergence of school accountability as being accountable along organizational, social, and professional dimensions of their respective roles." (Stewart, 1998b, p. 61) In this way, principals are making decisions daily that will affect the management of the school and perhaps keep the school out of court. Often the situations in which both teachers and administrators find themselves require them to make decisions instantly, without the opportunity to confer with anyone or consult lawyers. This has become even more difficult as schools are increasingly involved in areas that are more complex and the role of the school diversifies.

More than ever before educational decision making and practices are being challenged by those who feel disaffected or disadvantaged by the education system. It is the law that is increasingly providing both the grounds on which such challenges can be made and the remedies many complainants seek. (Williams, 1995, p. 2)

There has been a 300% increase of litigation in Australia since the late 1980s according to Stewart (1998a, p. 132). Litigation is a drain on resources, both human and financial. In fact, American research indicates, "the costs, and effects of litigation remains high. In a survey of its member schools, the National Association of Secondary School Principals (NASSP, 1989) found that 58% reported recent changes in their programs in response to fear of litigation." (Imber and Thomson, 1991, p. 226)

Similarly, Underwood and Noffke (1990, p. 16) indicate that on average schools across the United States of America (USA) faced one instance of litigation a year, 22.6% of which were negligence cases. They go on to say that although the school systems prevailed in 63.1% of cases, the fear of such litigation has greatly affected educational programs and policies and the work of educators and administrators throughout the USA.
There are many relatively new laws in Australia, including anti-discrimination, privacy and equal opportunity laws. The laws impact on the rights of individuals, including children. This legislative activity is reflective of an increase in human rights in many countries. For educators, this has resulted in an increase in professional responsibility and in an increase in legal obligation and involvement.

Interestingly, much has been written about the increase of legal cases in the Australian school context, authors such as O'Brien (1998), Hopkins (1996) and Walkley (1997) indicating a need for educators to have knowledge of legal issues. However, to date very little Australian research into school employees' knowledge of the law has been undertaken, as demonstrated in the following literature review.

The purpose of examining teachers' legal responsibilities to students at school is not to alarm educators. It should, however, alert educators to the most common and pertinent issues in education law. It should also indicate that at times, the law is on the teachers' side. It is important for all school leaders to have a comprehensive knowledge of their legal responsibilities in order to institute policies and practices to prevent or limit liability. For example, many serious accidents to students could have been avoided by careful planning and implementation of risk management procedures. The following paper delves into the various cases at law that have set certain precedents in law and provide a framework for the understanding of what can be labelled as 'safe' practice or 'good' practice in education.

**Area of research**

The particular focus of this study is teachers' and administrators' knowledge of the law in relation to professional negligence. Central to this is the issue of educators' duty of care for their students.

**Definition and significance of the problem**

The laws impacting upon schools, administrators, teachers and students are complex and frequently misunderstood. Researchers in the area of educational law have reported that teachers and school administrators frequently disagree on what is legally acceptable or unacceptable regarding accidents occurring to students and the issue of educational negligence or malpractice. Indeed, recent cases involving school personnel and students indicate a lack of knowledge in this area. Furthermore, the
testimony of defendants, generally school employees, often displays a lack of awareness regarding negligent actions or inactions.

Teachers are responsible for numerous activities within the school. They may be involved in situations of a legal nature, at times making decisions without help or consultation. Stewart and Knott (2002b, p.9) suggest that staff make legal decisions as situations occur. It is therefore imperative to have an understanding of the law as it affects schools and educators.

The primary assumptions of this study are that legal issues in schools are increasing and also that teachers and school administrators may be unaware of the actions and inaction that constitute negligence. Educators are also unable to keep abreast with changes in law and legislation significantly affecting schools.

It is true that the impact of the law on the educational environment is increasing and will continue to do so. Indeed, Chisholm (1987b, p. 7) writes that the legal impact on the school context is likely to increase substantially. More recently, Moore (2000, p. 5) indicated that over the past thirty years there has been a "broadening the scope of liability attaching to school authorities and teachers for injuries to students." He adds, "it is clear that such claims, in Queensland at least are on the increase." Stewart (1996a, p. 111) also observes a substantial increase in the law on Australian education.

Ramsay and Shorten (1996, p. 173) indicates that this has been a gradual impingement upon the educational environment by stating, "the courts have been incrementally extending the boundaries defining an educational authority's liability for these incidents." In a practical example of the effects of such an imposition, Spencer and Nolan (1997, p .1) write, "in a comment reflecting a critical situation in all Australian States, Queensland Teachers' Union president Ian Mackie claimed that increasing numbers of teachers were seeking advice about the risks of court action arising from their work in schools."

To combat such an intrusion, Stewart (1998a, p .129) indicates that those involved in education need to have a working knowledge of the law as it affects schools. Other authors including Coulsen (1994), Knott (1997a), Stewart (1992, 1998a, 1998b) and Tronc (1986) have acknowledged that risk management procedures and policies should be in place in all educational institutions to avoid litigation. They also suggest
that there is a large amount of money, time and effort involved in settling legal actions against schools.

There is a lack of Australian research in the area of education law. Although there have been several similar studies in the USA, there have only been a few conducted in Australia. This specific study addresses this issue by asking educators what they know about the law and to comment on actual cases and fictitious scenarios that reflect the present legal position in schools. The recent primary piece of research in Australia appears to be that of Stewart (1996b). This current study differs from other Australian studies as it provides both administrators and teachers an opportunity to discuss and comment on legal issues as well as a chance to consider school situations that might lead to litigation. From reading the cases and questions, the respondents considered their own knowledge and their school's legal risk management policies and procedures.

The study highlights specific areas of in-service or pre-service education in need of improvement. Furthermore, it indicates areas where improved training regarding legal issues in education would result in a more informed teaching force and eventually less litigation in schools.

**Research questions**

Specific questions to form the focus of this research are:

- *To what extent are teachers and school administrators aware of the legal issues which impact upon them, their work and the school?*

- *In which legal areas concerning educational law do administrators and teachers have common misunderstandings?*

- *Do factors such as gender, years of teaching, subject taught, role in the school or type of school system, affect knowledge or misunderstanding of school law?*

As stated previously, this study is concerned with specific aspects of education and the law. Central to this study are the issues of negligence and the duty of care. The
concept of the duty of care of students is explored through pertinent issues such as accidents to students, educational malpractice, and supervision outside school hours and premises. Other areas explored are accidents during sport, child custody issues and the use of potentially dangerous equipment.

Other issues including corporal punishment, giving negligent advice and copyright law are not discussed in this paper. Neither are intentional torts such as battery, assaulting students or teachers, emotional and psychological injury, sexual assault or criminal law.

**Significance of the research**

When studying the legal knowledge and experience of Queensland principals, Stewart (1996b, p. iii) found that 78% of principals indicated stress from legal issues and proceedings in schools. This statistic is most likely accurate for teachers involved with legal issues as well. It is therefore important to gather baseline data for analysis to discover the typology of teachers' present knowledge of the law. Data therefore had to be gathered and collated, forming a model of collective knowledge of the law. As a varied sample group was required, a questionnaire was sent to schools and invited all interested individuals to participate.

There was a requirement to acquire as much data as possible from a reasonably sized sample. The most suitable way was by utilising both qualitative and quantitative methodologies. To ensure validity of results and issues, legal specialists and teachers were consulted in the development and during the study.

The significance of this research is particularly valid as the educational environment evolves and the role of the teacher and school administrator has altered reflecting an ever-changing society and society's expectations of educational institutions.

**The changing role of the teacher**

The role of a teacher has changed over time. In classical times, the role of the teacher was that of mentor. In the days of Plato, classes often took place under shady trees with a gifted philosopher orator and a small group of dedicated students; subjects changing at the whim of the group. The situation at the commencement of the twenty-first century is extremely different. Education is highly politicised, the
curriculum is large and increasingly prescriptive, and the role of the educator is both complex and diversified.

Education is a political arena, much to the disapproval of many of its stakeholders. It is often affected by political change. As a consequence, education is a moving mosaic reflecting local, national and global communities and their goals. For a modern-day school to be effective, the work of teachers has had to change considerably to reflect these goals as well as the values and ideologies pervasive in our society.

Changing work of teachers: an historical perspective

Between 1850 and 1900, teachers' roles became closely linked to Government institutions, becoming more formulated and regulated. Mass education and publicly funded education became a reality in many countries including Canada, Australia, France, the United States and England (Robertson, 2000, p. 52). For the first time certain core knowledge and skills as well as egalitarian mass education were considered an integral aspect of a modern society.

During the first half of the twentieth century, the concept of teachers as professionals started to emerge. The post-depression years in western countries heralded the beginning of what Robertson (2000, p. 71) terms as the 'golden age'. The 1980s saw the commencement of a period of restructuring and reform that still continues in many countries today. The administration of educational institutions was decentralised, reframed, reorganised and devolved. This impacted upon the work of teachers and principals as they discovered their workplace changing significantly, often without their input or approval.

A recent significant change to the educational arena in developed countries included an alignment with the corporate world and the 'new management' theories of the 1990s. Zipin (2002, p. 3) indicates that there has been a move towards a quasi-privatisation of public institutions, attempting to manage them like private businesses. Schools everywhere were provided with new paradigms and modern-day business principles for managing their work environment and facilitating educational change.
A gradual, yet fundamental change which occurred throughout the second half of the twentieth century is a shift in the role of the teacher from being the holder and imparter of specific knowledge to being a partner in learning; facilitating individual and group learning in critical and creative spheres. An issue for educators is that they are no longer the keepers of knowledge and a certain level of power has been lost.

**Factors affecting the recent changes in teachers’ work**

Educational change has broadened teachers’ roles and increased their level of accountability and responsibility. Marshall (1998, p. vii) says that in Australia, “unemployment, economic restructuring, new technologies, multiculturalism, equal opportunity, reconciliation, environmental issues and HIV/AIDS have increased the responsibilities of teachers.” Higher levels of responsibility and a multiplicity of obligations have often resulted in increased workload and stress for teachers and school administrators.

**Curriculum**

There has been a need to broaden the range of subjects and skills learned in schools to be more closely related to society’s requirements; it seems teaching basic skills will no longer suffice. The need for students to be multi-skilled has led to a substantial broadening of the school curriculum in New South Wales. Society’s current issues and perspectives are increasingly becoming mandated subjects to be taught and studied.

**Bureaucratic burden**

There has recently been an increase of bureaucratic burden on educators. Teachers are being asked to provide more documentation for accountability purposes than ever before. A study in the UK by Coopers and Lybrand (1998) on behalf of the UK Department for Education and Employment identified the four main areas of bureaucratic burden on teachers in the United Kingdom. These were: external demands for information, internal organisational demands, new obligations arising from recent approaches to teaching and learning, and the working style of teachers in responding to these. These demands are also in existence in New South Wales schools.
Economic rationalism

Shacklock (1998, p. 177) indicates that education is highly affected by economic rationalism. Economic rationalism in education has led to an increase in professional accountability as teachers are expected to provide constant 'evidence' of teaching and learning.

Accountability

A substantial increase in accountability is common in many areas of society. The recent 'Vinson Report', entitled Standards of Professional Practice in New South Wales Schools (2002a,b,c), stated that teachers should regularly assess and report student achievements. The assessment should reflect the requirements of the curricula and learning outcomes prescribed by the governing educational body.

Social change

The increase of awareness and appreciation of social issues has impacted upon schools and their employees. Included in this is the rebuttal of the 'automatic respect for authority' (Hinton, 1998, p. 3). Socially accepted norms are being tested; individuality as well as cultural and religious diversity is being encouraged. Human rights and particularly the rights of the child have become pertinent social issues. Therefore there is a greater expectation for the fulfilment of the individual requirements of students and their parents. Concurrently, children and their parents now aware of their rights, feel confident to voice concerns previously undiscussed.

A major concern indicated by the teachers in a study by Zipin (2002, p. 31) is that children have more needs than ever before and such needs are encroaching upon the school. Teachers' work is currently undergoing an extraordinary period of change. Parental responsibilities have altered; schools are now responsible for many of the roles previously held by parents. Topics previously considered the domain of the family, such as drug and sex education, have become a formalised part of the school curricula. Social issues such as the breakdown of marriage, the increase in sole parents and children spending longer hours without their parents have all resulted in teachers becoming part-time parents and quasi-counsellors.
Social change "enacted through legislation often impinges on teachers' actions and responsibilities. In recent years Anti-Discrimination Legislation and Child Abuse Legislation among others, have made it even more important for teachers to be aware of their responsibilities under the Law, so they may conscientiously fulfil them and also protect themselves against possible litigation." (Spencer and Nolan, 1997, p. 4)

Technology

Increased digital technologies in the 1990s changed the "economy and nature of employment" (Ramsay 2000, p. 23). Hinton (1998, p. 4) adds that, information technology has had, and will continue to have, a huge impact on teachers' work and the way people acquire and utilise information. The teacher is no longer the most accessible provider of knowledge or information. In the year 2003, even preschoolers can proficiently access information they need on a computer and therefore the way children are schooled has dramatically changed.

Knowledge of technology has become an integral part of the role of a modern-day teacher. The technological age has had a huge impact on the way teachers teach and the type of knowledge and skills learnt in schools. Students in schools today are a part of the 'net generation'; they use technology daily, have access to several communication technologies, including the internet, and learn very differently from their predecessors. An alteration in learning styles has created a need for a change in teaching skills, style and student expectations.

Changes in the workforce and society

Throughout many periods in history, education has been the main adjunct to creating a suitable workforce. The major difference in employment in the year 2003 is that people will change their careers several times in their lifetime. This means that schools need to educate students to be prepared for vocational uncertainty and diversity. Kalantzis and Harvey (2002, p. 8) state that the modern workforce is mobile, requiring constant re-education and up-skilling. Thus, flexibility, adaptability and entrepreneurship will be fundamental skills in the future of education.
Furthermore, the learning environment will need to provide the learner and the teacher with opportunities to work within independent learning styles. In a review of Teaching and Teacher Education, Horton explains (2003, p. 3):

Schools in the 21st Century have to be transformed into self motivated and self directed learning communities where students, teachers and parents are all learners and where it is understood that all learn differently and have different preferred learning styles.

Furthermore, curriculum and student assessment will broaden further and will include doctrines and subjects not previously explored.

**Significant changes to the work of teachers**

Vick (2001a, p. 71) indicates that television and the cinema still portray teachers as working mainly in classrooms instructing classes even though teachers' work occurs in a myriad of environments and covers many educational purposes. Vick (2001a) provides a list of some of the roles presently held by today's teachers. They include playground supervision, regulating behaviour, attending parent, staff and committee meetings, coaching various teams, organising musical events, writing internal and external reports, choosing and managing resources, developing school policies and curricula as well as researching and applying the implications of recent research and educational change. The literature regarding teachers' work often discusses this increasing role of teachers and its effects.

**The balancing act – legal concerns in the face of change**

Amongst all this change and increased accountability, teachers and their principals seem to be involved in a 'balancing act'; balancing core or basic skills against a diversified broadened curriculum; balancing risk-taking activities against a strong duty of care; balancing devolution against accountability to governments and the community. This 'balancing act' is a pertinent issue that schools face daily.

As Hinton (1998, p. 4) poses, schools are definitely balancing learning with "responsibility for the safety and welfare of students – or what we loosely term 'duty of care'. This is becoming a particularly difficult and time-consuming task in the
context of changing learning environments and an increasing focus on litigation.” Slee (2002, p. vi) agrees, stating, “a key element of the new organisational context is the accountability of teachers, principals and education administrators in the legal matters that confront them with increasing regularity.” It is important to ensure the necessary skills and requirements of twenty-first century learners and workers such as independent learning, collaboration, problem-solving, risk-taking and entrepreneurship are fostered in a safe environment.

In discussing the work intensification of teachers and the issues which have increased teachers’ duty to care for their charges, Marshall (1998, p. 26) lists several areas which have had a serious impact on teachers’ work, creating a balancing act. They include: student health and welfare issues such as ‘sunsmart’, road safety, sexual health and teenage suicide. Marshall is also concerned with the increase in harassment and assault in schools leading to unsafe work and learning environments and the ensuing litigation. She adds that integrating students with disabilities is a mandate that has increased teachers’ overall responsibilities and workloads. In fact, much of the 2003 Annual Conference of ANZELA (Australia and New Zealand Education Law Association) involved the compliance with legislation regarding disabilities and discrimination.

Teacher and administrator stress has been recently identified as a likely area for increased educational litigation. Recent discussion in the media highlights the difficulties including the psychological effects educators often endure when attempting to manage legal issues. From his doctoral work, Stewart writes (1998b, p. 64) that one principal stated that legal issues added stress and time pressures to an already stressful position. This was due to added documentation and procedures used to avoid accidents, problems and, of course, litigation. One principal added “very seldom would a working week go by without some parent threatening legal action to redress some wrong. This has escalated under devolution where the buck ends at the school”. From the literature it is evident that such pressure on schools has definitely increased and is likely to further increase.

**Definition of terms**

This study is an educational study and consequently, the legal terms and definitions used have specific definitions relating to this unique context. The following defines some of the terms discussed in this particular paper:
School law or education law involves cases and issues occurring in the school environment.

School administrator is the principal, headmaster or headmistress

School executive is the group of individuals who are in management positions such as assistant principal, deputy heads and heads of department.

Law refers to 'the law' in Australia and in particular in New South Wales

Plaintiff is the person or persons who bring a claim against another body or person.

Defendant is the accused person or persons, often defending their position against a claim.

Educators are those involved in the active education of students, including teachers, the school principal and executives.

Outline of the thesis

Chapter Two contains a literature review focussing on the areas of the history of the Australian legal systems, founded in English common law. The various types of educational bodies or school systems are briefly discussed, with particular reference to New South Wales.

Chapter Three explains the legal doctrine of negligence and its principles of duty of care, standard of care and breach of care. The concept of injury as a result of the breach of a duty of care is also discussed. The chapter then focuses on the recent research on this subject, including American and Australian research.

Chapter Four explores the methodology of the study. The definition of the sample population, a description of the instrument and information about the pilot study is included, along with the procedure for data collection and collation.

Chapter Five presents analyses and explores data obtained from the execution of the case studies. Data from both qualitative and quantitative items are presented and discussed.
Chapter Six presents and discusses qualitative data obtained from the twelve-item Section III. Data is examined with particular reference to participant variables such as school system or type and role in the school.

In Chapter Seven, recommendations and conclusions are drawn.
CHAPTER TWO

LITERATURE REVIEW: GENERAL LEGAL PRINCIPLES OF SIGNIFICANCE TO EDUCATION

This chapter reviews the current literature on the topic, Teachers and the Law. It highlights the common cases and issues in a modern and historical context. An explanation of the history of Australian Law, including an exploration of the relationship to the legal systems of other modern, western, democratic countries, is included. The organisation of the Australian legal system and its present mechanics is also discussed.

To highlight the specific area of law to be explored in this survey, basic legal doctrine is explained; included are specifics about the doctrine of negligence and the legal situation in New South Wales. To clarify and define the school environment in Australia, specific school systems in Australia are briefly highlighted.

The law in an historic context

Throughout time, human beings have always had ways of deciding right from wrong and punishing those who injure others. Over time, as with many societal issues, rules of behaviour and subsequent laws were formulated to provide consistency of accepted norms – this became known as ‘the law’. Many laws are as old as time, others are relatively new, reflecting our developing society and its values. Throughout the world legal systems were formed and although they may vary greatly, they were formed for the same purpose, to provide some form of control and order. All forms of government, whether local, state or federal, have rules and guidelines, some of which form the laws people must abide by. Indeed, they provide guidelines as to what is acceptable and unacceptable.

Australian Law has its origins in English common law. A principle of Common law is that no one has the right to inflict harm without lawful excuse and secondly, people have a duty to take reasonable care to ensure that neither their acts, omissions or, property injure another. As time passes and Australian statute law grows, it is now
developing quite separately from English law although Australian solicitors and barristers will still use English cases in an attempt to persuade an Australian court into making a similar decision to that of the English courts. The Australian courts do, however, have the right to make a decision contrary to decided English cases.

Australian law has been created in two ways, by courts and by legislation. The main way laws are passed through legislation is through parliaments. The Parliament can make laws by passing Acts, these:

- often provide for some other body or individual to make further laws (usually called 'Regulations', 'By-Laws' or 'Rules') within the limits established by the Act. This kind of law-making is called delegated legislation. Therefore, a lot of law consists of legislation, either in the form of Acts of Parliament or laws made by a body authorised to do so by an Act of Parliament. (Chisholm 1987b, p. 2)

Australia has nine independent legal systems. There is a Federal, or Commonwealth system, which oversees the whole country of Australia as well as six for the states and two for the territories. The courts predominantly decide the laws of all nine legal systems.

The way courts rule on various cases is by examining the facts of each case and considering the principles of law as they relate to each specific situation. Courts also take into account any previous decisions handed down by senior courts, known as 'precedents'. At times, the courts have been obliged to create law, as some of the decisions involve issues not previously covered by any legislation or case.

The problem with the concept of precedence and its in-built flexibility is that it is difficult to state law with precision, particularly when it deals with differing circumstances. Courts in one system may not necessarily follow the decisions made by other courts or in other systems. Other countries' laws may also affect Australian decisions, for example, on occasion North American courts have been used for persuasive arguments in Australia even though their legal system is quite different from the Australian model.
Impact of the law on Australian education systems, particularly in relation to 
New South Wales

In a legal sense, a significant difference between public and private schools is that in 
private schools there is an expectation, written or implied, that the school will be 
allowed to enforce certain rules and the parents would encourage the child not to 
brake those rules. This also includes the school community agreeing to follow more 
ethereal concepts including the school's vision or ethos. Also, private or non-
government schools often have written or implied contracts with students and their 
parents for the provision of educational services.

Similarly, teachers of non-government schools have contractual relationships and are 
obliged, under their conditions of employment, to conform to the school's beliefs and 
policies. Contracts between teachers and the school are generally not about specific 
rules of the school, teachers' duties or legal responsibilities. They usually state the 
salary and position offered and perhaps the classes to be taught. If the school is 
religious, complying with the religious and moral ethos of the school may also be 
mentioned.

Teachers in government schools are not under contracts as such, but are expected 
to adhere to the various Education Department guidelines generally found in teacher 
handbooks. Supplementary to these guidelines are each State or Territory's 
Education Act and Teaching Services Act, which provide rules and regulations for 
those in the teaching service. In New South Wales, the Education Commission Act 
1980 is the primary piece of legislation governing the relationship between the 
employer, the State of NSW, as represented by the Education Commission, and the 
employee, being teacher or principal.

One issue that may differ between government and non-government schools is the 
issue of who is responsible for payment to the injured party in a negligence case. In 
the event of litigation arising from a teacher's negligence, the New South Wales 
Education Department will most likely assist the teacher by providing financial 
support or legal representation. Thus, the New South Wales Handbook (2003) 
5.8.1.e states:

if a determination is made to support the request a report will be submitted 
to the Attorney General with whom the final decision as to whether Crown-
representation should be granted rests. The nature of the Departmental recommendation will reply on the outcome of the investigation undertaken and will include an assessment of the extent to which the teacher has disclosed relevant facts.

However, in 1980 Pigott (p. 23) posed that theoretically, if the New South Wales Department of School Education were sued for the actions of a negligent teacher, they could counter-sue the teacher for any damages they had to pay.

Presently in New South Wales cases regarding intentional or criminal torts such as child sexual assault and physical child abuse are being examined to determine whether an employer is responsible for the criminal acts of its employees carried out in the course of their work; an example being that of New South Wales v. Lepore [(2003) 195 ALR 412]. In a very recent address Justice Mason (2003, p. 9) of the New South Wales Court of Appeals indicated that the courts are grappling with the non-delegable duty of care and vicarious liability. He concludes that it is the courts’ responsibility to determine what constitutes an act which is not in accordance with employment.

The issues that thwart non-government schools such as students not complying with the school’s philosophy have, at times, been challenged in courts. It is interesting to note that courts are reluctant to become involved in such issues and as a result there is very little actual case law on this issue. In the past, private schools have financially supported their teachers who are subject to legal action, although the actual specifics of the support differ from school to school.

Legal doctrine

Civil and criminal law

There are two types of law, which are fundamental to the discussion of teachers and the law. Criminal law refers to punishing the guilty or those who ‘do wrong’ in society. It is that “major section of our legal system where society as a whole decided that something is a serious affront to all the people collectively and the culprit must be dealt with by society in general.” (Trone and Sleigh 1989, p. 2) Therefore, in a criminal law case the State or community takes an individual to court. An example of
a criminal offence in education would be if a teacher assaulted or battered a student. Conversely, civil law involves a plaintiff, who has allegedly been wronged or injured by a defendant and who is seeking compensation, usually monetary. In criminal law cases, the prosecution, either the State or the community, must prove beyond all reasonable doubt that the defendant is guilty. However, in civil law cases, the plaintiff only has to prove that they have been wronged to the court's 'reasonable satisfaction'; in legal terms, this is known as the 'Balance of Probabilities'. In civil cases, it is the complainant's right to prosecute, but in criminal cases, the police prosecute on behalf of the community.

It is more common for teachers to be involved in a case of civil rather than criminal law. However, in a situation such as physically abusing a child, it could result in both. The majority of cases involving teachers are from the area of civil law known as torts.

**Tort law**

One area of civil law of particular relevance to teachers is tort law. Tort law claims that a 'civil wrong' has been committed and the plaintiff seeks compensation for the damage or injury they have endured. Tort law is an attempt at corrective justice; it provides an opportunity for the injured or wronged in society to be compensated. Actions in tort include assault, defamation, false imprisonment and negligence. Increasingly society is facing more court cases based on the Law of Torts.

**The doctrine of negligence**

When discussing litigation involving accidents occurring in the school environment and educational malpractice, one must look to the fastest-growing tort, the doctrine of negligence. The legal concept of negligence is the one of the oldest human laws, that of not harming one's “neighbour”. Negligence encompasses three general principles. They are duty of care, breach of care and injury or damage. The first of these principles suggests that for negligence to occur a duty of care must exist between two or more parties. In the context of the school, this duty can be defined as the responsibility for the supervision and general care of a child by the school and its employees. This duty is not limited to refraining from doing something that may lead to injury, but also obliges a teacher to take positive steps towards maintaining safety. The said 'duty' must be breached, and injury or damage must result for negligence to
be found. The injury must be a product of the breach of care therefore a direct relationship between the breach and injury must be shown.

The literature indicates that the school itself can be negligent in two ways; besides being vicariously liable for its employees, the school can be negligent for not providing safe premises, known as occupier's liability. It is generally the governing school body who is found in breach of occupier's liability. In cases involving the negligence of teachers and administrators, the school is generally vicariously liable as employees are acting as representatives of the school.

The law of negligence as it relates to the school environment has not originated from a schooling context at all, but from an early case questioning the rights of consumers and the obligations of manufacturers. The most famous and leading case of negligence is that of Donoghue v. Stevenson [(1932) AC 562] wherein a consumer found a snail in a bottle of ginger beer she was drinking. Lord Atkin, an English judge who presided over the case, said that "everyone has a duty to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbour." (Cosgrove in Knott et al. 1980, p. 56) These famous words have found their way into many subsequent negligence cases.

In the school context this means that the Department of Education, or individual school or system, owes to pupils, and indeed anyone who ventures onto the school grounds, a duty to care for them to prevent injuries occurring. In Donoghue v. Stevenson (1932) Lord Atkin commented that a landowner also owes to a trespasser, or those entering upon his land, a duty to warn them against known dangers. The landowner also owes a licensee, who is lawfully on his property, even if they do not have any business connected with them, the same duty but to a higher degree.

The law: an ever-evolving doctrine

The most important forms of law are the decisions handed down by the courts; the most significant of these latter appear in law reports and sometimes in Parliamentary Statutes. Courts then use these rulings and the particular circumstances of the cases litigated in courts to assist with other cases. As society's moral beliefs and values change, so too do the decisions in court which reflect such values. Judges therefore consult previous rulings as well as the specific circumstances of each case when making decisions.
The Australian Parliament can make laws by handing down Acts of Parliament. In this situation, a body other than the Parliament may make suitable and relevant regulations that carry the force of the law. An example is the Education Act and the regulations made under it. Gardon (1980, p. 21) says the difficulty facing the courts is to make the law unambiguous and yet flexible enough to alter with social change. He gives the example of changes in laws towards corporal punishment, reflecting the change in societal attitudes towards physical punishment.

Toomey et al. (2001, p. 1) discuss the substantial changes to both state and federal statute law over the past decade. Many of these changes affect all members of society including educators and their students. Toomey et al. (2001, p. 1) suggests some of the most relevant and recent areas affecting the schooling context are those relating to Child Protection, Disability Discrimination, Occupational Health and Safety and Privacy.

A growing area of public concern is child protection. The rights of the child have found an international public forum, specifically the right to be safe and receive an education. Governments throughout the world, particularly those in the west, have increased their obligation to provide a suitable education for the young. To reflect this evolution in child protection, the laws relating to education have also developed.

The legalisation of society

Australia has recently become one of the most litigious countries in the world. Menon (2002, p. 11) gives the example of the extraordinary increase from 1990 to 2002 in total public liability cases in New South Wales from $190 million to $1 billion. There has concurrently been an increase in legislation throughout Australian society. Resultant breaches of those laws have created a large amount of legal activity.

Legalisation is a method of achieving certain goals or outcomes in an area of our society. In education, legalisation is utilised to maintain order, control and organisational structure. Meyer (1986, pp. 256, 257) indicates that modernised societies have legally based educational systems which are often highly institutionalised. The legalisation of such organisations is a conduit to change and development as well as the continuation of traditional rules and values.
Legalisation is a tangible way in which the stakeholders in education can indicate their dissatisfaction with an area of the education system. Without such legalisation, education would develop independently from society, perhaps losing touch with the community's requirements. As Sungaila and Swafford (1988, p. 37) indicate, complaints may be made about education at any level, including directly to the school and in writing to the Minister of Education. In fact, there are state and federal ombudsmen who receive such claims. In the eight years between 1977 and 1985, the Federal office received 95,000 complaints. (Sungaila & Swafford, 1988, p. 39). The prevalence of such complaints suggests that parents and their children have concerns regarding education and require an avenue to communicate them.

Legalisation of Australian education

In 1992, commenting on education law, Williams (1992a) stated that the legalisation of Australian education has definitely begun. More recently he concluded:

more than ever before educational decision making and practices are being challenged by those who feel disaffected or disadvantaged by the education system. It is the law that is increasingly providing both the grounds upon which such challenges can be made and the remedies that many complainants seek. (Williams 1995, p. 2)

Heffrey (1985, p. 1) cites data provided by the Victorian Department of Education in 1985, indicating the prevalence of accidents to children in the school context. In 1982, there were approximately 32,000 reportable accidents to students in Victorian public schools. Although these statistics reflected the situation over twenty years ago, they are most likely an underestimate of the present situation in an increasingly litigious Australian society.

The legalisation of American schools has advanced more quickly than Australian schools, with Reglin (1992, p. 26) indicating that in 1992 there were approximately 1,200 to 3,000 lawsuits brought against teachers and school administrators. In an analysis of education-related litigation from 1960 to the late 1980s, Imber and Gayler (1988, p. 55) discovered that many commentators were seriously concerned with the amount of litigation in the school environment. Spencer and Nolan (1997, p. 7) state that Australia was slower than the USA or UK to allow litigation to impact upon the
educational arena as individual states in Australia have sovereign parliaments with absolute power for education, as opposed to other countries which have boards involved in sub-legislation. It also appears that Australian law is difficult to change and that the Australian population has been reasonably satisfied with the law and reluctant to alter it.

Governments formerly had little control over the activities within actual classrooms, however, the onset of legalisation of education and the resultant Acts of Parliament have directly affected schools. Therefore, the impact of Australian governmental policies on an individual school, its members and its programs is greater than ever.

Social change enacted through legislation often impinges on teachers' actions and responsibilities. In recent years Anti-Discrimination Legislation, Equal Employment Opportunity Legislation and Child Abuse Legislation among others, have made it even more important for teachers to be aware of their responsibilities under the Law, so that they may consciously fulfil them and also protect themselves against possible litigation. (Spencer and Nolan, 1997, p. 4)

Duty of care

The whole premise of negligence is that there is a duty of care owed to an individual or party. Ramsay and Shorten (1996) indicate that "the duty of care upon which a negligence claim rests comes from the notion of 'proximity' or 'neighbourhood'." That is, a relationship must exist between the two parties for a duty of care to be owed. The words of Lord Atkin in the much discussed Donoghue v. Stephenson [(1932)AC562 at 580] explain the notion of proximity in the context of the duty of care as follows:

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 acts 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 into question.
In education, this is quite simple, as in most cases the teacher/student relationship establishes a duty of care by default. Whenever a student is under the care of the teacher or the school, whether on the school grounds or not, a relationship exists.

Cosgrove (1980, p. 66) quotes Lord McMillian as he defines the duty of care in the case of Glasgow Corporation v. Muir [(1943) A.C., at pp. 448,457]:

Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation. The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

The actual duties of a teacher are indicated in various education manuals. An example of these includes "to safeguard the interests of the pupils at all times". (Clark 1989, p.14) This duty of care is legally binding for two reasons. Firstly, a duty of care exists as students are placed under a teacher's care due to compulsory age limits for education imposed by the Federal or State Government through the respective Acts of Education. Secondarily, the teacher is the students' mentor, supposedly older, wiser and more experienced in the 'dangers of the world' and therefore is the authority figure to which students look for protection and guidance. An example of this is an apprentice as although the student is beyond the compulsory school age, they are under a teacher's duty of care as a student/teacher relationship still exists.

The duty to take care of students is necessary when a teacher/student relationship is established. The courts have often discussed the notion of how and when a duty of care arises. Laurence (1999, p.10) explains that once a relationship between staff and students begins a duty to supervise them is apparent. He sites the leading case of Geyer v. Downs [(1977) 17 ALR 408] in which a child was injured before staff came on duty. The court held that although school had not started and the staff was not yet on duty, the principal was aware of children being present at school and admitted to occasionally supervising them. By his own admission, the principal himself had indicated he had a duty of care to the students who were present before
school. A future exploration of this case is found in the analysis of data in Chapter Five of this document.

A summation of this duty is provided by the New South Wales Department of Education and Training's Legal Services Unit. Indicating that the Department has a common law obligation to ensure reasonable care is taken,

to prevent students from injuring themselves, injuring others or damaging property. While the duty is not to provide an absolute guarantee of safety, it does require that reasonable steps be taken to protect students. (2002, p. 1)

**Standard of care**

The standard of care was once described as that of a 'reasonable parent' or 'in loco parentis'. In the case of *Williams v. Eady* [(1893)10TLR 41], Lord Esher told the court the duty to take care was similar to a careful parent. (Balfour, 2000c, p. 8) The pure over-simplicity of this term and the disparity of ideas about what is reasonable led to a re-evaluation of this term and its definition.

The standard of care is currently defined as the standard of a reasonable person, that is, in the school context, a reasonable person armed with the knowledge, skills and competence expected to work with children. The literature discussing the standard of care such as Boer and Gleeson. (1982, p. 135), implies that when determining the standard of care there is a need to discuss and analyse the specific attributes of each situation. Therefore, it is impossible to define the 'reasonable person' with precision. Educators should therefore assess the standard of care for each situation to ensure it is suitable.

Law reports indicate that judges understand the standard to be the average, not the exceptional or 'super human' standard.

The law takes into account at least some of the characteristics of the defendant in determining what is reasonable. Thus it sensibly expects a higher level of skill from a medical practitioner than from an unqualified person attending to a roadside emergency." (Chisholm, 1987a, pp.8, 9).
However as the status of teachers in the community grows concurrently with a general increase in litigation and accountability against professionals, the expected standard of care will probably rise.

Coulsen (1994) says that in the simplest definition, the standard of care is about being careful in a legal sense:

However, the 'reasonable person' is not a reasonable person in the normal everyday sense. In the legal sense, the reasonable person is really the embodiment of community standards of justice and fairness. As a result the law tends to credit the reasonable man with extraordinary capacity and foresight extending to possibilities which are highly speculative and largely theoretical. (p. 40)

This definition indicates the difficulty in determining the standard to take care of a student. The courts have several factors to take into account when considering this issue.

When discussing the standard of care the court looks to the main factors of risk, justifiability, professional standards and anticipation. When discussing the first factor of risk, the law maintains that the greater the risk, the higher the standard of care needed to protect students.

The court then argues the justifiability versus utility of the activity. In this way, the court determines if there is a justification for not acting like a reasonable person; an example is an ambulance officer speeding to save a life. Generally, if a professional follows good and common practice, and can prove it, they should be safe from litigation. The last factor is anticipation; at times a certain action, behaviour or situation may be anticipated. The court's concern is that if it is reasonable to anticipate a negative outcome, an increase in the standard of care is necessary.

**Breach of care**

Once a duty of care arises and the standard of care determined, there must be a breach of the care for the defendant to be found negligent. If a duty of care is owed to an individual or group and the teacher fails to adhere to that duty, the duty is said to
be breached. During the *Donoghue v. Stevenson* case of 1932, (Davis 1987, p. 64, 65; Clark 1989, p. 1) Lord Atkins stated that a breach occurs when someone does what a reasonable person would not do, or fails to do what a reasonable person would do to prevent or minimise a reasonably foreseeable injury. This test has since been labelled the 'reasonably foreseeable' test. Therefore, if a duty of care arises, teachers must recognise that duty and make positive attempts to perform their responsibilities or face the consequences of a breach occurring. It is therefore no excuse to say that it was too difficult to fulfil one's responsibilities and thus one could not avoid breaching their duty.

There are many cases illustrating the test of 'reasonable foreseeability'. One such case discussed by Langford-Brown (1994, p. 5) and Davis (1987, p. 71) is that of *State of Victoria v. Bryer [(1970) ALJR 809 944 ALJ]*. In this case, a child fired a paper pellet and injured the eye of another pupil. The teacher was aware that several students had previously fired such pellets. The court said that the teacher had a duty to take some form of disciplinary action and in not doing so, had breached a duty of care owed to the pupils. It was reasonably foreseeable that firing paper pellets would result in some form of injury. This incident was more reasonably foreseeable as there was a history of such incidents.

When determining whether or not a breach has occurred, the courts look to three main elements; they are: the age and maturity of the child, the health of the child, and the likelihood of injury happening. There are two important principles involving the age of the child. One is that the younger the child, the higher the standard of care and secondly, older children are not necessarily safe without any adult supervision.

A concern to educators is that the higher the standard of care becomes in the school environment, the greater the difficulty in achieving it. Therefore, teachers of very young children need to be aware of their legal obligations to their students and administrators need to provide adequate staffing for infants. An example of this is the case of *Miller v. South Australia [(1981) 24 SASR 416]* included in Heffey (1985, p. 14) and Davis (1987, p. 68). This case highlights the requirement of a very high standard of care due to the age and immaturity of the student. In this situation, a five-year-old child managed to sneak out of a story-telling session to investigate a barbecue that had started outside. Whilst in the barbecue area his t-shirt caught fire, resulting in severe burns. The staff was found negligent, as they had breached the duty of care they owed to the boy. The judge maintained that the child should have
been more adequately supervised, as he was very young and his behaviour unpredictable.

Another case involving very young students is that of *Barnes v. Hampshire County Council* [(1969 67 L GR 605] (Trone 1995, p. 8). The teacher in this case usually walked the infants’ children who were to meet their parents to the school gate at 3:30 p.m., as the school was situated 200 metres from a trunk road. If the parents were late, the children were to return to the school building. A couple of minutes before 3:30 p.m. a five year-old, whose mother was late, was permitted to go home on her own. At this time, her mother was still en-route to the school. As the child attempted to cross the main road, she was struck down by a car and was paralysed. The Lower Court in England found that the few minutes’ ‘early mark’ did not constitute a breach of duty, however, the English House of Lords refuted this, arguing that:

> to let them out before the mothers were due to arrive was to release them into a situation of potential danger, and therefore, a breach of duty. 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. (Trone, 1995, p. 8)

Obviously, the likelihood of injury to students increases as the inexperience and/or incompetence of the teacher increases. Teachers untrained in a particular subject should never profess competency in that subject; furthermore, they should never attempt to teach it. This issue is also of interest to administrators who, at times, struggle to staff classes during periods of staff absence. Sometimes, this means that teachers teach subjects for other faculties and often have little or no training in that particular field.

Another concern for teachers, shown to be an issue in some cases, is that the likelihood of injury increases if a student refuses to participate in an activity and the teacher coerces or forces them to participate. This has been particularly problematic when the student professes to have a health problem and despite this, the teacher insists on the student’s participation; this is common in sports and physical education.
Injury resulting from a breach of care

The third and final principle of negligence is damage or injury. When a duty of care is owed and a breach of that duty has occurred, the court discusses the resultant injuries. There are two main principles discussed when considering injury or damage: causation and remoteness.

The proof of an injury or damage occurring is often easy to prove but negligence can only be found if the plaintiff can actually show that the injuries they received were a result of the breach. This is generally known as causation. "To satisfy the element of causation, generally speaking it would be necessary to identify the nature of the step which the jury on the available evidence could conclude that a teacher ought to have taken but didn't take." (Davis 1987, p. 71) An example is that of Barker v. The State of South Australia [(1978) 19 SASR 83] whereby a girl fell off a chair whilst her teacher was absent from the room. Hopkins (1996, p. 10) states that the teacher was not held liable as the injuries the child received were not a result of a breach of duty of care. The Jacobs J, believed that the girl would have been injured if the teacher had been present, and thus the injury was not related to her absence.

In addition, the damage must not be too far remote from the breach of the duty of care. This concept of ‘remoteness’ is regarded differently by different states. In the case of Nicholas v. Osborne [(1985) unreported, County Court of Victoria] (Ramsay and Shorten 1996, p. 191) where a boy died during a bush excursion and a young girl sued for shock, the court held the school liable. This was a Victorian case, however, if the case had occurred in New South Wales the injury would have been considered legally ‘too far remote’. This is because in New South Wales the plaintiff must be legally related to the injured party to suffer nervous shock and be compensated for their own injury.

When determining whether or not the injury is ‘too far remote’, the test of reasonable foreseeability is used. Subsequently, the plaintiff must prove that the ordinary person with similar skills would have foreseen that an injury of a similar type was possible. Thus in the aforementioned case of Richards v. State of Victoria [(1969)VR136 138,139], when a classroom fight between two adolescents broke out and was not curtailed by the attending teacher, resulting in one child contracting spastic paralysis, the court held that the unexpected severity of the injuries did not excuse the teacher
from breaching his or her duty of care. The court concluded that physical injuries, such as cuts and bruises, could reasonably be expected from a classroom fight, and thus injuries of a similar kind were reasonably foreseeable.

It held that it was not necessary that the exact injuries which occurred should have been foreseeable, it was enough that the injuries suffered was of the same class or type as could be reasonably foreseen, even though the gravity of the injury or the precise events leading up to it were not reasonably foreseen. (Gordon, 1980, p. 34)

Injury can occur in several ways: the child may injure themselves or be involved in an accident whereby they are injured by another student or teacher. Injuries also occur from accidents involving students and an external party, for example, a van backing into the playground and injuring a student. The teacher may have a contributory responsibility if an accident occurs in any of these circumstances. An accident could also occur from misadventure, for example, when a branch that looks safe falls from a tree and injures someone.

If the teacher is not aware of a child's illness or weakness, it is unlikely that damage or injury and subsequent negligence will be found.

If no damage at all could have been foreseen to a person of normal sensitivity, and the plaintiff's abnormal sensitivity was unknown to the defendant, he is not liable because he has not breached a duty to take care. (Ryan, 1980, p. 70)

There is an old legal principle that states that the defendant must take the plaintiff as he finds him, and therefore if there is a health problem unknown to the teacher a breach of care would probably not be found. Ryan (1980, p. 70) quotes from the case of Dulien v. White [(1901) 2 K.B. 669], "It is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an usually thin skull or an usually weak heart". This concept is termed in common law as the 'egg shell skull' principle. For example, it is highly unlikely a teacher would be liable if a child had an asthma attack in sport if the teacher was unaware of the child's medical complaint.
CHAPTER THREE

LITERATURE REVIEW – RECENT RESEARCH ON THE LAW AND EDUCATION

In the previous chapter an overview of the various fields of law applicable to the Australian context was provided. In Chapter Three a review of key literature concerning research related to specific aspects of the law which constitute the focus of this study is considered.

Throughout Chapter Three a substantial exploration into the most recent research concerning the knowledge of school staff is undertaken. A significant amount of research on similar topics has been undertaken in the United States of America; the same cannot be said of Australia. The results of these studies indicate teachers' knowledge of the law in the educational context is somewhat lacking.

Recent research on educators' legal literacy

The majority of Australian research and literature on this topic is concerned with the discussion of cases, court rulings and the effects on Australian schools and educators. Until recently in Australia very little was written about teachers' actual knowledge of the law, most of the research in the area of teachers' knowledge of the law is from the USA.

Much is written in the literature regarding the importance of an understanding of the law as it affects teaching, learning and the school environment. As Reglin (1992, p. 26) writes: "to be effective educators, there is a need to be knowledgeable of public school law and its impact on daily school operations." He adds: "teachers must have a strong working knowledge, beyond common sense, of education law. This knowledge will enable them to provide proper supervision and to protect the rights and welfare of students." (p. 27) The work of Sungaila (1988) and Williams (1994) also recommend, the need for principals to have good working knowledge of the law in order to successfully manage the issues occurring daily in schools. Stewart (1998a) maintains that as with other management skills, a school administrator needs risk management skills to avoid situations leading to accidents and litigation.
“A working knowledge of the parliamentary statutes and common law decisions which affect schools are being increasingly perceived as necessary accoutrements of the professional knowledge of school principals”. (p.130) Therefore, teachers’ and administrators’ understanding of legal principles in education are fundamental to a successful professional experience.

Australian documentation regarding the current typology of education law, including educators' knowledge and understanding is difficult to obtain. The literature involving the union of education and the law is full of suppositions and conjecture about educators' lack of knowledge of education law and the reasons for it, rather than empirical data. In 1987 Chisholm stated:

Most teachers probably have limited knowledge of the law, and even less affection for it. There are plenty of reasons for this. Lawyers have not been conspicuously anxious to make their craft more intelligible to non-lawyers: legal language is notoriously ugly and impenetrable and legal wigs and gowns appeal mainly to the theatrically-minded.” (1987b, p.1)

Another Australian writer, Hawkes (1990, p. 18), suspects “that the real reason or most unease with matters legal, is that we, as teachers, are ignorant as to the exact workings of the law.” It is these exact beliefs that this paper explores.

**Australian research**

**Hewitson's research**

In 1991-1992, Hewitson surveyed first-year principals in Queensland in 23 primary and 13 secondary schools. His aim was to determine preparedness across many areas of administration, including legal obligations. Hewitson (1995, p. 20) indicates that the community expects principals to have a working knowledge of all areas of educational administration when they begin their 'principalship'; this includes such areas as legal responsibilities and legal risk management procedures.

His research indicated that generally the school principals were not often knowledgeable in legal and safety requirements. In particular, primary principals in the study generally had less experience as a deputy principal or acting head than
secondary principals, resulting in a lower level of knowledge. He stated that one participant indicated she wished she had had more experience with education law and health and safety obligations. Overall, principals had some serious concerns about managing legal issues.

**Stewart's research**

The Australian study most similar to this current research was undertaken by Stewart. Stewart (1996b) sought to determine principals’ knowledge of and experience with the law. He used an exploratory research design with a multi-method quantitative-qualitative research approach to achieve his objectives. Stewart's survey consisted of ten questions which were case studies highlighting duty of care in different situations. These included: “supervision of school grounds and buildings; classroom management and discipline; supervision while on excursions; travelling to and from school; and supervision during sports.” (Stewart, 1996a, p. 117). Using such techniques as questionnaires, telephone interviews and focus group analyses, Stewart collected data regarding common and statute law. The survey was mailed to 186 principals in Queensland public primary and high schools with a return rate of 82%.

The data provided some interesting findings. The principals in the study were often involved with as many as twenty-three major federal and state statutes. About one-quarter of the group had been involved in cases involving tort actions relating to accidents in the school context. A further 8% had encountered actions of defamation or intellectual harm. Nearly a fifth had been involved in cases in the school context of a criminal nature; this included drug cases and physical/emotional abuse cases.

Stewart also sought to determine principals' experiences with the study of school law. Presently in Australia, there does not appear to be a subject available at a tertiary level leading to a degree or diploma in 'school law', and therefore there is no actual award course in 'school law' or 'education law'. There are, however, courses which can be taken as electives in Bachelor or Master of Education degrees throughout Australian institutions. Interestingly, at present, there is no policy or requirement for principals to be educated in legal literacy.
Stewart (1996a, p. 117) found that of the principals involved in his study, 84% of those he surveyed had not taken any formalised courses on 'school law'. The 16% who had taken classes had done so as electives in their teaching degrees and a very small number had taken 'pure law' as a course in Bachelor of Business, Bachelor of Commerce or Bachelor of Laws degrees. Only 39% of the group had taken in-service courses on the law, the majority of whom received only minimal training, mostly focussing on workplace health and safety and anti-discrimination law. He thus concluded that there is a lack of formalised training in this area.

As with other studies there was a variance in the number of correct responses for each item. In the section aimed at discovering administrators' knowledge of common law, some items were well answered yet others were poorly responded to. For example, the highest number of correct responses (87%) related to duty of care prior to the commencement of classes. Conversely, only 12% were correct in their response to a question regarding liability for a fight between two high school students in a chemistry class.

Not one participant answered all questions correctly in Stewart's survey. Only two questions had a correct response rate of over 50%; these were about duty of care before school and duty of care to students on their way to and from school. Four questions received a correct response rate of 48% to 39% and the other four questions had a correct response rate of 28% to 12%.

Stewart (1996a, p. 118) found principals' knowledge of legal liability in the sporting context to be of serious concern. When presented with a case involving a game similar to softball, less than 25% of principals knew who was legally responsible.

Another investigation Stewart undertook was to determine the participants' knowledge of legislation such as the Education Act (1989) (Qld) and the Anti-Discrimination Act (1991) (Qld) and issues such as freedom of information, family law, health and safety. The section on common law had correct responses ranging from 82% to 8%. Again, no respondent answered all items correctly. Stewart concluded that the lack of knowledge of 'Acts' which school principals have a legal duty to adhere to is a serious concern. It is obviously difficult to avoid errors of judgment if knowledge of legal obligations is lacking.
Stewart (1996a, p. 119) makes a significant comment that most principals who take up new 'principalships' are inadequately prepared for many aspects of their role. He goes on to say that Australian government educational bodies have no induction for new principals and certainly no requirement for them to attend school law classes. Contrary to Stewart's hypothesis that the new principal would have less knowledge of the law as they would have had less experience dealing with legal matters, there was no significant difference between the new principals and experienced principals in their knowledge of common law, (p> 0.05). There was however, a slight difference displayed in their knowledge of legislation that affects school, (p< 0.05).

Stewart's research indicated that principals may be expected to manage some 23 parliamentary statutes, most of which were complex and difficult to comprehend in a school environment. Over 24% of the sample group of principals were involved in litigation involving student accidents and 8% in other actions in common law.

Another interesting comparison Stewart (1998b, p. 66) makes is that high school principals were faced with a significantly higher number of legal actions involving physical injuries to students than their primary counterparts. It appears that older children are generally involved in more adventurous or dangerous activities and may be more likely to be associated with criminal activities such as drugs, arson and theft. Secondary school principals were also involved with more incidences of intellectual harm than primary principals, however, primary school administrators had twice the incidence of defamation allegations.

Data from the study indicated found that some principals believed that no matter what they did they would always be legally responsible for student injury. As one principal involved in Stewart's study wrote:

it would appear in most situations the buck stops with the principal. This adds considerable stress to the point that one should seriously consider banning all sport, all excursions, and all school socials or dances etc. A balance needs to be found and a more common sense attitude towards responsibility. (1998b, p. 63)

Principals in this study admitted that a lack of knowledge resulted in considerable stress. Comments indicated some respondents felt inadequately skilled in this area and threatened by the looming arm of the law.
An example, in the words of one participating principal:

There is a strong perception amongst staff that regardless of their best intentions and efforts with students a climate of litigation encouraged by media hype puts them in the firing line whenever accident, injury, perceived injustice or unfair dealing befalls a student. (p. 63)

Although litigation has greatly affected Australian schools, these particular fears are mostly unfounded. To date, there have been very few cases where the principal has personally been held responsible in a negligence case. There are, however, many cases whereby the school or school system has been found negligent.

Walkley’s research

In 1997, Walkley conducted a survey of 215 primary and secondary schools in Victoria. His focus was to determine the problems associated with managing legal issues in education. He also studied 33 legal cases and five years of collected statistics on school accidents and their details.

Walkley (1997, p. 6) states that many theorists and educationalists agree that legal issues in Australian education are topical and affect the present and future educational environment. He believes that all educators should continually educate themselves on current changes to legal issues, changes in legislation and how they affect the educational environment.

His research showed that school leaders lacked knowledge about legal issues as they relate to the educational arena. Walkley’s (1997) research concluded that litigation in education could be limited by following risk management procedures. He suggests practices such as carefully assessing the playground supervision policies, reviewing physical education classes and minimising the amount of head injury accidents in schools. His key recommendations included publishing and distributing a newsletter to all schools about current cases and legal issues, providing pre-service and in-service training for educators and in particular school administrators, and legally auditing each school’s risk management procedures. Legal advice in the form of a telephone help line was also mentioned as a way to ensure teachers had access to legal counsel.
Menacker and Pascarella's research

In a study by Menacker and Pascarella (1982) nearly 300 school teachers and administrators throughout Chicago were surveyed by questionnaire to determine their knowledge of thirteen Supreme Court Cases of relevance to the provision of education.

The authors wished to examine whether a difference of legal knowledge existed between administrators and teachers, primary and high school teachers, and rural and urban teachers. Using thirteen relatively recent and important Supreme Court cases, they provided participants with statements to which they were to respond true, false or uncertain. These cases covered issues such as equal rights, church/secular relationships, student discipline and the rights of individual expression.

The results indicated an average of 64% of correct responses on the 10-item survey. Scores for each item varied with the highest being for cases concerned with discipline (88.6%) and equal rights (77.3%). Conversely, cases involving church/state relationships (30%) and student discipline (37%) had the lowest scores.

A significant difference was discovered between administrators and their staff. Numerically, this equated to the total mean score of the principals being 74% compared to 63% for the teachers. Menacker and Pascarella (1983, p. 425, 426) found no significant overall difference between the high school teachers and primary school teachers. They did find that high school administrators had a better knowledge than their staff but the reverse was true in the primary group, therefore primary teachers had higher scores than their executive staff. The urban educators performed slightly better than rural educators on three cases involving equal opportunity rights, but the opposite was true of the two discipline cases.

The authors believed that there were some areas of concern but stated that several items were well answered. They added that they could not find a specific pattern to why some issues and cases were more widely known and understood. An example given was that both the highest and lowest scored items were about student discipline. Menacker and Pascarella (1983) did believe that recent media attention to
particular cases may have led to their higher scores on the questionnaire. They reasoned that principals may be better informed as they may have more access to information about Supreme Court decisions and that their interest in school law may be higher than their staff. Conclusions indicated that the reason high school administrators performed better than their staff but primary staff performed better than their administrators was perhaps due to organisational differences between these school groups. This organisational difference, the authors believed could have led to differences in communication channels.

The recommendations from this study include in-service training on school law and the improvement of dissemination of information regarding Supreme Court decisions to teachers and administrators in schools.

Ogletree's research

Ogletree (1985) undertook a study seeking to determine educators' "unawareness of legal matters facing schools and the effect of studying school law in decreasing that unawareness." (p.65) Ogletree surveyed 385 principals and teachers in elementary and high schools throughout Illinois. The questionnaire had 40 items regarding school legal issues.

The issues covered in Ogletree's study were tort liability, teachers' tenure, students' rights, church-state association, as well as teacher and school board relationships. Data were cross-tabulated and the 'chi square' used to show significant statistical differences.

Many of the questions had a correct response rate of over 60%; however there were questions with only a 40-50% correct response rate. The number of correct answers varied with each item. The results of the Ogletree (1985, p. 65) study indicated that those who attended law courses had a significantly (p<.05) higher number of correct answers, indicating that attending school law courses results in greater knowledge of the law for teachers and administrators.

Ogletree (1985, p. 71) admits to some limitations of the study, namely complex issues pared down into simplistic questions, issue and item selection as well as bias resulting from regional differences. Despite these, Ogletree says that educators benefit from school law courses which give them an understanding about their
responsibilities and the implications of such responsibilities. "It makes them aware of the parameters of their responsibilities and the limitations of their actions." (p. 71) He concludes that all those involved in education should attend school law courses or undertake self-study.

**Dunklee's research**

Also in 1985, USA researcher, Dunklee sought to discover Kansas City teachers' and principals' knowledge or awareness of negligence and tort law. He undertook his research as he believed an understanding of the law is fundamental for modern-day teachers and school administrators. He commented:

> Practicing educators must have a strong working knowledge, beyond common sense, of tort liability law, enabling them, in everyday practice, to protect the rights and welfare of students, as well as understand the legal obligation inherent in the education profession. (p. 7)

Dunklee's work focussed on USA Supreme Court decisions. He asked his participants to respond to scenarios aimed to discover their ability to make appropriate decisions in particular school-related scenarios.

In summary, Dunklee found that approximately 60% of his respondents had inadequate knowledge of legal issues in education. He concluded that many principals had an inadequate level of common legal issues.

**Reglin's research**

In 1992 Reglin wrote of his research in this area, conducted in 1988. He devised a fifteen-item instrument concerned with various areas of public education from Supreme Court decisions, including teacher and student rights, handicapped students and corporal punishment.

The sample used was from fifty-two high schools in the State of South Carolina, USA. The total number of voluntary respondents was 290; 14% were principals, 21.7% assistant principals and 63.5% were teachers.
His results were more positive than most of those stated above. In fact, approximately half the survey questions had an 80% or higher correct response rate. The remaining items had a large variance in response rate, the lowest being 22% correct. (Reglin, 1992, p. 29)

Reglin (1992, p.30) concluded that teachers need to be educated further in Supreme Court decisions affecting the schooling context. His concern was that 83.4% of the educators in his research had taken no undergraduate classes in school law. Reglin concluded that there is an urgent requirement for teachers to be educated in areas of confusion.

**A comparison of American national studies by Pell**

An interesting study by Pell (1994) researched the legal knowledge of pre-service teachers. Pell's results indicated that although the amount of educational litigation was increasing, legal knowledge was decreasing.

Pell (1994, p. 139) discussed the results of other research projects to support her own. She consulted a 1991 study by the National Organisation on Legal Problems in Education (NOLPE) in the USA questioning whether pre-service teachers should be taught about education law. The respondents, mostly lawyers, school administrators and professors overwhelmingly agreed. Ninety-four per cent said it should be taught prior to teachers starting employment, with over 90% believing the areas of student discipline, negligence, teacher liability and child abuse reporting should be a particular focus.

Among other researchers, the work of La Bush (1993) was also consulted in Pell's paper (Pell, 1994, p. 141). La Bush conducted a survey on pre-service teachers' knowledge of the law. La Bush found that pre-service teachers had very little knowledge of education law. The mean score of the whole survey was 64%. In a specific section regarding students' rights, the mean score was only 52%. A correct response rate of 9% related to questions regarding responsibilities on excursions. Interestingly, no statistical difference appeared between the primary and the secondary pre-service teacher and between teachers from different colleges.
Pell, as a result of her review across many research studies, concludes: “teachers, pre-service or practicing, have little knowledge of school law. In research investigations and in dissertations, time after time it is clear that ignorance of education law prevails”. (1994, p.146) Pell recommends a comprehensive course in legal issues and risk management to all those involved in pre-service teacher education and those already in the teaching service in the USA.

Conclusion

Several authors have researched this subject, many with particular attention to case law and legislation, however, very few have determined educators' knowledge or understanding of the law. It is this specific area which this current research project seeks to explore. A few Australian and several American researchers have undertaken studies in this particular area. The results generally indicate that teachers and school administrators are not fully aware of legal issues in the school context and that they are inadequately prepared for dealing with potentially litigious situations.
CHAPTER FOUR

METHODOLOGY

This chapter discusses the methodology used and identifies the key elements of the problem. The survey participants are described and reasons for their selection indicated. The rationale for the collection of data and the type of instrument utilised is discussed. Data collection and collation procedures are determined, as well as the method of presenting and interpreting results.

Conceptualisation of the study

This study was conceptualised eight years ago when the author became interested in the subject of teaching and the law. After writing a paper on this topic, the author was approached by an independent school in Sydney, Australia to present a seminar on the subject. The aspects of the law covered in the presentation initiated some very interesting discussion, including some serious concerns and queries. Realising the lack of knowledge of this particular group may be indicative of the wider teaching population, the researcher then consulted Australian literature on the topic of 'Teachers and the Law'. Unfortunately, Australian research about teachers' knowledge of the law is uncommon, so comparisons were difficult to make.

Classification of research

The purpose of this study is to provide data to discover the level of knowledge that school administrators and teachers have of the law in education.

Gay (1987, p.13) defines descriptive research as "assessing attitudes or opinions toward individuals, organisations, events and procedures". He goes on to say that "descriptive data are typically collected through a questionnaire survey, an interview, or observation." Descriptive research describes a situation by collecting data to test a belief or theory; consequently, descriptive research is particularly useful for discovering the opinions or attitudes of a population.
In descriptive research the topic and research questions are stated, literature on the subject reviewed and finally there is a collection and analysis of data. The most common way data may be collected is through self-report research techniques such as surveys.

Descriptive studies are an excellent way of gathering and reporting data and of surveying groups of individuals. However, the most common limitation of descriptive research is response-failure, or the lack of returned surveys.

**Methodological position**

The methodological position of this paper is the utilisation of a combination of complementary methodologies of scientific and humanistic methods to gather the required information from the participants. Stewart (1996b, p. 78, 79) says that originally, the two methodologies were considered entirely different but now they are considered a part of the same continuum.

Gay (1987, p.7) says the scientific method aims to “explain, predict, and/or control educational phenomena.” Stewart (1996b, p.78) suggests the “humanistic approach to understanding phenomena, which emanated from the views of Aristotle, places considerable emphasis on interpretation of events in terms of underlying intentions or stated reasons.” Scientific and humanistic methodologies extract different types of data and results. They are often termed qualitative and quantitative to reflect this.

Since the early 1990s there has been a swing towards complementary research methods that are multi-dimensional. In this way, research can utilise all techniques and processes rather than being limited to one philosophy. Jick (1979, p.602) agrees that qualitative and quantitative methods should be considered complementary methodologies. As this study utilises both the quantitative and the qualitative paradigms, it is a multi-method research project.

**Triangulation**

Those involved in research often recommend the process of triangulation. The purpose of triangulation is to support research findings by using several methods. Wiersma (2000, p. 252) explains that “triangulation is qualitative cross-validation. It assesses the sufficiency of the data according to the convergence of multiple data
sources or multiple data-collection procedures.” Therefore, researchers often triangulate data as it enhances the validity and reliability of a study. Triangulation can result in agreement, contradiction or convergence.

Triangulation can occur in many different ways. As Wellington (2000, p. 24) describes, it could be by utilising multi-method research strategies that use more than one method of research to gather several types of data. An example of multi-method research is gathering data through both interview and observation.

Another commonly used methodological form of triangulation was used in this study. This was the utilisation of qualitative and quantitative paradigms in the form of open-ended and closed-ended questions. The researcher aimed to “capture a more complete, holistic and contextual portrayal” of the subjects. (Jick, 1979, p. 603).

Triangulation may also occur when several researchers are involved with the study. For example, bias may be reduced when several people evaluate the survey instrument or the results. In this study of teachers’ and administrators’ knowledge of the law, several lawyers were consulted throughout the process in order to triangulate the survey and the findings.

**Ethics**

When conducting research with human subjects, ethics are a major concern. The four major issues that were addressed throughout the conception and conduction of this study were informed consent, invasion of privacy and confidentiality, protection from harm, stress or danger, and knowledge of the outcomes.

Informed consent was obtained from all those who participated in the research study. The participants approached were given the opportunity to accept or decline the offer to participate. After the commencement of the study, they were also provided with an opportunity to withdraw at any time.

Participant anonymity was protected at all stages of the study. The biographical data that was collected could in no way be used to identify respondents and all the schools involved remain nameless in the study and are simply identified by a numerical code. The privacy of all involved was at no stage jeopardised.
Throughout the study, the respondents were not in any danger or under any stress relating to the survey. The offer to withdraw at any stage provided the participants with an opportunity to cease being involved if completing the task caused them any problem or concern.

The researcher had a responsibility to inform the participants about the outcome of the study as the participants are direct contributors to the results. Participants were informed that the final results and subsequent commentary would be available to those who participated or showed an interest in this topic. This is to ensure that participants for survey research are aware of their contribution and to authenticate the research. It is also important the respondents see that the study has an aim and an ultimate outcome and that their agreement to participate in studies is fundamental for the continuation of research and indeed, improvement of educational services in general.

Selection of the sample

Definition of the population

The population defined for this study is the teaching population and those in school management roles such as executive teachers, principals and deputy principals in New South Wales, Australia.

Pilot study group

The research setting for a pilot study was an independent school from Sydney's Eastern Suburbs. The school caters for over 800 students, including boarders. The school had over 70 full- and part-time teachers. The pilot study was conducted with the agreement of the school principal and support of the primary staff of twenty. The procedure included asking the group for volunteers and for those interested to complete a questionnaire and comment on it at a staff meeting the following week.
Method of selecting a sample

Gay (1987, p. 123) says that research is rarely conducted on the whole population of interest. An example of surveying an entire population would be a study involving a small finite number of individuals who are easily accessible, or a large government survey such as the census. As it is impossible to survey every teacher in the state on their knowledge of the law in education, a sample group is advisable. Babbie (1990, pp. 66, 67) indicates that history has shown survey sampling can provide very accurate results for researchers.

The restrictions on the sample selection of this paper included lack of resources, time and funds as well as the substantial geographical distance from participating schools. An initial objective was to determine the required characteristics subjects needed to be included in the sample group.

The researcher requested volunteer schools and individuals for this survey that were easily accessible, thus the sample is a convenience sample. In fact, most of the schools were in driving distance from the researcher's home. Wellington (2000, p. 59) recommends this form of sampling when personal and professional contacts already exist rather than contacting complete strangers unwilling to assist with a project.

Convenience sampling is a non-probability form of sampling meaning that the participants are not necessarily indicative of the whole population of teachers and school administrators. The sample will therefore not be a heterogeneous group.

Description of the sample

The initial group involved with the pilot study was a group of twenty (20) teachers at one Sydney school. They completed a first draft of the survey. The next group to assist with this survey was a group of ten teachers from various schools who agreed to participate and respond to the revised questionnaire; they formed a pre-test group.

The main study was completed by a sample of the teaching population; the method of choosing the group, as mentioned previously, was convenience sampling. Thirty-
two schools were selected, based on their existing relationship to the researcher. The proximity to the researchers' home was also a factor, as the schools had to be visited several times throughout the study. As a result, nearly all participating schools are from the metropolitan area of Sydney and therefore the survey results may not reflect the situation in regional and rural schools.

The aim was to survey between 150 and 200 teachers and school administrators. A total of 250 surveys were sent out to the volunteer schools, of these 175 were returned, 169 were complete. This constitutes a response rate of 68%. The comparatively high response rate was due to the high level of interest in the topic amongst the school administrators and teachers involved and the positive relationship between the schools and the researcher. All participating schools were followed up with several calls and personal meetings to clarify any concerns and questions.

Table 4.1 – Description of sample

<table>
<thead>
<tr>
<th>Gender</th>
<th>N</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>48</td>
<td>28%</td>
</tr>
<tr>
<td>Female</td>
<td>121</td>
<td>72%</td>
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</table>

<table>
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<tr>
<th>Years Teaching</th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1-7 years</td>
<td>39</td>
<td>23%</td>
</tr>
<tr>
<td>7-15 years</td>
<td>68</td>
<td>40%</td>
</tr>
<tr>
<td>15 or more</td>
<td>62</td>
<td>37%</td>
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</table>

<table>
<thead>
<tr>
<th>Role/Position</th>
<th></th>
<th></th>
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<tr>
<td>Infants</td>
<td>26</td>
<td>15%</td>
</tr>
<tr>
<td>Primary</td>
<td>69</td>
<td>41%</td>
</tr>
<tr>
<td>Secondary</td>
<td>39</td>
<td>23%</td>
</tr>
<tr>
<td>Administration</td>
<td>15</td>
<td>9%</td>
</tr>
<tr>
<td>Other</td>
<td>20</td>
<td>12%</td>
</tr>
</tbody>
</table>
Graph 4.1 – Gender of participants

- Male
- Female

Graph 4.2 – Years of Experience in Teaching

- 1-7 years
- 7-14 years
- 15+ Years

Graph 4.3 – School Role or Position

- Infant
- Primary
- Secondary
- Administration
Research setting

The researcher approached 32 schools from the three systems of public schools, the Association of Independent Schools (AIS) and Catholic schools. Of those approached, 25 schools agreed to participate. Of these 21 sent completed surveys back. Only one of these schools had recently participated in a school-wide in-service course on this topic.

Of the six public primary schools that agreed to participate, four were from Sydney’s Eastern Suburbs and had between 300-400 students. Two were from areas with a high socio-economic demographic and one was a school with significant socio-economic disadvantage. Two other schools used were from outer areas of Sydney with less than 100 students each. The students from these schools are from mixed ethnic backgrounds and were from an average socio-economic group.

There was only one public high school willing to participate in this study. It is a public school with over 1,000 students from mainly a high socio-economic demographic with a high Anglo-Saxon population.

There were three K-6 Catholic schools that participated in the study. One was in Sydney’s Eastern Suburbs, one in the Northern Suburbs of Sydney and one in a semi-rural area of NSW. The two schools from Sydney had between 150 and 250 students.

Only one Catholic high school contributed to the study. This school has a student population of just over a thousand and is situated in Sydney’s Eastern Suburbs.

The AIS schools that were involved in the study were from a diverse group. The three K-6 schools were all in Eastern Suburbs of Sydney; they had populations of between 200 and 350 students. These schools all had a high socio-economic demographic.

There were seven K-12 AIS schools that agreed to participate in the study. Two were from Sydney’s Eastern Suburbs with approximately 1,000 students, four were from the Northern Suburbs – one with 900 students and the others had over 1,000 students. Finally, one AIS school was situated overseas; it follows the New South
Wales Curriculum and employs teachers primarily from New South Wales as well as other Australian states.

Data collection procedures

Rationale of the survey

The study involves some very complex questions of law in educational settings. Due to the depth of understanding required and the possible need to read and re-read the scenarios, the questions and cases needed to be in a written form. The number of people and issues to be explored suggested that utilising other forms of data collection such as interviews would be very time-consuming and would accrue a considerable amount of data.

A survey is an excellent way of collating information about people's knowledge, behaviours and opinions or beliefs. (Babbie, 1990; Edwards et. al. 1995). More formally, Rossi, Wright, and Anderson (1983, p.1) state that surveys “consist of relatively systematic, standardized approaches to the collection of information on individuals, households, or larger organised entities, through the questioning of systematically identified samples of individuals.”

Self-administered questionnaires have some advantages over other forms of surveys. An obvious advantage is that the respondent has an opportunity to complete the survey in their own time and at their own pace. They also have a high degree of anonymity and confidentiality. The disadvantages include the lack of responses, late responses and the need for costly or time-consuming follow-up procedures.

Edwards, Knott and Riley (1997, p. 69) state that the strengths of the traditional pen and paper survey are the:

- ease and efficiency of administration, inexpensiveness to duplicate, and familiarity to those being surveyed. Furthermore, paper surveys are less likely than in-person interviews to elicit socially desirable responses. Their administration does not require interview skills, technical expertise, or sophisticated equipment.
Traditional pen and paper surveys have some inherent faults, including the bias related to manually collating data. It may also be a slow and laborious task to collate information and check for human error.

This particular questionnaire had to be self-explanatory as there was little opportunity for participants to seek clarification about what was required of them. The purpose of providing a self-administered survey was to be an inexpensive way to allow people to participate and to gather information from as many as 200 participants.

Research questions

The research questions were formulated after an exploration of the literature and in consultation with educators and academic personnel interested in this area.

Specific questions that form the focus of this research are: -

- To what extent are teachers and school administrators aware of the legal issues which impact upon them, their work and the school?

- In which legal areas concerning educational law do administrators and teachers have common misunderstandings?

- Do factors such as gender, years of teaching, subject taught, role in the school or type of school system, affect knowledge or misunderstanding of school law?

Instrument development and description

The function of the instrument was to report or describe the participants' knowledge of the law in the school context. There was a desire to create an appropriate and succinct questionnaire to discover this information. The researcher therefore aimed to develop a relatively short questionnaire consisting of four sections to explore and examine the issue.

The subject of teachers and the law is an inexhaustible field. The desire to determine teachers and school administrators' knowledge of the law in education could lead to
a lengthy questionnaire. It was therefore important to restrict the issues to be explored. Some of the issues intentionally left out of this study include occupational health and safety, sexual harassment, child abuse, child sexual assault, and corporal punishment.

The questionnaire (see Appendix) consists of Section I which explores teacher responsibilities in schools, Section II which examines student issues and Section III, a twelve-item section requiring participants to respond to various topical legal issues.

Section I asks participants to read and respond to three case studies. The first scenario aims to determine teachers' understanding of the concept of the duty of care and the temporal existence of that duty. It is based on the often-discussed, litigated matter of Geyer v. Downs [(1977) 17 ALR 408] (Kohn, 1997, p. 107). The second case is that of Butt v. Cambridgeshire County Council [(1969) CLY 2724] that is documented by Brown and Brown (1980, p. 86). It aims to explore the issues of dangerous objects, classroom supervision and contributory negligence. The third case is that of Peter W. v. San Francisco School District [(1976) 60 Ca App 3d 814; 131 Cal Rpt. 54] as mentioned by O'Halloran (1994b, p. 24) and Dawson (1993b, p. 28). This case analyses the concept of educational negligence or educational malpractice. It investigates the duty of care for intellectual welfare and the right to an education; questioning whether or not there is in fact a duty to educate. Although this case is an American one and there are inherent differences between the US and Australian legal systems, the case of Peter W. provides an interesting discussion on the subject as educational negligence is more common in the US than in Australia.

Section II deals with the issue of custody and residency. This fictitious case was included as there are an increasing number of children living in single-parent families and involved in custody/residency disputes.

The third section focuses on many areas of school law reflecting cases and issues regularly affecting the lives of the school community. The issues include: school sport, bus duty, standard of care, bullying, hours of care and child custody. Participants are asked to circle, 'true', 'false' or 'uncertain' to specific statements. The aim of this section is to gather quantitative data to compare participants' knowledge of the law and compare teachers from different school types, genders, years of experience and occupational positions.
Item description and selection criteria

A fundamental part of any study is writing the survey items. Both qualitative and quantitative research methods were used in this survey because it is a central concern to the researcher that the respondents were given opportunities to express their opinions and provide more than simple yes/no responses. This study therefore included both closed- and open-ended questions.

Closed-ended questions are those with a set response, examples being yes/no answers, multiple choice and questions with numerical ratings. Using this type of item has several advantages. The primary advantage is that data that can be gathered quickly and easily. In addition, the probability of a good response rate is higher than if people are asked to provide short answers or long comments.

Another advantage described by Edwards et al. (1997, p. 25) is that quantitative research containing closed-ended items has the advantage that a high level of reliability is possible, as every respondent is provided with the same frame of reference. It is therefore more likely that respondents will interpret the items the same way.

A negative aspect of closed-ended questions is that they restrict the participants' responses. The requirement to choose between alternatives given may force people to choose a response they do not totally agree with, therefore altering their possible response. It also makes people who are disinterested, confused or those who do not understand the question respond. When only closed-ended responses are available, the respondent may become frustrated that they are unable to express their feelings or thoughts fully.

There are three types of closed-ended items used in this questionnaire, they are: marking one or a number of responses from a list, yes/no, and true/false/uncertain. At times, the alternative of 'other' was offered in case not every selection is included. The obvious reason for including set responses is to determine a participant's stance on an issue simply and easily.

Open-ended survey items, also known as unstructured items, require participants to reply or comment in their own words, thus gathering qualitative data not possible with quantitative data. Open-ended responses often more accurately reflect the
knowledge or opinions of those completing the survey as they give more in-depth, complex and at times, precise answers than quantitative responses. This often results in varied and detailed data for analysis as well as intriguing conclusions and recommendations. Respondents may also be aware of issues not mentioned by the researchers. This may lead to discoveries regarding aspects of the topic not previously considered or covered.

The disadvantages of such items are that they require more effort by respondents and researchers. A long survey with many open-ended items may deter people from participating and even if volunteers agree to participate, waning interest in a long survey will lead to incompletion or inadequate completion.

Qualitative data is more difficult to analyse than quantitative data and has a higher level of error as the researcher has to analyse and assess the essence or meaning of the respondents' comments. The subjective nature of language and the differences between individuals' meanings create difficulties for researchers. Consequently, the time taken to read, code and evaluate the open-ended items is often substantial. Although it is simple to garner meaning from a tick in a box, written comments or statements can be illegible, ambiguous, unintelligent or irrelevant.

Using several different methods of gathering data the researcher can add value to the study, increasing its breadth and scope. This often means that the weaknesses of one method can be supported by the strengths of another. In this study the researcher was aware of the value of a short questionnaire utilising closed-ended questions. However, in order to determine why subjects gave particular responses or the meaning behind their comments, the researcher asked the respondents to comment in their own words. This provided the researcher and subsequently the reader of the research with a more comprehensive view of the subjects' knowledge of the law. The range of answers provided by the pilot study gave the researcher an insight into the potential response variance. The sole inclusion of closed-ended questions would not have highlighted this issue and would have in fact stilted the wealth of data collectable through open-ended questions and items.

The other type of item necessary for this survey was a demographic item. Edwards et al. (1997, p. 25) recommend placing the demographic questions at the end of the paper and to only include demographic questions that are completely necessary as many questions could cause participants to be concerned about anonymity.
purpose for the inclusion of demographic or biographical data was to collect information about the participants. The researcher wished to determine the attributes of the sample group, and establish any correlation between gender, years of teaching experience or teaching position and knowledge of the law.

**Development of the questionnaire**

The issues and cases that form the core of the questionnaire had been identified from several areas:

- Literature review
- Discussions at presentations
- Discussions with a senior lecturer, University of Sydney
- Consultation with a senior New South Wales Teachers' Federation lawyer and two practising New South Wales solicitors
- Meetings with two New South Wales principals
- Discourse with many practising teachers

Information collected from interactions with these groups indicated that the primary areas of concern and interest to teachers regarding legal responsibilities were:

- Duty and standard of care
- Classroom supervision
- Responsibilities beyond the school; outside school hours and the school boundaries
- Duty of care in potentially dangerous situations including school sport and science activities
- Mandatory notification of child abuse
- Educational malpractice
The whole study was hand-scored by the researcher. After it was scored, the results were scored again and cross-referenced to ensure there were no errors in scoring. Sections I and Section II were scored the same way. The first, second and fourth questions in each section required respondents to choose from one or more alternatives. Each time a respondent gave an answer the scorer added one to the score sheet. All responses were tabled in a score sheet for each question, including alternative responses; this was in case the alternatives were not exhaustive.

The third and fifth questions requested participants to expand on and explain their reasons for choosing a particular alternative. The qualitative data was grouped according to meaning or subject.

The last section was scored like a traditional test. Correct responses were given a score of one. Any incorrect or incomplete responses were given a score of zero.

Tabulation and coding

The back of every questionnaire sent out was numbered to enable the researcher to collate according to school type or system. This way, if a correlation between a particular school, school system or type appeared, generalisations could be made.
This also assisted with the follow-up procedures as schools which had not returned their questionnaires could be identified.

The responses were coded according to the corresponding letter on the questionnaire, for example, in question 2 the response, ‘Parents’ is labelled ‘b’; ‘yes’ is coded ‘y’ and ‘no’ is coded ‘n’ and so on.

Research Procedure

Figure 4.2 – Stages of execution of research study

Stage One
  Interest and preliminary research
  Review of related literature
  Discussion with relevant professionals
  Review and formulation of research problem

Stage Two
  Selecting a survey instrument
  Writing first draft of questionnaire
  Pilot study
  Evaluation of pilot study results
  Appraisal of questionnaire
  Alteration of questionnaire

Stage Three
  Pre-testing of final questionnaire
  Analysis of pre-test results
  Reflecting validity and reliability of questionnaire

Stage Four
  Selecting a sample from the population
  Contacting the schools by phone and post
  Meeting the principals and staff interested in participating
Stage Five
Follow-up procedures by phone
Sending replacement questionnaires
Follow-up procedures by phone

Stage Six
Collecting surveys by post and in person

Stage Seven
Collating and examining data.
Reporting results, conclusions and recommendations

Data collection procedures

Conceptualisation of study and formulation of research problem

The conceptualisation of this study occurred over several months. This was an integral part of the research as aims and objectives were clarified.

Developing the instrument

The second stage or phase was choosing and constructing a survey instrument. A questionnaire for approximately 150-200 teachers was designed. The first draft was given to a pilot study group. The pilot study group consisted of 17 female and 3 male primary teachers from an independent school in Sydney. Their ages and years of teaching experience varied. They critiqued the questionnaire as did a senior lecturer at the University of Sydney.

During the pilot study the survey was found to have some problems. The initial draft of the survey was a booklet with five sections. The first two sections were about real cases and provided the researcher with useful data. The third section, involving the case of Ward v. Hertfordshire County Council [(1970) 1AllER 535 CA], discussed in Brown et. al. (1980, p. 78), concerning occupiers’ liability, seemed irrelevant to many teachers. It is more likely to be relevant to principals or the school governing body. In the final draft, it was replaced by the case of Peter W. v. San Francisco Unified School District [(1976) 131 Cal. Rptr at 863] Kirby (1982, p.14), O’Halloran (1994b,
a case concerned with educational negligence or malpractice. According to the lawyers consulted, educational 'malpractice' has been somewhat of an 'educational buzz word' and a concern to many teachers today.

Another major improvement was the inclusion of a fictitious case about child custody or 'residency'. This was added as several principals commented on their fear of communication issues in schools and child custody problems. This issue is becoming more relevant with increasing numbers of children living in single-parent families and the increase in court orders involving parental responsibility.

The biographical data section also had to be changed as comments indicated that too much information was requested, leading to suspicions about a lack of anonymity. Alterations were also made to the format, style and wording to make the questionnaire more readable and easier to respond to. Ambiguous questions were altered or removed.

The aim of the pre-test was to have a sample population complete the survey in its entirety, therefore field-testing the questionnaire. This pre-test group was a group of interested teachers from various schools, of both sexes and varied experience in teaching. In pre-testing, the final survey took between eight and twenty minutes to complete. The time taken seemed to depend upon the simplicity and brevity of the quantitative responses. The pre-test group was then asked to comment on the content, format and wording of the questionnaire.

**Validity of the final questionnaire**

The most basic definition of validity is the level at which a particular thing measures what it is intended to measure. Validity of a research assignment is extremely important. Validity occurs in a given context and a study must be valid for the specific group it refers to or its ability to be generalised and overall importance may be insignificant. The most important type of validity for a study such as this is 'content validity'. According to Gay (1987, p. 156, 157), content validity "is the degree to which a test measures an intended content area ... Content validity is determined by expert judgement. There is no formula by which it can be computed and there is no way to express it quantitatively."
The items chosen should reflect the subject of teachers' and principals' knowledge of the law in education for the survey to be valid. Another important concern when determining validity is that subjects should be reflective of the population for the study, however, this convenience sample has some inherent sampling bias as it does not ensure a representative sample.

Triangulation greatly helps with validity, as explained earlier. This includes the use of both quantitative and qualitative data to explore the same issues. Several items on one subject are more valid than a single item for each topic. The first two sections of this questionnaire provided subjects with several opportunities to respond to the same issue, therefore giving respondents the chance to validate their own responses.

**The contents of the teachers’ questionnaire**

After over a year of preliminary work, the final questionnaire was ready for administration. The final questionnaire consisted of three sections:

**Section I – Teacher responsibilities**

Part A asked participants to read the case of *Geyer v. Downs* (1977). This leading case focuses on the issues of duty of care, hours of care, playground supervision and standard of care. The five questions in Part A aimed to determine the respondents' opinion about who is at fault for certain situations and why they are at fault. They were also asked to comment on ways to prevent the situation from occurring. In this way, the researcher aimed to discover the respondents' legal knowledge on the relevant points of law.

In Part B, respondents were presented with the case of *Butt v. Cambridgeshire County Council* (1969). The purpose of the five questions in this section was to examine teachers' knowledge of legal obligations regarding classroom supervision as well as responsibilities surrounding potentially dangerous objects or instruments used at school, such as scissors. This case also alludes to the concept of contributory negligence. The format is identical to Part A, therefore the respondents were asked to comment on who was at fault and why, and indicate ways the incident could be prevented.
The final part of Section I is Part C which examines the American case of Peter W. v. San Francisco School District (1976). The same format as Part A and B was used as participants were invited to explore the concept of educational negligence or educational malpractice. It asks the sample group to comment on who was at fault for a child's intellectual failure, and if and how it could have been avoided.

Section II – Children’s issues

Following the same format as Section I to assist in clarity, Section II has five questions centred on the issue of child of custody and residency. This is a fictitious case included to examine the teaching population’s knowledge of what to do when custody issues arise.

Section III – Various issues

Section III comprises twelve items reflecting various issues in school law. The respondents were asked to stipulate true, false or uncertain to statements dealing with family law, education regulations, safety and common practice in schools. Specifically the statements highlight the areas of duty, standard and breach of care, after/before school supervision, hours of school, and delegation of teacher responsibility, supervision at pedestrian crossings, responsibilities during sport, bullying, mandatory notification of abuse, and school involvement with custody or residency of children. These items were included as they reflect many of the cases recently reported in the media and in New South Wales law reports and may be of concern to the stakeholders in education.

Section IV – Biographical data

The last section is an opportunity for the researcher to gather biographical data to compare the knowledge of education law between groups. The question asks for the respondents’ gender, how many years they have been teaching and their role or responsibility within the school. This section helps the researcher determine the specific characteristics of the sample who have volunteered for this study and allows the researcher to make comparisons between variables such as gender and teaching experience.
Administering the teachers' questionnaire

The questionnaire took twelve weeks to administer. The school principals were contacted by phone and informed of the aims of the study, the procedure, the issues concerning confidentiality and then were asked to participate. Several principals wished to see the questionnaire before agreeing to become involved. Those particular schools were sent copies and contacted again after the principal had perused the questionnaire.

The school principals received the questionnaires by the post or by hand-delivery. The amount of questionnaires left at each school was at the principal's discretion. All schools accepted at least three questionnaires and several schools accepted more copies.

Principals were asked to speak to their staff about becoming a volunteer in this research. During the first week, a few schools decided to not participate due to too many other commitments. The researcher provided all those involved with self-administered questionnaires. During the administration of the instrument, a cover letter was provided stating the aims of the study and the requirements of the respondents were made known to all interested parties. (See appendix, item 1.)

Each school principal provided an area where completed questionnaires could be returned. All schools were given a date by which they could either send the papers back or have them picked up by the researcher. All schools were given stamped self-addressed envelopes. Participants interested in the survey results were asked to contact the researcher after the study.

Following the delivery of the questionnaires the researcher contacted the schools several times to ensure they were still interested in participating and to ask if the staff had completed their questionnaires. The questionnaires were all numbered and those unreturned were followed up regularly. Any schools needing more questionnaires were sent extra copies. Prior to collection dates the researcher phoned the principals to ensure the questionnaires were completed.

The last stage of the research procedure was collating and analysing the data.
Analysis of data/results

Statistical techniques applied

Gay (1987, p. 388) writes that the first process of data analysis is to "describe, or summarize, the data using descriptive statistics." The large amount of raw data the questionnaire yielded had to be organised and displayed in a logical and informative manner for the researcher to make comparisons, assessments and subsequent evaluations and judgements.

A large amount of data was collected during this study. All data were recorded on summary sheets by hand; this provided the researcher with a visual representation of the distribution of responses. The data were grouped according to frequency of response and included codes of biographical data for the purpose of cross-referencing. Frequency tables and percentage charts and tables were used to compare results.

The technique of creating ‘t’ scores to determine statistical difference was employed to compare various groups, including administrators and teachers and school systems.

The treatment of data was as follows:

Quantitative data

All responses were placed in a frequency distribution table; information included biographical data so the researcher could determine variables such as how many males or primary teachers responded. At any time during the study the researcher could cross-reference the results and make comparisons between school types, gender, years of experience and school role.

Percentages of responses were also used to identify the frequency of each response. By representing the data in a percentage form, comparisons between responses are relatively simple.
Section III, which is scored numerically, can be represented by its mean, mode, median and range. It is then simple to compare the knowledge of one group to another, an example being comparing the scores of males and females, or comparing Catholic school teachers and public school teachers; 't' tests were also used to find significant statistical differences between two groups or variables.

**Qualitative data**

Qualitative data had to be carefully analysed and grouped. The researcher did this twice to ensure limited scorer error. All the open-ended questions were grouped according to content. This was laborious and difficult as answers had to be individually analysed for meaning. The frequency of responses could then be determined and placed in frequency distribution tables. All responses were tabulated with biographical data.

**Reliability**

It is fundamental for any research to be reliable. Reliability in this study would mean that if the survey was conducted in the same manner again, the results could be replicated. The main purpose of triangulating the data used in this survey was to enhance the reliability of the work.

The reliability of this work was supported by the different contexts in which it was formulated and tested. During the development of the questionnaire, several lawyers were consulted, one specialising in New South Wales Education Law, as well as several educational personnel. The survey was given to teachers from differing socio-economic backgrounds, qualifications and school roles. The schools involved in this study were also from different geographic areas and from a variety of school systems.

Reliability of responses was also enhanced by the recurrent use of several questions involving one topic. The objective was to ensure the respondent was clear and exact in their response by asking similar questions more than once. If the items were not reliable, discrepancies in data would have occurred.
Scorer reliability/standard error of measurement

Response bias

Bias is an issue that affects all survey research. There are several types of bias suggested by Edwards et al. (1997, p. 48, 49) the first being response order techniques, whereby a respondent remembers one selection and so they choose it as their responses; it is often the first or last choice. Another response bias is the percentage of respondents who continually answer either 'yes' or 'no' despite item content; they are labelled 'Yea-saying' or 'Nay-saying'. Another type of bias is acquiescence, whereby the respondent gives the surveyor the response they think they want for the survey to be successful. Lastly, there are also participants who provide the perceived present socially correct answer.

Conclusion

In conclusion, this study is an example of a multi-method research project. Chapter Four examined the aims and conceptualisation of the study as well as the principles of research methodology utilised in its conception and execution.

The survey population was described in depth as well as the sample groups and specific survey participants. Some specifics of each school were also discussed, giving the reader an overview of the context in which the research is set.

The central aim of this work is to examine the extent of New South Wales teachers' and administrators' knowledge of the law as it affects the educational context. To successfully obtain such information qualitative and quantitative methodologies were employed to gather data.

The presentation and analysis of data will include percentages, graphs and 't' scores to enable easy reference and comparisons.
CHAPTER FIVE

RESULTS AND DISCUSSION OF CASE STUDIES

Introduction

In Chapter Five the data resulting from the case studies is presented and analysed. The data collected aims to answer the research questions indicated in Chapter One and to provide a typology of teachers' knowledge of the law in education. Specific issues of concern to educators are the focus of each case or scenario used in the questionnaire.

The specific cases used in the paper are explained and their facts listed. Discussed are the facts of each case and their inclusion is justified. The points of law and the court's ruling are stated and the participants' responses are displayed and analysed.

Case studies

Section I comprises three case studies, one relating to the hours of the duty of care, the second examines dangerous tools and the third educational malpractice. These cases reflect teacher responsibilities in schools.

Section II is concerned with a student issue. It is a scenario which is centred on child residency (formerly known as 'custody').

Section I, Part A – Teacher responsibilities

Case information

The first case used in this survey is that of Geyer v. Downs [(1977) 17 ALR 408]. It is arguably the most famous and leading case in Australian educational litigation and is often commented on by authors including Hawkes (1990, p. 18), Kohn (1997, p. 105) and Abrams (2000, p. 7).
The facts are as follows:

An eight-year-old girl arrived at school before the teachers came on duty at 9:00 a.m. While walking across the playground, another student who was swinging a softball bat injured the girl. The headmaster had opened the school gates between 8:00 a.m and 8:30 a.m. The principal said he opened the gates as he knew that children arrived early and he did not want to keep them locked out of the school, as it was adjacent to a busy street. In his testimony, the principal stated that he occasionally supervised students through his office window and asked students to play passively.

This case was included in the study of teachers' knowledge of the law because it examines the duty of care owed to a student by their teacher, principal, school and school's governing body. It also examines the hours of school and questions when an educator owes a student a duty of care. It also looks at the standard of care needed.

The Geyer v. Downs (1977) case highlights that once a teacher or school administrator is aware of the presence of a student on the school grounds they have a duty to take care of them. It is a duty to take affirmative action to provide a safe environment for the child. The standard of the duty is dependent on many factors. These include the child's health, age and likelihood of an injury occurring. Another issue this case raises is the duty to take care of those in the playground which at times can be a dangerous place.

**Court ruling**

The New South Wales Court of Appeal said that in this case the headmaster had no power to ask teachers to come in duty before 9:00 a.m, due to employment and union rules, and thus found that he owed no duty of care to the student. Consequently, the court ruled that he was not negligent. The plaintiff, unhappy with this decision, appealed to the High Court of Australia.

The High Court unanimously held that even though the headmaster had no power to ask teachers to supervise during such early hours, this was no solution to the
problem. Chisholm (1987b, p. 65) said the headmaster was found negligent for failing to provide supervision for the plaintiff, despite the fact he was powerless to do so. The court showed that a duty of care had been created by the principal opening the gates to the school and by occasionally supervising the playground dwellers. Being aware of the children and occasionally supervising them was considered inadequate supervision. The plaintiff was awarded $89,471 for severe head injuries. The education authority paid the damages as the principal was acting as an agent of the employer.

It was the principal's duty to take affirmative action for the students' safety. Yeo (1997, p. 277) comments that the duty is that of affirmative action,

> Unlike ordinary citizens who enjoy immunity from suits based on nonfeasance (that is, an omission to act), the liability of schools and teachers is typically founded on nonfeasance, for example, a failure to break up a scuffle between pupils or render aid to an injured pupil, or to shepherd young pupils across the road.

This case also poses moral questions not adequately responded to by the court. Some may argue that the principal acted in a moral and correct way by opening the gates of a school on a busy road and by occasionally supervising the students and asking them to play passively. Ironically, by doing what may seem as morally correct, the principal supervising the children created a duty of care and thus became legally responsible and subsequently negligent.

Research results and discussion: Section I, Part A – Teacher responsibilities

Was someone at fault?

Of all the cases and questions in this study, this particular case showed the greatest agreement among respondents. Eighty-five per cent (N=143) of the group believed that someone was at fault.

Who was at fault and why?

There were, however, 15 different responses as to who was at fault. Several respondents named more than one contributor to the accident. An example is
teacher Respondent 65 (R65), a female primary teacher, who blamed the two girls and the principal. She wrote the blame lay with several people such as the "principal because he should have been watching students properly if he was supervising. The girl who swung the bat (for her) stupid behaviour. Other girl and bat swinger because they shouldn’t have been at school at all".

The large group who indicated someone was to blame said the principal was at fault; this is displayed in graph 5.1. As mentioned above, this was also the court’s opinion.

Graph 5.1 – Geyer v. Downs – Who was at fault?

Nearly three quarters of the group believed the principal was either the sole person at fault or contributor to the accident. It is interesting to note that all the school administrators said someone was at fault for this accident. Sixty per cent indicated the principal was at fault for the girl’s accident, constituting a high percentage of agreement.

When respondents had to suggest what the principal did wrong, only 15 people gave the same response the court gave, that the principal was at fault as he opened the gate and provided some supervision. The largest group in agreement was a group of 12 participants who wrote that the principal opening the gates caused the accident. A further five respondents stated that opening the gate was the school and principal’s fault.
Answers to why someone was at fault provided an enormous amount of data. The results from those who said the principal was at fault are shown in graph 5.2. The reasons for parties being at fault included: providing little, poor or no supervision, opening gates early and having little or no policies or procedures. Some respondents mentioned the issue of childcare and providing before-school care facilities. Others discussed the need to ban dangerous play.

**Graph 5.2 – Geyer v. Downs – Why are they at fault?**

Those who indicated the parents were at fault said parents should not send their children early to school whilst others argued that children will always come early as parents have early commitments.

Principal and school was an appropriate response given by 13% of the group, the reason for them being at fault also included answers such as opening gates, allowing students on grounds and supervising, albeit inadequately.

Often respondents answered without conviction and with some degree of doubt in their response. One example is the comment of a female Catholic teacher with over 8 years of experience teaching infants' classes; she writes: “if the principal has allowed children on the premises, for whatever reason, there is a duty of care (I've heard this term and wonder if this is correct).”
There were significantly more males than females who believed, 'accidents do happen'. The answer that the school needs rules such as no sports equipment had more males (8) responding than females (6). This result is disproportionate as males only make up 28% of the whole group. Only one male compared to ten females thought asking children to 'play passively' was the way to avoid litigation.

There were a small proportion of individuals who did not answer this question; this was consistent with the rest of the survey.

How could the incident have been prevented?

The group was asked if the accident could have been prevented. The court said the principal had no power to ask staff to be on duty so early, however, this was not a solution. Authors writing on this subject indicate that prevention should be in the form of active supervision and by only opening the school gate when that supervision is available. In fact, the principal’s negligent act was providing limited supervision and thus acknowledging the students’ attendance. Approximately three quarters of the group thought this accident could have been prevented. Among the suggestions for ways to avoid the girl’s injury was by discouraging early arrival by sending frequent and clear notes to parents stipulating hours of supervision. In fact, the group suggested 17 different ways to prevent the incident.

A male teacher at an independent K-12 school with 1-7 years' teaching experience, who was correct in nearly every response on the questionnaire, wrote that the accident could have been prevented by “1. School gates open when official supervision begins. 2. All parents/caregivers are regularly informed in writing by school when supervision times take place”.

Of those who thought the incident could have been prevented, 30% indicated better supervision and a teacher on duty; a large group of these teachers were primary teachers. Some recommended asking teachers to come on duty before school starts, which the court said would be against union regulations. Only one person in the whole group commented that earlier supervision by teaching staff is highly unlikely.

Some participants suggested the way to prevent this accident would be by simply keeping the gates locked until 9:00 a.m. One could argue that opening the gates heralded the start of a new day, although cases have shown the issue of when
school commences or concludes is ambiguous and based on the commencement of the student/teacher relationship, not when gates are opened or bells are rung. When children are present on the school grounds and staff is aware of their presence, the teacher/student relationship has begun.

Boer and Gleeson (1982, p. 128) indicate that keeping the gates closed on a busy street does not relieve the principal of a duty of care as the children could have been involved in an accident on the street or simply jumped the fence to gain entry to the playground and have an accident anyway.

A small group of participants said parents should accept more responsibility for their children's care so before-school care would not be an issue. Furthermore, proportionally twice as many of the females to males thought better supervision would have prevented the accident.

Legal issues relating to Section I, Part A – Teacher responsibilities

Establishing a duty of care

*Geyer v. Downs [(1977) 17 ALR 408]* set a precedent for the establishment of a duty of care for before and after school, and therefore is often referenced in the literature. It appears that if the incident occurred during school hours it would have been a simple court decision of negligence. As the accident happened prior to school commencement the courts had to determine how a duty of care arises and what constitutes 'school hours'.

This case was finally settled in the High Court of Australia. It ruled that the minute the teacher/student relationship comes into existence, the duty of care arises. In fact, as Lewis (1985, p. 5) poses, "the fact that regular attendance times are laid down is irrelevant and that the known presence of children in the grounds appears to be sufficient to set up a duty for their care." The court ruling stated that a teacher should not create the duty or allow it to exist if they cannot adequately fulfil the responsibility that goes with it. However, this seems almost impossible as at times an interaction between teachers and students may occur when teachers are unwilling or unable to take responsibility for a student's welfare. This was in fact true in the case of *Geyer v. Downs* (1977).
Many writers on this subject, in line with the attitude and advice of solicitors, say that children who arrive early to school pose a serious problem for schools and can lead them into litigation. If the school is aware of an existence of an early morning or after school student attendance, the school has a legal obligation to provide supervision for those students. The exact organisation of the supervision would most probably be quite different for each particular school and its specific circumstance, and in some cases would be very difficult to achieve.

As the duty of care arises out of the position and status of the teacher, even a teacher who is walking casually in the playground who notices potentially dangerous conduct is obliged to suppress such behaviour in the interest of the children's safety. Similar to the Geyer v. Downs (1977) case, the knowledge of students being in the grounds after school creates a duty of care that must somehow be fulfilled by the school. The literature and solicitors in this field indicate that the school must make it well known to parents and students that loitering will not be tolerated by providing constant reminders in the form of school bulletins and parent information meetings.

Another issue is the duty for students on their journeys to and from school. Boer and Gleeson (1982) believe there is an expectation by parents and the community for the school to be vigilant concerning the safety of students, which at times may be an impossible task. This expectation has been highlighted by its inclusion in the New South Wales Teachers' Handbook (2003, 5.9.1, 5.9.2) that states:

1. Schools and parents have a responsibility to promote appropriate behaviour and the safety of students travelling to and from school. School policies should include statements covering appropriate behaviour in travelling to and from school ...

2. School supervision plans need to address the safe arrival and departure of students at and from the school. There must be a realistic assessment of the responsibilities of each individual school for the safety of pupils attending that school.

This extraordinary responsibility leads one to question at what point a teacher can claim to be no longer responsible for their charges. The difficulty arises because there is no statutory definition of school hours in New South Wales, the Australian Capital Territory and Northern Territory. The Western Australian educational policy is
currently being revised and may include definitions for school hours. In Queensland, Tasmania and South Australia there are at least statutes defining school hours.

The legal literature on this subject suggests the school should make parents well aware of the extraordinary difficulty of before-after-school supervision and be persuaded to organise childcare for their child. If this does not prevent children arriving early, there seems to be very little a principal could do if parents insist on dropping children off at school early. Even if the principal insists on the school providing early morning supervision in the form of an early morning duty, students could still arrive even earlier than supervision begins.

The community appears to be imposing more responsibility on schools, expecting them to accept students on school premises before school, however, it is certainly not in the professional interests of teachers to be required to carry out supervisory duties before school. “During this time, their attention is generally given over to acquiring resources, attending to administrative matters, checking their duty rosters, or taking part in a myriad of meetings or sporting/cultural activities.” (Stewart, 1991, p. 6).

In 1997 the then Director-General of Education in New South Wales sent a memorandum to schools titled ‘The Care and Supervision of Students’. Lemaire, (1998b, p. 51) indicates it sets out in some detail the school’s duty of care and the responsibilities of principals. The Director-General stated that the responsibilities of principals included providing and maintaining a supervision plan for students, before- and after-school duty provision, supervision during children’s breaks, supervision during teaching and learning activities, supervision of student travel and dismissal of kindergarten classes.

Lemaire (1998b), writing for The New South Wales Teachers’ Federation, says that the paper sets out in very specific terms the duty of schools and their teachers. Teachers are to:

- ensure the protection, safety and welfare of each student; prevent a student injuring themselves or other students and members; protect students in their care from sexual, physical and emotional abuse and neglect and from improper conduct of a sexual nature from staff. (p.51)
Lemaire adds that these are unrealistic expectations, placing unnecessary burden and a high responsibility on those who care for children.

In response to the *Geyer v. Downs* (1977) case the Director-General of Education stipulated that supervision half an hour before school commences is to be provided in the form of teachers visible on the school grounds; supervision cannot be incidental or indirect. This was to be continued during the recess or break period during the school day and included the patrolling of restricted or out of bounds areas and fixed playground equipment. Lemaire (1998b, p. 51) points out that in small schools this would indicate that teachers would have to be in two places at once. Another point made is that if a teacher inspects out of bounds areas, would they be liable if an accident occurred in the main playground?

**Section I, Part B – Teacher responsibilities**

**Case information**

Part B presents the case of *Butt v. Cambridgeshire County Council [(1969) CLY 2724]*. Discussed by Brown et al. in Knott et al. (1980, p. 86), it is of particular relevance to teachers of primary school and teachers using common equipment. The facts were as follows:

Nine-year-old girls were involved in a craft lesson. During the lesson one girl waved pointed scissors around and poked them into another girl's eye. The class was accustomed to using scissors and were all involved in individual tasks when the accident happened. The teacher was not looking at the girl when the accident occurred, but was instructing another student.

The central point of law of this case is the standard of care needed to avoid negligence, particularly in the classroom environment. This case also examines how a breach of care may occur and thus illustrates the relationship between the standard of care and the breach of care. Other issues include the standard of care when using potentially dangerous items or equipment and following good and common practices in education. Many cases such as this highlight the issue of contributory negligence as they investigate the contribution of others, including students, to incidents.
Court ruling

When this case went to court, discussion centred on the definition of the duty of care and the standard of care needed to avoid a breach of that care. The court held that the teacher was not under a duty to stop the class from their work when she worked with an individual student and that these particular children were familiar with scissors and their appropriate use. It was therefore not a negligent act to allow children to use them freely (Brown, 1980, p. 86). Thus the case was dismissed.

The court looked to the age of the children and likelihood of injury as well as good and common practice when discussing this case. The court held that it was common practice for nine-year-olds to use scissors in the classroom and, in fact, using scissors with competence is an expectation of students this age. The court supported the notion that teachers should assume students accustomed to using particular tools and having had adequate instruction in their use, should be able to use them as required. Indeed, to ensure that meaningful, challenging and valuable educational experiences continue, a certain amount of risk is to be expected.

As mentioned in Chapter Two (Literature Review), the court does not expect teachers to be an insurer of a child’s safety. The court looks to age and maturity of the child, the health of the child, and the likelihood of injury, as well as past experience and prior reputation for dangerous/disobedient behaviour.

Research results and discussion: Section I, Part B – Teacher responsibilities

Was someone at fault?

In total, 70% (N=118) of all participants thought someone was at fault; there were no ambiguous responses such as yes/no or any unanswered questions. This could be due to the simplicity of this case or because there was no ambiguity in the posing of questions or explanation of the case.

Twice as many secondary teachers (40%) to primary teachers (20%) and principals (24%) believed no one was at fault.
Who was at fault and why?

When questioned with who was at fault, participants responded in eight different ways. Of participants who thought someone was at fault, more than half thought the girl with the scissors was at fault. A further 17% believed the girl was a contributor to the accident. One experienced high school teacher (R51) wrote no one was to blame as “this amount of supervision in class ... can prevent all accidents. Some students are uncontrollable and should be withdrawn from the school system.”

Throughout this section, there was a difference between the male/female responses. This section had 11% more males than females suggesting the girl with the scissors at fault. We can compare this to 17% of females and 3% of males blaming the girl and her teacher. The reason for this could be that males in this survey are more apt to blame a singular individual; this could be examined further in future studies.

The largest group in agreement, a third of respondents, stated the girl with the scissors was the one responsible as she should have known better, being accustomed to the use of scissors. Others said that teachers cannot see everywhere at once and the teacher was not negligent as she provided adequate instruction and supervision.

Graph 5.3 – Butt v. Cambridgeshire County Council – Who was at fault?
Thirteen per cent of people who thought someone was at fault, named the teacher. Most people in this group believed poor supervision and the use of sharp or pointed scissors were the main reasons for the accident.

Approximately one fifth of the group named more than one person as the responsible party. When asked why the person was responsible answers included: not using safety scissors, poor supervision, and poor instruction. Some participants believed that nine-year-olds were incapable of using scissors and should not have been given scissors in class.

The response 'no one was to blame' resulted in 16% of the total group writing 'accidents do happen'. As one respondent (R59) wrote: "Accidents happen – all due care was taken." Many respondents indicated that the "teacher cannot see everything all the time, children often do things suddenly. The school however, will be held responsible." (R107, Female K-6 Catholic school teacher with over 15 years’ experience)

**How could the incident have been prevented?**

**Graph 5.4 – Butt v. Cambridgeshire County Council – Could the incident have been prevented?**

As displayed in graph 5.4, there was almost an even division between those who thought the accident could have been prevented and those who thought it could not.

The respondents’ answers as to how the incident could have been prevented included repeating rules and instructions, using safety scissors, better supervision, and ensuring children follow rules. Three participants went so far as to say students
should not have access to scissors or biros; others recommended the grouping of students who were using equipment so they can be supervised. Some people thought the girl should have been more careful or responsible with the scissors.

The largest group, almost one third, believed the way to prevent an accident such as this is by repeating rules and providing clear instructions. Another common suggestion was providing 'safety scissors' for students. Some of the participants indicated that changes had to be made including stating rules, grouping scissor users together for ease of supervision, seating children away from one another and making children more responsible for their actions.

A few participants even called students “impulsive” and “uncontrollable”. Comments were also made about the need for students to be responsible for themselves, particularly for equipment the students use on a regular basis with proficiency and confidence.

A group of 42% said the accident could not have been prevented; one-third of them stating, it was just an accident. One person commented that “children act without thinking” (R67) and another said you have to trust your students. One female primary teacher from a K-6 Independent school (R144) wrote, “Teacher(s) cannot have 30 pairs of eyes. (The) girl should know correct use of scissors.”

A large group of school administrators, over two-thirds, believed the accident could not have been prevented; only 40% of infants/primary teachers responded the same way.

Some respondents recommended preventative actions which would be very difficult to achieve. One experienced K-6 Catholic teacher (R25) wrote that it is necessary to have “one to one supervision of each student by an adult; or having two metres of space between each student.”
Legal issues relating to Section I, Part B – Teacher responsibilities

Dangerous items and high standard of care

An interesting issue relating to the case of Butt v. Cambridgeshire County Council [(1969) CLY 2724] is that of using equipment or tools that may be dangerous. The court in this case had to use the 'reasonable foreseeable' test to determine if a breach of the duty of care had occurred. As described in Chapter Two, the courts look to three main elements when testing 'reasonable foreseeability'; they are: the age and maturity of the child, the health of the child, and the likelihood of injury happening; as well as past experience and prior reputation for dangerous or disobedient behaviour.

Clark (1989, p. 17) indicates that if "the teacher's actions accord with common practice, it is unlikely that a court will find negligence. An example of this is the case of Wright v. Cheshire County Council [(1952) 2A11 ER 789] whereby the ten-year-old plaintiff claimed the teacher was negligent in allowing another student (as opposed to an adult), to assist the plaintiff upon the completion of a vault. The teacher's evidence showed the practice to be ordinary and recommended in many texts. In light of this being a common practice, the court held that the teacher was not negligent. To ensure this alignment with good and common practice, Brown and Brown. (1980, p. 81) recommend that school administrators and their staff discuss and agree upon acceptable practices to be utilised in their schools.

For each case involving an instrument, equipment or tool, the court has to decide if the likelihood of injury was high and if the risk of injury outweighs the negative effects of non-participation. If the court believes that students should be competent and confident in the use of key educational tools and appropriate instruction in their use is given, a breach would be difficult to prove. As Ford (2003, p. 21) reminds the reader, a mother once said to her child, "Don't be afraid to go out on a limb. That's where the fruit is." This means there is always a risk versus reward issue which has to be taken into account in using dangerous equipment.

If a teacher is involved in 'high risk' activities or subjects in which there is a high risk of injury to pupils, the standard of care for the children must be raised in line with the level of risk. This includes such subjects as sport, science, cooking, sewing, technical studies and industrial arts, or any other subjects which may involve
dangers of any kind. Lewis (1985, p. 8) suggests that teachers who find themselves teaching in situations of high risk of injury should write guidelines of teaching/learning activities as well as organisational details and submit them to their employer for approval.

In education, teachers and students are continually led to newer, greener pastures. Educators often provide dynamic experiences for children, requiring challenging and, at times, dangerous situations. The limitations upon the educators could in fact stifle the creative and exciting activities currently offered in schools. For example, most teachers would agree that it would be a grave injustice if young children were not allowed scissors or senior primary students were unable to use knives in art. Many would agree that these common ‘tools’ have become integral in providing stimulating activities for the young.

Section I, Part C – Teacher responsibilities

Case information

The case used in this section was the case of Peter W. v. San Francisco School District [(1976) 131 Cal Rptr 854] (Dawson, 1993b, p. 27). The facts were as follows-

A 17-year-old boy had just completed high school. However, his parents were gravely concerned about his reading ability. Consequently, they had his reading age tested discovering that he had the reading ability of an eleven year old or year five student. The parents accused the school of malpractice for allowing the boy to progress through high school and graduate.

The plaintiff, Peter W., attempted to sue his school authority for graduating him from high school with the reading ability of an eleven-year-old child and for “failing to provide adequate instruction, guidance, counselling and/or supervision.” (Dawson, 1993b, p. 27). He had been at school for some twelve years but was functionally illiterate. Peter W. argued that he should not have been allowed to progress through each school year and that one of his teachers should have detected his problem and worked to improve his reading level. His argument centred on the fact that the
Californian Education Code stipulated that students should have attained an eighth grader's reading skills before they graduate from high school.

This case is an American case discussing the duty of care for the intellectual welfare of a child and the right to an education. This specific area of law is often termed 'educational negligence' or 'educational malpractice'. The issues discussed in this case are the same as those for any negligence case – duty of care, breach of the duty and injury. Unlike accidents to students, the injuries from educational malpractice are intellectual, not physical. They are therefore difficult to define and prove.

Educational malpractice is an American term used to describe the concept of litigation faced by teachers or schools who are alleged to be professionally negligent. Sungaila (1991, p. 49) states that cases generally fall into two categories, the first being a child of able mind and body, failing to achieve certain skills or benchmarks and the second, being a child with either an intellectual or physical disability being incorrectly labelled or inappropriately assisted.

As with all negligence cases, a duty of care must be owed, a breach must then occur and the resultant injury must be proven to be causally related to the breach, and not too far remote. Another pertinent issue this case also highlights is that of contractual obligation in education.

**Court ruling**

The court held that educational standards are very difficult to define and that it is difficult to state with precision how or what children should be taught. The school district was not held liable for educational negligence as the criteria for the breach of duty could not be determined. If Peter W.'s case had resulted in negligence, the flood gates to educational malpractice litigation would surely have been forced open; the courts deciding how and what is to be taught and learnt. The American court found that inadequate, inappropriate or insufficient educational tuition does not result in negligence.
The presiding judge said:

Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might – and commonly does – have his own emphatic views on the subjects. (Dawson, 1993b, p. 28)

It is therefore the inability to define and label effective and appropriate education standards that prevents educational negligence from being a more common occurrence.

Research results and discussion: Section I, Part C – Teacher responsibilities

Was someone at fault?

A large group of 84% (N=142) of respondents said someone was at fault for the boy’s low reading age. A group of 13% said no one was at fault, which was the court’s view. The remaining four people either said yes/no or did not answer the question.

There were significant discrepancies between groups which said no one was at fault, 25% secondary teachers, 14% infants/primary teachers compared with only 7% of school administrators.

Who was at fault and why?

There were 12 different answers (see graph 5.5) as to who was at fault for the boy’s low reading age. Interestingly, a large group of 72% indicated that this predicament was the result of several people’s inaction, inappropriate action or inadequacy. One secondary teacher (R113) said, “The boy should have told the teachers, the parents are definitely also to blame as they should be aware of such problems as should the teachers and the school.”
The most common responses as to why someone was at fault included a lack of communication between teachers and parents and regular testing of students. Others said the child should have been placed in a suitable remedial program.

A small percentage of the group believed the primary school was at fault; these participants wrote that children should be able to read at the end of primary school.

One respondent (R78) wrote that the Department of Education or school system was legally responsible for this problem because of “their ridiculous policies of allowing students to progress no matter what their ability, attitude, behaviour or attendance.” He went on to say that this situation could have been prevented by, “Get (sic) some sensible people in the Department. People who have worked in the real world.”

Over 11% more males than the females said the school was at fault. When one breaks down the staff into groups, one discovers the administrators have a larger group in agreement than the infants/primary, secondary or ‘others’ group.

One fifth of the administrators believed that the schools and parents were to blame. In total, approximately half the administration staff in this study believed the school contributed to this unfortunate turn of events. Interestingly, two thirds of all
participants named the school as at least a contributor to the problem. The most common reason for the school being at fault was not informing the parents about the child’s inability to read.

More administrators than any other group, 14% compared to approximately 6%, stated that the high school teacher was to blame. Comparatively more men than women believed the school was at fault; 33% of the males and 22% of the females.

**How could the situation have been prevented?**

A large group of 145 people thought the situation could have been prevented. A group of 17% thought testing or assessing the child followed by remediation would prevent this issue from arising. This was the most common response. A similar-sized group recommended early detection and intervention. One Independent school teacher (R127) wrote prevention was possible by “providing a specific program for that child in the classroom at primary school level. By providing remedial reading help. By meeting with parents to fully inform them of student’s difficulties.”

The eight respondents who thought it could not have been prevented all had differing responses.

**Legal issues relating to Section I, Part C – Teacher responsibilities**

**Educational negligence**

It is an interesting paradox that for many years teachers and schools have been found to be legally responsible for the physical well-being of students but not for their intellectual well-being. Poulton (1999, p. 9) explains that Australian Government schools do not have a duty to educate to any standard or specific level. Contrary to this, the literature of leading authors including Boer (1987), Knott et al. (1980), Martindale (1999) and Nelson (1987) indicate that a duty to educate should exist even though education acts generally do not actually mention education.

There are several reasons for the lack of educational negligence or malpractice suits. Firstly, the courts are disinterested in being a ‘watchdog’ or overseer of educational standards. This is probably as it would be difficult to state with precision a suitable standard of care for intellectual welfare. Furthermore, Riley (1997, p. 122) believes
that successful claims would lead to a spate of further claims and subsequent financial burden for schools. The Law Reform Commission discussed these concerns in 1981. They suggest opening the 'floodgates' to educational negligence cases would result in expensive payments to the injured and in turn increase insurance premiums, placing a financial strain on an already resource-limited school system. Furthermore, an increase in litigation against public schools in New South Wales would impact upon the state government and ultimately, the taxpayer.

The literature suggests that if the issue of educational negligence came to the forefront and became a serious concern for teachers, it might either prevent good teachers from entering teaching as a vocation or prevent teachers already employed from experimenting with individualised programs for children.

**American educational negligence cases**

The cases concerning educational malpractice are mostly American. In the United States, an educational duty of care is often easy to prove, as it is the Common Law duty of American teachers to teach students adequately. However, finding negligence is still difficult because there is no exact educational standard in the USA and no knowledge of the precise criteria for a breach of such standards. This was apparent in the previously aforementioned case of *Peter W. v. San Francisco Unified School District [(1976) 131 Cal Rptr 854]*.

Thompson (1985, p. 89) gives the example of the case of *Donohue v. Copiague Union Free School District [408 N.Y.S. 2d 584 (1977)]*. In this case, Donohue, who graduated high school without a functional literacy level, sued his school district for negligence. Donohue was claiming $500,000 in compensation as, although a reading problem was evident in first grade, every year he was allowed to progress to the next year without any assistance. This occurred until his last six months of schooling when he was provided with a 'specialist learning' teacher. At the completion of high school, he could not read menus, signs or clothing labels. The plaintiff argued that the state was negligent. Their argument stated that New York Statute required the Board of Education to examine students who were underachievers and those who continually failed, in order to determine the reason for their problem.

Having outlined the elements of an educational malpractice claim, the majority relied heavily on the Peter W. case. On policy grounds, there was no
duty of care flowing from educators to their students the breach of which would render them liable in an educational malpractice claim. (Thompson, B. 1985, p. 89)

The decision reaffirmed the concept that a failure to learn is not necessarily the result of a failure to teach. The court held that the plaintiff was from a whole group of students with access to the same instruction and who had not failed and claimed malpractice; therefore other factor/s caused the learning problems.

Another American case is that of Hoffman v. Board of Education of the City of New York, [[1979) 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317] (Dawson, 1993b, p. 28; Epley 1985, p. 60). In this case, the plaintiff was assessed at six years old and was deemed to be intellectually disabled. The assessing psychologist recommended he be placed in a special class and be reassessed in two years' time as early testing may be inaccurate due to a speech defect. At the age of eighteen, his IQ was found to be average to above average. Hoffman argued that due to this incorrect assessment, he was denied a suitable education, resulting in alleged diminished intellectual capacity and therefore limited vocational opportunities and financial gain. Hoffman said that the experience had caused him psychological and emotional distress. The case went to court and the plaintiff was successfully awarded US$750,000. The defendant appealed the decision resulting in a diminished award of USA $500,000. The decision was appealed a second time to a higher court which overturned the decision with a majority of four to three. The court stated that it would only be involved in education only in the most extraordinary circumstances, involving 'gross violations of defined public policy'. Clearly, no such circumstances are present here. The court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many education programs offered by the schools of this state. (Dawson, 1993b, p. 29)

Generally, cases within this area of law can be divided into nonfeasance cases, or the failure to discover and subsequently correct problems with suitable programs; or misfeasance, the act of doing something that impairs or disadvantages the student. In the educational setting, misfeasance cases are more likely to find for the plaintiff as they often show more intention than nonfeasance cases.
Nelson (1987, p. 226) explains that when discussing malpractice, one must make a distinction between 'inadequate education' and 'professional error'. In the context of the American cases this means that the Hoffman case had issues which made it essentially a case of professional negligence and damages were denied as the case occurred in an educational setting. Thompson (1985, p. 98) indicates that the difference between the two types of cases is that one is a case concerned with the failure to educate and the other is professional error such as inappropriate classification.

Past litigation has shown that other professionals such as doctors and lawyers have a duty of care to their clients. Consequently, as Kirby (1982, p. 16) states, "If teachers claim full membership of the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents." Sungaila (1988, p. 171) supports this notion by writing,

Unless teachers are prepared to accept a self image as mere child minders responsible only for the physical well being of the children placed in their care, their professional claims to a responsibility for the mind and intellectual advancement of the child may have consequences for their legal liability where it can be proved that teachers and education administrators have not reached appropriate levels of skill and care in discharging their intellectual functions.

**English educational negligence cases**

An interesting development in the area of educational malpractice is that of the hearing held in 1994 in the English Court of Appeal. The hearing involved three cases of alleged educational negligence due to the educational system's failure to identify and meet the special education needs of individual students. The result of this unusual three-case hearing seems to be the antithesis of the American court's position in the case of Peter W. and similar American cases. It is therefore a stark reminder to Australian schools and courts that "in principle there is no reason why negligence law should not be applied to education professionals who carelessly carry out educational tasks associated with the recognition, assessment and treatment of students' learning disabilities." (Williams 1996a, p. 6)
The first case was that of *E (a minor) v. Dorset County Council* [(1994)4 A11 ER 640] (Williams 1996c, p. 21). At eight years old E’s parents thought he/she had a learning difficulty that could be a form of dyslexia. The Council’s psychologist disagreed and said that E did not have a specific learning difficulty. Two years later, the council advised that the local school E attended was the most appropriate place for him/her and further advised the school and parents of strategies for assisting E with his/her problems. Six months later E’s parents were convinced that the council psychologist was negligent in the assessment and advice. They sent E to a private school where E’s problems were diagnosed and addressed. The psychologist in this case was considered a diagnostician similar to the position of a doctor; the court found no difference between the professional educator’s poor diagnosis and that of a medical practitioner.

In another case, a child from the ages of 5 to 11 showed learning problems and associative behaviour problems. His parents believed he had dyslexia, but the school principal refuted this, saying that the child needed more discipline and needed to work harder. After six years of parental concern the principal finally referred the child to a ‘Teachers’ Centre’ for an assessment. The diagnosis was that he had no serious handicap and he should work harder to achieve better results. “Several years later he was independently assessed and diagnosed as a severe dyslexic.” (Williams, 1995, p. 9) Court arguments focussed on the fact that the headmaster was in breach for not referring him to an educational psychologist. The plaintiff claimed for damages based on diminished opportunities for employment and earnings.

The third case of *Keating v. Bromley London Borough Council* [(1994) 4 A11 ER 640 (CA)], Riley (1997, p. 129), Williams, (1995, p. 10) dealt with a child who from 6-8 years old was not registered at school. From the ages of 8-14 he attended a special school until it closed down. He did not attend any school for the next two years and attended a regular school when he was 16. At twenty-one years of age he attempted to sue his local council for not making inquiries into his ability or needs.

After much deliberation the judge, Lord Browne-Wilkinson, indicated that professionals do have an obligation to exercise reasonable care when giving professional advice and that a headmaster has a responsibility to deal with a child’s poor academic performance. In a pivotal 1996 address to the Education Law Association in England, the Lord also maintained that the education system had a responsibility to educate.
[A] school which accepts a pupil assumes responsibility not only for his physical well-being but also for his educational needs. The education of the pupil is the very purpose for which the child goes to school ... If it comes to the attention of the headmaster that a pupil is under-performing, he does owe a duty to take such steps as a reasonable teacher would consider appropriate to try to deal with such underperformance. To hold that, in such circumstances, the head teacher could properly ignore the matter and make no attempt to deal with it would fly in the face, not only of society's expectations of what a school will provide, but also of the fine traditions of the teaching profession itself. Knott (1999a, p. 233)

Williams (1995) adds that it cannot be said that all teachers will be sued for negligent diagnoses or inappropriate or inadequate assessment or remediation. The decision, simply says that a legal claim based in negligence and alleging a failure on the part of the education system and its teachers to identify, and respond to, the educational needs of students with learning disabilities is not untenable in the English courts (p.10).

There was one specific case which some believed further opened up the way for other educational malpractice claims, particularly in England and countries whose legal system is founded in Common Law. Poulton (1999, p. 10) writes of the recent case of Phelps v. Mayor and London Borough of Hillingdon [1998] EWCA Civ 1686 (4th November, 1998). In this case, Ms Phelps was paid 46,000 English pounds because an educational psychologist at her school failed to identify her as having dyslexia. Throughout the deliberations and several court cases, discussions focussed on whether dyslexia is in fact an injury and if diagnosis and intervention would have resulted in less 'injury'. This case is very important in the discussion of the duty of care of specific educational specialists and what constitutes intellectual damage.

Australian educational negligence cases

Until recently, there has been a lack of cases in Australia, dealing with teachers' negligence for the intellectual or academic development of a child. Litigation has been mostly concerned about negligent action or inaction resulting in physical injury. Those writing on this issue question why the obligation of schools has been to physically protect their charges when the actual purpose of schooling is to educate.
Furthermore, until recently, Australian educational statues were not about education at all, only about compulsory school attendance and curriculum issues. "The Acts state in broad terms the intention to provide education of the highest standards, and do not attempt to detail specific standards of professional competence." (Riley, 1997, p. 132) A fundamental reason for this could be that most people in society have differing theories of education, including what should and should not be taught. Epley (1985, p. 63) agrees: "Teaching is complicated. Strategies which work well with one child one day may not work on another day or with another child ... To meet the diverse needs of their students, teachers need to be encouraged to innovate, to experiment, to create." Another reason statues are not about 'education' is to avoid establishing a duty to educate Australian students and, therefore, limiting the resultant responsibility and potential law suits.

However, there is a burgeoning increase in community interest in educational standards and practices, often reflected in the media. Groundwater-Smith (1998, p. 313) says that the media fuels the fire of complaints about poor literacy standards in Australian schools; headlines about falling literacy rates and basic skills are common. With approximately 44% of Australians from 15-64 with poor or very poor literacy skills (Australian Bureau of Statistics, 1999, p. 1), the interest in literacy standards and the desire to seek some sort of compensation for an inadequate education is a very real possibility.

In Australia, the two areas that could lead to an educational malpractice suit are breach of statutory duty and "establishing a claim within the common law principles of breach of contract, misrepresentation or negligence." (Riley, 1997, p. 131) Stewart and Knott (2002, p. 14) indicate that in recent times more and more legal principles have been altered by Statutory Provisions. Statutes begin as Bills that are argued in parliament and voted upon. Once passed through Parliament they become Acts of Parliament and therefore, law.

In 1988, Sungaila wrote that under current statute law in Australia, it was not possible to successfully sue an educator if a child who attends school learns little or nothing at all. This is supported by Riley (1997, p. 132, 133) who states that there is no statutory right to sue for educational malpractice in Australia. He adds that the New South Wales Education Reform Act 1990 states that it is the State's duty to ensure "that every child receives an education of the highest quality". It then goes on to say that no civil action may be taken against the Act. Therefore, in layman's terms it
means that the State will educate a child to a high standard, however, if it fails to do so, the child has no recourse. Nelson (1987, p. 224) supports this by quoting the High Court in *Introvigne v. the Commonwealth of Australia* [(1982) 150 CLR 258], "it is erroneous to say that the Commonwealth owes a duty to educate children." This is obviously an area of some complexity.

Various teaching regulations set down by Government Departments of Education appear to indicate that teachers have an obligation to provide for the intellectual well being of the child. For example, The New South Wales Teachers' Handbook (2003, 5.1) states

Teachers in the Education Teaching Service have a responsibility to ensure that students gain the knowledge and skills they require to become effective learners and ultimately effective and responsible citizens and understand and appreciate the values and beliefs supported by Australian society.

They also have a responsibility to meet the individual learning needs of students and assist each student to maximise his or her learning outcomes; (page 5.1)

Even though, these statements indicate a duty or responsibility for intellectual well-being, they do not reflect any statutory provision; laws or Acts of Parliament.

When arguing that the school system has a responsibility to educate, the plaintiff could use several pieces of legislation to support their argument. Two examples are *The Disability Discrimination Act 1992* which aims to protect those with disabilities from discrimination and the *Commonwealth Trade Practices Act 1974* which stipulates legal responsibilities for companies, including private schools.

Australia is also a signatory to the 'Rights of the Child’ document produced at The Conference for the International Rights of the Child at the United Nations. Amongst other subjects, this document stipulated a child’s right to an education. Riley and Sungaila (1992, p.145) quote the document by writing,

the child is entitled to receive education which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will
promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.

When Australia became a signatory to this document, it signalled to the international community that Australian children have a right to be educated. This is evident, as the Australian courts have stated that where Australia is a signatory to an International Convention there is an implied expectation it intends to meet its obligations imposed by the provisions of the convention.

As aforementioned, malpractice could be sought through breach of contract. This is especially true if the school is a private institution. Until now, no Australian court has shown that a duty of care to educate based in contract exists, although Sungaila (1991, p. 46) says that in the future we will see this be proven at law. Interestingly, at present many of the stakeholders in education believe that there is a responsibility to educate. In a response as to why a school had a responsibility for education, one survey respondent (R109) wrote, “The school had taken on a contract to educate the student.”

The obvious issue here is that most parents who send their children to private schools do so without signing an actual document. However, Australian Contract Law has changed and is beginning to recognise 'legitimate expectation'. In other words, although in some situations there is no actual written or verbal promise, there is a legitimate expectation of a contract. For example, if a family seeks advice from their accountant or financial adviser, it is legitimately expected that they will give the family adequate advice. Similarly, it is a legitimate expectation for children to receive an adequate education at a private or non-government school. In simple terms, the school offers to teach the child, the parents accept on behalf of the child, a fee is paid and this agreement is legally binding.

The other factor affecting educational malpractice under contract law is that standards of educational provision are not generally provided in contracts between private schools and parents or students. Consequently, before a claim can be successful the court must be satisfied that the school owed a duty to educate a child to a certain standard. A common way to avoid a duty of care to educate is that government and non-government schools avoid writing explicit statements to regarding educational provision or standards. Similarly, educational handbooks also
limit explicit aims of education and the particular duties required of teachers to provide them.

The following are recent cases involving alleged professional errors that will ultimately affect the result of future malpractice cases in Australia. In 1983, a NSW student sat his final exams and awaited his results. His marks were wrongly calculated, resulting in a lower score, thus he missed out on a place at a university for the following year. The case, widely reported in the media throughout Australia, had the potential to open the way for claims of educational negligence. If the school had been found in breach of its duty to educate the student, it could be sued for the costs of an extra year at school, loss of potential earnings, as well as compensation for injury relating to emotional distress and anguish associated with the negligence; the implications on this area of law would be substantial. The aforementioned 1983 case was settled out of court. Ramsay and Shorten (1996, p. 297) believe that if this case had been argued in court it would have been successful. Their argument is that the school system owes a duty to calculate the marks accurately. In contrast, a case involving incompetent teaching or inappropriate programs is more complex, subjective and more difficult to prove.

Szego (1999, p. 5) discusses the unreported case of Duggan and Leman (1996) who sued the NSW Department of Education for inadequately teaching the NSW HSC curriculum, resulting in their failure to gain university entry. The case was also settled out of court for an undisclosed amount. Another case in Victoria involved a whole Year 12 English class who had been taught the wrong text for the final exams. Szego (1999) adds that, at the time of writing, never before have so many schools taken out such expensive and extensive insurance policies against such things as professional indemnity, libel and slander. Sungaila (1991, p. 45) also discusses a situation whereby in 1990 students sat down to an agricultural science exam only to discover none of the topics they were taught were in the exam. In this case, the Education Department had issued a memo to principals stating that there were topic changes that year; however this memo was never read or even sighted by the head of department or teachers of agricultural science at a particular school.

In conclusion, although in principle an injured student should be able to claim for intellectual harm and the resultant economic loss, in reality this is highly unlikely. A claim would be, however, be possible if specific professional errors were made
"caused by identified acts" (Riley, 1997, p. 135), especially if written statements suggesting a specific level of educational attainment were provided.

Section II – Children's issues

Case information

In this fictitious case about custody or residency, survey respondents were asked to comment if someone was at fault for letting a child go home with her mother.

The facts listed were:

An eleven year old girl was waiting for her father to pick her up from school. The teacher on duty was surprised to see the child’s mother arrive as the child lived with her father who had been the sole care-giver since the parents had separated several months before. The teacher allowed the child to leave with her mother, without consulting the principal or the child's classroom teacher.

This section explores the issue of custody or residency arrangements. The point of law revealed in this case is the duty to take care when there is a residency or custody issue. This concern is a very real one for many schools as schools are aware of the breakdown in the traditional family unit and the variety of family groups now in existence and the impact of these situations upon school life. Many authors have recommended having procedures and policies in place to avoid problems resulting from custody disputes, particularly as court orders for residency of children increases.

Court ruling

Solicitors in this field and research in this area indicate that teachers should always be aware of situations that are problematic. A central issue to this fictitious case is that the parents were separated and not yet divorced, and thus, as the case is described in the survey the most correct answer is that no one was at fault. This is because until the court rules, both parents have custody or joint residency of the child. This is of course unless there is a specific court order stating that a particular
parent is not permitted any access to the child. If a teacher is genuinely not aware of a court order, holding them responsible would be nearly impossible. If, however, the school was aware and failed to inform individual teachers the school could be liable for any harm that might result. As with other cases in negligence, the courts would use the 'reasonably foreseeable' test. Thus, the court would question whether there was a breach of duty of care and a likelihood of injury or damage occurring.

The common policy in most schools, often recommended by departments of education in Australia is to communicate solely with the parent with whom the child resides. If one parent has legal custody and the other non-residential parent demands access to a child, usually to pick them up after school, the school should request the court order saying that the non-residential parent is permitted access to the child. Many schools have a rule that all visitors must report to the school's office; this way the school administrator may check if there are any issues regarding access to the child. Conversely, Spencer and Nolan (1997, p.161) say that it could create legal problems if a teacher refused access to one parent at the request of the other parent. The best solution is to have the principal ask the parent to wait whilst the other parent is contacted.

Research results and discussion: Section II – Children’s issues

Was someone at fault?

A large proportion of the group, 71%, believed someone was at fault, which is incorrect. As mentioned above both parents have access prior to divorce unless a court order is in existence. Not many participants appeared to know about this law. Another legal principle which is also important is that people cannot be held legally responsible for acts they honestly know nothing about. A teacher cannot be negligent if they honestly know nothing about a troublesome issue.

This 'fault' was attributed to 21 different persons or groups, showing an amazing disparity in opinion. Approximately one-quarter of the respondents said no one was at fault and 5% left the question unanswered.

An interesting result was the administrators' responses; of the administrators almost half said someone was at fault, and the other half said no one was at fault. One can
compare this to secondary school teachers 85% of those who responded said someone was at fault.

**Who was at fault?**

The largest group, 44%, believed that the teacher on duty was at fault. A comparatively higher proportion of infants/primary teachers said this compared to the group of school administrators.

A group of 12% believed that it was the teacher and the principal who were responsible for this unfortunate situation. While 43% of all administrators believed it was the school's fault, only 6% of secondary and 9% of infants/primary teachers responded this way.

A large proportion, 78% of the total group believed the teacher was either solely responsible or partially responsible.

Of the 21 responses as to who was responsible, many named multiple contributors; these included the teacher on duty, class teacher, the girl herself, parents, and the principal. A small group, 8%, thought everyone, except the girl, was legally to blame.

**Graph 5.6 – Who was at fault? Residency scenario**

![Graph showing the percentage of responses to who was at fault in the residency scenario.](image)
Why were they at fault?

The reasons given as to why someone was at fault were many and varied. Many people said the incident happened as the teacher on duty should have consulted with another adult about the custody/residency issue to find out who was the custodial/residential parent. In fact, one experienced male teacher from a public high school (R12) wrote, "This is a matter of child custody. If the teacher on duty has been communicated with this information by the principal, the teacher is at fault. If not, then the principal and then the schools are at fault." (sic)

The largest group to agree on who was at fault and why, was the 13 people who said the teacher on duty was at fault as they should have checked custody details with the school principal or the resident parent, in this case the father, (see Table 5.6). It is interesting to note what would have happened if the residential parent could not be found.

<table>
<thead>
<tr>
<th>Responses as to why the teacher on duty was at fault.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Should have given instructions to school</td>
<td>2</td>
</tr>
<tr>
<td>Should not just let a child go</td>
<td>9</td>
</tr>
<tr>
<td>Should send mother to principal</td>
<td>6</td>
</tr>
<tr>
<td>Should check custody from principal</td>
<td>13</td>
</tr>
<tr>
<td>Teacher on duty should have known arrangements</td>
<td>7</td>
</tr>
<tr>
<td>Should have contacted the father</td>
<td>7</td>
</tr>
<tr>
<td>Should check with teacher, principal, father</td>
<td>5</td>
</tr>
<tr>
<td>Teacher was obviously aware</td>
<td>2</td>
</tr>
<tr>
<td>Teacher should invite parent in to see child's work and check with principal</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>53</td>
</tr>
</tbody>
</table>

How could the incident have been prevented?

A large percentage of 83% men and 70% of women said this incident could have been prevented. More secondary teachers than other groups suggest it could not
have been prevented, 26% of secondary compared with 13% administration staff and 15% infants/primary. Four people said “Yes and no” and a considerable group, mostly of high school teachers, of 10 people left the question unanswered.

Of those who said yes it could have been prevented, one-third stated that improved communication and informing staff was the way to prevent a potentially dangerous situation. Some teachers mentioned the need to have a file with photos on each child with details about each child’s custody arrangements. Others said the non-custodial parent should be asked to wait whilst the principal was consulted.

About 15% of those who thought it could have been prevented said it was important for a school to have a clear and consistent policy on children with custody issues and that staff should adhere to the policy.

Some of the respondents requested unusual administrative procedures that would be difficult or impossible to observe. These included having parents pick up children from individual class teachers in their classrooms and providing a sign-out sheet for each child in the school which involves having the parent who picks up the child signing for the child each and every day. One teacher from a K-6 independent school (R77) wrote that, “All teachers on gate duty need to have a list, possibly with photos, on these situations. The list should have all names and classes of (children) in dispute and class contact number for teacher.”

Of those who said no, it could not be prevented, one-fifth said that teachers should be alerted about the court access arrangements for each child in their care. These respondents indicated that it is important for parents to provide schools with up-to-date information about custody arrangements and that this information be disseminated amongst staff. One-fifth of the group said that the mother must have had access for this situation to occur.

One respondent from a public high school (R96) who believed it could not be prevented said,

If a parent wants a child and the child goes willingly with a parent or anyone – they cannot be stopped. Barbed wire wouldn’t work. Even if the teacher had known they could not have done anything. Grabbing the child is illegal. Put yourself in front of the car? The only thing that could have happened is had
the teacher known the problem, they could have contracted the police, quickly.

Legal issues relating to Section II – Children’s issues

Child custody or residency

As previously discussed the parents were only separated for a few months and, therefore, unless a specific court order exists stating that one parent is not permitted any access to the child, both parents are allowed to pick up their child from school.

If the parents are divorced it is generally “seen to be exercising reasonable care and responsibility in assuming that the parent who enrolls the child and to whom school notices and directions are forwarded, is the legal guardian of the child.” Ackroyd (1986, p. 38) It is therefore recommended that all teachers who have responsibilities for children involved with custody issues should be familiar with the resident parent and the situation for each child.

As Trone and Sleigh (1989, p. 128) indicate,

Under the Family Law Act, the previously numerous grounds for divorce have been replaced by one single ground – “irretrievable breakdown of the marriage relationship as evidenced by 12 months’ separation”. During this 12 months’ separation period, before a divorce has actually taken place, both parents have equal rights to see the child, even though the child may be living with only one of them. A teacher would, therefore, be taking a serious legal risk in rigidly shutting one parent out at the request of another, when there was as yet no issue of a court order directing this be done.

As mentioned earlier, if a teacher is genuinely not aware of a court order it would be nearly impossible to find them at fault for permitting contact with a non-custody/non-resident parent. If, however, the school was aware and failed to inform their teachers, the school could be liable for any harm that may have resulted.

If one parent has legal responsibility for a child and the non-residential parent asks to see a child at school, or if there is any uncertainty the teacher/school should ask to
sight any document including a court order. It is rare for court orders to be given on weekdays and certainly during school hours unless there are special circumstances. Once a court order is sighted by school personnel, a copy should be made, put in a child's file and shown to all staff. A problem would definitely arise if a school was informed of the existence of a custody issue and they did not protect the child. If there is the existence of a court order which denies one parent from any custody at all, that parent is not entitled to any documentation about their child from the school, including the school reports, and may not attend school functions.

Tronc and Sleigh (1989, p. 129) recommend alerting staff to children with custody concerns by having a student visit each member of staff with a fake memorandum to make them aware of the situation. However information is disseminated, writers on this issue say that it is imperative that principals make sure they inform their staff of all custody/residency issues and arrangements or they could be in breach of their duty of care. Documentation about such legal issues should be kept recent and kept with sensitive documents. The Department of School Education of New South Wales Legal Services Unit (1994, p. 17) says that unless a school sights a new court order they can only legally rely on an old order.
CHAPTER SIX

RESULTS AND DISCUSSION OF ISSUES

Chapter Six focuses on the survey results from the twelve-item section of the survey, Section III. The qualitative data accumulated from this section is dissected and correlated to consider if factors such as gender, teaching experience and school role affect knowledge of education law. Other comparisons between school systems or types are also examined and responded to.

Some of the twelve items concern the same points of law; therefore they are grouped together to determine if educators have any common understandings or misconceptions regarding this topic.

Statistics are presented in several forms, such as tables and graphs, and comparisons and judgements are made.

Issues of law

The third section of the survey provided participants with an opportunity to respond to a variety of cases involving education law and areas of legal concern to teachers and school administrators. This section aimed to gather quantitative data about several broad areas of concern. These are duty of care, standard of care and responsibilities concerning school sports, bullying, notification of abuse and custody or residence. The advantage of this section is that the data displays the relationship between the various groups of respondents, indicating areas of similarity and difference.

Analysis of Section III

When comparing all the school groups to determine differences between school systems or types, Catholic high school employees displayed the most superior knowledge of educational law. This was perhaps due to the group having attended a recent in-service course in the area of schools and the law.
Table 6.1 - Total mean scores for individual school systems

<table>
<thead>
<tr>
<th></th>
<th>Correct score out of 12</th>
<th>Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Primary schools</td>
<td>6.2</td>
<td>52%</td>
</tr>
<tr>
<td>Public High schools</td>
<td>6.9</td>
<td>58%</td>
</tr>
<tr>
<td>K-6 Catholic Schools</td>
<td>6.3</td>
<td>53%</td>
</tr>
<tr>
<td>K-12 Catholic Schools</td>
<td>7.7</td>
<td>64%</td>
</tr>
<tr>
<td>K-6 Independent Schools</td>
<td>6.1</td>
<td>51%</td>
</tr>
<tr>
<td>K-12 Independent Schools</td>
<td>5.1</td>
<td>43%</td>
</tr>
</tbody>
</table>

Mean score of all participants 6.5 54%

Catholic male high school teachers had the highest 'score' with 8.25. This may be compared to the lowest scoring group, female K-12 independent school teachers, with 4.6. The K-12 independent school results were lowered significantly by one school whose knowledge of the law was very poor. Some participants from this school achieved scores as low as 1 or 0 out of a possible 12.

When all scores were compared against the school which had recently completed a course for teachers on the implications of the law, a statistically significant difference was found (t (167) = 2.987, p< 0.01). Another statistically significant difference was found between the teachers and administrators who participated in the project (t(167) = 3.412, p< 0.001).

There was no significant statistical difference between teachers or administrators with less than seven (7) years' experience compared to those with more experience. Similarly, no difference occurred between Government and Non-Government School systems.

When one breaks down the individual schools in the K-12 group, several schools had significantly higher scores, representing a higher knowledge of the law. The range of scores between the K-12 schools was 7.5-3.5.

Male public high school teachers also scored well, with a mean score of 7.7.
The results in this section indicated that there was no significant statistical difference between males and females involved in the survey.

Graph 6.1 – Section IV – Total correct results item by item

- 'In loco parentis'
- Determining level of care
- Pedestrian Crossings
- Sport
- Bullying
- Custody

Percentage of correct responses for each item, Section III
Graph 6.2 – Section IV – Total correct results by issue

Issues of law relevant to the school

Duty of care – When and where does a duty exist?

Discussion of issues – Item 2

Item two tested knowledge of the temporal ambit of schooling. The item stated “Teachers are legally responsible for any students who they see in the playground after school.” As with all items in this section the respondents were asked to circle ‘true’, ‘false’ or ‘uncertain’ to the item.

The issue of children loitering in the playground before or after school focuses on two points of law:

1. Occupiers’ liability
2. The Law of Negligence.
It poses the question of whether school teachers are responsible for children in the school grounds outside school hours who are not involved in school activities. As Australian law stands at present the most correct answer is true, teachers are responsible for students in the playground. Balfour (2000b, p. 25) says there is no way to escape the duty of care between a teacher/principal and student. He goes on to say that teachers may also owe a duty of care to other teachers and visitors to the school.

The issue of how and where the duty of care arises was dealt with in the aforementioned case of Geyer v. Downs (1977). This case was an important precedent as it indicated that although it is difficult or even impossible to supervise children in the school grounds before and after school this does not alleviate the school's responsibility. In fact, once a duty of care arises, the school has a responsibility to the child and precautions are necessary to protect the child or a breach of the duty of care may occur.

The issue of 'Latch key kids' also poses a problem to schools, particularly if it is common knowledge that children loiter in the playground. The school should post notices around the school grounds and in newsletters to remind parents of the danger of loitering. Even if the school does this, they could still be negligent if a school employee sees someone on the grounds and they do not act to prevent an incident occurring.

In this situation, a school could argue that a duty of care was not owed by proving that no student/teacher relationship was in existence. This would be extremely difficult. However, there is yet to be a court case in Australia in which a school teacher ignores students in the playground involved in safe activity and an accident happens after the teacher departs. It would be interesting to discover the court's opinion on such a situation.

Laurence (1999, p. 9), in his article, says a duty is owed, "during school hours (including before and after school) when the child is in the classroom or on school grounds." Trone (2000a, p. 17) illustrates this by discussing the case of Strath v. State of New South Wales [(1999) NSWSC 391]. In this case, a child with an intellectual impairment fell off the school playground equipment after school hours. The child suffered severe head and hip injuries resulting from the fall. The school had to prove to Malpass J, that although they were aware of students using the play
equipment out of school hours they had done all they could to prevent an accident. The sending out of newsletters, clearing the playground after school of all students and oral warnings to loiterers was sufficient evidence of such activity. The court found the school not liable as it had not breached its duty to take care.

Results – Item 2

Almost half the participants were correct in suggesting that teachers are responsible for children they see in the playground after school. Once a teacher and student meet on the school grounds, a student/teacher relationship is created by default, thus setting up a duty of care. A teacher who is aware of a student on the school grounds has an obligation to act. A suitable action would be to inform a member of the executive who can deal with the situation by escorting the student off the premises. If, however, the teacher managed to prove in court that they were no longer on duty as their school day had finished, the school would still most probably be responsible as the child’s presence was known to a staff member.

The group with the highest number of correct responses was the Catholic high school teachers; 60% of them were correct. Half the public primary and high school teachers were correct on this item. Only 35% of the K-12 independent teachers’ group were correct.

Two thirds of administrators were correct compared to approximately 45% of the teachers.

Discussion of issues – Item 4

Item 4 deals with the issue of when school starts and finishes. It states that, “school bells and starting times herald the commencement of legal obligations of teachers to students.”

The commencement of a school’s duty of care is not related to the ‘ringing of the school bell’ or indeed school starting times. Duty begins when a teacher/student relationship commences, as mentioned above in the sections discussing Geyer v. Downs (1977).
Nash (1986, p. 179) indicates,

The school's legal liability ends when the school has done all those things which in all the circumstances a reasonable person would do. Thus, if, for example, there is a major highway at the door of the school a ... reasonable school would not allow 5- and 6-year-olds to wander across the highway without supervision.

This suggests there would be situations whereby the duty or responsibility is not restricted to school opening times and the boundary of school grounds.

Teachers in New South Wales are generally expected to arrive at work at least thirty minutes before classes start. Lemaire (1998b, p. 51) quotes the Director-General of Education in New South Wales as stating in a directive that supervision must be provided for half an hour before and after the school day. Therefore, it would be reasonable to assume that schools are responsible for students at least half an hour before classes commence and adequate supervision of a suitable kind is necessary.

An interesting point to make is that in a recent case cited by Martindale (1999, p. 12, 13) of State of NSW v. Jones [(1996) unreported New South Court of Appeal, 6/6/96], an accident occurred after the bell rang at the completion of lunch. The children were in or around the school hall when one child threw a pen at another, injuring his eye. The judge said that as lunch was definitely over the teachers should have supervised the students more carefully. If this accident had occurred after school finished for the day and the presence of students was unknown a duty of care may no longer have been owed; thus the court may have decided differently.

Martindale (1999, p. 12) also discusses another case exploring the care needed after the school finishing time and off school grounds. The case involved an unsupervised primary school child who was injured by a high school child at a school bus stop. The accident happened twenty minutes after the school bell and 300-400 metres from the primary school at the local high school bus stop. In this case of Koffman v. The Trustees of the Roman Catholic Church for the Diocese of Bathurst [(1996) ATR 81-399], a primary school teacher was present at the bus stop. The teacher was not on bus duty as the school said they were not aware that any primary school students caught a bus at this bus stop located outside the nearby high school. The high school provided supervision, however, on this particular day no teacher arrived to supervise
the bus stop. When the case first went to court, the judge found the high school negligent for not providing supervision and controlling their students, one of whom ended up harming a younger child; he also found the primary school negligent, as the teacher catching the bus should have known that the child needed supervision.

At an appeal on the judgment, the court held the primary school not to be negligent as these children at the high school bus stop were not necessarily in any more danger than those who walked home.

There is no absolute duty that the school authority must safely return the child to the care of her or his parents ... it is a question of assessing such factors as the age of the child, the geography of the area; the density of the local traffic, whether the child has known physical or mental limitations and so on. (Kohn 1997, p. 111)

Kohn (1997) recommends that the school must make it known that supervision is only available at certain times and under certain circumstances. It is important to ensure that no implied or expressed duty is available outside the hours and conditions that the school can adequately provide for. He suggests that schools lock their gates and only provide supervision when a high standard of care is possible. He also indicated that schools should disseminate pamphlets and newsletters boldly stating the hours of school and the level of care available during those hours.

Results – Item 4

Approximately 60% of the 169 participants were correct in their response to this item. Public high school teachers responded correctly 93% of the time; this is the largest group agreement in this whole section of the survey. Only about half of the K-12 independent teachers were correct on this item. Fifteen per cent of the Catholic K-6 teachers were uncertain.

The respondent teachers were correct 62% of the time compared to almost three quarters of the principals.
Discussion of Issues – Item 5

Item 5 also considers the physical and temporal aspects of a duty of care to students. It poses, "If the school creates a supervised pedestrian crossing, it legally owes its students a duty of care."

It is true that providing extra supervision in the form of bus duty or pedestrian crossing creates an added responsibility for teachers and sets up a duty of care. Dr Sungaila (1992a, p. 7) and Clark (1989, p. 16) suggest that the very relationship between teachers and their students sets up a duty of care and a teacher being present at bus stop or pedestrian crossing establishes a relationship which requires a high standard of care.

Ignoring this duty can also lead to issues of not providing for the child adequately if an accident is foreseeable. For example, a school on a main road would probably be liable if it failed to provide appropriate supervision for a road crossing. If a student had a serious accident, on such a road the school could be held liable for failing to foresee and avoid an accident, therefore putting a child's safety at risk.

Even though as Laurence (1999, p. 11) states, there is no legal duty for schools to provide transport service of any kind, if it does, it has a duty of care to those it transports. For example, a high standard of care would be needed if a school has its own bus and decides to transport some of its students.

This situation is complex and problematic because the teacher is not often within the physical boundaries of the school and not within conventional school hours. The NSW Teachers' Federation has for some time suggested that teachers do not participate in duties involving the supervision of bus stops and road crossings. Contrary to this recommendation from the Union, Lemaire (1998) quotes the Director-General of the NSW Education Department who wrote in a 1998 memorandum that principals must ensure the safe entry and exit from school grounds, provide appropriate before and after school supervision to ensure students safely cross roads, safely enter and exit school grounds, regularly inform parents and caregivers of the rules and bring to their attention repeated breaches. (1998, p. 3)
Item 5 reflects the principles of the case of Koffman v. The Trustees of the Roman Catholic Church for the Diocese of Bathurst [(1996) ATR 81-399], as quoted in Tronc (1999, p. 15). The boy, Koffman, was 12 when the accident occurred. He and his friend were waiting for a school bus with some high school students who regularly caught the bus with them. The two groups began teasing one another, and as a result Koffman’s eye was stuck by one of the local high school students who threw rocks and stones at the primary boys. The court originally found for the boy even though the bus stop in question was 300 metres from the school; as it was a school bus and the school was aware that the children regularly caught the bus. The Court of Appeals overturned that decision stating that the school had no obligation to ensure the child got onto a bus and arrived home safely. Justice Mahoney went on to say that schools are under no obligation to provide supervision for bus stops that are 300-400 metres from a school unless there were special circumstances. Two other majority judges dismissed the appeal saying that the circumstances suggest that there were imminent dangers for boys and the school should have been more vigilant in ensuring their safety. Also, the proximity of the bus stop to the school and the knowledge that some children caught a bus at that particular stop meant that the school had a responsibility to the children.

The case took 13 years to conclude and the discourse involved brought many issues to the attention of the various judges. One such issue that induced much discussion was whether or not the school owed a duty of care for the whole journey home. Yeo (1997, p. 278) said: “The conventional view is that the school-pupil relationship does not extend automatically over the whole journey to and from school. Its existence depends on the particular circumstances of each case.” This case can be compared to another ‘Bus Duty’ case that found for the defendant. In his case, Stokes v. Russell [Supreme Court of Tasmania, 18 January, 1983 (Serial No 2/1983; List A)] (Yeo, p. 278) an accident occurred at a bus stop only 130 metres from a school gate. The judge concluded that the reason negligence was not found was because the bus stop was a distance from the school and the bus was a scheduled public bus which the parents knew was unsupervised.

Results – Item 5

It is reassuring to discover that 80% of the survey participants realise that they establish a duty of care when supervising a pedestrian crossing or bus duty.
All fifteen K-6 independent teachers were aware of this duty. All groups did well on this item, in fact, 80% of K-6 Catholic teachers and three quarters of the primary public teachers were correct.

The K-12 independent school teachers did not fare as well; about 20% were incorrect and a relatively large group, 20%, were uncertain.

When the percentages of teachers and principals are examined, 93% of principals and 76% of teachers were accurate in their answers.

Discussion of issues – Item 8

This is the final item that gathers data regarding teachers’ and principals’ understanding of the duty of care. The item states, “With the principal’s knowledge, teachers may give ‘early marks’.”

Even though it is difficult to say exactly when a teacher or school becomes responsible for a student, allowing a student to leave the class and/or grounds before the official finishing time for the day is definitely dangerous. The concept of ‘early marks’ as a reward for children is not a new idea. The core principle is that if a child is good they may be rewarded and allowed to go home early. In legal terms, this could mean in a worse case scenario that the child’s reward could be to leave the grounds before anyone and to be injured on the grounds or on their route home.

If the teacher has been given express permission of the principal to allow students to go home, the teacher may relieve themselves of a duty of care, placing the responsibility on the principal as his or her professional superior. However, the school as a body would end up in court if an unfortunate incident occurred. The plaintiff could simply argue that the teacher or principal knew the child was too young or irresponsible to be allowed to wander out of the school alone. Similarly, children should not be kept after school if their safety is in any way jeopardised.

A leading English case in this area of law is one previously mentioned in the literature review, that of Barnes v. Hampshire County Council [(1969)67 L GR 605]. Discussed by Ramsay et al. (1996, p. 176), the facts were that a young child was let out of
school a few minutes before the usual school finishing time and allowed to walk home. On her journey she was hit by a car, resulting in paralysis.

The Lower Court found that dismissing a child a few minutes early was not a breach of a school's duty to take care. The English House of Lords disagreed, insisting that it was reasonably foreseeable for a small child to have an accident when their journey home alone included crossing a road. For this reason, regardless of the permission of the school administration or indeed classroom teachers, children should not be allowed to leave school early.

Results – Item 8

Nearly 70% of the respondents were correct in assuming that school personnel should not allow students to leave school early with or without the principal’s support. A group of 12% thought they could give ‘early marks’ with the principal’s permission. A relatively large group, a fifth of the participants, were uncertain as to the legal stance on this issue.

Nearly 90% of both public primary and secondary groups responded correctly. A group of 15% of the independent K-12 teachers were wrong and a large group, 40%, were uncertain.

A similar number of teachers and principals, 70% and 73% respectively, were correct in their response.

Standard of care in education

Discussion of issues – Item 1

Item 1 poses, “A teacher’s full legal responsibility can be defined as ‘in loco parentis’ or ‘in place of the parents’.”

The expression ‘in loco parentis’ was coined in the 1950s to explain the legal responsibility of teachers or carers. In fact, in the case of Williams v. Eady [(1893)10TLR 41], Lord Esher said that the duty of care was equated with the way a careful father would take care of his children. It was commonly believed that, at law,
a teacher was standing in the place of a reasonable parent, therefore 'in loco
parentis'. Thus Piggott (1980, p. 29) states that the care delegated by parents to the
teacher allows them to supervise, restrain and control their children. The definition of
'in loco parentis' was also discussed in the cases of Ramsay v. Larsen [(1964)111CLR16] and Rich v. London County Council [(1953) 2 A11E.R. 376] where
the duty owed by a teacher was said to be that of a careful parent in similar
circumstances.

In Ricketts v. Erith Borough Council [(1953) 2 A11 E.R. 629] the analogy of 'in loco
parentis' was somewhat questioned by suggesting that one would have to visualise a
very large family for this definition to be accurate. One example given was that if
perhaps the situation in question involved a teacher in a small country school with
very few students, then a realistic comparison is possible between the teacher and
the parent. Actually, the legal cases have shown that the standard of care for the
safety and welfare of children exercised by the teacher is greater than that exercised
by many parents.

The 'in loco parentis' definition of the standard of care has since been replaced, and
is no longer a legally relevant term (Balfour, 2000c, p. 8). Despite this, Ackroyd
(1986, p. 34) states that it is still commonly used amongst Australian educators.
Indeed, Justice Murphy refuted the definition of teachers 'in loco parentis' in the case
of Introvigne v. Commonwealth of Australia (1981), suggesting that teachers cannot
be labelled as 'in loco parentis' because the legal responsibilities of a school body
may go beyond that of a parent. Heffey (1985, p. 7) agreed, adding that teachers
often have skills which exceed that of the average parent: "every teacher is a trained
person with supraparental expertise." Justice Murphy also stated that the school
should not be equated with the home, as one would often discover far more hazards
in a home than in a school.

Indeed, the term, 'in loco parentis' was very relevant prior to the introduction of
modern mass compulsory education organised by governments, large educational
institutions and systems. Abrams (2001, p. 3) agrees,

Until recent times, Courts demanded that the duty of care expected from a
school, teachers and educators was to take at least such care of the students
as a careful father would take care of his children. One judge described the
duty of care as similar to a parent of a very large family. As time goes by, it is
now very clear that at law, a much stricter approach has been adopted by the courts. Legal liability of educators is now one to take reasonable measures to protect students in their care from risks of injury that the educator should have reasonably foreseen.

Another problem with the 'in loco parentis' definition of the standard of care, suggested by Boer and Gleeson (1982, p. 135), is that parents have a wide range of beliefs as to what they deem as reasonably safe activities. Obviously, what is acceptable to some parents may be unacceptable to others. In 1981, Justice Murphy stated that in an ideal world where everyone has the same values, beliefs and expectations the concept of 'in loco parentis' could be accurate and valid, however, the Justice said that parents have many and varied ideas about what they deem as reasonable.

This was also discussed by a research officer for the New South Wales Teachers' Federation, Maree O'Halloran, who writes that the duty expected is higher than the duty expected of parents. O'Halloran (1993, p. 14) illustrates the difference between the duty of parents and that of teachers by discussing the case of Robertson v. Swincer [(1989) 52 SASR 356; 10 MVR 47; [1989] ATR 68,875 (80-271)] which went to court in 1989. In this case, a four-year-old child wandered onto a road and was hit by a car whilst his parents were standing at their front door talking. The driver was sued for negligence and was not able to convince the judge of a case for contributory negligence by the parents. The court held that the parents had not breached their duty to take reasonable care to supervise the child. O'Halloran (1993) suggests that it is likely that in a similar situation a teacher or school administrator would have been found negligent.

Results – Item 1

It is then important to examine the results of Section III, Item 1. Only a quarter of the respondents were correct in saying that 'in loco parentis' does not fully portray the full legal responsibility of teachers. Almost 25% of the participants were unsure of the answer and responded "uncertain". A probable reason for this could be the amount of literature using the old term and present overuse of the term by educators.
Therefore, over 70% of the group were incorrect of their knowledge of their full legal responsibility. More public high school teachers answered correctly than any other group. The poorest scorers on this question were the teachers from the K-12 Independent schools; 65% were incorrect, while a large group of 41% were uncertain.

One independent male sports teacher of 1-7 years' teaching experience (R142) said that he believed the “School has a legal obligation to supervise students in loco parentis” when describing who was at fault in Geyer v. Downs.

The teachers were correct in their response 23% of the time, whilst over 45% of principals were correct. Therefore the principals were more aware of the legal depreciation of the term ‘in loco parentis’.

**Legal responsibility for determining the level of care.**

**Discussion of issues- Item 3**

Item 3 asked participants to respond to the statement: “Teachers’ responsibilities to their students are decided and governed by the various departments of education in each state.”

The responsibility to a student falls under the doctrine of negligence. As discussed in Chapter Two, the law of negligence encompasses the three general principles; establishing a duty of care, breaching the duty of care and resulting injury. The law of negligence was actually formed from the leading case of Donoghue v. Stevenson [(1932) AC562] (Garden 1980, p. 33), where a consumer found a snail in a drink she purchased. This seems far removed from the classroom of the year 2003, however, the principle is the same, a duty to take care abides.

Similarly, the school system owes a duty to every enrolled child. This duty is to prevent injury occurring to the child whilst they are under the school’s care. This duty is determined by precedence and the Australian courts. Schools can recommend rules which adhere to safe/good practice as an attempt to keep their school out of the courts, however it is ultimately the courts which teachers should look to for advice about what to do in different situations. Issues arise when educators are under the
false assumption that the school or school system determines the parameters of responsibilities.

An example of the government’s responsibility over those of school age is the compulsory age limit for school attendance. This requirement is imposed by Federal and State Governments through respective education acts and stipulates details concerning the attendance of children at school. Interestingly though, it is the court which determines the standard of care needed to avoid a breach of care whilst attending school. Coulsen (1994, p. 44) states, “It is always for the court to decide what the standard of care is and not for a professional body to adopt that role.” Clark (1989, p. 14) concurs,

department handbook directives do not necessarily have the force and effect of law. They are not usually subject to the review of Parliament. As such, departmental directives will have no force if they are in conflict with Acts of Parliament or the regulations made by subordinate bodies under the authority of Parliament.

An example of this is the 1993 case of Rogers v. Whittaker [(1993) 67 ALJR 47]. The decision of the High Court of Australia went against the notion of following common practice or opinion in a particular trade, therefore the court decided the standard of care, not the school system. Coulsen (1994, p. 14) also adds that Departmental guidelines could work against an educator in a case. The example he gives is some guidelines for excursions he reviewed. He states that some of the guidelines were so onerous that teachers would find it difficult to fully comply. If these guidelines were taken into court as evidence of a breach, the school could be providing the plaintiff with an excellent course of action.

Results – Item 3

Over half the total group was wrong in assuming that departments of education govern teachers’ responsibilities. Over a third of the participants were uncertain and only 17% chose the correct response that the courts determine the level of care. Less than 10% of public primary (6%), public high (6%) and K-6 independent (7%) teachers were correct on this item.
Sixty per cent of the Catholic high school teachers responded correctly, a substantially higher result than any other group.

There was a large disparity of response between teachers (13%) and principals (60%) choosing the correct answers for Item 3.

The factors determining the standard of care

Discussion of issues – Item 6

In Item 6, the subjects were given the following statement to respond to: “The court looks to the age, health and experience of the child as well as the likelihood of injury when determining if a teacher is negligent.”

This item is included in the survey to determine if teachers are aware of the main factors the court examines when discussing negligence in education. As mentioned previously, the law of negligence is based on the establishment of a duty of care and a subsequent breach. Thus, if an individual or group is owed a duty of care and the teacher fails to adhere to that duty, the duty is said to be breached.

In determining whether or not a breach has occurred the courts look to three main elements; they are: age and maturity of child, health of the child, the likelihood of injury happening, as well as past experience and prior reputation or behaviour.

An obvious area where teachers need to show caution is when a student has a particular health concern. If such a concern is known to a teacher, they have a duty to take special care. Therefore, if it is foreseeable that the child could possibly be injured due to an existing health issue, the teacher must stop or alter the activity. An example of a legally problematic situation would be if a child professed to have a health problem and despite this, a teacher forced them to participate in an activity and an incident occurred.

As discussed in Section I, Part B (see Chapter Five) experience in a certain activity or using a particular tool raises an interesting issue, as the standard of care must reflect the requirement. This is of course important as the school day no longer
consists of the singular experience of the 1950s whereby children generally sat at desks and rote learnt information.

The courts recognise that many educational activities (for example, playing sport) involve some risk of injury, but this must be balanced against the benefits which can flow from accepting that slight risk. Thomas, J of the Queensland Supreme Court commented that, whilst courts ensure that teachers observe a high level of responsibility as well as performing their functions carefully and thoughtfully, it is "not in the interest of society to impose artificial standards that would encourage the rearing of a green-house generation". (Hopkins, 1996, p. 12, 13) Also commenting upon this risk versus reward issue, Mason, J of the New South Wales Court of Appeal (Mason, 2003, p. 12) recently stated that there is an accepted societal risk in the involvement in particular activities. He added that society wishes children to take certain risks and even make errors of judgement in order to learn from their mistakes, building both character and skills.

Heffey (1985, p. 6, 7) suggests that it is very difficult to state the standard of care with precision, however, constant supervision is generally not expected. In some circumstances occasional supervision will suffice and in other situations, close and perpetual supervision may be necessary. Courts determine if supervision is adequate by questioning whether extra or better supervision would have prevented the accident. It is the responsibility of the plaintiff's counsel to prove that this is true.

An example is that of Musico v. Trustees of the Christian Brothers [Unreported, NS. Dist. Court Wall J, 17 Nov 1986]. In this case, a child severely damaged his/her elbow whilst ice-skating. (Kohn, 1997, p. 112) The school was found liable despite constant supervision, as instruction was not given. In this situation, instruction was considered a requirement of an adequate standard of care, as some students were novice or first-time skaters.

In 1998 the New South Wales Director-General said that all students should be supervised at a suitable level whilst involved in teaching and learning activities either on the school grounds or off-site. Lemaire (1998b, p. 51) comments that this statement sets up a high standard of care for teachers and renders difficult many common situations in education. These include such practices as allowing senior students to finish work unsupervised or allowing them to go home early to study.
Furthermore, using this definition, sending children to work unsupervised to areas such as the library or study hall may be considered inappropriate or inadequate.

Many documented cases indicate that the younger the child the higher the standard of care. Generally, the difference between the standard of care of a kindergarten and high school students is substantial. Stewart (1999, p. 8) states that there are relatively few cases of accidents involving young children to give a true implication of what the law expects. He also explains that most cases are settled before they ever get to court and therefore are not necessarily reported.

When schools decide to take the children off campus they can not remove their duty to take care of them simply because they are no longer on the school grounds, in fact, a higher standard of care is often required. As mentioned previously, this standard is said to be what is reasonable in the circumstances, and not an insurer of safety. An example is the case of Brown v. Nelson [(1970) 69LGR 20] (Kohn, 1997, p. 119) whereby children were involved in an Outward Bound Adventure camp. Following an unfortunate incident involving apparatus, the judge believed that the school was not under a duty to inspect all the equipment as the school was familiar with the campgrounds and staff from previous camps. The students were high school aged and the activity was appropriate for their age group. An example of a situation whereby the school relaxes its duty for a period is when it sends upper high school students on work experience, a fact which appears reasonable at law.

A recommendation for teachers is that if they are involved in a school activity outside conventional school hours, they should obtain written documentation acknowledging that they are acting for the school in the course of their employment. This is an attempt to protect the teacher's rights and to formally recognise that the teacher is acting for their employer.

Results - Item 6

Forty per cent of the total participants recognised that these factors are the major concerns when determining negligence. An equal-sized group was uncertain of the legal position.
The Catholic high school group achieved the highest correct result, with 60%, and the Independent K-6 was the lowest, with 20%.

A very large group of public school teachers (40%) and K-12 Independent teachers (50%) and K-6 Independent school teachers (50%) were uncertain of the response.

Principals chose the correct response 60% of the time compared to teachers, who had a 35% correct response rate.

**Sport in the school context**

**Discussion of issues – Item 7**

Research subjects were to respond to: "Teachers who supervise organised contact sports such as football and basketball are legally responsible for broken limbs received by students whilst they are playing for their school."

It is true that when discussing sporting activities the court considers the age and experience of the students involved and the likelihood of injury. This item gathers data about teachers' and principals' understanding of the legal obligations when supervising contact sports.

Sporting activities, due to the propensity of accidents to children, require an extremely high standard of care. In fact data from Australian hospitals, "indicate that a great number of children aged 10-17 are treated each year for injuries received in school sports." (Stewart and Knott, 2002b, p. 63) The majority of the injuries are minor, although some are much more serious.

In school sport several situations can lead to litigation. These include the use of dangerous or inappropriate equipment and unsuitable activities for specific ages or abilities. Cases have also been heard in court whereby plaintiffs claimed there was little, inadequate or no instruction in sports classes. The main concern regarding sports litigation in education has been poor or inappropriate supervision.

Guidelines for sports vary with each activity however, sport teachers have a general duty to ensure that no instruction in sport should begin unless the students are physically prepared for and capable of the activity. It is also fundamental that the
teacher only begins sport and physical classes once a high standard of supervision is possible for the entire exercise.

However, sport should not be avoided even though it generally requires more supervision than most educational experiences. In Australia, in particular, many people have a life-long interest in sporting endeavours and are taught fundamental physical skills as well as health, participation and team skills through school sport. Our society places a high level of importance on sporting involvement and ability, often formed in youth. In fact, the majority of people who make sport their career or life's passion are generally very young and at school when they begin acquiring skills and experience. Therefore, the need for safe and challenging sporting activities is very important in Australian schools.

Teachers and administrators should not be concerned that reasonable care in the context of sport means that the teacher guarantees that no injuries will occur. Games and activities of a physical nature and those with a high level of body contact often result in accidents that, on occasion, can be quite serious. If the injury is generally common and expected provided 'responsible care' was exercised, a breach or duty would be difficult to prove. In fact, there are literally thousands of accidents to students in New South Wales schools and very few cases in court regarding sporting injuries.

A leading and most insightful case in this area of education law is Rootes v. Shelton [(1970)116 CLR 38]. In this case the then Chief Justice, Sir Garfield Barwick, said,

> By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime ... but this does not eliminate all duty of care by the one participant to the other. O'Brien (1994, p. 12)

For example, if a player was knocked unconscious or given a black eye in a football match, it would be difficult to find the school or teacher negligent as the individual chose to play a relatively rough sport and must understand the physically aggressive nature of the game. Again, there is often the risk versus reward principle which society expects and accepts.
However, in an unreported New South Wales case, *Watson v. Haines [(1987) ATR 80-094]*, a boy sued for injuries received when he played in the front row of a football team. The boy’s physical stature was inappropriate for the position as he had a long, thin neck that is not desirable for a person in the scrum or front row of a football team. The boy’s resultant quadriplegia was said to be a likely injury resulting from a child of his physical attributes being in such a position. This event was particularly foreseeable as evidence revealed that Dr John Yeo, Director of Sydney’s Royal North Shore Hospital, had made attempts to assist the New South Wales Department of Education in avoiding such an accident. After a terrible year in 1980,

seven footballers had been admitted to his spinal injuries unit in the one season, Dr Yeo had arranged for the production of an audio-visual information kit entitled ‘The Lost Cord’, warning of the dangers of diving into shallow water, playing body contact sports such as football, and of car and motorcycle accidents. (Dawson 1993a, p. 8)

It was, however, quite ironic that the spinal unit offered the Department of Education 300 copies of a video called ‘Don’t stick your neck out’ which educated schools about the problems relating to placing students with unsuitable necks in the front row of football teams. The Department of Education needed 440 copies to supply each school with one, unable to do this, they decided to take 100 copies of the video and put them in Professional Services Centres, which meant that very few schools were aware of their existence. The literature indicates that the judgment passed on the teachers involved in this case displays that they were simply let down by the bureaucracy.

The Wollongong schoolboy who was injured in this case was awarded $2.2 million, a judgement that the Department of Education did not appeal against. There was also another well-known incident involving a rugby game between two boys’ private schools. In this case, there was a maul resulting in a 16-year-old becoming a quadriplegic (Bell, 1983, p. 37). Situations such as these have led many schools to seriously re-think their policies and procedures for teaching sport and choosing suitable students for school teams.

In another case, some children were involved in a game of Kastie (a version of softball). The teacher had instructed the children to stand in a position of safety from the bat. As the game progressed, the students edged up and ended up standing in a
very dangerous position, resulting in one child being hit in the face with considerable force, severely injuring his eye. The teacher was held negligent, not because at the time of the accident she was talking to the scorer and had her back to the events which led to an accident, but because she failed to enforce her own rules and monitor the children's position in relation to the swinging bat. The fact that the teacher created rules regarding a safe place to stand indicated that she herself considered an accident reasonably foreseeable and that there was a likelihood of an injury occurring. ([Nally v. McMillian and Association of the Franciscan Order [Supreme Court of Queensland, 15 March 1982 (Appeal No 32 of 1981)], in Stewart, 1991, p. 6).

The likelihood of injury increases when a student actually refuses to participate in a particular sporting activity, especially if they profess to have a health complaint or problem. A teacher who forces or perhaps even persuades a child to be involved in a sporting activity in which they are incapable of participating would find themselves with very little defence if litigation arose.

There are also reported cases of playing sport without recommended equipment. A teacher who did not enforce such basic safety precautions is going to have a difficult time explaining their actions in court. If the common practice in a particular sport is to wear a mouthguard or face helmet the school should enforce this rule. Another problematic situation is when students play 'ad hoc' games in the playground using makeshift equipment. Several cases have been tried in which the school did not intervene in games using such things as slats as cricket bats, garbage bins as wickets and sharp objects as projectiles. O'Brien (1994, p. 15) suggests that a case could also arise if the grounds upon which the sport is played were dangerous. In the 1984 case of Nowak v. Waverley Municipal Council and Ors [(1984)ATR 80-200], the owners of the land, the Waverley Council, and the New South Wales Rugby League were held liable for unsafe premises when a player injured himself on a sprinkler system on a field. If this accident involved school grounds or a school-organised game on another's grounds, actions could be taken against the school and the owner of the land.

The governing bodies of some sports have altered the rules, regulations and common practice in their sports. Schools have an obligation to adhere to these changes. One example is the changes to schedules for young gymnasts based on new research indicating the detrimental effects of excessive training on young girls.
There is also research on the dangerous effects of fast bowling on young cricketers; all this has to be acknowledged and addressed by sports teachers and administrators as it could be used against them in a court action if they have ignored the most modern and common safe practice.

A concern for educators regarding school sports is that children's skills and coordination will vary greatly. As with all other subjects, difference in ability and skill must be taken into account. In sport ignoring ability (or lack of ability) may lead to serious injury. It is therefore not recommended for a school to have a compulsory extra-curricular sport policy. It is, however, important for children to be involved in some sort of physical activity however sports such as compulsory rugby or long-distance running should not be attempted.

Crouch (1996, p. 26) says that the actual relationship of teacher and pupil remains, even though the teacher may be the referee or the coach. This is due to the fact that students may perceive their teacher as their teacher and not as a coach. In the case of Smoldon v. Whitworth [unreported English High Court April 1996] (Singh, 1997, p. 179) the issue of teachers refereeing sport was discussed. In this case, a student broke his neck during a collapsed scrum in a game of rugby. The defence argued that those playing rugby knew of its inherent risks and dangers. The judge said that it is true that a referee is under no obligation to ensure no accidents occur, however, in this case, the rules of scrums were not reinforced, resulting in an accident.

The pressure of elite school sport also creates concerns, particularly when excessive training and pushing students beyond their limits becomes an issue. Knott (1999c, p. 15) says that if a teacher in charge of a particular sport believes their job security centres on the success of a top sports team they could make poor decisions, endangering student safety. Therefore, teachers acting in the role of coaches should be mindful of the advice they give students, as poor advice leading to injury may result in negligence. If a student could prove economic loss as a result of this injury, monetary compensation may be owed.

In his paper about school sport and the law, Crouch (1996) gives school administrators and those involved in school sport a list of recommendations. These are:

1. be vigilant in its appreciation and elimination of any dangers to students.
2. All staff who coach a team must be competent for the task.
3. Staff must supervise students well when they are coaching them.
4. Ensure that your school has good insurance to cover both public liability and professional indemnity.
5. Coaches and/or teachers need to display common sense. (p. 28)

Another example discussed by Heffey (1985, p.15) is the case of *Wright v. Cheshire County Council* [1952] 2 A11 E.R. 789. In this case, a boy aged 10 performed an exercise on the gymnastic vault. The common practice was for a child to wait at the end of the vault after they had their turn, to help the next child. As the boy was finishing the vault the school bell rang and the boy at the end ran outside to play. At the time of the accident the classroom teacher was a short distance away supervising another activity. This case proved that generally following common practices, especially those displayed in books on the subject and departmental guidelines may prevent litigation.

The issue of allowing high school students to make their own way to sporting activities held outside the school grounds is also problematic. Several cases have been mentioned in the literature, including a case discussed by Martindale (1999, p. 16, *Home v. State of Queensland and others* [(1995)ATR 81-343] whereby a student fell off her bicycle whilst on the way to a school tennis lesson which was off-campus. The school was negligent, as the school was aware of the child riding on a busy road to tennis lessons but did nothing to protect her and others from an accident.

**Results – Item 7**

Over 60% of the participants were correct in assuming teachers are not responsible for broken limbs incurred whilst playing sports such as basketball and football.

Eighty per cent of public high teachers and 70% of public primary teachers were correct in saying the statement was false.

Nearly half of the K-6 Independent School teachers were uncertain and so were 40% of the K-12 Independent teachers.
The principals in the study were correct 73% of the time, compared to 61% for the teachers.

Discussion of issues – Item 10

Item 10 states, "Teachers who play sport against students are safe from litigation as they do so with the principal's permission."

In New South Wales teachers still play sport with and against students, even though this activity may open the door for litigious action. A simulation activity which reflects this issue is discussed by Wilson and Carey (1991, p. 25). In this stimulation a young, athletic, male teacher, was on playground duty when some boys were playing cricket on the school pitch. The students then asked the teacher to join in their game; he happily obliged by bowling a few balls before batting. As the students cheered his prowess, the teacher began smashing the ball further and further out field. He was an A-grade cricketer in his spare time and could hit hard and far, making the fielders in this game have to chase the ball to return it to the bowler. A group of girls had gathered in the outfield to admire the game when the teacher hurled the cricket ball towards them. The result was a hit to the side of the head, blinding Dora Bull. In this situation, the court would find for Dora Bull as the teacher should have been aware of his strength and skill. Being involved in an inappropriate and dangerous activity, he blatantly endangered the students' lives.

In an English case reported by Tronc (1985b, p. 2), a 15-year-old student was tackled by a 26-year-old sports teacher during a game of rugby. The teacher involved only joined the game because the students were short one player. The court awarded the student 12,000 pounds in damages as he received permanent back injuries. The solicitors involved in the case recommend, "teachers and adults must not take part as active members of one team of pupils against another in body contact sports such as soccer, hockey, basketball and rugby" and that "staff v. pupil matches are 'gravely unwise'." (Tronc, 1985b, p. 2) Such advice is certainly very sensible in this environment of accountability and fervent litigation.
Results – Item 10

The range of correct responses was from 49% to 65%, indeed a relatively small difference for this survey.

Interestingly, nearly 34% of the total participants were uncertain of whether or not they were safe from litigation when playing sport with students. The reason for this lack of knowledge could be because there has not been much media attention regarding playing sport against students.

Principals were slightly more knowledgeable (73%) compared to teachers (54%).

School bullying

Discussion of issues – Item 9

In Item 9 respondents are faced with the statement, "Teachers could be legally responsible for repeated acts of bullying if these acts cause physical harm to another child."

Recently much has been written and discussed with regard to school bullying, authors indicating that ignoring repeated acts of bullying could be perceived as contributing to the bullying. Bullying can be "either physical or emotional." (Hopkins, 2000, p. 28) It may be defined as, "repeated oppression, physical or psychological, of less powerful individuals or groups." (Rigby and Slee, 1995, in Rigby, 1995, p. 3). Bullying therefore includes verbal abuse, spreading malicious gossip and the more obvious physical abuse.

In a study by Rigby and Slee (1995) of 7,500 students, approximately half the students involved reported experiencing bullying at some stage and up to one in five were bullied once a week at school. It appears that bullying is an international issue found at all educational institutions at every level, including more subtle forms such as "indirect (for example, deliberately ignoring someone) and relational bullying (for example, deliberately excluding another student)." Slee (2000, p. 4) Bullying is more common in primary school than high school and leads to a variety of effects on individuals, including loss of self-esteem, poor physical health, fear of school and
depression. Furthermore, it can lead to permanent physical, psychological and emotional problems, and a life-long feeling of victimisation or ostracism.

Slee (2000, p. 7), a well-known authority on school bullying and its effects, cites many examples of the obligation of schools to protect students from bullying. He suggests a failure to intervene in a situation could be in breach of their duty of care. He alludes to cases whereby schools, parents and students are appealing to the courts for compensation for failing to protect students against bullying.

Although no actual law covers the issue of bullying, it is covered under criminal law, as battery, assault and false imprisonment. Battery occurs when one person deliberately and offensively touches another's person; assault is when one person causes another person to fear dangerous or humiliating actions from another.

A 'bully' could also break the laws of discrimination if they discriminate or victimise another based on gender, race, age or person's disability. The Australian Education Union reports,

In recent times payments of damages or compensation for that type of activity has started to escalate. It is now possible to face financial sanctions measured in tens of thousands of dollars, as at least one school principal discovered recently. (Wilson and Murray 2000, p. 6)

Therefore, if a student was being vilified and discriminated against and was not successful in litigating under common law, they could always look to the applicable anti-discrimination acts.

As with other areas of negligence, a duty must be owed, then breached and injury must occur. The difficulty lies with the need to prove a relationship between the lack of or incorrect intervention and the final psychological or physical act of bullying. Tronc (1999, p. 17) If the plaintiff can show that their injury was the direct result of the action or inaction of the defendant they would have a valid case.

A leading case of school bullying in Australia is Warren v. Haines [(1986) ATR 80-014]. In this case a child, who was a known to be an aggressor and would often fight with other children of both sexes, picked up a 15-year-old girl and dropped her on her tailbone causing her permanent back damage. The court awarded the girl $250,000
in compensation, as the school had previously failed to discipline the boy and reinforce the ramifications and punishment associated with inappropriate behaviour. The main issue was not whether or not the school provided adequate supervision but how it dealt with a known ‘bully’. The problem was that previously, the boy’s behaviour had not been curtailed and punished and he thought he could behave as he pleased. The judge believed that a teacher on duty in the area would not have affected the outcome as the bully would always find a way to harass the girl if he wished to. It is interesting to note that the first time this case went to court the judge found no negligence, but when appealed in the Supreme Court of New South Wales, two judges found the school negligent.

Following that Supreme Court decision the case was appealed in the Full Court and failed due to legal technicalities. Interestingly, throughout all these deliberations several judges considered the case differently. One of the judges said supervision was adequate; another that failing to discipline was negligent and the third said the supervision for recess break was inadequate. This in itself is a perfect example of the uncertainty of legal discussions and decisions.

There are several other cases that have occurred involving a school bully and the school’s lack of intervention in their behaviour. Many such cases listed in Trone (2000b, p. 32, 33) are unreported, such as Dunn v. State of Victoria (unreported, County Court of Victoria, Dove J. No P103912/1995, 27 May 1997) and Gray v. State of New South Wales (unreported, NSW Sup CT, Grove J. No 191/94, 27 February 1998). In the case of Stephens v. State of Victoria (unreported, County Court of Victoria, Ostrowski J. No 99207719, 2 June 1998), a teacher was found negligent because he/she did not intervene in an argument resulting in a serious assault. Significant factors influencing the court’s discussion were that this school was a ‘last chance’ school for students with behavioural and intellectual disabilities and that the student aggressor had a severe behavioural problem and was known to attack others. The student he assaulted was a slow learner and unable to defend himself. The court said that the school knew of the potentially dangerous situation and refused to intervene in any way.

Although bullying is a relatively new area of education law it receives a lot of media attention. (Maher and Spentzaris, 2000, p. 3) This may be because so many children are bullied at some stage of their school lives. The exact number of school children bullied in Australia is unknown. Stewart (1998b, p. 63) says that there is very little
data on how much physical abuse is occurring from bullying. "As one principal commented in the Queensland study 'I have had a case of bullying in the school yard and the parents are suing the Department for failing to protect the child against physical abuse'. A further incident was reported whereby 'a student being beaten up by his mates in an out of bounds area and the parents sued the Education Department when the real culprits had no money!'"

A very recent bullying case settled in Sydney was reported by Walker (2003a, p. 10) in the Sun Herald newspaper. This case involved a high school junior boy being assaulted by a group of senior boys during 50 different incidents. The plaintiff posed that the school had done nothing to quell the senior boys' behaviour. In fact, after the senior boys had been expelled and sentenced, the young boy returned to the school only to face ridicule and ostracism for being the cause of the school losing some popular school sports stars. This area of the law is no doubt becoming progressively common as students and their families have begun to expect a higher duty of care with regard to bullying.

In 2000, in Victoria, The Age newspaper reported a girl who was allegedly forced to study via correspondence as she was constantly bullied at school. When the paper went to print, she was developing a case against the Victorian Education Department. This case illuminated a recent change in litigation regarding bullying. Until recently cases were about physical acts culminating from persistent bullying, not about psychological abuse. (Maher and Spentzaris, 2000, p. 3)

Recently, more educators and parents have become focussed on the quelling of bullying and providing students with anti-bullying behaviour techniques. This may affect the future of this area of education law. Maher and Spentzaris write (2000, p. 3) that in an attempt to prevent bullying in schools, the United Kingdom has become proactive, legally requiring schools to produce anti-bullying policies since 1999.

Results – Item 9

Over 60% of the educators knew that teachers and schools have a duty of care to prevent and suppress repeated acts of bullying, 21% were uncertain.
Some groups had nearly 30% of participants choose uncertain as their answer. Public high school teachers were correct nearly 80% of the time.

Sixty per cent of teachers and 73% principals were correct.

Mandatory notification of abuse

Discussion of Issues – Item 11

Item 11 poses, "If a teacher notifies the authorities about child abuse and their accusation proves incorrect, they may be sued for false accusations or defamation"

A recent issue which has gained both concern and discussion from those in education and the wider community is that of mandatory reporting of abuse. It is particularly topical as it has been strongly supported by those concerned with child welfare and provides a myriad of concerns and issues for educators. Mandatory reporting has been instigated to improve child protection in our society and to provide a structure for people reporting suspected child abuse. As Kenny (2000, p. 18) writes: "Teachers who have reasonable grounds for their belief cannot be sued, regardless of whether the abuse is substantiated or not." Therefore, the law aims to protect those who report suspected child abuse from litigation and any charge of impropriety.

The legislation which supports this area is the Children (Care and Protection) Act 1987. It includes the reporting of all areas of child abuse: sexual, physical or emotional abuse. Antrum (2001, p. 5) lists the people responsible for mandatory reporting under the Act as including health-care professionals, educators, law enforcers and those in residential services.

The effect of making a report as a mandatory reporter as opposed to a general reporter is firstly the protection against prosecution ... the other is you are not able to make the report anonymously, but your identity may be subsequently protected pursuant to s 29 (f).

Thus teachers are definitely expected to report on suspected child abuse, otherwise they risk prosecution. This of course is not the purpose of the law, however, it is a
necessary tool to urge people to report. Swain (1998, p. 233) is concerned that teachers "may lack knowledge of how to detect and report instances of maltreatment; there may be a fear of retaliation or legal action being taken if allegations prove to be unfounded."

Teachers are required to report child abuse 'as soon as possible' after they have formed a belief based on 'reasonable grounds'. There appear to be some fundamental problems with these guidelines. Reasonable grounds may be difficult to define; this is another example of the courts avoiding absolutes and leaving educators with fallible definitions. Of course, the issue is exasperated further by the effects of not reporting until the teacher feels it is 'reasonable' which should be as 'soon as possible'.

Although there are some concerns about the process of mandatory reporting, most State governments have introduced mandatory reporting requirements, contributing to a nation-wide increase in the detection of child abuse over recent years. Kenny (2000, p. 18) says that since 1994 all teachers and principals in Victoria have been legally required to report suspected cases of physical and/or sexual abuse against children under 17 years of age to the Child Protection Unit of the Department of Human Services. In Victoria the law says that an individual teacher must advise the Department of Human Services if they suspect child abuse, as well as discuss it with their principal. In Victoria a failure to report suspected abuse presently carries a $1,000 fine.

There have been few cases mentioned in Swain (1998, p. 233) of actions being brought against teachers who did not report suspected child abuse. One such action was commenced in New South Wales in 1994 and has yet to be completed. Another was a Victorian case, covered widely in the media, which involved a principal who insisted that he did not report a case of child abuse as he was not sure on reasonable grounds. The court had to determine what the principal knew about the child's situation and whether the principal had actually formed the belief that abuse was occurring. A successful civil case against the principal was made.

Kenny (2000, p. 18) gives another example of the Supreme Court of Victoria awarding a girl nearly half a million dollars for her school's failure to act on evidence of sexual abuse in 2000. There were signs that the child was being sexually abused by her stepfather, which included drawing and behavioural changes. The deputy
principal was aware of these but failed to inform the principal or the relevant authorities. The counsel for the defence complained that the school could not reasonably have foreseen that it would be negligent for activities which happen in the home and have nothing to do with the educational environment. The jury ruled that the school was 20% responsible and the parents 80%, however, because the parents were not insured the school was obliged to pay 100% of damages.

Of course, much has been written about the added work and responsibilities associated with mandatory reporting of any kind. Teachers can be a primary source of information and support with regard to abuse of children in their homes, however, unfortunately not all teachers feel competent to notify. The literature indicates this may be because they are untrained in this area and are unfamiliar with abuse indicators or because they fear the repercussions of notifying, including being sued for incorrect assumptions. In most states the law requires all teachers to report suspected abuse to the principal who is then to report it to the relevant authorities.

Swain (1998, p. 231) says a major concern regarding mandatory reporting is that studies show it leads to over-reporting of suspected child abuse. A consequence of this is a draining of already limited resources to deal with situations that are not actually child abuse cases. Furthermore, reporting of those who have not actually abused children could lead to a disastrous outcome as the family is investigated at length by government bodies and child health authorities.

Another problem is that teachers have concerns with parents' reactions to reports of child abuse. Angry parents are unlikely to continue positive relationships with the school personnel if they are being investigated for abusing their own child. It is therefore fundamental for teachers to be mindful of their interactions with anyone being investigated for abuse.

Results – Item 11

Over 60% of subjects were right to assume that they could notify suspected child abuse without any action being taken against them.
Nearly 80% of public high school teachers were correct on this item. However, the independent school teachers were only correct 50% of the time. Nearly a quarter of participants in each school group were uncertain of the answer.

Principals again had a higher level of understanding of this point of law, with 73% correct, compared to 59% teachers.

**Custody/Residency**

**Discussion of Issues – Item 12**

In Item 12 participants are asked to respond to: “If a teacher allows a non-custodial parent to take their child from school, they may be liable even if they are not aware of the custody arrangements.”

Before entering on a discussion of the groups’ response to this issue it is important to reiterate that the terminology has changed regarding the custody of students. Guardianship or custody was previously the basic legal right to make decisions about the child and refers to the person who generally cohabits with the child. Since 1996 the term custody no longer refers to this situation. The term is now ‘parental responsibility’ and includes day-to-day care as well as making long-term decisions about the child. A court order either dissolving or conferring ‘parental responsibility’ is called a ‘parenting order’. Educators should be aware of this type of court order as well as ‘residence orders’. Residence orders refer to the parent who lives with the child and do not align the day-to-day decisions about a child with the person he or she lives with.

The actual term ‘custody’ is now legally known as ‘residence’. Most teachers are still using terminology which was altered in 1996, thus the survey used the old terminology. It is a very confusing issue as the parent who has a residency order may also obtain a ‘specific issues order’ which allows him/her to have whole responsibility for the day-to-day decisions involving the child. Sometimes both parents have residence orders describing what the child may do with one parent whilst they are in their care. There are also ‘contact orders’ which can be issued to describe the contact a child has with the non-resident parent or another person, such as a carer or grandparent. This is meant to provide people such as teachers with information about who the child is staying with and can go home with. Although these are the main
legal documents that affect children, there may also be a parenting plan or a 'family protection order'. If a parent has a protection order against them the child is not usually allowed to be alone with that parent. This is because the court is attempting to protect the child against acts (usually violence) of the parent. It is important then to insist that all separated parents make the school aware of their family’s specific orders and provide them with copies of any Family Court orders and legal information.

The most accurate response to Item 12 is that if the teacher was in fact truly unaware of the custody arrangements they would not be held responsible. An example of teacher negligence in this area would be if they were aware of a residency concern and allowed the child to go home with a non-residential parent. To date very few cases have been documented regarding negligence and custody arrangements. If the custodial/residential parent made the school aware of a change of custody arrangements it is the responsibility of the principal to inform all staff for the protection and safety of the child. If the principal did not inform the duty teacher, the principal or school would be held negligent rather than the teacher.

In a non-government school this is even more of a concern as Chisholm (1987a, p. 28) writes:

> In the case of non-government schools, there is generally a written contract between the parent or parents and the school. Where one parent has been solely responsible for enrolling a child and bringing the child to school it is possible that the courts would say there was an implied term of the contract that they would not hand the child over to anyone else.

Much has been written about the need for teachers and school staff to stay out of proceedings involving residency/custody debates particularly during the twelve months’ separation period. During this period parents are often trying to gather information to support their case for custody or residency, and teachers often get caught in the middle of such disputes.

Since there has been a significant increase in the number of students affected by custody issues, the court has made contact orders and specific issues orders for parents with responsibilities and roles in the child's life. Contact orders generally state who is allowed to have contact with the child and under what circumstances.
Specific issues orders include such things as who is to receive school reports, who is to make decisions for the child, who has responsibility for long-term care and who is to be called in the event of an accident. It is these orders that must now be sighted by teachers to ensure they have full knowledge as to the legal status of the student. All this documentation may lead to some confusion, as in the past one parent has generally been responsible for all decisions regarding the child.

The most extreme of cases involving custody of students is that of child abduction. There is an organisation, FORCE, which consists of fathers who contract others to get children smuggled out of Australia away from their mothers. This is not very common, but a concern for teachers who are involved with family orders.

In an extraordinarily drastic recommendation in 1986, Justice Rowles, recommended taking a child who was in a residency/custody dispute to the nearest police station to be placed in police custody. More sensibly, in the document *Family Law and School* (1994), the New South Wales Legal Services Unit indicates that any problem which arises should be directed to them. The document has some examples of situations that may arise and how to deal with them. It informs educators what documents should be cited before children can leave the school with an adult and what documents are needed to prove custody and residency. A major concern is that this important and practical document may not have been read by all teachers in New South Wales. As with many Government directives and documents, this one may be shelved somewhere and rarely, if ever, consulted by those working in schools with children.

**Results – item 12**

Nearly a quarter of the teachers and administrators involved in this survey were correct in assuming they could not be held liable if they innocently let a child go with a non-custodial parent. In fact, over half the group thought they could be successfully sued and the remaining group of 22% was uncertain.

The Catholic high school teachers achieved the highest answers to this item with 47%, however, only 15% of Catholic K-6 teachers were accurate in their response.
A large group of over 40% of respondents from both public and Catholic primary schools was uncertain of the response.

This poorly responded to item had only 20% of teachers and 25% of principals answering appropriately.

**Conclusion**

Throughout this chapter the cases used in the questionnaire were presented and analysed to indicate a typology of New South Wales' teachers and administrators' knowledge of the law as it affects the school. The large quantity of data obtained from each of the case studies has been displayed in many ways including graphs, percentages and qualitative descriptions. The results discussed in this chapter indicate resoundingly that there is a disparity of knowledge of legal issues pertaining to education. When explored and explained, common areas of understanding and misunderstanding, as well as knowledge and lack of knowledge emerge.

Interestingly, some schools displayed a much better understanding of the legal principles in education than others. The administrators often had better knowledge than the teachers, however, the overall results were quite disappointing. The results will be examined further in the next chapter.
CHAPTER SEVEN

RECOMMENDATIONS AND CONCLUSIONS

Introduction

Australian society has recently undergone significant social and technological change. Some of the major changes include improvements in human rights as well as the rights of minorities and the disadvantaged. There has been a move towards higher community expectations and consumerism, reflected in the significant increase in professional accountability. Concurrently, there has been an overall increase in legal activity reflecting such societal changes. Australia is becoming a heavily litigious nation as an increasing number of citizens who feel wronged or injured apply to the courts for compensation.

The education system has not been omitted from this legal pursuit and, with the complex organisational and structural changes occurring in education, a balancing act has begun between providing successful, challenging and stimulating programs and safer protectionist programs. In Australia there have been many recent changes to legal dogma in the educational context. Acts of Parliament and statutes are being continuously formed. Emergent issues such as, educational malpractice and negligent advice are areas of administrative law that are altering the way education is delivered. In fact, a very recent area of education law, psychological harm including stress to school personnel, is going to affect the system further. It appears this area of law is continuing to grow to be a concern for educational personnel and policymakers.

Limitations of the study

This study provided some interesting data. There were, however, some limitations that affected the outcome. Although the study involved a group of some 169 teachers from a non-heterogeneous group, a study involving a much larger group would have been more desirable. In addition, the proportion of participants does not reflect the
proportion of teachers in the various schooling systems. Generalisations would then have been more valid and results more reliable if these variables had been altered.

A further concern were the limited number of questions included on some particular points of law. Ideally, several items regarding one issue should have been included, as this would have resulted in internal triangulation of all results. Therefore, some conclusions were formed by relying on a single item or source of data.

The case study section provided rich and plentiful qualitative data that was researcher-collated and coded. Due to the subjective nature of this human activity, bias inevitably occurred.

The narrowing of relatively complex issues into one or a few items is also a limitation, as issues may become obvious and simplistic. There is also an inherent bias in the item selection as certain topics or cases were chosen over others. The whole arena of education law was beyond the scope of this study so it was unavoidable that only specific areas could be included.

Another limitation is the lack of involvement by different schools outside the metropolitan area. Nearly all of the participating schools were from the metropolitan area of Sydney and therefore the survey results may not reflect the situation in rural schools in New South Wales, resulting in regional bias.

Research Questions

There were three broad areas that this study explored. They aimed to provide a typology of participants' knowledge of specific areas of the law in the educational environment. These areas are articulated into three research questions, to be answered and addressed below.

Research question one

- To what extent are teachers and school administrators aware of the legal issues which impact upon them, their work and the school?
The core aim, to discover educators' knowledge of the laws, provided some interesting data. The case studies (Sections I, II and III) provided an insight into the high level of disagreement and confusion amongst New South Wales school teachers and principals. This is especially evident from the overall mean score for correct responses in Section III, which was only 54%. The plethora of rich qualitative and quantitative data from this study leads to the conclusion that New South Wales educators are generally not aware of the various legal issues that affect them.

Research from the United States had similar results, for example, Menacker and Pascarella (1982) obtained a mean score of 64%. Pell (1994) summarised results from American research when she wrote "innumerable studies indicate that teachers, pre-service or practicing, have little knowledge of school law."

In another American study, Ogletree (1985) found that although some questions had a correct response rate of over 60%, there were questions with only a 40-50% correct response. In the same year, 1985, Dunklee discovered that approximately 60% of his respondents had inadequate knowledge of legal issues in education. In fact, approximately half the survey questions had an 80% or more correct response rate. The remaining items had a large variance in response rate, the lowest being 22% correct. (Reglin, 1992, p. 29)

More recent Australian research by Hewitson (1995) into the knowledge of issues in education of newly appointed principals concluded that principals often lacked skills and understanding of legal principles in their work environment. Similarly, Walkley (1997) found that educational leaders lacked knowledge about legal issues as they relate to the educational arena.

Stewart (1996b) undertook an in-depth study into the area of principals' knowledge of the law in Queensland and discovered that although principals are involved with several areas of legislation and statutes, they are limited in their knowledge of legal principles. In this study only two questions had a correct response rate of over 50%; these were about duty of care before school and duty of care to students on their way to and from school. Four questions received a correct response rate of 48% to 39% and the other four questions only attracted a correct response rate of 28% to 12%. 
Research question two

Results of the study: Correct response percentages

- In which legal areas concerning educational law do administrators and teachers have common misunderstandings?

Data indicated that various legal issues were poorly understood and others well understood. The case studies showed little agreement as to legal knowledge. The first case, that of Geyer v. Downs, involving a girl injured before school by another child swinging a softball bat, was well answered compared to the other case studies and achieved the highest level of correct responses. This result is possibly due to this case being reported often in education law literature and referenced often in relation to other education law cases; this would be interesting to explore in further research.

Generally the case studies were not responded to as well as the section on legal issues. This was perhaps due to the subjective nature of qualitative responses and the interpretation involved in reading and responding to scenarios. The lack of commonality or consistency also reflects the amount of choice of responses.

Some respondents had extreme points of view, others were more moderate. Many indicated their confusion or uncertainty. In some instances teachers were likely to incorrectly blame the teacher for the incident, showing that teachers are fearful of the implications of the law. Often participants did not understand who was legally responsible for incidents. In fact the scenario regarding custody issues indicated a large variance in responses; there were 21 different responses as to who was to blame for the unfortunate incident.

Basically, there were no areas of total agreement on any specific area of the law in the educational context. Some items were better responded to than others. In fact, those relating to the standard of care were very poorly responded to, the range of correct responses being between 17%- 24%. These items focused on the specific level of care needed to ensure a breach of care did not occur.

The correct response range for the two sport-related questions was 40%-61%, higher than the breach of care questions. The duty of care questions were better responded to and ranged from 46%-79%. 
Teachers appeared to be generally aware of the duty of care, however, the legal standard and specifics relating to various educational situations were often unknown. At times participants were overly cautious, an example being the common listing of many people as being responsible for the various unfortunate incidents listed in the survey.

The item regarding bullying had a 64% correct response rate, similarly, the item regarding abuse had a correct response rate of 62%. The issue of custody/residence was particularly poorly responded to, having only one quarter of participants correct. This is reflected by the New South Wales Legal Services Unit, which states that after amendments to the Family Law Act 1975 (Cth) in 1995 a booklet was issued to principals to assist them with family breakdown and Family Court orders. Despite this, the unit concedes that some staff "remain unaware of the contents of the booklet and the procedures to be followed." (Legal Services Unit 1999a, p. 4)

Research question three

- Do factors such as gender, years of teaching, subject taught, role in the school or type of school system, affect knowledge or misunderstanding of school law?

There was no significant difference in scores obtained in relation to gender, years of teaching, subject taught, role in the school, or type of schooling system. The means ranged between 5.1 and 7.7. The only obvious concern is that one school had a very low rate of legal literacy. This school had no affiliation with any school system or type, as it was an independent school catering for students from Kindergarten to Year 12.

Principals or school administrators performed better on the last twelve survey items. The work of Menacker and Pascarella (1982) in the United States of America also indicated school administrators were more knowledgeable of legal literacy.

There was no significant statistical overall difference between primary and high school teachers; this was also true of the Menacker and Pascarella study reported in 1982. Stewart's (1996b) Australian study indicated that there was no significant difference between primary school and secondary school principals in regards to
common law, however, primary school principals had a higher level of knowledge regarding statute law.

In the USA, by comparison, Ogletree (1985) found that educators with experience in school law had a slightly higher (0.5%) correct response rate.

**Recommendations**

The results of this study indicate that educators and administrators in New South Wales schools have limited knowledge of the law as it affects them in their work. It also appears that accidents will continue to happen, however, the future of litigation in education will be dependent upon many factors. These include whether teachers and administrators are armed with adequate training, knowledge and skill to avoid potentially litigious situations and confront with confidence incidents leading to litigation, as well as general changes in societal expectations and values.

On the basis of relevant research in this area, those in education need to understand what constitutes legal breaches, recognise common situations that can lead to problems, and be aware of acts of parliament affecting schools and suitable risk management procedures. Teachers also need to know when to go to the principal for advice and when to consult others. Similarly, principals need to know when to consult a lawyer or, if appropriate, the legal section of the Department of Education or governing school body.

Essentially, litigation is an expensive and inconvenient way to solve educational problems. An obvious alternative to litigation is preventative law. Preventative law is increasingly being discussed as a more desirable means to address legal concerns in education and, in particular, the instigation of legal risk management procedures.

**Legal risk management**

Legal risk management focuses on preventing potential problems as well as dispelling and controlling issues after they occur, therefore avoiding litigation. It is about being aware of and attentive to legal issues. Appropriate risk management in the school environment, according to Stewart (1998b, p. 67) is preventative and primarily concerned with planning. Stewart and Knott (2002a, p. 24) add, "risk management involves sound planning; effective decision-making; accepting known
risks; reducing possibilities of occurrence or consequences of harmful events; and mitigating adverse effects of unavoidable events."

The educational profession is not the only profession having to confront risk management. Other professions, such as the medical and legal professions, have for some time instigated risk management policies. In discussing the American situation, Zirkel (1985, p. 9) suggests educational institutions should look to the medical profession in particular for advice about risk management procedures and their purposes. As professional negligence claims become more common, other professionals and para-professionals will also have to consider risk management procedures.

An integral part of a school’s risk management procedure should be the formation of a risk management document or plan. Research regarding present school practices and physical hazards needs to be undertaken for such a plan to be formulated. Stewart and Knott (2002a, p. 24) suggest the plan should “set objectives; identify hazards; assess risks; decide on control measures; implement control measures; and monitor and review the process.” The review of the process should be an on-going activity with at least one complete assessment of the plan each year. Zirkel (1985, p. 9) recommends a regular legal appraisal consisting of collecting and analysing significant data and making amendments as needed to ensure the policy is relevant. The documentation of such assessments should be included in the school yearly plan and school policy documents. Stewart and Knott (2002b, p. 154) recommend that risk management policies be a part of the school welfare policy, as they should support pupil welfare, aiming to protect students from harm and physical danger.

Risk management documents are becoming an expectation of New South Wales policy-makers as discussed by the Legal Services Unit of the New South Wales Department of Education (2002, p. 1); “to meet the Department’s duty of care, principals and institute managers need to be able to demonstrate that systems are in place to identify risks and that once identified, precautions are taken to avoid or minimise those risks.” Some principals are looking to outsiders for assistance in this area. Walkley (1997, p. 6, 7) recommends inviting a legal consultant to conduct a school-wide legal audit. This is particularly useful as a legal specialist may objectively assess the school's legal strengths and failings.
A legal checklist for teachers should be an integral part of the risk management policy. This would provide new and existing teachers a clear indication as to what is legally expected of them. Clark (1989, p. 24), provides an example of such a legal checklist; it includes being aware of the obligations stipulated by teachers’ handbooks, sourcing legal advice from colleagues and supervisors and continuing to accrue knowledge of legal concerns in education.

Raising awareness

It is no longer sufficient to feign ignorance about the duty to take care of a minor, the skill of foreseeing potential dangers and the awareness of dangerous behaviours and environments are vitally important. Teachers and principals have to raise their own awareness and become more vigilant. O'Brien (1998, p. 13) agrees when suggesting that educators should be attentive and assertive in the abolition of dangers within the school, this is particularly true of physical dangers. This could possible alleviate some of the incidents which lead to court action. Hopkins (1996, p. 14) also agrees, stating that principals and teachers may avoid liability if they raise their safety awareness and become more conscientious of potentially dangerous situations. He also recommends informing parents of all activities, planning excursions well and having safety procedures in place. In this way, all educational participants are more aware of legal obligations and responsibility.

In discussing limiting educational malpractice, Williams (1981, p. 6) indicates that teachers should become more legally aware and “teach in ways that are educationally sound and legally defensible.” Furthermore, increased communication between parents and schools should limit the amount of educational negligence and ensure teachers and parents are aware of learning difficulties, therefore addressing problems more readily.

Legal services

From the data collected, the number of uncertain responses indicates that teachers need access to legal services. Walker (1997, p. 6, 7) recommends a legal help line. This could be a phone service provided to all teachers in all systems and would allow them to make inquiries as situations occur. Staff lawyers should also be available to periodically visit schools and provide them with legal advice and information.
regarding recent alterations to legal dogma. Legal professionals associated with schools should provide digestible information for educators, devoid of legal jargon, particularly regarding new laws or statutes.

Walkley (1997, p. 67) concludes from his research that communications such as newsletters for schools be provided for each school and include recent legal issues and concerns. Relevant information could then be passed on to students and their parents.

A recent legal service which posts such information and is now available to New South Wales government school teachers is the Department of Education and Training Legal Services website. The website contains recent memoranda regarding legal issues, changing legal obligations and recommendations. If teachers use this site often and appropriately, they may gain a substantial amount of legal literacy. A strong recommendation regarding legal services is that such a provision should also be made available for non-government school teachers.

Access to professional education law associations is also recommended to improve legal understanding. Presently there are networks throughout the country that regularly meet and discuss these issues. The networks and organisations consist primarily of policy-makers and educational administrators. It would be an advantage if all schools in Australia had at least one representative as an active member of such associations or networks.

Training

Organised, relevant and accessible training is paramount to the future of legal literacy of educators. As Hawkes (1990, p. 19) writes, "I plea for three things ... understanding, protection and training." Research of 300 educators and principals in the USA by Menacker and Pascarella (1982, p. 426) indicated that the communication and dissemination of legal information was a concern as it was "ineffective and haphazard". The authors therefore concluded that legal information should be provided to educators during their pre-service training and throughout their teaching career, in a systematic and organised manner.
In discussing the form of training needed, Walkley (1997, p. 6, 7) indicated that his research highlighted the need for core pre-service legal training and training on specific areas of the law, on a regular basis. He also recommends specific training courses for specific roles and needs. He gives the example of training to meet the unique requirements of novice principals. Spencer and Nolan (1997, p. 1), quoting the then Queensland Teachers' Union President, suggest that teachers in Queensland need urgent training in 'risk avoidance'.

A useful training practice which may be conducted at each school could be to examine scenarios or cases often found in educational publications. In the journal the Practising Administrator, Keith Trone, a Barrister, gives the reader realistic scenarios based on actual cases or points of law and asks them to choose an appropriate course of action based on the facts given. This is an ideal way for teachers and educational administrators to consider problems and their solutions, prior to finding themselves in the situation in real life. Schools should discuss areas of concern and common practices and highlighting possible problems that could occur within their school. Although this sounds like a negative way to consider the issue, foreseeing possible problems and concerns can often lead to the avoidance of legal problems.

**Reporting**

A long-term recommendation for all schools is that they improve the reporting of incidents and the storing of resultant documentation. In a bulletin to schools, the NSW Department of Education and Training Legal Services Unit (2002, p. 2) recommends that unless an accident is trivial, an accident report should be made. The main purpose for this report is to examine and possibly defend the Department's position in a legal sense if any legal action is taken. The Unit says that the Department may be involved at any time in both litigated and unlitigated claims. To ensure the employee involved as well as the employer is protected against negligence, schools should report such details as witness statements, photographs, sketches, supervision rosters and any first aid given. Hopkins (1996, p. 14) suggests keeping records of all policies and procedures which were followed when incidents occurred.

Reports have to be made soon after the incident and kept in a secure place in an organised manner, to be referred to when necessary. They have to be kept until the
person involved attains 25 years. (Legal Issues Bulletin, 2002, p. 2) The statute of limitations says that the child may sue many years after they have left the school involved; often this is long after any employees have any memory of the event. An example is the case of Geyer v. Downs which took some ten years to decide. Other cases have taken a similar time to be completed as they have moved through the court system, sometimes all the way to the High Court of Australia.

**Insurance**

Even schools with trained staff and comprehensive risk management procedures need to be vigilant in their insurance assessment and coverage. An experienced headmaster, Crouch (1996, p. 28) stresses the importance of good insurance coverage for schools, as unforseen litigation may always occur. O’Brien (1998, p. 13) agrees, indicating that for most schools to be adequately insured they require at least $10,000,000 in cover.

Never has there been so much spent on insurance and so many claims against schools and their employees. This has resulted in an increase in payouts for damages and an overall increase in insurance premiums. Furthermore, this has become a recent issue for a large provider of education in New South Wales, the Catholic Education Office, which recently increased its tuition fees to address the costs associated with insurance and compensation payments.

**Burgeoning areas**

From recent literature and media reports in this field there are certain issues which appear to be burgeoning concerns. One area highlighted by Riley and Sungaila (1992) and Poulton (1999, p. 9) is that of educational malpractice and giving inadequate or negligent advice. There is evidence to suggest this area will become a concern in the near future for educators and educational policy-makers. Even though Riley and Sungaila (1992, p. 150) suggest that educational malpractice is not yet established in Australia as a legal obligation, there is a likelihood it will be an issue in the near future as more emphasis is placed on comparative literacy and numeracy levels. An increased interest in state-wide and nationwide testing, as well as common educational outcomes, suggests that education is to be provided at a certain standard and that the specific standard is now being documented and assessed.
existence of such a standard will provide disgruntled parents and students with evidence to use in their argument for inadequate or inappropriate educational provisions.

Another area is that of psychological abuse or stress, particularly teacher or administrator stress. Justice Mason, (2003, p. 5) indicates the law is focussing more and more on psychiatric and stress-related diseases. He goes on to say that in education this is due to "the apparently increasing stressfulness of teaching and school administration as society heaps more and more duties upon those at the front line of education." This issue has become even more significant since the introduction of occupational health and safety laws. This is because the employer has a greater responsibility than ever for the safety and well-being of its employees.

One example of this issue in education is when a teacher suffers psychological stress relating to the acts of violent pupils, particularly when personal information such as a violent past or disposition is not made available by the employer. Indeed recently, the integration of students with disabilities has brought many issues to the forefront, including the accuracy and management of stored and shared information involving students. Dawson et al. (2003, p. 1) imply that there is a conflicting intersection between the Privacy and Personal Information Act (1998) NSW and the Occupational Health and Safety Act (2000) NSW. Indeed, the employer has a legal responsibility to their employees to ensure they have a safe work environment, however, they have a similar obligation to protect the privacy of personal information about pupils. Concerns often arise when the withholding of information about a student can lead to an unsafe environment.

Another is the psychological affects of baseless claims against teachers. Each year there are many claims of negligence and intentional torts against teachers, some of which are founded, however, there are many unfounded claims against teachers as discussed by Wellington, Walker and Spreadbury (2003). The effects of these baseless claims, many of which take at least a year to be cleared or solved, cause substantial stress as well as physical and emotional distress.

Previously, it was very difficult to prove that an employee was not acting on behalf of their employer, known at law as vicarious liability. Very recent cases regarding such intentional torts, for example, child sexual assault in New South Wales v. Lepore [(2003) 195 ALR 412], are presently examining the rule of vicarious liability (Mason,
In this way, the Australian courts are currently involved in determining whether an employer is responsible for the acts of its employees in the course of their work if the act is criminal or intentional. Results of these deliberations and judgements will no doubt impact upon the future educational environment.

Commentators on legal activity have indicated that there has been a pendulum swing towards the legal system expecting people to take more responsibility for their own safety. Mason, J, (2003, p. 5) says examples of this trend are Reynolds v. Katoomba RSL All Services Club Ltd [(2001) 53 NSWLR 43], Ghantous v. Hawkesbury City Council [(2001) 206 CLR 512] and Waverley Municipal Council v. Swain [(2003) NSWCA 61]. The litigation in schools is likely to be affected by this societal change. This trend aims to enforce the concept that organisations and environments such as schools are not insurers of absolute safety. Ford (2003, p.2) in discussing the IPP Report – Final Report of the Review of the Law of Negligence Sept 2002, says that negligence as it "is applied in the courts is unclear and unpredictable." He also states that it has been too easy for defendants to be found negligent and that damages for injuries have been too high. Insurance costs have become prohibitive and thus the courts are placing more responsibility on plaintiffs to be responsible for their own safety.

A legal balancing act

It is evident that in the future teachers and administrators will have to find a stable balance between suitable educational experiences and a safe environment. Avenell (1990, p. 16) describes this balance as a paradox "to provide a stimulating and enriching educational environment and yet protect pupils from all risk of foreseeable injury."

Despite this, there is a certain risk versus reward which those in education have to frequently consider. In a recent address Ford (2003, p. 21) discussed at length the value of activities involving a certain level of risk. Justice Mason (2003, p. 12) also discusses the importance of providing a balance in education when he states "among other things, schools aim to be environments where children can experiment and play and take risks in a supervised but less than totalitarian atmosphere." This is certainly to be the job of educators and educational policy-makers at the start of the twenty-first century.
Conclusion

The results of this study overwhelmingly indicate that teachers and school principals are lacking in some areas of knowledge of education law. A similar result has been documented by nearly thirty years of research in Australia and the United States of America by researchers such as Menacker and Pascarella (1982), Ogletree (1985), Dunklee (1985), Hewitson (1995), Stewart (1996b) and Walkley (1997).

Recommendations for improved literacy in this area include assistance at the system and school level. Legal literacy in schools will improve if pre-service and in-service education becomes organised and systematic. The results from this study indicate that, in fact, the respondents would greatly appreciate training and assistance in this area to alleviate some of the uncertainty associated with legal understanding.

Teachers and school executives need to also be confident that the law is there to protect their rights and support them in the educational context as well as protect the rights of their students. They need to be aware that not all accidents or incidents will be perceived as their fault at law, and that there are specific areas where their understanding of legal obligations are very important.

Learning about preventative risk management procedures and instigating appropriate and effective policies are an important part of this process. A vigilant awareness of potentially litigious situations is the first step in limiting legal activity. School-based legal audits and the development of legal risk management policies are the necessary tools for every school in the promotion of preventative risk management.

In conclusion, the future of litigation in education is largely dependent on making provisions for teachers and principals with regard to training and on-going services. Although, accidents will always happen, understanding the legal system in education will assist our educators in dealing confidently with situations of a legal nature.
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APPENDIX

Copy of instrument

SUBJECT INFORMATION FORM

The following questionnaire is a part of a research project which examines teachers' knowledge of the law within an educational context. The aim of the questionnaire is to gather information about your knowledge of legal principles and issues.

The questionnaire is basically organised into two sections, the first section consists of case studies and questions relating to them. Both sections examine issues relating to two areas – teacher responsibilities and students' issues. The second section will be responding to statements regarding several issues involving education and the law. I'll be asking you to give honest responses to the questions asked and to be as specific as possible.

Please note that you don't have to answer any of these questions and may withdraw from the study at any time, but should you chose to participate, your participation is valued and very much appreciated.

The information you provide will remain confidential. The results of this study will be available for your perusal on completion..

Yours sincerely,

Diane Harapin

Any enquiries, complaints or concerns regarding this research should be directed to Mrs Gail Briody, Ethics Officer, University of Sydney (telephone—9351 4811)
SECTION I
TEACHER RESPONSIBILITIES

Part A

Please read the following case and answer the questions.

An eight-year-old girl arrived at school before the teachers came on duty at 9:00 a.m. She was injured whilst walking across the playground by another student who was swinging a softball bat. The school gates were opened by the principal between 8:00 a.m and 8:30 a.m because he knew that children arrived early and he did not want to keep them locked out of the school as it was adjacent to a busy street. The principal said that he occasionally supervised students through his office window and asked students to play passively.

Please circle the most appropriate response—

1. In your opinion, was someone at fault in this case?
   Yes
   No
   If yes, go to Question 2
   If no, go to Question 4

2. Who do you think was at fault in this case?
   a. Girl swinging bat
   b. Parents
   c. Girl, who got hit
   d. School
   e. Principal
   f. No one
   g. Other, please specify ____________________________

3. Please state why you think that.

   ________________________________________________

   Please circle the most appropriate response—

4. Do you believe the accident could have been prevented?
   Yes
   No

5. Please state why you think that.

   ________________________________________________
Part B

Please read the following case and answer the questions.

Nine-year-old girls were involved in a craft lesson. During the lesson one girl waved pointed scissors around and poked them into another girl's eye. The class was accustomed to using scissors and were all involved in individual tasks when the accident happened. The teacher was not looking at the girl when the accident occurred, but was instructing another student.

Please circle the most appropriate response –

6. In your opinion, was someone at fault in this case?

Yes
If yes, go to Question 7
No
If no, go to Question 8

7. Who do you think was at fault in this case?

a. Girl using scissors
b. Teacher
c. Principal
d. School
e. Other, please specify ____________________________

8. Please state why you think that.

_____________________________________________________

_____________________________________________________

Please circle the most appropriate response-

9. Do you believe the accident could have been prevented?

Yes
No

_____________________________________________________

_____________________________________________________

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PART C

Please read the following case and answer the questions.

A 17-year-old boy had just completed high school. However, his parents were gravely concerned about his reading ability. Consequently, they had his reading age tested, discovering that he had the reading ability of an eleven-year-old or Year Five student. The parents accused the school of malpractice for allowing the boy to progress through high school and graduate.

Please circle the most appropriate response –

11. In your opinion, was someone at fault in this case?

   Yes  
   No
   If yes, go to Question 12  
   If no, go to Question 14

12. Who do you think was at fault in this case?

   a. Boy
   b. The boy's high school teachers
   c. The boy's primary school teachers
   d. School
   e. Parents
   f. Other, please specify ________________________

13. Please state why you think that.

   ____________________________________________

Please circle the most appropriate response –

14. Do you believe the situation could have been prevented?

   Yes  
   No
   If yes, go to Question 15  
   If no, go to Section II

15. Using your knowledge as a teacher how do you think this situation could have been prevented?

   ____________________________________________
SECTION II
CHILDREN'S ISSUES

Please read the following case and answer the questions.

An eleven-year-old girl was waiting for her father to pick her up from school. The teacher on duty was surprised to see the child's mother arrive as the child lived with her father who had been the sole care-giver since the parents had separated several months before. The teacher allowed the child to leave with her mother, without consulting the principal or the child's classroom teacher.

Please circle the most appropriate response –

16. In your opinion, was someone at fault in this case?
   Yes  No
   If yes, go to Question 17  If no, go to Question 19

17. Who do you think was at fault in this case?
   a. Girl
   b. Father
   c. Mother
   d. Teacher, on duty
   e. Girl's classroom teacher
   f. Principal
   g. School
   h. Other, please specify ____________________________

18. Please state why you think that.

________________________________________________________________________

________________________________________________________________________

Please circle the most appropriate response –

19. Do you believe the situation could have been prevented?
   Yes  No

20. Please state why you think that.

________________________________________________________________________
SECTION III

The following section contains general statements about education and the law and more specifically, teachers' legal responsibilities to students.

Circle True, False or Uncertain for each statement-

1. A teacher’s full legal responsibility can be defined as ‘in loco parentis’ or ‘in place of the parents’.

   True False Uncertain

2. Teachers are legally responsible for any students who they see in the playground after school.

   True False Uncertain

3. Teachers' responsibilities to their students are decided and governed by the various Departments of Education in each state.

   True False Uncertain

4. School bells and starting times herald the commencement of legal obligations of teachers to students.

   True False Uncertain

5. If the school creates a supervised pedestrian crossing, it legally owes its students a duty of care.

   True False Uncertain

6. The court looks to the age, health and experience of the child, as well as the likelihood of injury when determining if a teacher is negligent.

   True False Uncertain

7. Teachers who supervise organised contact sports such as football and basketball are legally responsible for broken limbs received by students whilst they are playing for their school.

   True False Uncertain

8. With the principal's knowledge, teachers may give 'early marks'.

   True False Uncertain

9. Teachers could be legally responsible for responsible acts of bullying if these acts cause physical harm to another child.

   True False Uncertain
10. Teachers who play sport against students are safe from litigation as they do so with the principal's permission.

True False Uncertain

11. If a teacher notifies the authorities about child abuse and their accusation proves incorrect, they may be sued for false accusations or defamation.

True False Uncertain

12. If a teacher allows a non-custodial parent to take their child from school, they may be liable even if they are not aware of the custody arrangements.

True False Uncertain
SECTION IV

The following section gathers data about our respondents. Please circle the most appropriate response –

1. Your gender:
   a. Male
   b. Female

2. How many years have you been teaching?
   a. 1-7 years
   b. 8-15 years
   c. Over 15 years

3. What are your teaching responsibilities?
   a. Infants – classroom
   b. Primary – classroom
   c. Secondary – Please specify which subject __________________
   d. Administration – principal, assistant principal
   e. Other, please specify ________________________________