CHAPTER 5

A COMPARATIVE SCHOOL LAW PERSPECTIVE OF THE EDUCATOR-LEARNER RELATIONSHIP

5.1 INTRODUCTION

South Africa does not boast of having the global village's perfect school law. So it is good to remember that awareness of school law in one's own jurisdiction and an understanding of the prevailing mood in others provide the potential for changing educational perspectives to be realised (Richter & Birch, 1990:364).

The following countries were selected for the sake of a comparative law perspective:

- England and Wales: where the educator has the status conferred on him by the doctrine of *in loco parentis* (*cf.* 1.2 and 5.4.1) and serves as such in a quasi-parental role.
- Canada: where the educator no longer acts as a mere delegate of the parent, but is employed as a "state agent" to fulfil its *parens patriae* responsibilities (*cf.* 5.4.2). The phrase *parens patriae* is defined by La Morte (1990:439) as *"the State as sovereign; referring to the sovereign power of guardianship over persons such as minors"*.
- Japan: where article 26 of the Japanese Constitution implies that the educator has a highly respected *custodian* responsibility to carry out his duty in the interest of the child (*cf.* 5.4.3).

In order to oversee the full perspective, in the course of this chapter the focus will fall on:

- historical features of school law in each country;
- the sources of school law in the various countries;
- the duties and responsibilities of educators in each country;
- the rights of learners in each country;
- school discipline as it has established itself in each country;

- educator liability for negligence or malpractice in the various countries; and
- an international comparison of vital aspects in school law.

5.2 HISTORICAL FEATURES OF SCHOOL LAW

It is necessary to understand the context in which a country's school law has developed. Political and legal trends will help to explain by which authority education is legislated and administered in each country.

5.2.1 England and Wales

Important developments have taken place in the English education system since the Education Act of 1902. While the 1918 Act (also referred to as the *Fisher Act*) raised the school-leaving age to 14 for all children, it also imposed a statutory duty on local education authorities to provide courses of advanced and practical instruction for older and more able learners in public elementary schools. During 1918-1944 demands and efforts were made to reform the English education system. All of these attempts culminated in the Education Act of 1944, which drastically reorganised the statutory regulated system of public education in England (Vos & Brits, 1990:140).

Since World War II, as United Kingdom governments have become more interested in education, the flow of legislation onto the statute books has increased considerably. Although there have been twenty-five mainstream Education Acts of major and minor significance since 1944, it is customary to refer to the Education Act of 1944 as the *Parent Act* (Aldrich & Leighton, 1985:9) or the *Basis Act* (Barrell & Partington, 1985:xxx). The central concept of this Act, namely that of a partnership in education of parents, local government and national government, remains intact. What has changed, is the nature of the partnership and the concept of an equal partnership. An area of concern is whether local education authorities are merely becoming the agents of national government policy in education. At the same time financial stringency has left local education authorities with less room to manoeuvre (Partington, 1990:85).

The issue surrounding parental involvement in education policy at local level flared up in the 1960's and has barely subsided since (Partington, 1990:98). The Education Acts of 1980, 1986 and 1988 have transferred numerous powers from local authorities to school governing bodies, thus increasing the role of parents. There have also been

major changes in child law, and shifts in local government and employment law, all of which have influenced the education service (Harris *et al.*, 1992:2-4).

The background to these developments has been the gradual breakdown of the consensus on education policy which characterized the political scene in England and Wales until the 1960's (Partington, 1990:86). This breakdown has been the mainspring of significant court action, even though the courts have dealt only superficially with the interpretation of parts of existing legislation.

5.2.2 Canada

The enactment of the British North American Act in 1867 (now formally named the *Constitution Act 1867, 30-31 Vict., c.3 (U.K.)*), set a parliamentary system of government in Canada into place (Black-Branch, 1997:2). The British North American colonies became united within a federal governmental framework. Each province has its own constitution, and provincial control over education constitutes the cornerstone of the conceptual design of the Canadian education system (Bruwer, 1986:51-52). The tradition of regionalism, the vast size of the country, and its clearly identifiable geographical regions have given rise to a preference for decentralisation, which explains the high degree of autonomy displayed by Canada's provincial authorities (OECD, 1976:17) and the few powers and responsibilities of the federal government as far as education is concerned (Steyn, 1995:531).

The decentralised structure of the Canadian education system follows naturally from the country's history. The historical development of different cultural groups that interacted with different levels of peace and hostility, is responsible for the ratio between the usage of English and French in education. At the same time the provision of education for minority groups and the original inhabitants has also been influenced by the history of the country (Steyn, 1995:502; *cf.* 5.5.2).

Constitutionally based as a federal system, Canada consists of ten provinces and two territories (Steyn, 1995:500). One of the important reasons for accepting the federal system as the form of government in Canada, is found in the assurance of local and provincial control of education (Steyn, 1995:503). Although there are, practically speaking, three levels of government (federal, provincial and local), there are only two

levels in constitutional terms, since the local governments fall under the control of the province. The powers and responsibilities between the federal and provincial spheres are divided by the Constitution Act 1867 (MacKay & Sutherland, 1990:170). Legislative authority over education is specifically assigned to the provinces by section 93 of the Constitution Act 1867. Moreover, there is very little federal legislative interference (MacKay & Sutherland, 1990:171) as education is considered the *jewel* of the provinces in Canada.

Canada is still drawing on its British background, thus educational issues have traditionally been handled at the political level rather than in the courts. Even though there have been a few court cases on the authority of school boards, the employment of educators on the one hand and negligence with respect to the care of learners on the other hand, the bulk of educational policy was made in the provincial legislatures or at the local school board level. In the last two to three decades political power has become more centralized in the provincial departments of education and local school board control has been eroded (MacKay & Sutherland, 1990:170).

The courts became partners with provincial legislators in the design of educational policy with the arrival of the Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 (hereafter called Canadian Charter of Rights and Freedoms; *cf.* 5.3.2) as part of Canada's Constitution Act 1982, Schedule B of *Canada Act 1982* (U.K.), 1982, c.11 (hereafter called Canada's Constitution) (Black-Branch, 1997:13 and 21). This does not mean that Canada has totally abandoned its British roots in the doctrine of parliamentary supremacy (which recognizes parliament as the crucial decision-maker in society). It means that judges and legislators have become partners in the design of education policy and that front-line educators have to contend with lawyers and the judicializing of Canadian education (MacKay & Sutherland, 1990:170; Black-Branch, 1997:21).

5.2.3 Japan

When the Emperor came to the throne in 1868, the starting point in modernizing Japan began with the so-called Meiji Restoration era. The Meiji Constitution, which came into force on 29 November 1890 (the day the first Imperial Diet or legislature

was convened), declared the sovereignty of the Emperor as divine: he was to have total and absolute state power. All three branches of government - executive, legislative, and judicial - were to be presided over by the Emperor (Ishii, 1997:99). Sadly, ideas of fundamental human rights were not strongly articulated, since the rules concerning the rights and duties of the people dealt only with the relation of the people to the State. Nevertheless, the first educational transformation in Japan was brought about by the Meiji Restoration (Schoppa, 1991:22).

From a school law viewpoint, the purpose of public education was to train children as loyal followers of the Emperor. Parents and learners were under an *obligation* to receive education: they had no rights to education (Aoki, 1990:318-319). As Horio (1990:95-86) puts it, education was categorized as one of the Emperor's prerogatives under the Meiji Constitution.

After World War II, the Meiji Constitution was replaced by a new Constitution in 1946 (hereafter called the Japanese Constitution), which brought about not only a radical change in the government structure and the protection of human rights (Dean, 1997a:75-76), but also the second educational transformation in Japan (Schoppa, 1991:1-2). The Japanese Constitution broke with militarism, centralism and authoritarianism and advanced new democratic principles such as (Dean, 1997c:506):

- pacifism;
- popular sovereignty; and
- the protection of fundamental human rights.

Although no specific provisions are stipulated in the Japanese Constitution, these constitutional principles are to serve as the basis for future educational policy. At the same time they were intended to produce democratic education, which implied that the right of people to education should be protected as a fundamental human right and that the general scheme of public education should be changed to one democratic structure (Horio, 1990:106-108).

Japanese school law developed as a discrete legal area based on education principles in the 1970's (Aoki, 1990:317). Prior to 1970, which brought about *The Third Reform of Education* in Japan, according to Horio (1990:160), Japanese law relating to

public education was a branch of administrative law which provided the justificiation for the administrative control of public education. Thus administrative action was not subject to the judicial review of the ordinary courts, since only the administrative court (which was regarded as an administrative organ) could review the legality of any administrative action (Urabe, 1997:576-577).

With the help of the educators' rights movement and the learners' struggle against school authority after World War II, public education acquired a legal foundation (Aoki, 1990:317). Educators and learners could claim educational rights in the face of governmental restrictions and controls. No longer viewed as a duty to the state, education was now re-defined as an inalienable right of Japanese people. Education objectives were now re-dedicated to the creation of a democratic and pacifistic society (Horio, 1990:123).

The Japanese Constitution currently calls on everyone to take whatever measures are necessary to realize their human rights and liberties fully. The rights contained in the Japanese Constitution are not merely an enfranchisement to liberty. These rights are inseparably related to every citizen's right to live and work (Horio, 1990:110).

5.3 SOURCES OF SCHOOL LAW

School law is strictly national, and often even regional or local. Although broken school windows and learner assessment are familiar occurrences in most countries of the world, schools, school administration and courts handle such cases on the basis of the body of law which exists within a specific country. They hardly ever look abroad for possible solutions (Birch & Richter, 1990:ix).

5.3.1 England and Wales

Although parliamentary statutes form the basis and are the first source of school law in England and Wales, these statutes often delegate the power to make binding regulations through statutory instruments to the Secretary of State for Education and Science. According to section 67 of the Education Act 1944, the Secretary is also given the discretion to decide various matters which must be referred to him, and under certain conditions. An appeal lies beyond him to the courts under certain conditions (Partington, 1990:85). The courts regulate the Secretary of State's exercise

of power by invoking the doctrine of *ultra vires* (*cf.* 3.3.4). Furthermore, the courts also interpret the law when called upon, and their interpretation then becomes law until modified by statute.

The 1960's and 1970's was an era of growth in education, specifically in litigation between parents and local education authorities. An area of particular interest to lawyers has been the scope of the right of parents and others to appeal to the Secretary of State on the extent to which administrative discretion or its abuse (*cf.* 3.3.1 and 3.3.4) excluded the jurisdiction of the courts (Partington, 1990:85).

A second source of school law in England and Wales is the common law. Although Barrell (1982:2) defines it as the law which is universally accepted throughout the Kingdom, Partington (1990:86) defines it as "*judge-made law*" or case law that relies heavily on the binding force of precedent (*cf.* 2.3.1 and 5.3.2). This source of law comes into play whenever the courts are concerned with the status of educators *in loco parentis* (*cf.* 3.3.5) and their relationship with learners, especially with reference to their quasi-parental duty of care (Barrell, 1970:2 and 11; Partington, 1990:86; *cf.* 4.3 and 4.4).

5.3.2 Canada

There are various levels of Canadian sources of school law, and each has corresponding levels of scope and legal force (MacKay & Sutherland, 1990:172). The first source of Canadian school law is the Canadian Charter of Rights and Freedoms (*cf.* 5.2.2) which was entrenched on 17 April 1982. The Charter is seen as the "supreme law of Canada", superior to all federal and provincial statutes. It has the widest possible scope, because it applies equally to all Canadians. It guarantees a variety of basic rights and fundamental freedoms (Black-Branch, 1997:19). Unfortunately, nothing in this document is specifically aimed at education, with the exception of denominational school rights (religious based schools) and minority language education rights (MacKay & Sutherland, 1990:172; *cf.* 5.6.2).

In Canada the most comprehensive sources of law are provided by the provinces through their respective Education Acts (*cf.* 5.4.2) with regulations emanating from those laws. In addition there are school board by-laws and policies (Black-Branch,

1997:31-32). The provincial Education Acts cover all the facets of the administration of education, from the powers of the Minister of Education to the duties of learners. These provincial acts not only define school districts and outline the powers and duties of local school boards, but they also cover the duties and responsibilities of educators and principals (MacKay & Sutherland, 1990:172). Specific references are often made to labour relations with educators and staff, as well as the suspension and discipline procedures for learners. All the provincial statutes deal with similar subjects. However, the unique historical development of each province is reflected by the widely varying approaches (MacKay & Sutherland, 1990:172), such as the approach to the compulsory school-going age: 6-15 in some provinces, 6-16 in others, and only 6-12 in the Northwestern regions (Steyn, 1995:514).

In addition to the Education Acts of each province, distinct statutes often regulate specific aspects of education. In Nova Scotia these would include, *inter alia*, the Education Assistance Act S.N.S. 1969, c.6; the Education of the Blind Act R.S.N.S. 1967, c.82; the Hospital Education Act S.N.S. 1975, c.11; the School Boards Membership Act S.N.S. 1978,c.13; the Teachers' Collective Bargaining Act S.N.S. 1974, c.32; and the Teaching Profession Act S.N.S. 1968, c.109.

A second source of law which emanates from the provinces in Canada, is called *subordinate legislation* or regulations. Carrying the same legal force as a statutory provision, these regulations are usually more detailed and narrower in scope. An example would be the regulation which Nova Scotia passes in January of each year outlining the terms and formulae for providing funding to school boards across the province (MacKay & Sutherland, 1990:172 and 234).

Part of the subordinate legislation as a source of Canadian law are the by-laws and manuals passed by the school boards. Although they carry little weight in a courtroom, these guidelines may be enacted by school administrators and school boards to govern their own activities. The by-laws and manuals would have legal force if they could be tied to one of the other sources of law (MacKay & Sutherland, 1990:172-173).

Similar to England and Wales, the final source of school law in Canada is the common law, or judge-made law (*cf.* 5.3.2). Gall (as cited by Black-Branch, 1997:2) describes

the common law approach as *"to scrutinize the judgements of previous cases and extract general principles to be applied to particular problems at hand"*. As parents have become more familiar with the protections afforded them by the Canadian Charter of Rights and Freedoms, there has been a surge of judge-made law in the field of education (Black-Branch, 1997:73).

MacKay and Sutherland (1990:173) point out that judges are becoming prominent figures in the field of Canadian education, since these cases with their nation-wide impact carry much more weight than cases based on provincial statutes. At the same time this situation is likely to continue for some time until the provinces adapt their Education Acts to reflect the newly protected rights and freedoms of all Canadians.

Canadian education is furthermore affected by many different cognate sources of law, such as criminal law, family law and labour law. Not only was the entire juvenile justice system overhauled in 1984, but it has also changed the way children are dealt with in society drastically (MacKay & Sutherland, 1990:173). In 1988 the Criminal Code, R.S.C. 1985, c. C-46 (*cf.* 5.4.2 and 5.5.2) was modified to protect learners even better from sexual abuse. These broad protection measures have caused a great deal of concern among educators as a greater burden was thus placed on them to become more aware of the warning signs of abuse. These measures made it mandatory to report any suspicion that a learner needs protection (MacKay & Sutherland, 1990:174). While Canadian educators are concerned about the welfare of their learners, they are also concerned about being victims of damaging allegations of physical or sexual abuse (MacKay & Sutherland, 1990:173).

Labour law has also proved to be an important area for Canadian educators as they fight for improved working conditions. In most provinces educators' labour relations are regulated by a separate piece of legislation concerned with collective bargaining, namely the Teachers' Collective Bargaining Act (MacKay & Sutherland, 1990:173).

5.3.3 Japan

Although Aoki (1990:322) says the Japanese legal structure follows the civil law system, and not the common law system, Dean (1997b:147-148) points out that the Japanese legal system is essentially a hybrid: it is an example of legal pluralism. Dean

is also of the opinion that, although through its *codes* the Japanese legal system has elements of the civil law tradition and has absorbed something of the common law tradition, it has at the same time retained aspects of customary law as a result of the British occupation during World War II.

There are a considerable number of statutes which have established the legal status of learners, educators and parents, the establishment and operation of schools, the powers of boards of education, and many other matters of concern to public education. Governance of public education has to be carried out under the rule of law and administrative agencies are not allowed to go beyond these statutes (Aoki, 1990:322).

The prime source of law in Japan is *written* or *enacted law* (Dean, 1997b:148-151), which in turn comprises a sub-hierarchy of six *codes* (namely the Japanese Constitution, the Civil Code, the Commercial Code, the Code of Civil Procedure, the Criminal Code, and the Code of Criminal Procedure), statutes (the most common rules regarding the rights and duties of citizens), orders (issued by government agencies pursuant to statutory delegation), rules, local ordinances (enacted by the local assemblies which means they cannot be enforced in conflict with the statutes), and treaties (concluded by the Cabinet and requiring the Diet's approval).

Unwritten law, however, also forms part of the hierarchy of Japanese sources of law (Dean, 1997b:148). Custom law (which regulates legal relationships if specific rules do not exist, provided that the customs are not in conflict with public policy) and *jori* (natural justice or common reason) stem from the civilian tradition which recognizes custom as a source of law (Merryman, 1985:25; Dean, 1997b:152-153). Furthermore, *non-binding judicial precedent* is described by Tanaka (as cited by Aoki, 1990:323) and Dean (1997b:154-156) as an important source of Japanese law, although it does not refer to the binding authority of case law as found in a common law system. A Japanese lawyer will first seek authority from the codes and statutes, then consult the commentaries of authors and only at a later stage look at case reports (Dean, 1997b:156).

In the final instance, Dean (1997b:156-160) identifies a unique class of *non-justiciable law* as a source of law in Japan. This is aptly termed *administrative guidance*, which is

neither a legal term, nor can it be found in any of the general written laws. As a concept, it has no fixed definition. Yet it is used by central and local administrative authorities to describe a type of informal regulation of individuals, companies or associations. The administrative guidance generally occurs in the form of a request of no legally coercive effect by an administrative authority, asking a party to take or avoid a particular course of action in pursuance of an administrative aim (Dean, 1997b:156).

The legal principles of public education (*cf.* 5.4.3) are contained in Japan's Fundamental Law of Education which was promulgated in 1947, and which has been designed to realize the constitutional principles (*cf.* 5.2.3). This law stands as the guideline for the interpretation of statutes on education (Aoki, 1990:321). Because it embodies the spirit of the Japanese Constitution, the Japanese Fundamental Law of Education should be thought of as a vehicle designed to facilitate the realization of those constitutional ideals in the realm of education. It represents a concrete expression of educational goals, and intends to set directions for a new system of educational practice and administration (Horio, 1990:109).

5.4 THE DUTIES AND RESPONSIBILITIES OF EDUCATORS

Education systems across the world are struggling for recognition because the status of education as a profession suffered severely in the last century. Strangely enough not all countries specify clearly what they expect from their educators either in the form of a duty list or in the form of a code of conduct.

5.4.1 England and Wales

During the late 1960's educators in England and Wales found their salaries and professional status badly eroded. At the same time society's expectations of schools and the demands made on them were growing. This caused the education profession to feel itself not only increasingly under pressure, but also not well rewarded for its efforts. The education profession eventually sought to establish that certain activities traditionally carried out by educators in school were, in fact, not contractual but voluntary. The educators based their argument on the fact that the educators' conditions-of-service document of the time did not define the educator's day and duties (Partington, 1990:102-103).

While involved in national salary negotiations, educators withdrew from what they referred to as voluntary or goodwill activities. Amongst these activities were the supervision of learners during lunchtime break, refusal to accept duties of learner supervision immediately before and after school, attendance of parents' or staff meetings out of term time, and extra-curricular activities (Partington, 1990:103).

According to Partington (1990:103-104) the government's response was to legislate in the form of educator contracts. In terms of the legislation the educator's contract now boasted detailed professional duties, and also formally imposed the duty on educators to follow the reasonable directions of the principal in carrying out their listed professional obligations. The interpretation of "reasonable" in the context of the principal's directions to his staff has been a source of legal dispute (*cf.* 4.3.2) since then.

Educators in England and Wales have a general duty to behave in their personal and public lives in a way society expects of them. The educator is in effect another parent to each learner, and the parent is regarded as having delegated his power of control and supervision to the educator (*cf.* 5.4.2). This is referred to as the doctrine of *in loco parentis* (*cf.* 3.3.5 and 5.4.2). There can be no question of the educator's acting on the instructions of the parent (Partington, 1984:54-55). Educators *in loco parentis* must act as a reasonable parent would to safeguard the learner's physical well-being (Adams, 1984:217), and must take into account factors which are relevant and obvious, such as a small child's lack of understanding (Adams, 1984:113).

If a dispute were to end up in court, the decision would be made using the yardstick of *reasonableness in the circumstances* and the notion of the *reasonable parent* doctrine (*cf.* 4.3.1 and 5.7.2), which is the test of the *reasonably careful parent*, not of an anxious or excessively cautious parent (Partington, 1990:111). Moreover, Harris *et al.* (1992:162) point out that by the 1960's the courts in England and Wales began to acknowledge the limitations to the test, and particularly the inappropriateness of judging the standard of care expected of an educator at school, with perhaps 30 learners to control, against that expected from a parent who has to look after considerably fewer children.

The courts in England and Wales have recognised on more than one occasion that the careful, reasonable parent would not produce thirty or more children! It would thus be unreasonable to expect educators to supervise as closely as parents would at home (Partington, 1984:55).

5.4.2 Canada

As in many countries across the world, special duties of care are imposed upon educators and school authorities in Canada because of the nature of their work. To enforce Canadian society's demand for the safety of its learners, various duties have been imposed on educators from various sources (MacKay & Sutherland, 1990:228). Provincial education statutes impose specific duties on school personnel in areas such as the maintenance and supervision of school premises, the provision of safe transportation for learners, and attendance to the general safety and comfort of learners. These duties are further clarified by regulations, school board by-laws, policy statements, personnel job descriptions and individual school rules and policies. In the final instance, educators are subject to the criminal negligence provisions of sections 202-204 of the Criminal Code (MacKay & Sutherland, 1990:228; *cf.* 5.3.2 and 5.5.2).

MacKay and Sutherland (1990:197) point out that there are two bases for the legal responsibilities of educators, namely statutes and common law. Unfortunately the *legal status* of educators in Canada has not, to date, been seriously addressed by legislation (MacKay & Sutherland, 1990:199). In the Canadian community of parents, learners, educators and other relevant parties, educators are in perhaps the most delicate position, because any *ambiguity* in the law, such as open-ended provisions which are subject to legal interpretation (Black-Branch, 1997:31), rests on the shoulders of the educators, since they form the front line contact with the learner.

Unfortunately there are a number of such ambiguities in Canadian law in relation to the duties and responsibilities of educators. At the most fundamental level the law has not yet caught up with the changing role of educators in Canadian schools (MacKay & Sutherland, 1990:197). For example, in the late nineteenth and early twentieth century, Canadian educators were thought to stand *in loco parentis* (*cf.* 3.3.5 and 5.3.1) in their legal relationship with their learners. This legal doctrine granted educators a wide range of authority to act in place of the parent.

The high standard of care which educators are expected to maintain in caring for learners, commonly known as the *careful parent rule*, had its origins in the English case of ***Williams v Eady*** *(1893), 10 TLR 41 CA; LCT 240* (MacKay & Sutherland, 1990:229; *cf.* 5.4.1). Because the careful parent rule originated from the *in loco parentis* doctrine, this rule has been criticized and attacked in Canada as a paternalistic and outmoded standard, blind to the realities of modern education. It has been criticized for being too harsh on the educator and so flexible that the court could bend it in any way it sees fit (MacKay & Sutherland, 1990:229). However, contrary to the criticism and several court cases calling into question the modern applicability of the *careful parent rule*, the Supreme Court of Canada *reaffirmed* this rule as the standard by which Canadian courts are to measure an educator's conduct again in ***Myers v Peel County Board of Education*** *(1981), 17 C.C.L.T. 269 (S.C.C.).*

The old common law doctrine of *in loco parentis* has become eroded in Canada. The Canadian Charter of Rights and Freedoms now challenges this notion: school attendance has namely been made mandatory and educators have no legal connection to parents in Canada, making it unrealistic to characterize the relationship between educator and learner as a "parental delegation" (MacKay & Sutherland, 1990:197; *cf.* 5.4.1). This has also contributed to the erosion of traditional administrative authority, especially with regard to pupil discipline (Black-Branch, 1997:70; *cf.* 5.6.2). Prior to the enactment of the Canadian Charter of Rights and Freedoms, school administrators had almost exclusive control over schools and school systems, while the courts dealt with educational issues only in extreme circumstances (Black-Branch, 1997:21).

In the case of ***Ogg-Moss v The Queen*** *(1984), 14 C.C.C. (3d) 116 (S.C.C.)* the Supreme Court of Canada did not deny the *in loco parentis* doctrine, but suggested that the doctrine will apply only in respect of persons who have more than a temporary relationship with a child and who are responsible for the child's pecuniary needs. This case did not involve an educator, but it could serve to exclude Canadian educators from this doctrine.

The common law doctrine of *parens patriae* (*cf.* 5.1 and 5.5.2) provides the more appropriate characterization of the role of the educator in Canada. As mentioned

before, the concept *parens patriae* refers to the sovereign power of guardianship over persons such as minors. Originally this common law notion was developed to describe the authority of the government to protect the interests of children and mentally incompetent persons (MacKay & Sutherland, 1990:198). In this regard educators are viewed by the law as "state agents", which means that they are employed to fulfil their *parens patriae* responsibilities. They are thus hired and licensed by government and must answer to school board authority. MacKay and Sutherland (1990:198) point out that it is no longer tenable to suggest that the duty educators have to parents is sufficient to establish a legal delegation of authority.

As was mentioned earlier (*cf.* 5.3.2), the most direct and distinct sources of Canadian educator responsibilities are the provincial Education Acts themselves. Most of these Acts contain sections which specifically set out the duties of educators. So, for example, according to section 235 of the Education Act, R.S.O. 1980, c.129 (Ontario); section 74 of the Education Act, R.S.N.S. 1967, c.91 (Nova Scotia); and section 15 of the School Act S.A. 1988, c. S-31 (Alberta), it is the duty of the educator *" to teach diligently and faithfully ... to encourage the learners by precept and example ... to maintain proper order and discipline"* in the school or room in his charge and on the school grounds and during activities sponsored or approved by the school board (MacKay & Sutherland, 1990:198-199 and 237; Black-Branch, 1997:79). The most striking feature of these sections is the extremely broad scope.

These sections on educators require educators to be beyond reproach as "moral exemplars" for the community at large and its children. Educators are under constant scrutiny in their community, seeing that parents are over-sensitive to who is setting an example to the learners. The privacy and lifestyle of the educator may cause difficulty with employers and even lead to court challenge. Possible arguments in defence could be made with reference to, *inter alia*, the following sections of the Canadian Charter of Rights and Freedoms (MacKay & Sutherland, 1990:199 and 202):

> *"2. Everyone has the following fundamental freedoms:*
>
> *(a) freedom of conscience and religion;*
>
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*

(c) *freedom of peaceful assembly; and*

(d) *freedom of association.*

7. *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice* (commonly referred to as the *due process* clause).

8. *Everyone has the right to be secure against unreasonable search and seizure."*

In ***Abbotsford School District 34 Board of School Trustees v Shewan and Shewan*** *(1986), 70 B.C.L.R. 40 (S.C.)* the restrictions on educators' privacy and lifestyle came to the fore. An American magazine published a photograph of a half-nude local educator. She had been photographed by her husband who was also an educator. Both educators were suspended without salary for one month. The British Columbia Supreme Court upheld the suspension, and indicated that educators were expected to meet the standard of conduct of the community in which they taught. An appeal was dismissed by the British Columbia Court of Appeal, based on the argument that educators not only hold a position of trust and responsibility, but their conduct could also not be permitted to jeopardize public confidence in the school system.

Given that they are viewed as state agents in law (*cf.* 5.1), educators in Canada are subject to scrutiny under the Canadian Charter of Rights and Freedoms. Moreover, MacKay and Sutherland (1990:198) point out that although the Charter provides a fairly broad scope for the responsibilities of educators, all the rights of learners (*cf.* 5.5.2) may be construed as part of the legal responsibilities of educators. Many of these responsibilities are not of major concern to individual educators, since the issues are so broad that they require well-defined school board policies and procedures. In most cases of violations of the learner's rights, the school board policy will be challenged in court, rather than the educator personally (MacKay & Sutherland, 1990:244).

Prior to the Canadian Charter of Rights and Freedoms, school administrators and educators enjoyed a substantial degree of administrative autonomy in their decision-making capacity. These education officials acted according to what they felt was appropriate for the safety, security and well-being of the school environment. Decisions were made which were deemed to be *in the best interest of the learner* and the school community at large (Black-Branch, 1997:67).

Currently, however, educators must adhere to the principles enshrined in the Charter of Rights and Freedoms. Section 1 (commonly referred to as the limitations clause) clearly indicates that none of the rights and freedoms are absolute:

> *"1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

It thus follows that in some instances, subject to the discretion of the judiciary, schools and school systems can limit freedoms within the educational context in order to promote a broader social "good" within the school community. These limits to individual rights and freedoms in school must of course have the force of law (Black-Branch, 1997:24-25).

Educators must therefore act reasonably, *inter alia*, when setting school rules and when administering sanctions for violations thereof (Black-Branch, 1997:65 and 89). However, this should not be seen as a threat to education. Based on an assessment of court cases which dealt with learners and administrative practices, some of which involve the physical handling of learners, Black-Branch (1997:68) comes to the conclusion that the court is likely to uphold administrative and educator acts which are thought to be in the overall interest of the school community.

The Supreme Court of Canada spelt out the nature of the limitations clause in ***R v Oakes*** *(1986) 2 S.C.R. 713.* Commonly known as the *Oakes Test*, the *Oakes* decision provides a two-step analysis to determine whether a legal provision is a *reasonable limit* and is *demonstrably justified*. It was pointed out that section 1 has two functions, namely that of constitutionally guaranteeing the rights and freedoms set out in the

provisions, and of stating explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured.

In another case, namely ***R v Edwards Books and Art Ltd.*** *(1986) 28 C.R.R. 1*, the procedure of the *Oakes Test* was explained by the court as satisfying two requirements to establish a limit as reasonable and demonstrably justified. Firstly, the limitation must bear on a *pressing and substantial concern*, which means that it must be of sufficient importance to warrant overriding a constitutional right. Secondly, the means which have been chosen to attain the objective must be appropriate to the ends. This requirement entails three aspects: the limiting measure must be rationally connected to the objective, impair the right as little as possible, and not infringe on individual or group rights to the degree that the objective becomes outweighed by the infringement of rights.

According to MacKay and Sutherland (1990:171), the most significant impact of the Charter of Rights and Freedoms in constitutional terms is that it is leading to national standards in education. With rights and freedoms having been established for every Canadian citizen (regardless of residence or age) by the Charter of Rights and Freedoms, education rights and privileges can no longer be variously defined by different provincial Education Acts (MacKay & Sutherland, 1990:171). As the courts are currently hearing cases which involve the impact of constitutional rights in education, the provinces and schools are forced to adjust and amend their education policies and reassess their practices to comply with the norms of the Charter of Rights and Freedoms, or else face litigation (Black-Branch, 1997:20).

5.4.3 Japan

As was mentioned earlier (*cf.* 5.2.3), the Japanese Constitution does not contain any *specific provisions* for education. However, the background to educators' duties and responsibilities in Japan is article 26 of the Japanese Constitution which states that:

> *"(1) All people have the right to receive an equal education correspondent to their ability, as provided by law.*

(2) All people shall be obligated to have all boys and girls under their protection receive ordinary educations as provided for by law. Such compulsory education shall be free."

Article 26 is also referred to as *the right to education in Japan*, and Aoki (1990:321) points out that it is concerned with which education a learner receives in public education, how a learner develops, and who is to decide on the school teaching materials, contents and methods used. This article should be read in conjunction with other precise fundamental human rights provisions such as the dignity of the individual (article 13), religious freedom (article 20), freedom of expression (article 21), academic freedom (article 23) and due process of law (article 31).

At the same time it is provided not only in the Japanese Constitution (article 26 section (2)), but also in Japan's Fundamental Law of Education (article IV) that parents or guardians have a duty to protect the learner's right to compulsory common education for 9 years, that is from 6-15 years of age (Aoki, 1990:320-321; *cf.* 5.5.3).

The relationship between the responsibilities of the educator and his educational freedom is theoretically formulated in accordance with the Japanese notion of the *child's rights* (*cf.* 5.5.3). As pointed out by Horio (1990:190), the primary responsibility for educating the learner and guaranteeing his right to learn falls upon the people as a whole, and upon parents in particular. Parental power which was previously exercised by the father is, pursuant to the reform, currently in the hands of both parents (Oppler, 1997:138).

One of the major duties of secondary educators in Japan is to oversee and guide the various extracurricular activities through which the learners should learn the discipline of group life and the value of perseverance, to develop their physical strength, and so identify themselves with the school community. It is generally assumed that elementary and secondary school educators should also exercise supervisory power over learners' behaviour outside the school (Fujita, 1991:157; *cf.* 5.5.3).

The following three characteristics emerge from the legal principles of public education which are contained in Japan's Fundamental Law of Education (Aoki, 1990:321):

- Article I of Japan's Fundamental Law of Education (as an outcome to article 26 of the Japanese Constitution; *cf.* 5.3.3) asserts that educators must essentially aim at developing the individual personality of the learner, not indoctrinate ethics or morality:

  "ARTICLE I - Aim of Education: Education shall aim at the full development of personality, striving for the rearing of the people, sound in mind and body, who shall love truth and justice, esteem individual value, respect labour and have a deep sense of responsibility, as builders of a peaceful state and society."

- The law relating to educators must create people's trust for educators, thus improving the educator's status. According to article II of Japan's Fundamental Law of Education (as an outcome to article 23 of the Japanese Constitution), educators must have an autonomous authority and so assume professional responsibility for school teaching:

  "ARTICLE II - Educational Principle: The aim of education shall be realized on all occasions and in all places. In order to achieve the aim, we shall endeavour to contribute to the creation and development of culture by mutual esteem and co-operation, respecting academic freedom, having a regard to actual life and cultivating a spontaneous spirit."

- Public participation in the educational decision-making process must be secured. According to article X of Japan's Fundamental Law of Education (as an outcome of article 92 of the Japanese Constitution), constitutionally-protected rights to education are provided with the decentralization of educational governance:

  "ARTICLE X - School Administration: Education shall not be subjected to improper control, but it shall be directly responsible to the whole people. School administration shall, on the basis of this realization, aim at the adjustment of the various conditions required for the pursuit of the aim of education."

In the landmark decision of ***Japan v Sato et al.***, *30 Keishu (5) 615 (Supreme Court. G.B. May 21, 1976)*, also referred to as the ***Hokkaido Gakute Case***, the court ruled that, based on article 26 of the Japanese Constitution which affords every person the right to develop his own personality both as a citizen and as an individual, the

educator must carry out his duty *in the interest of the child*. Japanese educators thus have a highly respected mission to meet the learner's right to learn (*cf.* 5.5.3).

It is quite clear from both the Japanese Constitution and the Fundamental Law of Education, that educators should not be robots controlled by superiors; they should have autonomous authority for teaching (*cf.* ***Ienaga v Japan*** *Hanrei Jihoo No.751 (Tokyo District Court. July 16, 1974)* as discussed in 5.5.3). Few countries respect educators the way Japan does: teaching is regarded as prestigious a profession as medicine or engineering, and the term *sensei* or master is used both for educators and people with doctorates. The Japanese educator fully deserves this respect, based on his advanced level of training and his exceptional zest for work.

Unfortunately the educator's zest for work causes him to put immense pressure on his learners. On the one hand an intensive system of entrance examinations (*cf.* 5.6.3) at the end of the lower secondary phase determines whether a learner can move on to upper secondary education - in reality determining the course of a learner's life (Schoppa, 1991:4-6). On the other hand upper secondary institutions are judged according to their ability to get learners accepted at the prestigious institutions for advanced education. The educator ends up coaching the learner obsessively in order to increase the number of candidates admitted to prestigious institutions (Pretorius, 1995:350).

The statistics documenting high graduation rates suggest the belief that learners complete school successfully and that the school should bear the responsibility for learners to graduate. Perhaps less obviously, these rates also suggest that dropping out of school (especially from senior high school) tends to carry a stigma (United States Department of Education, 1991:143-144). Fujita (1991:157) points out that these beliefs are not only reinforced by the structure and character of school activities and programmes, but are also linked inextricably with the strong *custodial role* of school in Japan. Merriam-Webster (1985:318) defines the word custodial as *"relating to guardianship; marked by or given to watching and protecting"*.

5.5 RIGHTS OF LEARNERS

As pointed out by Harris *et al.* (1992:61), the relationship between the interests and rights of parents, children and the State has been influenced by an increasing emphasis on the paramountcy of the child's welfare. Since the legal protection of the learner's welfare is not the same as the conferment of rights on learners, (Harris *et al.*, 1992:61), there is obviously room for disagreement about how much independence (if at all) to grant learners at different stages of their development.

5.5.1 England and Wales

Learners in England and Wales generally have few rights where their education is concerned. To secure the education and welfare of learners, educational legislation overwhelmingly lays duties on others, especially parents and local education authorities (Partington, 1990:106). Thus, under the legislation of England and Wales, children have no substantive right to education and are thus dependent on the obligations of their parents as educators. Parents' rights have been greatly strengthened by the Education Acts of 1980 and 1986 where choice of school and involvement in the management of schools are concerned, but no corresponding duty to consult learners has been enacted (Partington, 1990:106). If, for example, the parents of a learner decide on home schooling, the learner has no right to be consulted.

Currently, the compulsory school-going age in England and Wales is 5-16 (Goodey, 1995:189). In the case of magistrates judging school attendance proceedings, the aim is not to support the learner's right to education, but to convict the parents (Partington, 1990:106). Local education authorities assume that the parental duty is being carried out if the learner attends school regularly. Whether suitable education is being received, is not considered. At the same time, if a learner is excluded from attendance at school either temporarily or permanently, the right of appeal is granted not to the learner, but only to the parents.

While Harris *et al.* (1992:60) feel that these extensions of parental rights have produced a conflict between State and parents' interests, whilst failing to advance the independent rights of learners, Barrell and Partington (1985:56) point out that it

remains a perennial dilemma for those in education services to decide whether children should have autonomous substantive rights in law, or whether parents should be endowed with such rights to exercise on their children's behalf. On the one hand the education system is criticized for creating vested interests for principals, educators and administrators. On the other hand, the system may be seen as paternalistic in that it seeks to protect children not only from themselves, but also from allegedly bad influences (Barrell & Partington, 1985:56).

In recent years there has been a shift in the general direction of children's autonomous rights: where care proceedings are, for example, being heard in the juvenile court, a child is entitled to request that his parent does not speak for him according to the Magistrates Court (Children and Young Persons) Rules of 1970. Section 18 of the Child Care Act (1980) stipulates that the local authority is required to *"so far as is practicable, ascertain the wishes and the feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding"* (*cf.* 2.2.2).

The case of ***Gillick v West Norfolk and Wisbech Area Health Authority*** *[1985] 3 All ER 402*, made positive change in the attitude of the law towards the rights of children evident. A mother applied to court in search of a guarantee that her daughters (under 16 years of age) would be given contraceptive advice by the National Health Service only with her prior consent. The House of Lords ruled against the mother, laying down two principles: in the first place that *"parental rights are derived from parental duty and exist only as they are needed for the protection of the person and the property of the child"* and in the second place (quoting an earlier judgment) that the power of the parents *"starts with a right of control and ends with little more than advice"*. Parental rights *"yield to the child's right to make his own decisions hence he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision"* (*cf.* 2.4.1).

On the other hand, however, according to Partington (1990:106), the Education Act 1986 has unfortunately in actual fact reduced learners' rights even further: the right of elected learners to serve as school governors was abolished because of a general view in local government legislation that public office involving the spending of public

funds should be held only by persons of adult status, which means over 18 years of age. In the second place the same Education Act awarded school governors the right to veto sex education in their school, without allowing learners the right of appeal against such a decision.

5.5.2 Canada

In Canada education laws traditionally focussed on the *duties* rather than the *rights* of children. With the advent of the Canadian Charter of Rights and Freedoms, there has been greater emphasis on particularly the rights of learners (MacKay & Sutherland, 1990:209). While it is certain that the Charter of Rights and Freedoms is the primary focus of learner rights in Canada, the human rights codes of the provinces, as well as Department of Education regulations and school board policies of some provinces and school districts, provide further protection of learner rights (MacKay & Sutherland, 1990:219). Although only the human rights codes of Quebec (*Charte des droites et libertes de la personne, L.R.Q. 1977, c.C-12*) and Saskatchewan (*Saskatchewan Human Rights Code, S.S. 1979, c.S.-24.1*) *expressly* protect education, many human rights codes have been interpreted as applying to schools (MacKay & Sutherland, 1990:219).

The Charter of Rights and Freedoms specifies three ways in which school authoritites can violate the learner's rights in general terms (MacKay & Sutherland, 1990:213):

- when the content of a school rule violates the Charter;
- when the procedures followed to enforce a particular school rule violates the rights of a learner; and
- when the mode of punishment (*cf.* 5.6.2) used to enforce the school rule constitutes a breach of the Charter.

Section 7 of the Canadian Charter of Rights and Freedoms (*cf.* 5.6.2) concerns itself with enforcing the rules and serves to ensure substantive procedural fairness in administrative decision-making, since it guarantees the principles of fundamental justice (MacKay & Sutherland, 1990:215):

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Most provinces have provisions which are designed to ensure that children are safe from child abuse. These provisions recognize the vital role which the educator plays in detecting physical or mental abuse of learners (Manley-Casimir & Newman, as cited by MacKay & Sutherland, 1990:219). Section 215 of the Criminal Code requires that children be provided with the necessities of life, and the doctrine of *parens patriae* (*cf.* 5.4.2) gives the court the jurisdiction to protect children.

Section 15 of the Charter of Rights and Freedoms guarantees everyone (including the learner) equal protection and benefit of the law, without any discrimination (*cf.* 2.4.1.2). Specific discriminations which are ruled out, are those of discrimination based on sex, national or ethnic origin, colour, religion, age or mental or physical disability. Some of these enumerated grounds, such as age, sex, and physical disability, are particularly relevant for educators.

Even though very little is specifically aimed at education (*cf.* 5.3.2), the Charter of Rights and Freedoms provides the vehicle for a shift towards a learner-centred education system, away from the existing adult-based system (MacKay & Sutherland, 1990:219). However, the legally recognized practice of parents exercising the learner's rights on his behalf currently remains intact. MacKay and Sutherland (1990:248) describe this practice as an example of *bias*, and point out that it is reflected in the civil procedure codes of all the provinces which provide for violations to be brought to court on a *guardian ad litem basis* (adults acting on behalf of the minor). They draw attention to the fact that the Federal Parliament was forced to amend the Young Offenders' Act so that children are allowed to retain lawyers' services directly, since the Manitoba Court of Appeal had expressly interpreted that Act to deny children the right to retain counsel.

Although the Charter of Rights and Freedoms grants the youth the same basic rights as adults, it also invites the court to use section 1 to determine the "reasonable limits" to the expression of these rights. Moreover, Canada's history suggests that the court is likely to accept many limits on the rights of children (MacKay & Sutherland, 1990:219).

Broad discretionary powers are granted to school boards, school administrators and educators by the provincial education acts. The position of the learner is typically influenced more frequently by these discretionary powers, being at the bottom of the school hierarchy. Since the arrival of the Canadian Charter of Rights and Freedoms these discretionary powers need to be exercised within reasonable limits (MacKay & Sutherland, 1990:209). Yet the scope has not been restricted significantly, since many valid objectives may be pursued through the use of discretionary authority. Or as Black-Branch (1997:73) puts it, it seems as if the court is upholding traditional practices subordinating the legal rights of the learner to the *reasonabe* management of schools. It will rule against the acts of school administrators only when it is felt that they have acted in an excessive and unreasonable manner, such as deliberately misleading a learner to believe something other than the truth, or by denying him his rights in accordance with the Young Offenders Act, R.S.C. 1985 (Black-Branch, 1997:79).

In ***R v Sweet*** *(12 December 1986), (Ont. Dist. Ct.) [Unreported],* contained in Dickinson and MacKay (1989:389-390), a nineteen-year-old male learner was detained for what was described as a serious breach of school discipline. Several educators alleged that Sweet had been smoking marijuana at school. Sweet was told to stand against the wall in the hallway to await the arrival of the vice-principal. He defied the order and left school, physically assaulting an educator who attempted to keep him from leaving. Charged with assault, Sweet claimed that his fundamental rights in terms of the Charter of Rights and Freedoms had been violated in three ways: he contended that he had been arbitrarily detained (section 9), that he had been denied the principles of fundamental justice (section 7), and that he had not promptly been informed as to why he had been detained (section 10(a)). The court considered the ***R. v G. (James Michael)*** case (*cf.* 5.6.2) in reaching a decision. It stated that these legal rights (within the meaning of section 10(a)), do not apply in a situation of an alleged serious breach of school discipline. The court concluded, in fact, that had the principal and educators not acted in this manner, it would have been a serious dereliction of their duties. Since such a detention did not constitute a detention within the meaning of section 10, the educators were under no obligation to inform the learner of the reasons for his being detained. Moreover, he had not been arbitrarily

detained under section 9. The court also found no evidence that the principles of fundamental justice (under section 7) had been violated.

The Canadian Charter of Rights and Freedoms is unique in its endorsement of educational linguistic rights. No other country currently makes such a recognition under constitutional law (Black-Branch, 1997:118). The framers of the Charter believed the provision of minority language education to be crucial to the continued existence of linguistic minorities. It was believed not only that national unity would be enhanced, but also that the assimilation of the minority into the majority would be stemmed (MacKay & Sutherland, 1990:186). At the same time an important distinction regarding these rights should be made: they are bestowed on the parent and not the learner. Hence, in the event of disagreement regarding the realization of these rights, the parent makes application with the court on his own behalf and not that of the learner (Black-Branch, 1997:119). However, it remains the learner who benefits greatly from these minority language educational rights.

The minority language educational rights are found in section 23 of the Canadian Charter of Rights and Freedoms. This section should be seen as a remedial provision, aimed at remedying past injustices regarding minority language educational rights and ensuring that the injustices are not repeated (MacKay & Sutherland, 1990:186; Black-Branch, 1997:142):

> *"23. (1) Citizens of Canada*
>
> *(a) whose first language learned and understood is that of the English or French linguistic minority population of the province in which they reside, or*
>
> *(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,*

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds."

In ***Mahé et al. v R. in Right of Alberta et al.*** *[1987] 6 W.W.R. 331, 42 D.L.R. (4th) 514 (Alta C.A.), rev'd [1990] 3 W.W.R. 97, 72 Alta. L.R. (2d) 257 (S.C.C.)* the court was called upon to interpret section 23. On 15 March 1990 the Supreme Court of Canada rendered its decision. A group of section 23 rightholders were dissatisfied with the provisions for French language education in the Edmonton, Alberta area. At the time of the Supreme Court hearing, the Edmonton Roman Catholic Separate School Board was operating a French school. The rightholders argued that they had no measure of management or control over the school. They contended that section 23 entitled them to a completely autonomous school board. The Supreme Court offered guidelines for the management and control of minority language education in accordance with what it called a *sliding scale approach* (*cf.* 2.4.1.2) to interpreting this

section. The sliding scale approach refers to the fact that, depending on the number of minority language learners of parents who qualify *per province*, the type of arrangements for this minority language educational instruction will be determined. As the number of the learners of parents who qualify increases, so too will the requirements for separate educational facilities and arrangements for management and control by the minority group. The court stated that although the minority language and majority language educational systems need not be identical, funds allocated to the minority language schools must at least be *pro rata* to the funds allocated to the majority schools in a province. It concluded by saying that the rights in section 23 should be interpreted so as to interfere as little as possible with provincial legislative jurisdiction over educational institutions.

Applications of minority language rightholders to instruct their children at home (the so-called *home-schooling system*), can be filed according to guidelines established by the individual provinces. The application should be neither biased nor advantaged by the fact that the applicant is a minority language parent (Black-Branch, 1997:141).

MacKay and Sutherland (1990:209) are concerned about the fact that, although it is assumed in Canada that parents will always act in the best interests of their children, the children might have a different view as to what are in their best interests. Option rights such as freedom of expression, belief or opinion had previously been denied to learners on the basis that children were unable to make competent choices. Now that the concept of learners' rights has become fashionable, however, this notion is being called into question.

5.5.3 Japan

Although the Japanese Constitution has transformed the legal status of the learner from that of a duty-follower to that of a right-holder, it cannot be said that the learner's rights have been protected in schools. Horio (1990:116) points out that the duty involved concerning compulsory education (*cf.* 5.4.3), was conceived not in terms of the need to guarantee the rights of the learner, but rather in terms of the Imperial State's need to make sure that parents complied with the obligation to submit their children to education.

One of the most critical hindrances to the protection of the learner's rights in the Japanese school is that school authorities have a wide discretion over learners and their parents (Aoki, 1990:327). An example of this would be the school rules of order and behaviour which school officials determine arbitrarily (Horio, 1990:16; *cf.* 5.6.3). The ideology of *over-management* which dominates contemporary Japanese society often results in the abuse of the learner's rights to grow and learn freely.(Horio, 1990:15). Or as Tobin (cited by Finkelstein, 1991a:77-78) puts it: *"Japanese children go into pre-school overindulged and undercontrolled and come out overcontrolled, unimaginative, and spiritless".*

There appears to be three theories why learners' rights are not protected and advanced in school (Aoki, 1990:327-328):

- The first and most persistent theory is concerned with the adoption of the German civil law doctrine of *Besonderes Gewaltverhältnis* (Special Governmental Relationship). According to this theory, private individuals should be subordinate to a public officer who has special and superior authority over them. Such a public official holds comprehensive power of control, order and discipline, even without a specific detailed statutory base. These actions may even be beyond judicial review. This principle is inconsistent with Japan's (rights-based) Fundamental Law of Education.
- The second theory is built on the argument that learner-school relationships are based on contract, so that the school, the learner and the parent are on equal footing regarding matters of educational rights and conditions. School officials as well as educators exercise their authority only within the confines of the contract. Such contracts occasionally have terms which are unclear, and school codes and schoolboard policy are vague in terms of regulating powers. This approach may allow for wide discretion unless more precise or restrictive standards are developed by local boards of education or schools. At the same time it can provide for the learner and parents to bring suits to court to claim their legal rights in the school setting. In reality, however, rights are more restricted and less protected in Japanese schools.

- The third theory is that educators and learners establish school self-government on an equal footing. Kaneko (as cited by Aoki, 1990:328) is of the opinion that this argument does not necessarily conflict with the contract principle. Educators must have some professional freedom and learners must have the right to learn and participate in the school teaching process, assuming that the fundamental principle is the protection of all human rights in the school setting. According to this theory, if there is concern that such autonomy might limit the court from intervening in in-school violation of the learners' rights, it could be argued that the court can intervene in support of the protection of the learner's rights and democratic education. This would then emphasize the fact that the learner's right to learn must be applied in the school situation. At the same time it is the starting point for developing the right to education as a fundamental human right.

A very important interpretation of Article 26 of the Japanese Constitution is found at the beginning of the ruling in ***Ienaga v Japan***, *Hanrei Jihoo No.751 (Tokyo District Court. July 16, 1974).* In this ruling the idea that the people (and thus the learner) have the *right to receive education* is formulated as an expression on the cultural plane of the fundamental right to existence. Judgement was handed down in response to an educator's suit challenging the constitutional legality of the textbook screening system and the process by means of which the Japanese Ministry of Education withdrew the certification of his Japanese textbook for upper secondary school use. In addition to regarding education as a right of the learner, based on his own needs and requirements, the judgement calls attention to the special character of the human rights which the learner possesses by virtue of his existence as a being who has *inherent potentiality in and possibilities for the future.* Furthermore, the court recognized the learner's rights to grow and learn as *innate rights grounded in natural law.* In accordance with this notion of the learner's rights, the relationship between the responsibilities of the educator and his educational freedom is theoretically formulated (*cf.* 5.4.3). The court pointed out that because the educational obligations concerning the learner are realized for the most part through the work of the educator, the latter's professional duties are grasped as responsibilities to society which are entrusted to him by the learner's parents. Although the court did not declare the screening system unconstitutional, it declared that the system as it was administered at the time violated

5.6 DISCIPLINE

It is widely accepted that the standard of educating and learning will suffer without good discipline in a school. Learner behaviour has been described as *"a touchstone of the quality of the school system"* (Harris *et al.*, 1992:141), and in South Africa this is considered to be the most urgent problem underlying all educational problems.

Yet it would be difficult to prescribe acceptable standards of learner behaviour for universal application in exact legal terms.

5.6.1 England and Wales

Under English and Welsh law the educator's right to administer reasonable punishment to pupils derives from the educator's status *in loco parentis* (Barrell & Partington, 1985:444-445; *cf.* 3.3.5), although the notion of the educator's quasi-parental role has frequently been questioned. According to Partington (1990:108) this status derives from case law even though, with the passing of time, it has been modified both by individual local education authorities' regulations binding over their employees and by statute. An example would be the banning of corporal punishment by the Education Act 1986.

Even though English and Welsh law nowhere insists that learners must or must not be punished as far as their behaviour at school is concerned (Harris *et al.*, 1992:139), it has been held since 1888 that there is *"some discretion of restraint given to (school) masters in the interest of school order and discipline"*. However, the discretion must be exercised reasonably (Partington, 1990:110).

Case law in England and Wales has established the following (Partington, 1990:108):

- Being *in loco parentis*, educators have the right to influence both a learner's social and scholastic behaviour. Furthermore, the authority over such behaviour extends to cover the daily journeys between home and school.
- Principals have the right to make reasonable rules of behaviour for their schools.

The limits beyond which educators may not go in the area of punishment have been built up over the years from actions brought in court, also called *judge-made law* (Partington, 1984:109):

- Punishment must be meted out "in good faith".
- When punishing the learner, the educator must bear factors affecting the learner in mind.
- The punishment itself must be such as the parent might expect his child to receive in the given circumstances.
- The punishment must be such as is usual in the school.

With reference to specific disciplinary methods, the confusion surrounding the variations in the meanings of the terms suspension, exclusion and expulsion was cleared up with the Education Act 1986. According to section 23 of this Act, the statutory term is *exclusion* and it may be for a fixed term or permanent. Provided the exclusion is in good faith, it cannot be challenged in the courts of England and Wales (Barrell & Partington, 1985:462). The Education Act 1986 created a very important legal framework within which exclusions from school may take place, which allows parents and others to have their say in the decision-making process (Harris *et al.*, 1992:146).

Concerning exclusion, the Education Act 1986 put much that had previously been subject to case law and local variation onto statutory footing. On the one hand the motivation to do so sprang from publicized clashes between educators and governing bodies over the reinstatement of allegedly violent learners. The lack of any statutory authority to determine such cases finally, was keenly felt. On the other hand, there was not only the awareness of the provisions of the European Convention on Human Rights relating to the "Right to Education", but also the need to demonstrate that this should be denied a learner (if it is denied at all) only after due and careful process (Partington, 1990:109-110; *cf.* 3.2.3 and 3.3).

5.6.2 Canada

Based on an assessment of many Canadian court cases dealing with incidents involving learners and administrative practices which include the physical handling of learners, the courts are likely to uphold administrative and educator actions that are thought to be in the overall interest of the school community (Black-Branch, 1997:68).

Dickinson, as cited by Black-Branch (1997:69) states that the protection of the rights of other learners in the learning environment at school requires authorizing educators to discipline forcibly any learners who disrupt that environment. Even the Law Reform Commission of Canada would not interfere with educators' authority to use coercive or restraining force.

Turning to the federal Criminal Code is the first step in determining the scope of legally permitted punishment in Canada. Section 43 of this statute has traditionally protected educators from criminal assault charges when physical force is used to discipline a learner:

> *"Every schoolteacher, parent, or person standing in the place of the parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."*

Deriving from the doctrine of *in loco parentis*, this section has recently come under fire for the antiquated attitude which it illustrates towards children (*cf.* 5.4.2). The Supreme Court of Canada has interpreted it strictly to restrict its application so that the use of force must be proved to be of benefit to the child's education (MacKay & Sutherland, 1990:220). Given the trend in educational philosophy away from physical correction, it will become increasingly difficult for educators to argue that physically disciplining a learner will "benefit" his education.

However, regardless of the Canadian Charter of Rights and Freedoms, the courts support the notion that educators are not only encouraged to take control, but are in fact compelled to act in situations of a breach of discipline by learners at school. Not to do so would amount to a breach of the educators' statutory duties in observance of the Education Act (Black-Branch, 1997:79; *cf.* ***R v Sweet*** in 5.5.2). The judiciary is only willing to rule against the system when there has been apparent abuse of administrative authority which cannot be tempered by section 1, the limitations clause (Black-Branch, 1997:79).

R. v G. (James Michael) *(1986), 56 O.R. (2d) 705 (C.A.)* involved a fourteen-year-old learner. Another learner told the principal that Michael was in possession of illegal drugs. The accused was summoned to the principal's office and instructed to take off

his shoes and socks. The principal removed a piece of tinfoil containing marijuana. The police were called and they promptly arrested Michael, informing him of his legal rights. He was convicted under the Young Offenders Act for possession of narcotics. Michael claimed that his legal rights under section 10(a) of the Canadian Charter of Rights and Freedoms had been violated by his being detained to be searched. He furthermore claimed that the school principal had failed to inform him of his right to counsel before asking him to remove his shoes and socks, and that the drugs had therefore been found during an illegal search. However, the court's decision was in favour of the school, stating that in this case the search was merely an extension of normal disciplinary acts. The court found no evidence that the principal was doing anything other than performing his duties, since school management includes reasonable disciplinary actions or investigative procedures to assist in managing schools. According to Black-Branch (1997:79) the precedent set by this case sends a clear message to school principals that they are to conduct business as usual within their schools.

In the case of ***R. v Lauzon*** *(23 May 1991), (Ont. Prov Div), Merredew Prov J. [Unreported]*, contained in Black-Branch (1997:68-69), a high school educator was charged on two counts of assault, stemming from incidents in the gymnasium and the boys' locker room. The educator admitted to having used physical force (by grabbing the learner's arm several times and shaking him) for belligerent language and defiance of authority. The court upheld the educator's acts, stating that the educator had not used *excessive force* (as referred to in section 43 of the Criminal Code) while he was trying to control and remove a defiant, rebellious learner.

Although most forms of punishment could be challenged as infringing a liberty or security of the learner (person) under section 7 of the Charter of Rights and Freedoms, the courts will not ban all forms of discipline in the Canadian schools. The scope of legally permissible punishment ranges from negative comments on a learner's record, through detentions, exclusions and suspension, to expulsion, as long as they are enforced fairly. However, the line is drawn at corporal punishment in most jurisdictions (MacKay & Sutherland, 1990:221), and strict attention is given to the procedures leading up to the punishment.

An example would be the Yukon O.I.C. 1982/287, s.22 regulation which covers the administration of corporal punishment:

> *"22 (2) No corporal punishment may be administered for other than major offences, such as theft, vandalism, or any practice which is likely to injuriously affect the character or person of other pupils. "*

On the other hand, Schools Act Regulation, B.C. Regulation 436/81, s.14 of British Columbia prohibits the use of corporal punishment:

> *"14 (1) The discipline in every school shall be similar to that of a kind, firm and judicious parent, but shall not include corporal punishment to any pupil.*
>
> *(2) No teacher shall administer corporal punishment to any pupil."*

As can be seen from the regulation in Yukon which bars the learner from *injuriously affect(ing) the character or person of other pupils*, some Canadian regulations actually set out specific duties of learners. These are, *inter alia,* punctuality, clothing, banning the use of obscene language, cleanliness, deportment, respect for school property, overall courtesy to educators and classmates, and the duty to attend school (MacKay & Sutherland, 1990:211-212).

5.6.3 Japan

Although the Japanese school system has been applauded, as can be seen in its high test scores in international achievement contests, many schools in Japan have been confronted with education and discipline problems such as lower levels of academic achievement, higher levels of truancy, violence at home and at school, delinquency, dropout, bullying, malicious teasing, isolation and other problems (Horio, 1990:14). Generally speaking, most controversy is resolved without reference to the courts so that legal issues affecting education are to be discovered in educational rather than in legal practice (Aoki, 1990:317).

Blame for the absence of adequate solutions concerning such problems seems to be laid at the door of Japanese public school governance. Accordingly, several controversial issues involving the Japanese government's involvement in public school governance have been raised. For example article X is not clear on whether the

phrase "shall not be subject to improper control" prohibits the central government from determining the content of the curriculum. While the current administration has interpreted this phrase as not prohibiting central government from intervening in public schools, many Japanese legal commentators argue that the central government's control of education is illegal under the Japanese Constitution and the Fundamental Law of Education (Horio, 1990:120-122). These commentators have asserted that article X calls for a dramatic change from the central governmental domination over public schools that characterized the pre-World War II period.

Controversy also surrounds the question whether the central government's authority to establish "various conditions" for the pursuit of educational goals should be interpreted narrowly or broadly. On the one hand there is the interpretation that this phrase empowers the government to control internal school operations from disciplinary procedures to curriculum standards. On the other hand there is some sentiment among Japanese educators that governmental authority should be limited to external conditions necessary for education to take place (Aoki & McCarthy, 1984:445). To date, the actual meaning of the phrase *external conditions* has not been clarified.

The Ministry of Education justifies the central control of education as necessary to modernize the Japanese society. Centralization assures that all schools have similar subject packages and standards, since there is a lack in confidence that local school boards can make educational policy in the best interest of the nation. Accordingly, when confronted with a discipline problem, the local school board contacts the Ministry of Education for advice. Therefore a *Handbook on School Administration* containing detailed specifications has been distributed by the Ministry of Education (Aoki & Mc Carthy, 1984:446).

Although the position of the educator is equal to that of a public employee in Japan, teaching enjoys a special status foretelling independence, future-expectancy and trusting person-to-person relationships. Assuming that teaching is to be carried out in such a context of professional freedom, Aoki (1990:325) points out that educators should be able to decide, among other things, how to discipline learners and maintain a safe and healthy environment.

According to Horio (1990:15) and Finkelstein (1991a:78) *all* aspects of the Japanese learner's life whether he enters the school grounds or goes out on his own after school hours, are being managed through the highly detailed rules of order and behaviour which are arbitrarily determined by the schools (*cf.* 5.5.3): whether it be the hairstyle, the length of the skirt, the colour of the socks, or the width of the schoolbags. Horio (1990:15) finds it particularly alarming that, even though physical punishment is forbidden, *schools are administering physical punishment* to learners who violate these arbitrarily determined rules.

In addition to the more obvious forms of discipline exercised by educators, such as enforcing school and classroom regulations and punishing those who violate these rules, there is also the hidden form of discipline resulting from the entrance examination educational evaluation in the form of the report card and the so-called *naishinsho*. The latter is a confidential report used as a means of evaluation by upper secondary schools when deciding whom they will admit (Horio, 1990:279; *cf.* 5.5.3). Apart from the learner's course grades which are obviously known to him, this report also contains confidential information regarding his character and behaviour. The latter is graded according to a predetermined five-stage scale. Because neither the learner nor the parent is allowed either to see the report, challenge its validity, or appeal to have it altered, the system of *naishinsho* has come to function as an *invisible whip* in order to keep Japanese learners in line (Horio, 1990:279-280).

The increasing incidence of disciplinary problems in Japanese schools (as mentioned above) results from, *inter alia,* the increasing pressures generated by an overheated school system and excessive competition in entrance examinations (Horio, 1990:12; Finkelstein, 1991b:140); Schoppa, 1991:49; Pretorius, 1995:361-362). In a 1983 study of juvenile violence, Yoshiya (1983:15) attributed this situation to the fact that *middle school represents a terrifying selection process for young people.*

The pressure placed on Japanese learners by the *examination hell* (Pretorius, 1995:361) has given rise to all sorts of disciplinary problems at school. The Afrikaans newspaper *Beeld* (as cited by Pretorius, 1995:361) reported on Friday 24 June 1988 that five Japanese learners had died in the previous three years as a result of excessive corporal punishment.

Instead of enhancing the educator's role in Japan, the ideologies of managerial efficiency and strict discipline have hastened the deterioration of the educator's educational prestige and pedagogic authority (Horio, 1990:280).

5.7 LIABILITY FOR NEGLIGENCE OR MALPRACTICE

As in all other professions, education takes place within a legally secured environment. It is therefore vitally important that all stakeholders be updated with legal expectations and requirements. At the same time, educators across the world should feel safe and secure in performing their work.

5.7.1 England and Wales

In England and Wales, the term *negligence* has been described as having three meanings in law: a state of mind, careless conduct and the breach of a duty to take care which has been laid down by law. What is definite is that in England and Wales the term rules out any intention whatsoever to injure anyone (Elgin, as cited by Partington, 1984:48). Harris *et al.* (1992:159) describe negligence as a tort, or a civil wrong in respect of which a court may order a person to be held liable to remedy his wrong. The remedy normally takes on the form of monetary compensation or damages. Although the satisfaction may be determined by a court or agreed upon by out-of-court settlements, it must be sanctioned by the court where the injured person is a child.

Only when the learner, suing through his parents, is able to establish negligence in civil law, will legal liability to pay compensation for damage or injury to a learner occur (Partington, 1984:46; Partington, 1990:110). The plaintiff must prove the necessary elements to constitute negligence (Adams, 1984:112; Harris *et al.*, 1992:160):

- that a legal duty of care was owed to the plaintiff;
- that the legal duty of care was broken; and
- that damage resulted.

An educator who is held liable for negligence in causing injury to a learner in the course of his duties, may find that the insurance offered by professional associations covers payment of compensation. There is also a general principle that where an

educator is negligent in the course of his duties, the education authorities (the employer) are vicariously liable (Harris *et al.*,1992:159; *cf.* 3.3.3).

Strictly speaking, an employer who is required to compensate his employee's victim may claim a contribution from the employee. However, it is unusual for this to happen in England and Wales in the case of educator negligence (Partington, 1990:110; Harris *et al.*, 1992:160), except where the injury has been sustained as the result of a deliberate act by the educator, such as assault (Partington, 1990:110).

Courts in England and Wales apply the test of the reasonably careful parent, not the anxious or excessively cautious parent (*cf.* 5.4.1). The basis for this test is the *in loco parentis* principle: the educator acts in place of a parent in having the care of children (Adams, 1984:104). No negligence was, for example, established when a learner was injured while playing on an ice slide which the learners had made on the playground. The making of ice slides was found to be a commonplace children's activity for centuries, thus there was no need to supervise the slide (Partington, 1990:111).

Several courts have held that the excessive supervision of children may be poor educational practice. In ***Jeffery v London County Council*** *(1954), 52 LGR 521* the court concluded as follows:

> *"... school authorities ... must strike some balance between the meticulous supervision of children every moment at school and the very desirable object of encouraging sturdy independence as they grow up."*

Moreover, another court noted in ***Suckling v Essex County Council*** *(1955)* that it is not necessary for an educator to go to quite extraordinary lengths to secure potentially dangerous items. Although it was standard practice in one school for the educator to hand out the modelling knives during handicraft lessons, one boy got his knife from the educator's unlocked cupboard and injured another boy. The court found that it would be putting an excessive burden on educational establishments to hold that an actionable wrong was committed by schools which left such implements unlocked. He is quoted as having said ..: "*It is better that a boy should break his neck than allow other people to break his spirit.*"

While Partington (1990:112) names the educator's foresight and the learner's age (*cf.* 2.2.2) as the keys in all education-related negligence cases, Harris *et al.* (1992:160) adds prevention as another important factor.

According to the former author and Khan (1991:540), courts in England and Wales will in the first place ask whether the injury could reasonably have been foreseen by the respondent (educator), using the professional skills of an expert on children's behaviour.

In the second place, the supervision of younger learners would of necessity have to be closer than that of older ones (Barrell & Partington, 1985:372). Part of the educational process involves encouraging learners to take increasing responsibility for their own actions. If an educator entrusts a learner or group of learners with a degree of independence, he must have regard not only for the propensity of children for mischief in certain situations, but also for the age of the learners. Older learners may themselves be held negligent or, if the educator is partly to blame, contributorily negligent (*cf.* 4.5.4). In school situations contributory negligence could well be important where older learners are concerned. If intelligent fifteen year olds were told not to touch certain chemicals because they were dangerous, or not to use certain defective pieces of apparatus, then it could well be contributory negligence if they were to disobey (Adams, 1994:116).

Older learners may thus be expected to protect themselves against risks about which the educator has warned them, whereas younger learners may not be trusted to do so, depending on the circumstances (Harris *et al.*, 1992:162-163). Contributory negligence is, therefore, unlikely to succeed in cases involving young learners who cannot be expected to understand the full implications of their actions.

In the third place, the educator would be expected to guard against (prevent) foreseeable harm to which learners might otherwise be subjected (Adams, 1984: 105-107). An injury which no reasonable amount of care would have prevented and which was not reasonably foreseeable, will not give rise to negligence (Barrell & Partington, 1985:373-375; *cf.* 3.3.3.1 and 3.3.3.2 and 4.4). An example would be that an educator would not be liable if, on a calm day, a freak gust of wind were to knock a learner to the ground (Harris *et al.*, 1992:160).

Educator liability for accidents during school games has become an area of concern. Although learners (taking into consideration the learner's age) accept that a degree of risk is implicit in taking part in any sporting activity, games masters must take due care while instructing. Compensation for injuries sustained during physical activities at school is frequently paid in England and Wales. This trend could become a major deterrent to educators who take such classes voluntarily (Partington, 1990:112-113).

5.7.2 Canada

Canadian educators are faced with duties from different sources to ensure the safety and well-being of the learners placed under their care. In Canada the high standard of care expected from educators is termed the *careful parent rule* (*cf.* 4.3.1). Furthermore, as was mentioned before, provincial education statutes impose specific duties on school personnel with regard to maintaining and supervising school premises, providing safe transportation for learners, and attending to their general safety and comfort (*cf.* 5.4.1). These duties are further clarified by regulations, school board by-laws, Department of Education and school board policy statements, personnel job descriptions and individual school rules and policies.

In the last instance, educators and school authorities are also subject to the criminal negligence provisions found in section 202-204 of the Criminal Code. MacKay and Sutherland (1990:252) point out that criminal negligence charges are very rarely laid against educators in Canada. Charges under the Criminal Code will only be laid if a *"wanton and reckless disregard for the lives and safety of other persons"* (as stated in section 202(2)) has been demonstrated.

Negligence on the part of the educator is not established by the mere breach of one of these expressed statutory or institutionally imposed duties. Canadian courts will consider the statute and regulations as evidence of an existing legal duty, and potential evidence of the requisite standard of care expected of educators in particular circumstances. Furthermore, to establish liability, a direct causal link between the injuries sustained by the learner and the educator's breach of the standard of care will have to be proven (MacKay & Sutherland, 1990:228).

Since the careful parent rule has its origins in the *in loco parentis* doctrine (*cf.* 1.2), it has endured harsh criticism in Canada, specifically for being too harsh on the educator and too flexible for the court decisions (*cf.* 5.4.2). Yet, in spite of all the criticism and the questions surrounding the modern applicability of the rule, in 1981 the Supreme Court of Canada reaffirmed the *careful parent rule* as the standard by which Canadian courts are to measure an educator's conduct (MacKay & Sutherland, 1990:229).

In the case ***Myers v Peel County Board of Education*** *(1981), 17 CCLT 269 (SCC)* the Supreme Court ruled that it was negligent for an instructor to force a learner to dismount from suspended rings without any safety mats in place. It was suggested that physical education instructors may be held to a higher standard of care than that of the prudent parent. The court's reasoning was prompted by the instructor's more detailed knowledge of the condition and capacity of the learners, as well as his familiarity with the activities and equipment used for physical education.

Educators in Canada are expected to take extra precautions not to place pupils in potentially hazardous situations when taking them on field trips. A long held and legally enforced responsibility is the educator's duty to take action in medical emergencies, as well as to look after the basic health of learners at school. Educators are expected to allow learners to seek medical attention when they request it, and to apply appropriate, competent medical aid in appropriate situations (MacKay & Sutherland, 1990:230).

However, learners are responsible for their own *tortuous acts*. In the case of ***McCue v The Board of Education for the Borough of Etobicoke and Stewart*** *(1982), (Ont. S. C.)* the grade nine pupil was held personally liable for injuring the eye of his fellow classmate by shooting a paper clip at him with an elastic band. In all common law provinces parents are not vicariously liable for their children's actions. The province of Quebec, where the civil code governs civil law, is the exception to this rule in Canada. By virtue of article 1054 of the Quebec Civil Code, both parents and educators are held responsible for the tortuous acts of children under their control. In Quebec, parents and educators have to rebut a presumption of legal responsibility in order to escape liability (MacKay & Sutherland, 1990:232).

5.7.3 Japan

The causes of injury to learners in Japan vary from, *inter alia*, being hit by a bat playing baseball, drowning in a swimming-pool, incurring broken bones in judo wrestling, to accidents from many other activities (Aoki, 1990:328). Although some injuries are found to have been caused by the misconduct of a certain person, it is difficult to specify a particular cause for avoidable accidents. At the same time some injuries may also result from defective school equipment (Aoki,1990:328).

Ito and Oda (1988:9) classify school injuries in Japan from the aspect of educators' liability as follows:

- injury during classroom teaching;
- injury between learners during teaching;
- injury in extra-curricula activities and club activities;
- excursion and gymnastic competitions;
- injury during school breaks and after school hours;
- injury caused by educator's violence, discipline and corporal punishment;
- injury caused by learners' malicious teasing or violence; and
- injury caused by defects in equipment or the operation of school facilities.

Almost all the learners enrolled in compulsory public schools enter the Japan Athletic and School Health Centre, established and controlled by the Ministry of Education in 1985 under the Japan Athletic and School Health Centre Law, in order to recover damages for learner injuries. While recovery for damages is based on moneys currently available to the centre and not on any security-liability rule, financial compensation amounts only to about thirty percent of the actual damages (excluding aspects such as automobile insurance and tort damages). Many injured learners and their parents are dissatisfied with this recovery amount (Aoki, 1990:328-329).

Where injury results from an illegal act, any person can recover damages under article 709 of the Civil Code. Article 17 of the Japanese Constitution provides that a person may sue for redress in the case of damages suffered through the illegal act of any public official. On the strength of this provision a special law of the Civil Code was

enacted, namely the State Compensation Law. This law allows a person to seek two types of damage-compensation (Aoki, 1990:329):

- damage caused by illegal acts in the execution of public authority (article 1); and
- damage caused by defects in the establishment and operation of public works (article 2).

Although there is a wide variety of cases, it is educators' negligence that is the most critical point in recovering damages. The case of ***Nakagawa v Kumamoto City,*** *Hanrei Jihoo No.621 (July 20, 1970, Kumamoto District Court)* serves as an example of the inconsistency in resolving cases under the current statute. A fifteen year old learner suffered a brain haemorrhage during an extra-curricular judo wrestling club activity. A supervisory educator supervised club activities about twice a month and on that specific day he had left the school to attend a parent and educators' association meeting. An instructor usually came to the school after 17:00. The incident occurred before that time.

The plaintiffs brought a suit for damages under article 1, section 1 of the State Liability Law. The Kumamoto District Court held that Kumamoto City had to pay damages of ten million yen to the learner and one million yen to the parents for the employer's liability. The court argued that, even if club activities continued after an educator's working time, an educator in charge of club instruction should provide every possible measure to ensure learner safety. In this case the educator knew that the instructor would not arrive until later and yet he wilfully left the school. Both the educator and the principal were found guilty of negligence for their action and inaction. Many educators refused to assume the supervision of extra-curricular activities after the Japanese court had so expanded the supervisory duty of club educators.

Under article 1 of the State Liability Law, the plaintiffs have to prove an educator's negligence in order to recover damages. They are thus compelled to accuse the educator of wrongful conduct, but many parents and learners are reluctant to challenge the harmony existing between school, pupils and parents by claiming for damages. This incompatible situation determines the issue in many cases where there has been injury, even though educators and principals are not personally liable for the payment of damages (Aoki, 1990:330).

Aoki (1990:330) voices a need for a policy which will protect not only the interest of learner-educator harmony, but also provide the educator with some latitude in his professional activities. Without needing to demonstrate negligence by school officials and educators, parents and learners would be able to recover damages on the basis of a public liability. At the same time this author appeals for new legislation to provide for non-fault liability for learner injuries, except in cases where there is clear misconduct on the part of educators or school officials. Such legislation would enable learners and parents to recover damages on the basis of a public liability, without needing to demonstrate negligence by school officials and educators (Aoki, 1990:330).

Although educators and school officials must assume the general duty to ensure the safety of learners at school, their legal liability should not go beyond their teaching domain. However, educators' immunity against damages for learner injuries should not prevent parents and learners from being compensated by governmental bodies (Aoki, 1990:330).

Claims for *damage caused by defects in the establishment and operation of public works*, such as playgrounds, horizontal bars, pools and other facilities, should be made under a non-fault liability rule (Aoki, 1990:330). School administrators and educators in Japan have a duty to provide safe equipment and physical conditions in schools, and take preventative steps in keeping schools safe and healthy, thus guaranteeing the right to education (Aoki, 1990:330).

5.8 VITAL ASPECTS IN SCHOOL LAW: AN INTERNATIONAL COMPARISON

At this stage it is possible to compare *the most important aspects* that have been considered in these three countries, as well as in South Africa.

5.8.1 The sources of school law

While the supreme source of law in South Africa is the SA Constitution (*cf.* 2.3.2.1), England and Wales have Parliamentary statute (*cf.* 5.2.1) and Canada has its Charter of Rights and Freedoms (*cf.* 5.2.2). Although South Africa calls on common law, embobied in case law, as a further source of school law (*cf.* 2.3.2.1), the Schools Act is the primary source for education. Canada has subordinate legislation as a second source (*cf.* 5.3.2) and adds criminal law, family law and labour law as cognate sources

of school law (*cf.* 5.3.2). Both England and Wales and Canada call their final source of school law *common law*, yet define it as being *case law/judge-made law* (*cf.* 5.2.1 and 5.2.2). It is therefore evident that not only South Africa, but also England and Wales and Canada follow the common law system with regard to their school law.

The Japanese legal system, however, is a hybrid of civil law, common law and customary law. Their prime source of school law is *written law*, consisting of the Japanese Constitution, six codes and other subordinate legislation. *Unwritten law*, consisting of custom law and *jori*, is the second source. Still part of the hierarchy of the sources of school law are the categories *non-binding precedent*, consisting of case law and commentaries, and *non-justiciable law*, consisting of administrative guidance (*cf.* 5.2.3).

Although South Africa, England and Wales and Canada rely on the precedents which have been established by case law (*cf.* 3.2 and 5.3.1 and 5.3.2), Japan does not refer to case law as an authoritative source of law (*cf.* 5.3.3).

5.8.2 The fundamental rights of learners

In South Africa the SA Constitution has contributed to a change in the emphasis from the previous culture of authority (*cf.* 2.4), such as the power of the parents, to the responsibilities of the parents and the rights of the child (*cf.* 2.4.1). The South African learner is currently not only endowed with the comprehensive variety of fundamental rights enshrined in the SA Constitution (with the exception of the specific restrictions imposed on him by his youth), but also with the special rights afforded him by section 28 (*cf.* 2.4.1.2). Noteworthy is the protection as far as a learner's best interests are concerned, although this protection is granted only to persons under the age of 18 years (*cf.* 2.4.1.2). The extent of this protection is underscored, *inter alia*, by permitting education in the official language of the learner's choice where it proves to be *reasonably practical* and by protecting the status of the minor in the Schools Act (*cf.* 2.3.2.1.2).

The South African learner has a right to basic education (*cf.* 2.3.2.1.2 and 2.4.1.2), with compulsory school attendance ranging either from 6-15 years of age, which concurs with that of Japan as well as some provinces in Canada (*cf.* 5.3.2; 5.4.3), or

from grade 1 to the completion of grade 9, whichever occurs first (2.3.2.1.2). The other provinces in Canada have compulsory schooling from 6-16 or 6-12 years of age (*cf.* 5.3.2).

Although learners in England and Wales have no substantive right to education, and there is no duty on parents or educators to consult them, their juvenile court and the Child Care Act (1980) recognize the wishes, feelings and interests of a young person, depending on his age and level of understanding. Nevertheless, education is taken so seriously that the learners have 11 years of compulsory school-going age from 5-16 years of age (*cf.* 5.5.1).

Like the SA Constitution (*cf.* 2.3.2.1.1 and 2.4.1.2 and 3.3.2), the Canadian Charter of Rights and Freedoms guarantees the principles of fundamental justice to all people. As is the case with learners in Canada (*cf.* 5.5.2), *reasonable limits* may be imposed on the rights of the South African learner (*cf.* 2.4.1.2). With the exception of denominational school rights and minority language rights, nothing in the Canadian Charter of Rights and Freedoms is aimed at education specifically (*cf.* 5.3.2).

Canada is unique in its endorsement of minority language educational rights and in its concern regarding the continued existence of linguistic minorities, but it does not endow the learner with these rights. The latter is dependent on the wishes of his parents in this regard (*cf.* 5.5.2). A discrepancy can be found in the legal practice of Canadian adults acting on behalf of the minor, since the Young Offenders' Act allows Canadian minors to retain the services of lawyers directly (*cf.* 5.5.2).

Contrary to England and Wales (*cf.* 5.5.1), Japan endows its learners with the right to education (*cf.* 5.4.3). Although this looks like a discrepancy, in England and Wales and Japan this aspect reflects more on the need to make sure that parents comply with their duty concerning their children (*cf.* 5.5.1 and 5.5.3). In contrast to the other three countries, Japan adds that education should not only be correspondent to the learner's ability, but also free (*cf.* 5.4.3). Yet Japan does not protect the learner's rights at school (*cf.* 5.5.3), but allows serious infringement of these rights through, *inter alia*, corporal punishment, bullying and textbook screening (*cf.* 5.6.3).

5.8.2.1 Legal obligations of the learner

Whereas South Africa, England and Wales, and Canada expect of their learners to obey *reasonable* rules of behaviour to ensure school order and discipline (*cf.* 2.3.2.1.2 and 5.6.1 and 5.6.2), Japanese schools determine highly detailed rules of order and behaviour *arbitrarily* (*cf.* 5.6.3). Legislation in South Africa protects the welfare of its schools by expecting of the learner to submit to reasonable authority, discipline and punishment (*cf.* 2.3.2.1.1 and 3.3.5 and 4.5.3.4). At the same time the learner has a duty to participate in activities (*cf.* 2.3.2.1.1), which is reminiscent of the emphasis Japan places on the extracurricular activities of their learners (*cf.* 5.4.2). It would seem that Japanese learners actually have a duty to take part in these activities.

One province in Canada has an ordinance which specifically bars its learners from either committing *major offences* such as theft or vandalism or injuriously affecting the character or person of other pupils (*cf.* 5.6.2). Also mentioned as legal obligations of the learner in Canada are aspects such as punctuality, refraining from the use of obscene language, showing respect for school property and exhibiting overall courtesy to their educators and fellow learners (*cf.* 5.6.2). Similar to South Africa (*cf.* 2.3.2.1.1), Canadian learners have a duty to attend school (*cf.* 5.6.2), although in South Africa it is clear that the learner shares this obligation with his parent in the sense that the parent is obliged to ensure the child's school attendance (*cf.* 2.3.2.1.1).

Japanese learners are duty-bound to subordinate themselves to over-management and strict authority, as well as not to violate the school rules of order and behaviour (*cf.* 5.5.3 and 5.6.3). These learners are subjected to the enforcement of corporal punishment, although is it legally forbidden at schools (*cf.* 5.6.3).

5.8.3 The educator's duty of care

Both South Africa and England and Wales regard their educators as being *in loco parentis* at school (*cf.* 2.1 and 5.3.1) and therefore obliged to act like *prudent parents* (*cf.* 4.3.1 and 5.4.1). Yet there is a difference in opinion concerning what can legally be expected of an educator: while South Africa expects a higher degree of care from educators in their dealing with learners (*cf.* 4.3.1.1), England and Wales focus on the fact that a reasonable parent does not have thirty or more children in his care (*cf.* 5.4.1). In England and Wales the emphasis is thus only on *reasonableness*, while in

South Africa more emphasis is on the expertise which the educator exercises in his dealing with the learner(*cf.* 4.3.1.1.1 and 4.3.1.1.2 and 4.3.1.1.3 and 4.3.1.1.4).

Believing the *in loco parentis* doctrine to have become obsolete (*cf.* 5.1), Canadian education relies on the *parens patriae* doctrine to characterize the role of the educator (*cf.* 5.1 and 5.4.2). Yet, although it originated from the *in loco parentis* doctrine, the *careful parent rule* has survived the test of time in Canada (*cf.* 5.4.2). Just like England and Wales (*cf.* 5.4.1), Canadian educators are expected to lead exemplary lives and are placed under close scrutiny of society, even though there is no legal connection between educators and parents (*cf.* 5.4.2).

Japanese educators are looked upon as fulfilling a *custodial* role, with strong emphasis on developing individual personality, which includes overseeing the various extracurricular activities of the learners (*cf.* 5.4.3) as well as their behaviour even outside the school (*cf.* 5.4.3). Based on his advanced training and his zest for work, the educator enjoys great respect in Japan (*cf.* 5.4.3). Great pressure is placed on him not only to comply with education standards, but also to excel at increasing the number of learners who are admitted to prestigious institutions (*cf.* 5.4.3).

While the SA Constitution guarantees the *best interests* of the South African learner (*cf.* 2.4.1.2), the Japanese Constitution endows the educator with the duty to carry out his duty *in the interest of the child* (*cf.* 5.4.3). On the other hand there is concern in Canada that the assumption that the *best interests* of the child are complied with might not be in accordance with the child's viewpoint of his best interests (*cf.* 5.5.2).

5.8.3.1 Discipline

Similar to South Africa (*cf.* 2.3.2.1.1), Canada imposes on the educator the duty to take action if the learner fails to submit to and obey the educator (*cf.* 5.4.2). Although English and Welsh law nowhere insists on the learner's being punished for his misbehaviour, it is accepted that educators are given some discretionary power of restraint for the sake of order and discipline at school (*cf.* 5.6.1). South Africa, England and Wales and Canada stipulate *reasonableness* as a prerequisite for lawful punishment (*cf.* 4.5.3.4 and 5.6.1 and 5.6.2). South Africa and England and Wales invoke the *ultra vires* doctrine to regulate the exercise of power (*cf.* 3.3.4 and 5.3.1).

South Africa affords the learner the right to be included in the process of drawing up a code of conduct for his school (*cf.* 2.3.2.1.2). In England and Wales principals have the right to make reasonable rules of behaviour for their schools (*cf.* 5.6.1).

Although South Africa, England and Wales and Japan have banned corporal punishment at schools (*cf.* 2.3.2.1.2 and 5.6.1 and 5.6.3), Japan is being accused of infringing the rights of the learners by continuing with this disciplinary measure (*cf.* 5.6.3). Canada, on the other hand, has not yet decided on a national policy concerning corporal punishment: while some provinces allow it under strict regulations, others have completely banned it (*cf.* 5.6.2).

Both South Africa and England and Wales call on the prerequisite of *bona fides* (good faith) when handling a learner's breach of conduct (*cf.* 3.2.6 and 5.6.1). While South Africa refers to suspension as a temporary, and to expulsion as a permanent measure of discipline (*cf.* 2.3.2.1.1), England and Wales have decided on the statutory term *exclusion* and it can be applied as a disciplinary measure either for a specified term or permanently (*cf.* 5.6.1).

Canada has a wide scope of legally permissible forms of discipline, ranging from detentions, exclusions and suspension, to expulsion, on condition that these are enforced fairly (*cf.* 5.6.2). A hidden form of punishment in Canada would be the negative comments on a learner's report card (*cf.* 5.6.2). Japan adds hidden forms of discipline, such as the report card for examination evaluation and the *naishinsho* or confidential report on character and behaviour, also called the *invisible whip* (*cf.* 5.6.3).

South Africa provides for *due process* to be followed in any disciplinary proceedings in which the learner is involved (*cf.* 2.3.2.1.1 and 2.4.1.2 and 3.3.2).

5.8.3.2 Legal liability

Education authorities in South Africa and England and Wales are regarded as being *vicariously liable* for the unlawful acts of educators (*cf.*3.3.3 and 5.7.1). The elements of a breach of statutory duty and actual damage are prerequisites in determining the negligence of educators in South Africa, England and Wales and Canada (*cf.* 4.5.2 and 5.7.1 and 5.7.2). South Africa and Canada further require evidence of an actual causal link between the damage and the breach of the standard of care which was expected (*cf.* 4.5.2 and 5.7.2).

Furthermore, negligence of an educator in South Africa and England and Wales can be proved only if the damage caused was both reasonably foreseeable and preventable (*cf.* 3.3.3.1 and 5.7.1). The age of the learner places a higher standard of care on the educator (*cf.* 3.3.3.2 and 5.7.1). South African and Canadian legislation specifically expect of the educators to take extra precautions against hazardous situations whenever learners are taken on field trips (*cf. 4. and* 5.7.2). Both South Africa and England and Wales apply the principles of contributory negligence as part of expecting learners to take responsibility for their own actions (*cf.* 4.5.4 and 5.7.1) and Canada holds learners responsible for their own tortuous actions (*cf.* 5.7.2).

Strangely enough, contrary to what might be expected, given the over-management of schools (*cf.* 5.4.3), the parent community of Japan prefers not to disturb the peace and harmony by laying criminal charges against or trying to prove wrongful conduct of the educator (*cf.* 5.7.3). Criminal negligence charges are also rarely laid against educators in Canada (*cf.* 6.7.2).

5.9 SUMMARY

In this chapter the focus fell in the first place on a comparative school law perspective of the educator-learner relationship in England and Wales, Canada and Japan. In the second place the *most important aspects* which have been scrutinized in South Africa, England and Wales, Canada and Japan were compared in a school law perspective.

The next chapter contains the summation, findings and recommendations of the research.