

CHAPTER 1

ORIENTATION

1.1 INTRODUCTION

The South African educator-learner relationship is, by its own complicated nature, a cause for concern given the fact that all the parties involved are endowed with individual rights and freedoms. Very often the focus falls emphatically on the latter only, neglecting to prioritize the duties which everyone should be obligated to fulfil. This can lead to unfortunate irregularities which are not to the benefit of society.

It is imperative that the educator especially be well-informed regarding the learner's fundamental rights and his own duties and obligations, so as to ensure an accountable, responsive and open educator-learner relationship.

To simplify matters, the male reference will be used in this research. The female reference is *mutatis mutandis* included.

This chapter presents the investigation of the situation by

- stating the problem;
- determining the objectives of the research;
- explaining the research methodology; and
- indicating the division of chapters.

1.2 STATEMENT OF THE PROBLEM

According to Van Wyk (1987:11), Oosthuizen and Bondesio (1988:10), and Bray (1988:5) education comprises a complex network of human relationships, consisting mainly of principals, educators, the parent community and learners at schools. These relationships are structured legally by determining each participant's status in such relationships (Beckmann & Prinsloo, 1989:4). Prinsloo and Beckmann (1987:14)

indicate clearly that education would degenerate into chaos unless the relationships are legally arrayed and the legal status of each is clearly defined. Without this, educative teaching would become impossible, as it is based on structure and order.

Wood (1995:1) focuses on education as being a social phenomenon, also involving relationships among various participants. In formal education the principal, educator, parent and learner each has a particular legal status that gives rise to specific relationships which are formed (Prestorius & Van Wyk, 1991:13).

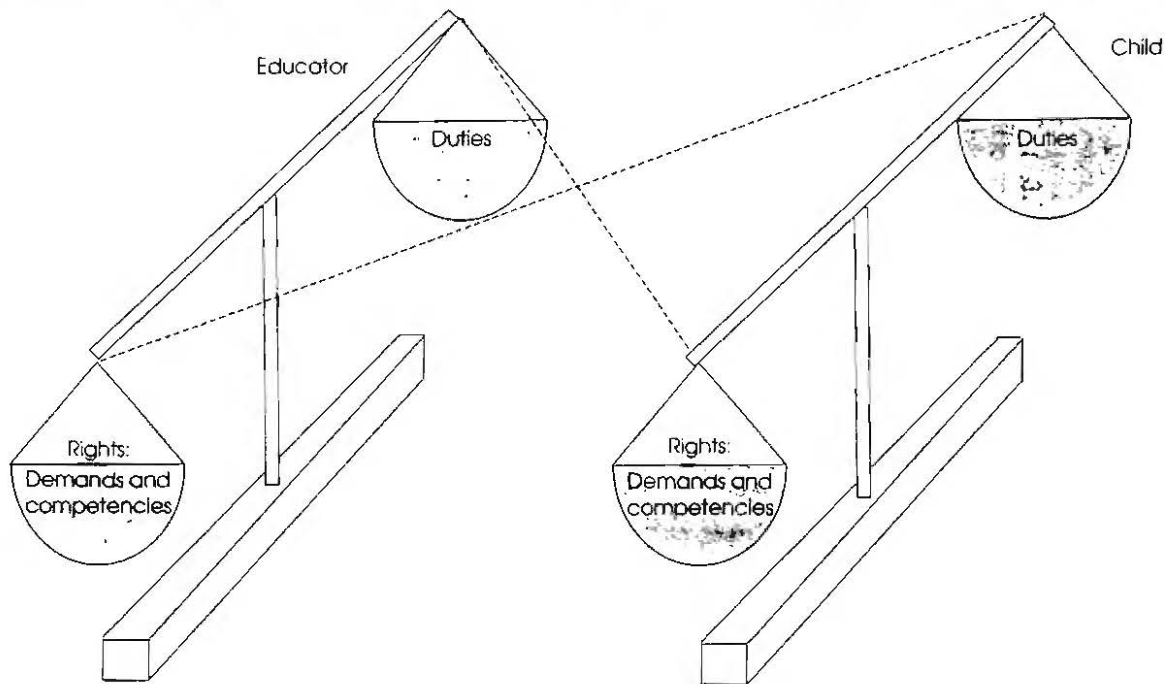
Educators and parents stand in a legal relationship to one another on account of both parties' position of authority concerning the formal teaching and general education of the child (Van Wyk, 1987:65). Children and their parents stand in a legal relationship to one another (Van der Vyver & Joubert, 1985:443), and a general as well as a specialized legal relationship exists between educator and learner. This entails that the learner must not be regarded as an inferior partner in education (Van Wyk, 1987:74). While Oosthuizen and Bondesio (1988:11) point out that the learner is an inextricable part of the education partnership, Van Wyk (1987:74) reasons that the learner is one of the most important partners in it.

While Van Wyk (1987:80) points out the difference between general and legal relationships (for example between school and parent community) and individual relationships (for example between educator and learner at school), Bray (1988:26-29) highlights the fact that numerous rights and duties actually evolve from these general and individual relationships. The same author (Bray, 1988:26-29) goes on to say that the right of one person sometimes actually imposes a particular duty on another person.

Specific rights and duties have their origin in the educator-learner relationship, thus implying that the rights of a learner impose a duty on an educator and vice versa. An example would be the learner who is subject to compulsory education and who has to submit to the rules associated with this, including those to attend school, the rules of

order, obedience to educators, and carrying out instructions (Bondesio, 1995 : 43). Schematically this is presented in Figure 1.1 (Bondesio, 1995:42):

Figure 1.1: The relation between the rights and duties of educator and learner



The Republic of South Africa Constitution Act 108 of 1996 (hereafter called the SA Constitution) is the supreme law of the country: all other laws and all conduct must be in accordance with the SA Constitution. While section 1 points out the values of *"human dignity, the advancement of human rights and freedoms, democratic government to ensure accountability, responsiveness and openness"*, section 3(2) reminds all citizens that they are *"equally subject to the duties and responsibilities of citizenship"*.

The impact the SA Constitution has on education in South Africa is seen by Bray (1996b:151) as being understood only when the role of the State as provider for education is explained. In terms of section 29 of the SA Constitution all persons are guaranteed the right to basic education. The State furthermore determines education structures as well as the powers and functions of the education authorities.

Chapter 2 of the SA Consitution contains a Bill of Fundamental Rights. Carpenter (1995:261) states that the absolute nature of the rights which are protected in this chapter is qualified by various words, phrases and clauses. While the Bill of Fundamental Rights confers the full panoply of constitutional rights on the learner as an individual person (Bray, 1992:24), it is in terms of the SA Constitution commonly accepted that all of these fundamental rights are subject to some form of constraint: the range and scope of one person's rights are influenced by the mere existence of another person's rights (Carpenter, 1995:260).

In an article on human rights (Bray, 1992:24) educators are made aware of the fact that a learner's rights are not co-extensive with those of an adult. According to Van der Vyver (1997:296) the equal protection clause, section 9, is an example of a situation where certain limitations are inherent in the very definition of the concept: "*equal protection*" then requires per definition that unequals (such as learners and educators) be treated unequally.

Court decisions throughout the years have established a jurisprudence, under which educator and learner have mutual responsibilities and obligations. The mutuality of this relationship (see Figure 1.1) is predicated on society's expectations of the school in advancement of the common good (Alexander & Alexander, 1992:279). The following case is an example of such court decisions.

In ***R v Le Maitre and Avenant*** 1947 4 SA 616 (C) the court found that 17 hostel learners were guilty of wilfully undermining the housemaster's authority: these boys ignored several warnings and continued with their intentional damaging of hostel property. The court emphasized that, for an educator to uphold this authority, it is absolutely necessary to teach learners how to behave themselves.

This would even imply strict measures if the circumstances called for them. The court reiterated its reluctance to interfere with the educator's discretionary power in terms of discipline, with the exception of an educator exercising his discretionary power

unreasonably or unfairly.

Arising from the aforementioned "*educator's discretionary power in terms of discipline*", the focus falls on the educator being in such a position. The Latin term *in loco parentis* which means "*in the place of the parent*" (Hiemstra & Gonin, 1981:200) has developed in South African common law to imply that the educator stands in for the educational activities at school (Essex, 1987:212-215; Oosthuizen, 1989:104-105; Bray, 1992:18; Oosthuizen, 1992:56; Oosthuizen, 1994:209). This is regarded as implied delegation of parental authority by parents to educators (Maithufi, 1997:260).

The implications of sections 8(3)(a), 8(3)(b), 36(2), 39(1), 39(2) and 172(1)(a) of the Bill of Fundamental Rights give a new dimension to the role of common law in South Africa (Van der Vyver, 1997:268-269): "*Although rules of the common law that regulate the conduct of persons other than organs of State and which violate the SA Constitution would be unconstitutional, a court may 'develop' such law rules so as to bring them into harmony with the constitutional regime for the protection of human rights. It must do so either by giving effect to a constitutionally protected right, or by bringing the common law limitations of a constitutionally protected right in conformity with the limitation provisions of the SA Constitution.*"

This common law role of the educator (*in loco parentis*) has been confirmed by different statutory measures which exist in South African education. The implications of the educator's *in loco parentis* position are discussed, *inter alia*, by Essex (1987:212-215), Van Wyk (1987:73), Oosthuizen and Bondesio (1988:67), Oosthuizen (1992:56-57), and Oosthuizen (1994:209). It becomes quite evident that, given the educator's obligation to educate the learner, there are two co-extensive pillars to the *in loco parentis* role which educators play (Maithufi, 1997:260-261): the duty of care (which implies looking after the physical and mental well-being of the learner), and the right to maintain order at school (which implies the educator's right to discipline the learner).

Bray (1992:24) states that the courts will be challenged with not only defining and interpreting the rights and interests of learners so as to protect them against abuse, but also with ensuring that the duty and responsibility of educators to exercise control and discipline over the educational process are not undermined. As Van der Westhuizen and Oosthuizen (1989:743) so clearly point out; educators should in the first place be expected to keep themselves informed concerning judicial aspects that have bearing on effective school management, and in the second place to keep themselves informed concerning any judicial liability that has bearing on both intra and extra-mural activities. Clearly it is the educator in the educator-learner relationship who carries the considerable responsibility of actually foreseeing learner conduct which would interfere with the orderly education process at school (Bray, 1992:24).

The same author (Bray, 1992:24) sounds a warning when she states that court actions which so circumscribe the discretion of educators that they devolve responsibility towards the learner, which historically and rightfully is theirs, would be a danger to public interest.

Based on the preceding information the following questions need to be asked:

- What is the legal position of the learner within the school system?
- Which are the legal determinants of the educator-learner relationship?
- To what degree do educators have a duty of care towards learners and their parents?
- What would a comparative school law perspective of the educator-learner relationship look like?
- Which educational-juridical guidelines can be developed to ensure an accountable, responsive and open educator-learner relationship?

1.3 OBJECTIVES OF THE RESEARCH

The overall objective of this study is to help educators gain insight into the intricate

nature of the educator-learner relationship by making them aware of specific educational and juridical aspects. By promoting this, the study aims at enhancing their confidence and creating greater job satisfaction. All of this should then culminate in the best interest of the learner in the administration of justice.

This overall objective can be operationalised by:

- determining the legal position of the learner within the school system;
- identifying the legal determinants of the educator-learner relationship;
- examining the degree to which the educators have a duty of care, exposing them to probable liability;
- presenting a comparative school law perspective of the educator-parent-learner relationship; and
- developing educational-juridical guidelines in an effort to ensure an accountable, responsive and open educator-learner relationship.

1.4 RESEARCH METHODOLOGY

1.4.1 Literature study

Primary and secondary legal and educational sources were studied to gather information on the educator-learner relationship with regard to the sources of school law, the fundamental rights of learners, legal obligations of the learner, the educator's duty of care, discipline, and legal liability.

DIALOG and ERIC searches were conducted to locate appropriate literature sources. Key concepts used in the searches were fundamental rights, human rights, legal status of minors, administrative powers, pupil/learner rights, pupil/learner duties, *in loco parentis*, teacher/educator's duty of care, teacher/educator authority, negligence, and delictual liability.

1.4.2 Comparative school law perspective

The comparative law method is defined by Venter *et al.* (1990:213) as a "*unique, systematic and jurisprudential strategy*" which, by virtue of similarities and differences, is used regarding a specific topic within a variety of legal systems to come to a new understanding about this topic. Such a synoptic study has been done, with specific reference to South Africa, England and Wales, Canada and Japan.

1.5 CHAPTER DIVISION

This research report was constructed in the following way:

CHAPTER 1:	ORIENTATION
CHAPTER 2:	THE EDUCATOR AND THE LEARNER: THE LEGAL POSITION OF THE LEARNER WITHIN THE SOUTH AFRICAN SCHOOL SYSTEM
CHAPTER 3:	THE EDUCATOR-LEARNER RELATIONSHIP: LEGAL DETERMINANTS
CHAPTER 4:	THE EDUCATOR'S DUTY OF CARE
CHAPTER 5:	A COMPARATIVE SCHOOL LAW PERSPECTIVE OF THE EDUCATOR-LEARNER RELATIONSHIP
CHAPTER 6:	SUMMATION, FINDINGS AND RECOMMENDATIONS

1.6 SUMMARY

This chapter has provided an orientation to the research, defining the problem, determining the objectives and demarcating the research method to reach these objectives. The chapter division has also been determined.

The next chapter will focus on the legal position of the learner within the school system.