CHAPTER 3

THE EDUCATOR-LEARNER RELATIONSHIP: LEGAL DETERMINANTS

3.1 INTRODUCTION

A legal relationship between parent and educator is entailed by the former's position of authority concerning the general education of the child, and the latter's position of authority concerning the formal education of the learner (Van Wyk, 1991: 65).

The legal basis of the educator-learner relationship is found in the fact that the educator has been appointed to a specific teaching post at a specific school. Consequently, he is responsible for carrying out particular administrative actions related to (Van Wyk, 1991:75):

- education;
- the teaching and training of learners; and
- school management.

Educators have to carry out all these administrative actions in accordance with prescriptive procedural rules and regulations prescribed by administrative law. As stated in 2.1, administrative law forms part of South African public law and concerns itself with the actions, competencies and organization of State administration. At the same time it regulates the legal relations of public authorities (such as the legal relation between educator and learner) *vis-á-vis* individuals. Wiechers (1984:96) points out that the manner in which State administration operates is referred to as an *administrative act*.

Van Wyk (as cited by Wiechers, 1984:38) is of the opinion that South African school law has not only become a specialised subdivision of South African administrative law, but also draws heavily from common law. Common law is defined as that part of South African law which developed from Roman-Dutch law and English law, and which is not laid down in statutory law (*cf.* 2.3.1.2).

Nevertheless, school law is a section of administrative law and this implies that each act in the field of education, whether managerial or educational, has a legal basis (Bray, 1988:5-7). Managerial acts which are exercised within the school management substructure, are administrative educational acts (Bray, 1988:45).

Whenever administrative acts are carried out in education, legal administrative relationships come into existence between the concerned parties. These parties are the legal subjects who are involved in the actions. One of the legal subjects in a legal administrative education-relationship is always an authoritatve body who has been endowed with state authority, thus creating an *"unequal relationship"* (*cf.* 2.1). The educator is such an education body (Bray, 1988:21).

The unequal or authoritative education relationship mentioned above does not imply that the subordinate party (such as the learner) becomes a passive partner within the legal administrative relationship. Based on his education-partnership with the State, he has acquired certain rights, competencies, freedoms, obligations and Constitutional rights (Bray, 1988:21; *cf.* 2.4.1.2).

This chapter is dedicated to specific legal determinants of the educator-learner relationship. The focus will fall on:

- the requirements which have to be met when carrying out valid administrative education acts; and
- principles of common law which are intertwined with administrative actions.

3.2 LEGAL REQUIREMENTS FOR VALID ADMINISTRATIVE ACTS

The administrative body (such as the school board and the educator) is not free to use his powers as he pleases when acting from a position of authority; he must rather exercise these powers in a manner which advances not only the public interest, but also remains faithful to the purpose of the enabling legislation (*cf.* 2.3.2.1.1). The administrative body may also have to fulfil certain duties (Baxter, 1991: 351).

As Baxter (1991:75) aptly points out, since the institutions which are necessary for the existence and operation of public administration are created by law, the *authority* of the administration also depends on the law. In other words, a public body (such as the educator) derives his authority from the law.

Managerial acts which are performed at school, are determined by special statutory and common law requirements. In general this implies that the person who performs a managerial act must have the necessary authority to do so (*cf.* 3.2.2), act within bounds (*cf.* 3.3.4) and according to specific prescriptive procedures (Van Wyk, 1987:108; *cf.* 3.2.3).

Similar to school law (*cf.* 2.3.1), the sources of South African administrative law can be found in legislation, case law and common law (*cf.* 2.3.1.2). According to Wiechers (1984:49) case law and common law are the most important sources when it comes to determining the legal rules involved in the actions of an administrative body. Courts rely to a great extent on the *precedents* established by case law (Wiechers, 1984:195-196; La Morte, 1990:437). This is referred to as the doctrine of *stare decisis*.

The term *precedents* is defined as authoritative court decisions which were handed down previously and which addressed identical or similar questions of law (La Morte, 1990:439). Court decisions are of special value in areas where there is no policy direction from legislation, the SA Constitution or the Department of Education.

It thus follows that the question that needs to be answered, is whether the administrative body has acted in a legal way. The manner in which South African courts apply administrative law is based on the principle of legality.

3.2.1 The principle of legality

As was mentioned above (*cf.* 3.2), the administrative body is legally bound to advance the public interest at all times. According to Wiechers (1984:84) this comprises, in essence, the recognition and protection of individual rights and freedoms. In a nutshell, the legal requirement of advancing public interest, together with the recognition and protection of individual rights, gives content to the principle of legality.

Bray (1988:60) describes the principle of *legality* as one which stipulates that administrative actions must be carried out according to general prescriptives of the law. The legal requirements for valid administrative acts cover the complete legal spectrum, which implies that all administrative acts must comply with all the legal requirements stipulated by the law (*cf.* 2.4.1.2).

Thinking in a more dynamic line of thought, Wiechers (1984:201) depicts the principle of legality as one which concerns itself with the powers as well as the complete conduct of administration: its procedures, objectives and achievements.

Selznick (as cited by Baxter, 1991:78) finds a differentiation between the *minimalist* and the *normative* concept of legality: the former concerns itself merely with determining whether an administrative act was legally authorized, without getting involved with what the rules of law actually stipulate. On the other hand, the latter is used as a principle of *just government* in that, as a basic principle of the legal system, it requires fairness, equality before the law and freedom from arbitrary administrative action (*cf.* 2.4.1.2).

The principle of legality may be said to imply the following specific principles (Baxter, 1991:301):

- the initiator of the act must be legally empowered to perform the act (*cf.* 3.2.2);
- an administrative act may only be performed by the lawfully constituted authority (*cf.* 3.2.2.1 and 4.5.3.3);
- the act must comply with the circumstantial and procedural prerequisites laid down by the enabling legislation (*cf.* 3.2.3.1);
- the power to act must not be exercised unreasonably (*cf.* 3.2.6 and 4.3.1);
- the decision to act must be taken in a fair manner (*cf.* 3.3.2); and
- action taken without legal authority generally attracts the same liability as would the acts of private persons (*cf.* 3.3.4).

But coupled with these principles concerning the administrative act, requirements are also laid down for its author.

3.2.2 Prerequisites concerning the author of the administrative act

The author of an administrative educational act is the educational body who performs the act. Prerequisites in this category are concerned with both the qualifications of the administrative body, and the scope and nature of the body's statutory authorization (*cf.* 3.3.4 and 4.4).

3.2.2.1 Legal requirements *ratione personae*

It frequently happens that the law attaches certain specifications or qualifications to a specific position. If the person who holds the position does not match up to these legal requirements, his acts would be deemed unlawful (*cf.* 4.5.2.1). As Wiechers (1984:208) points out, the legal requirements concerning the personal qualifications of the administrative body do not relate to the subjective opinion of the administrative body towards his own expertise, qualifications or impartiality.

It is trite law that there is a presumption that administrative bodies may not sub-delegate their authority (the legal principle being *delegatus delegare non potest*). While the practical need for delegation must be recognised, the danger exists that once delegated, the power which legislature has chosen to be exercised by a specific body might in fact be exercised by someone who is neither as well qualified, nor as responsible as the chosen repository of the power.

The general legal principle in administration is, according to Wiechers (1984:56), that a duty which comprises the exercising of discretionary powers, may be delegated to another person only by explicit authorization. Passing down such a responsibility to a subordinate person would make the action null and void.

3.2.2.2 Legal requirements *ratione loci*

An administrative body is granted authorization to exercise his power either within a specific geographic area or at a specific place. An administrative act becomes unlawful when it is performed outside the geographical boundaries stipulated by the specific Act (Wiechers, 1984:212).

The administrative educational act may be performed only within the school sub-structure, otherwise the action is *ultra vires* (*cf.* 3.3.4). The principal of a school, for example, has no authority over learners of a neighbouring school. This is illustrated in the case of ***S v Lekgathe*** *1982 3 SA 104 (BT)*: a magistrate's court in the then Bophuthatswana had convicted a school principal, Mr Lekgathe, on a charge of having assaulted an ex-learner, Petrus Maboa. The incident that led to the assault occurred when Petrus hit a learner of Mr Lekgathe's school. The learner reported the matter to her principal, Mr Lekgathe, who took it upon himself to punish Petrus. During the

principal's appeal against his conviction, the court ruled (among other arguments) as follows:

> *"On the merits of the case the magistrate has made a positive finding that complainant was not under custody or control of the accused and that the accused was, therefore, not* ***in loco parentis*** *of the complainant and had no right to chastise Petrus."*

3.2.2.3 Legal requirements *ratione materiae*

This term refers to the requirements which are concerned with both the administrative act itself and the object of the administrative act (Wiechers, 1984:214). In general the rules of interpretation of statutes (*cf.* 3.2.3.1) must be used in determining the object (concrete matters such as sport meetings) and the subject (for example the managerial and leadership skills of the principal) of the administrative act (Bray, 1988:62-63). Bray and Wiechers (1984: 215) agree that both the object and the subject of the action are circumscribed in the enabling legislation.

Legal requirements *ratione materiae* ensure that the initiator of the administrative act does not exceed his authority either with regard to the physical object of his act or with regard to the matter which justifies his act (Wiechers, 1984:215).

3.2.2.4 Legal requirements *ratione temporis*

In general administrative educational acts are time-bound and must be performed within the specified time in order to be valid. Bray (1988:62) mentions the example of a principal who has to perform certain duties at the opening and closing of his school (or even on leaving the school). These duties need to be performed at those given times, otherwise the acts would be unlawful (*cf.* 3.2.5.2).

The requirements for the administrative act and its author having been considered, the form and procedure of the act need urgent attention, as it is in this area that educators need special guidance.

3.2.3 Prerequisites concerning form and procedure

Wiechers (1984:221-202) points out that acts are distinguishable as administrative acts only when they are (a) couched in a specific physical form, and (b) conform to

specific requirements concerning the external course of the action. So, for example, the commencement of the act is, *inter alia*, characterized by timeous notification and listening to evidence (*cf.* 3.3.2.2.1).

Furthermore, following procedures is of the utmost importance in achieving good order, just acts, harmonious co-operation, skilful utilization of time and efficient education, without which no legally acceptable administrative act can exist (Van Wyk, 1987:105).

The formal requirements to which administrative acts must conform are usually determined by legislation and common law, and in this way the form and procedure which must be followed in performing administrative acts are determined (Bray, 1988:63).

3.2.3.1 Statutory requirements

When determining the statutory requirements, the rules of interpretation of statutes are applied. Du Plessis (1986:1) defines the interpretation of statutes as *"the tools (in the form of rules, principles, methods and techniques) which are used by the interpreter to enable him to interpret and understand the laws"*.

It thus follows that the question is whether the particular form and procedure of the act comply with the purpose of the legislation. Attention should at the same time be given to whether the directive is imperative (peremptory) or merely indicative (directory). Not complying with a directive of the former nature would lead to an unlawful act (*cf.* 3.2.5.2). On the other hand, a violation of an indicative directive does not imply unlawful action (Wiechers, 1984:224).

Wiechers (1984:227) presents the legal principle in administrative law that circumstances do exist where the law permits the existence of a discretion to grant exemption from statutory form and procedural prescription. Condoning non-literal compliance with such a prescription may occur if (Wiechers, 1984:227-228):

- the prescription has been complied with in essence;
- no harm or injustice has occurred as a result of the non-literal compliance; and

- insistence on the literal compliance with the prescriptions in this specific case would lead to real or potential harm or injustice.

3.2.3.2 Common law requirements

Relevant common law concepts are dealt with in detail in the second part of this chapter (*cf.* 3.3). Suffice it to mention here merely the common law aspect that the objective of the administrative act must be explicit and comprehensible, and that this aspect implies an objective test (Wiechers, 1984:230-231). The test comprises inquiring about the reasonable comprehensibility of the administrative act which is referred to in legal terms as the *reasonable person test*, commonly referred to as the *reasonable man test* in legal documents (*cf.* 3.3.3.1 and 4.3.1).

According to Van der Merwe and Olivier (1985:126-127) the reasonable person's behaviour is distinguished by characteristics that fall between those of *"...an exceptionally gifted, careful or educated person...(and) an uneducated, careless person"*. In ordinary terms the reasonable person is an average person.

3.2.4 Objective of the act

The objective of an administrative act is described as being the matter which is served by the consequences of the act (Wiechers, 1984:257).

All acts of state administration, including those of education, are performed in the general interest of the public (*cf.* 3.2) as well as with a specific objective (Bray, 1988:67). While all managerial acts are purposeful, it must be noted that authority as well as procedure may never be used to further an inadmissible objective (Van Wyk, 1987:110; *cf.* 4.5.3.3). This is illustrated in ***Van Coller v Administrator, Transvaal*** *1960 1 SA 110 (T)*. The court concluded that a high school principal was wronged by the irregular act of the Administrator who followed a less elaborate procedure than prescribed by law (*cf.* 3.3.2.2.1), resulting in his unfair transfer as lecturer to a college of education, because of which the principal suffered loss of status. Moreover, the judge ruled that the Administrator was unfairly prejudicial towards the principal (*cf.* 3.3.2.2.2). His transfer was accordingly annulled.

It is therefore imperative that the educator, as author of administrative acts, be constantly aware of the legality of his objectives.

3.2.5 Legal consequences of administrative acts

As the legal consequences of lawful administrative acts are obviously very different from those of unlawful acts (*cf.* 4.5.2.1), it is necessary to deal with lawful and unlawful administrative acts separately.

3.2.5.1 Lawful acts

A lawful administrative act is that which is authorized by enabling legislation. Baxter (1991:353-354) makes the reader aware of the fact that since lawful administrative acts are authorized by enabling legislation, it has automatic legal consequences. Looking at it from this perspective, the administrative act can be described as a juristic act: a lawful act is said to be a juristic act when the objective law attaches the same legal consequences to it as were intended by the author of the act (Van der Vyver & Joubert, 1991:5). Although Van der Vyver and Joubert are referring to the situation in private law, the same holds true for administrative acts.

Administrative acts have a range that spans across relations regulated by law. In other words these acts might not only create rights, privileges, powers, liabilities and duties, but they might also remove them (Baxter, 1991:354). This latter danger imposes great responsibility upon the educator when considering the objective of an administrative act so that it will not be deemed unlawful.

3.2.5.2 Unlawful acts

Whenever an administrative act is not authorized by law, it is invalid. According to Baxter (1991:355) this is the logical consequence of the principle of legality (*cf.* 3.2.1). Although this legal axiom seems to be characterised by simplicity, the matter is complicated by the following aspects (Baxter, 1991:355):

- administrative acts are usually performed by public authorities who *appear* to act with the necessary authority; and
- only a court of law can determine whether these acts are within their powers.

Wiechers (1984:278) summarizes the legal consequences of unlawful acts by stating that an administrative body may not bring about unfair or unjust consequences by means of his administrative acts without explicit enabling legislation (*cf.* 4.5.3).

This necessitates scrutiny of the validity of administrative acts as judged from the intentions of the author.

3.2.6 The prerequisite of *bona fides*

Hiemstra and Gonin (1981:164) define *bona fides* as *"good faith and sincerity"*. Bray (1988:70-72) indicates clearly that all administrative acts must be executed *bona fide*, in other words, with the good intentions and sincerity of the author. Moreover, the good faith imperative lays down the grounds on which the validity of all administrative acts must be judged. The same author points out that the *bona fides* of an author cannot, however, change his invalid act into a valid one.

Were the author to act in bad faith, he would act *mala fide* (Hiemstra & Gonin, 1981:217) and the consequences of a *mala fide* act can result in loss of validity (Bray, 1988:66-72).

Declaring the act of an administrative body *mala fide*, stems from the fact that he knows or should know that his acts are unlawful in the following instances (Wiechers, 1984:286):

- in exceeding his authorization (*cf.* 3.3.4);
- in failing to conform to formal prescriptions (*cf.* 3.2.3.1 and 3.2.5.2 and 4.3.2.1.5); and
- in diverting the procedure because of inadmissible intention or result (*cf.* 3.2.4).

As mentioned above, the author of a *mala fide* act is aware of the illegality of his unlawful act and he can cause the following results by his *mala fide* act (Wiechers, 1984: 289; Bray, 1988:71-72):

- the wronged person is given the opportunity to procure direct legal reappraisal, because the legal requirement, that internal remedies should first be exhausted before recourse is taken to the court, will not be valid here;
- the court is afforded the ability to reappraise even if legislation excludes legal control;

- the court need not refer the case to the initiator for reappraisal, but will instruct him how to amend his act, while it does not generally interfere in the execution of the discretionary powers of administrative bodies; and
- the state is made accountable for his act, even if this accountability is excluded or limited by law.

Bray (1988:71) accordingly points out that the principal who acts *mala fide*, knows or should know that his act will be invalid because of his bad intention. A superior organ of authority can thus declare his act invalid and commission the required course of action.

For the learner the *bona fides* prerequisite implies that neither educator nor principal may take any steps against him with bad intentions. This is illustrated by ***P v Board of Governors of St Michael's Diocesan College Balgowan*** *1961 4 SA 440 (N)* (*cf.* 3.3.2.2). The principal of the school stated that he had expelled the learner because the latter had breached a rule of the school which prohibited the drinking of liquor. The parents filed a complaint against the principal, stating that the principal had acted, *inter alia*, in bad faith. Having considered the evidence, the court ruled that the principal did not act in bad faith when he suspended and expelled the learner. At the same time it was stipulated that the court would censure such a decision if there were evidence of *mala fides* (*cf.* 4.5.3.4).

The above attention to the legal consequences of administrative actions necessitates deeper insight into common law (as foreseen in 3.2.3.2).

3.3 COMMON LAW CONCEPTS RELEVANT TO THE EDUCATOR-LEARNER RELATIONSHIP

Educational-juridical problems are solved by consulting the formal sources of school law, which are legislation, common law, and case law (Bray, 1988:8; *cf.* 2.3.1.2). Although common law is used as a supplement to legislation, various educational affairs fall within the category of common law, as is the case with the safety of learners (*cf.* 4.3.2.1.3) and the right to be heard (Van Wyk, 1987:22; *cf.* 2.4.1.2 and 3.3.2.2.1). Bray (1988:19) also refers to negligence (*cf.* 3.3.3 and 3.3.3.1) and assault as concepts of common law.

Together with statutory prescriptions and case law (judicature), common law principles also determine the course of the different managerial acts at school (Van Wyk, 1987:101). As the principal's duties are (a) extensive and (b) cannot be demarcated, exercising his powers often leads to the impairment of others' rights and duties. Bray (1988:58-59) points out that to determine whether the impairment has occurred legally, the validity requirements to which the act has to conform need to be investigated. These validity requirements are mainly laid down by the courts, as an appreciable number of these requirements are of common law origin.

In respect of the validity of an administrative educational act, five concepts of common law will be dealt with for the objectives of this thesis:

- quasi-judicial competence;
- the rules of natural justice;
- vicarious liability;
- the *ultra vires* doctrine; and
- the *in loco parentis* doctrine.

These concepts are all deeply involved with the learner's rights, competencies and duties.

3.3.1 Quasi-judicial competence

Quasi is defined as *"seemingly, not really; almost"* (Hawkins, 1994:783). This competency therefore resembles a judicial act, but it is not really one.

The concern here lies with a specific discretion which is used by an educative body to *"...after investigating and considering the pros and cons, grant or deny somebody a right, or to make a decision which would impose a duty or harm his person or belongings..."* (Prinsloo & Beckmann, 1987:268). Wiechers (1984:138) defines it as the act which is performed by a non-adjudicatory body, but which resembles the prototype of a court.

According to the adjudicatory process (the judicial review of courts; *cf.* 2.) specific administrative bodies (for example the departments of education or the governing bodies of schools) are given the competency to investigate, hold trials, come to

conclusions, make official decisions and exercise a measure of discretion. Although the action is administrative in nature, the decision to act against an accused ought to be reached according to the adjudicative process (Baxter, 1991:220-221; *cf.* 2.3.2.1.1 and 2.4.1.2).

In ***R v Le Maitre and Avenant*** *1947 4 SA 616 (K)* the court underscores the court's reluctance to interfere with an educator's discretionary competency regarding punishment, provided a thorough investigation has been held (*cf.* 3.3.2) and the punishment is not unreasonable.

3.3.2 The rules of natural justice

According to Bray (1988:65), the rules of natural justice prescribe reasonable and just procedures, which, when applied, ensure that the relevant case be given appropriate attention. One of the examples of the variety of legal rules in South Africa which sanction ethical principles, is that administrative investigations and trials must conform to certain principles of natural justice (Van der Vyver & Joubert, 1987:111-112; *cf.* 2.4.1.2 and 2.3.1).

3.3.2.1 Definition of the concept

Van Zyl (1987:237) points out that the rules of natural justice reflect the characteristic of justice inherent to positive law.

The principle of natural justice is worded in the following two Latin idioms (Bray, 1988:65-67; Hiemstra & Gonin, 1981:163 and 225; Baxter, 1991:163):

- *audi alteram partem* - "hear the other side"; and
- *nemo iudex in propria causa* - "nobody is fit to act as judge in his own cause" (*cf.* 3.3.2.2.2).

The concept of natural justice is therefore concerned with the fact that persons who are affected by an administrative act, are entitled to a fair, unprejudiced hearing (Baxter, 1991:536; *cf.* 2.4.2.1).

3.3.2.2 Legal requirements of the rules of natural justice

At school the rules of natural justice are applied to a principal's quasi-judicial acts because he may impair the rights and duties of the staff, learners or parents in exercising his discretionary competencies (Bray, 1988:64).

A principal would thus act reasonably and justly if he complied with the rules of natural justice and other legal requirements (Bray, 1988:65; *cf.* ***P v Board of Governors of St Michael's Diocesan College, Balgowan*** *1961 4 SA 440 (N)* which was mentioned in 3.2.6). The court concluded that the principal acted, *inter alia*, reasonably and justly in suspending a learner.

The Latin principles that define the concept of natural justice comprise its legal requirements, as will be seen in the following two sub-sections.

3.3.2.2.1 Audi alteram partem

Van der Vyver (1997:280) points out that *audi alteram partem* is a basic principle of justice. The opportunity to put one's side of a matter comprises the following (Baxter, 1991:545-557):

- adequate information to the accused;
- sufficient time to prepare the defence;
- personal appearance of the accused is not a prerequisite;
- the right of the accused to present and refute evidence;
- the right of the accused to cross-examine witnesses against him;
- the possibility of legal representation for the accused; and
- the right of a public hearing unless prescribed differently: for example, in order to protect minors such hearings are often held *in camera* (not in the public eye).

According to Brassey *et al.* (1989:78-80) the following motivation for holding a fair hearing are quoted:

- a hearing results in a better finding;
- even God first had a discussion with Adam before He passed sentence; and

- the procedure of a hearing has inherent value:
  - it complies with the expectations of the accused;
  - it recognizes the humanity of the accused; and
  - it gives the accused the satisfaction that he can defend himself.

The *audi alteram partem* principle therefore implies an equitable hearing, but the latter does not necessarily imply the same formal standards that courts of law do: the course of investigations will vary from informal to strictly formal, depending on the nature of the investigation, rules of procedure and the infringement (Brassey *et al.*, 1988:3). The application of natural justice must not be rigid. It comprises flexibility regarding the circumstances of the case, the nature of the investigation and infringement (Baxter, 1991:541).

However, the fundamental requirements of an equitable hearing are determined in a proper opportunity to be heard and in notice of the intended action (Baxter, 1991:543-544).

In ***Van Coller v Administrator, Transvaal*** *1960 1 SA 110 (T)* (*cf.* 3.2.4) a high school principal's transfer was annulled as he was not granted the opportunity to state his side of the matter.

3.3.2.2.2 Nemo iudex in propria causa

"Nobody is fit to act as judge in his own cause" (*cf.* 3.3.2.1) implies bias about the matter in question. Concerning this, Baxter (1991:536) states clearly that nobody may pass judgement juridically if there is the possibilty of personal bias (*cf.* 3.2.4), and bias is confirmed if a reasonable person (*cf.* 3.2.3.2) merely suspects that the person involved in passing judgement was biased (Baxter, 1991:558-561).

He (Baxter, 1991:561-564) continues by distinguishing three circumstances which may lead to bias:

- financial interests;
- personal interests; and
- biased opinions of the decision-maker.

It is the last which must be rooted from the educator-learner relationship.

Bray (1988:67) correctly points out that the educator must guard against his personal preferences or dislikes influencing his objective decision-making.

3.3.2.2.3 The value of natural justice

The above-mentioned principles of the rules of natural justice serve a threefold objective (Baxter, 1991:538-540):

- they facilitate accurate, informed decision-making;
- they ensure that decisions are made in the public interest; and
- they cater for important process values.

Wiechers (1984:243) points out that the rules of natural justice must be honoured whenever an administrative body (like a principal) is exercising his discretionary competence which could possibly impair the legal rights and duties of subordinates (for example learners).

These rules also compel all educational matters, such as the suspension of learners (*cf.* 2.3.2.1.2) to be dealt with through the correct channels and according to the correct procedure (Van Wyk, 1987:138-139).

The greatest value in upholding the principles of natural justice in education is therefore that educators accept accountability for their actions (*cf.* 4.5), especially in the best interest of the learners (*cf.* 2.4.1.2). When they do not uphold these principles, their negligence raises the legal question of bearing responsibility (*cf.* 3.3.3.1 and 4.3.2.1.4) as in vicarious liability.

3.3.3 Vicarious liability

Hiemstra and Gonin (1981:137 and 415) explain this common law term as meaning that one person is held responsible for another's act. Neethling *et al.* (1992:308) define vicarious liability as the blameless accountability of one person for the unlawful act of another. They also point out that this occurs when two persons are situated in a special relationship to each other. Hosten *et al.* (1979:432) explain it more fully as an employer being held responsible for the unlawful acts of his employee.

Concerning education, this common law principle comprises the circumstances in which the Department of Education is, in the final instance, held accountable for the actions of its staff (Oosthuizen & Bondesio, 1988:30).

Vicarious liability is indeed only applicable where the following aspects are present (Botha, 1998:84):

- there must have been an employer-employee relationship at the time of the unlawful act;
- the employee must have executed an unlawful act (*cf.* 4.5.2.1);
- the unlawful act must have occurred during the execution of the employer's duties; and
- the employee must have acted within the limits of his competencies (*cf.* 3.2.6 and 3.3.4).

As the educator acts as body of the educatory authorities when he is doing his work, the educational authorities can, on the principle of vicarious liability, be held accountable for any unlawful act of the educator while executing his duties (Oosthuizen & Bondesio, 1988:30), provided the claimant can prove the educator's intent or negligence (Bray, 1988:86; *cf.* 3.3.3.1).

Botha (1998:78) describes intent and negligence as follows: a person acts with intent if his will is directed at a preconceived result while knowing that his conduct is unlawful; negligence occurs if the person's conduct does not adhere to the standard of care legally required of him (*cf.* 3.3.5 and 4.3.1.1.4).

3.3.3.1 The test for negligence

In order to determine what the law expects of a person, the test of the reasonable person (*cf.* 3.2.3.2 and 4.3.1) is applied. The court poses the following three questions (Botha, 1998:78; *cf.* 4.3.1.1.4):

- How would a reasonable person have acted in similar circumstances?
- Would a reasonable person foresee the damage as possible consequence of his conduct?

- Would a reasonable person (having foreseen the likelihood of harm) have taken the necessary steps to prevent such harm from occurring?

Negligence can only exist when the damage was both reasonably foreseeable and preventable.

In ***Broom v Administrator, Natal*** *1966 3 SA 505 (D)* the experienced physical training educator was accused of negligence when he allowed boys to use a cricket stump as a bat for softball. As is apparent from the title of the court case, the Administrator was called to account for the educator's act. The court refused to grant the claimant (Broom) compensation, as the educator was not negligent. It was pointed out in the court's verdict that *"the mere fact that a game or an exercise may result in some risk of injury, does not result in a conclusion that it is negligent to permit boys to take part in such a game"* (*cf.* 4.3.1.1.3 and 4.3.1.1.4).

Were an outsider (such as a parent) to succeed in an attempt to claim compensation from the educational authorities, the latter have the right to apply for right of recourse from the court (Oosthuizen & Bondesio, 1988:31), which means that they can claim compensation straight from the employee who committed the unlawful act.

3.3.3.2 Factors which influence an educator's negligence

Botha (1998:80-81) states that based on his proficiency and expertise, an educator's conduct is not subject to the ordinary reasonable person test (*cf.* 3.2.3.2 and 4.3.1), but rather has to comply with the higher standard of the reasonable educator. At the same time the weight of legal authority indicates that a greater degree of care is required where children are involved (Boberg, 1984a:280; 355-356; *cf.* 4.3.1.1).

The educator must at all times be aware of the fact that children behave impulsively and thoughtlessly (*cf.* 4.3.2.1.2), and should be able to adapt his conduct to allow for this aspect of children's behaviour.

There are, however, two important considerations to be taken into account: the *ultra vires* doctrine and the *in loco parentis* doctrine.

3.3.4 The *ultra vires* doctrine

A valid administrative act occurs on the basis of the powers vested by the authorities, and whosoever acts beyond this, acts *ultra vires* (Wiechers, 1984:196; *cf.* 3.2.2).

Hiemstra and Gonin (1981:278) define *ultra vires* as *"acting beyond competency"*. Were a person (such as the educator) therefore to exceed the limits of his competence (as set out in enabling legislation), he would be acting *ultra vires* and his acts would then be invalid.

Baxter (1991:303-305) points out that the logic behind this doctrine provides an *inherent* rationale for judicial review: the court does not need statutory authority for exercising its supervisory powers. This inherent jurisdiction to review administrative acts extends to all kinds of administrative acts; as long as the courts have general jurisdiction and a duty to apply the law, their inherent jurisdiction to review administrative acts flows logically from the *ultra vires* doctrine and cannot be ousted.

Courts have held administrative acts to be *ultra vires* in a wide variety of situations. Baxter (1991:445) distinguishes the following seven deficiencies in the execution of administrative acts which could lead to the annulment (invalidity) of such acts:

- where notification of taking action against an accused was not issued timeously;
- where the notification was not published in the official languages;
- where the notification was not published in the correct newspaper;
- where public bodies of state failed to carry out their own rules of procedure;
- where a disciplinary committee was not properly appointed;
- where the necessary reports were not presented and dealt with before decisions were made; or
- where decisions were made without the required consultation.

In order to circumscribe the framework within which administrative bodies must exercise their competencies, Bray (1988:59) refers to the *ultra vires* doctrine. Wiechers (1984:198-199) and Bray (1988:60-61) agree that the general legal principle is fundamental to the general legal requirements for administrative acts. Administrative acts must thus not only be performed within the prescriptions of the law (*cf.* 3.2.6 and

4.3.2.1.5), but common law prescriptives (*cf.* 3.3) and the administration of justice must also be carried out (Wiechers, 1984:199-201).

At this point Wiechers (1984:201) makes the following interesting observation concerning the link between *the principle of legality* and *the doctrine of ultra vires*. The latter refers only to the *powers* of administration. The former pertains to the powers of administration as well as its complete conduct (*cf.* 3.2.1). Administrative *procedures* and *objectives* cannot be measured according to the *ultra vires* doctrine.

According to Baxter (1991:301), the administrative organ acting *ultra vires* must realize that he is accumulating accountability against himself in the same measure as it would have accumulated against a private person in similar circumstances (*cf.* 3.2.1).

In ***R v Scheepers*** *1915 AD 338*, Mr Scheepers, the principal of a primary school, was convicted in a magistrates court on a charge of assault after having struck a female learner on the buttocks and bare legs. She had deliberately lied to him on two occasions. The conviction was sustained by the Appellate Division, the legal principle being that *under all the circumstances of the case, the punishment had been cruelly administered.*

In ***R v Muller 1948*** *4 SA 848 (O)*, Mr Muller, housemaster of a hostel, was convicted of assault in a magistrates court after having punished twenty-seven boys who were guilty of acts of provocation. The housemaster appealed against the decision. The Apellate Division found him guilty of assault. The legal principle of the court's judgement being that "*Where a head of a boarding house is charged with having unlawfully, wrongfully and intentionally assaulted an inmate, the* ***onus*** *is on him to justify the assault by proving (1) that the punishment was not unreasonable or unduly severe, and (2) that he had exercised the right to impose the punishment in his capacity either as an educator or as the head of the boarding house ... such educator has the unenviable task of satisfying the Court that his action was either in the interest of the learner or the school*". In this case the court was not satisfied that the accused had conducted a reasonable investigation to identify the real culprits. It was found that the punishment meted out was not promotive of the learners or the school.

3.3.5 The *in loco parentis* doctrine

As *in loco parentis* (*cf.* 1.2 and 4.2 and 5.4.1), the educator exercises delegated authority (parental authority which is transferred to the educator for the sake of the children's compulsory education) as well as original authority (the educator's legal duty to tend to the learner's welfare, take adequate steps on behalf of the furtherance of the chain of educational events and the maintenance of the educational institution) over the learner at school (Boberg, 1984b:464-465; *cf.* 4.2).

Concerning its educational vocation, the parental home is the primary educational institution (Oosthuizen, 1989:105). However, the parent is dependent on the educator's educational didactic skills for the schooling and career preparation of the child. In the education situation the educator therefore acts on behalf of the parent from the moment the child comes under the control of the school (Oosthuizen & Bondesio, 1988:66).

A potential for conflict exists between parent and educator, since independent interest groups are both concentrating on the child (Oosthuizen & Bondesio,1988:14). They also point out that co-operation between parent and educator requires a clear definition of the different areas of legal rights and legal duties. Oosthuizen (1992:56) states that the educational act should still be a unified one although it is accomplished by differentiated educational participation.

According to Van Wyk (1987:73), Oosthuizen and Bondesio (1995:67) and Oosthuizen (1992:56-57) the implications of the *in loco parentis* doctrine relate to the educator's legal duty concerning caring supervision (*cf.* 4.3) and the accompanying right to maintain discipline (*cf.* 2.3.2.1.1 and 4.5.3.4).

Oosthuizen (1989:108) points out that education at school does not stand isolated from parental education, but that the educator *in loco parentis* must link up with the educationally accountable spirit and direction of parental education.

By now it has become abundantly clear that the educator cannot act prudently and competently in the best interest of the public and especially of the learner (or of his own career) unless he is cognizant of all relevant legal determinants.

3.4 SUMMARY

The sources of administrative law (legislation, common law and case law), play intricate roles in determining whether an administrative body (such as an educator) has acted in a lawful or unlawful way.

All administrative bodies are legally bound to advance the public interest at all times. In the case of education, this would imply that the educator must at all times act in such a way that the best interest of the learner is advanced.

It is legally expected of an educator to act within the bounds of his authority and according to prescribed procedures. The *principle of legality* underscores such prescriptions: the *minimalist* concept determines the legal authority of an administrative act, while the *normative* concept requires fairness, equality and freedom from arbitrary acts.

There are legal requisites for the author of the administrative act, the place of the act, the object or subject of the act and its specified time.

Concerning *form* and *procedure* there are also statutory requirements (such as whether the directive was peremptory or directory) and common law requirements such as that of the reasonable person.

Not only must the objective of the act be legal, but it must be executed *bona fide*.

In upholding the common law concepts such as *quasi-judicial act* and the rules of natural justice, namely *audi alteram partem* and *nemo iudex in propria causa*, educators accept accountability for their acts in the best interest of the learner.

Transgressions lead, amongst other consequences, to *vicarious liability* which is the blameless accountability of one person for the unlawful act of another (such as an employee). So educational authorities can be held accountable for any unlawful act of the educator, provided the claimant can prove the educator's intent or negligence, for which the *ultra vires* and the *in loco parentis* doctrines must be taken into consideration.

In the next chapter the logical outcome of the legal determinants in the educator-learner relationship, the duty of care, will receive pre-eminence.