

Chapter 2: Law and the Courts

ANN R. SHORTEN

School of Graduate Studies, Faculty of Education, Monash University, Clayton.

INTRODUCTION

Since the provision of public school education is one of the most important functions of government, the administration of public schools and public school systems necessarily has a legal context. Both those responsible for the development of educational policy and those charged with the daily management of education need to be aware of the legal parameters of their work. The purpose of this chapter is to explore some salient features of the interface between education and the law in the administration of public education in both Australia and Canada. Examples drawn from both countries illustrate the kinds of factors which control the extent to which law and the courts influence the context for educational leadership and educational administration in modern post-industrial societies where there is a Westminster-style political system and a legal system based on an adversarial common law system. *Inter alia*, the Chapter covers the sources of law in education, the influence of statute law, the influence of the common law, the effects of the nature of the culture of the legal system and the scope of litigation in education.

The provision of public education is a field of endeavour in modern post-industrial societies where the rhetoric of the individual rights of the child and of social justice and equity flows freely through the fields of educational theory and desirable practice. There are not infrequently also references to the duties and obligations of the participants in the educational process. However, insofar as rights and duties are concerned a distinction needs to be drawn between legal rights and duties of individuals and groups and other kinds of rights and duties, whose conceptual and philosophical origin may be in the moral values about which there is a general social consensus, or in political ideology which espouses a certain view of the role and functions of education in modern society. In this Chapter a reference to rights or to duties means only those rights and duties which are enshrined in legislation and are statutorily enforceable or those rights and duties, arising in the common law, which are rights and duties recognized at law, and which

will, if a court finds them to have been breached, be held to give rise to compensation for the injured party.

SOURCES OF LAW FOR EDUCATION

The influence of law and the tribunals and courts on the context for educational leadership and administration is determined by the nature of the legislation in a particular jurisdiction and the kinds of disputes affecting educational policy and practice which come before the courts and tribunals for decision. In Westminster-style democracies statute law and common law are the primary sources of law for education.¹ Statute law includes both statutes and subordinate legislation (or statutory rules). The common law is the law distilled from the judgments of the authoritative superior courts. However, the rules arising from judge-made law have the inherent constraints of the doctrine of precedent and the authority of the court which has made the decision, and the weight to be given to judicial comments *obiter* which do not form part of the reasons for the decision made, as distinct from those which form part of the *ratio decidendi* of a decision, which are crucial to the application of the doctrine of precedent. There is also to be taken into account in the Westminster system the power of the executive arm of government. Ministerial orders, that is directives given by the relevant minister responsible for the administration of a particular Act, are rules made by the executive as distinct from the legislature, but these will also have the force of law insofar as the administration of an education system or an educational institution is concerned. In federal systems there may be both federal and state or provincial laws which affect the provision of education. The statutory framework of the law relating to education will be of considerable significance for the organisation of public education. It will determine the nature of the organisational structures for the administration of public education and where effective power resides in those structures. In most jurisdictions it will provide for the degree of supervision the state chooses to exercise over non-government provision of school education. Educational administrators need to be well apprised of the range of relevant statute law governing their activities. Certainly they need to be aware also of the ministerial directives and official guidelines which a relevant government authority might issue in relation to administrative practices.

Awareness of the current developments in the common law in their particular jurisdiction, particularly in relation to professional negligence, is also essential for educators and educational administrators. However, the awareness of current developments in common law needs to be informed by an understanding of the purposes of the procedural structures of the adversarial system and an understanding of the fundamental differences between the purposes of criminal law and those of tort law. It is also important that the distinction between the concepts of guilt in the criminal law and of liability under tort law is understood. And what is perhaps even more important, educational administrators need to be aware that a decision of a court in another jurisdiction is not necessarily of any effect or authority in their particular jurisdiction. There needs also to be awareness that the operation of the common law in a particular jurisdiction may be constrained by statute law, and that a case may not proceed because in that jurisdiction the defendant may be able to successfully invoke a statutory immunity from suit in the particular circumstances of the case. There needs to be awareness also that the adjectival or procedural law in a particular jurisdiction may determine not only whether a case may be successfully brought but also the outcome of the matter. Further, in the adversarial legal systems in Canada and Australia parties to a dispute may agree to an out-of-court settlement of the matters in contention between them. Sometimes such settlements receive publicity in the news media. Educational administrators need to understand that such settlements are private agreements, not the rulings of the courts, and consequently, they are not statements of the law and they cannot constitute a precedent.

THE INFLUENCE OF STATUTE LAW

In Westminster style parliamentary democracies in which legal and political theory provides for representative and responsible government, the separation of powers of the executive, the legislature and the judiciary, the independence of the judiciary and the supremacy of the legislature over the executive, this political and legal framework determines the extent to which law and the courts are likely to be influential in the provision of education. The statutory framework of education defines the power relationships between the provider and its employees and the parents and students who are the clients of the education system, and the responsibilities of the provider and its employees and

those clients in the educational process. Whether the laws relating to education provide for statutorily enforceable duties and for statutorily enforceable rights for participants in the educational process is of prime importance. Where there are entrenched constitutional rights for individuals or groups which are referable to the provision of education, there is likely to be greater resort to the courts and consequently greater influence by the courts on educational policy making if the courts choose to use an interventionist approach the resolution of disputes relating to education by using the rules of statutory construction to read rights broadly. It is worth noting that legislation other than entrenched constitutional laws, such as the education legislation, legislation relating to child welfare, freedom of information legislation, occupational health and safety legislation, workers' compensation legislation, copyright laws, anti-discrimination legislation, and laws relating to the prescription of sexual and racial harassment may also provide rights referable to participants in the educational process. However, where the statutory framework of the provision of public education does not provide for rights for the participants in the educational process, or even specifically limits judicial review of ministerial actions, there is far less likely to be resort to the courts. Nevertheless, statute law other than laws which provide rights referable to the provision of education may affect the daily work of educators and educational administrators. For example, educators and educational administrators need to be aware of the fundamental concepts of family law, such as guardianship and custody, in their jurisdiction. Finally, whether the framework of criminal law in a jurisdiction provides for a criminal code, or for a crimes statute which is applied in conjunction with the common law, educational administrators may find that professional obligations arise in relation to crimes such as the sexual abuse of children, and assault, theft and other crimes where they occur within the educational system or institution.

THE INFLUENCE OF THE COMMON LAW

The common law will also have a broad reach over educational activities. Tort law, that is the law which provides for the compensation for various kinds of injury done by one person to another, is among educators and educational administrators probably best known for the tort of negligence. Contract law is also of importance for educational administrators, particularly insofar as they are responsible for the local or

regional management of the human, financial and physical resources of schools and educational facilities. Where criminal law is in the field of common law in any jurisdiction, educational administrators need to be aware of its implications for their professional activities. Insofar as the common law is concerned, whether or not the courts influence educational policy-making or educational practice will depend upon whether the courts in any particular case choose to adopt an activist interventionist approach, for example by extending the categories of negligence, or by overruling earlier decisions. Of course, in any particular case, a court may choose not to take such an approach on public policy grounds such as a desire not to open the floodgates of litigation, or perhaps because the court, in the factual context of the case before it, declines to intervene in the complexities of the provision of education. Educational administrators need also to be aware of the weight of authority of the determinations of tribunals such as administrative appeal tribunals and equal opportunity tribunals which do not have the authority of decisions of the superior courts in any jurisdiction and that, unlike courts, these tribunals are not bound by the doctrine of precedent in making their determinations, and they may not necessarily follow an earlier determination they have made if a similar matter comes before them at a later time.

THE INFLUENCE OF THE LEGAL CULTURE OF THE JURISDICTION

Of equal importance is the legal culture of a particular society which determines the degree of the ease of access for aggrieved persons to the legal system. In adversarial common law jurisdictions the issue of ease of access to courts is certainly influenced by the costs of litigation. These costs are not simply a function of the fees charged by attorneys and counsel. They are also a function of the rules governing the legal profession in a jurisdiction. There is probably little doubt that access to the courts is likely to be easier in those jurisdictions where solicitors and counsel are permitted to undertake work on a contingency fee basis. However, costs are also a function of the procedural rules of court of a jurisdiction. These rules of court determine the nature and timing of procedural requirements of an action, and who between the parties shall be required to bear those party-party costs such as the court costs, that is the fees charged by the courts for filing applications and issuing writs. Where for example the rules of courts provide for a costs indemnity rule, which means generally that the losing party is