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## RECOVERY IN TORT FOR EDUCATIONAL MALPRACTICE: PROBLEMS OF THEORY AND POLICY\*

Robert H. Jerry, II\*\*

Nearly a decade has passed since a few imaginative commentators suggested that students could sue their teachers and schools in tort for inadequate classroom instruction.<sup>1</sup> These early suggestions proved to be prophetic. During the last decade, several students have initiated lawsuits against their schools and teachers to recover money damages for "educational malpractice."<sup>2</sup>

Although these lawsuits have occurred only sporadically, the implications of students suing their teachers and schools for "educational malpractice" are of great interest to educators<sup>3</sup> and legal scholars.<sup>4</sup> Given the substantial publicity afforded malpractice suits against persons in other professions, it is not surprising that educators have bristled when confronted with the provocative notion that a student might recover money damages for the loss of the difference the teacher or school

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<sup>1</sup> See *You in Court*, SATURDAY REV., Oct. 14, 1972, at 50; *Suing the Schools for Fraud: Issues and Legal Strategies* (Mar. 1973) (transcript of a conference on Fraud in the Schools, Washington, D.C.) (Educational Policy Research Center, Syracuse University Research Corp., 1973).

<sup>2</sup> An action for educational malpractice seeks to recover for the loss of learning caused by inadequate instruction. In other words, the action alleges that because of inadequate instruction the student was prevented from learning as much as he would have learned. Immediately, one is confronted with the idea that the cause of action for educational malpractice sounds in contract, rather than in tort. The claim for educational malpractice appears to allege that the school promised to teach the student skills and to develop the students to a certain level, but failed to fulfill its promise. The claim definitely has contractual overtones, but the same can be said of any malpractice theory. For example, plaintiff in the medical setting contends that the doctor promised to mend his hand but failed to do so, or that the doctor promised to remove his tumor and improve his health, but the doctor did not perform as promised, and he is not as healthy as he would have been but for the failure of the doctor to perform as promised. That medical malpractice should be dealt with under contract law, rather than under tort law, is not a new argument. See O'Connell, *The Interlocking Death and Rebirth of Contract and Tort*, 75 U. MICH. L. REV. 659, 665-66 (1977) (discussing, but rejecting argument that contract theory in allocating loss in medical malpractice is solution to tort law's deficiencies). Courts, however, generally continue to view malpractice from a tort perspective. In the medical service setting the physician's liability is based on negligence, unlike liability in contract. Plaintiff sues not so much for the loss of an expectancy, as for the damage to his person—the loss of health that would not have occurred but for the physician's negligence. Similarly, in the educational setting, the student alleges that the educator's negligence prevented him from obtaining skills that he would have obtained but for the negligence. While the argument can be transposed to sound in contract, its substantive basis is in tort.

<sup>3</sup> E.g., Hentoff, *Who's to Blame? The Politics of Educational Malpractice*, 6 LEARNING, Oct. 1977, at 40; Sharken, *Dangers in Educational Malpractice Concept*, AM. TEACHER, June 1975, at 4; Sparks & Strauss, *How Soon Before Those "Professional" Teachers of Yours Can Be Sued for Malpractice?*, 159 AM. SCH. BOARD J., June 1972, at 19; Sugarman, *Accountability Through the Courts*, 82 SCH. REV. 233 (1974).

<sup>4</sup> Abel, *Can a Student Sue the Schools for Educational Malpractice*, 44 HARV. EDUC. REV. 416 (1974); Elson, *A Common Law Remedy for the Educational Harms Covered by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641 (1978); Rattner, *Remedying Failure to Teach Basic Skills: Preliminary Thoughts*, 17 INEQUALITY EDUC. 15 (1974); Vacca, *Teacher Malpractice*, 8 U. RICH. L. REV. 447 (1974); Note, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U. L. REV. 293 (1978); Note, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L.J. 117 (1978); Note, *Nonliability for Negligence in the Public Schools—"Educational Malpractice" from Peter W. to Hoffman*, 55 NOTRE DAME LAW. 814 (1980); Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U.L. REV. 27 (1979); Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA L.J. 383 (1978); Note, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976); Note, *Educational Malpractice*, 1 W. NEW ENGLAND L. REV. 759 (1979).

system makes in how much the student learns. Beyond the practical concerns voiced by educators, the suggestion that students have a cause of action for educational malpractice has presented courts with difficult questions of theory and policy.<sup>5</sup>

This Article considers whether denial of a cause of action for educational malpractice is consistent with recognized tort principles and the general policy considerations underlying those principles. After briefly summarizing three lawsuits in which the cause of action has been advocated and rejected, it explores the collision between theory and policy that permeates the decisions. The Article suggests that refusal to recognize the cause of action is incompatible with accepted tort principles, and that a cogent theory supporting nonrecognition cannot be articulated within the confines of the accepted principles and the general policies upon which those principles are based. If special policies justifying nonrecognition exist, then that result should be legislatively prescribed, rather than judicially pronounced in a manner that is antithetical to the recognized, traditional tort principles.

## I. THE DECIDED CASES

Although several suits alleging educational malpractice by schools or teachers were initiated in recent years,<sup>6</sup> only three of those suits resulted in reported decisions. Yet those three lawsuits—*Peter W. v. San Francisco Unified School District*,<sup>7</sup> *Donohue v. Copiague Union Free School District*,<sup>8</sup> and *Hoffman v. Board of Education*<sup>9</sup>—resulted in no less than seven published opinions.

### A. *Peter W. v. San Francisco Unified School District*

In *Peter W.*, a student who had graduated from a high school operated by defendant school district and who had attended the district's schools for twelve years,<sup>10</sup> charged the school district and other defendants<sup>11</sup> with a variety of negligent acts and omissions.<sup>12</sup> The gravamen of *Peter W.*'s complaint was that defendants "negligently and carelessly failed to provide plaintiff with adequate instruction,

<sup>5</sup> The questions raised by the treatment of educational malpractice allegations might be said to be threefold: (1) Are the holdings that no cause of action exists for educational malpractice consistent with recognized tort principles and the general policy considerations upon which those principles are based? (2) If not, is it the judiciary's function to declare, as a matter of policy, that no such cause of action exists, or is this function more appropriately performed by legislatures? (3) Given a determination of which decisionmaker can best decide whether educational malpractice should be actionable, what decision should be made and, if the decision is to limit the cause of action, how should that decision be effected? Before the last two questions can be addressed cogently, the answer to the first question must be clearly understood.

<sup>6</sup> At least eight educational malpractice lawsuits have been filed. No effort is made to inventory or discuss in detail the non-reported lawsuits. For further discussion, see Note, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U.L. REV. 293 (1978) (Fisher); Note, *Donohue v. Copiague Union Free School District: New York Chooses not to Recognize "Educational Malpractice."* 43 ALB. L. REV. 339 (1979) (Garrett, McNeil, and Beaman).

<sup>7</sup> 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

<sup>8</sup> 95 Misc. 2d 1, 408 N.Y.S.2d 584 (Sup. Ct. Suffolk County 1977), *aff'd*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

<sup>9</sup> 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

<sup>10</sup> 60 Cal. App. 3d at 817, 131 Cal. Rptr. at 856.

<sup>11</sup> Plaintiff also sued the district superintendent, the school board, and the board members in their individual capacities. *Id.* at 817, 131 Cal. Rptr. at 855.

<sup>12</sup> Plaintiff's complaint, as explained by the California Court of Appeal, stated seven counts. Count I sounded in negligence. *See id.* at 817, 131 Cal. Rptr. at 856. Counts III through VII incorporated the allegations of Count I and pleaded various breaches of a duty purported to arise out of statutory law. *See id.* at 826, 131 Cal. Rptr. at 861-62. Count II also incorporated the allegations of Count I and charged that the school district misrepresented plaintiff's performance, thereby causing his injury. *Id.* at 827, 131 Cal. Rptr. at 862.

guidance, counseling or supervision in basic academic skills such as reading and writing."<sup>13</sup> He postulated that defendants' relationship to him was akin to the relationship that exists between any professional and the person benefitting from the professional's services. He claimed that this relationship gave rise to a legally cognizable duty, as it does in the context of other professional services. Specifically, he claimed that defendants failed to exercise the "degree of professional skill required of an ordinary prudent educator under the same circumstances,"<sup>14</sup> a standard parallel to that applied to other professionals.<sup>15</sup>

Peter W. contended that defendants "negligently and carelessly" breached the duty they owed to him in five ways: (1) by failing to recognize his reading disability; (2) by assigning him to classes beyond his skill level, in which he could not progress because he could not sufficiently comprehend the material; (3) by promoting him to more advanced grades and courses before he achieved the skills necessary to advance; (4) by providing instructors who were not qualified to teach students with his kind of learning disabilities; and (5) by permitting him to graduate even though his reading skills equalled those of the average fifth grade student.<sup>16</sup> Peter W. sought damages that would compensate him for his inability to obtain meaningful employment because of skill deficiencies, his diminished earning capacity, and the costs of the remedial tutoring he obtained.<sup>17</sup>

Defendants did not dispute the sufficiency of plaintiff's complaint in pleading negligence, proximate cause, and injury.<sup>18</sup> They did, however, dispute whether the complaint alleged facts sufficient to establish that defendants owed Peter W. a duty of care.<sup>19</sup>

The court, after rejecting plaintiff's bases for a duty of care,<sup>20</sup> explained that the scope of a duty is limited by the foreseeability of the injury<sup>21</sup> and that judicial recognition of the duty is initially determined by reference to considerations of public policy.<sup>22</sup> The court inventoried the often-listed factors relevant to the inquiry: the social utility of and the risk involved in the conduct of the activity out of which the injury arises; the status of the parties to the relationship; the feasibility of a standard of care and the ability of the parties to translate the standard into practical means of preventing injury; the foreseeability of injury resulting from violation of the standard; the difficulty of proving that a party was injured, including the possibility of feigned claims; the ability of the parties to absorb, spread, or insure

<sup>13</sup> *Id.* at 818, 131 Cal. Rptr. at 856.

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g.,* Loudon v. Scott, 58 Mont. 645, ..., 194 P. 488, 491 (1920).

<sup>16</sup> 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

<sup>17</sup> *Id.* at 818, 131 Cal. Rptr. at 856-57.

<sup>18</sup> *Id.* at 818, 131 Cal. Rptr. at 857.

<sup>19</sup> *Id.*

<sup>20</sup> Peter W. argued that by assuming the task of instructing students, defendants thereby acquired a duty to exercise that function with reasonable care. The court rejected this argument on the ground that the cases plaintiff cited were distinguishable. The cases applied a statute granting tort immunity to public employees when performing a job-related function "assumed" in the exercise of their discretion. *Id.* at 820, 131 Cal. Rptr. at 858.

Alternatively, Peter W. argued the existence of a "special relationship" between student and teacher out of which the duty arose, citing decisions recognizing various rights or privileges of students. The court rejected this argument because none of the cases plaintiff cited involved a question of whether school authorities owed students a duty in the course of their academic instruction. *Id.* Finally, Peter W. argued that a duty to exercise reasonable care in the instruction and supervision of students had been recognized in California. The court rejected this argument because the cited decisions, in its view, only recognized a duty to exercise reasonable care for the physical safety of students. *Id.* at 821, 131 Cal. Rptr. at 857.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 822, 131 Cal. Rptr. at 859.

against the financial burden of injury; the law already applicable to the relationship between the parties; the effect of recognition of a duty on the relationship, the parties, and society; and moral considerations, including the blameworthiness of a party who violates the standard.<sup>23</sup>

The court evaluated Peter W.'s claims in light of these factors and expressed three reservations about educational malpractice suits. First, it questioned the feasibility of a standard of care, noting that educators hold diverse views on how to teach.<sup>24</sup> Second, the court questioned plaintiff's ability to prove causal links between their injuries and the acts or omissions of schools and teachers. Nor was it clear to the court that plaintiffs could identify the effects of factors beyond the control of schools and teachers that contribute to a student's learning deficiencies.<sup>25</sup> Finally, the court expressed its concern about the adverse effect that recognizing the existence of a duty of care might have on school systems. It feared the prospect of "countless" claims, some feigned, which would place excessive burdens on the public treasury as well as the schools.<sup>26</sup> In the final accounting, the court refused to recognize any duty owed by defendants to Peter W. and held that plaintiff's complaint failed to state a cause of action.<sup>27</sup>

## B. *Donohue v. Copiague Union Free School District*<sup>28</sup>

### 1. *The Trial Court*

Plaintiff's claims in *Donohue* were substantially similar to those in *Peter W. Donohue*, like Peter W., contended that defendant school district and its agents breached a duty owed to him because Donohue was permitted to graduate even though he lacked basic reading and writing skills and had received failing grades in several subjects.<sup>29</sup> He alleged that it had been necessary for him to seek tutoring in order to acquire the basic skills that he had not been taught in high school.<sup>30</sup> Donohue specifically claimed that defendant had a duty not only to teach him, but also to ascertain his learning ability through tests calculated to measure his comprehension and understanding of various subjects.<sup>31</sup> He alleged, much like Peter W., that defendant had failed to recognize his learning deficiencies, to provide adequate personnel and facilities for necessary tests and evaluation, to teach him in a manner that he could understand, and to supervise properly his academic training.<sup>32</sup> For

<sup>23</sup> *Id.* at 822-24, 131 Cal. Rptr. at 859-60 (quoting *Raymond v. Paradise United School Dist.*, 218 Cal. App. 2d 1, 8-9, 31 Cal. Rptr. 847, 851 (1963), and *Rowland v. Christian*, 69 Cal. 2d 108, 112-13, 70 Cal. Rptr. 97, 100, 443 P.2d 561, 564 (1968)).

<sup>24</sup> 60 Cal. App. 3d at 824-25, 131 Cal. Rptr. at 860-61.

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* at 825, 131 Cal. Rptr. at 861.

<sup>27</sup> In deciding Counts III through VII, the court reasoned that the statute upon which Peter W. sought to base a duty was not designed as a safeguard against educational underachievement and as such could not serve as the basis of a cause of action. *Id.* at 826-27, 131 Cal. Rptr. at 862. The misrepresentation allegation in Count II was rejected because, for the same policy reasons outlined earlier in its opinion, no cause of action existed for negligent misrepresentation. Because plaintiff did not allege reliance on any misrepresentation, the court held that Count II did not state a cause of action. *Id.* at 827, 131 Cal. Rptr. at 863.

<sup>28</sup> 95 Misc. 2d 1, 408 N.Y.S.2d 584 (Sup. Ct. Suffolk County 1977), *aff'd*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

<sup>29</sup> See 64 A.D.2d at ..., 407 N.Y.S.2d at 876. Plaintiff further alleged that he did not have an understanding of the other subjects covered in his high school courses. *Id.*

<sup>30</sup> *Id.* at ..., 407 N.Y.S.2d at 876.

<sup>31</sup> *Id.* at ..., 407 N.Y.S.2d at 876.

<sup>32</sup> *Id.* at ..., 407 N.Y.S.2d at 876-77. Donohue also alleged in a second count that he was the third-party beneficiary of a duty to educate imposed by the New York State Constitution. *Id.* at ..., 407 N.Y.S.2d at 877.

these alleged breaches, Donohue sought damages in the amount of five million dollars.<sup>33</sup>

The trial court cited the "parallel if not identical" complaint and disposition in *Peter W.* and held that Donohue's claim failed to state a cause of action for educational malpractice.<sup>34</sup> The trial court, however, invited the Appellate Division of the New York Supreme Court to review its decision. The Appellate Division accepted this invitation and affirmed the dismissal in another published opinion.<sup>35</sup>

## 2. *The New York Appellate Division*

After articulating the factors pertinent to whether one party owes a duty to another,<sup>36</sup> the appellate court quoted at length from *Peter W.*, making only a few observations of its own.<sup>37</sup> It elaborated on the *Peter W.* court's concern for the lack of a workable standard of care, stating that recognizing a cause of action for educational malpractice "would impermissibly require the courts to oversee the administration of the State's public school system."<sup>38</sup> It also emphasized the practical difficulties that confront a student when attempting to prove that the conduct proximately caused his failure to learn.<sup>39</sup> In accordance with *Peter W.*, the court held that no duty existed.<sup>40</sup>

One member of the three-judge panel dissented. Judge Suozzi, although principally concerned with Donohue's alternative argument that the New York Constitution created a duty of care applicable to schools and teachers,<sup>41</sup> also argued that the problem of establishing the cause of a learning deficiency posed "a question of proof to be resolved at a trial" and was not a reason to dismiss the action.<sup>42</sup> Judge Suozzi also rejected the majority's concern about feigned claims and the establishment of an appropriate measure of damages, noting that such concerns had been deemed insignificant in other contexts in which novel causes of action were proposed.<sup>43</sup> He believed that Donohue's complaint was similar in material respects to a complaint alleging medical malpractice arising out of a failure to diagnose and treat a dangerous condition—Donohue's failing grades evidenced a potentially serious condition that defendants made no attempt to diagnose and treat, even though they had, as does a doctor who renders professional services, a duty to do so.<sup>44</sup>

<sup>33</sup> *Donohue v. Copiague Union Free School Dist.*, 95 Misc. 2d 1, ..., 408 N.Y.2d 584, 585 (Sup. Ct. Suffolk County 1977).

<sup>34</sup> *Id.*

<sup>35</sup> *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978).

<sup>36</sup> *See id.* at ..., 407 N.Y.S.2d at 877.

<sup>37</sup> *See id.* at ..., 407 N.Y.S.2d at 878.

<sup>38</sup> *Id.* at ..., 407 N.Y.S.2d at 879. To support this conclusion, the court referred to and quoted from two New York decisions in which the court declined invitations to review educational judgments made by the New York Commissioner of Education in the exercise of his administrative discretion. *Vetere v. Allen*, 15 N.Y.2d 259, 267, 206 N.E.2d 174, 176, 258 N.Y.S.2d 77, 80 (1965); *James v. Board of Educ.*, 42 N.Y.2d 357, 366 N.E.2d 1291, 397 N.Y.S.2d 934 (1977).

<sup>39</sup> 64 A.D.2d at ..., 407 N.Y.S.2d at 878.

<sup>40</sup> *Id.* at ..., 407 N.Y.S.2d at 878. The court, with one judge dissenting, also dismissed Donohue's second count involving the New York State Constitution. 64 A.D. 2d at ..., 407 N.Y.S.2d at 880-81. *See also* note 32 *supra*.

<sup>41</sup> *See* note 32 *supra*.

<sup>42</sup> 64 A.D.2d at ..., 407 N.Y.S.2d at 883 (Suozzi, J., dissenting).

<sup>43</sup> The dissent stated: "Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts." *Id.* at ..., 407 N.Y.S.2d at 883.

<sup>44</sup> *Id.* at ..., 407 N.Y.S.2d at 885 (Suozzi, J., dissenting).

### 3. *The New York Court of Appeals*

The Appellate Division's decision was appealed to the New York Court of Appeals. That court affirmed the dismissal of the complaint.<sup>45</sup> The Court of Appeals conceded that an action for educational malpractice, like other claims for professional malpractice, could be formally pleaded. Departing from the observations in *Peter W.* and the appellate division's opinion, the Court of Appeals stated that articulating a standard of care was not necessarily an unsurmountable burden; that proving causation, while difficult, might not be impossible; and that it was possible that plaintiff had suffered a measurable "injury."<sup>46</sup> The court nevertheless declined "as a matter of public policy" to entertain the cause of action.<sup>47</sup> The court stated that the authority to make educational policy decisions was vested in the Board of Regents and the Commissioner of Education, not in the courts, and that a common law cause of action did not exist because the administrative agencies had sole authority to evaluate such claims.<sup>48</sup>

## C. *Hoffman v. Board of Education*

### 1. *The Trial Court*

The holding in *Donohue* that no cause of action exists for educational malpractice was refined in *Hoffman v. Board of Education*.<sup>49</sup> Hoffman suffered from a speech abnormality that developed immediately after his father died. Hoffman, then only thirteen months old, had started talking and walking, but retrogressed after his father's death.<sup>50</sup> When Hoffman was nearly five years old and still incapable of speaking properly, his mother took him to the National Hospital for Speech Disorders. The hospital's records noted that the child exhibited virtually no intelligible speech and appeared to be retarded. Psychological tests were recommended. One month later, Hoffman was given a nonverbal intelligence test, the results of which indicated that his IQ was within the range of normal intelligence.<sup>51</sup>

A few months after Hoffman entered kindergarten, he was given a primarily verbal intelligence test. On that test, he achieved an IQ score of 74, which indicated borderline intelligence and was one point below the statutory cutoff for placement in classes for children with retarded mental development (CRMD). Because of the findings of borderline intelligence, the examiner recommended retesting within two years. At the time of testing, however, the examiner did not request Hoffman's

<sup>45</sup> 47 N.Y.2d 440, 391 N.E. 2d 1352, 418 N.Y.S.2d 375 (1979).

<sup>46</sup> *Id.* at 443, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 377.

<sup>47</sup> The court stated:

The fact that a complaint alleging "educational malpractice might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained. The heart of the matter is whether, assuming that such a cause of action may be stated, the courts should, as a matter of public policy, entertain such claims. We believe they should not.

*Id.* at 443-44, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

<sup>48</sup> *Id.* at 444-45, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377-78. In a concurring opinion, two justices endorsed the lower court's concern for the manageability of educational malpractice claims and the difficulty of proving causation. These two justices would have gone further than the rest of the court and would have used these factors as additional bases upon which to refuse to recognize the cause of action. *See id.* at 445-46, 391 N.E.2d at 1355, 418 N.Y.S.2d at 378-79 (Wachtler and Gabrielli, JJ., concurring).

<sup>49</sup> 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

<sup>50</sup> 64 A.D.2d at ..., 410 N.Y.S.2d at 101. The facts outlined in the text are supplemented, based on a brief filed by plaintiff, in the discussion in Note, *Nonliability for Negligence in the Public Schools*, 55 NOTRE DAME LAW. 814 (1980).

<sup>51</sup> 64 A.D.2d at ..., 410 N.Y.S.2d at 101.

social history, which would have revealed the retrogression commencing at the time of his father's death. The examiner also made no request for Hoffman's examination history. This history would have indicated that Hoffman was of normal intelligence.<sup>52</sup>

Later that year, Hoffman was placed in his first CRMD class. His mother was not informed of his borderline IQ score or her right to request a reexamination. After Hoffman attended CRMD classes for twelve years, he was administered an IQ test that indicated his intelligence to be well within the normal range. Because of this test, Hoffman was no longer eligible for the occupational training program that he had been enrolled in for two years.

Later in the school year, Hoffman was given additional IQ examinations, all of which indicated that he was of normal intelligence. The psychologist who administered several of the tests concluded that Hoffman's learning potential had always been above average, but that his intellectual development had been impaired by the original incorrect diagnosis of retardation and his consequently diminished educational stimulation.<sup>53</sup> He showed little improvement despite subsequent therapy and rehabilitation and at the time of the trial was a part-time messenger earning fifty dollars per week.<sup>54</sup> Hoffman sued the Board of Education of the City of New York. A jury awarded him 750,000 dollars in damages.<sup>55</sup>

## 2. *The New York Appellate Division*

The trial court's judgment was appealed to the Appellate Division of the New York Supreme Court, which in a three-to-two decision affirmed the judgment but remitted the award to 500,000 dollars. The court held that evidence that defendant, through its agents, ignored the recommendation that Hoffman be retested was, by itself, sufficient to sustain the jury's verdict.<sup>56</sup>

The dissenting justices contended that the case should not have been submitted to the jury. Justice Martuscello concluded that the evidence demonstrated no impropriety by defendant.<sup>57</sup> Justice Damiani, however, asserted in a separate dissenting opinion that the complaint sought to recover for educational malpractice which, under the *Donohue* decision, did not constitute a cause of action.<sup>58</sup> He contended (1) that Hoffman entered school with improper speech patterns and a lack of knowledge and experience; (2) that his learning deficiencies resulted from his defective communication skills; and (3) that his speech was no worse when he finished school than when he started.<sup>59</sup> Under *Donohue*, Justice Damiani reasoned, lack of educational achievement was not a legally cognizable injury for which Hoffman could recover.<sup>60</sup>

The majority rejected Justice Damiani's argument on the ground that educational malpractice was a theory intended only to remedy nonfeasance and that causes of action for misfeasance, or affirmative negligence, in the classroom were not

<sup>52</sup> *Id.* at ..., 410 N.Y.S.2d at 102-03.

<sup>53</sup> *Id.* at ..., 410 N.Y.S.2d at 106.

<sup>54</sup> *Id.* at ..., 410 N.Y.S.2d at 106.

<sup>55</sup> *Id.* at ..., 410 N.Y.S.2d at 100.

<sup>56</sup> *Id.* at ..., 410 N.Y.S.2d at 109.

<sup>57</sup> 64 A.D.2d at ..., 410 N.Y.S.2d at 111 (Martuscello, J. dissenting).

<sup>58</sup> 64 A.D.2d at ..., 410 N.Y.S.2d at 117 (Damiani, J., dissenting). It appears from the structure of the opinions that each writing Justice revised his opinion at least twice, probably responding to revisions from the opposing Justices.

<sup>59</sup> *Id.* at ..., 410 N.Y.S.2d at 118.

<sup>60</sup> *Id.*



foreclosed by *Donohue*. The majority reasoned that Hoffman's injury did not result from nonfeasance, but instead from misfeasance. The affirmative negligence consisted of the failure "to follow the individualized and specific prescription of defendant's own certified psychologist, whose very decision it was in the first place, to place plaintiff in a class for retarded children."<sup>61</sup>

Justice Damiani, responding to the misfeasance-nonfeasance distinction, argued that the complaints in *Donohue* and *Hoffman* alleged acts of both commission and omission. If anything, Hoffman was injured by an act of omission, namely the failure to retest him after two years, while *Donohue* was injured by an act of commission—the rendering of improper or ineffective instruction.<sup>62</sup> Accordingly, Justice Damiani questioned the validity of the distinction between action and inaction and rejected the majority's contention that the facts in *Donohue* were distinguishable. In any event, Justice Damiani argued, the misfeasance-nonfeasance distinction was immaterial, since negligent behavior can be either active or passive. The essential question for Justice Damiani was whether a duty existed, and he followed the rule in *Donohue* to determine that no duty existed.<sup>63</sup>

### 3. *The New York Court of Appeals*

With the arguments so framed, the Appellate Division's opinion sustaining the jury's verdict was appealed to the New York Court of Appeals. That court reversed in a four-to-three decision.<sup>64</sup> The majority, in a terse opinion by Judge Jaren, agreed with Justice Damiani that Hoffman's claim sounded in "educational malpractice" and that under *Donohue* such a cause of action should not, as a matter of public policy, be entertained.<sup>65</sup> The majority adopted Justice Damiani's view that both *Donohue* and the instant case involved acts of commission and omission, and that the policy considerations noted in *Donohue* favoring nonrecognition of the cause of action applied with equal force to "educational malpractice" actions alleging misfeasance and to those alleging nonfeasance.<sup>66</sup> The three dissenting judges, in a one paragraph opinion, approved the lower court's opinion. They agreed that the case involved "discernible affirmative negligence on the part of the board of education" in failing to retest Hoffman, rather than educational malpractice.<sup>67</sup>

## II. THE COLLISION OF THEORY AND POLICY

### A. *Result vs. Doctrine: Inherent Inconsistencies*

Although the courts in *Peter W.*, *Donohue*, and *Hoffman* held that plaintiffs' complaints failed to state causes of action, their views concerning the extent to which a cause of action for educational malpractice was consistent with traditional tort principles differed considerably. In determining whether a duty existed, the court in *Peter W.* analyzed the various components of duty and concluded that the determinative

<sup>61</sup> 64 A.D.2d at ..., 410 N.Y.S.2d at 110. The court agreed with Professor Diamond who wrote that plaintiff's case did not involve so much a failure to act but rather "affirmative acts of negligence which imposed additional and crippling burdens upon a student." *Id.* (quoting Diamond, *Educational Law*, 29 SYRACUSE L. REV. 103, 150-51 (1978)).

<sup>62</sup> 64 A.D.2d at ..., 410 N.Y.S.2d at 118 (Damiani, J., dissenting).

<sup>63</sup> *Id.*

<sup>64</sup> 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

<sup>65</sup> *Id.* at 125, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.

<sup>66</sup> *Id.* at 126, 400 N.E.2d at 320, 424 N.Y.S.2d at 379.

<sup>67</sup> *Id.* at 127, 400 N.E.2d at 321, 424 N.Y.S.2d at 380 (Meyer, J., dissenting).

components of duty did not support recognition of the cause of action. The New York Court of Appeals in *Donohue* and *Hoffman* conceded that, under a traditional analysis, the cause of action could be pleaded, but held purely and simply as a matter of public policy that the cause of action should not be recognized. Obviously, the court in *Peter W.*, in applying a traditional test, was engaged in making delicate public policy judgments,<sup>68</sup> but the New York Court of Appeals was more candid when it did so. As many commentators have urged in support of the dissent in *Donohue*, the logic upon which the holdings in *Peter W.*, *Donohue*, and ultimately *Hoffman* rest is not satisfactory.

It has been widely noted that the three concerns articulated by the court in *Peter W.*<sup>69</sup> and reiterated by the New York Supreme Court in *Donohue*<sup>70</sup> are unpersuasive. First, although providing a remedy for plaintiffs who have incurred learning deficiencies is difficult, this difficulty is not a forceful reason for refusing to recognize the tort of educational malpractice. Projecting the lost future earnings of a student who proves he cannot acquire meaningful employment is difficult, but certainly not impossible.<sup>71</sup> The absence of physical injury is not determinative since there are several torts under which damages may be recovered for mental distress.<sup>72</sup>

Second, the concern that no standard of care exists against which the school's conduct can be measured is not unreasonable, but it is easily exaggerated. Notwithstanding an often-expressed reluctance to intervene in questions of educational policy,<sup>73</sup> and notwithstanding persuasive evidence of the absence of a uniformly accepted standard—or "custom of the profession"—against which a teacher's or school's conduct must be measured,<sup>74</sup> courts have in a variety of contexts appraised the strengths and weaknesses of particular educational programs, environments, and modes of instruction.<sup>75</sup>

<sup>68</sup> The classic attempt to define what constitutes a duty is found in *Raymond v. Paradise United School Dist.*, 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963), upon which the court in *Peter W.* relied. In *Raymond*, the court conceded that its definition of a duty was grounded in "various and sometimes delicate policy judgments." *Id.* at ...., 31 Cal. Rptr. at 851.

<sup>69</sup> See text accompanying notes 24-26 *supra*.

<sup>70</sup> See text accompanying notes 36-39 *supra*.

<sup>71</sup> Elson, *supra* note 4, at 759-61. When education is considered a marital asset to be divided between spouses pursuant to a divorce settlement, courts place a value on skills or education insofar as they affect future earning capacity. *E.g.*, *In re Marriage of Horstmann*, 263 N.W.2d 885, 890 (Iowa 1978); *Daniels v. Daniels*, 20 Ohio App. 2d 458, ...., 185 N.E.2d 773, 775 (1961). See generally Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980).

<sup>72</sup> Although courts have been reluctant to award damages for mental distress as a tort in and of itself and typically have not done so in the absence of physical injury or intentional infliction of the distress, courts have not hesitated to award such damages in a variety of circumstances. See W. PROSSER, *LAW OF TORTS* § 12, at 51-52 (4th ed. 1971).

<sup>73</sup> See *Goss v. Lopez*, 419 U.S. 565, 589-91 (1975) (Powell, J., dissenting); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 652 (1943) (Frankfurter, J., dissenting).

<sup>74</sup> See Elson, *supra* note 4, at 709-19. *But see* *Green v. Orleans Parish School Bd.*, 365 So.2d 834, 838 (La. App. 1978) ("the teacher's instruction and preparation for and supervision of the [wrestling] drill in which plaintiff was injured [did not fall] below any locally or nationally accepted reasonable standard of care for teachers under similar circumstances").

<sup>75</sup> In desegregation cases, courts make judgments about the quality of education in racially unbalanced schools. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 737 (1974); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954). Questions of public school financing directly impact upon the quality of education. *E.g.*, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). First amendment issues have forced courts to decide what may or may not be taught in the schools. *E.g.*, *Epperson v. Arkansas*, 393 U.S. 97 (1968). In considering the statutory rights of handicapped children, courts have evaluated the quality and effect of the efforts of educators. *E.g.*, *In re Peter H.*, 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (Fam. Ct. 1971). The question of compulsory language programs for non-English speaking students also requires courts to appraise the quality of education. *E.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974). See Elson, *supra* note 4, at 689-90.

Third, that factors unrelated to the teacher's or school's conduct, such as social, economic, or cultural factors, might cause the failure to learn is certainly a valid concern, but it does not support a refusal to recognize educational malpractice. The probable effect of these factors in many cases does not mean that a teacher's or school's conduct was not a cause of the failure to learn. Indeed, *Hoffman* illustrates that in some circumstances a causal link between a school's conduct and a student's injury can be documented with probative evidence.<sup>76</sup> In any event, proving causation does not require proof that no other factors contributed to a result: if *A* negligently spills gasoline, and *B* ignites the gasoline, which results in damage to *C*, *A* is liable for *C*'s damage, even though *A*'s act by itself was not sufficient to injure *C*.<sup>77</sup> Thus, that other circumstances may have contributed to educational deficiencies does not provide a basis to presume conclusively that all defendants cannot be held liable for educational torts.

In *Donohue* the New York Court of Appeals was sensitive to the weaknesses in the rationale underlying *Peter W.* and the New York Appellate Division's opinion in *Donohue*. Indeed, the court agreed in substance with the lower court's dissent in *Donohue*: "It may very well be that even within the strictures of a traditional negligence or malpractice action, a complaint sounding in 'educational malpractice' may be formally pleaded."<sup>78</sup> Even though the cause of action was consistent with traditional principles, the court concluded that, as a matter of policy, lawsuits alleging nonachievement due to the negligence of teachers and schools should not be entertained. *Donohue* and *Peter W.* illustrate the tension that exists between theory and policy whenever a court is asked to recognize the presence of a duty where none has previously been acknowledged. The Court of Appeals in *Donohue* realized that its holding could not be articulated consistently with traditional tort doctrines, and it did not attempt to be consistent.

### *B. Results vs. Doctrine: The Impact Rule Analogy, Zones of Duty, and Professional Malpractice Generally*

The foregoing discussion demonstrates that within the confines of traditional tort principles, duties may logically exist, but if a court is persuaded that society's interests are not served by permitting plaintiffs generally to sue for breach of the duty, the court must either reconcile a policy-oriented result with traditional

<sup>76</sup> 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

<sup>77</sup> *Trapp v. Standard Oil Co.*, 176 Kan. 39, 269 P.2d 469 (1954).

<sup>78</sup> 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377. The Court of Appeals had no difficulty with the proposition that a duty exists for which there are readily available standards to determine that breaches occurred:

[T]he imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students. If doctors, lawyers, architects, engineers, and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators. Nor would creation of a standard with which to judge an educator's performance of that duty necessarily pose an insurmountable obstacle.

*Id.* Similarly, the remaining elements of proximate causation and injury did not, in the Court of Appeals' view, raise insurmountable obstacles:

As for proximate causation, while this element might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude that it could never be established. This would leave only the element of injury and who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English—a deficiency allegedly attributable to the negligence of his educators—has not in some fashion been "injured".

*Id.*, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 377.

principles, which is difficult to do cogently, or it must repudiate the traditional analysis and announce an undisguised policy judgment. This collision between theory and policy in educational malpractice is in some respects analogous to that which occurred when plaintiffs first challenged the "impact rule." Interestingly, the arguments that favor the impact rule are virtually identical to those that have been made against recognition of a cause of action for educational malpractice.

Courts have grappled for years with the question whether plaintiffs could recover for mental distress in the absence of actual physical impact between the plaintiff and some instrumentality placed in motion by the defendant.<sup>79</sup> The first cases that refused to overrule the impact rule cited the difficulty of proving causation between an injury and the "fright" allegedly causing the injury. The courts also acknowledged a fear of feigned claims, and a fear of a "flood of litigation."<sup>80</sup> With time, however, many courts realized that these concerns were insignificant and recognized the cause of action.<sup>81</sup> When the Supreme Court of Pennsylvania confronted the question in *Niederman v. Brodsky*,<sup>82</sup> it concluded that the "inherent humanitarianism of our judicial process and its responsiveness to the current needs of justice" mandated that in the absence of actual impact, plaintiffs still should be given the opportunity to present their claims.<sup>83</sup> Difficulty in proving a causal connection did not, in the court's view, "represent sufficient reason to deny [plaintiff] an opportunity to prove his case to a jury."<sup>84</sup> The court held that the possibilities of fraudulent claims and increased litigation were minimal and well within the judiciary's ability to manage.<sup>85</sup>

Courts that recognized a cause of action for an injury caused by another person's negligence but without impact typically required plaintiff to have been in actual physical danger.<sup>86</sup> These courts were soon asked to recognize a cause of action for injury even when there was no threat of physical injury. Substantially the same

<sup>79</sup> The close relationship between duty of care and proximate cause makes it difficult to determine if a court, when considering whether a plaintiff could recover for mental injuries absent impact, assumed the existence of duty and then sought to limit the scope of acts or omissions that could proximately relate to an injury, or if a court was focusing directly on the scope of the duty. See, e.g., *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970). In any event, it seems clear that most cases assume a relationship exists between the negligent actor and the injured party that entails some sort of duty, although the zone of that duty may not be broad enough to permit recoveries for mental injuries absent an impact. See, e.g., *Cosgrove v. Beymer*, 244 F. Supp. 824 (D. Del. 1965) (daughter walking within four feet of father when father was run over cannot recover for mental injury); *Lessard v. Tarca*, 20 Conn. Supp. 295, 133 A.2d 625 (1957) (members of family who survived auto accident could not recover for mental injuries suffered while watching daughter pinned in wreckage burn to death); *Tobin v. Grossman*, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 560 (1969) (conceptualizes issue in terms of "extend[ing] the duty").

<sup>80</sup> E.g., *Kalen v. Terre Haute & I.R.R.*, 18 Ind. App. 202, 205-13, 47 N.E. 694, 696-98 (1897); *Mitchell v. Rochester R.R.*, 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896).

<sup>81</sup> Most courts that have considered abandoning the impact rule have repudiated it. See *Niederman v. Brodsky*, 436 Pa. 401, 401 n.1, 261 A.2d 84, 85 n.1 (1970) (noting that at least 22 of 31 courts considering the question have abandoned the impact rule). Some courts have rejected the reasoning of the majority position. E.g., *Towns v. Anderson*, 567 P.2d 814, 816 (Colo. App. 1977); *Gilliam v. Stewart*, 291 So. 2d 593, 595 (Fla. 1974); *Benza v. Shulman Air Freight*, 46 Ill. App. 3d 521, ..., 361 N.E.2d 91, 94 (1977). See generally Annot., *Right to Recover Damages in Negligence for Fear of Injury To Another, Or Shock Or Mental Anguish at Witnessing Such Injury*, 29 A.L.R.3d 1337 (1970).

<sup>82</sup> 436 Pa. 401, 261 A.2d 84 (1970).

<sup>83</sup> The plaintiff in *Niederman* suffered coronary problems after witnessing defendant, who was operating a motor vehicle, run over his son. *Id.* at ..., 261 A.2d at 84-85.

<sup>84</sup> *Id.* at ..., 261 A.2d at 87 (emphasis in original).

<sup>85</sup> *Id.* at ..., 261 A.2d at 88-89.

<sup>86</sup> E.g., *id.* at ..., 261 A.2d at 90; *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972). Not all courts, however, have adopted this restriction when abrogating the impact rule. E.g., *Daley v. LaCroix*, 384 Mich. 4, ..., 179 N.W.2d 390, 395 (1970); *Hughes v. Moore*, 214 Va. 27, 34-35, 197 S.E.2d 214, 219-20 (1973).

arguments used by courts to abrogate the impact rule were used to support elimination of the requirement that plaintiff be within the zone of physical danger. Yet courts were—and generally continue to be—reluctant to enlarge the zone throughout which the duty of care extends.<sup>87</sup> Not surprisingly, the rationale most often used to justify retention of the requirement that plaintiff be within the zone of physical danger is, purely and simply, “public policy.”<sup>88</sup>

The evolution of the impact rule illustrates that situations occur in which one's actions may in fact cause injury to another and the injury is foreseeable, but no duty is owed to the other person. The results in these cases, not surprisingly, are subject to vigorous criticism. Yet, at a certain point, most people agree that not every wrong deserves a remedy; that it is not in society's interest to remedy every wrong; that seemingly arbitrary demarcations between wrongs that will be remedied and those that will not must be drawn; that explanations of the line-drawing will be strained; and that reasonable criticism will accompany, or at least quickly develop after the line-drawing.

The refusal of courts to recognize a cause of action for educational malpractice can be defended as but another instance of line-drawing that inevitably occurs on the frontiers of recognized zones of duty. The opinions in *Peter W., Donohue*, and ultimately *Hoffman* read as if the courts were listening to the arguments that were advanced in the impact cases and were merely engaging in line-drawing to protect legitimate societal values. The question presented by the impact cases, however, was quite different than that raised in the educational malpractice cases. The analysis in the impact cases began with the assumption that defendant's act violated some duty for which a person within the zone of duty could recover if the other elements of the tort could be proved.<sup>89</sup> Thus, the question was essentially how far to extend the zone of duty. In *Peter W., Donohue*, and *Hoffman*, the courts decided that no zone of duty existed at all. This outcome, like that in the impact cases, may also be intended to protect legitimate societal values, but to say “the line must be drawn somewhere” does not justify the result. The decision not to recognize an entire zone of duty should be consistent with decisions to recognize or not to recognize zones in closely related contexts. The existence of zones of duty in closely related settings is a persuasive indicator that a zone of duty exists, or should be recognized, in the educational setting.

As the court suggested in *Donohue*, educational malpractice cases are appropriately analogized to other professional malpractice cases.<sup>90</sup> For example, in medical malpractice, troublesome questions of causation frequently arise, but the existence of causation questions does not immunize physicians from liability by removing the duty of care. A patient's outrageous eating and smoking habits may necessitate open-heart surgery, during which the physician makes a negligent, incapacitating error. The patient's physical problems, which have been exacerbated by his own

<sup>87</sup> See *Grimsby v. Samson*, 85 Wash. 2d 52, ..., 530 P.2d 291, 293-95 (1975).

<sup>88</sup> See *Guilmette v. Alexander*, 128 Vt. 116, 259 A.2d 12 (1969), quoting *Waube v. Warrington*, 216 Wis. 603, 613, 258 N.W.2d 497, 500-01 (1975):

[T]he answer to [the] question cannot be reached solely by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. The answer must be reached by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended.

*Id.* at ..., 259 A.2d at 14.

<sup>89</sup> See note 79 *supra*.

<sup>90</sup> See note 78 *supra*.

conduct, and which could be fatal but for medical assistance, do not bar a malpractice action. On the contrary, the patient has the opportunity to prove that the doctor's negligence prevented him from becoming more healthy. By the same token, a student may be culturally deprived or may be less than diligent in his studies, but this should not bar him from attempting to prove negligence that prevented him from attaining greater proficiencies. The stark similarity of these causes of action and the willingness of courts to recognize a duty in one case but not in the other strongly suggests that something is amiss in the theoretical underpinnings of *Peter W.* and *Donohue*.

### C. Attempted Reconciliation as Evidence of Inherent Inconsistencies

To approach the problem differently, the difficulty with the theoretical justification of *Peter W.* and *Donohue* is evidenced by the holding in *Hoffman*. The New York Supreme Court, doubtless constrained by its *Donohue* decision, attempted to distinguish Hoffman's injury, which strikes ordinary sensibilities as a wrong that deserves a remedy, from the injury alleged in *Donohue*.<sup>91</sup> To reach the "fair" result, the court had no other option because under the holding in *Donohue*, lack of educational achievement is not an injury for which a student may sue. Hoffman would therefore have no cause of action, much less a recovery, unless the circumstances of his injury somehow differed from those surrounding Donohue's injury.<sup>92</sup>

Facially, the efforts of the supreme court to reconcile Hoffman's recovery with the holding in *Donohue* that no cause of action exists for educational malpractice are persuasive. Hoffman, unlike the plaintiffs in *Donohue* and *Peter W.*, was the victim of a specific, identifiable failure on the part of the school. The school did not follow a specific recommendation of its psychologist.<sup>93</sup> The damages incurred by Hoffman were apparent, and the causal link between defendant's negligence and the injuries he incurred was supported by probative evidence. Hoffman's situation is different from that of Peter W. or Donohue, either of whom is likely to be characterized as a disgruntled student seeking a scapegoat for learning deficiencies caused by personal laziness.

On closer analysis, however, the differences between Hoffman's situation on the one hand and Donohue's or Peter W.'s situation on the other are qualitatively insignificant. Each plaintiff charged that the school system failed to appraise properly his ability to learn. Hoffman was incorrectly diagnosed as a non-learner and was placed in a setting that was counterproductive to his needs. Peter W. and Donohue were incorrectly perceived as learners and were placed in settings in which

<sup>91</sup> See Note, *Nonliability for Negligence in the Public Schools—"Educational Malpractice" from Peter W. to Hoffman*, 55 NOTRE DAME LAW. 814, 831-32 (1980) (arguing that *Hoffman* and *Donohue* are dissimilar, and that "educational malpractice" is a narrow concept inapplicable in *Hoffman*).

<sup>92</sup> By analyzing the educational malpractice cases as questions of the existence of a duty rather than as a question of proximate cause, the courts have missed one analytical approach that permits *Hoffman* to be distinguished from *Donohue* and *Peter W.* Duty and proximate causation are closely related concepts. See W. PROSSER, *TORTS: CASES AND MATERIALS* 383-84 (5th ed. 1971). Whether a duty exists, however, is a question of law for determination by the court, while proximate causation is usually a question of fact. Support exists for the proposition that when the evidence permits only one reasonable conclusion on the issue of proximate cause, the issue becomes a matter of law for the court to determine. See, e.g., *Fruehauf Trailer Div. v. Thornton*, 366 N.E.2d 21 (Ind. App. 1977). Under this standard, frivolous cases in which a student without justification alleges educational malpractice will not reach a jury, whereas a student like Hoffman can get his case to a jury and recover if a preponderance of the evidence supports his allegations.

<sup>93</sup> At the time Hoffman was found to be retarded, the testing psychologist recommended that he be retested within two years. See text at note 52 *supra*.

they were not intellectually stimulated or advanced. Both situations, according to the allegations of the complaints, involved the failure of school systems to provide appropriate educational services, which ultimately resulted in the students' inability to obtain decent jobs or otherwise to assume a productive role in society.

The only practical difference between *Hoffman* and the other cases is that Hoffman could prove his claim, while it was not clear at the outset of their cases that either Peter W. or Donohue could. This difference is not a basis for holding that the schools owed no duty to Peter W. or Donohue. The New York Court of Appeals probably perceived the inconsistencies developing in its precedents. To reconcile these inconsistencies, however, it chose in *Hoffman* not to reverse its prior judgment that Donohue could not state a cause of action, but instead stated the rule that no student—including a student like Hoffman—can assert a cause of action. Thus, the court avoided the inconsistency that would occur if Hoffman were allowed to state a claim while Donohue was not by applying its holding in *Donohue*, that no duty exists in the educational setting to instruct competently. In eliminating this inconsistency, however, the court created another one: although similar zones of duty are recognized in closely-related professional fields, and although, as the Court of Appeals virtually conceded, there is no cogent basis for not applying those principles to educational malpractice claims,<sup>94</sup> the court approved a principle that treats educational torts differently than torts in other professional areas.

#### *D. Proof of Inherent Inconsistencies: Educational Malpractice and the Educator's Duty to Supervise*

In *Peter W.* the court briefly confronted the central theoretical deficiency in the rule that there is no duty to instruct in a manner that does not impede students' normal attainment of skills and knowledge: the duty to instruct competently is functionally and legally indistinguishable from the firmly established duty of teachers and school officials to supervise students on the school grounds to prevent physical injury.<sup>95</sup> While the cases recognizing the duty to supervise to prevent physical injury are different in some respects from the cases considering whether a duty to instruct competently exists, the distinctions do not justify inconsistent treatment of injuries suffered as a result of negligent supervision and injuries suffered as a result of negligent instruction.

It is well-settled that a cause of action exists for a school's or a teacher's failure to supervise adequately conduct on school grounds that threatens students with physical injury.<sup>96</sup> The duty to supervise to prevent physical injury extends, not surprisingly, to settings in which the risk of physical injury is substantial, such as the gymnasium and the vocational shop,<sup>97</sup> when the teacher's proper instructions are essential to protect the students from injury. Thus, when a high school student was paralyzed while wrestling in a physical education class, the teacher's instructions to

<sup>94</sup> 47 N.Y.2d at ...., 391 N.E.2d at 1353, 418 N.Y.S.2d at 377.

<sup>95</sup> This argument was before the court in *Peter W.* Plaintiff argued that a duty ran from teachers to students, citing the cases in which physical injury to students resulted from a failure to supervise. The court rejected this suggestion, stating only, without further analysis, that physical injuries—not mental injuries—were involved in those cases, and hence, the cases and the argument were not applicable. 60 Cal. App. 3d at ...., 131 Cal. Rptr. at 858.

<sup>96</sup> E.g., cases cited and discussed in Annot., *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting From Lack or Insufficiency of Supervision*, 38 A.L.R.3d 830 (1971).

<sup>97</sup> E.g., *Bellman v. San Francisco High School Dist.*, 11 Cal. 2d 576, ...., 81 P.2d 894, 897-98 (1938); *Matteucci v. High School Dist. No. 208*, 4 Ill. App. 3d 710, ...., 281 N.E.2d 383, 386-87 (1972); *Keese v. Board of Educ.*, 37 Misc. 2d 414, 235 N.Y.S.2d 300 (Sup. Ct. Kings County 1962).

perform a particular wrestling escape were questioned because of the student's level of wrestling proficiency.<sup>98</sup> It is easy to envision a case in which a woodworking teacher incorrectly instructs a student in the use of a power saw, and the student, following precisely the teacher's instruction, injures his hand. In these examples, the competence of instruction—as distinguished from supervision—is at the core of the question of liability and there is a duty to instruct competently.

Imposition of the duty is eminently sensible, for classroom instruction has many of the attributes of supervision. Learning largely emanates from the individual. The student's attentiveness, his willingness to practice the reasoning techniques being imparted to him, and his dedication to studying assigned materials that supplement classroom instruction are all key elements of the learning process. In all of these functions, the teacher plays a "supervisory" role, directing and leading the student through the work and materials the student must assimilate in order to learn.

The chemistry classroom illustrates the coextensiveness of the supervisory and teaching function, where experiments, instead of reading assignments or mathematical problems, play a principal role in the learning process. Schools often have been held liable for the negligence of chemistry teachers during experiments that cause physical injury to students. Typical of the cases illustrating that a school or teacher has a duty to instruct properly in a manner that prevents injury to students is *Mastrangelo v. West Side Union High School District*.<sup>99</sup> A required experiment during which plaintiff was injured involved the mixing of explosives. The textbook instructions directed the student to powder or pulverize certain ingredients separately on sheets of paper. Instead of following these directions, plaintiff, an intelligent student, used a pestle to mix and grind the ingredients of the explosive, including one incorrect ingredient, in an iron mortar. While grinding the ingredients, an explosion occurred that severely injured plaintiff. He sued the school on the theory that the negligent instruction or supervision of the dangerous experiment caused his injury. A nonsuit was granted for defendant prior to submitting the case to the jury, and plaintiff appealed. In reversing the nonsuit, the appellate court recognized the existence of a duty to instruct the students in a manner designed to protect their safety:

It is not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to *instruct students* regarding the selection, mingling, and use of ingredients with which dangerous experiments are to be accomplished, rather than to merely hand them a text-book with general instructions to follow the text . . . . It is the province of the jury to determine whether the mixing of the ingredients which were used to compound gunpowder in a mortar by means of a pestle increase the danger of an explosion; whether the plaintiff was without previous knowledge or *instruction* regarding that danger, and whether that process was knowingly permitted to be followed by the pupil without warning from the teacher. It may also be a proper question for the determination of the jury as to whether the delivery of a text-book to an inexperienced pupil with mere instructions to follow the text, in the performance of a dangerous experiment in chemistry, is a sufficient exercise of care.<sup>100</sup>

<sup>98</sup> *Green v. Orleans Parish School Bd.*, 365 So. 2d 834, 838 (La. App. 1978) (wrestling class).

<sup>99</sup> 2 Cal. 2d 540, 42 P.2d 634 (1935).

<sup>100</sup> *Id.* at . . . , 42 P.2d at 636 (emphasis added). In *Klenzendorf v. Shasta Union High School Dist.*, 4 Cal. App. 2d 164, 40 P.2d 878 (1935), the following jury instruction, in the context of other instructions, was approved:



*Mastrangelo* recognized a duty to instruct properly: the teacher failed to impart knowledge about the experiment he reasonably should have imparted. The student's injury could have been prevented if the teacher had exercised his supervisory power to intervene and halt the experiment, or if he had performed adequately his instruction function, thereby imparting knowledge that would have ensured safe performance of the experiment. The failure to instruct adequately was alleged by each of the plaintiffs in *Peter W.*, *Donohue*, and *Hoffman*.

One arguable distinction between *Mastrangelo* and the educational malpractice cases is the area in which the injury occurred. It is well-settled, however, that injuries occurring outside the classroom but arising out of in-the-classroom negligence are not necessarily outside the zone of proximate causation. While most of the cases holding that schools have a duty to protect students from physical injury involve activities that occur on school grounds,<sup>101</sup> many cases that recognize the duty involve injuries that occurred outside the school's boundaries.<sup>102</sup>

The chemistry classroom again illustrates this proposition. In *Engel v. Gosper*<sup>103</sup> a child was killed by the explosion of a homemade rocket ignited by two high school students. In addition to bringing an action against the students, the decedent's administratrix sued their science teachers and the school boards that employed the teachers. Plaintiff alleged that the teachers improperly instructed the students with respect to rockets, encouraged their experiments with rockets, and thereby contributed to the accident. The court, although conceding that the claims against the teachers and schools were "tenuous," denied a motion to dismiss.<sup>104</sup> Accordingly, *Engel* supports the proposition that a teacher may be liable if he encourages a student to conduct an experiment at home and gives the student improper instructions that contribute to an accidental injury that occurs outside the classroom. Of course, the obstacles to proving causation are substantial in such a case. Significant intervening causes may supersede the negligence of the teacher, a possibility that

You are instructed that if you find from the evidence that the plaintiff . . . was injured while operating a hand jointer . . . and that the defendants negligently failed to instruct said plaintiff in the operation of said hand jointer, and that such negligent failure was the direct and proximate cause of the injury sustained by him, you are to find for said plaintiff [absent finding contributory negligence].

*Id.* at 882.

<sup>101</sup> See generally Annot., *supra* note 96.

<sup>102</sup> In *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 731, 585 P.2d 851, 150 Cal. Rptr. 1 (1978), a ten-year old student-truant was struck by a motorcycle after leaving the school grounds without permission. The trial court sustained the school's motion to dismiss, ruling that the school had no "duty" to prevent off-campus injuries because such injuries, as a matter of law, could not be proximately caused by negligent, on-campus supervision. The court, however, concluded that it was "foreseeable" that students might wander off from school during a lapse of supervision. *Id.* at . . . , 585 P.2d at 858, 150 Cal. Rptr. at 8. The school could be liable "so long as [the school's] negligent supervision was an actual ('but for') cause of the injury and the general type of injury was reasonably foreseeable." *Id.* at . . . n.6, 585 P.2d at 858 n.6, 150 Cal. Rptr. at 8 n.6. The existence of other intervening causes would not necessarily absolve the school from liability; that another party's "misconduct was the immediate precipitating cause" of the injury does not compel a conclusion that negligent supervision was not the proximate cause" of the injury. *Id.* at . . . , 585 P.2d at 858, 150 Cal. Rptr. at 8 (quoting *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 750, 470 P.2d 360, 365, 87 Cal. Rptr. 376, 381 (1970)).

In *Calandri v. Ione Unified School Dist.*, 219 Cal. App. 2d 542, 33 Cal. Rptr. 333 (1963), plaintiff, a 15-year old student, was injured at his home when he unintentionally fired a toy cannon he made in metal shop class. Plaintiff charged the school district and his teacher with negligently failing to warn the student of dangers associated with loading and firing the cannon. The court, in reversing the dismissal of the complaint by the trial court, acknowledged the existence of a duty running from the school to the student, even though the injury did not occur on the school's premises. *Id.* at . . . , 33 Cal. Rptr. at 336-37.

<sup>103</sup> 71 N.J. Super. 573, 177 A.2d 595 (1962).

<sup>104</sup> *Id.* at . . . , 177 A.2d at 596-97.

exists whenever an injury occurs outside the school grounds and the plaintiff attempts to link the injury to negligence occurring on the school grounds. This does not mean, however, that a tort can never be proved.

Thus, that an injury occurs outside the classroom does not justify nonrecognition of a duty and a cause of action if the injury resulted in part from improper classroom instruction. If a student receives incorrect instruction in a woodshop class, establishes his own woodshop after graduation, and is injured while operating a saw in the manner in which he was taught, the student should be allowed a cause of action against his teacher for breach of the duty to instruct properly. If a business teacher instructs students on a typing keyboard that has not been used for fifty years, and a student seeking a job after graduation is considered unqualified by prospective employers because of the lack of knowledge of a modern keyboard, the student should have a cause of action against the teacher or school administrators. The causation is easy to establish in these extreme examples. Although causation will not be as easy to prove in most instances, it cannot be said that as a matter of law, a plaintiff who claims education deficiencies resulting from negligent instruction will be unable to prove his case. Indeed, *Hoffman* is evidence that circumstances can arise in which the school system's negligence can be proved to have caused the student not to learn as much as he would have learned but for the negligence.

Another arguable distinction between supervision and instruction cases is that the former typically involve physical injuries, while the latter involve mental injuries. It is not necessary, however, to belabor the point that in appropriate cases tort law does provide remedies for mental injuries. As noted earlier,<sup>105</sup> courts have been reluctant to recognize mental injury as an independent tort, but compensation for mental injury associated with various torts is an established practice. The absence of a physical injury does not necessarily mean that recovery should not be permitted for a failure to instruct competently.

To recapitulate, the results reached in *Peter W., Donohue*, and *Hoffman* are theoretically unsound because the courts' analyses of the failure to instruct competently is not consistent with their analyses of the failure to supervise reasonably. Although the supervisory function is largely indistinguishable from the teaching function, courts recognize a duty to supervise reasonably, but not a duty to instruct competently to prevent mental injury. Given the functional and legal coextensiveness of supervision and instruction, an analytical scheme that treats the two functions differently will inevitably be unsound.

### III. CONCLUSION

The theoretical inconsistencies inherent in the principle that no cause of action exists for educational malpractice do not prove that the special policy objectives of the principle are not meritorious. In other words, questioning the logic of the courts' analyses is not equivalent to questioning the view that our educational system is more viable if the cause of action is not recognized. Yet the inability of courts to reconcile non-recognition of the cause of action with well-recognized tort principles suggests that legislatures—and not courts—should make the ultimate policy determination. A legislature, believing for public policy reasons that the cause

<sup>105</sup> See text accompanying notes 79-90 *supra*.

of action should not be recognized, could mandate this result by reviving a measure of sovereign immunity or by prescribing exclusive administrative remedies.<sup>106</sup>

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<sup>106</sup> In some jurisdictions, it would be possible to argue that the holding that no cause of action exists for educational malpractice merely constitutes a judicial effort to revive previously abolished immunities. Through the doctrine of sovereign immunity or the statutorily-based principle that public employees are not liable for acts within their discretion, teachers and schools—as well as other government agencies and employees—are arguably insulated from liability for torts. When sovereign immunity has been abrogated or when the legislature has not devised an exclusive administrative remedy, it is fair to view the non-recognition of a cause of action for educational malpractice as a judicial effort to restore previously abrogated immunities or to impose immunities the legislature has not seen fit, through inaction, to impose. The New York Court of Appeals in *Donohue* and *Hoffman* stated that the administrative processes provided by the New York Educational Law were exclusive remedies, even though nothing in the statute suggests that the processes were intended to be exclusive remedies. *Hoffman v. Board of Educ.*, 49 N.Y.2d at 126-27, 400 N.E.2d at 319-20, 424 N.Y.S.2d at 379-80; *Donahue v. Copiague Union Free School Dist.*, 47 N.Y.2d at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378.