

Exclusion From School: Established and Emerging Issues

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Abstract

The paper examines the contractual sources and terms of the power to exclude students from private schools, and the significance of these principles in relation to possible remedies at law open to parents on the one hand and students on the other. The paper then discusses the statutory sources and terms of the power to exclude from public schools, and the significance of judicial review and administrative review of such decisions. Procedural issues are canvassed, with particular reference to the application of the principles of natural justice in public schools and, possibly, in private schools. The paper concludes by indicating the growing significance of anti-discrimination legislation and students' rights legislation.

Introduction

It is a case of great importance; for, on the one hand, it is for the general benefit of society, and especially of its youth, that the authority of those charged with the care of great scholastic establishments should be maintained; and, on the other hand, it is of equal importance that it should not be exercised arbitrarily. That it has been exercised honestly in this case there can, I think, be no doubt. The question is, whether it has been exercised reasonably or unreasonably, and according to your view upon that question, your verdict for the Plaintiff or Defendant must in the main depend.¹

Legal issues surrounding exclusion of students from schools are of fundamental importance to students, teachers, administrators and parents. Lack of awareness of the relevant principles and the rights of students in these matters can have serious consequences. There are a number of significant differences between private, or non-government schools, and public, or government schools. In this paper the terms private school and public school refer to non-government and government schools respectively; the term public school is not used in the traditional English sense. The scope of this paper involves preschool, primary and secondary schools, both private and public; tertiary institutions are not dealt with.

Sources and Terms of the Power to Suspend/Expel - Private Schools

Basic principles - contract law

The role of government in education is now so large that it can easily be forgotten that the origins of the law of education law lie in contract. This is not merely an academic point because, as will become apparent, the contractual basis of education in private schools can still be material in determining the rights of the various participants.

The essential principles were summarised in the first edition of *Halsbury's Laws of England*, published in the 1890's, as follows:

The relations between parent and school master are governed by the terms (express or implied) of the contract for the education of the child. There is an implied contract that the master shall continue to educate the child so long as the child's conduct does not warrant his expulsion from the school, and the expulsion must not take place except upon reasonable grounds and in the honest exercise of the schoolmaster's discretion.

The master is in loco parentis; the parent delegates to him all his own authority over the child, so far as it is necessary for the child's welfare, though this delegation is revocable. The parent further undertakes that the master shall be at liberty to enforce with regard to the child the rules of the school, or at all events such rules as are known to him and to which he has expressly or impliedly agreed. The master is bound to take such care of his pupils as a careful father would take of his children.

There is judicial support for the proposition that the law of contract is still the basis in relation to private schools. In *Introvigne v Commonwealth of Australia & Ors*ⁱⁱ a case which dealt with a public school, the Full Court of the Federal Court of Australia in a joint judgment observed:

The position may be different in the case of non-government schools or, as they are sometimes called in Australia, independent or private schools. In their case there may be delegation by the parents or the pupil of parental authority to the school council, trustees or other governing body of the school. The delegation would arise from the contract between the parents and the school authority and may be express or implied.

It should be noted in passing that, particularly with an age of majority of 18, there will be circumstances where the contract is between the student and the legal entity conducting the school. This will be rare so far as the scope of this paper is concerned.

It is quite clear that the terms of the contract between the parents and school may vary greatly from case to case. To ascertain what the terms of the contract are it is necessary to examine the documents passing between the parties and the general course of dealings between them. School prospectuses and other documents exchanged at or before the time of the contract will be very important. Many private schools devote some care to this documentation because of its contractual significance.

It is most important to bear in mind that the validity or enforceability of the contract or its terms may be influenced by legislation, whether State or Commonwealth and whether relating to education specifically or to more general topics such as discrimination.

The contractual power to expel

The decision of Cockburn CJ, in *Fitzgerald v Northcote & Anor* is an important decision as far as the fundamental concepts are concerned. This was an action for assault and false imprisonment incidental to his expulsion from school for alleged misconduct brought by a former student, Fitzgerald, against the heads of the school at which he had been placed by his father. Whilst no action was brought in relation to wrongful expulsion itself, the imprisonment was sought to be justified on the ground that it was incidental to the expulsion and necessary on the same grounds as the expulsion. It was admitted that if the expulsion could not be justified then the imprisonment could not be. The critical question in the case, upon which all else depended, was whether the expulsion could be justified.

The only justification relied upon for the expulsion was the existence or reasonable belief of the existence of *a certain society with a serious and mischievous object and design*. The allegation was that Fitzgerald had set out to establish a society which would, putting it very generally, involve pupils from more privileged backgrounds in incidents of harassment and embarrassment of those students from more modest backgrounds who were admitted for the purpose of training for the priesthood.

An important issue in the case was whether the Court was entitled to consider the reasonableness of the conduct of the heads of the establishment or whether honesty alone could be considered. During argument, Cockburn CJ said:

... I should lay it down that there must be reasonable grounds for the course which was pursued. I hold that there is an implied contract ... that the (school) will continue to educate the child so long as his conduct does not warrant his expulsion from the school. And when we consider the serious consequences to a child of his being so expelled, it is the more essential that this implied contract should not be broken; and therefore, it will be a question, under all the circumstances - making due allowance for the discretion undoubtedly vested in the presidents of such educational establishments, and which is certainly not to be

overruled upon light grounds - still the question must be submitted to the jury whether, under all the circumstances, this contract has not been broken.

In relation to the story of the supposed *conspiracy* Cockburn CJ said:

Now, as to this, if the fact really was that young Fitzgerald, after the ill-feeling which had existed in former times between the lay and clerical students, really did organise a confederacy among the students for the purpose of renewing that unhappy and discreditable feud, for the purpose of making the position of the clerical students of inferior birth uncomfortable and unpleasant, there could be no doubt that it was a most unjustifiable, dangerous, and improper course of proceeding, and one which, if it did in fact exist, would call for the intervention of the president and other authorities of the institution in some marked and conspicuous manner, to crush the attempt before it had reached a head, and thus to preserve the peace and comfort of the establishment. But was there such an association with such an object, or were there reasonable grounds for believing in its existence?

Later, Cockburn CJ commented:

But then came the question whether, when the contents of the pocket-book were seen, they were such as to justify Dr. Northcote reasonably in coming to the conclusion that there was any serious design to annoy or molest the clerical students? It is incidental to the authority of a headmaster to expel from the school over which he presides any scholar or student whose conduct is such that he could not any longer be permitted to remain without danger to the school. This, however, is not a power to be exercised arbitrarily - it may be questioned; and although, no doubt, a large discretion must be allowed, it must not be exercised wantonly or capriciously. And if it has in this case been exercised unreasonably, then its exercise cannot be set up as a defence. Does the evidence then lead to the reasonable conclusion that there was such an association - as is represented - with the design and purpose supposed?

As to this, it is a pity that Dr Northcote did not extend his inquiries a little further than the mere papers, and did not inquire whether there had been any actual annoyance to the clerical students - any outward manifestation of that which was supposed to be the real object of the society, instead of being, as the youth all along alleged, a mere piece of idle amusement. And, under the circumstances, it would have been far wiser had Dr Northcote simply sent for the youth and remonstrated with him. In the absence of any evidence of practical annoyance to

the clerical students, and of anything to show that the supposed society was seriously mischievous, it did seem monstrous publicly and ignominiously to expel the youth from the College. I think that the authorities acted far too hastily in the matter.

A number of questions were put to the jury and as a result of the answers given by the jury damages of five pounds were awarded to the former student Fitzgerald.

This decision clearly establishes that reasonableness as well as honesty may be examined by the Court, but does not deal expressly with the issue of whether, where the decision maker has acted honestly and reasonably, the expulsion can be set aside by the Court if it finds that the facts relied upon by the decision maker did not exist even though they were reasonably believed to exist.

In *Wood v Prestwich*ⁱⁱⁱ, Avory J made the following comment:

... if they meant that in every case where a boy is expelled upon a suspicion of theft, or of any other offence against the good discipline of the school or against the general law, the headmaster can only justify the expulsion by proving to the satisfaction of the jury the commission of the offence, then with great respect I venture to differ from them. I cannot help thinking that if that proposition is to be applied at all to such a case as the present, the true question for the jury would be, 'Did the headmaster have reasonable grounds for believing that the boy had committed the offence which was imputed to him?' If the jury found that he had reasonable grounds for so believing, although at the same time they found that the boy had not committed the offence, I think that would be a complete justification and answer to the Plaintiff's claim.

The issue was also dealt with by Mahoney J, in *McMahon v Buggy*^{iv}. Although the case involved a public school Mahoney J expressly referred to the position in both private and public schools. His Honour noted that consideration was given by Counsel to the question whether in order to justify exclusion:

... it is sufficient that the school authorities, at the time of exclusion, reasonably believed in the existence of facts of such a nature as to be capable of warranting exclusion, or whether, if the exclusion be challenged, it can be sustained only if the Court finds the particular facts to exist.

After noting the passage in *Wood v Prestwich* referred to above, His Honour balanced various considerations and came to the conclusion that on balance, 'I do not think that the existence of the power should depend upon the view which a Court might subsequently take as to the existence of the relevant grounds'.

It is submitted that the approach of Avory J and Mahoney J is correct. It should be noted, however, that one of the factors which will undoubtedly go to reasonable belief in appropriate circumstances will be the nature of the enquiries conducted and the evidence upon which the belief was formed.

Significance of parental breach of contract

The significance of a serious failure by parents to comply with their obligations under the contract is illustrated by *Price v Wilkins*^v, a decision of the Queen's Bench Division in 1888. A father, contrary to the terms of the contract between the school and himself as set out in the rules and regulations appended to the prospectus, insisted on his son leaving the school during the Easter term. The Headmaster released the boy but insisted on his return, ultimately indicating that unless the son returned on a specified evening the Headmaster would not receive him back. Consequently, the father did not send the boy back and an action was brought by the school to recover the school fees for the term, only a short part of which had involved the boy's attendance. The school was successful in the action, Wills J stating:

He cannot, without breaking the contract implied by the very relation between them, require his son to disobey such a rule of the school. And the contract of the master is, not at all hazards and in all events to supply board, lodging, and tuition, but to supply them on the terms that these rules are observed, so far at least as the action of the parent is concerned. It seems to me that the very nature of the school life imports such an obligation on the part of the parent. If all fathers were to do as this Defendant did, the discipline without which a school could not be carried on would be at an end; the authority and legitimate power of the schoolmaster would be brought to nought; and incalculable mischief would be done to education in the best and widest sense of the term. The contract of the Plaintiff was, in my opinion, that he would give to the Defendant's son a term's education on certain conditions, one of which was that the father would submit to his son having no exeat during Easter term.

School closures

In *Trusler v Rev. Fr. Nazareno Fasciale & Ors*^{vi} relief was sought by parents in contract against the proposed closing of a Roman Catholic School in Melbourne. Their daughter Kylie had been enrolled at the college and accepted as a student in May 1986, commenced her education at the school in February 1987, and at the time of the proceedings in August 1991 was in Year 11. The school was to be closed at the end of that year. One could loosely describe it as '*expulsion by closure*'.

Nathan J summarised the contractual claim of the parents in the following terms:

In effect, they seek to enjoin the Defendants from closing the school, founding their cause of action in contract which, it is asserted, arises out of the enrolments and acceptances to which I have already referred, creating a term of the contract that Kylie, once enrolled at the particular school, was entitled to receive a Catholic education thereat until the conclusion of her VCE year.

He added:

I cannot conclude that the Plaintiffs have an arguable cause of action sounding in contract and certainly not in the terms pleaded by them. I would be prepared to concede that on the basis of the fees charged by the school there was a contract. These fees apparently were charged and rendered on a term or annual basis. It is impossible to conclude that the fees were made referable to a 'whole of educational life' term. The consideration passing in this contract, if any, was limited to the educational period to which the fees were referable and not, as I have said, to an extended whole of educational life.

Many facts could have intervened to bring this contract to an end; death or removal of the student, on the one hand, or closure of the school, on the other. They were the exigencies, all of which could, and it might be said have, in this case intruded to give this contract a limited term and not the extended period for which the Plaintiff contends.

Accordingly, ... I have come to the view that the Plaintiffs' cause of action sounding in contract with its particular terms pleaded here, is forlorn and does not pass the preliminary threshold required to sustain an injunctive remedy.

Some attempts, albeit unsuccessful, have been made to use administrative law principles to prevent the closure of public schools. The New South Wales Supreme Court held in *Durant v Greiner*^{vii} that the power to close a state school was a discretionary power and that subject to certain conditions there could be no legitimate expectation that a school would not be closed. In *Carmel Primary School Parents and Citizens Association (Inc) v Geoffrey Ian Gallop, Minister for Education*^{viii} it was held by the Supreme Court of Western Australia that the Minister's discretion under a statutory provision not to continue and not to maintain any government school provided the implicit power to close a school, to be exercised subject to the provisions of the Act.

Legal remedies open to the student

As the student is not a party to the contract, the capacity of the student to bring proceedings is very limited. The doctrine of 'privity of contract' prevents, as a general rule, persons who are not parties to a contract from enforcing contracts or suing for damages in respect of breach of contract.

Although the writer does not know of any case in which it has yet been attempted, there is a possibility that a student may attempt to sue under statutory provisions which confer in some circumstances rights to do so on persons for whose benefit a contract has been entered into.

It is of course open to the student (as occurred in *Fitzgerald v Northcote*) to sue in tort for example for defamation or false imprisonment. It has, however, been held that wrongful expulsion does not, without more, involve the commission of a tort. This was determined by Lord Hewart C.J., in *Hunt v Damon*^{ix}. On both the contractual and tortious issues, the Judge summarised the position as follows:

There was no privity of contract between the parties, nor was this particular claim associated with defamation, false imprisonment, or any other head of recognised tort. On the contrary, the claims under those heads had been abandoned or negated. It was said that the mere fact that the Defendant in the circumstances refused to continue the girl's education involved a tort giving rise to a claim to damages on her part, but he did not think that any such claim was sustainable in law.

Whether there is an implied contractual power to suspend

Although the point does not seem to have been decided, it is likely that at common law there is no implied term to suspend for a limited period. The power probably exists only where explicitly provided in the contract.

Sources and Terms of the Power to Suspend/Expel - Public Schools

Basic concepts

Since the 1870's it has been common in the United Kingdom and in the Australian States and Territories for statute law to impose upon parents an obligation to compel their children between prescribed ages to attend at a public or (approved) private school in the absence of some lawful excuse as stipulated in the legislation. In Australia the majority of children have attended public schools conducted by education departments of the State Governments. State legislation provides a statutory framework not only for the compulsory attendance provisions but also for the establishment and regulation of public schools themselves. It was not until 1964 that the conceptual basis of the legal relationships existing in respect of students attending public schools pursuant to the compulsory attendance provisions was authoritatively clarified in *Ramsay v Larsen*^x, in which the following passage was approved by a majority of the Court:

It is claimed upon the authority of the cases earlier referred to that the authority of such a master is, at least in some part, derived, not from the Crown, but from the parents of each child subject to this charge. In my view this notion is

completely inconsistent with the statutory provisions the substance of which has been set out. It is not difficult to see how the notion may have developed in earlier times. No doubt an express or implied delegation of parental authority occurred when a child was committed to the care of a tutor. Likewise a delegation of parental authority might well be taken to have occurred when the care and education of a child was voluntarily entrusted to an established school. In such cases the delegation, if not express, would be implied from the contractual relationship between the parent or guardian, on the one hand, and the tutor or the board of management of the school, or other governing authority, on the other hand. But I can see no ground, in the circumstances of the present case, for any implication that any part of their parental rights in relation to the respondent were delegated by his parents when, in compliance with their statutory obligation, and under pain of the penalties prescribed by the legislation, they caused him to attend at a State school where he became subject to the care and authority of masters who, in turn, were subject in all matters of the control of the Crown. But even if grounds existed for thinking that there had been some delegation of parental authority to the Crown, it would, I think, be impossible to hold that there was a delegation by the parents of the respondent to any and every master who, from time to time, might have charge of him at the school. The authority of the master must, even on that view, be regarded as having been acquired from the Crown and exercisable in the course of his employment. Ferguson J, in the Full Court dealt with both aspects of this point in the following passage with which I respectfully agree:

‘Pupils of the prescribed school age attending public schools have, during school hours, been compulsory removed, by the authority of the Crown, from the protection and control of their parents. In view of that compulsion, by the establishment of public schools for the reception of such pupils, and the provision of teachers to impart instruction and maintain discipline, the Crown must be regarded as having taken over, in respect of the pupils those obligations of which their parents have been deprived, including the obligation to take reasonable care for their safety.’ (at page 37 per Taylor J).

Clearly then, matters of suspension and expulsion arise in such schools as a matter of statutory interpretation, to which normal principles of administrative law will apply. It is not a question of express or implied contract between the parents and the authorities conducting the school.

Whether these principles apply to students above the age of compulsory attendance is a question which will need to be considered on a case-by-case basis. Contemporary trends in public law and administration increase the chance that other principles may apply.

However, in respect of the overwhelming majority of students attending public pre-schools, primary or secondary schools, the source of the power to suspend or expel is statutory, and is likely to remain so.

The terms of the statute

The terms of the power will therefore be primarily a matter of statutory interpretation. In *McMahon v Buggy*, it was necessary for Mahoney J to determine whether there was a power to expel in the absence of any explicit power in the *Public Instruction Act 1880* which then applied. The Act did provide that the discipline to be maintained in high schools and all other matters necessary to be done for the efficient conduct of such schools should be determined by regulations approved by the Governor, but no such regulations had been passed. Mahoney J indicated that, subject to the terms of the particular legislation, *the considerations which would, in the contractual context, require the implication of a power to expel would, in the legislative context, similarly require such an implication*'. His Honour held that the absence of regulations did not have the result that there was no power to expel, indicating that 'it would not be contemplated that unless and until such regulations were approved, there would be no implied grant of power to the Minister in respect of any matter which was 'necessary to be done for the efficient conduct of such schools'. He therefore held that:

There was in the Minister power, exercisable upon proper grounds, to exclude the Plaintiff from the Blacktown High School ... by way of expelling him from the school.

Where there is express statutory provision, the importance of examining carefully the terms of the statute is illustrated by *Carson & Ors v Minister for Education of Queensland & Ors*^{xi}, a decision of Spender J of the Federal Court of Australia. It was held that the power conferred by Section 21 and Regulation 36 was a power to suspend a student only from the school being attended by that student and not from schools generally conducted by the Director-General of Education. The relevant passage reads:

It will be remembered that Section 21, which I earlier referred to, said that a person can be excluded only in the circumstances provided for by the regulations, and that Regulation 36 permitted the Director-General, with the approval of the Minister, to order the exclusion of a student from a school when he is satisfied that the student is guilty of disobedience, misconduct or other conduct prejudicial to the good order and discipline of the school. I am strongly inclined to think that, however inconvenient or unfortunate such a conclusion might be, the law of Queensland permits the Director-General of Education to suspend a student from a school and does not permit him to exclude a student from any school other than

the school at which he is attending. This is a conclusion based simply on the construction of Regulation 36 and Section 21. The basis for exclusion is the requirement that the Director-General is satisfied that the student is guilty of disobedience, misconduct or other conduct prejudicial to the good order and discipline of the school.

Another example of the importance of the precise terms used is the *Education Act 1989* (New Zealand) which limits the power to the following two circumstances:

- (a) the student's gross misconduct or continual disobedience is a harmful or dangerous example to other elements at the school
- and:
- (b) because of the student's behaviour, it is likely that the student, or other students at the school, will be seriously harmed if the student is not suspended.

Such precisely defined circumstances require administrators to consider carefully, in each situation, whether each of the elements of such a power has been established. If not, then the power does not exist in the circumstances^{xii}.

The Canadian case *Re Peel Board of Education and B et al*^{xiii}, a decision of the High Court of Justice of Ontario in 1987, illustrates well the need to examine carefully the terms of the power and the relationship to those terms of the facts under consideration. Section 22 of the *Education Act* empowered a Principal to suspend a pupil for a fixed period on various grounds such as 'conduct injurious to the moral tone of the school or to the physical or mental wellbeing of others in the school' and the section also empowered the Education Board to expel a pupil in circumstances which included that the conduct of the student 'is so refractory that his presence is injurious to other pupils'. In January 1987 the Board received information from the Police that in December 1986, certain students had been charged with the offences of kidnapping, unlawful confinement and sexual assault in relation to a 14 year old female who was a student at another school. The incident alleged did not occur on school property. Immediately on hearing of the criminal charges the Principal suspended them for 10 days and recommended to the Board that they be expelled. Reid J made the following comments:

Some of the actions taken by the Board or its officials have a distressingly arbitrary appearance. The suspensions were immediate upon the Principal receiving the information that the students had been charged. The students were given no opportunity to speak on their own behalf before being ordered to leave the school. There is no statutory obligation on a Principal to give a student such an opportunity, but I would have thought it would have assisted the Principal in deciding whether suspension was appropriate, in view of their clean records. The

reason for this peremptory action appears to have been the Principal's view that it was his duty to suspend. That, in turn, appears to stem from his view that the mere laying of the charge made the conduct of the students 'injurious to the moral tone of the school', to quote from the letter he wrote informing the mothers of the suspensions. Thus, again without any investigation of his own, or without giving the students a chance to speak for themselves, the Principal immediately recommended their expulsion. In a further letter to the mothers to inform them of that recommendation, the Principal stated that the basis for it was that the students' presence was 'injurious to other pupils'. That letter made it clear that nothing more than the fact of the charges being laid was the basis for the recommendation. The letter went on to say: This recommendation for expulsion resulted from information received from the Peel Regional Police that ... has been charged ...

This comes distressingly close to condemnation without trial. The Principal seems to have assumed that the students were guilty simply because they were charged. That is wholly contrary to the fundamental principle of our system of justice. Everyone is presumed to be innocent until found guilty by due process of law. Had the Principal not jumped to the conclusion that the students were guilty he would have had no basis for ordering their suspension. He had no other information on which to base his conclusion that their conduct was injurious to the moral tone of the school. He had therefore no basis for suspending them under Section 22(1) of the Act.

The peremptoriness of the suspension was exacerbated by the recommendation for expulsion, for it was rested as well on the assumption that the students were guilty of the charges.

The Judge also commented in relation to the question of possible expulsion:

Whether an untried charge of immoral behaviour on the part ... of two students amounts to conduct injurious to the moral tone of an entire school is a highly dubious proposition. How it standing by itself is an indication of refractory behaviour and thus a basis for embarking on an expulsion hearing is even more dubious.

The Canadian case *Donald et al v The Board of Education for the City of Hamilton et al*^{xiv}, a decision of the Court of Appeal of Ontario, illustrates the importance of bearing in mind not only the provisions which confer the power to expel but the possible significance of other provisions of the legislation. In this case, parents challenged a decision to exclude from the school children who

refused, on religious principles, to sing ‘God Save the King’, to repeat the Pledge of Allegiance and to salute the flag. Section 7(1) of the *Public Schools Act* then in force provided that:

No pupils in a public school shall be required to read or study in or from any religious book, or to join in any exercise of devotion or religion, objected to by his parent or guardian.

The parents were successful in establishing that Section 7(1) had the effect that the purported exclusion of their children was beyond power, the key passage stating:

The statute, while it absolves pupils from joining in exercises of devotion or religion to which they, or their parents, object, does not further define or specify what such exercises are or include or exclude. Had it done so, other considerations would apply. For the Court to take to itself the right to say that the exercises here in question had no religious or devotional significance might well be for the Court to deny that very religious freedom which the statute is intended to provide.

It is urged that the refusal of the infant appellants to join in the exercises in question is disturbing and constitutes conduct injurious to the moral tone of the school. It is not claimed that the appellants themselves engaged in any alleged religious ceremonies or observations, but only that they refrained from joining in the exercises in question. As stated by the learned trial judge, ‘it is clear that although the infant Plaintiffs refused to so sing and so salute, they otherwise stood respectfully during such exercises and in no way, other than the refusal to participate, showed any disrespect or caused any outward disturbance by their conduct.’ The regulations relating to both public and high schools specifically contemplate that a pupil who objects to joining in religious exercise may be permitted to retire or to remain, provided he maintains decorous conduct during the exercises. To do just that could not, I think, be viewed as conduct injurious to the moral tone of the school or class.

Cases from other places and other times, particularly where the ground of expulsion involves matters not directly related to behaviour, such as appearance and grooming, need to be treated with some care. Although in *Ward et al v Board of Blaine Lakes School Unit No. 57*^{xv} the Saskatchewan Courts upheld an expulsion of an eleven year old student whose hair exceeded the defined maximum length on the basis that prescribing within reasonable limits the extent of cleanliness required of pupils attending school, the extent of clothing they should wear, their general appearance including hair grooming was within the powers of the Board under the heading ‘Administering and Managing the Educational Affairs of the School District’ and ‘Exercising a

General Supervision and Control Over the Schools', it is doubtful whether such a view will always be taken. There is a wise warning by Mahoney J in *McMahon v Buggy* in the following terms:

What conduct will be sufficient ... will be affected by the prevailing social standards and the circumstances of the particular school and of the particular case. Conduct which 50 years ago would be judged sufficient to warrant expulsion might well today be seen as a normal incident of adolescence such as might be expected to be dealt with within the school by an experienced master; conversely standards of discipline which might have been proper to be laid down by a master at that time might be regarded today as being such that no reasonable teacher would be justified in insisting upon them.

Anti-discrimination laws, such as those relating to physical appearance or sex^{xvi}, would be relevant to such cases arising today.

Judicial review of exclusion decisions in public schools

Decisions to expel taken under a power conferred by statute will, unless there is statutory provision excluding judicial review, be subject to judicial review, that is review by a superior court on administrative law grounds. Speaking in general terms these grounds do not go to the merits or policy but to the legality. The principal grounds are well stated in the *Judicial Review Act 1991* (Qld) in the following terms and in general are consistent with the common law:

The application may be made on any one or more of the following grounds:

that a breach of the rules of natural justice has happened, is happening, or is likely to happen, in relation to the conduct;

that procedures that are required by law to be observed in relation to the conduct have not been, are not being, or are likely not to be, observed;

that the person proposing to make the decision does not have jurisdiction to make the proposed decision;

that the enactment under which the decision is proposed to be made does not authorise the making of the proposed decision;

that the making of the proposed decision would be an improper exercise of the power conferred by the enactment under which the decision is proposed to be made;

that an error of law:

Has been, is being, or is likely to be, committed in the course of the conduct; or

Is likely to be committed in the making of the proposed decision;

that fraud has taken place, is taking place, or is likely to take place, in the course of the conduct;

that there is no evidence or other material to justify the making of the proposed decision;

that the making of the proposed decision would be otherwise contrary to law;

The Act also provides (again, in general in accordance with common law principles) that a reference to an improper exercise of a power includes a reference to:

- (a) taking an irrelevant consideration into account in the exercise of a power; and
- (b) failing to take a relevant consideration into account in the exercise of a power; and
- (c) an exercise of a power for a purpose other than a purpose for which the power is conferred; and
- (d) an exercise of a discretionary power in bad faith; and
- (e) an exercise of a personal discretionary power at the direction or behest of another person; and
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; and
- (g) an exercise of a power that is so unreasonable that no reasonable person could so exercise the power; and
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (i) any other exercise of a power in a way that is an abuse of the power.

In *CT & JT v Board of School Trustees of School District No. 35*,^{xvii} a decision of the Court of Appeal of British Columbia, it was held that a policy on expulsion adopted by a School Board fettered the statutory discretion of the Principal in relation to suspensions. The relevant legislation provided that Principals ‘... may suspend a pupil in accordance with the Act ...’. The policy adopted by providing that in certain circumstances students ‘shall be immediately suspended’ was held by the Court to be ‘inappropriately worded’ and beyond power because its ‘clearly mandatory language’ tended to erode the discretion given to the Principal. To that extent, the policy was beyond power.

In *Leclerc v Board of Trustees of Perigord School District No. 850*,^{xviii} a decision of the Court of Appeal of Saskatchewan, the action of a teacher in refusing to suspend or dismiss a student contrary to a purported direction to do so was protected by the court.

Under subsection 23 of Section 110 of The School Act, the Defendant had power to suspend or dismiss the Plaintiff for gross misconduct, neglect of duty, or refusal or neglect to obey any lawful order of the Defendant, but there is no evidence that he was guilty of any of these matters. The only order, if it was an order, of the Defendant that the Plaintiff refused to obey, was to suspend one of the school children, and the Plaintiff says that, as he had nothing against the child and feared the father might take some action against him, if he put out the child, he refused to put her out and told the trustees to do so themselves.

In my opinion he was justified in doing so; he could not suspend the child under subsection 12 of Section 198 of the Act, as he had no complaint against the child, and if the Defendant knew of some valid reason why the child should be suspended or expelled from the school it was the duty of the Defendant itself to suspend or expel the child, under subsection 31 of Section 110 of the Act.

Clearly a decision to suspend or dismiss taken under dictation and without reasonable basis would itself have been invalid.

Administrative review of exclusion decisions in public schools

Parliaments are increasingly passing new laws and creating new tribunals to increase the accountability of public administrators. Freedom of Information laws, legal duties to give reasons for decisions, and appeals to have administrative tribunals empowered to review decisions on merit or policy grounds, are part of the new landscape of public administration. Decision-makers in public schools are sometimes bound by these laws, and accordingly it is necessary for them to determine the extent to which such laws apply to them and their decisions.

Procedural Issues

In the case of a private school the legal procedural requirements will be those expressly agreed under contract or arising by necessary implication. This is a matter of contract law unless a statutory provision is relevant or the principles of natural justice apply. Where the decision in relation to a public school represents the exercise of a statutory power then the procedural requirements will be determined by interpretation of the relevant statutory provision subject to the application of the rules of natural justice. As late as 1987 a leading Australian text on administrative law stated in a footnote that there was 'scant authority' on the question of whether a school child is entitled to a fair hearing before suspension or expulsion. That statement was not entirely accurate at the time, although admittedly the authorities were somewhat obscure, but the position is even more clear now.

Public schools and natural justice

The basic principles are that, where the rules of natural justice apply, in a decision adverse to the interests of a person, a decision-maker should not show bias and the person whose interests are at stake should be properly apprised of the matters under consideration, given an opportunity to respond and that response, if any, seriously considered before the decision is made. The application of the rules of natural justice may be excluded by statute, expressly or by necessary implication. Where the rules apply, the nature of the inquiry which ought to be conducted will be influenced by the relevant statutory provisions and by the nature of the inquiry. At one end of the spectrum one has the criminal trial and at the other end the suspension of a school student. Obviously a much greater degree of legality and formality will be appropriate in the former case rather than the latter.

An early application of these principles/considerations can be found in a decision of an Ontario Court in 1886. The trustees of a public school had modified a decision as to exclusion in a manner adverse to the interests of the student at a meeting of which the student and his parents had no notice. Whilst it was not essential to the decision, it was said in passing:

The action of the trustees in modifying their judgment in the absence and without notice to the parties interested was an irregular proceeding; but it is quite manifest from the evidence before the Court they were actuated only by a desire to do their duty properly, and the slip made was one that men in their position, unaware of the requirements of the law, might very readily make^{xix}.

There were decisions of State Courts in India in the 1950's^{xx} and a Malaysian decision in 1971^{xxi} holding that the rules of natural justice did apply to expulsion from public schools. In each case the decisions made clear that the procedure requirements are less rigid than those which would apply in more formal circumstances.

The most important decision in the Australian context is that of Mahoney J in *McMahon v Buggy & Ors*. His Honour noted that there did not at that time appear to be any recent judicial consideration of the application of the principle to the question of expulsion or exclusion from school of the pupil. He held that:

There is in my opinion nothing in the nature of the power of expulsion or exclusion of a pupil from school which would render the natural justice principle inapplicable. The consequences of the exercise of the power can, and often are, serious. The power is not one which in the normal case would be required to be exercised in such an emergency that some consideration to the facts in question could not be given and some opportunity afforded to the pupil to offer such defence as he may desire to do. What the principle requires may, in my opinion, in this particular context vary according to the exigency of the occasion, but this consideration would go rather to the content of the principle in its application to such a case rather than to the question whether it applies at all.

In the circumstances of the statutory form of education in force in this state, I am of the opinion that what I take to be the prima facie presumption that the natural justice principle should apply to the exercise of statutory powers having some serious consequences is not rebutted. It may be that whether the child be at the lower or higher end of the age spectrum of school pupils, the statutory consequence and practical consequences of expulsion or exclusion are such that the principle should apply, although the procedures to be followed in the case of a pupil of one age may not necessarily be appropriate to a pupil of another age.

It also should be noted that His Honour expressed some doubt as to whether the principle applies to a 'child of more than school leaving age' and 'if so what is its content'. His Honour analysed the events which had taken place in some detail and held that the rules had been complied with. Surprisingly this decision appears never to have been reported but is now well known in the educational community.

In *Rich v Christchurch Girls High School Board of Governors (No. 1)*^{xxii} the Court of Appeal of New Zealand held that the rules of natural justice did apply. In this case particular emphasis was placed upon the need to ensure that all of the matters under consideration should be brought to the attention of the student and that there should be no question of the decision-maker acting on uncommunicated information.

Surprisingly, the question does not appear to have been considered in England until 1988, when it came before McCullough J. of the Queen's Bench Division of the High Court of Justice, in *R v. Board of Governors of the London Oratory School ex parte Regis*^{xxiii}.

The Judge noted that Counsel were 'unaware of any English authority on the point' and commented:

I see no reason why the rules of natural justice, in other words the ordinary principles of fairness, should not apply just as much to the expulsion of a pupil from a secondary school as they do to the sending down of an undergraduate or student from a university. I am not impressed by the suggestion that because a boy or a girl, having been expelled from one school can be educated in another, the decision to expel is one of comparative unimportance ... I can see no reason why the rules of natural justice the ordinary rules of fair play should not apply when governors are considering the question of expulsion of an eleven year old boy from a secondary school.

It is therefore submitted that only in the event of a very clear express provision or almost inescapable necessary implication will it be held that where there is a statutory system of public education the rules of natural justice do not apply to expulsion and suspension decisions. The precise procedures required will be influenced by the legislation, by the nature of the inquiry and by the age of the student. The courts will not take a rigid or legalistic approach but will examine what has happened in the light of the principles and will make a reasonable and practical assessment of whether or not 'fair play' has been extended to the student.

The question of bias has arisen in at least one case, apparently unreported. In *R v Board of Governors of Stoke Newington School ex p M*^{xxiv} Potts J quashed the decision of an Exclusion Panel and the decision of the Hackney London Education Authority deciding not to direct the Head Teacher of a school to reinstate a student who had been excluded. The Exclusion Panel had included a teacher who sat on the panel because of his position as a School Governor, but who had had a number of dealings with the excluded student at relevant times and had, indeed, been her Head of Year during that period. Potts J held that, because of this teacher's dual role as Head of Year and member of the Exclusion Panel, the rules of natural justice had been breached. He held that there was no actual bias, but that the relevant test was whether, in the view of a reasonable person, no real bias having been shown, there was a real likelihood of bias against the student as a result of his presence on the panel. The Judge was satisfied that there would, in the view of a reasonable person, be a real likelihood of such bias.

Private schools and natural justice

The question whether or not a requirement of compliance with the rules of natural justice will be implied into the contract between parents and school appears unresolved. There has been no final determination of the issue in the cases.

Blackburn J of the Supreme Court of the Australian Capital Territory in *Seymour v Swift*^{xxv} considered the issue of natural justice and private schools. His decision concerned an application for an interlocutory injunction and the Judge indicated in his decision that he would do so 'in the fewest possible words and without canvassing all the matters that had been put before me'. In

essence he held that there was ‘absolutely no evidence’ before him that a term could be implied into a contract between school and parents that the school would not exclude the student without giving her parents a detailed specification of the reasons. In relation to a further submission His Honour said:

In my opinion this ground simply cannot stand. There is no rule or principle of law, in my opinion, from which it could possibly be made out that the headmistress of a private school has to act in a quasi-judicial, or acts in a quasi-judicial capacity, and therefore has to apply rules of natural justice.

His Honour also held that there was no evidence that the headmistress had acted in any way which was in breach of natural justice.

In *Dage v Baptist Union of Victoria*^{xxvi} the matter in issue before Starke J was also an application for an interlocutory injunction. The statement of claim alleged, among other things, that it was an implied term of the agreement between the parents and the school that the student would not be expelled unless there were reasonable and proper grounds for expelling him and a declaration was sought that the student had been wrongfully expelled and that the decision to expel was void on the ground that it was arrived at in contravention of the principles of natural justice.

Starke J, whose decision shows that he was aware of *Seymour v Swift*, held that there was a serious question of law to be decided at the trial and that that question was whether ‘*the pupils at school - when it comes to serious matters such as expulsion - are entitled to rely on the principles of natural justice*’.

In neither of these cases do there appear to have been any further proceedings.

In *R v. Fernhill Manor School ex parte A*.^{xxvii} (discussed more fully below) the Judge acknowledged the possibility of declaratory relief based upon the argument that parents could:

contend that when the heads had a contractual right to require the removal of a pupil whose influence was found to be detrimental to her companions, that impliedly meant that such a finding could not be made except by a process of adjudication which complied with principles of natural justice, that there had been a breach of the principles of natural justice, and that, accordingly, the heads did not have the contractual right to require the pupil's removal. Accordingly, the parents might have been able to seek and obtain a declaration to that effect.

This issue is therefore open to final decision should it arise in a future case and it is certainly possible that with increasing emphasis upon the rights of young people a judge might be prepared to imply such a term into the contract.

The decision of Brooke J of the Queens Bench Division of the High Court of Justice in England in *R. v. Fernhill Manor School ex parte A* is an interesting example of an attempt to apply

public law principles to a private school. In that case, a 15 year old student was expelled from an independent school for alleged bullying and intimidatory behaviour. Neither she nor her parents were informed of the allegations against her before the decision to expel was taken and no opportunity was given to respond to the allegations. The student denied the allegations and made an application through her mother for judicial review seeking an order to quash the decisions and a declaration that the decisions were improper and invalid by reason of a failure to apply the rules of natural justice. It was submitted that the 'statutory underpinning for the relationship between independent schools and their pupils provided by the Education Act 1944 brought the decisions complained of into the field of public law and thus susceptible to judicial review'. His Honour concluded:

It is true that private schools operate within a statutory framework of control, but the relationships between the private schools and those who attend them are founded on the contract which is made between the school and those who are paying for the teaching and education of the pupils at the school. That contract is a completely private contract and it is not underpinned by statute.

Accordingly as Brook, J. held that the case fell 'fairly and squarely into the private law sector in which this Court, which exists to provide public law remedies, can provide no relief' dismissed the application.

His Honour concluded his judgment with the following passage:

I reach this conclusion with considerable reluctance. I hope that any publicity which this case may attract may draw the attention of those who are responsible for the government of independent schools to the need to have in place procedural rules designed to ensure that pupils receive fair treatment in accordance with the principles of natural justice, which are sometimes called fair play in action, if there is any question of their being expelled.

Expulsion from school is and always has been a stigma. It may lead to difficulties in the smooth progress of a child's education, perhaps at a crucial stage. It may lead to later difficulties on the employment market. The relevant principles of fair play have been repeatedly stated by this Court and they apply, as McCullough J has said, just as much to the relationship between a school girl of 16 and her school as they do to an undergraduate and his university or a trade unionist and his trade union.

At present as the law stands, however, if a child goes to an independent school, as opposed to a maintained school, this Court can afford that child no remedy. As I have explained, the only remedy that the law offers is a remedy available to the

child's parents, if they can afford to have recourse to it and if they wish to have recourse to it, of seeking a declaration in a law Court administering private law that some rights of theirs under their contract with the school have been infringed because of the way the school has treated their child. But the child herself has no remedy unless parliament is willing to give her one to remedy the apparent anomaly this case has revealed.

This case is an interesting example of the significance of the legal basis of the relationships existing in respect of a particular school in relation to parties' remedies in the event of litigation. It will always be necessary in particular cases to examine carefully the law relevant in any particular jurisdiction but this case illustrates very neatly the different remedies available to students at public and private schools.

Anti-Discrimination and Human Rights Laws

It is beyond the scope of this paper to do more than simply indicate the growing importance of anti-discrimination and human rights laws in connection with exclusion from school.

Anti-discrimination legislation is now in force in all Australian jurisdictions. The scope of those laws is thoroughly outlined in *Education and the Law* by Ian M Ramsay and Ann R Shorten^{xxviii}. It is quite clear that disability discrimination is an increasing and potentially major issue in Australian schools, particularly in relation to learning disabilities^{xxix} and disruptive behaviour. The growing number of such cases will impose on school administrators in particular a need for new skills.

If students' rights legislation is passed in Australia mirroring legislation in other jurisdictions such as the United States of America, Canada and New Zealand^{xxx}, then legally enforceable rights such as those to freedom of expression, freedom of association and freedom of conscience would raise serious questions as to the validity of many grounds of exclusion commonly relied upon.

Conclusion

Although this area has produced relatively little litigation in the past, it is likely that there will be much more in the future. The creation by Parliaments of new rights, remedies and tribunals will see to that, reinforced by an increasing tendency in the community to look to the law as a solution to life's problems and complexities. Teachers and school administrators need to be familiar in general terms with the principles, and to approach such decisions with care and sensitivity.

Keywords

Exclusion	Schools
Procedural Issues	Natural Justice
Students' Rights	

Endnotes

- i. *Fitzgerald v Northcote* (1865) 4 F & F 656
- ii. (1980) 32 ALR 251
- iii. (1911) 104 L T 388
- iv. Supreme Court of NSW, Equity Division, No. 2095/72, Dec., 1972
- v. (1888) 58 LT 680
- vi. Supreme Court of Victoria, Practice Court, No. 8982 of 1991, 20 August, 1991
- vii. (1990) 21 NSWLR 119
- viii. Supreme Court of Western Australia (Ipp J), No 2845 of 1990, unreported
- ix. (1930) 46 TLR 579
- x. (1964) 111 CLR 16
- xi. (1989) 88 ALR 467
- xii. See the careful analysis of the New Zealand grounds by Dr Rodney Harrison, QC, in *Student Discipline by School Principals and Boards of Trustees: Powers, Procedures and Remedies in School Discipline and Students' Rights* (Legal Research Foundation, Auckland March 1996, p.56)
- xiii. (1987) 50 OR (2d) 654
- xiv. (1945) OR 518
- xv. (1971) 4 WWR 161
- xvi. As in *Cope v Girton Grammar School Ltd* (1995) EOC 92-680
- xvii. (1985) 65 BCLR 197
- xviii. (1925) 2 WWR 312
- xix. *McIntyre v Blanchard Public School Section 8* (1886) 11 OR 439
- xx. *Ghanshyam Das Gupta v Board of High School and Intermediate Education UP*, (s) AIR 1956 All 539; and *Ramesh Chandra Sahu v N Padhy* AIR 1959 Orissa 196
- xxi. *Anandarajan & Ors v Mahadevan* (1971) 2 MLJ 8

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- xxii. (1974) 1 NZLR 21
- xxiii. High Court of Justice, Queen's Bench Division, CO 1136/86, McCullough J, 4 Feb, 1988
- xxiv. 21 January 1992, unreported
- xxv. (1976) 10 ACTR 1
- xxvi. [1985] VR 270
- xxvii. (1993) 1 FLR 62-022
- xxviii. *Education and the Law* by Ian M Ramsay and Ann R Shorten (Butterworths) Sydney 1996. See generally Chapter 7 and in respect of school closures, pages 14/15
- xxix. There is a detailed analysis of some of the complexities in P. Williams *The Law and Students with Learning Difficulties: Some Recent Developments* (Working Paper 96.01, Curtin University Business School, Perth, 1996)
- xxx. See the various essays on the significance of the New Zealand Bill of Rights in *Education and the Law in New Zealand* (Legal Research Foundation, Auckland, April 1993) and *School Discipline and Students' Rights* (Legal Research Foundation, Auckland, March 1996)