CHAPTER 2
REVIEW OF LITERATURE

2.0 INTRODUCTION

Principals are expected to be a specialist in leading a school and knowing what it means to be a competent school adminster. Having decided to accept the responsibilities associated with being a principal, it is important to consider what standards of care that are likely to be applied as the principals execute their duties (Shoop, p.50). Principals make hundreds of decisions each day and no principal is able to check the policy manual before each decision. Nevertheless any decision that is questioned will be measured against the relevant policy or generally accepted practice. But the fact that the principal did not know about a certain policy or didn’t enforce certain policies will be presented as the principal’s failure to perform to the standards set by the Ministry of Education. Principals should take heed that if they are careless, unprofessional, or negligent they can be subjected to financial penalty (Reglin, 1992). Principals awareness of legal issues here is examined from the perspectives of negligence, teachers’ legal rights, students’ legal rights, school discipline and preventive programs that principals take into account when they are dealing with when managing a school daily.

2.1 NEGLIGENCE

The courts have imposed a special duty of care on educators commonly referred to as that of the careful and prudent parent. Educators are expected to use the same degree of caution that a careful or prudent parent would have in the care of their own children (Kozlowski, 1998). When an accident occurs, teachers will be liable in
negligence if their conduct, which causes injury to a student, falls below that expected of a careful parent. This duty of care is subject to limitations. The law of negligence presumes that a person should be able to determine when his/her actions might create risks, which could harm others. In determining negligence, potential victims and the risks of harm must be reasonably foreseeable (Shaughnessy, 2003).

Negligence is an unintentional tort. A tort is a civil wrongdoing. There are intentional and unintentional torts, which have been created by judges in response to claims for compensation for damages. Generally the plaintiff in an action is required to establish on a balance of probabilities, the existence of the necessary elements of liability such as:

1. Duty of care (careful and prudent parent)
2. Breach of the duty of care (e.g. inadequate supervision, inadequate information)
3. Breach of the duty of care damages (i.e. physical injury)
4. Reasonable foreseeability of causation (link between breach of duty of care and the loss is not remote)
5. Plaintiff suffered some actual loss (damages are not punitive or criminal)

(Source: Jennifer Canas, Langley School District, 2003)

Arguably the main legal problem for both school principals and teachers has been for many years to do with the physical safety of students. Data collected by Heffy (1985) during the early 1980s showed that, 23 students in every 1,000 enrolled in schools in Australia had suffered injuries necessitating some form of medical assistance. In a recent Australian study (Stewart, 1997) carried out with nearly 300 principals from government primary and secondary schools indicate that 25 per cent of the respondents have been involved in some form of legal action emanating from
physical injuries incurred by students. It would seem important, therefore, that principals have a level of legal literacy sufficient to appreciate the potential legal consequence of students suffering physical harm in school related accidents.

Principals need to be aware of the magnitude of negligence litigation. In the United States, negligence suits by students constitute 42% of all school law cases reported in a recent survey, and coaches and physical education teachers are specifically at risk (Petzko, 1998).

The escalation in the number of challenges to public education in the United States is at least partially due to the landmark case of Tinker v. Des Moines Independent Community School District where the United States Supreme Court stated that students do not shed their constitutional rights at the school gate (Reglin, p.27; McCarthy, 2002). In the wake of the Tinker decision the courts especially at the federal level have been inundated with challenges to policy, procedures, actions and decisions of school personnel. The widely publicized ruling in Tinker has alerted society to the fact that schools can and will be accountable for their actions. Not only are there more suits against educators, there are more types of suits against them.

A student or any other person who wishes to establish a legal claim of negligence against a principal must proof four separate elements: a recognizable legal duty, breach of duty, proximate cause and injury (Permut, 1998). The first requirement of litigation for negligence is to establish a recognizable legal duty. Under the law, the concept of legal duty suggests there is a relationship between two parties where one is obligated to protect the other from injury. For the principal, there appears to be at least four recognizable and somewhat overlapping duties.

1. To utilize competent and efficient personnel
2. To adequately instruct
3. To furnish and maintain safe equipment and safe premises

4. To make and enforce adequate rules.

All four duties appear to fall under the rubric of adequate supervision. It should be no surprise that another definition for negligence, particularly sensitive to the nature of administration is lack of supervision.

A second important element to establish negligent conduct on behalf of a principal would be an attempt to illustrate breach of duty. The plaintiff would suggest that the principal had a legal duty to protect and failed to do so. As a court might consider the issue the doctrines of the “reasonable man” and “foreseeability” would come into perspective. The reasonable man doctrine asks whether a prudent administrator would act in the same manner given the same set of circumstances, as a reasonable man would have acted which might include such things as age and maturity of the students; the risks to which they are exposed to, prevention mechanism in place before the incident (e.g. instructions at school meetings); and plans for a response if problems occur (e.g. who call the ambulance if the principal is absent). Closely coupled with this would be an analysis by the court regarding whether the problem encountered could be foreseen and responded to.

Proximate cause is the third legal requirement needed and is used in an attempt to establish that the failure of the principal to perform appropriately is the primary and moving cause without which the injury might not have occurred (Permuth, p.43). In other words the failure of the principal to perform through an act of omission (lack of appropriate rules and enforcement) or commission (e.g. placing students in harms way through authorization of an inappropriate field trip) had a direct bearing on an injury. The effort is to tie the behavior of the principal in time and the consequence to the injury.
The final issue is that injury has occurred. To this point, the question of physical injuries has rarely been questioned but, again, the issue is whether the action or lack of action by the principal contributed to the injury. Principals are advised to carefully consider the emotional impact of potential acts of negligence, regardless of the element of legal recovery.

Teachers rather than principals are most often present when an injury, which leads to lawsuits occur. Principals can find themselves named in lawsuits as well under the doctrine of respondeat superior- let the superior answer (Shaughnessy, 2003). This doctrine allows courts to hold superiors of the negligent persons liable for the employee’s negligence. Courts expect that all supervisors will have instructed all their employees in appropriate behavior. Teachers have a right to expect that principals will give them information they need to avoid negligence. Teachers have a responsibility as well to use common sense and to act the way one would expect a reasonable, mature teacher to act. Courts also expect that policies and procedures will be in place and that teachers will follow them.

Most negligence cases occur in the classroom because that is where students and teachers spend most of their time. However, other areas in school are potentially more dangerous than the classroom, and a greater standard of care will be expected. Lab and physical education classes carry greater potential for injury than classrooms and case law indicates that courts expect teachers to exercise greater caution than they would in ordinary classrooms (Shaughnessy, p.30). Teachers and administrators are expected to maintain equipment in working order and to keep areas free of unnecessary hazards. Teachers should give students safety instructions regarding the use of potentially dangerous equipment. Teachers can be held liable for willful and wanton negligence in failing to inspect equipment (Sawyer, 2001)
The prudent principal will not only require that all new coaches and teachers receive first aid training prior to the lesson but he or she will also provide in service training programs for them on the fundamentals of liability (Stader & Francis, 2003). Coaches and teachers who understand legal concept of “a reasonable person” and the terms “standard of care”, “foresee ability” and “preventability” will find it easier to conduct their lessons within the expectations, resulting not only in less chance of litigation, but safer activities for students (Sawyer, 2001). If this is not done, teachers run an unnecessary risk of being sued, the principal at a greater risk of being sued and worst of all, there is an immense likelihood that the student may be seriously injured.

Most cases alleged that students had been harmed as a result of the action or inaction of a school and several of its employees. In each case the principal will be named as a defendant. More so when the student attempts to show that the action of a teacher caused harm that would not have occurred if the principal had exercised his or her duties according to professional standards (Shoop, 2002)

Field trips are a legal disaster waiting to happen if students do not understand to what extent off campus misconduct will result in school disciplinary consequences and if teachers are not confident in their responsibilities and students rights (Petzko, 1998). It is the rare principal who is certain his or her student would never bring something on a field trip that does not belong there; other principals would be wise to discuss the notice due to the students regarding off campus conduct and the reasonable criteria for search with the teachers. Principals should inform teachers what the law says about taking students on visits. Principals should reassure teachers that as long as the organization is meticulous, they would not be personally liable for negligence (Lowe, 2002).
2.2 RIGHTS OF TEACHERS

The principal and the management team in schools are expected to supervise teachers. Sometimes teachers may be irritated when supervision is rigid and feels that the administrators don’t trust them when in fact the supervisor is a teacher’s best defense against the charge of malpractice. If an administrator can say that the teacher acted appropriately when observed, a powerful piece of evidence is in the teacher’s favor (Milsom, 2002).

All educators should be familiar with the elements of negligence. Teachers are expected to provide reasonable supervision of students. Principals should develop rules and regulations, which guide teachers in providing for students safety, and teachers develop safety procedures for their classroom. The most important question and a commonly asked question is “Did the teacher do what a reasonable teacher would be expected to do?”

A teacher who leaves a classroom unattended in order to take a coffee break will generally be held to have violated a duty. But if it can be demonstrated that teachers have regularly left classes unattended and the principal did nothing to stop them, the principal may be held equally, if not more, liable than the teacher (Taylor, 2001). Another important factor is that the younger the child, the greater the teacher’s responsibility. It might be expectable to leave a group of Form Five students alone during a math’s lesson when it would not be expectable to leave a group of seven year olds alone.

In 1974 Congress enacted the Family Educational Rights and Privacy Act (FERPA) and the law took effect throughout the United States (Yell, 2001). The purpose of FERPA was to guarantee parental access to student records while prohibiting access to them by persons without the legitimate reasons to know their content. A positive
result of the passage of FERPA has been the cleansing of files of inaccurate information and information based on opinion rather than fact. It is important that students files are accurate based on facts and first hand observation and educationally relevant. It is important teachers guard the confidentiality of students’ educational information (Taylor, 2001). Teachers will also be held liable for writing offensive or degrading remarks about a student.

The courts have consistently held that sexual conduct between teachers and students is sufficient cause for dismissal. Although most cases deal with minor students, sexual involvement with students of legal age would probably lead to dismissal. The court stated that there are certain professions which impose upon persons, attracted to them, responsibilities and limitations on freedom of action which so not exist in regard to the other callings... school teachers fall in such a category (Ogletree, p. 69).

2.3 SCHOOL DISCIPLINE

Too often in urban schools across the country, both students and teachers feel unsafe. Many have been threatened physically or verbally, or have directly experienced violence. Beyond generating fears for everyone’s safety, violence in schools is diverting energy and resources from instruction. Simply put, violence impedes learning and student achievement.

The celebration of violence in movies, on television, and in popular songs has turned into an epidemic of personal tragedies for people in America. Exacerbated by the readily availability of drugs and weapons, violence has become a public issue of immediate concern. Yet the sources of violence are deep and long standing, for America is a country sharply divided between haves and have-nots, and areas of high
poverty concentration have long been susceptible to all forms of violence, from vandalism, robbery, and rape, to suicide - the ultimate violence of despair. (Ascher, 1994)

Starting in the mid-1980s the Supreme Court gave school personnel more freedom to restrict students' expression in public schools. The Supreme Court emphasized that public school have an important role in cultivating the manners and habits of civility and that schools must teach by example the shared values of a civilized social order. The court reiterated that the Federal Constitution does not require teachers, parents and elected school officials to surrender control of the American public school system to public school students (Yell & Katsiyannis, 2001). The lower courts in America have upheld disciplinary action against public school students for a range of expressive activities including wearing sagging pants, t-shirts that reading "Drugs Suck" and various other attire found to be lewd or indecent. One goal of public education is to inculcate basic values such as civility and respect for others with different background and beliefs (Day & Golench, 1997). The Court has also recognized that schools have a duty to educate students in a safe and orderly environment. So a student’s freedom of expression is limited to expression or speech that does not interfere with the school’s operation because schools have a duty to establish standards of student conduct and behavior. Similarly, a student’s right to privacy gives way to a school’s duty to maintain a safe environment.

2.4 LEGAL RIGHTS OF STUDENTS

In the landmark 1969 decision, Tinker v. Des Moines Independent School District, the Supreme Court acknowledged the special circumstances of the school environment and held that public schools could discipline students for their
nonverbal expression of ideological views if such expressions is likely to cause a substantial disruption of or material interference with school activities or to collide with the rights of students to be secure and to be alone (McCarthy, 2002). While the court in Tinker broke new ground in protecting students’ rights it emphasized the need for affirming the comprehensive authority of the State and of the school officials, consistent with the fundamental constitutional safeguards, to prescribe and control conduct in the schools.

The two Supreme Courts decision that directly affect how school officials may keep school safe and orderly while safeguarding the rights of students are New Jersey v. TLO (1985) and Veronia School District v. Acton (1995).

In 1985 the U.S. Supreme Court in New Jersey v. TLO addressed warrantless searches in the schools (McCarthy, 2002). A teacher discovered two girls smoking in the school lavatory. The students were taken to the principal’s office and a purse was taken from one of the girls to examine it for cigarettes. In addition to cigarettes, the purse also contained cigarette-rolling papers. Suspecting that the girl might have marijuana the principal emptied the contents of the purse. In it he found a pipe, a small amount of marijuana, a large amount of money, a list of people owing TLO money and two letters implicating her in marijuana dealings. The girl’s parents were called and evidence was turned over to the police. Charges were brought by the police and based on the evidence collected by the principal and TLO’s confession, a juvenile court declared TLO a delinquent. The parents appealed the decision on the grounds that the search was conducted without a warrant and therefore illegal under the Fourth Amendment. Because the search was conducted illegally the parents argued the evidence was inadmissible. The U.S. Supreme Court declared that the Fourth Amendment, prohibiting illegal searches and seizures, applied to students as
well as adults. The Court also noted, however, that student’s privacy interest must be weighed against the need of administrators and teachers to maintain order and discipline in schools. Furthermore, the Court noted that maintaining security and order in schools require some easing of the requirements normally imposed on the police.

The Court ruled that schools did not need to obtain a search warrant before searching a student (Yell & Rozalski, 2000). The reasonableness standard the school officials must meet holds that a reasonable person would have cause to suspect that evidence of illegal activities to be present before conducting the search. The search must be conducted as the result of legitimate suspicion. This does not mean the school officials must be absolutely certain prior to conducting a search but rather that there is a commonsense probability regarding the necessity of a search. Situations that justify a reasonable suspicion include information from student informers, police tips and phone calls and unusual student conduct (Yell, 1998). The scope of the search must be reasonably related to the rule violation that led top the search in the first place.

In the case of Veronia School District v. Acton (1995) the court noted that students in schools have a decreased expectation of privacy relative to adults in the general population. In both cases the court granted a great deal of latitude to schools because they have a legitimate duty to educate students in a safe and orderly environment. The law permits educators to respond to school safety problems as the situation dictates, providing the actions are reasonable (Yell, 2000). In Veronia the high court noted that privacy expectations of students in public schools are less than those of the general public because school authorities act in loco parentis. In loco parentis is a concept that originated in English common law. According to this concept, when
parents place their children in schools, they give a certain amount of control of their children to the school personnel. The principal and teacher, therefore, have authority to teach, guide, correct and discipline children to achieve educational objectives (Yell, 2000).

The intrusiveness of the search is also relevant factor. Considering the nature of the possible offense, the search should not be overly intrusive (e.g. a strip search to locate missing money). When these conditions are met, school officials have a great deal of leeway in conducting searches of students and their property. These decisions are important because they give school officials guidance in using procedures such as targeted and random searches, and drug testing.

In 1998, the school district in Oklahoma adopted a student activities drug testing policy, which required all middle and high school students to consent to drug testing in order to participate in any extracurricular activity (Conlon, 2003). Students were required to take a drug test before participating in the activity and had to agree to be tested at any time based upon reasonable suspicion. The mandatory urinalysis test was designed to detect only illegal drugs and the results were kept confidential. No disciplinary or academic sanctions were imposed for a positive test. Lindsay Earl, a member of a high school choir objected to the random drug testing when the school had no reason to believe that she had ever used drugs. Together with her parents she brought a lawsuit claiming that the policy violated her rights.

Justice Thomas wrote “students that participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some clubs require travel and communal undress; others have special rules that do not apply the student body as a whole. The majority therefore concluded that students had a limited expectation on privacy” (Conlon, p.300).
Explaining that evidence shows that the drug problem among the nations youth has only grown worse the Court stated that a demonstrated problem of drug abuse is not in all cases necessary to the validity of a testing regime but that some evidence does shore up an assertion of special need for a suspicionless search program. The evidence here, teachers observing students who appeared to be under the influence of drugs, a dog trained in searching for drugs and finding marijuana cigarettes near the school parking lot, and police finding drugs in a student’s car in the parking lot showed that schools faced a serious drug problem. Testing students was a reasonably effective means of addressing the schools policy in preventing and deterring drug abuse. The court concluded that the privacy interests compromised by the process of obtaining the urine was negligible. It emphasized that the results of the tests were only disclosed to a limited class of school personnel and were not turned over to the enforcement authorities.

On the question of student grade reduction (e.g. for unexcused absences), if a student can show a grade was lowered for disciplinary reasons or that a teacher acted out of malice the court would listen (Ogletree, 1985). However the burden of proof is on the student to establish the reason for the grade reduction.

2.5 PREVENTION

There is a tremendous amount of activity within the education community to understand and come to terms with the issue of school violence as well as to identify and implement effective solutions. A large majority of school boards in America have policies to address the issues of violence and violent incidents. Nearly all schools have included a statement concerning suspension and expulsion. It serves
only as a quick fix solution by removing the offending students from the immediate environment and fails to address the long-term problem (Day & Golench, 1997). Other areas, which schools boards were addressing, include delegating administrative responsibilities, communicating policy information to stakeholders and promoting a positive school climate (Day & Golench, 1997). It is essential that members of the school administrations are made aware of their roles and responsibilities for violence prevention policy. However, it is also important that all stakeholders including students, parents or guardians and others with a vested interest in schools be aware of both content of the policy documents (e.g. code of conduct, range of consequences) and the procedures, regulations and guidelines for implementing policy.

Measures should be taken to ensure moderate levels of security are maintained (e.g. adult supervision on the school grounds) and to foster relations with the police. Working relationships could be forged between schools and parents or guardians and government agencies to address the problem jointly. The courts have noted that the nature and power of school authority exercise over their students is custodial and tutelary, permitting a degree of supervision that could not be exercised over adults. Therefore students have a lesser expectation of privacy than members of the population generally (Conlon, p.298).

An essential key to providing important legal defense for the principal lies in the understanding and use of risk management or avoidance in an attempt to foresee and prevent problems that are likely to cause difficulties (Milsom, 2002). An important effort to diminish negligence vulnerability centers on minimizing exposure on areas in which the risk of injury is high and perhaps inconsistent with the educational outcomes of the school. For example, eliminating dangerous equipment like trampolines, restricting the privilege of students to field trips depending on
disciplinary standing during the year, ensuring that all equipment (e.g. for physical education, science and agriculture classes) and physically troubling situations have priority reporting mechanisms for correction. Minimizing external field trips with little connection to the educational goals of the school can prevent negligence litigation.

With knowing legal protection brings an understandable level of comfort and minimizing exposure provides an extra sense of prevention, an essential ingredient of action to prevent injury to students and self-protection against successful litigation focuses on diligent and continuous effort to improve supervision throughout the schools.

With scheduled periodic staff meetings and student assemblies to review the rules of conduct developed for the safety of the students (Permut, 1998). Staff meetings should emphasize the role of the faculty in supervising students both in the classroom and beyond. It is critical to fully inform teachers of their role and potential liability for failure to carry out these rules.

Focus on the areas of school where issue of negligence are most likely to occur and prepare plans for prevention and response if problems occur. Appropriate rules and conduct regarding the use of equipment should be tested for each class, rules posted and unusual circumstances dealt with (Sawyer, 2001).

Co curricular focus should be on review of all events held on school grounds, such as field trips protocols, including issues of who is allowed to go, assurance of the educational value of the trips, reporting mechanisms to the school in case of difficulties and conduct of the activities for the teaching staff on the trip (Kozlowski, 1998). The principal must affirm any policy taken by the teaching staff.
The principal must also formally designate a person or persons to stand in for him or her in the absence of the principal or if the school is unable to reach the principal. An essential area for the principals’ attention is to ensure the credentialing and certified standing of those in schools to carry out responsibilities assigned to them.

2.6 CONCLUSION

School principals must have an understanding in legal issues because running a school is getting more and more complex. Little matters in running a school from day to day may take its toll on the school authorities if the knowledge is not there. Some small problems can escalate into bigger problems and grab media attention, therefore the knowledge of education law is more effective as a protector than a healer and it is better to have a solid understanding of education law. Although a small amount of training will certainly not be a panacea or a guarantee that litigation will completely prevented, it may serve to reduce the risk of challenges and the tension and confusion that may subsequently occur.