Control and Management of Schools - Disciplinary Powers of Boards of Trustees

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Introduction

The first day of October 1989 was a significant one in the history of education administration in New Zealand. On that day more than two thousand, six hundred boards of trustees gained statutory powers under the newly enacted Education Act 1989. The boards had been elected earlier that year and had taken office in May, with their existing powers, in preparation for the change in legislation and in the central administrative structures which was to take effect from 1 October.

The changes came about as a result of the report of the Taskforce to Review Education Administration, commonly called the Picot Report.[1] This report, which was released on 10 May 1988, described the then existing education administrative structure as "overly complex by having too many decision points" and went on to say that "An effective administration system must be as simple as possible and decisions should be made as close as possible to where they are carried out".[2] It was proposed in the report that individual learning institutions be the basic unit of education administration, that people in the institutions should make as many of the decisions that affect the institution as possible, that the running of learning institutions should be a partnership between the teaching staff (the professionals) and the community working in terms of the charter and within national guidelines, and that the mechanism for creating such a partnership should be a board of trustees. The Government sought responses to the proposals in the Picot Report from the general public and from educationists. More than 20,000 responses were studied, and the policy position reached by the Government was set out in the *Tomorrow's Schools* [3] booklet which provided the policy basis for the new legislation.

The significance of the changes which occurred in 1989 is that now the delivery and administration of primary and secondary education involves parents and the community, in partnership with the teachers and staff, running schools. It is important for any practitioner dealing with school boards to realise that the 1989 changes are far greater for primary schools than for secondary. Prior to 1989, secondary schools had been controlled and managed by boards of governors which already had the power to employ teachers and other staff. Primary schools, on the other hand, were controlled and managed by education boards which employed the teachers and other staff and which managed the resources of the schools. Local school committees had limited powers and functions. Secondary school boards of governors also had the power to make bylaws (or rules) for the school and had statutory powers in relation to the suspension and expulsion of pupils. For primary schools these powers were held by the education board of the district in which

the school was situated, although the principal of the school had the statutory power to suspend a pupil. From 1 October 1989 all state and integrated schools, whether primary, secondary, intermediate or area, have the same administering body - a board of trustees with the authority under section 75 of the Education Act 1989 to control the management of the school.

In this paper I will examine the powers of boards of trustees and principals in relation to the discipline of pupils, both in the wider context of the boards' discretion to make and enforce school rules, and in the narrower context of the statutory provisions relating to suspension and expulsion. This paper contains my own views, it does not represent the official view of the Ministry of Education.

School Rules and School Discipline

I have already referred, in passing, to section 75 of the Education Act 1989 which gives a board of trustees complete discretion to control the management of the school, subject to any enactment or the general law of New Zealand. Section 76 of the Act goes on to say that a school's principal is the board's chief executive in relation to the school's control and management. Again, subject to any enactment or the general law of New Zealand, the principal must comply with the board's general policy directions and has the complete discretion to manage the school's day-to-day administration.[4] So, the board has the overall responsibility for control and management of the school, and its policies with regard to control and management are implemented by the principal who, as the board's chief executive, is responsible for the school's day-to-day administration.

As part of its responsibility for control and management it is recognised that a board must maintain good order and discipline in a school and that to do this it is necessary to have rules governing pupil behaviour. In order to maintain good order and discipline, a variety of rules are commonly made by school boards of trustees. Judicial comment in two well known cases illustrates acceptance of this point.

Speight J in giving the judgment of the Court of Appeal in *Edwards v Onehunga High School Board* [5] *said:*

> It appears to this Court that 'control and management of the school' are wide and substantial topics including in their scope, of course, the control and management of pupils. The behavioural checks necessary, let alone desirable for such day-to-day running of the school, may be infinite and incapable of codification ...

In *Rich v Christchurch Girls' High School Board of Governors (No 1)* [6] also in the Court of Appeal, McCarthy J, when considering rules relating to attendance at assembly and religious observance said:

> In the operation of any school there are frequently difficult decisions to be made ... The making of such decisions in the absence of direct statutory direction must be a part of management. Parliament has left that management in this school to the board.

In *Edwards*[7] and *Rich* [8] governing appearance and dress (specifically hair length, and attendance at assembly and religious observance respectively) were accepted as lawful

by the Court of Appeal. These two cases were decided under the Education Act 1964. Pursuant to section 61(1)(b) of that Act the governing body of every secondary school "shall have the control and management of the school". This is a similar but not identical provision to the current section 75[9] giving boards of trustees power to control the management of the school. The main differences are that section 75 applies to all schools (not just secondary schools), it includes the words "complete discretion" and "as it thinks fit" in referring to the board's power and, as already mentioned, makes the power to control subject to any enactment and the general law of New Zealand. Section 61 was expressly subject to the other provisions of the Education Act 1964 and any regulations made thereunder but was not expressed as a complete discretion.

In *M and R v Syms and the Board of Trustees of Palmerston North High School*[10] the school rules were briefly discussed[11] and rules relating to smoking, possession and use of alcohol and the sale, purchase or use of any illegal drugs were noted.

Process for making rules and legal implications for enforcement and penalties

The first point to note in a consideration of the rule-making process is that neither the board of trustees in making the rules, nor the principal in enforcing them, has an unfettered discretion. As already mentioned, the powers given to the board under section 75 of the Education Act 1989 and to the principal under section 76 are subject to any enactment and to the general law of New Zealand. These words expressly limit the discretion of both the board and the principal and mean that every decision to make a rule, enforce a rule or impose a penalty for breach of a rule is open to challenge under particular enactments such as, for example, the New Zealand Bill of Rights Act 1990 and to the general civil, criminal and common law of the land.

In a report by the Auckland District Law Society Public Issues Committee on schools and searching for drugs, the question of whether the provisions of the New Zealand Bill of Rights Act will apply to a school board or a principal is discussed. The Committee came to the following conclusion:[12]

> The Bill of Rights applies to 'acts done' -
>
> (a) By the legislative, executive or judicial branches of the government of New Zealand; or
>
> (b) By any person or body in the performance of any public function, power or duty conferred or imposed upon that person or body by or pursuant to law.
>
> While a school board and school principal clearly do not come within (a) above, we consider it strongly arguable that their exercise of disciplinary or other authority pursuant to the Education Act 1989 does fall within (b). The provisions of the Bill of Rights Act ... will therefore apply.

The issue of possible effects of the New Zealand Bill of Rights Act on the day-to-day operations of schools would make a discussion paper in its own right and I propose to make only brief comment. Many of the constitutional rights protected by the Bill of Rights Act are the kind of rights which could arise in a disciplinary context in a school but the application of the Act to schools is as yet untested in legal proceedings. For example,

under section 9 of the New Zealand Bill of Rights Act, everyone has the right not to be subject to torture or to cruel, degrading or disproportionately severe treatment or punishment. Newspaper reports late last year about discipline methods at an Auckland school alleging punishments such as being made to stand on the spot outside for the whole school day indicate that this is a right which could be breached in the application of punishment for breach of rules. Corporal punishment is, of course, prohibited in all schools, state and private, by an amendment in 1990[13] to the Education Act 1989 and the Crimes Act 1961.

Under section 14 of the New Zealand Bill of Rights Act every person has the right to freedom of expression. The exercise of this right on the part of a pupil could come into collision with a board's responsibility for internal order and discipline in the school, particularly in the area of hair length, style and colour, of jewellery and of other items of dress and of the display of badges or slogans. It is, after all, 19 years since the *Edwards* case (relating to hair length) was decided and community attitudes have changed considerably since then.

Section 21 of the Act provides that everyone has the right to be secure against unreasonable search or seizure whether of the person, property, or correspondence or otherwise. This section could be relevant to school rules relating to drugs, alcohol and cigarettes and to consequential issues such as the search of pupils and their property and the confiscation of items of property. It may also be relevant to the question of detention, particularly where the detention is imposed after school hours when it could be argued that the school no longer has any authority over the pupil.

Section 22 of the New Zealand Bill of Rights Act provides that everyone has the right not to be arbitrarily arrested or detained. In her article "R v Goodwin: The meaning of arrest, unlawful arrests and arbitrary detention",[14] Janet November discusses unlawful detention and section 22 of the New Zealand Bill of Rights Act 1990. She refers to school detentions[15] and says:

> The basic concept common to all deprivations of liberty is 'detention'. This can be divided into two subsets: first 'detention under any enactment', and secondly 'detention not under any enactment'.
>
> Under the second heading would be detentions by parents (of children in their rooms), by teachers (of children being punished) and also arbitrary detentions.

Her view, expressed in diagrammatic form in her article, is that there may be protection under the New Zealand Bill of Rights Act for pupils in this situation if 'arbitrarily detained' and that it would be possible to sue for false imprisonment. In my view it is at least arguable that the doctrine of *in loco parentis* (which I will discuss later in this paper) as it applies to teachers may provide a defence against such an action.

It would seem, therefore, that for the relationship of school discipline and the New Zealand Bill of Rights Act it is a case of "watch this space".

The second point to note about rules and the rule making process is that the form the rules take, and their content, could be important if they are likely to be the subject of legal

challenge. School boards of trustees have the power, under section 72 of the Education Act 1989, to make bylaws. Section 72 provides as follows:

> **72. Bylaws** - Subject to any enactment, the general law of New Zealand, and the school's charter, a school's Board may make for the school any bylaws the Board thinks necessary or desirable for the control and management of the school.

There is no procedure set down in the Education Act 1989 for the making of these bylaws, as there is, for example, for councils in the Local Government Act 1974.[16] and there are no penalties provided for breach of a bylaw. Are all rules made by a school board of trustees (disciplinary or otherwise) automatically bylaws? Speight J in the *Edwards* case seemed to think so. In that case he was dealing with a rule about hair length made by the board of governors of a secondary school acting under the authority of section 61 of the Education Act 1964, which contained a similar bylaw-making power and he said:

> Both parties in their submissions equated the rule with a bylaw and the Court proposes to deal with the matter on that basis.

If all rules made by boards of trustees are to be bylaws, what implications does this have when a rule is challenged?

Bylaws are a form of subordinate legislation and in New Zealand, the Bylaws Act 1910 will apply. Section 8(2) of that Act provides that a bylaw shall be invalid so far as its provisions are repugnant to the laws of New Zealand, or unreasonable, or ultra vires of the local authority by which it is made. The definition of "local authority" in section 2 of that Act would include a board of trustees. Other grounds for attacking the validity of a bylaw include unreasonableness, uncertainty (where the bylaw fails to indicate adequately what it is prohibiting), error of jurisdictional fact and invalid sub-delegation.[18] With respect to rules relating to order and discipline it would appear that the reasonableness or otherwise of the particular rule will be an issue.

In *Rich v Christchurch Girls High School Board of Governors*[19] a school rule requiring attendance at assembly was challenged on the grounds that it was ultra vires. In considering this point McCarthy J also referred to reasonableness. He said:[20]

> I am prepared to assume without necessarily deciding that when issuing rules or orders relating to attendance at assembly or at classes, the board is required, like many subordinate legislatures, to act reasonably and that the validity of its rules can be subjected to the test of reasonableness.

In *Edwards*, Speight J in discussing whether a law governing the appearance of pupils was within the class of delegated legislation authorised by section 61 (of the Education Act 1964) said:

> ... but it certainly appears to us that a reasonable governing of appearance and dress fall properly within the ambit of matters authorised to be so controlled.[21]

As well as the general law relating to subordinate legislation, the board of trustees' power to make bylaws is given, in section 72, subject to any enactment. This raises again the issue of the effect of the Bill of Rights on a board's power to make bylaws and the effect the provisions of the Bill of Rights might have on a court when considering the

reasonableness of a disciplinary bylaw. Section 72 also provides that a board of trustees bylaw-making power is also subject to the school's charter. I wonder how many schools, in making rules relating to good order and discipline, have considered the provisions of the school's charter?

The National Education Guidelines[22] which have been published as core elements of the charter of every school specify a code of conduct for every board of trustees. As part of that code of conduct trustees shall:

> ensure that all students are provided with an education which respects their dignity, rights and individuality, and which challenges them to achieve personal standards of excellence and to reach their full potential.

As with the Bill of Rights Act provisions relating to freedom of expression, in practice there can be a basic tension between respecting dignity, rights and individuality and maintaining good order and discipline in a school environment. This tension has not yet been tested in court but reported instances of strip searching for drugs and suspension because of hair colour suggest that we might not have to wait too long for judicial answers to some of the questions raised. An indication of the way a Judge today might approach school discipline issues is given by McGechan J In *M and R v Syms and the Palmerston North Boys High School.*[23]

He said:

> No one should underrate a school child's capacity to perceive and feel personal injustice. The Court must be conscious not only of a public interest in orderly education, but also of a need to protect the individual child, and that child's confidence it can receive justice from authority.

The third point to note when considering a school's disciplinary rules, and a teacher's authority to enforce rules and to impose penalties is the doctrine of *in loco parentis.* As you know, this is a Latin expression meaning "*in the place of the parent*". It refers to the position a person can be placed in, either by arrangement with the parent of a child or by some rule of law whereby that person is regarded as the lawful parent of the child with regard to the office and duty of the parent to make provision for the child. Under this doctrine the teacher derives his or her authority by delegation from the parent so that the disciplinary authority of the school is an extension of the disciplinary rights of parents or guardians over their own children.

Blackstone said of a father's authority:

> He may also delegate part of the parental authority during his life to the tutor or school master who is then *in loco parentis* and has such a portion of the power of the parents committed to his charge (such as that of restraint and correction) as may be necessary to answer the purposes for which he is employed.[24]

In *Bennett v Bennett* it was asserted that "... nothing is better established than this, that as regards a child, a person not the father of the child may put himself in the position of one *in loco parentis* to the child, and so incur the obligation to make a provision for child.[25]

The existence of this doctrine implies that there are some inherent powers of discipline

available to boards, principals and teachers which do not derive from the statutory provisions relating to control, management and day-to-day administration of the school. What then is the nature of these inherent powers?

The doctrine of *in loco parentis* has been recognised by the New Zealand Supreme Court in *Hansen v Cole.*[26] This was a case involving corporal punishment where a school master assaulted and beat a pupil (who misconducted himself), by caning him on the hand several times causing injury to the thumb. One of the issues before the court was the origin of the school master's inherent authority to correct. Prendergast CJ discussed the doctrine of *in loco parentis* but made his ruling on the basis that the authority for a school master to administer corporal punishment arose out of the necessities of the case, the relationship of school master and pupil, and derived from the Education Act 1877 rather than from any supposed delegation of the parents' authority. This appears to be the only New Zealand case which discusses the doctrine. It has, however been considered in several Australian cases.

In *Introvigne v Commonwealth of Australia and Others*[27] the Full Court of the Federal Court stated:

> It is now established as the law of Australia that a government school teacher, in performing his duties, is exercising authority derived by him from the Crown in respect of obligations assumed by the Crown

The Federal Court in Introvigne followed the approach of the High Court of Australia in *Ramsey v Larsen.*[28]

Both the High Court on appeal in *Ramsey v Larsen* and the Full Court in *Introvigne* approved the reasoning of Ferguson J in his judgment in *Ramsey v Larsen*[29] in the Supreme Court of New South Wales.

He said as follows:

> Pupils of the prescribed school age attending public schools have, during school hours, been compulsorily 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 - an obligation which is to be measured by that care which a careful father would take of his own children. It does not seem to me to be right to say, as was said in *Hole v Williams* (1910) 10 SR (NSW) 638, that a teacher in maintaining discipline and imparting instruction, is exercising an authority delegated to him by the parents of a pupil and unless there is evidence of an express or implied delegation I would not think that compulsion provided that evidence. However that may be, I prefer the view that a public school teacher in the exercise of his functions as such is exercising an authority delegated to him by the Crown in respect of obligations assumed by the Crown.

These cases would indicate that the doctrine of *in loco parentis* has lost much of its relevance to the teacher/pupil relationship and cannot be relied on to justify disciplinary action. However, in my view it does still provide some residual implied authority to

teachers where the teacher/pupil relationship exists but where it is not so clear that the school's authority extends. I accept that under a statutory regime of compulsory attendance at school[30] the notion of the continuing assent of the parent is outdated. However, there are conceivably situations where the doctrine of *in loco parentis* might be the source of authority. What is the position, for example, in the pre-school area. There is no equivalent of section 75[31] for kindergartens and early childhood centres. What is the source of a teacher's authority in a boarding hostel situation, on a sports trip during the school holidays, during an overnight camping trip? These situations all contain an element of parental assent and are outside the compulsory attendance requirements of the statute.

An interesting argument is put forward by Heather Crook in "In Loco Parentis: Time for a Reappraisal?"[32] She suggests that a better analysis would be to regard the teacher's power as an instance of a general common law power given to those in positions of control over others. She suggests this would have the advantage of producing an explanation of the power common to **all** teachers (my emphasis), including those working in the independent sector and in nursery education, who fall outside the auspices of the Act. Moreover, she says, a general power of this sort has been recognised in such diverse cases as a bus driver over his passengers (*R v Trynchy*)[33] and a ship's captain over his crew (*Hook v Cunnard SS).*[34]

This argument would certainly be consistent with the duty of care which teachers have towards their pupils as a corollary to the teacher's position of authority (however derived). It is also consistent with the provisions of section 151 of the Crimes Act 1961 which imposes a duty on everyone who has charge of any other person unable, by reason of detention, age etc to withdraw himself from such charge, and unable to provide himself with the necessaries of life, to supply that person with the necessaries of life. This duty applies whether such charge is undertaken by way of contract (as you could argue it is for the early childhood sector) or imposed by law (as you could argue in the compulsory schooling sector).

In the context of unreasonable search and seizure the doctrine of *in loco parentis* has been applied by courts in the United States and searches of students at school have been upheld because the Court has considered that the school acted with the delegated authority of a parent.[35]

It would seem then that the doctrine of *in loco parentis,* initially designed to justify the infliction of punishment, has not survived into the 1990's in its original form, particularly in the compulsory schooling sector. However, the doctrine cannot be entirely dismissed and could still be relevant in the pre-school, private school and out-of-school activity areas.

Suspension and Expulsion

The only legislative sanction for pupil misbehaviour and, many would say, the ultimate sanction a school can apply, is suspension and/or expulsion. Sections 13 to 17 of the Education Act 1989 set out the grounds on which a pupil may be suspended or expelled from school and the procedural steps required. These sections contain statutory discretions

to be exercised by principals and boards of trustees in accordance with established legal principles.

Section 13(1) provides that a principal may suspend any student for a specified period (not exceeding three days) as for an unspecified period if, in the principal's opinion -

(a) The student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school; or

(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.

There is a statutory requirement for guidance and counselling in subsection (2) of this section and for notice of the suspension to the board, the parents and the Secretary of Education in section 14 of the Act. Section 14 also requires that the principal give a full written report to the board about the suspension as soon as is reasonably practicable.

Under sections 16 and 17 of the Act the board of trustees has powers to lift or extend the suspension of a student under 16 who has been suspended by the principal for an unspecified period or reinstate or expel the student in the case of a student over 16. Again there are statutory requirements for notice to parents and parents have a right to be heard on the matter prior to the board making a decision.[36]

In 1992, 5,082 suspensions and 120 expulsions were notified to the Secretary of Education. Each case involved the exercise of a statutory power of decision by a principal or board of trustees. In a submission to the Ministry of Education Working Group on suspension and expulsion in 1991 the Parent Advocacy Council[37] (which no longer exists) reported that it dealt with 66 cases during a five month period involving individual parents, or in some cases, groups of parents concerned either about particular suspensions or the pattern of suspensions at a given school. The Council recorded that of those enquiries which related to particular suspensions 67% raised issues relating to the procedures used by the school. I think it is worthwhile referring to some of these as illustrations of what procedural difficulties schools can face in this complex area.

The Parent Advocacy Council noted that the procedural issues brought to the Council's attention by parents were issues such as:

- informal or 'kiwi' suspensions where students are told to go home and not come back "until you've ... changed your attitude ... cut your hair ... got a uniform" etc. Often parents are not contacted directly and some students were reported to be out of school for considerable periods.

- 'partial suspension' where the student is allowed to attend school but not to attend classes and has to (in one case) sit outside the principal's office all day.

- pressure on parents by the school to withdraw the student - most often expressed as "If you don't agree to withdraw her I will suspend her and that will be on her record forever."

- questionable methods of investigation such as lengthy questioning and isolation of students without support or notification of parents.
- belated or post-dated suspensions sometimes occurring after parental challenge of an informal suspension.
- double jeopardy where students suspended for three days and entitled to then return to school are suspended again for an unspecified period for the same 'offence'.
- incorrect or inadequate information to parents about the suspension. No advice to parents of board meeting.
- no board meeting held to consider a suspension for an unspecified period, or board meeting not held within the required time limit.

Fertile ground for litigation some might think - but this has not been the case. Most schools treat suspension with the seriousness which it deserves and follow the statutory procedures carefully. If a mistake is made many act to put matters right. Since 1 October 1989 only one case involving suspension and expulsion has been argued in the courts. In all other cases where disputes have arisen over the application of the statutory procedures the dispute has been resolved at a local level or not pursued by the parents to litigation.

The leading case is *M and R v Syms and the Board of Trustees of Palmerston North Boys' High School.*[38] In this case applications for review (under the Judicature Amendment Act 1972) were brought on behalf of two boys against the decisions of the principal of Palmerston North Boys' High School effecting the suspension of both boys for an unspecified period and by the board effecting the subsequent expulsion of one of the boys and the suspension with extended effect of the other. Briefly, the background is as follows. The school had a set of school rules published in a handbook. Supplementary to this a circular was issued to all third form entrant parents regarding, amongst other things, the possession and use of alcohol and drugs on school grounds or when boys are under school discipline or involved in school functions in any form. The circular made it clear that offences against school rules relating to alcohol would result in immediate suspension and a recommendation to the board of trustees for the removal of offenders from the school. The two boys were on a school trip to the Secondary Schools Ski Competition and were involved in an incident (with boys from another school team) where a small quantity of beer was consumed. The incident was discovered by a teacher and reported to the principal who, after making enquiries and meeting with the boys and their parents, suspended them in accordance with school policy as set down in the circular.

The school's board of trustees met subsequently to consider the matter and resolved that one boy be expelled and that the suspension of the other be extended. The parents of both boys were present at the board meeting and written submissions from them were considered by the board as well as references as to both boys' good character. The grounds for the decisions made by the principal and the subsequent decisions by the board of trustees were those set out in section 13(1) of the Education Act 1989 - that the breach of

school rules amounts to gross misconduct which is a harmful and dangerous example to other pupils.

In discussing gross misconduct and the statutory powers of boards under the Education Act 1989 McGechan J said:

> "School boards and principals have wide powers under s75 and 76 in relation to the management and administration of schools. Power to suspend and expel, however, is controlled specifically by s13(1), with its mandatory requirement for "gross misconduct". I am satisfied the legislature did not envisage statutory controls as open to an outflanking by the device of school rules which direct that trivial infractions or perhaps even all infractions shall constitute "gross misconduct"; and/or enable suspension or expulsion. Parliament would not have intended that a school by mere passage of a rule that some minor matter amounts to gross misconduct could empower itself to expel for a triviality. A matter either is "gross misconduct", as envisaged by the statute, or it is not. Idiosyncratic school rules or practices do not control suspension or expulsion. However, school rules and practices do a relevance; and it may be considerable in some cases. The existence of a school rule as to the conduct in question may well demonstrate the importance of the matter involved, and its significance to the proper functioning of the school, matters which bear on the questions at issue. Moreover, an infraction (and particularly knowing infraction) of an express school rule can carry overtones of challenge to authority which aggravate the seriousness of that which occurred. Rules do not predetermine. Rules are, however, circumstances to be taken into account, along with all other circumstances in reaching an ultimate conclusion whether gross misconduct is or is not "gross" misconduct.[39]

McGechan J found on the facts of the case that the principal, in forming an opinion about whether gross misconduct had occurred, erred in law in that he did not assess the conduct concerned against all the circumstances of the case. He found that it was not permissible for the principal to ignore such factors as, for example, quantity consumed, intoxication or otherwise, ownership (of the alcohol) and pre-meditation or impulse.

> Instead of asking himself the correct conceptual questions, and putting the conduct concerned into full context before reaching answers, he applied a fixed rule and reached an inevitable conclusion.[40]

In the circumstances of this particular case he found that the principal applied a remorseless approach to alcohol offending and that no consideration at all was given to any factors (such as amount consumed, previous good conduct) other than the fact of voluntary consumption. McGechan J also found that the principal had a discretion under section 13(1) ("may suspend") and that that discretion is not to be fettered by self-imposed rules permitting no exceptions.

He said:

> Parliament does not compel a principal who has formed an opinion [that '] gross conduct and harmful or dangerous example[‘] exist to suspend for an unspecified period in all cases.
>
> The principal 'may' act, without requirement that a principal 'shall' so act. The permissive word "may" is a deliberate safeguard. There may be cases where the severe consequences for a child of suspension for an unspecified period, and

> removal or potential removal, would be disproportionate ... There might well be need for flexibility to cater for children with special individual problems, whether psychological or material.[41]

He went on to say:

> Where Parliament confers a discretion on a school principal, it expects the principal to give actual and appropriate consideration to its exercise, on a case by case basis, and in that function to show mercy where appropriate.[42]

With respect to the exercise of a further discretion by the board of trustees to expel one boy and extend the suspension of the other McGechan J found that the board did not address in accordance with law whether the boys' consumption of alcohol, in all the circumstances of the particular case, amounted to 'gross misconduct' and that the board applied a remorseless rule without regard to all the circumstances. He also found that the board did not address its statutory discretions under sections 16 and 17 of the Education Act 1989 in accordance with the law.

He took the same approach to the board's discretion as he had applied to the question of the principal's discretion and found that the board was required to exercise a genuine statutory discretion whether to lift the suspension (unconditionally or subject to conditions) or to extend it, in the case of one boy or to expel in the case of the other. In the circumstances of this case McGechan found that the board of trustees regarded the consumption of alcohol per se as gross misconduct without all circumstances being brought into consideration in any real way.

It is important to note that the decision in this case is based upon the particular approach taken by the principal and board of trustees in these circumstances. It does not mean that a pupil can never be suspended from school for the consumption of alcohol, or for the breach of any similar school rule. McGechan J took some care in his judgment to make this clear and he emphasised that it was open to the principal and the board of trustees to validly reach the same conclusions to suspend, and expel by following the correct procedural processes.

He said:

> This is not to say a procedurally correct approach, with the right questions asked and context fully allowed for, necessarily must have produced a different opinion. The conclusion of "gross misconduct" in fact reached was of a range open on the material available, and conceivably might have been reached even by process along impeccable lines. That, quite simply, is an unknown.[43]

McGechan J also took the unusual step of adding a postscript to his judgment to make absolutely clear the import of his decision for principals and school boards. I believe this postscript should be kept by every principal and by every practitioner who advises schools or parents in this area of the law alongside the relevant sections of the Education Act 1989 so that it can be referred to easily whenever a discretion is exercised or scrutinised.

In effect McGechan J was talking about fairness. He said in summary:

(i) that "gross" misconduct involves misconduct striking and reprehensible to

a high degree which warrants removal of the student from the school despite damage which would result to the student. Whether conduct attains that level will depend on all the circumstances of a particular case.

(ii) that schools may have a general policy towards alcohol and drugs, but cases of alcohol and drug use must not be resolved automatically in accordance with such policy. Principals and Boards instead must carefully consider all the circumstances of each individual case before deciding whether or not individual alcohol related conduct amounts to gross misconduct. It may be troublesome, but it must be done.

(iii) that even where gross misconduct and harmful or dangerous example have been found to exist, principals must not suspend automatically. Principals must pause and consider whether, in all the circumstances of the particular case, suspension for an unspecified period is warranted as a matter of discretion. Boards must consider whether, in all the circumstances of the particular case, uplifting the suspension (conditionally or otherwise) or extended suspension or expulsion is warranted as a matter of discretion. At each of the latter discretionary stages, special circumstances and considerations of humanity and mercy may be brought into account.

(iv) that these statutory approaches are designed for the protection of children. They are not to be sacrificed to administrative or disciplinary efficiency, or some supposed need for absolute certainty. Results must not be fixed: they must instead be fair.

Finally, it is worth noting that, while not required to decide the point for the purposes of the case, McGechan J in *M and R*[44] was of the view that under section 13(1) the principal determines subjectively what is "gross misconduct" and a "harmful or dangerous example".

This is consistent with the approach taken in *Rich v Christchurch Girls' High School*[45] and with the finding of the Court of Appeal in *Edwards v Onehunga High School Board.*[46]

In the *Edwards* case, when considering section 130(1) of the Education Act 1964 (the predecessor to section 13(1) of the Education Act 1989) Speight J said:

> The words of section 130(1) are "any child who, from gross misconduct or incorrigible disobedience, *may be considered* an injurious or dangerous example". We think this latter phrasing makes it plain that the power of suspension is placed in the hands of the principal and it is for him to consider whether the disobedience was a dangerous example to other pupils and if he has decided that it is, a Court will not interfere unless it appears that the principal could not reasonably have reached that view.[47]

It appears then that the Court will not interfere with the principal's opinion as to gross misconduct and harmful or dangerous example as long as it is within the limits of reason and procedurally correct.

In closing, I can do no better than to repeat the words of McGechan J in *M and R* [48] "Discipline never is an easy field".

1 *Administering for Excellence, Effective Administration in Education, Report of the Taskforce to Review Education Administration*, April 1988.
2 Ibid, page xi.
3 *Tomorrow's Schools,* The Reform of Education Administration in New Zealand, August 1988, Lange, the Rt Hon David.
4 Section 76(2)(a) and (b), Education Act 1989.
5 [1974] 2 NZLR p.238 at p.243.
6 [1974] 1 NZLR p.1 at p.6.
7 Supra note 5.
8 Supra note 6.
9 Education Act 1989.
10 Unreported CP 302 and 303/90, High Court, Wellington, 5 December 1990.
11 Ibid at pages 3 and 4.
12 Schools and Searching for Drugs - A report by the Auckland District Law Society Public Issues Committee, 18 July 1991, at p.10.
13 Education Amendment Act 1990, No 60; section 28.
14 [1993] NZLJ 54.
15 Ibid at page 58.
16 Local Government Act 1974, section 681 - Procedure for making bylaws.
17 Supra note 5 at page 241.
18 Judicial Review, A New Zealand Perspective, G D S Taylor, Butterworths 1991 at pages 216 to 218.
19 Supra - note 6.
20 Ibid at page 6.
21 Supra note 3 at page 243.
22 New Zealand Gazette, 11 January 1990, No 1, page 6.
23 Supra note 10, at page 55.
24 (Stevens (ed)), Blackstone's Commentaries 9th edn, Vol II, p296.
25 *Bennett v Bennett* (1879) 10 Ch 474 per Jessell MR at 477.
26 (1890) 9 NZLR 272.
27 [1981] 32 ALR 251 at 261.
28 (1964) 111 CLR 16.
29 *Ramsey v Larsen* (1963) 80 WN (NSW) 1627 at 1634-5.
30 Section 20, Education Act 1989.
31 Education Act 1989.
32 November [1989] Fam. Law 447.
33 (1970) 73 WWR 165.
34 [1953] 1 A11 ER 102.
35 See "Student Rights under the Charter", Saskatchewan Law Review, Vol 49, page 63.
36 Sections 16(2) and 17(2), Education Act 1989.
37 Established by section 49, Education Act 1989 and disestablished by section 2, Education Amendment Act (No 2) 1991.
38 Supra - note 10.
39 Ibid at page 28.
40 Ibid at page 36.
41 Ibid at page 40.
42 Ibid at page 42.
43 Ibid at page 37.
44 Supra - note 10.
45 Supra - note 6.
46 Supra - note 5.
47 Ibid at page 245.
48 Supra - note 10 at page 53.