Some limitations of *in loco parentis*

Alan Hall and Margaret Manins

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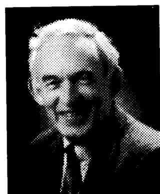

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The phrase *in loco parentis* has a familiar ring for most New Zealand primary and secondary school teachers. Many understand it to be a legal description of an important aspect of the expected professional relationship between them and their pupils, but its basis and implications are unclear. For example, in the 1980s, corporal punishment in schools was made illegal. At that time, some teachers suggested that the change meant that they no longer stood *in loco parentis* towards their pupils. This was because a change in the law meant that teachers were no longer permitted to punish their students physically, although the children's parents were still legally permitted to do so. A few years later, however, the first edition of the NZEI Code of Practice (NZEI, 1993) used the term, implying that *in loco parentis* continued to apply to teachers. Despite that, in a later edition (NZEI, 1997), the term ceased to be used. Recently, a local secondary school principal publicly justified the provision to senior students of advice and access to contraceptives via his school's health clinic. He adopted this position, regardless of the points of view of the students' parents, believing that he stood *in loco parentis* to the students. Occasional use of the term by the press also suggests that there is some public expectation that teachers fulfil such a role. For example, in 1996, when a public inquiry was conducted into a public accusation that a teacher in a Hamilton primary school had abused children (Lunn, 1997), the *Waikato Times* headed its leader "Loco parentis not an easy task" (Waikato Times, 1996). Such evidence suggests that the status of *in loco parentis* is far from clear.

In this paper we will examine the concept of *in loco parentis*, consider its legal origins and its relevance to contemporary schooling, particularly in regard to the professional responsibilities of teachers.

In loco parentis as a Legal Principle

In loco parentis is a common law doctrine. The word 'doctrine' has a number of meanings, but in this context it denotes a tenet or principle. To say that it is a 'common law' doctrine means that the tenet or principle is derived from the 'common' or case law. In effect, a common law doctrine is a legal principle based on past legal decisions rather than a specific law passed by parliament (Mulholland, 1995). Courts appear to turn to such principles for guidance in the absence of more explicit legal injunctions (Harrison, 1996: 68).

The principle is derived from English law where the *Oxford Dictionary of Law* (1997) notes that *in loco parentis* means "in place of a parent" and observes that the term is "used loosely to describe anyone looking after children on behalf of the parents, e.g. foster parents or relatives" (p.234). More explicitly, Jowitt's Dictionary of English Law (Jowitt, 1977) says that:

> *A person is said to be* ***in loco parentis*** *towards an infant when he assumes towards the infant the moral obligation of making such a provision for him as his father would in duty be bound to make. The assumption of the character may be, and generally is, implied from the acts of the person putting himself* ***in loco parentis****, as where he pays for the maintenance and education of the infant or establishes him in life. The fact that the father of the child is living does not*

*prevent another person from putting himself **in loco parentis**, but if the child resides with the father and is maintained by him it affords an inference, although not a conclusive one, against the assumption of the character by another person. (p.950)*

The English legal precedents upon which the principle is based are from the nineteenth century and the gendered nature of this definition reflects the predominantly patriarchal social order of that time, a shortcoming that has been corrected in the more recent *Butterworths NZ Law Dictionary* (Spiller, 2001), although in essence the later definition remains more-or-less the same.

While not commonly invoked, account has been taken of the principle of *in loco parentis* in New Zealand in recent years. Two examples are a Family Court judgement regarding an application for consent to the marriage of a minor, where the Court made its own inquiry and acted *in loco parentis*[1], and a Complaints Review Tribunal judgement against a racehorse trainer who had sexually harassed and engaged in non-consensual sexual intercourse with a young female apprentice jockey while he was considered to be *in loco parentis* towards her[2].

In education, the doctrine was originally the basis for the authority of teachers to discipline their pupils. Thus, Harrison (1996) notes, that the doctrine originally

... postulated a derivation of disciplinary authority on the part of a school teacher from the "common law" disciplinary powers of the student's parent or parents. Either explicitly or by implication, it was said, the parent had delegated his or her authority in relation to discipline to the student's teacher, while under their care or control. (p.68)

There are two features of the principle, as explained by Harrison, that should be noted. The first is that the delegated powers are not unlimited. Writers on the topic, such as Breakwell (1993: 104) and Crook (1989) cite the legal authority of *Blackstone's Commentaries* on 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. (p.478)*

This suggests that the powers delegated to the teacher are limited to those necessary for the teacher to fulfil his or her teaching functions. Indeed, Crook (1989: 447) is explicit on this point and interprets Blackstone as meaning that the teachers' rights are no greater than those rights the parent has *chosen* to delegate.

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Secondly, while the principle of *in loco parentis* conferred powers upon teachers, especially the power to punish their students while under their control, it also imposed upon them a duty to take reasonable care for the safety and well-being of those students. As in most other instances, the conferring of power was accompanied by the imposition of obligations. Thus in an Australian case, Judge Ferguson concluded that:

". . . the Crown must be regarded as having taken over in respect of pupils the obligation to take reasonable care for their [the pupils'] safety – an obligation which is to be measured by that care which a careful father would take of his own children." (Hole v Williams [1910] *10 SR (NSW) 638, cited in Walsh, 1999: 22).*

These features of the principle have been recognised by teacher organizations. For example, the *Teachers' Legal and Service Handbook* of the New Zealand Educational Institute (Ashbridge, 1959: 264-265)[3], notes that:

*"The parent does not impliedly hand over all his rights and duties, but only those that are necessary for the welfare of the child and in carrying out those delegated duties, the teacher must not be negligent. A schoolmaster (*sic*) is bound to take such care of his boys as a careful father would take of his boys" (pp.264-265).*

This handbook makes it clear that failure to provide the "reasonable care" required of *in loco parentis*, could be the basis for a legal charge of negligence and possibly a claim for damages. In this country, as Walsh (1999) observes, the case law in education tends to focus on the issue of corporal punishment, which has now been abolished for 10 years.

Contemporary Legal Relevance

There are three reasons why the concept of *in loco parentis* appears problematic as a legal principle in education in present-day New Zealand. Its relevance in a system of compulsory education is questionable, as is its appropriateness in a contemporary social context where students have rights separate from those of their parents. There is also evidence that the functions of *in loco parentis* have been largely superseded by other legislation.

(a) In a System of Compulsory Education

The relevance of *in loco parentis* in a contemporary system of compulsory education is questionable. Crook (1989) notes that the legal principle of *in loco parentis* preceded the advent of compulsory education, pointing

out that the parental delegation of authority to teachers may be traced back at least as far as the early Roman Empire, when a father would attend to the education of his sons, frequently employing servants for the purpose (Bowen, 1975). The same practice occurred in 18th and 19th century England when parental authority (usually paternal) determined whether or not a child would be educated, and the necessary authority was delegated to the teacher who might be a tutor in the home or a school teacher (Boyd & King, 1972). It is not hard to relate Blackstone's commentary on *in loco parentis*, cited earlier, to this kind of situation.

However, both Crook (1989) and Harrison (1996) point out that the relationship between parents and teachers was radically changed by the introduction of compulsory education via legislation such as the English Elementary Education Act 1870 and the New Zealand Education Act 1877. The legal requirement for all children to be educated meant that most parents had to enrol their children at schools because only a small proportion were able to either home-school them acceptably or employ a private tutor for the purpose. As a result, the powers of teachers in schools ceased to be delegated by parents. This made the legal relevance of *in loco parentis* questionable because, as Crook (1989) notes, under the terms of the English Education Act 1944, the obligations of local education authorities (LEAs) to provide a system capable of educating all children in their area was to the Minister of Education (representing the Crown), rather than directly to the parents of those children. Thus, schools became primarily answerable to the government via LEAs, and as Crook observes, a parent suing for damages would sue for breach of a duty to the Crown rather than for breach of a duty owed primarily to themselves.

Similarly, in New Zealand, the Education Act 1877 established a national system of education within which the Education Boards later fulfilled some of the functions of the English LEAs. As a result, the authority of schools and teachers was derived from the Crown rather than directly from parents. The 1990 changes to the administration of education placed each school under the governance of its own board of trustees which became directly answerable to the Crown via the Ministry of Education. However, that did not change the legal basis of teacher authority.

Thus, while *in loco parentis* may have had legal relevance prior to the establishment of compulsory education, the imposition by the Crown of a legal requirement for all children to be educated changed the relationship between parents and teachers. No longer do parents have the discretion to decide whether or not they will delegate their authority to their children's teachers; nor do they have the right to independently determine the degree of authority available to those teachers.

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(b) In the Current Social Context of Education

The current social context of education also makes the relevance of *in loco parentis* questionable. A significant feature of the very phrase is its paternalistic nature. Traditionally, it was the basis of an agreement between parent and teacher about the educational arrangements for a child, with no suggestion that the child should have any say in those arrangements which, in Victorian times, were legally regarded as stemming from "the natural jurisdiction of the father over his child until the age of twenty-one". To ignore it "would really be to set aside the whole course and order of nature and ... disturb the very foundations of family life" (*R v Agar Ellis [1883]*, cited in Crook, 1989). Such a view appeared to tacitly assume that parents would automatically act as the guardians of their children's rights. However, from a contemporary point of view, as Crook (1989) observes, this 1883 view effectively denied children any rights because it treated them as objects, rather than legal subjects with the independent right to legally hold another to a duty.

In recent years, there have been moves to define and assert the rights of minors, and an increasing interest in what is referred to as 'youth justice' (Youth Law Project, 1996) with clear implications for the rights of students in schools (Rishworth, 1996). Such developments challenge the appropriateness of what Crook (1989) described as the *bilateral* nature of arrangements based upon *in loco parentis* which give the student no right of involvement. This shortcoming led Crook to suggest that a *trilateral* model (involving parents, student and teacher) was needed for account to be taken of the rights of students. This view is based on the idea that students ought to have rights of self-determination, which might conceivably conflict with the wishes of their parents, especially as students approach majority. Thus, in 1986, the British House of Lords recognised the 'autonomy interest' of a minor when it upheld a doctor's discretion to give contraceptive advice to a girl under sixteen without parental consent, provided she had sufficient understanding and intelligence to fully comprehend that which was in issue. As Crook (1989) observes, this decision has implications far beyond the practice of medicine because it implies that majority, 'rather than being suddenly and completely acquired at eighteen years of age will be acquired gradually, depending on the child's ability to comprehend the ramifications of the particular issue under consideration' (p.449). In short, if students who have not reached the age of majority are to have the rights of self-determination

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to the extent that they have sufficient understanding and intelligence to fully comprehend that which is at issue, then the bilateral nature of agreements based on *in loco parentis* alone are demonstrably unjust.

(c) In the Light of Other Legislation.

It may be argued that the legal functions of *in loco parentis* have now been largely usurped by more recent and more explicit legislation. In 1996, Harrison observed that there did not appear to be any modern legal cases in New Zealand education where the principle had been invoked (Harrison, 1996). That is not surprising. One obvious reason is that corporal punishment, which has been the focus of New Zealand case law on *in loco parentis* (Walsh, 1999) was legally abolished in New Zealand schools in 1990. Jefferson (1994) notes that the original provision in the Crimes Act 1961[5], giving teachers the authority to use force by way of correction stemmed from this principle.

> *Every parent or person in the place of a parent, and every schoolmaster, is justified in using force by way of correction towards any child or pupil under his care, if the force used is reasonable in the circumstances. (Crimes Act, 1961, 59[1]).*

However, Section 139A of the 1990 Amendment to the Education Act 1989 effectively banned the use of corporal punishment in registered schools and early childhood centres. The legislation made clear that from July 1990 no person employed by a board of trustees of a school, or the managers of a private school, or the management of an early childhood centre:

> *. . . shall use force, by way of correction or punishment, towards any student or child enrolled at or attending the school, institution or centre, unless that person is a guardian of the student or child. (Education Act 1989 as amended by s28(1) Education Amendment Act 1990 [1990 No 60]).*

We should note that even if parents agree that teachers should use corporal punishment to correct the behaviour of their children, from 1990 the law has forbidden it, regardless of the fact that it remains legal for parents and others in the place of parents to use reasonable physical force as a corrective.

Another reason for believing the principle to be legally superseded is that the 1990 *Tomorrow's Schools* reform of educational administration in New Zealand made the boards *bodies corporate* which . . .

> *May sue and be sued, and otherwise do and suffer everything bodies corporate may do and suffer. (Education Act 1989, Section 117, Sixth Schedule [1])*

This change was significant for teachers because it meant that the local boards of trustees, rather than more remote government agencies (such as the by-then defunct education boards or Department of Education) became accountable for the ways in which students were treated. Thus, every school was required to develop its own policies and procedures which had to meet the specific requirements of such legislation as the Health, Safety and Employment Act 1992, the New Zealand Bill of Rights 1990, the Privacy Act 1993 and the Human Rights Act 1993. As bodies corporate, boards of trustees now run the risk of being sued if they do

not comply with the legal requirements.

At the same time, boards of trustees have increasingly found it necessary to legally safeguard themselves against arbitrary decisions on such matters as suspensions and expulsions by ensuring that the rights of students to natural justice and other procedural principles are maintained. The significance of these changes for the status of *in loco parentis* is that a number of acts of parliament spell out the obligations of boards of trustees towards their students as well as their employees. Thus, not only is the legal basis of teacher authority enshrined in other legislation, but increasingly the obligation for schools to exercise 'reasonable care' of their students is spelled out explicitly and is no longer reliant on the benign authority of teachers acting *in loco parentis.*

In this light, it is hardly surprising that recent commentators concluded that the *in loco parentis* doctrine is now largely replaced by statutory authority, such as the Education Act, which gives schools the right to control students. (Walsh, 1999; Walsh & Bartley, 1999). We would add that other legislation, which binds school trustees as the employers of teachers and the providers of education services, also safeguards the interests and wellbeing of students in schools.

This leads us to the conclusion that in the 21st century, *in loco parentis* has significant shortcomings as a legal principle because it takes no account of the rights of students to reasonable self-determination in their own education. We are also of the view that generally it is no longer the source of authority for schools and their teachers in a system of compulsory education. Nor has it been for some time. In fact, the source of authority for schools and teachers is now largely derived from legislation such as the same Education Act that requires parents to have their children educated between ages 6 and 16 years. Moreover, schools are legally bound to meet the requirements of other legislation that specifies where they must attend to the safety and well-being of their students. Nevertheless, Jefferson's conclusion that from a legal point of view '*in loco parentis* may be usefully consigned to the wastepaper bin' (Jefferson, 1994) is questionable. The common law doctrine still appears to have relevance to areas of non-compulsory education, notably the pre-school sector, private schools and extra-curricular activities.

Conclusions

To agree with Walsh (1999: 23) "that in loco parentis has passed its used-by date" is not to suggest either that teachers, as staff members of their schools have less authority than they had in the past, or that they are no longer required to be attentive to the well-being of their pupils and take reasonable care of them. Rather it means that the source of their authority lies in other, more explicit legislation, and that the obligations of schools and teachers is spelled out in a variety of acts of parliament and may be tested using legal principles such as natural justice and the law of negligence.

What then do these conclusions suggest about the examples of apparent popular confusion about *in loco parentis* by teachers and the wider public that were cited at the beginning of this paper? Firstly, under circumstances where parents are legally required to surrender their children to the care of relative strangers in schools when those children are at a vulnerable age (Soder, 1990: 73), it is hardly surprising that the phrase *in loco parentis* is sometimes latched onto by parents and members of the public to describe the duty of care they expect of teachers. However, when the phrase is used in this way, its use is metaphoric, rather than legal. This also appears to be the basis of its use in the *Waikato Times* leader cited earlier (Waikato Times, 1996).

Secondly, the change to the Education Act 1990, forbidding teachers to use corporal punishment, and the 1990 education reforms which established a system of self-managing boards of trustees, appear to have spurred legal re-consideration of the relevance of *in loco parentis* to teaching. That re-consideration led to somewhat belated recognition that generally, *in loco parentis* was not the source of teacher authority.

Thirdly, in the light of our discussion, the suggestion that a secondary school principal might provide senior students with advice and access to contraceptives via his school's health clinic on the grounds that the principal stood *in loco parentis* to those students appears to be without legal foundation. That is not to say that his action was wrong and might not be justified on other grounds. However, the doctrine of *in loco parentis* does not appear to be the source of such authority.

Regardless of the fact that the doctrine of *in loco parentis* may have only limited legal relevance to teaching in schools, it is our view that it still has value as an ethical metaphor for the roles of professional teachers. There is no doubt that schools and teachers are obliged to fulfil some of the caring roles of parents for their pupils and *in loco parentis* as a metaphor appears to express that relationship rather well[8]. For teachers to regard themselves as being metaphorically *in loco parentis* still requires them to distinguish between teacher and parent roles. The relationship between this metaphoric use of the phrase by teachers and the ethic of professional care is a matter to be explored in a future paper.

If teachers use the term as a metaphor, it is important for them to distinguish clearly between its use as a metaphor and its use as a common law doctrine. As a common law doctrine applicable to teachers, it is now largely superseded by other legislation and therefore is in the main an anachronism.

Notes

1 Buckland v Buckland, Family Court, New Plymouth, 24 November, 1988. File FPN043/302/88

2. Proceedings Commissioner v Laursen, Complaints Review Tribunal, 27 May 1996. File CRT10/96.
3. This statement was also repeated in the 7th and latest edition of the *Teachers' Legal Handbook,* published in 1965.
4. The cases cited were *Jones v London County Council*, concerning a permanent injury to a child suffered in a compulsory rough game and *Williams v Eady*, in which a teacher left a dangerous substance (phosphorus) where it was accessible to a student who played with it and was burned and injured (Ashbridge, 1959: 266-267). In each case, the teacher was judged to have been negligent.
5. The provision of the Crimes Act 1961 may be traced back to the Criminal Code Act 1893 which the Youth Law Review (2000) records "gave statutory recognition to the long-established English common law principle that parents and schoolteachers could use reasonable chastisement to correct the behavior of children under their authority" (p.7).
6. The case of *M v Board of Trustees of Palmerston North Boys' High School* (cited Walsh and Bartley, 1999, 40-42) illustrates how the principle, may apply in the context of a school boarding establishment. A boarder was caught on a security camera stealing a wallet in a school boarding establishment. He was interviewed by the Rector and dismissed from the boarding establishment, although he was permitted to continue to attend the school as a day pupil. The parents brought a legal action to have him reinstated as a boarded because the Rector had interviewed him without the parents present, which was a requirement of the school's policy for dealing with theft by students. The court ruled that the boarding establishment was separate from the school and that the boarding establishment was obliged to comply with the terms of the separate boarding contract, which it had done, and was not obliged to follow the school's policy regarding theft by students. The Rector was considered entitled to act *in loco parentis* in his role as head of the boarding establishment, without the parents present. Because the student was still able to attend the school, the Education Act was not infringed.
7. For example, in the 1950s the South Auckland Education Board regulated corporal punishment via its by-laws which delegated the power to punish to "the Headteacher, or by an assistant in charge of the class with the Headteacher's approval" with the proviso that the Headteacher did not have the power to order any assistant to inflict punishment. (Education Board of South Auckland, 1955: 22). The by-laws stated that corporal punishment "shall be reserved for deliberate breaches of discipline and wilful faults" (p.22) and made it clear that it should not be inflicted for such shortcomings as trivial breaches of discipline, failure or inability to learn, or neglect to prepare home lessons. The accepted form of punishment was to be with a leather strap to the hands; other forms were expressly forbidden; and girls were not to be subjected to corporal punishment unless under exceptional circumstances, and then only at the hands of a woman teacher (p.22).
8. Shaw (1995) speaks of teachers as being emotionally *in loco parentis*.

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