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The Curious Anatomy of Professional Status

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Medicine and law no longer accurately represent a complete definition of professional status. Today the term has come to refer to a worker more than an autonomous, skilled individual providing services to clients. Ambiguities regarding what constitutes a profession have created an opening for other groups to claim this status. Using teachers as an example, this paper explores the contemporary profession. It is contended that maintaining the service user's trust has become an integral part of professional status. There are expectations as to standards of service, especially where advice is given. And yet, employing the service user's perspective also reveals limitations particularly how the law's technical analysis of tort liability may dash these expectations. Profession may give rise to obligations in favour of employers of professionals but the term is not necessarily as effective when service-users seek to enforce expectations.

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I. Introduction

As a precatory word, profession is a term of undetermined depth. It has been used to denote a higher standard of work ('She is professional.'). Striking workers are said to lack professionalism. Most often it is used as an adjective, a professional athlete for example. This article focuses on the noun as it is used to define a cadre of worker who has a university degree and a professional designation. Although the noun suggests clear parameters of identity, a profession cannot be absolutely defined because it is socially constructed.¹ An exploration of the theoretical properties of 'profession' reveals the contemporary term diverging from its classical² origins. Within this opening the present

* I am grateful to Andrew Huxley, Colm McGrath, Tonia Novitz and Emmanuel Voyiakis for their comments.

¹ G. Troman, 'The Rise of the New Professionals?: The Restructuring of Primary Teachers' Work and Professionalism' (1996) 17 *British Journal of Sociology of Education* 437-487 [Troman], 476.

² The term 'classical' will be used in reference to the work of lawyers and doctors which forms the basis of discussion on professions. H. L. Wilensky in 'The Professionalization of Everyone?' (1964) 70 *The American Journal of Sociology* 137-158 [Wilensky], 138, uses the term 'traditional' for the following reason: 'Any occupation wishing to exercise professional authority must find a technical basis for it, assert an exclusive jurisdiction, link both skill and jurisdiction to standards of training, and convince the public that its services are uniquely trustworthy. While this traditional model of professionalism, based mainly on the 'free' professions of medicine and law, misses some aspects of the mixed forms of control now emerging among salaried professionals, it still captures a distinction important for the organization of work and for public

study inserts itself. The boundaries of the term have been relaxed in a manner that teachers (as one example) may claim membership in this esteemed collective. The argument put forward here is that teachers (those who teach in government-funded elementary and secondary schools) remain outside of professional status as defined by law and medicine because of what they lack as a collective. For this reason, teachers are an instructive group in revealing the nuanced complexity of the term profession. Engagement of this topic is undertaken utilising the tools of sociology and law (in particular employment and tort). Profession is discussed here as a term of assurance regarding standards for service provision.

The sociology of the term ‘profession’ is canvassed in section two. Although the hallmarks of the classic profession have become out-dated, law and medicine remain quintessential examples. Some of the markers in this expanse between the work of professionals and that of teachers include knowledge and autonomy. Conversely, a point of consistency amongst teaching, medicine and law is the trust of those who use the services. The section ends with a discussion of teachers’ employment contracts which impose obligations based on teachers’ classification as professionals. This discussion will not advocate for teachers as members of the professions nor is the paper intended to chart the rise of the professions. The aim of this section is to outline the obligatory nature of the term: when a worker is classified as a professional, expectations of her work are raised by her employers as well as service-users.

To the chagrin of many, profession does not ensure that expectations are obligations. Section three explores how service users’ expectations of professional service may not be met in tort law. In contrast to the aspirational nature of the term (notably within the employment context), tort law reveals how those who provide professional advice (broadly construed) may not be held to the same level of expectation contained in the sociological and employment discussion. The term profession serves a useful role for businesses seeking clients and employers looking to extend non-delineated obligations, but it is not a term of force for service-users seeking to enforce professional level services when expectations are not met.

II. Understanding Professional Status

This section explores the differing elements of professional status using the example of teachers. We may ask: of what are teachers professionals? Respondents to this query would be hard-pressed to find easy similarities to other professions. Teachers are simultaneously social workers, managers, school personnel and community members. While not an exhaustive list, each of these roles represents one of the different expectations of teachers. The range of these demands poses significant difficulties for the straightforward classification of teachers as professionals.

policy.’ This term has also been employed by others such as T. J. Johnson, *Professions and Power* (London: Macmillan, 1972) [Johnson].

i) The Classical Idea of a Profession

What is today the classical concept of a profession has been formed through the retroactive identification of characteristics in the medical and legal disciplines.³ This attribute definition of a profession has a long history; an instructive point for the study of professions since it has shaped contemporary views.⁴ Four criteria have consistently appeared in the literature:⁵

- professionals demonstrate a notable level of expertise earned through university training;
- this expertise is utilised in the performance of an important public function (discretion to exercise knowledge);
- professionals work with a distinguishable amount of autonomy compared to other occupations; and
- those who form the professional group exert some degree of control over the education of candidates and their entry into membership.⁶

Not surprisingly there has been lengthy discussion of these characteristics.⁷

³ This is not to ignore that law (at least solicitors) and medicine were not viewed as professions earlier in history, but the contemporary notion of profession is informed by the Victorian era and the dominance of law and medicine as professions at that time.

⁴ As Carr-Saunders and Wilson noted, for example, in their reference to Addison's identification of the 'three professions of divinity, law, and physic' in the early 1700s: A.M. Carr-Saunders and P.A. Wilson, *The Professions* (Oxford, Clarendon Press, 1933) [Carr-Saunders and Wilson], 200, 294. Though at that time, teachers were included under the heading of the Church (Carr-Saunders and Wilson, 295). Still, it is hard to tell whether teachers would have been viewed as professionals had they not had such linkage with divinity: M. Bottery, 'The Challenge to Professionals from the New Public Management: Implications for the Teaching Profession' (1996) 22 *Oxford Review of Education* 179-197[Bottery], 180.

⁵ D. Mangan, 'The Challenge of Identifying Teachers as Professionals' in R. Flynn (ed.) *Educational Leadership Today and Tomorrow: The Law as Friend or Foe* (Toronto: Canadian Association for the Practical Study of Law in Education, 2010) 275.

⁶ N. N. Foote, 'The Professionalization of Labor in Detroit' (1953) 58 *The American Journal of Sociology* 371-380 [Foote], 372; J. Covert, 'Educational Malpractice and the Future of Teaching' (1988/89) 1 *Education and Law Journal* 183-197 [Covert], 186; J. Nixon, J. Martin, P. McKeown and S. Ranson, 'Towards a Learning Profession: changing codes of occupational practice within the new management of education' (1997) *British Journal of Sociology of Education* 5-28. [Nixon et al.], 12; G. Shaw, 'German Lawyers and Globalisation: Changing Professional Identity' (2005) 58:2 *German Life and Letters* 211-225, 212; M. Bottery and N. Wright, 'Cooperating in Their Own Deprofessionalization? On the Need to Recognise the 'Public' and 'Ecological' Roles of the Teaching Profession' (1996) *British Journal of Educational Studies* 82-98, 85; D. Mangan, 'The Challenge of Identifying Teachers as Professionals' in R. Flynn (ed.) *Educational Leadership Today and Tomorrow: The Law as Friend or Foe* (Toronto: Canadian Association for the Practical Study of Law in Education, 2010) 275. Wilensky (138), describes two criteria, leaving out the public function which is notable because he finds the public perception of a profession to be integral to its status as such. D. Hellriegel, W. French and R. B. Peterson add 'colleague orientation' to these criteria: 'Collective Negotiations and Teachers: A Behavioral Analysis' (1970), 23 *Industrial and Labor Relations Review* 380-396 [Hellriegel et al.], 382.

⁷ Some would shorten to one key factor or enlarge the above list. For example, expertise has been identified as the chief characteristic of professions; what Angel calls this 'the prerequisite to professionalism' in her discussion of professionalism in American society: M. Angel, 'Professionals and Unionization' (1982) 66 *Minnesota Law Review* 383-457 [Angel], 392. Payment for services has also been said to be a key element of the classical profession. *Ibid*, 492.

The aforementioned characteristics no longer exhaust the description of professional identity. The contract for service was the means of engagement for the classical professional. It is more likely to find doctors and lawyers who now work as contracted or salaried employees under an organisational structure and who are far from independent. Client access to the classical professional had been for a purpose, for a particular matter, at a moment in time and not on a consistent, on-going basis as would be customary in an employment relationship. A conflict emerges, though more evident in the public sector, between expertise and autonomy where the tasks of trained, credentialed personnel are prescribed in a manner which betrays a subtle devaluation of discipline knowledge. The change signals a shift. In the early half of the twentieth century, workers who possessed a defined skill were thought to be better protected from dismissal.⁸ In the 21st century, there is unprecedented uncertainty when it comes to employment security and professionals are not immune.

ii) The Contemporary Profession

The modern analysis utilises these criteria but denies they are exhaustive; leaving the contemporary idea of a profession more difficult to pinpoint. A modern profession relies on the presence of ‘some essential quality or qualities which mark off the professions from other occupations and provide a basis for a distinct body of theory and variant forms of analysis.’⁹ This difference contributes to increased comfort with the professional on the part of the service-user. Here is a starting point: the word professional connotes a positive reputation which consists of an orientation towards clients’ interests.¹⁰

Tracing the idea of reputation, history suggests social position or social esteem¹¹ as an early form. Though somewhat anecdotal, the description by Geoffrey Chaucer in *The Physician’s Tale* of the doctor narrator of this story as well-dressed, a character conducive to his standing as a professional, evidences a general perspective of the status of physicians.¹² The professions were ‘suitable for a gentleman.’¹³ Social status became the means of gaining entry to the Royal College of Physicians.¹⁴ Although social status no longer plays the same role it once did,¹⁵ today’s new medical doctor leaves with a degree and an elevated social status. Remuneration reinforces modern-day doctors’ social position. While the contention

⁸ We can infer this from the comments of organisers for the United Autoworkers of America as they organised unions in the years preceding the Second World War. ‘Generally speaking the workers would look up to the skilled workers. . . . They were safe because they were highly skilled and [so] had less chance of the company booting them, but they had to be cautious’: J. Manley, ‘Communists and Auto workers; The struggle for Industrial Unionism in the Canadian Automobile Industry, 1925-36’ (1986) 17 *Labour/Le Travail* 105-166, 113.

⁹ Johnson, 10.

¹⁰ T.H. Marshall, ‘The Recent History of Professionalism in Relation to Social Structure and Social Policy’ (1939) 5 *The Canadian Journal of Economics and Political Science* 325-340 [Marshall], 327-328.

¹¹ Nixon *et al*, 12.

¹² Carr-Saunders and Wilson call attention to this passage, 66.

¹³ Marshall, 325.

¹⁴ *Ibid*, 71. Lawyers, too, were subject to a level of status, though arguably a different form, combined with education: the ‘candidate must first secure election as a student, for which purpose he must show that he is a ‘gentleman of respectability’ and has received a general education up to school certificate standard’: Carr-Saunders and Wilson, 7.

¹⁵ The costs of university education suggests some social limitations – despite the presence of bursaries and scholarships.

that professionals are not monetarily oriented may be debated, there is a duality regarding professionals' remuneration: 'The professions . . . are respectable because they do not strive for money, but they can only remain respectable if they succeed, in spite of this pecuniary indifference, in making quite a lot of money, enough for the needs of gentlemanly life.'¹⁶

Although professionals' reputations have been enhanced by the importance placed on them, there is a less savoury side to the endeavour. This point of view has been explored by the functional perspective. It is premised on 'those elements which are said to have functional relevance either for the society as a whole or for the professional-client relationship'¹⁷ rather than the individual professional.¹⁸ Government may be relied upon to control the individualism which may be viewed as counter-productive to society. Professions' self-interest precipitated an inefficient distribution of services.¹⁹ Only when the state took control of the management of these services to the public did distribution improve.²⁰ Professions may form a means of curbing individualism. Marshall summarised: just as commercialism is the opponent of professionalism in the private sector, so too is politics the foe of public sector professionals.²¹ These commentaries, together, suggest inherent challenges to maintaining confidence in the professions. The business of running a profession presents occasions when the values associated with this status may be subverted.

Neither attributes nor function exhaust the definition of profession. Part of the problem is that the above ideas focus on professionals' point of view. The public interest is presumed to be inherent in their conduct. Another important aspect is only casually alluded to, the perspective of the user of the service. Considering the interaction between the consumer and the service providing professional can help draw a better composition of 'profession'. If professions exist as an element of society, consideration of the public's viewpoint should be undertaken. The concept of trust can be used to uncover this particular perspective because trust is composed of different factors which are touched on in the analysis of what constitutes a profession. This includes an admission of the public's role as it 'monitor[s], assess[es] and evaluate[s] and thereby produce[s] the climate of opinion which provides the background for 'professional' standing.'²² Public trust is essential to a profession's work and no less so to teachers: 'It therefore becomes necessary that the teacher be the sort of person who can be trusted to act properly when no one is watching'.²³ Complaints by users of legal services in the United Kingdom suggest how the lofty status of a professional becomes tarnished when the public's interactions with members of the profession fall short of expectations.²⁴ Although reliance on a quicksand such as public opinion may be a

¹⁶ Marshall, 326.

¹⁷ Johnson, 33.

¹⁸ *Ibid.*

¹⁹ H. Laski, 'The Decline of the Professions' (1995) *Harper's Monthly Magazine*, Nov. 656-657 cited in Marshall, 331.

²⁰ Marshall, 333.

²¹ *Ibid.*, 335.

²² K. M. Macdonald, *The Sociology of the Professions* (London: Sage, 1999) [Macdonald], 7.

²³ *Ibid.*

²⁴ M. Seneviratne, 'Consumer complaints and the legal profession: making self-regulation work?' (2000) 7 *International Journal of the Legal Profession* 39-58.

tenuous premise for identity, it is public outcry which grounds discussions surrounding increased regulation of a profession – issues which are prompted by a lack of trust.

Confidence in the name ‘professional’ can be traced to representations made by professionals to the public. There is a relationship of dependence which implies the presence of a weaker and a stronger party. The person who holds herself out as a doctor professes that she is qualified to do so by the state; possessing the requisite knowledge to address whatever medical issues a patient may present. Ability is accepted upon the representation and this acceptance arises in two ways.

First, there is trust in the group and this stems from a positive tradition or reputation within that collective:

[The Professions] inherit, preserve and pass on a tradition . . . they engender modes of life, habits of thought and standards of judgement which render them centres of resistance to crude forces which threaten steady and peaceful evolution. . . . The family, the church and the universities, certain associations of intellectuals, and above all the great professions, stand like rocks against which the waves raised by these forces beat in vain.²⁵

This form of trust is volunteered by the client/user. Trust is held in the group represented by the term ‘doctor’, for example, because the group is expected to meet certain expectations such as ability to accurately diagnose a problem. And so, doctors are seen as having earned this trust in recognition of the work put into attaining the designation.

Second, the professional retains the client’s trust in her individually as apart from her professional colleagues. Pedigree alone is insufficient since the professional seeks to secure the client’s trust through interaction – not simply relying on her professional credentials but exhibiting them in a manner aimed, at least in part, at justifying the initial trust reposed in her. She must demonstrate not simply knowledge of the discipline but also an understanding of human interaction – ‘The best service can be given only when the practitioner knows his client intimately, his character, his foibles, his background, and his family circumstances.’²⁶

(iii) Professions and Teachers

Of the two types of trust noted above, teachers’ strength is found in the individual form.²⁷ Their ability to positively connect with students (and parents) forms a mechanism for trust. This trust is also a virtual job requirement because it is through detailed knowledge and understanding of individual students that teachers best perform their work. The recognised professions have not been required to exhibit the same depth of personal knowledge. The collective and individual layers of trust as applied to teachers are elaborated upon below.

The difficulty for teachers’ professional status lies in the collective element of trust. They have not established their pedigree as have professionals like lawyers and doctors. Teachers

²⁵ Carr-Saunders and Wilson, 497.

²⁶ Marshall, 328.

²⁷ For example, in 91% of respondents in a 2009 Ipsos MORI survey were satisfied with their child’s local school: Ipsos MORI, *Politics, Public Services and Society: Context for the General Election of 2010* (London: Ipsos MORI, 2010), 23.

have been charged with effecting change (as outlined in government reforms); however, they do not define the parameters of that change. Teachers ‘possess no specialised technique’²⁸ which forms the basis of expertise. Instead, they are called ‘semicredentialed’²⁹ or semi-professional because they ‘do not administer their own activities, do not evaluate their peers, and there is not much training required for practice.’³⁰ It may be further contended that teachers’ level of knowledge of their subject matter does not necessarily exceed that of a layperson.³¹

Trust alone is not a panacea for those striving for professional status. The legacy of the classic professions still colours contemporary perceptions of what the status means. The characteristics of a profession remain those of the classic professions which teachers cannot exhibit. Distinguishing factors between professions and teachers include the following.³² Professions have been known to mystify knowledge³³ – enough to exert exclusive jurisdiction³⁴ so that it may be only ‘potentially accessible to lay members of society’.³⁵ Educators, conversely, impart their knowledge to students and often provide their skills (such as reading strategies and other lessons) to parents so as to facilitate further practice outside of the classroom for students in developing their individual ability. The idea of a teaching strategy – ostensibly a bastion of teacher expertise – provides no end to this argument because many teachers develop their own. These techniques are neither universal nor accepted as standard professional strategies by a governing body (as may be found in the medical field).³⁶ Aside from the content of lessons, teachers’ expertise in many respects approximates a trial and error process. They use their judgement: ‘a judgment based on the tacit knowledge that comes from experience and from acknowledgement of a distinctive relationship between teacher and learner.’³⁷ There is no established compendium of strategies for educators in diagnosing student learning issues. If there is a difficulty for a student, the assigned teacher is charged with training that student’s mind. This requires a personal commitment by teachers which, interestingly, is also expected of them as it is outlined by statute.³⁸ Similar to other professions like law (though not to the same extent),

²⁸ Carr-Saunders and Wilson, 298.

²⁹ G. Filson, ‘Ontario Teachers’ Deprofessionalization and Proletarianization’ (1988) 32 *Comparative Education Review* 298-317 [Filson], 311.

³⁰ Benveniste, 274.

³¹ C. T. Kerchner and K. D. Caufmann, ‘Lurching toward Professionalism: The Saga of Teacher Unionism’ (1995) 96 *The Elementary School Journal* 107-122. [Kerchner and Caufmann], 108.

³² These factors are based on the comparison between teachers and doctors found in G. Fenstermacher, ‘Some more considerations on teaching as a profession’ in J. Goodlad, R. Soder & K. Sirotnik eds. *The Moral Dimensions of Teaching* (San Francisco: Jossey-Bass, 1990), 130 [Fenstermacher].

³³ Nixon et al., 81.

³⁴ Fenstermacher, 148, 149.

³⁵ Macdonald, 4. Wilensky suggests a subtle strategy to this mystification: ‘[s]ince tacit knowledge is relatively inaccessible, it is also less subject to direct criticism and quick change’: Wilensky, 149.

³⁶ Hoyle, 167.

³⁷ Kerchner and Caufmann, 110.

³⁸ For example, teachers in Ontario, Canada are subject to s.264 of the Ontario Education Act and Regulation 298 made under Ontario’s Education Act. Section 264 of the Act states, in part:

‘It is the duty of a teacher and a temporary teacher,
(a) to teach diligently and faithfully the classes or subjects assigned to the teacher by the principal;
(b) to encourage the pupils in the pursuit of learning;

teachers gain their knowledge through practice. Certainly this point is reinforced by the structure of teacher education where the practicum (or practice teaching) comprises the essential component of teacher training programs. The point remains: the practice of teaching is not afforded the same status as the practice of law. In comparison, professionals meet their clients within the parameters of a problem – something which has prompted them to attend at a professional’s office. While, as noted above, there is interaction (purposeful though it is), there remains an inherent aloofness perpetuated by a mystification of the knowledge possessed by the professional. Finally, students must be participants in the education process – they are not passive persons who pose questions seeking answers. For professionals, the effort tends to be one-way. The client provides information based upon which the professional decides on a course of action. Teachers are not put in a place of authority like lawyers and doctors, but are instead expected to include parents and students in problem-solving. Teachers, then, are more client-oriented than doctors or lawyers insofar as the relationships built with students are expected to be more intimate and discursive than those of the classic professions.

The ideal to which teachers are held – that is, what the public expects of them – also complicates the situation. These expectations are buoyed by people’s experience and failure to meet them hampers efforts to earn trust. Having attended school, each member of the public may presume a greater level of knowledge about how to run the system than one would in relation to the health portfolio. In attempting to address this solicited and unsolicited advice, education strives to fulfil all the wants of society because this is the public expectation. Then British Prime Minister James Callaghan’s initiation of a ‘great debate’ on education in 1976 made the direct connection: ‘I take it that no one claims exclusive rights in this field. Public interest is strong and legitimate and will be satisfied.’³⁹ Common among these expectations is that teachers must readily adapt to current public demands. The salient point for the present endeavour is teachers’ readiness to meet these expectations; preparedness which, in turn, develops trust in their individual ability.

Trust in teachers has been battered by years of public scrutiny⁴⁰ and so questions understandably surface regarding quality. Globalisation has added to the challenge because states are seeking to address the competition which increased global activity has prompted. Consider, for example, Labour’s 1997 classification of teaching: ‘Teaching is a profession – one of the most important professions for the future success and well-being of our country’.⁴¹ Education is viewed as a primary means by which this competition will be

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- (c) to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues;
 - (d) to assist in developing co-operation and co-ordination of effort among the members of the staff of the school;
 - (e) to maintain, under the direction of the principal, proper order and discipline in the teacher’s classroom and while on duty in the school and on the school ground ...’

³⁹ J. Callaghan, ‘Towards a national debate’ (16 October 1976) reprinted in *The Guardian* 15 October 2001 [Callaghan]; also quoted in J. Furlong, ‘New Labour and teacher education: the end of an era’ (2005) 31 *Oxford Review of Education* 119-134 [Furlong], 120.

⁴⁰ J. Evetts, ‘Trust and Professionalism: Challenges and Occupational Changes’ (2006) 54 *Current Sociology* 515-531 [Evetts], 516.

⁴¹ *Excellence in Schools*, 51.

addressed⁴² and seen this way it is the subject of intense speculation and criticism. Teachers are an externally defined cohort and they have always worked within a construct that invites public attention and scrutiny in a way which professions do not.⁴³

The history of teaching is also instructive in explaining why educators are not easily accepted among the professions. Teaching has always been a caring profession. As with other such professions, women populated its ranks and for some time almost exclusively. Women were placed into tight constructs which encumbered their position. As a result, lower wages for teachers were accepted. As a female-dominated occupation for a large part of the 20th century, teachers found themselves languishing behind those in other jobs on the level of pay and work conditions. The gender of the occupation can partly explain why historically teaching has not been as esteemed. Lord Plowden's report employs the stereotype of teaching:

Before the war the schools could count on most teachers giving 40 years of service. A school staff was a body of experienced professionals in which a newcomer could easily learn to find his feet. Today the proportions are often reversed. A small body of experienced teachers is surrounded by a rapidly changing group of young women who expect to marry soon after they leave college and in many cases to leave within a few years, at least for the time being, in order to start their own families. Some return to teaching; more should. When they return they are the richer because they are themselves mothers, the poorer because they have often not had long enough to reach professional competence before they gave up teaching. Some can teach full-time; some part-time. The schools have to accustom themselves to being staffed in a novel way at the same time as they are developing new methods of individual and group work which demand greater competence and cooperation from teachers.⁴⁴

Today, with larger numbers of men calling themselves teachers and movements in law towards greater equality in the workplace, teachers have become a better paid working group. Despite enhanced remuneration, teaching started out behind others and has not made up ground.

It may be suggested that an appropriate comparison is between teachers and nurses. This is apt but has limitations for the present exercise. Certainly there are ripe thematic similarities such as feminisation of both teaching and nursing as well as the struggle to be seen as professional. To engage the nursing comparator, however, would deviate from the aim of dissecting what is a profession. Teachers work in individual settings and are supervised for management purposes by head teachers. Nurses work according to doctors' instructions; a layer not present with teachers. In education, the teacher alone is responsible for children (the equivalent of patients in the comparison). Education contains specialists like the special education teacher, teacher-librarian, and subject-specific teachers in the secondary panel. Delegation, however, is not the purpose of these specialties. Teaching is distinct from medicine where a doctor may diagnose a patient and then delegate to a nurse the appropriate treatment – a separation of work which remains in force in medicine.

⁴² Marshall, 328. When it came to power, New Labour acted on this point as outlined in *Excellence in Schools* Cm3681.

⁴³ Ingersoll, 60.

⁴⁴ Lord Plowden, *Children and Their Primary Schools* Cm.1239 (London: HMSO, 1967).

The quicksand of public opinion problematizes the claim to professional status for those groups, like teachers, who do not have a long history of such standing. The point remains that teachers (and other groups seeking professional status) will always have to struggle for professional recognition because of the fickle nature of public demands.

iv) The tool of professional status

There are two tools in use here. First, teachers desire professional status because they believe it will enhance their position: the perceived autonomy it provides to them as a cohort; the potential for uplift in remuneration (though teachers in England do not see this, teachers in Ontario Canada may reach an approximate top rate of \$95,000 per year); and finally, though most intangible of all, respect as a cadre. Teachers have been cognizant of the overall uneasy fit between their members as a group and the professions.⁴⁵ The call to a firm professional standing continues and has come (for some time now) from within teacher organisations. To be regarded as professionals, teachers maintain they

must be responsible for the standards of our profession: for the preparation of our future colleagues, for the performance of our fellow teachers, for the provision of means of self-improvement, for the regard in which our profession is held by our students and by the public.⁴⁶

Despite their awareness, this cohort continue to struggle with gaining acceptance as a group standing side by side with doctors and lawyers.

The second tool is found in why government seeks to entrench teachers as professionals. Consider the directness of the following statement by Labour when it came to power in 1997: ‘We are committed to ensuring that teaching is seen as a valued and worthwhile career for our best young people; a profession that is recognised and valued by the wider community. We will play our part in raising the profile and esteem of the profession.’⁴⁷ The imperative to raise the status of teaching – to call it a profession – is clear here. What is the utility for governments in stepping up teachers into the professional ranks? In response, look at how the term profession is utilised to convert aspirations into obligations regarding work undertaken by the relevant cohort without necessarily entering into a legal delineation of obligations. The cohort, in desiring the professional status, voluntarily assumes the attendant obligations. The term binds the group to a standard of service delivery and conduct, a form of *imprimatur* of standards: trust in the group is intended to be stronger as a result of being called a profession. The title also offers assurance that the conduct of professionals will be consistent with the requirements of trustworthiness.

⁴⁵ Ingersoll, 237. One author has written: ‘If we do not move our field toward a profession of teaching, through increasing professionalization of teacher preparation, we will likely face increasing government regulation that imposes its own brand of uniformity on teaching practice.’: A. E. Wise, ‘Establishing Teaching as a Profession: The Essential Role of Professional Accreditation’ (2005) 56 *Journal of Teacher Education* 318-331 [Wise], 319.

⁴⁶ Ontario Teachers’ Federation, *Pattern for Professionalism: the report of the OTF Commission to the Board of Governors on the Ontario Teachers’ Federation* (Toronto: Ontario Teachers’ Federation, 1968), 11.

⁴⁷ *Excellence in Schools* Cmd3681, 46. Also consider the title of Chapter 5 in this document, ‘Teaching: High Status, High Standards’.

The utility of the nomenclature of profession is seen in the sometimes crude way in which the law speaks of obligations. Three 1980s decisions regarding teachers' work illustrate. The court in *Metropolitan Borough of Solihull v. NUT*⁴⁸ brought an end to a lunch time supervision dispute (that such an activity was not voluntary work) by relying on a view of teachers as professional employees: they were obliged to work for the benefit of the professional enterprise. In *Royle v. Trafford B.C.*,⁴⁹ the Council sought to reduce costs by lowering the numbers of teachers and correspondingly raising the number of students in each class. Following the National Association of Schoolmasters Union of Women Teachers' (NASUWT) call for industrial action, Royle refused to teach the five extra pupils assigned to him, but continued with his other duties (teaching the remainder of the class as well as taking on extracurricular activities). Trafford refused to pay him any salary for the six months of industrial action. The Court agreed with the Council's argument that Royle broke his contract; though there is little reasoning on the point. Since the Council accepted the teaching of 31 students, they could reduce Royle's pay by 5/36 of his salary for that period. In effect, Royle was told that he had to teach all students provided to him by the school as it was his obligation as a teacher. *Sim v. Rotherham B.C.*⁵⁰ looked at the issue of whether or not teachers were expected to supervise the classes of absent colleagues. Finding they were, Scott J. classed teachers' contracts as those of professionals: agreements which could not possibly set out the entirety of the duties between the parties because the work itself defied explicit enumeration. Together, these decisions read in work obligations based on teachers' status as professionals. They were being called upon to adhere to a certain standard of work; an assurance that they could be trusted to fulfil the duties given to them by their employers.

Tension between the perceived benefits and the associated challenges (for example expanded expectations) is evident in professional status. The teacher cases suggest that an employing entity is vested with the authority to identify expectations of its professional level workers. Within the employment paradigm, it is easily foreseeable that these expectations will be subject to continual refinement upwards but not necessarily resulting in increased remuneration. This duality is a fitting segue to the final section of this paper where service-users' expectations are considered within the tort law framework.

III. Professional as a precatory term in tort

The enforcement of professional obligations faces difficulty when we move from enforcing professional demands of employers to those of service-users. The above pages have outlined the aspirational elements of the term, but tort law offers a technical analysis of professional obligations, which does not necessarily fulfil service-users' expectations.

To this point, profession has been used as a term imbued with expectations of and imposing obligations regarding higher standards of work. In this section, the service-user's perspective is employed to test enforcement of these aspirations. When the matter comes to trial, the law offers a technical assessment as to when expectations may be enforced and in particular when a duty of care has been breached. Though valid, the law contrasts

⁴⁸ [1985] I.R.L.R. 211 [*Solihull*].

⁴⁹ [1984] I.R.L.R. 184 [*Royle*].

⁵⁰ [1986] I.R.L.R. 391 [*Sim*].

unfavourably with the perception of professionals' work and how, as illustrated above, the term is imbued with assurances. There is no general principle in tort law that will compensate for a professional's failure to meet a client's expectations. And yet, the dearth of instances enforcing these expectations undercuts the notion of professional services.

This piece is not an argument to suggest that all clients' expectations of professionals must be met. Nor is it the purpose to contend that tort law should provide a remedy simply for expectations. Codes of conduct enforced by a professional body may be said to provide the appropriate outlet for missed expectations. These extra-legal measures may provide some sort of acknowledgement of failed standards. There are two points in response. First, the potential for involvement by professional bodies (if they exist in the relevant area) should not necessarily preclude tort action, especially where the defendants have actively encouraged reliance. Second, there is a regulatory function which a successful tort action can uniquely provide. There may be greater force where a professional defendant is found liable and must compensate a former client than an extra-legal body levying an administrative penalty.

The contention here is that if a defendant has actively encouraged reliance upon his professional services (the use of his special skill or knowledge) then there is a basis for the claimant's expectations of service which, if unmet, may ground a successful claim. In a broader way, the aim here is to bring forward a more nuanced discussion of professional services and responsibility.

When we look at the liability of professionals, claimants often fail to meet the tests for establishing professional defendants' responsibility.⁵¹ Tort law recognises a different standard of care for professionals⁵² through the assessments found in the decisions of *Bolam v Friern Barnet Hospital*⁵³ and *Bolitho v Hackney AHA*.⁵⁴ The standard expected of a professional is different from that of the ordinary person. As made clear in *Bolam*, this standard recognises the higher degree of difficulty and skill in the work of professionals. Moreover, it is intended to provide room for differences of opinion within the cohort.⁵⁵ The 'gloss'⁵⁶ provided by *Bolitho* was that the standard of care did not apply where the body of opinion was not responsible or not reasonable. The predicament in which we find tort law is that this standard of care has become sufficiently elastic so as to protect defendants in some instances (though it has not become a defence). Much of the assessment of the standard of

⁵¹ There is importance to the term responsibility. Wigmore's separation of tort into three elements (damage, responsibility and defence) situated responsibility as a lynchpin between damage and liability: J. H. Wigmore, 'The Tripartite Division of Torts' (1894) 8 *Harvard Law Review* 200-210 [Wigmore]. He calls responsibility the secondary limitation. This phrasing is useful here because it is the limitation of liability for professionals which is questioned where professionals have actively encouraged reliance upon their skill.

⁵² It has long recognized that the standard of care 'varies directly with the degree of risk involved': *Glasgow Corp. v Muir* [1942] AC 448, 456.

⁵³ [1957] 1 WLR 582 [*Bolam*].

⁵⁴ [1997] UKHL 46 [*Bolitho*].

⁵⁵ Following *Bolam* (587), a doctor accused of negligence may satisfy the standard of care by demonstrating that she 'has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art'.

⁵⁶ As Mulheron has called it: R. Mulheron, 'Trumping Bolam: a critical legal analysis of Bolitho's "gloss"' (2010) *Cambridge Law Journal* 609-638 [Mulheron].

care analysis has been conducted by way of medical law;⁵⁷ perhaps a by-product of the topic of the leading decisions. As attested to by court decisions and academic commentary, this area remains a mystery to many because of the specialised knowledge required to parse out distinctions⁵⁸ as well as the common law's reluctance to enter into debates about responsible medical opinion.⁵⁹ Unfortunately, medicine has preoccupied thought to the detriment of greater insight into the tort standard applied to professionals.⁶⁰

The breach analysis has at times been improperly utilised resulting in a wide rule which is a disservice to the tort standard of professional liability. The Court of Appeal's decision in *Adams v Rhymney Valley DC*⁶¹ illustrates. Council flats were built with lockable key windows rather than a push-button release. The latter version posed difficulties where children were involved but they also were easier to operate in a fire. Sadly children died in a fire when they were trapped in their unit. By a 2:1 majority the Court of Appeal said the council had not breached the standard of care when opting for windows requiring a key to open them. According to Sir Christopher Staughton LJ, *Bolam* is merely 'an adaptation of common sense to the special case' of arcane skills.⁶² Lord Justice Morritt opined that *Bolam* does not depend on actual possession of the relevant qualification. The alleged liability arose, 'if at all, from the installation of the windows, not the thought processes that preceded it'.⁶³ The wide applicability⁶⁴ of this ruling remains troublesome when considering the standard of care for professionals. The experienced surgeon may act in a particular way out of habit or from intuition. If her choice results in harm to her patient, she is sued for causing the damage by that action. If her action satisfies the *Bolam* test she is not liable; if she does not, then she is liable however long and carefully she thought in advance about what to do. In his illuminating dissenting opinion, Sedley LJ offered a preferable analysis. The *Bolam* standard did not apply here because the defendant had not considered fire-hazards; no special knowledge had been employed (if one assumed that the council

⁵⁷ See for example, M. Brazier & J. Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8 *Medical Law Review* 85.

⁵⁸ Lord Browne-Wilkinson wrote in *Bolitho* (243) of the 'rare case' where 'it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.' Mulheron questions the rarity of such instances as she contended there are numerous unexpressed applications of *Bolitho*: Mulheron, 618.

⁵⁹ On the point, Lord Browne-Wilkinson wrote in *Bolitho* (243): 'it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported'. The finding of no liability in *Bolitho* stands out as a focus for debate on this topic. See Heywood who argues that acceptance of both intubation and the refusal to intubate as valid medical procedures fell short of the instruction provided by Lord Browne-Wilkinson: R. Heywood, 'The logic of *Bolitho*' (2006) 22 *Professional Negligence* 225-235.

⁶⁰ Keown argued *Bolitho* only starts the courts' work 'in reclaiming from the medical profession the power which they have unwisely delegated to it': J. Keown, 'Reining in the Bolam test' (1998) 57 *Cambridge Law Journal* 248-250, 250. The criticism may be more generally applied to professions and the standard of care analysis.

⁶¹ [2000] EWCA Civ 3035 [*Adams*].

⁶² *Adams*, [41].

⁶³ *Ibid*, [59].

⁶⁴ H. Evans, 'Negligence and process' (2013) 29 *Professional Negligence* 212-222, 213.

possessed such understanding). There must be an exercise of skill before *Bolam* applies.⁶⁵ Sedley LJ warned of serious public policy implications

if those who owed a duty of care requiring professional judgement for its discharge could act more or less at random, and then, if harm resulted, defend themselves by showing that - even though proper advice would almost certainly have obviated the harm - a minor school of expert opinion existed that would, if consulted, have sanctioned the course taken by them.⁶⁶

What the majority called liability for 'thought processes'⁶⁷ was actually nothing of the kind. The professional standard of care was utilised in *Adams* as a means by which the council escaped liability. The purpose of the standard of care analysis was to assess professional skill exercised, but that purpose was absent here.

In contrast to more recent cases, older decisions have enunciated more client-focused concerns; expressing what clients may have expected when engaging the services of those professing to be experts in their fields. Mister Justice Megarry wrote in *Duchess of Argyll v Beuselinck*.⁶⁸

If the client engages an expert, and doubtless expects to pay commensurate fees, is he not entitled to expect something more than the standard of the reasonably competent? I speak not just of those with expertise in family law, but also of those with long experience and great skill in its practice, as compared to those with a more ordinary calibre in the same field of law ... The essence of the contract of retainer conflicts with the *Bolam* approach. This point may one day require further consideration.

In *Sidaway v Board of Governors of the Bethlem Royal Hospital*,⁶⁹ Lord Scarman wrote of the standard 'expected to be shown by a doctor who had successfully completed the training to qualify as a doctor' where the claimant alleged the doctor failed to warn her of certain risks. He concluded that the *Bolam* standard did not apply in such an instance.⁷⁰ Even in sport there have been greater expectations when it comes to levels of play. In *Condon v Basi*⁷¹ the court suggested that a 'higher degree of care would be required of a player in a First Division football match than of a player in a Fourth Division football match.'⁷² Sadly, there has been reluctance to carry on with this line of thought. In *Wimpey Construction v Poole*,⁷³ an architect held himself out as having especially high skills, but the *Bolam* test (and not the expectations he created) applied. In *Shakoor v Eternal Health Co.*,⁷⁴ assessment of a traditional Chinese medical practitioner requires was to be by those practising the same 'art' alongside orthodox medicine. Here the court found the defendant was not in breach because he did not hold himself out as a practitioner of orthodox

⁶⁵ Lloyd LJ had previously identified a need for distinction when he wrote of the *Bolam* standard being inapplicable where no professional skill had been exercised: *Gold v Haringey HA* [1988] Q.B. 481, 490.

⁶⁶ *Ibid*, [18].

⁶⁷ *Adams*, [59] per Morritt LJ.

⁶⁸ [1972] 2 Lloyd's Rep. 172.

⁶⁹ [1985] AC 871, 876. Lord Scarman's was the dissenting opinion on this point, but found the claimant had still not made out her case.

⁷⁰ *Ibid*, 885.

⁷¹ [1985] 1 WLR 866.

⁷² *Ibid*, 868.

⁷³ [1984] 2 Lloyd's Rep. 499.

⁷⁴ [2000] 4 All ER 181.

medicine. The question remains why are the contractual and sociological parameters seemingly better enforced than the obligations raised in tort law.

The concern raised in this final section is one noted previously by English courts. The decision in *Bolitho* drew from the 1933 decision of the House of Lords in *Lloyd's Bank v Savory*,⁷⁵ a cheque fraud case, where the court said it would overrule a professional practice where the practice, 'on its very face, is inconsistent with precautions against a known risk' even if all bankers follow this practice.⁷⁶ *Bolitho*, guided by *Savory*, was the response to 'the regrettable tendency to automatically acquit of negligence any practitioner who can find colleagues to condone what he or she did or did not do.'⁷⁷ Distinct from instances of medical negligence, the argument here is not for professionals to be found liable for failing to take every precaution.⁷⁸ Instead, the focus is on those professionals who create a scenario of reliance by the service-user and fail to deliver as a result of an occurrence within the professionals' control; when the title 'professional' is utilised in a manner to solicit business and the level of skill is either not present or carelessly applied. The words of Sedley LJ are instructive: the *Bolam* test enables 'the court to determine whether a person professing and purporting to exercise a particular skill has exercised it with sufficient competence to escape a charge of negligence'.⁷⁹

*Cann v Willson*⁸⁰ (though from 1888) is one instance in which the courts have provided a more pointed discussion of standards of service by the professional cadre in the tort context. In this mortgage valuation case, the expectations as to standards of service emerged as an issue. Chitty J. cited rulings regarding the poor quality of services or products provided, identifying them as not fit for the purpose for which they were to be provided. He focused on untrue statements which were intended to induce the recipient to act in a certain way. If we look at the emphasis in the transaction it was on inducing the claimant into an arrangement. The accuracy of the information provided to meet this end was dubious. Chitty J emphasised the reasonableness of the basis for the information provided: he found there was no reasonable basis for the defendant's valuation of the property and that the advice given was reckless. The disconnect identified here between reckless or careless provision of professional service and the expectation of professional service informs the present discussion.

The analysis of professional liability at the breach stage is called into question here. Courts should (at least) consider the special role professionals have in providing services and how service-users rely (first) upon that name and (second) upon the assurances, if any, professional have made. The argument put forward here is modest because the reasonable argument service-users should be able to expect more than competence has not been overtly

⁷⁵ [1933] A.C. 201 [*Savory*].

⁷⁶ *Ibid*, 235.

⁷⁷ J. Keown, 'Easing the burdens on medical plaintiffs?' (1995) 54 *Cambridge Law Journal* 30-32, 31. The comments made about medical negligence can extend to other professionals.

⁷⁸ This was the basis for liability in the 1968 decision of *Hucks v Cole* [1993] 4 Med. L.R. 393.

⁷⁹ *Adams*, [16].

⁸⁰ (1888) 39 Ch. D. 39 [*Cann*].

pursued. It is hoped that the present measured offering will provide a point of departure for further nuanced investigation.⁸¹

IV. Conclusion

'Profession' embodies expectations and this has been discussed in reference to individual and collective trust. The classic professions of law and medicine fit within both versions of trust. Teachers, as a cohort, do not exhibit all of the characteristics of professionals found in the classic professions of law and medicine. Still, teachers excel on the individual level of trust which is an important element of the contemporary professional-client relationship. The strategic basis for governments recognising teachers as professionals lies in the fact that expectations of this workforce continually rise. The teacher workload cases of the 1980s demonstrated how identity as professionals expanded demands beyond those outlined in employment contracts.

Moving from the professional obligations of workers to their employing entities to the expectations of service-users of those professionals they have retained reveals a gap. There are unmet the expectations of many using professional services. Although the courts acknowledged the expectations of those using professional services, the more recent developments in the cases regarding breach of a standard of care leave much more to be discussed because the notion of professional standards is left to languish.

⁸¹ In some respects, the suggestion here is to utilise assumption of responsibility where professionals actively induce customers to rely upon their services. An example may be seen in the pure economic loss case of *Chaudhry v Prabhakar* [1988] 3 All ER 718 (CA) where it was found that a gratuitous agent who offered to purchase a second-hand car on behalf of another owed the buyer a duty of care to exercise the degree of care and skill which could reasonably be expected of him in all the circumstances, that degree of care and skill being measured objectively and not subjectively.