THE SILENCE IS DEAFENING

Access to education for deaf children[1]

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The recent Federal Court of Australia disability discrimination case of *Hurst and Devlin v Education Queensland* [2005] FCA 405 had the potential to set a systemic and definitive precedent for the rights of access to education in Australia for deaf children. Regrettably, however, the judgment of Justice Bruce Lander sounds but a cautionary peal to educational institutions on their obligation to educate hearing and non-hearing children alike. Some of the salient findings in the case appear to encroach into the family lives of deaf children and effectively punish a deaf child who has been fortunate enough to have had accessible communication from a young age and who managed to keep up with her hearing peers, in spite of the many barriers confronting her in an education system largely devoid of Australian Sign Language (Auslan).

The gist of the applicants' arguments was that the respondent (Education Queensland) had discriminated against them by teaching them in English without the assistance of an Auslan teacher or interpreter. Below is a summary of the case and its findings, and a discussion of its potential for practical repercussions in the education sector.

Divergent views on communication methods

The case featured myriad expert evidence, led by both the applicants and the respondent, about what is the best form of communication for deaf children and the best learning environment for them. While the judgment of Justice Lander does not seek to bridge this divide, its findings suggest that the prevailing philosophy has shifted in the last decade to a bilingual-bicultural approach that promotes Auslan as a first language.

Auslan is the natural language of the Deaf. It is symbolic of the Deaf community's identity, autonomy and self-determination. It is a visual-spatial language and was first introduced into Australia in the 1800s. It is recognised as a separate language, quite distinct from English, though sharing some lexical and grammatical aspects.

Signed English is a manual representation of spoken English. It is not recognised as a separate language and it is not a substitute for Auslan. It is used contemporaneously with English speech, lip reading and finger spelling. Unlike Signed English, Auslan cannot be used contemporaneously with English speech as it has its own incompatible grammar and syntax.

Until the 1970s in Australia, deaf children were instructed orally and it was acknowledged that they were disadvantaged by this oral education. In the early 1970s Signed English commenced in Australian schools and this method prevailed into the 1990s.

In 1994 the respondent adopted the Total Communication Policy (CS–11), which is fundamentally a teaching and communication philosophy. It did not include Auslan, but used signing and Signed English. It recognised that all deaf children should be assessed individually to determine what form(s) of communication would best suit their education needs.

In the 1990s debate flared, and has continued to simmer, amongst academics, educators, professionals and interest groups throughout Australia about the benefits and disadvantages of the two systems of teaching — total communication and Auslan communication.

In recent years there has been a movement to an educational communication program for deaf children that embraces Auslan. It is known as the Bilingual-Bicultural (BLBC) approach. Recognising Auslan and English as distinct languages, the BLBC approach provides a child with Auslan as a first language (to communicate with the Deaf community and other Auslan speakers) and English as a second language.

Professor Power, Emeritus Professor of Special Education at Griffith University, was one expert witness called by the respondent. He conceded that for decades there had been a divergence of opinion about the best method of communicating when educating deaf children, but that the recent trend in education circles is towards the BLBC approach in preference to Signed English, that is, that Auslan is a valuable tool for educational purposes.

Ben and Tiahna

Benjamin (Ben) Devlin was born profoundly deaf on 15 April 1993. He lives with four hearing siblings and two hearing parents, none of whom communicate using Auslan.

Ben attended a childcare centre and kindergarten run by the respondent from 1995 to 1997. The respondent provided Ben with an Advisory Visiting Teacher (AVT). In 1994 Mrs Devlin wanted Ben to be oral — to be able to speak English. She did not alter this wish until 1998 and then did not advise the respondent of her change of mind until 1999, first formally complaining to the

REFERENCES

1. All number references in this article refer to the numbered paragraphs of the Reasons for Judgment of Lander J in *Hurst and Devlin v Education Queensland* [2005] FCA 405 (15 April 2005).

Throughout this article, 'Deaf' has been used to refer to the Deaf community, that is, in relation to identity and culture, whereas the lower case 'deaf' is used to refer to the physical condition.

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headmaster about the school's method of instruction for Ben in 2001.

In 1997 Ben commenced at Noosaville Special Education Development Centre (SEDC) and in 1998 went to Noosaville Preschool and then on to Noosaville Primary School from 1999 (all run by the respondent). Ben has attended both mainstream and special education classes.

Tiahna Smith was born profoundly deaf on 24 February 1998. Her maternal grandparents are profoundly deaf and they communicate in Auslan. Her hearing mother is bilingual (Auslan-English) and her father's second language is Auslan.

Tiahna attended the respondent's Yeerongpilly Special Education Development Unit between 1999 and mid-2001 and then Noosaville SEDC until early 2002. After a year in a private school Tiahna attended the Sunshine Beach State Preschool and then the Coolum State School from January 2004. Tiahna attended both mainstream and special education classes. Tiahna's parents paid for her to attend private speech therapy lessons to try to ensure she did not fall behind.

Neither Ben nor Tiahna can hear the spoken word and their speech is affected. While Tiahna can talk and communicate effectively, Ben is not capable of being understood. Ben is a boy who has no language and no capacity to communicate, except by gesture.

In 1998 both Ben and Tiahna were tested to assess their non-verbal intelligence. The tests involved a language-free measure of abstract problem-solving skills, used to cognitively assess hearing impaired children. The results show that neither Ben nor Tiahna had failed to progress because of any intellectual defect — both being assessed as having average to above-average cognitive ability.

In 2002 Ben and Tiahna were tested by Ronald Morris, speech pathologist and audiologist. He tested their receptive and expressive language skills. He found that Ben presented with severely delayed speech and language skills, whereas Tiahna had good oral language skills. Significantly, he found both would benefit greatly from Auslan in the classroom.

The levels of competency in Signed English and Auslan amongst Ben and Tiahna's teachers were the subject of contention between the parties. Ultimately his Honour accepted that some of Ben's teachers and some of Tiahna's teachers were able to sign and use Signed English, but none had proficiency in Auslan.

After numerous fruitless requests in 2001 and 2002 for the respondent to acknowledge and ameliorate the children's difficulties in learning in a non-Auslan environment, on 30 May 2002 Ben's mother and Tiahna's mother lodged disability discrimination complaints on behalf of their children with the Human Rights and Equal Opportunity Commission (HREOC).

Put simply, the gist of both Ben and Tiahna's complaints was that because they are profoundly deaf, the only way in which they could be taught by the respondent, which would not amount to unlawful discrimination, was in Auslan. And, because neither has been taught in Auslan, they have been treated less favourably than their hearing peers to the detriment of their education.

In more detail, both applicants contended that the respondent had unlawfully discriminated against them by failing to provide them with Auslan instruction and, as a consequence, their education, numeracy and literacy levels had been diminished and would be retarded into the future, ultimately diminishing their chances of tertiary education and employment. They also contended that various teachers and teachers' aides had inferior or no skills in Signed English, the basis upon which the respondent's Total Communication Policy (CS–11) was meant to instruct hearing-impaired students.

The pith of the facts and law in dispute

There was no contention that both Tiahna and Ben have a 'disability', as defined in s 4 of the *Disability Discrimination Act 1992* ('DDA'). Nor was there any dispute that the respondent administers educational institutions in Queensland, the state in which both applicants resided and went to school.

Ben's claim of direct discrimination by the respondent

Ben alone claimed that he had been directly discriminated against by the respondent, alleging he was treated less favourably than his hearing peers by reason of his disability as his teachers could not communicate fluently with him in Signed English. This, he claimed, was in breach of s 5 of the *DDA*.

Essentially, there is a three-step inquiry in determining whether direct discrimination has occurred:

1. Was the applicant treated differently to a person without the applicant's disability (the latter being referred to as the comparator)?

2. If so, was the different treatment by reason of the applicant's disability?
3. If so, was the treatment less favourable?

His Honour focused on Ben's (and Tiahna's) allegation of indirect discrimination and found it unnecessary to make a finding as to Ben's claim of direct discrimination.

Ben and Tiahna's claims of indirect discrimination by the respondent

Both Tiahna and Ben claimed that they had each separately been indirectly discriminated against by reason of a requirement or condition which required them to receive their education in English and without the assistance of an Auslan teacher or interpreter. This, each claimed, was in breach of ss 6 and 22 of the *DDA*.

Essentially, there is a four-step inquiry in determining whether indirect discrimination has occurred:

1. Has the respondent (the alleged discriminator) required the applicant to comply with a requirement or condition?
2. If it has, can a substantially higher proportion of persons without the applicant's disability comply with the requirement or condition?
3. If they can, is the requirement or condition reasonable having regard to the circumstances of the case?
4. If it is not, is the requirement or condition one with which the applicant has actually not complied or not been able to comply?

The most contentious aspects of this inquiry in each of Ben and Tiahna's cases were:

- identifying the requirement or condition with some precision;
- whether or not the requirement or condition was reasonable in the circumstances; and
- whether or not the applicant could comply with the requirement or condition.

The onus is on the applicant to show these things.

The respondent denied that the education it offered either applicant was inferior to that offered to their hearing peers. It disagreed with the contention that Auslan is the only appropriate method of communication for teaching deaf children. It also denied the allegation that none of its employees or officers offered Auslan and that Auslan was never offered to the applicants. Further, it asserted that both applicants had not gained access to education material at the same rate as their hearing peers and therefore had fallen behind for other reasons that were unconnected with its Total Communication Policy (CS–11) and teaching program, including:

- (for Ben) his poor behaviour at school and his failure to do homework;
- (for Ben) the failure of his parents and family to contribute to his learning at home by not engaging in sufficient signing or Auslan communication;
- (for Tiahna) her irregular attendance at Noosaville SEDC and her failure to stay for entire classes when there, and
- (for Tiahna) detrimental interference by her mother in her schooling.

Mixed results for Ben and Tiahna

Ben was successful in his claim of indirect discrimination under ss 6 and 22 of the *DDA*, while Tiahna was not successful, as it was held she *could* comply with the requirement or condition that she be taught in English without the assistance of an Auslan teacher or an Auslan interpreter.

Justice Lander made the following salient findings on the facts presented in Ben's case:

- Ben failed to establish that it was not reasonable for the respondent not to have had a BLBC program in place prior to 30 May 2002 (the date on which his complaint was lodged with HREOC), but Ben did establish that it was *not reasonable* for the respondent to not provide him with an Auslan teacher or interpreter for the two years prior to 30 May 2002;
- Ben succeeded in establishing that it would have been of benefit to him to have been instructed in Auslan rather than English;
- 'the appropriate requirement or condition is to be taught in English without the assistance of an Auslan teacher or an Auslan interpreter' [at 818];
- *Ben has not been able to comply with the requirement or condition* that he be taught in English without the assistance of an Auslan teacher or an Auslan interpreter, and
- Ben therefore made out his case under ss 6 and 22 of the *DDA*.

Accordingly, Lander J then made the following orders:

- that the respondent did unlawfully discriminate against Ben;

Some of the findings and dicta of Justice Lander provide stark warnings to disability discrimination practitioners. His Honour was dismissive of witnesses and experts whom he felt were motivated by an agenda of their own.

- general damages be awarded in the sum of $20,000 for 'hurt, embarrassment and social dislocation' [at 846] and $4,000 interest on that sum, and;
- loss of future earning capacity in the sum of $40,000 (on the basis that Ben had lost two years of school which his Honour equated to the loss of two years work, there being insufficient evidence led by the applicant concerning loss of future earning capacity).

Justice Lander made the following salient findings on the facts presented in Tiahna's case:

- like Ben, Tiahna failed to establish that it was not reasonable for the respondent not to have had a BLBC program in place prior to 30 May 2002, but Tiahna did establish that it was *not reasonable* for the respondent to not provide her with an Auslan teacher or interpreter throughout the whole of her education with the respondent;
- like Ben, Tiahna succeeded in establishing that it would have been of benefit to her to have been instructed in Auslan rather than English and the same requirement or condition had been imposed on Tiahna as Ben [at 818];
- where Tiahna's case diverges from Ben's is in relation to her ability to comply with the requirement or condition — unlike Ben, *Tiahna has been able to comply with the requirement or condition* that she be taught in English without the assistance of an Auslan teacher or an Auslan interpreter;
- Tiahna's progress, relative to her peers, has been very good; she has excellent English skills, she is highly competent in Auslan, she has maintained parity with her hearing peers and she has developed linguistically and cognitively at an age-appropriate level;
- therefore Tiahna does not make out her case under ss 6 and 22 of the *DDA*, and
- even if his Honour were wrong on the above conclusion, Tiahna did not, on her evidence, establish that she had suffered any loss or damage.

A lesson in litigating disability discrimination cases

Some of the findings and dicta of Justice Lander provide stark warnings to disability discrimination practitioners.

His Honour was dismissive of witnesses and experts whom he felt were motivated by an agenda of their own. His Honour found several witnesses to be evasive, prone to exaggeration, defensive and largely unsatisfactory. Others he found to be acting as advocates for their cause and, in doing so, 'surrendered their academic detachment and objectivity' [at 148]. Accordingly, their evidence was afforded little or no weight.

His Honour was particularly scathing of the participation of Deaf Children Australia (DCA) in the proceedings. In his Honour's opinion, DCA took an active interest in the proceedings for the purpose of promoting its own views on how deaf education should be delivered — namely, on a BLBC basis, with Auslan as a first language. He warned:

> In my opinion, it is a misconception to think that legal proceedings of this kind are the appropriate vehicle to introduce changes into the education system and, in particular, into that part of the education system that impacts upon persons with disability [at 424].

For practitioners who see the enforcement of the *DDA* by the courts as a valuable means of effecting systemic change, this statement is quite disconcerting.

From a practical, rather than ideological, perspective the judgment reminds applicants' counsel that they must present sufficient and compelling evidence at the trial not only as to the elements of the unlawful discrimination but also as to damages, non-economic loss and any loss of future earnings. His Honour noted that it is 'the Court's duty to assess compensation' and that that 'assessment must be made on the admissible evidence before the Court' [at 843]. He warned that the 'time for Ben to call evidence, in relation to a claim for economic loss, or more particularly loss of earning capacity, was at the trial' [at 844].

It is also important that an applicant can adequately articulate the elements for which he or she has an onus to prove to the court in the evidence that he or she leads. Justice Lander was forced to distil and clarify 'the rather convoluted requirement or condition that was advanced' by both of the applicants [at 804].

Prudent pre-trial planning and an expansive and lateral approach to gathering evidence and drafting pleadings should reduce the practical risks highlighted by his Honour. Practitioners should also carefully review analogous Federal Court, Federal Magistrates Court and Administrative Decision Tribunal judgments to aid in this process. A coherent and formidable body of disability discrimination jurisprudence and precedent is today crystallising and should not be overlooked by practitioners.

The repercussions for deaf children's education

The more contentious points that were raised in evidence by the parties and commented upon by his Honour concern what is and should be the accepted method of teaching deaf children and who should decide this. It remains to be seen what (if any) practical implications his Honour's comments and findings on these points will have for the Australian education sector, deaf students and their families.

In his Honour's opinion some time between 1998 and 2000 the majority of academics and educators formed a consensus in Australia that 'total communication' was not the most appropriate teaching philosophy for deaf students and must give way to Auslan communication, at least for profoundly deaf children. He felt that fundamental changes to teaching programs and philosophies 'should be evolutionary, not revolutionary' [at 785]. The applicants and the DCA pointed to educators from the United States moving away from 'total communication' in the 1970s and 1980s and contended that the consensus was reached in Australia a number of years before 1998. Clearly, for Ben and Tiahna and their families, after years of futile agitation, the evolutionary process had become more of a devolutionary process, and one wonders what other resort they had left, but to storm the Bastille.

While his Honour held that not all deaf children must or should necessarily be educated in Auslan, he found that Auslan is best for deaf children who live in a home where it is the first language and who learn it themselves as a first language and then use it to learn a second language (like English). He also found that Auslan is best introduced in a bilingual-bicultural program in a schooling environment that has a critical mass of participating students, with commitment from parents and staff who are fluent in Auslan. Co-enrolment between deaf students and non-hearing impaired students is best practice — a philosophy of inclusion, not exclusion or seclusion, must be fostered. What is needed is a concerted and collaborative approach from a deaf student's school, teachers, peers and family.

His Honour made it quite clear that the 'views of parents must be respected' [at 770]. He also stressed that '[e]ach child with a hearing impairment should be individually assessed as to the best method of educating that child' [at 767].

While his Honour stopped well short of demanding that Auslan be offered in all schools where deaf children attend, he did find that Auslan will be of assistance to children who are severely or profoundly deaf even if delivered on a one-to-one basis. He noted that '[a]s the degree of deafness increases, the likelihood of the use of Auslan as a preferred method of communication also increases' [at 768].

Based on his Honour's findings and the sorts of disability discrimination complaints our centre, the New South Wales Disability Discrimination Legal Centre, sees in this area, it is submitted that schools would be prudent to offer at least *some* level of Auslan instruction. A sensible way to determine what level is adequate for the child and feasible for the school is by transparent consultation and communication between the school, the child, the child's parents or guardian, a disability services representative from the education department and a representative from the relevant regional, territory or state deaf society.

Open communication needs to occur from the outset and all parties must be given an opportunity to present their views. Each child should be individually and independently assessed to ensure that any proposed level of Auslan (or other) instruction is sufficient for them to receive an education. Those involved must be wary not to become embroiled in personality conflicts or to have unrealistic expectations. The goal must always be to ensure a deaf student is provided with the means to access and receive an education. If those involved lose sight of this, then it is the child who suffers most.

The repercussions of the decision for the Hursts themselves have been telling. They will return to court soon to decide whether they will be ordered to pay the legal costs of the respondent. They have sought legal advice about whether to appeal to the Full Federal Court and this is pending subject to the decision about costs. They have decided to move to Western Australia, a state whose public education system is willing to provide Tiahna with the Auslan support she needs.

Interestingly, Ben Devlin, despite his success in the case, is now enrolled and attending the Thomas Pattison School in Sydney, New South Wales. Thomas Pattison School provides a bilingual-bicultural education program for deaf children, CODAs (hearing children of Deaf adults), siblings of deaf children and community children who have facility in Auslan. The language

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