**EQUAL MEMBERS OF THE HUMAN FAMILY:**

**DISABLED PEOPLE’S RIGHT TO A FAIR LEGAL HEARING**

1. I have a secret double life, about which I am not ashamed to speak. I am a practising barrister from the England and Wales Bar, with a speciality in domestic and international discrimination law. I have lectured and written articles on these subjects for many years. But every Saturday morning, I leave my wig and gown at the door, cycle from my flat and take up the reins as a volunteer at Oxfam’s charity bookshop in Kentish Town, where I live in London.
2. I first started 11 years ago and the benefits are legion: I believe in the work that Oxfam does, it’s lovely to see my Kentish Town community talking intellectually to one another; but also it serves me well because I love second-hand books.
3. A couple of years ago I was unpacking a new box of donated books – gold dust for us at Oxfam – and my eyes were drawn to a copy of Paula Giddings’ 1985 book *When and Where I Enter: The Impact of Black Women on Race and Sex in America*. It was an early edition, and Giddings’s recollections about individual women as active participants in changing rascist practices, and their attitude to the sufferings of black women, was very moving. But I was struck most by the point that Giddings made in the first preface of the book: that in order for her to write as she did, as a historian at a well-known American university, it was necessary to try to be both objective and subjective, otherwise American black women’s story would never be told. In law, as in history, there is both the objective and the subjective story. Objectively, there are things that we all agree form part of the lawyer’s discourse and the judge’s opinions. Subjectively, there is a point where an individual tells their story and - almost more importantly than that - describes the deep impact that those events have had on them. It struck me that disabled people’s stories, subjective, were an important part of the stories that we tell, and the law that forms a part of the world in which we life. Disabled people need to have their stories heard if society is to justly take their needs and duties into account.

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1. On the day before the new Millennium I had a stroke and it changed my life. I was mixing a gin and tonic for my cousin, Jessica. I brought her drink over to her, settled down on a comfy chair and then reached out for my drink – but I didn’t. I then cried out “What the hell?!” - but I didn’t. I was paralysed down my right-hand side so completely that I couldn’t stand up or form a sentence. I couldn’t even swallow.
2. Many people, myself included, thought that such a severe stroke was the end of my life, and certainly thought I could never practise law again. The earliest days, and what happened to me are perhaps subjects for another essay, but by 2002 I was back at my chambers in Cloisters, London, practising law as a barrister with a new zeal. I believed in justice in the law courts for all discriminated people. It had been like the ripples that spread from a pebble dropped in water: first it was other people with my particular disability; then it was all disabled people; and then it was all discriminated people, no matter what the cause of the discrimination. I believed that I could make a difference for claimants in the courts and tribunals that existed in the UK to uphold their rights.
3. Turn forward the clock some 2 or 3 years and I was pursuing a case for a client in the Court of Appeal - for free - that was based on her gender. We won her case, albeit on a new point of law that stemmed from comments that the three Court of Appeal judges made about the powers of the Employment Appeal Tribunal. While listening to my argument, which the Judges rejected, I was stopped 33 times in mid-sentence by a Judge’s intervention in the half hour that those submissions took. I know this because I have seen the transcript that was taken at the time, and that is the number of sentences which are stopped by the Judge before I actually said anything meaningful. When I sat down at the end I was shaking.
4. The Court of Appeal Judges allowed my client’s appeal, and did not question with me my conduct of the case, either in open court or outside. However, unbeknown to me, the lead judge approached my Head of Chambers and asked him to pursue a complaint with the Bar Standards Board on a basis that my advocacy had not advanced my client’s case one jot. My Head of Chambers, quite rightly, refused. So the lead judge complained on behalf of the Court of Appeal to the Bar Standards Board himself.
5. I first heard about the complaint six months after the hearing, about a month before the Board met for the first time. When it got to the final hearing - and despite able counsel[[1]](#footnote-1) that in fact as a disabled advocate my performance had been perfectly adequate - no reasonable adjustments had even been considered by the Court of Appeal Judges and, pointing out that even, if it were right that my performance had been under par on the day, a “normal” able-bodied advocate would have to be guilty of more than a single performance in what was then a 13 year stint at the Bar. The Bar Standards Board at first ignored these points, and banned me from appearing in the High Court, the Court of Appeal, Privy Council and Supreme Court. The Board also stipulated that before every case that might undertake in lower courts, I had to write to my client and the judge in the court, informing them of my disability and my recent medical history. It was not a complete block on my career but affected it profoundly and I still feel the machinations of it. I felt profoundly humiliated – here was I only trying to some good and this was the treatment that this Court of Appeal judge and this Bar Standards Board gave me. How would you like it?
6. I appealed this decision. It took 14 months. A matter of days before the hearing, and having sought senior counsel’s advice, the Appeal Panel quashed entirely the lower panel’s verdict and any sanction against me. This may have been due to the opinion of Antony White QC[[2]](#footnote-2) that if they did anything else they would be as guilty of discrimination due to my disability as the lower panel had been. The Appeal Panel decision quashed the Bar Standards Board without hearing from me.
7. Remarkably, despite this extraordinary decision, the Bar Standards Board refused in correspondence to accept that they had behaved in any way that was inappropriate towards me - and certainly not a way that was discriminatory. Although I had won the case, it remained for me to pursue the Bar Standards Board in Employment Tribunal. They litigated against me with some force – bombarding me, through their solicitors, with likely areas of cross-examination being prepared for me by a QC (who was head of his chambers) about largely irrelevant points. Eventually, we were a month away from a seven-day Employment Tribunal hearing when they settled for a payment to me of £5,000 and a formal admission from them that they had discriminated against me. The whole process had taken four and a half years. I was exhausted as only a litigant can be exhausted.
8. The Bar Council, despite the terms of the settlement, did not apologise to me and have not to this day. It is scarcely surprising that it burns just as it did when the settlement was reached all those years ago. My estimation of the Bar Council as an organisation has diminished. Because it seems to me that they should have at least signifed that the decision which they made and then maintained for all those years - and was, as they eventually admitted, discriminatory - was also morally wrong. In fact, during my Employment Tribunal case the Bar Council introduced mandatory training in equal opportunities for their Board members – and although they have never admitted it, I think I have the right to say that it was probably because of my case. I can never know because they have never admitted that they were wrong, and that they were wrong about on a point of morality. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
9. Why do I tell this story? Why is the discrimination that happened to me so important? Clearly it means something to me: I have the compulsion to tell the story. I have the urge to be a witness.
10. Telling the story about discrimination is a compulsion for most disabled people. I recall how the website for stroke survivors, Different Strokes[[3]](#footnote-3) used to have a page where it invited stroke survivors to tell their story. They did this in their thousands. It was almost as if they were compelled to do so.
11. But it is more than just a compulsion to tell their story: it is the desire to have the society in which we live be quiet for a time, and then, when the disabled person has told their story, to seek justice. I believe in this profoundly: it is why I continue to practise at the Bar of England and Wales.

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1. There is a view among able-bodied lawyers that, no matter the morality of the situation when a disabled person tells his or her story, in terms of law, the courts must be “impartial”. In particular, courts must be impartial in deciding the proper interpretation of a word or phrase of a particular statute, rule book, or case. The court will give no weight to the fact that, in the particular case, the action is bought by a disabled person. The majority of lawyers say that the fact that a person is disabled has no relevance at all to the way in which the European or domestic court goes about interpreting anything.
2. Of course, in a sense that is right – it makes no difference that it is a case brought by a disabled person or which the disabled person defends. The disabled person’s point of view is irrelevant. What matters is the court’s view.
3. But lawyers, when talking among themselves, have a rather different question, which yields surprising results: how is an individual phrase, whether it be a phrase from a convention, a statute or a rule book, to be interpreted? In England, the way this was done was, broadly speaking, of looking up the common meaning of the phrase, and that was an end of it. But in Europe the system was different: under the Vienna Convention Article 31, the European or International Court must look to the purpose of the individual Convention, and that purpose can be found by looking at any Article which has the word “purpose” in the title and, critically, the preamble. It is not right to say that the purpose is whatever suits the individual lawyer running the individual case.
4. Of course the purpose of the UN Convention of Rights of Persons with Disabilities is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity – Article 1 of the Convention. But – and it is an important but – certain guidelines are also indicated by the preamble.
5. *“a. Recalling the principles proclaimed by the Charter of the United Nations which recognised the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.”*
6. Surely there can be no doubt that such a statement in the preamble means that the articles which follow must be interpreted with humanity and morality. Certainly the President of the English Employment Appeal Tribunal in *Rackham[[4]](#footnote-4)* thought it so.

*“f. Recognising the importance of the principles and policy guidance contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules of the Equalisation of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and other actions at the national, regional and international levels to further equalise opportunities for disabled persons with disabilities;*

*…k. Concern that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world: …”*

1. Taken together these two preambles are surprising and thought-provoking. The people who had responsibility for drafting this preamble clearly thought that there was a problem with the UN’s involvement in at least two instruments that had “served” the rights of disabled people beforehand – the fact that disabled people continued to face barriers all over the world in their participation as equal members of their society, and what is more, violations of their human rights. That the UN itself, in such a formal document read by lawyers around the world, drew the reader’s mind to its concerns, speaks to the UN placing itself morally in a conceptual space that acknowledges past moral failures. It is right that the UN does not take part of the “blame” - but, that said, it goes a long way down that road, even in the preamble to a Convention. I assert that this means that part of the purpose of the UNCRPD is to be realistic about whether or not a particular rule will in fact help disabled people fully and equally enjoy all human rights and fundamental freedoms, as their able-bodied peers do. Again the President of the EAT in *Rackham* agreed.
2. This agreement looks like the solution to a lawyer’s argument and not much more until you realise two things:
   1. If it is how the purpose of the Convention is to be decided and therefore the meaning of the Convention is to being deterimed with that in mind, then it is also the purpose the domestic legislation as well. And no just the domestic legislation – all rules, regulations and guidance is to be interpreted with the purpose of the Convention in mind. It applies to every statute, statutory instrument, case, regulation, rules and guidance which in any way has the effect of helping disabled people enjoy their fundamental freedoms;
   2. It is fundamentally moral and human and realistic, in the sense that disabled people use these terms when they try and assert their rights. In disability discrimination what wins ultimately is morality, not law.

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1. Under Article 13(1) of the UNCRPD

*“State parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”*.

1. In *Rackham*, and again in the Northern Ireland Court of Appeal case of *Galo[[5]](#footnote-5)*, the courts both linked the protection of disabled rights under the UN Convention Article 13 and the UK drafted Equal Treatment Bench Book. They did so with the help, in part, of submissions like these above by the Claimants in both cases. The President of the EAT in the jurisdiction of England and Wales found that, in fact, Mr Rackham had been afforded an appropriate consideration of those rights: the case is up for appeal to the England and Wales Court of Appeal sometime this year.
2. However, in *Galo* the three-man Court of Appeal Judges, on learning, in part, that there had been no *ground rules* hearing at the beginning of the case – which the Equal Treatment Bench Book suggests is at the least good practice – determined that Mr Galo (who has Asperger’s syndrome) did not benefit from a fair procedural hearing at his various preliminary hearings or final hearing, and therefore allowed the appeal.
3. But they also took time to comment on the state of the law and, more importantly, the state of the Judges and legal practitioners that they saw around them in Northern Ireland, whatever their field of practise: criminal, civil, family, employment or other.
4. They said:

*“59. The duty is cast on the tribunal to make its own decisions in these matters. There were clear indication of observed agitation and frustration on the part of the appellant. These should have put the tribunal on notice of the need to investigate the precise nature and diagnosis of his condition. That said, this case highlights perhaps the need for there to be better training of both judiciary and the legal profession in the needs of the disabled”.*

1. Later on they say:-

*“61. ..we find it a matter of great concern that no reference appears to have been made to the Equal Treatment Bench Book by the (Court)… That is an unsatisfactory state of affairs. We have formed the clear impression that the Equal Treatment Bench Book does not appear to be part of the culture of these hearings. That is a circumstance which must fundamentally change with a structural correction to ensure that this situation does not recur. Had there been proper cognisance of the contents of the Equal Treatment Bench Book, we are satisfied that a different approach would have been adopted to this case.”*

1. This – given the context of it being a judgment given by the Court of Appeal ­­– is very strong stuff indeed. What it says, I think, is that there is a fundamental link between taking seriously a disabled person’s disability, and making reasonable adjustments early on – with compassion for the disabled person and based upon evidence at an appropriate and early time. That is the moral thing to do.
2. Already there has been widespread acceptance in Northern Ireland among practitioners and judges that there needs to be a change in the Courts’ procedure and the Judges’ attitudes. What transpires will be of great interest to myself, and also to Mike Potter, a friend and fellow member of Cloisters, who is the barrister responsible for *Galo*. But I will allow myself three comments here:
   1. In terms of the procedure both of the individual case in readying itself for a full trial, and the procedure to allow legal practitioners and Judges access to training in the needs of the disabled people who form part of the society in which they work, the procedural changes seem comparatively easy. It may be that we are living in a time in which we have to face some cutbacks, due to what is argued to be an austere economic climate – but these are fundamental human rights, and they must be respected or the UK will fail to recognise the inherent dignity and worth, much less the equal rights, of the disabled community that forms part of the human family. This is not my view: it is the view of the drafting team of the Convention on the Rights of People with Disabilities.
   2. It may be that Judges as a whole worry about changing the rules of engagement so that disabled people can be recognised as an equal part of this human family not due to any legal reason but out of discomfort. It is important that Judges have the respect of all in the human family. This is true whether they are specialists in crime, civil employment or family law. From my experience with the Bar Standard Board, it is not enough simply to change the rules and to ignore Judges’ roles in past cases. It may be that the new procedure is really great but in this case the people affected in the past by the old rule, in this case disabled people, need to know why this change has been brought about. In this case, the adoption by the judiciary no matter in what field, was the human and moral thing to do. It is perhaps not what a fly-by-night businessman would do but Judges are more than that. They have morality and humanity as two of their highest goals. To admit that – looked at as a whole – Judges were wrong, is paradoxically to assert this humanity and morality.
   3. After all, Judges and legal practitioners must bear in mind that admitting they were at fault is not without precedent in this area. If you look back at paragraph k of the preamble to the UNCRPD you can see the UN doing exactly that. The point is not to make the best gloss on Judge’s decisions of the past: the point is to make a better world of the future – and that a world that is free from discrimination.

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1. Karon Monaghan QC of Matrix Chambers and Alison Foster QC of 39 Essex Street. [↑](#footnote-ref-1)
2. Of Matrix Chambers [↑](#footnote-ref-2)
3. differentstrokes.co.uk [↑](#footnote-ref-3)
4. *Rackham v. NHS Professionals Limited* UKEAT/0110/15 [↑](#footnote-ref-4)
5. *Galo v. Bombardier Aerospace UK* GLI9979 [↑](#footnote-ref-5)