

Deaf People at the Bar

Some considerations of the possibilities

Jim Kyle
Centre for Deaf Studies, University of Bristol

jim.kyle@bris.ac.uk

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With an advance in attitudes and the search for access and opportunity, it is appropriate to consider the specific circumstances of Deaf people in the legal processes. It is further relevant to consider the role of Deaf people in regard to the practice of the law and in particular, the possibility that a barrister, himself or herself, may be Deaf.

This paper examines a number of questions concerning this situation.

1. The starting point

As well as the dawning of awareness in the community as a whole, there have been major steps forward in the laws dealing with disability. The Disability Discrimination Bill (2005) will place a duty on all public sector authorities, not merely to respond to cases of discrimination but actively to promote *disability equality*. This can be taken to mean

the need to promote equality of opportunity between disabled persons and other persons; and the need to take steps to take account of disabled persons disabilities, even where that involves treating disabled persons more favourably than other persons. (DRC, 2005, page 5)

Such promotion while focusing on the individual who is disabled can also be taken to place a duty on the employer to ensure that colleagues of the Deaf person are suitably educated in Deaf Awareness (see EATS/0049/04, Employment Tribunal, Edinburgh 2004). In effect, it is the case that the *human* and *physical* environments may need to be adjusted.

However, there are exclusions from the 2005 Bill which introduce some degree of ambiguity into the particular circumstances:

4.7 In addition, there are certain actions of public authorities which the Act excludes from being subject to the duties. In s.49A the general duty outlined in Chapter 2 does not apply to:

- * a judicial act (whether done by a court, tribunal or other person)
- * any act done on the instructions or on behalf of a person acting in a judicial capacity

The precise definition of these, I must leave to others; however, it remains appropriate to examine the extent to which in normal circumstances, a Deaf person could practise as a barrister.

1.1 Some definitions

Deaf people in this paper (with a capital D – cf capital E in English or capital F in French) refer to those people who consider themselves to be members of the Deaf community and who are users of British Sign Language.

People who have minor hearing losses or who lose their hearing gradually as in older age are termed *hard-of-hearing*. This group are culturally hearing, have usually been educated in mainstream education, and live and work primarily in a world of hearing-speaking people. They are likely to gain benefit from hearing aids – although it is unlikely that these will restore hearing completely and in many (noisy) circumstances, these individuals will find it hard to respond appropriately.

A final but much smaller group are those who are suddenly and severely or profoundly *deafened*. Typically occurring in mid-career, this may affect a person in any occupation including barristers. This will make direct interaction though hearing very difficult even though that person will retain the capacity for fluent and effective speech.

This paper deals mainly with the circumstances of *Deaf* people; presumably, different issues of competence apply when the qualified barrister has been hearing and gradually or suddenly loses that ability to hear.

Another definition which is needed is a *bilingual*. A person can be termed bilingual when he or she can function effectively in a domain of knowledge in more than one language. In this circumstance, language can be spoken, heard, read or written. While it is considered that most spoken language bilinguals will be able to function in all four aspects of language use, there are many bilinguals who may not have competence in written forms of the language (indeed there may not be a written form). It is also conversely the case, that a second type of bilingual may not be competent in the spoken form of the language. This is commonly true for Deaf bilinguals who may use sign language fluently but may use only written forms in the second language.

A *sign language interpreter* is typically (although not inevitably) a hearing person who is bilingual in a spoken language (usually English, in the UK – although it might also include another minority language) and in sign language (typically BSL – although again, in some circumstances an American Sign Language interpreter or other national sign language may be envisaged). Significantly, bilingualism is a necessary but not sufficient condition for being an interpreter – such a person must undergo training in the process and practice of meaning transfer between one language and another and must have demonstrated capacity to do so in a range of circumstances. Normally, this will be done through traditional University courses of training, although increasingly, practical placement and monitoring of that placement are seen as major components. As yet, there is no detailed training programme for work in legal situations. There are however, a number (relatively small) of experienced and competent interpreters who are available for work within the legal process and in courts of justice. It is not guaranteed that such persons will be legal experts.

1.2 Some facts

Although the performance of Deaf people as seen in national surveys of educational achievement is generally poor, this is not a reflection of their intelligence. Studies of Deaf people in the UK (eg Conrad, 1979) and elsewhere, confirm that the distribution of general intelligence is normal. This measure of non-verbal intelligence implies that Deaf people have the same characteristics of cognitive competence as hearing people. Given appropriate educational approaches and within their own community, Deaf people would aspire to and would succeed in all areas of public life.

British Sign Language or BSL is the signed language used by Deaf people in the UK. It is subject to regional and dialectal variations but its grammatical structure, as far as can be determined, is similar throughout the UK. It is a coherent and rule-bound language with a history stretching back at least four hundred years. As with all languages, it is reckoned that it is capable of expressing all the needs of its users. Where new requirements appear, new signs will be developed. As with all languages, the language is never complete as new inventions, scenarios and new legislation, require the construction of new ways of talking and defining. Lack of technical terminology in a particular area is not an indication of a weakness in the language – but is usually a symptom of the users not having engaged in action in that area. At the same time, lack of one feature in a language (as compared to another language) should not be taken as indicative of a poorer language. For example, English has no future tense, whereas French does. This does not render English people unable to discuss the future – it is just that the verb structure does not have that specific form.

2.0 The Fundamental Question – Can Deaf people be barristers?

This question is firstly dealt with in regard to the supposition that a Deaf person *can* receive the necessary training (section 2) and then secondly, the question is examined in regard to the potential problems and hurdles to be overcome (section 3). There are three main scenarios to take into account:

1. Deaf-only circumstances
2. Deaf bilinguals
3. Deaf professionals with interpreters

2.1 Deaf-only

Since Deaf people have similar cognitive competences to hearing people and since we can show that Deaf people have a well-developed language, community structure and culture, it is not too difficult to imagine a scenario in which all members of a society were Deaf. In this case, it can be claimed, that Deaf people would fill all roles within that society and would indeed come to fulfil the roles of the legal profession. There is nothing in the practice of law which cannot be transferred from one culture to another. For example, the practice of law in France differs from that in England but is engaged in by French people – using the language French etc.

In a Deaf society, Deaf people would be barristers.

We cannot offer this as a real proposition but it opens up a secondary scenario. In a circumstance where a defendant or applicant is from a minority community, the most effective professional to deal with that person, may be someone from that minority community; someone who shares the same language and who can at least empathise with the community and cultural values. We see this commonly in cases where race is an issue. In circumstances of cross examination or evidence taking, a Deaf barrister would be much better placed than a hearing monolingual barrister if the client were Deaf. (Interestingly, the arguments which are sometimes applied to Deaf professionals – lack of qualified interpreters – would apply with some force to the working of the hearing barrister). In court, a Deaf barrister would be able to pose questions directly, would understand the direct testimony and be more able to form a legal opinion, than a hearing barrister – since he/she would share the same language as the client. Indeed, the questions of interpreter adequacy might be circumvented if there were Deaf and bilingual hearing barristers in the court room.

One can therefore claim that having a Deaf barrister might be desirable in cases based in the Deaf community and even in cases where a single Deaf person was involved.

2.2 Deaf bilinguals

It seems unlikely that a person would be disallowed from the English Bar because he or she had been educated in France and spoke French; although it can certainly be expected that he or she would study English law and proceed in the usual fashion through

professional development. In effect, the person would be expected to become bilingual and to some extent bi-cultural. One can then argue that there should be no obstacle (because of Deafness per se) to a Deaf person from the Deaf community who is a primary user of BSL, becoming a practising English barrister – provided that he/she becomes bilingual.

(a) Hearing loss is not a simple determining factor –people with a hearing loss since childhood may be able to speak clearly enough to be understood (indeed much effort in education goes into training this very activity) and some members of the Deaf community are able to hear sufficiently well with a hearing aid, to be able to understand what people say, in less noisy surroundings or in one-to one situations. The first English Deaf head teacher (in modern times, and currently in post) is one example of this type of bilingual.

Such a Deaf bilingual may be able to carry out most, if not all, functions in dealing with evidence and questioning. While the Deaf bilingual may not have perfect hearing nor perfect speech, the capacity to interact may be such that effective professional practice may be achieved. In dealing with Deaf clients, the additional benefits of scenario 1 above would be seen.

(b) Where the person is able to speak but not to hear, these circumstances would clearly make it difficult to function independently. However, since a full simultaneous verbatim transcript of court cases is always taken, it is not inconceivable that a Deaf speaking barrister would be able to read the testimony and responses of others from a display linked to the court stenographer. These systems are already in use in live television subtitling and have been used Parliament for over 20 years. Such a system might be considered *a reasonable adjustment* under the Disability Discrimination Act.

(c) Deaf bilinguals of the second type – competent in BSL and only in written English – may pose a different problem. They fall into scenario 3.

2.3 Deaf professionals with interpreters

A deaf bilingual in contact with hearing people would either interact through text – writing down, text/speech display – or through a third party – a sign language interpreter. Many Deaf professionals today, carry out their professional duties aided by a qualified sign language interpreter. Indeed, the Government programme, *Access to Work*, explicitly prescribes sign language interpreting as typical support for the workplace. Where interaction with other people is part of the employment and the person's employment might be at risk if he/she was unable to interact effectively, the Access to Work programme would be expected to support the provision of interpreters.

In this circumstance, the Deaf professional would sign and the interpreter would transfer the meaning into speech and vice versa. This could apply in all live settings. Consecutive interpreting would be favoured in circumstances where precision was required – simultaneous interpreting would be used when time is a factor.

That is, the interpreter can work more accurately if he/she is allowed to listen/watch the complete incoming message and then to translate it – rather than to speak/sign at the same time as the message is being received (which is (strangely) more typical of current court

scenarios and also of evidence/instruction taking and even in the making of statements to the police).

Given a fully qualified interpreter with training in the law, then consecutive interpreting could provide a high level of accuracy. With simultaneous interpreting the accuracy would decline and more quickly in time – ie after 30 minutes, the interpreting could become unsafe in many circumstances.

The issue of a Deaf barrister with hearing interpreter, then becomes a matter of adjustment within the court to ensure that sufficient time is allowed for the process of language transfer. It also become a judgement of appropriateness – is it appropriate for a Deaf barrister to work in cases where all participants are hearing? In the contrary situation, the same question applies – ie should hearing barristers aided by interpreters, work with Deaf clients?

It can therefore be claimed:

- A Deaf barrister would be far more effective in questioning a Deaf defendant than a hearing barrister who would be passing messages through a hearing sign language interpreter.
- A Deaf barrister or judge would be far better at determining fitness to plead or the effectiveness of the proceedings in a Deaf case, than would be their hearing counterparts, supported by an interpreter.

However, given these positive responses to the main question posed, there remain other difficulties and issues to be examined.

3.0 Practical issues

3.1 Language Competence

It seems relatively clear that in an English court and in the English systems of justice, the legal professional would have to be able to read English to a high level – to be able to access legal documents, case lore and judgments. If one were to draw a threshold across current English competence in the Deaf community, then a relatively small number would have the required written English skills to carry out a legal practice. The fact that there are relatively few candidates, however, cannot be used to disallow – in fact, it may become an incentive to progress further in language competence if the possibility of such eventual employment were opened up. However, there is no doubt that this is a major challenge to educational system as it is at present. One cannot imagine a flood of candidates.

3.2 Quality, supply and roles of Interpreters

The interpreting issue is enormous.

(a) Not only would interpreters be required to support the Deaf professional extensively during professional practice, they would be needed all through the period of training. While it is common to employ interpreters for University level support, there may be more problems if training for the Bar required extended interactions on a daily basis – such that interpreters would need to be retained. However, again these problems are potentially surmountable with financial support.

(b) What is more of an issue is to find sufficient numbers of interpreters educated to a University level in subjects of relevance to the training. At present, one could not be confident that the correct interpreter could be found in the correct training establishment at the correct time. However, with the advances in video telephony, a student may be *fed* the interpretation from a remote interpreter. That is, the required highly qualified interpreter, who lives in say, Newcastle, can be connected remotely to a lecture in Bristol. (We have such a system in test in Bristol at present).

(c) Assuming that one could meet the needs in training, the extended needs or last minute needs of the judicial system would be hard to satisfy, without the Deaf barrister, having a personal interpreter, on call. In the current state of training and supply, this is a problem. However, it should be pointed out that a Deaf barrister would be more likely to retain a personal interpreter – and therefore, have immediate access – than would a hearing barrister who is more likely to be struggling to try to engage an interpreter for an upcoming case.

This would also be seen in the issue of having to use more than one interpreter. In cases where the hearing barrister or advisers have to meet with clients and then to progress the case to court, it is very likely that different interpreters will be used at different stages of the case (due to availability). In contrast, a Deaf barrister would be much more likely to use the same interpreter at all times.

(d) There is also the inevitable issue for interpreters of having to specialise sufficiently to be able to deal with legal cases and courts of law. One cannot imagine there ever being more than a handful of highly qualified court sign language interpreters in the UK. One could predict the creation of a second tier of qualified and experienced police and solicitors' interpreters. In order to achieve this, one would need to take an initiative to train them (as is being done say, in the case of mental health interpreters). Again this is not unimaginable, but the situation in training and development at present is not satisfactory.

(e) There are also issues surrounding the role of the sign language interpreter in court which are not yet addressed by what little training there is. That is, as well as needing to know the points of law and the procedures, there is a need to study how the interpreter contributes to the defendant's fitness to plead, how the act of transfer of meaning creates a position of power in the hands of the interpreter, which only the Deaf person will recognise (and whose rights may be affected) and how the interpreter has to deal with the different perceptions, anxieties and impatiences in the court room.

The profession of interpreting is at an early stage of its evolution and more is required to be developed to make it fit with the requirements of the legal process. This applies whether the barrister is Deaf or hearing.

3.3 Use of sign language in court

The presence of a sign language using barrister in court may raise issues for the process as a whole. This is not within my remit to answer but it is important to point out that if Deaf barrister were to use BSL directly with a Deaf witness, the hearing members of the court would be disadvantaged and would have to rely on the interpreter to follow the main proceedings.

3.4 Translation

Very often, questions of vocabulary are posed: “is there an equivalent of x word or y phrase in BSL?” The answer is often no – in the sense that there is not a word-for-word equivalent for technical terms. However, if the question is posed as “can the x word or y phrase be translated into BSL? then the answer is bound to be yes. Or if the question is, “will an equivalent term/phrase emerge as Deaf people use these terms?” then again the answer is yes.

The process of generating new terms and use of new terms will be far more productive when in the hands of Deaf professionals than in the hands of sign language interpreters (who may struggle for all the reasons described in the section above).

3.5 Nuances in Language

Additionally, there is sometimes a question posed about sensitivity to the nuances of language. This may be set (unfairly) as a problem solely of interpreting from English and is based on a supposition that an interpreter would lose this information. A well trained interpreter should not lose this. Equally, the responses of a Deaf client have to be interpreted to a hearing barrister and the same concern might be expressed here about mis-interpretation the Deaf client’s body language, facial expression and intonation (all part of BSL).

3.6 Differences in structure in BSL and English

No two languages are identical in grammatical structure. Comparative analysis always shows major mis-matches in the structure – whether it is verb structure, or implied subjects in a sentence and so on. BSL differs from English. A bilingual Deaf barrister would be aware of the differences and would be able to interpret transcripts of English according to their implied meaning and at the same time be able to monitor the constructions in BSL. This would not be the case for a hearing barrister and would not be the job of the sign language interpreter. The interpreter may be under pressure to ask the question in “an English legal way” which translated literally to BSL may be a leading question. Also the tactic of posing a question in a form where the respondent has difficulty in disagreeing (ie “is it not the case that ...?”) may have a different impact in a topic-comment structure in BSL. Such problems are not easily solved in any bilingual courtroom. As usual, a bilingual professional is better able to detect such problems.

3.7 Advances in technology

It is certainly the case that advances in video technology, mentioned above, mean that a sign language interpreter, need not be physically present in an interaction between a Deaf person and a hearing person. In fact, even the Deaf person need not be physically present – implying that advice could be taken by a legal professional in one location, through an interpreter in another location, from a client in a third location. Since this transaction is carried out over the Internet, the cost of the calling is minimal. Since none of the parties have travel costs nor travel time, the whole process might be carried out far more efficiently and cheaply (and quickly).

The systems to do this can be shown today. The approach will apply to a range of circumstances out of court.

There may be more complex issues when the circumstance is in court. These relate to the need to see all of the proceedings, rather than just a single person, the absolute security of the call and the difficulties of guaranteeing quality of service¹. Such circumstances will need to be tested within the legal process.

A Deaf barrister would most certainly make use of a visual display of the verbatim transcript in order to follow what other people were saying. This should be relatively trivial to set up.

3.8 Liability

One question raised has been the one of liability. It has been suggested that if a Deaf barrister were practising then his/hers would be the liability for malpractice of the interpreter. I cannot be sure of the legal issues here, but the suggestion above seems unlikely in many circumstances.

If a hearing barrister is defending a Deaf person, it would seem unreasonable that the barrister would be liable if the interpreter engaged by the Crown Prosecution Service failed to appear or was incapable or misbehaved in some way. That is, the court engages the interpreter to deal with the language problem – it does not penalise either the Deaf person or the professionals for being unable to communicate.

In an interview with a Deaf person, where an interpreter failed to arrive, the liability is unlikely to rest with the Deaf person (no matter who booked the interpreter).

Where a Deaf barrister engages the services of a separate interpreter in the fulfilment of their own role, as part of the service to the court, it would seem harsh if the Deaf barrister were threatened with liability of all costs. This would seem to be discriminatory.

¹ This term relates to the quality of the Internet connection and the potential for the bandwidth to vary according to traffic – in the case of audio this is not usually noticeable, but in the case of video it may lead to blurring in the image and even moving images becoming stuck. Solutions to this issue are in the research labs at present.

4.0 Conclusions

The simple answer to the question of whether a Deaf person could be a barrister is yes. In certain circumstances, a Deaf barrister would be preferable to a hearing barrister. It is not possible to determine whether there are enough cases involving Deaf clients for a specialist career to be financially rewarding. However, we can say clearly that a Deaf person could have the intellectual and linguistic competence to carry out duties as a barrister.

Some consideration has to be given to

- (a) the bilingual competences of the Deaf barrister – in speech, hearing, literacy, as well as in BSL.
- (b) the specific application – cases which involve only hearing people (where it may be judged less appropriate, but possible, for some Deaf bilinguals) or involving Deaf people (more appropriate and possibly more valuable)
- (c) the current state of training of the interpreting support services and the need to use consecutive interpreting rather than simultaneous interpreting, for accuracy
- (d) the availability of interpreters (lack of numbers of highly qualified and experienced practitioners)
- (e) the need for the application of current technology in video and text transcripts

Issues of language equivalence need to be recognised and it is likely that some adaptation may be needed in court practices – but these may be included in the reasonable adjustments required by the Disability Discrimination Act.

References

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