

Current Developments in Australia: School Safety and Disability Discrimination —*Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62

**Sally Varnham
Senior Lecturer in Law
Massey University Wellington Campus
Wellington
New Zealand**

Introduction

When a child with a disability behaves in a manner which threatens the safety of other children and staff in the school, school authorities are faced with a dilemma. The balance between the competing interests of individuals and the school community is never more clearly seen than in such a situation. The child has a right to participate equally in the educational process, but he or she shares that right with the rest of the school community, who are entitled to expect that their educational environment will be safe and non-threatening. The judges of the High Court of Australia recently were required to consider whether the exclusion from school of a special needs child who behaved in a dangerous manner towards staff and other children was to discrimination on the basis of his disability pursuant to s 5 of the *Disability Discrimination Act 1992 (Cth)*. Though divided in their opinions, the majority of the court upheld the actions of the school authorities. The judgment depended to a large extent on the construction of the Australian commonwealth legislative provisions. However, the decisions of the judges are of universal value for their comprehensive examination of the issues surrounding a school's exercise of its powers of exclusion in relation to the behaviour of a child with special needs.

The Facts

Daniel Hoggan was born on 8 December 1984. He suffered brain damage as a result of severe encephalopathic illness suffered when he was six months old. As a result of the brain damage Daniel suffers from intellectual disabilities, visual disability and epilepsy. His intellectual disabilities affect his thought processes and result in unusual individual mannerisms, and in behaviour such as rocking, humming and swearing. Importantly, Daniel displays anti-social and often aggressive behaviour such as hitting and kicking others. The appellant in the case, Mr Purvis, is Daniel's foster father.

In 1996, Mr and Mrs Purvis applied to have Daniel enrolled as South Grafton High School, administered by the State of New South Wales in Australia. Initially, the application was refused by the school principal, but in 1997 Daniel's enrolment was accepted. This acceptance followed a complaint to the Human Rights and Equal Opportunity Commission (HREOC) and the appointment of a new principal at the school. The chronology of events, set out in the judgment

of Callinan J,¹ details a large number of meetings which all preceded his enrolment. These included a conciliation conference convened by HREOC, meetings of the Integration Committee and Teachers' Federation (who strongly opposed the enrolment), and meetings between those bodies, the principal, teachers at the school and Mr and Mrs Purvis. Daniel started at the school on 8th April 1997.

Daniel was first suspended on 24 April 1997 for one day for "violence against staff". He was suspended five times during 1997, for various periods of time, all for his damaging behaviour towards other students and staff. During that period the school convened various case management meetings, which were attended by psychologists who had assessed Daniel and special education consultants. There were behaviour management strategies put into place and there was teacher aide support provided. Daniel's last suspension was for 12 days for punching the teacher aide in the back. In September 1997 the school principal recommended to Mr and Mrs Purvis that Daniel's education be continued at home with the support of teacher aides who would have access to the school resources. He also proposed the option of Daniel being enrolled at the Special Unit at Grafton High School, this proposal was supported by the School counsellor. Mr Purvis did not accept either of these proposals and on 2 December 1997 he advised the school that Daniel intended to return. On 3 December 1997 the school principal excluded Daniel from South Grafton High School.

The Australian Disability Discrimination Legislation

The *Disability Discrimination Act (Cth) 1992* was passed by the federal Parliament of Australia pursuant to the international movement to abolish discrimination against persons with disabilities and to encourage equal opportunities for those people in all areas. The Act states as one of its objects, in s 3, to eliminate as far as possible discrimination against persons on the grounds of disability in the area of education and to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community. The definitions of disability are contained in s 4 and include a wide range of physical, mental, cognitive and behavioural characteristics. The part of that section which is relevant to the present case is s 4(1) (g) which includes within that definition: 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour'. The provisions of the Act which were relied on by the appellant were:

Disability Discrimination

- 5 (1)** For the purposes of this Act, a person ('discriminator') discriminates against another person ('aggrieved person') on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.
- (2)** For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact

¹ *Purvis v State of New South Wales (Department of Education and Training)* [2003] HCA 62 (Unreported, Gleeson CJ, Kirby, Hayne, Gummow, Heydon, Callinan, McHugh JJ, 11 November 2003 S423/2002) 65 ("Purvis").

that different accommodation or services may be required by the person with the disability.

And:

Education

22 (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:

- (a) by refusing or failing to accept a person's application for admission as a student; or
- (b) in the terms or conditions on which it is prepared to admit the person as a student.

(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:

- (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
- (b) by expelling the student; or
- (c) by subjecting the student to any other detriment.

The Action

The Human Rights and Equal Opportunity Commission (HREOC) first came across Daniel Hoggan in December 1996 when it received a complaint from Mr and Mrs Purvis concerning the school's initial refusal to accept Daniel's application for enrolment. Then the Commission convened a mediation conference which resulted in an integration committee being established at the school to determine the level of resources and support which the school would require for Daniel to be enrolled as a pupil. These endeavours of the HREOC had led to Daniel's eventual enrolment. A further complaint was lodged with HREOC on 22 March 1998, following Daniel's exclusion, and his unsuccessful appeal to the school. The HREOC appointed Commissioner Innes to hear the complaint, and his decision was delivered on 13 November 2000.

The Commissioner found for Daniel.² He held that by suspending and expelling Daniel the school was in breach of the *Disability Discrimination Act (Cth) 1992*. In the Commissioner's belief the school erred in three ways. The first was in its failure to consult more broadly in the development and adjustment of the draft welfare and discipline programme designed for Daniel. Secondly, in its failure to adequately provide teachers with training or an awareness programme to deal with Daniel's requirements in the school environment. Thirdly, the Commissioner held that the school did not adequately obtain the assistance of experts or act on the recommendation of expert assistance which it did obtain. In his view, because of the reasons above, the school's disciplinary actions towards Daniel served to exacerbate the situation and lead to Daniel's behaviour worsening.

² *Purvis (on behalf of Hoggan) v The State of New South Wales (Department of Education)* (2001) EOC 93-117.

The State applied to the Federal Court for judicial review of the Commissioner's decision.³ Emmett J upheld the application for review.⁴ Mr Purvis then appealed to the Full Court of the Federal Court (Spender, Gyles, and Conti JJ) which dismissed his appeal.⁵ The judges of the Full Court confirmed the view of Emmett J that the Commissioner had made significant errors of law.⁶ These were:

- In relation to the meaning of 'disability'

While holding that the school had decided to suspend and expel Daniel because of his behaviour rather than his disability, the Commissioner had found that the two were so closely connected that it amounted to the same thing. He held that in effect Daniel had been given less favourable treatment because of his disability which caused the behaviour. Both Emmett J and the Full Court held that the behaviour was a consequence of the disability but not part of it, therefore less favourable treatment on the ground of behaviour was not necessarily less favourable treatment by reason of the disability.

- In relation to the interpretation of s 5 (2) of the Act which the Commissioner seemingly used to impose a requirement on the school to make reasonable accommodation in response to Daniel's disability

Emmett J and the Full Court held that s 5(2) could not be read as imposing a positive obligation on the school. The judges held that failing to give special treatment to a student does not necessarily amount to subjecting that student to a detriment. The Full Court made the point that the school could not be held to have a positive duty to manage the conduct of the student irrespective of the cost and impact upon the school, and to be in breach of s 22 for failure to do so.

- In relation to the comparator which is an integral part of s 5(1)

S 5(1) states that a person discriminates against another person if, because of that person's disability, the discriminator treats the person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats a person without the disability. In the Commissioner's view the comparison was to be made between Daniel and a person in the same year, without Daniel's disability and without his disturbed behaviour. He believed that to do otherwise would be against the clear legislative intent to prevent detrimental treatment of persons whose disability results in disturbed behaviour. Emmett J and the judges of the Full Court held that the Commissioner was wrong in his use of this comparator. In their view, the correct comparison was between the school's treatment of Daniel and how the school would have treated a student who did not suffer from a disability but who had engaged in the same sort of behaviour as Daniel.

³ Pursuant to the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.

⁴ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69.

⁵ *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237.

⁶ *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237.

- Finally, in relation to the meaning of discrimination ‘on the ground of’ disability

The Commissioner had said that because Daniel’s behaviour was so closely connected to his disability, less favourable treatment on the ground of that behaviour amounted to discrimination on the ground of his disability. Emmett J said that it was not the case that Daniel’s disability necessarily resulted in his behaviour. Therefore the punishment for his behaviour could not necessarily be said to be less favourable treatment by reason of his disability. The Full Court agreed. In the judges’ view, the Commissioner’s conclusion would mean that any treatment of Daniel by the school, no matter how dangerous his conduct was or how detrimental it was to the safety of other members of the schools community, would be in breach of s 22.

Mr Purvis then appealed on behalf of Daniel to the High Court of Australia. The majority of the High Court (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ) dismissed the appeal. Kirby and Hayne JJ dissented. The following is an analysis of the judges’ reasoning.⁷

The Majority View of the High Court of Australia

Gleeson CJ concentrated first on that part of the definition of ‘disability’ contained in s 4 which related to Daniel, that is, that he suffered from a condition which resulted in disturbed behaviour.⁸ The judge focused his decision to dismiss the appeal on a consideration of the actions of the school principal in light of his responsibility for the safety of the whole school community. He said that the term ‘disturbed behaviour’ was so wide as to include serious antisocial criminal conduct for which an offender would not generally escape conviction. The conduct of Daniel was of such seriousness so as to pose a significant risk to the safety of staff and other pupils at the school. He emphasized the responsibility which school authorities are under to ensure the safety of students and to protect them from violence.⁹ Thus it is difficult to rationalize the view that a school is able to take action to preserve that safety only if it does not involve the disciplining of a child who has a disability. In his view, a consideration of the actions taken by the school can only be undertaken taking into account the duty of care a school owes to all its pupils. The words ‘discriminated against’ in the Act must be construed against a background of this responsibility.

He then proceeded to consider the ‘comparator’ aspect of s 5, and addressed the argument of the appellant that the comparison should be with a person in the same circumstances who did not suffer from a disability and who did not engage in dangerous conduct. This argument is based on the proposition that because the disturbed behaviour was an aspect of Daniel’s disability to discipline him for that behaviour was to treat him less favourably because of his disability. However, Gleeson CJ said, the fact remains that even though Daniel behaved in that way because of his disability, a person without that disability could also behave dangerously, and that

⁷ *Purvis v State of New South Wales (Department of Education and Training)* [2003] HCA 62 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 11th November 2003, S423/2002) (“*Purvis*”).

⁸ s 4(1)(g) *Disability Discrimination Act (Cth)1992*.

⁹ He referred particularly to Articles 3 and 19 of the *International Convention on the Rights of the Child (UNCROC)*.

child would be punished for his or her behaviour. That therefore was the correct comparison. He said:¹⁰

It is one thing to say, in the case of the pupil, that his violence, being disturbed behaviour resulting from a disorder, is an aspect of his disability. It is another thing to say that the required comparison is with a non-violent pupil. The required comparison is with a pupil without the disability; not a pupil without the violence ... The fallacy in the appellant's argument lies in the contention that, because the pupil's violent behaviour was disturbed, and resulted from a disorder, s 5 always requires, and only permits, a comparison between his treatment and the treatment that would be given to a pupil who is not violent ... There are pupils who have no disorder, and are not disturbed, who behave in a violent manner towards others. They would probably be suspended, and, if the conduct persisted, expelled, in less time than the pupil in this case.

The judge was unequivocal in the priority which the school must place on its responsibility for the safety of others in the school when faced with such a situation. He accepted the view of the principal that his action in suspending and expelling Daniel was motivated by this responsibility, and was based solely on Daniel's violent behaviour, not on his disability.

Gummow, Hayne and Heydon JJ agreed that the appeal should be dismissed.¹¹ They began their joint judgment by stating that the question at issue, whether the Commissioner had made an error in law by holding that the school had discriminated against Daniel because of his disability, under ss 5 and 22, depended substantially upon the construction of those sections. Such construction they said, must be underpinned by the purpose of disability discrimination legislation universally. They pointed out that there is a significant difference between the philosophy behind disability discrimination and that relating to other forms of discrimination, such as on the grounds of race or gender. The latter provisions, as contained in the *Sex Discrimination Act 1984 (Cth)* and the *Racial Discrimination Act 1975 (Cth)*, focus on the requirement of equality of treatment not on treatment because of difference, whereas the focus of disability discrimination legislation is upon difference. They said that in Australia, as in other jurisdictions, the purpose of such legislation is 'to prevent or compensate for disadvantages'.¹² The attention is directed to the reduction or elimination of barriers to participation and¹³ 'It begins from the premise that "in order to treat some persons equally, we must treat them differently"'.¹⁴

However, they said it was important that the Australian *Disability Discrimination Act (Cth) 1992* does not oblige persons to treat disabled persons differently or to take measures to accommodate disabled persons. In this regard, the Australian legislation could be distinguished from the *Disability Discrimination Act 1995 (UK)* or the *Americans with Disabilities Act 1990 (US)*. Also

¹⁰ *Purvis*, at p 5.

¹¹ *Purvis*, at p 55.

¹² They quoted from Directive 2000/78/EC of 27 November 2000, (2000) *Official Journal of the European Communities* L 303/17, Recital (26).

¹³ *Purvis*, at p 48.

¹⁴ The judges quoted from *Regents of University of California v Bakke* 438 US 265, at 407 (1978) per Blackmun J.

in this context, the judges also drew a comparison with the Canadian case of *Eaton v Brant County Board of Education*¹⁵ decided under disability discrimination legislation of the state of Ontario. The Minister of Education of that province was required to ensure that special services, programmes and facilities were available for children with special needs. There the parents Emily Eaton, a 12-year-old child with cerebral palsy, challenged the decision to place her in a special education class. It was the parents' wish that Emily be mainstreamed in a regular classroom. The Supreme Court of Canada held that the decision was not discriminatory and thus it was not in breach of the right guaranteed by s 15(1) of the Canadian Charter of Rights and Freedoms. The emphasis of the judges was that protection of the right not to be discriminated against on the basis of mental or physical disability may require distinctions to be made, based on the particular disability of the person.¹⁶

Gummow, Hayne and Heydon JJ then proceeded to deal with the issues specifically arising in this case based on construction of the Australian legislation.

Firstly, they considered the definition of 'disability' contained in s 4. The particular phrase which is concerned here has two components. It defines disability according to the affect of the disorder on a person's 'thought processes, perception of reality, emotions or judgment' and then its affect on the person's behaviour, that it results in 'disturbed behaviour'. The problem with this definition in this context is that it must be read as an aggregate. In the view of the judges:¹⁷

... to focus on the cause of behaviour, to the exclusion of the resulting behaviour, would confine the operation of the Act by excluding from consideration that attribute of the disabled person (here, disturbed behaviour) which makes that person "different" in the eyes of others.

Curiously the judges seem to be suggesting here that Daniel's disability be defined by taking into account both the affect of his disability on his mental state and the resultant antisocial behaviour. This would lead to the result that excluding him for his behaviour would be discriminatory as excluding him for his disability. However, the remainder of their reasoning does not indicate that view.

They then considered the comparison to be made in terms of s 5(1). The comparison required is between the treatment of the disabled person and a person without a disability 'in circumstances that are the same or are not materially different'. They point out that in this respect also the Act is different from the equivalent sections of disability discrimination legislation in other jurisdictions, such as the UK. In the latter, the comparison looks at the reason (the disability) why the person was treated as they were, and then considers whether they would have been treated in the same way were it not for the disability. The Australian Act, on the other hand, requires a comparison with the treatment of another person in circumstances which are not materially different. This aspect is behind the differing views in relation to the comparator between the Commissioner, Emmett J and the Full Court. The Commissioner held that the

¹⁵ [1997] 1 SCR 241.

¹⁶ [1997] 1 SCR 241, 272 per Sopinka J.

¹⁷ *Purvis*, at p 50.

proper comparison is with another child without the disability who did not behave in a disturbed manner, and the latter courts held that the proper comparison is with another child without Daniel's disability who behaves in a similar dangerous manner. In the view of Gummow, Hayne and Heydon JJ, s 5(2) clearly states that a requirement for different services or different accommodation by the disabled person, does not make the circumstances materially different so as to affect the operation of s 5(1). They agreed with the school authority's argument that s 5(2) does not impose any obligation on the alleged discriminator to provide different accommodation or services, so it does not follow that a failure to do so constitutes less favourable treatment or discrimination. On this point, they were in disagreement with the Commission (HREOC).¹⁸ It was the submission of that body that when the school had failed to provide Daniel with the different accommodation and services which he needed in order to participate in the school environment, and then expelled him, the situation in which that expulsion occurred was materially different to any other child not in need of that special accommodation. The judges said that the comparison was clearly with a person without the disability, and a consideration of how the school would have treated such a person in similar circumstances. The importance of s 5(1) was to prevent different treatment of persons with disabilities in similar circumstances to the treatment of a person without a disability, rather than to require provision be made for equality of treatment (as, for example, in the UK legislation, the *Disability Discrimination Act 1995 (UK)*).

Returning to the line of reasoning pursued earlier by Gleeson CJ, they felt that it would be a 'startling' result if taking action against a disabled person who acted in a dangerous criminal manner would render an authority open to an allegation of discrimination. They said:¹⁹

... the construction we have described allows for a proper intersection between the operation of the act the operation of State and federal criminal law. Daniel's actions constituted assaults. It is neither necessary nor appropriate to decide whether he could or would have been held criminally responsible for them. It is enough to recognise that there will be cases where criminal conduct for which the perpetrator would be held criminally responsible could be seen to have occurred as a result of some disorder, illness or disease. It follows that there can be cases in which the perpetrator could be said to suffer a disability within the meaning of the Act.

In their view the central question to be asked was: how would the alleged discriminator treat or have treated a person without the disability in the same circumstances? On this point they held that the Commissioner was wrong in focusing upon Daniel's disturbed behaviour as being caused by his disability and being the reason for his less favourable treatment. Daniel had a disability within terms of s 4 but the reason he was expelled was because of his behaviour which posed a very serious threat to the safety of others at the school.

Having decided to dismiss the appeal on this point, the judges did not feel it necessary to consider at any length the appellant's further argument that Daniel received less favourable treatment 'because of' his disability. The need for such examination of motive was removed, in

¹⁸ The Second Respondent in this action before the High Court of Australia.

¹⁹ *Purvis*, at p 54.

their view, by the determination that Daniel was treated as he was because of the school principal's concern for the safety of the school community.

Callinan J agreed with the majority. He concentrated his judgment largely upon the responsibility of the state, through the public school system, to provide free and compulsory education for all children.²⁰ The behaviour manifested by Daniel had the capacity to interfere with the provision of that education for the other children at the school. Thus he said:²¹

It is arguable that federal legislation imposing upon a State educational authority the adoption of measures which would appear to require it to tolerate behaviour which is otherwise proscribed as criminal, or is detrimental to the education of the general body of students, or which requires the State to alter the manner in which it ordinarily provides educational services [see ss 5(2) and 22(2) of the Act], may have a capacity to burden or affect a State Government in the performance of its functions [see *Austin v Commonwealth* (2003) 77 ALJR 491 at 497-498 [19]-[20], 500-501 [26] per Gleeson CJ, 527 [166] per Gaudron, Gummow and Hayne JJ; 195 ALR 321 at 328-330,333,369-370], or unduly interfere with them.

Callinan J based his decision to dismiss Daniel's appeal on the simple proposition that it was unlikely that the Commonwealth, in enacting the *Disability Discrimination Act 1992 (Cth)*, would have intended to interfere with or unduly impede the operation of the state's responsibilities in terms of education and in terms of the criminal law. In his view, to allow the appellant's argument would lead to the result of imposing a toleration of criminal behaviour on state authorities.²² This view was in agreement with the sentiment expressed by the other majority judges, particularly by Gleeson CJ.

McHugh and Kirby JJ disagreed with the finding that the school had not discriminated against Daniel. In their view the school could have done more. They began their judgment by stating what they considered to be the essence of the case in the following terms:²³

It concerns the failure of an educational authority to treat him equally with other students by taking steps that would have eliminated or substantially reduced his disruptive behaviour and allowed him to enjoy the same quality education as his fellow students enjoyed.

In their view of the Australian anti-discrimination legislation must be considered in the wider international context as requiring in some cases, positive steps to be taken to ameliorate disadvantage to a disabled person. They considered at length three issues which were raised in the case, all of which related essentially to the construction of the words contained in the legislation. In reality, however, it appears that their decision that the appeal should be allowed was based on the above premise. Specifically, the judges believed that the Commissioner had

²⁰ *Purvis*, at p 62, referring to the *Free Education Act 1906 (NSW) and the Public Instruction Amendment Act 1916 (NSW)*.

²¹ *Purvis*, at p 62-63.

²² *Purvis*, at p 64.

²³ *Purvis* at p 7.

been correct in holding that Daniel had been treated less favourably by the school in that it did not: adjust their policies to suit his needs, provide teachers with the skills to deal with Daniel's behavioural problems, and obtain expert assistance to formulate proposals to overcome Daniel's problems.²⁴ With this belief underpinning their dissenting judgment, the judges concentrated their reasoning on three main points.

The first was that Commissioner was correct in holding that Daniel's behaviour in itself was a 'disability' within the purposes of s 5(1) and s 22 of the *Disability Discrimination Act 1992 (Cth)*. Thus it was correct to say that Daniel was discriminated against because of his disability. They held a strong conviction that Emmett J and the Full Federal Court were wrong to distinguish between the underlying condition and the behavioural manifestation of that condition, and that they were wrong in holding that less favourable treatment because of his behaviour did not amount to the same thing as less favourable treatment because of his disability. They based this belief on the evidence of a registered psychologist²⁵ which showed that Daniel's brain damage meant that he had an inability to act within what could be considered to be a normal range of behaviour. They felt this to be within the types of disability set out in s 4(1) of the Act. They believed that the Full Court's definition of disability was too narrow. Daniel's disability was not confined to his brain damage but included his lack of capacity to behave to a standard which was consistent with the safety of others in the school community. The disability which Daniel faced arose largely because of his inability to interact appropriately in a social environment, and he should not be discriminated against because of this.

This then led the judges to the second point on which they believed Emmett J and the Full Court was in error. This was in relation to the obligation or otherwise on the school to provide accommodation for Daniel's disabilities. Section 5(1) of the Act provides that a person discriminates if they treat a person with a disability less favourably on the grounds of their disability, than they would treat a person without the disability, in circumstances that are the same or not materially different. Section 5 (2) then qualifies s 5(1) by stating that the circumstances are not materially different simply because different accommodation or services may be required by the disabled person. The Commissioner had held that, pursuant to s 5(2), the school had an obligation to provide reasonable accommodation, and accordingly he had awarded damages to Daniel for breach of that obligation. Kirby and Hayne JJ did agree with Emmett J and the Full Court that the Commissioner was wrong in this finding. However, they felt that what s 5(2) does mean is that a person cannot escape a finding of discrimination by showing that those with and without the disability were treated equally, because by not making accommodation for the disabilities the circumstances are materially different.²⁶ Essentially what the judges appear to be saying is that the school, by not taking the measures which the Commissioner had suggested should have been taken to enable Daniel to function effectively and safely within the school environment, had rendered the circumstances in which the behaviour occurred materially different and that it could not then argue that they had not discriminated in circumstances which 'were the same or not materially different'.²⁷ Without appropriate and

²⁴ *Purvis*, at p 8.

²⁵ Evidence was given by Norman Lord, who was a registered psychologist employed by the New South Wales Department of Community Services, see *Purvis* at p 10.

²⁶ *Purvis* at p 26.

²⁷ *Purvis* at p 27.

effective special accommodation having been made, Daniel's circumstances would always be materially different.

The judges felt that even though the Commissioner had been wrong in his finding relating to the responsibility to make accommodation, his conclusion relating to s 5(1) was correct, in that the failure of the school to provide accommodation led ultimately to its decision to suspend and later expel Daniel. If the accommodation had been provided the behaviour would probably not have occurred.

The third and related point on which Kirby and Hayne JJ considered that Emmett J and the Full Court had erred, was in using the wrong comparator as required by s 5(1).²⁸ The Commissioner had said that the comparator was a student of the same year without Daniel's disability and who did not display the same disturbed behaviour as Daniel. Emmett J and the Full Court, on the other hand, had found that the comparator was a person without Daniel's disability but who had behaved similarly badly. Kirby and Hayne JJ believed that the latter comparison would be appropriate in a situation of gender or racial discrimination when the basis for discrimination was not so related to the prohibited ground as with Daniel's case, his brain damage and his disturbed behaviour. They felt that the purpose of the disability discrimination provision would be defeated if the characteristics of the disabled person, the disturbed behaviour in this case, were to be attributed to the comparator. They said:²⁹

In this case, as a result of the brain injury he suffered, Mr Hoggan [Daniel] is unable to control his behaviour as well as a "normal" person of his age. The Commissioner accepted the evidence of Mr Lord [the clinical psychologist] that the nature of Mr Hoggan's disability means that he has no sense of the cause of his behaviour such that it can be described as planned or motivated by a evil intent. This makes Mr Hoggan's circumstances materially different from those of a person who is able to control his or her behaviour, but who is unwilling to do so for whatever reason. In Mr Hoggan's circumstances, the behaviour is a manifestation of his disability — for the "normal" person it is an act of free will.

This reasoning leads the judges back to their previous point which is that the school cannot use the argument that the circumstances are materially different when it could have done something to change them, by putting in place the measures and providing the services which would have enabled Daniel's circumstances to be more or less the same. They were firmly of the view that if the school had made accommodation for Daniel's disabilities he would not have misbehaved to the extent that he did, and the circumstances between him and another student would not have been materially different. They said:³⁰

To obtain access to the benefits of an education and the High School and to overcome his behavioural problems, Mr Hoggan required accommodation. His disabilities required the educational authority to adjust the DWD policy to suit his needs, to provide teachers with

²⁸ *Purvis* at p 29.

²⁹ *Purvis* at p 32.

³⁰ *Purvis* at p 34.

the skills to deal with his special problems and to obtain the assistance of experts to formulate proposals for overcoming those problems. On the findings of the Commissioner, if that accommodation had been made, it is likely that the educational authority would not have denied the benefits to Mr Hoggan or subjected him to the detriments that it did because it is likely that he would have behaved.

The judges then proceeded to discuss the existence of a causal nexus between the alleged discrimination and the disability, in other words, whether it could be said that the discrimination was 'on the grounds' of the disability, in terms of s 22. This involved a discussion of the 'but for' test, which they believed was wrongly applied in this circumstance by the Commissioner. They considered the UK cases such as *James v Eastleigh Borough Council*³¹ and *Nagarajan v London Regional Transport*³² in which the House of Lords adopted the approach that for the purposes of deciding whether the treatment was discriminatory on the basis of race it is relevant to consider the reason but not the motive. However, having embarked upon a lengthy discussion relating to the above and other such cases, the judges then seem to conclude that it is not necessary to show that the discriminator acted with a discriminatory motive. However, in taking this view they overlook the converse argument which supports the state. This argument says that in this case the principal's motive should be taken into account, acting as he did to protect the safety of the other members of the school community, in response to his wider responsibility.

Conclusion

To comprehend the reasoning of all the judges relating to the interpretation of s 5 of the *Disability Discrimination Act 1992 (Cth)* requires mental gymnastics of Olympic proportions. Putting aside the long-winded arguments, essentially this case is about the tension between different philosophical approaches to the education of children with disabilities. It is also a question of degree in considering a school's responsibility to one child, and its duty to ensure the safety and needs of the whole school community.

No-one would argue that children with special needs do not have the same right to education as all other children. Furthermore, it is generally recognized that in order that special needs children be able to participate equally in the educational process it is necessary that special accommodation and facilities be provided by the education authorities. Frequently this will entail considerable expense in terms of money, time and resources but this is clearly accepted as an integral part of providing education. The school concerned here could have argued at the outset that to enrol Daniel would cause them unjustifiable hardship pursuant to s 11 of the *Disability Discrimination Act 1992 (Cth)*.³³ However, the principal chose to enrol him and to put in place all the measures he believed was necessary to enable him to participate as a member of the school community.

³¹ [1990] 2 AC 751.

³² [2000] 1 AC 501.

³³ This may only be argued prior to enrolment of the child.

The problem arose in this case because the school, after some considerable time and effort, considered that it had taken all the steps available to it to facilitate the equal participation of Daniel, but the safety of the school community continued to be seriously threatened. The school principal was placed in the unenviable position of having to choose between his responsibility to provide an education to Daniel, and his responsibility to ensure a safe educational environment for the other children at the school, and a safe working environment for school employees.

The Commissioner of Human Rights and the dissenting judges considered the school could have done more. The majority judges believed that the school had taken all the appropriate measures available to it and that what mattered in the final analysis was that Daniel's behaviour was of such seriousness that it could be considered to be criminal assault, and that the school had no other option open to it than to remove that danger.

What is largely forgotten here is the most important question: what course of action was in the best interests of Daniel? The facts show clearly that Daniel found the high school environment extremely stressful. It may be that what was required here was a recognition that such an environment may not have been in the best interests of Daniel and his education. One can only feel sadness that so much time was spent, by Daniel in a school environment which was unsuitable for him, and by Daniel's foster father, the school and the many others involved, in fighting this battle. Perhaps the time could have been better devoted to investigating other environments which may have been more appropriate for Daniel and in which he could have pursued his education more comfortably and more effectively.