



Article Title

Courtroom English.

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Bio Data

The first submission is by presented by Mr. Thomas Davidson, a lawyer from Hong Kong. Mr. Davidson received his LL.B. from Oxford, and later obtained an Ma in Education from the South Australian University. He has been practicing for 27 years, has appeared before Supreme Courts in Australia, and in the High Court and Old Bailey in London. Currently he is practicing in the field of International Law and Consumer Protection.

Courtroom English.

Consider the following English case recorded in the English law journals. A seaman who was a witness in the case was being cross-examined. He was asked if he knew the plaintiff. The seaman said he did not know what the word 'plaintiff' meant and could not answer the question. The attorney chided his lack of knowledge by saying, "You mean you came into this court and don't know what 'plaintiff' means?" Later in the proceedings, the sailor was asked, "And where were you when the boat lurched?" The sailor replied. "Abaft the binnacle." The questioning attorney, not familiar with nautical terms asked the sailor to rephrase the sentence so he could understand it. The sailor responded, "You mean you came into this court not knowing where abaft the binnacle is?"

The Trade Practices Act. Misrepresentation.

Each country, Australia, New Zealand, United Kingdom, Canada and the United States has its form of trade practices laws.

Key words in the Acts are;

False and misleading representations

Deceptive practices

Definition sections explain the meanings and the ambit they fall under. That the field of EFL publishing and teaching is covered by similar laws is a nice legal question just waiting to be tested. Most Acts relate to certain type of legally constituted businesses, whether they are state or federally constituted. That some of the practices that fall within the world of second language acquisition are, false, misleading and deceptive is a fact. Clearly some promises are made that can not be kept.

But, "every wrong has a right," according to Lord Wilburforce of Great Britain. How wrong he was. Of course at that stage the international EFL market was not in place where some publishers and private schools deceive clients by making representations that are clearly false. This market is more of a modern occurrence, and is rapidly growing as the EFL/TEFL field grows rapidly across Asia, Europe and the Middle East.

One can wonder about the future of this market. Can it go on as it is making unsubstantiated claims and promises forever?

Does not a wrong need a plaintiff? Who will be the first plaintiff? Indeed, who will be the first defendant? Will it be the international publisher selling his books across the globe? That brings in difficult questions of international law and jurisdiction. Will the plaintiffs be a class action? Thirty years ago no one ever thought that cigarette companies would be the losing defendants in a class action. What will the defendants claim? How were they wronged? How long before publishers start providing warnings on their books like cigarette packets.

Here are some futuristic examples.

Warning.

"Reading and learning the contents of this book does not mean you will be able to speak English."

Warning.

"The contents of this book are false and misleading and make unsubstantiated claims that may cause you to be so confused you will never speak English or pass an English test."

Warning.

"This English school teaches English but makes no representations that you will learn anything, nor that you will be able to utter a word of English, nor that you will ever pass an English exam."

Warning.

"By paying education fees to this school we neither guarantee our teachers are competent to teach English, or if they are, we neither guarantee you any success or advantages."

One wonders where the limits of professional indemnity will end? Doctors, prior to an operation are subject to the rules of 'disclosure and advising the patient of risks inherent, no matter how small, in the operation.'

Consider the following hypothetical teacher's disclaimer.

"I, (insert teachers name) the teacher, hereby advise you, (insert student's name) the student, that I the teacher make absolutely no representation that you the student, by paying fees for the specific purpose of English education and or acquisition, will, either now or at any future time whilst attending my classes,

i) be able to speak fluent English

ii) learn any specific number of words

- iii) pass any exam not controlled by this teacher
- iv) be able to write any English words
- v) understand any grammar principles
- vi) have any confidence at English communicating
- vii) be able to read English
- viii) be able to understand spoken English

and further, you the student, if gaining any knowledge whilst my student, accept unreservedly that that knowledge is beyond that which you were advised you would learn in any event, and that you agree unreservedly to hold me harmless from any and all civil actions for your failures to communicate in the subject that I have taught you.

Signed. (student)

Signed. (teacher)

However, having said all this hypothetically and with tongue in cheek, what I do wish to strongly emphasize is that;

- a) teachers are providing a service.
- b) teachers are making representations.
- c) teachers and academics hold themselves out as professionals.
- d) students have a reasonable belief in that they will receive a service of quality.

This, it is submitted, can only lead to one possible conclusion. Namely that the field of English teaching is of far greater importance than is currently recognized, and that the demands upon professionals in the future will be greater. That teacher's conditions, contracts, salaries, must reflect this and governments must move to control private business's purporting to teach second language acquisition. Groups of teachers, (such as in Korea, KOTESL, Japan JALT) will and must have a greater role to play in conjunction with the government in policing and setting standards. Current laws, whilst possibly being satisfactory within the Korean and Japanese system, are far from satisfactory from an international stand point. China still has a very long way in developing a satisfactory legal system of rules pertaining to education and schools.

However, as has been shown now both in the United Kingdom and the United States, Government education departments are open to be sued in the civil law of negligence (amongst other tort remedies) if they do not provide the service that is clearly within their expertise, namely in our case, the teaching of English to students, such that a student can expect to receive a reasonable level of tuition from a professional teacher, and expect that input to manifest itself. Similarly, education authorities must give far more thought to the educational books they publish, or this area will be open to litigation too.

Of course, whilst it is apparent that the English teacher's role will become of far more significance in the new millennium than any one has forecast, it is also apparent that as with other professions, e.g. the medical and legal profession, careful note taking of a student's progress and efforts will become vital. {The English teacher shudders at the thought of more paper work!}

But maybe this futuristic thinking will give the authorities the jolt needed to start taking the profession of second language teaching and English education far more seriously than they have till now. For till now, (with the notable exception of the Greek government,) the Korean government and the Czech Government, to name but two prime examples, have not done enough to give recognition to this vitally important developing field of study, yet the countries abound in private language schools. Like medicine and law, where practitioners choose a field of specialty, so it must be in the new millennium that schools and teaching institutions that are providing a service, must have teachers who are specialists in their field.

Some of the areas of law that will rear themselves within an educational litigation context in the next decade are;

Fraudulent Misrepresentation.

Definition. A statement made which is known to be false, or made without a belief in its truth, or recklessly, not caring whether it is true or false.

Remedies. If the innocent party has suffered loss he may claim damages, based on the tort of deceit

Innocent Misrepresentation.

An innocent misrepresentation is a statement that the maker honestly and reasonably believes to be true. The teacher relies on the university to employ qualified professionals, yet recent examples associated with a boom in on line course has shown a few universities to be employing unqualified educators to conduct these courses. Thus the teacher student himself herself receives negligent advice from his source of instruction.

Negligent Misrepresentation.

A negligent misrepresentation is a false statement made by a person who had no reasonable grounds for believing it to be true. The innocent party has a right to damages for misrepresentation if he has suffered loss. However if the maker of the statement proves that he had reasonable grounds for believing, and in fact did believe, up to the time the contract was made that the facts represented were true, then he has a defense. (see for example; S.2 (1) Misrepresentation Act 1967 (U.K.) The boom in EFL publishing where book covers can promise students results that are clearly unachievable also leads to the possibility that publishers must start to consider their responsibility.

Given the above, then one can foresee situations arising where plaintiffs may claim a wrongful misrepresentation, and the defendant may claim innocent misrepresentation. Those in the business of supplying English second language education will undoubtedly come under closer scrutiny in the near future. Just how far that scrutiny goes (compare the rigid rules in Greece for establishing a private language school, and compare that to the lax system in Korea for establishing a language school) is doubtful, for one can't imagine governments interfering in a field in which transgresses the boundary of government control and free enterprise. However, the signs are appearing that the Korean government is starting to at least consider the situation.

Much of the foregoing is future speculation, but it is clear that in some form or shape, the field of law will enter into the area of EFL/TEFL, for law and lawyers have that pervasive ability to discover where future clients are waiting.