Catherine Gleeson, 'Goods trademarked in a foreign language'

to be assessed by determining the 'ordinary signification' of the word to the target audience of the mark, being the ordinary purchasers, consumers and traders of the goods. It is not to be assessed by determining the likelihood that other traders may legitimately desire to use the word in connection with their goods: at [30], [71]. That is a separate inquiry and does not accommodate any desire by a trader to use words that convey an allusive or metaphorical meaning in respect of the goods: at [73].

The meaning of a foreign word, when translated, is not critical but may be relevant to whether the mark is inherently adapted to distinguish goods. The word is to be viewed by reference to the point of view of the possible impairment of the rights of honest traders, and of the public. What is critical is the meaning conveyed by the foreign word to those concerned with the goods, namely, whether or not it is understood by consumers to be directly referable to the character or quality of the goods (and thereby prima facie not registrable): at [48], [59].

In the present case, the words were not demonstrated to convey a meaning or an idea to any person in Australia concerned with coffee as having a direct reference to the character or the quality of the goods: at [72]–[77]. For that reason, the marks were inherently adapted to distinguish the goods from those of other traders: at [78].

Gageler J dissented. His Honour's reading of the authorities was that the focus of the test is on the extent to which the monopoly granted by registration of a mark would foreclose other traders in the goods from using them without any desire to benefit from the applicant's reputation: at [92].

For Gageler J, the conclusion that a word does not have a direct reference to the character or quality of the goods or services is not itself a finding that the word is inherently adapted to distinguish the one trader's goods from those of others. In relation to a technical or a foreign word, other considerations will arise, including the use by traders of the word in its technical or foreign context: at [98], [110].

His Honour agreed with the Full Federal Court that the words, 'gold' and 'five star', are ordinary English words and denote quality. They are not inherently adapted to distinguish goods and are words that a trader may legitimately seek to use. The Italian equivalents of those words, which the evidence showed were applied to goods often associated with, and imported from, Italy and often sold to Italian speakers, was not inherently adapted to distinguish Cantarella's goods: at [112], [113].

Endnotes

1. The present version of s 41 is differently formulated but to the same effect.
2. *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* (2013) 299 ALR 752 at [117].
3. *Modena Trading Pty Ltd v Cantarella Bros Pty Ltd* (2013) 215 FCR 16 at [80].

Recent decisions from the United Kingdom Supreme Court

Daniel Klineberg reports on two recent decision of the United Kingdom Supreme Court. *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 concerned the scope of the right of conscientious objection to taking part in an abortion pursuant to the *Abortion Act 1967* (UK). *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 concerned whether the police owed a duty of care in relation to its response to an emergency call.

Greater Glasgow Health Board v Doogan [2014] UKSC 68

The *Abortion Act 1967* (UK) (the 'Act') provides a comprehensive code of the circumstances in which it is lawful to bring about the termination of a pregnancy in England, Wales and Scotland. It also regulates the procedure. Thus, other than in an emergency, two doctors must be of the opinion that the grounds for bringing about a termination exist and the termination must take place either in a National Health Service hospital or in a clinic approved for the purpose.

The Act contains a clause protecting the right of conscientious objection to taking part in an abortion. The case concerned the scope of that right.

The Act

Section 1(1) of the Act provides that a person will not be guilty of an offence 'when a pregnancy is terminated by a registered medical practitioner' if two registered medical practitioners are of the opinion, formed in good faith that:

(a) the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family;

(b) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman;

Section 4(1) provides, relevantly, that 'no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection'.

(c) the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The vast majority of abortions performed in the United Kingdom are performed on ground (a) (98 per cent in England and Wales and 98.7 per cent in Scotland in the year to 31 December 2012).[1]

The effect of section 1(3) of the Act is that 'any treatment for the termination of pregnancy' must be carried out in a National Health Service hospital or other place approved for the purposes by the secretary of state for health.

Section 4 of the Act is headed 'Conscientious objection to participation in treatment'. Section 4(1) provides, relevantly, that 'no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection'. That right is expressed to be subject to section 4(2) which provides that section 4(1) does not affect any duty to participate in treatment which is necessary to save the life of, or to prevent 'grave permanent injury' to, the physical or mental health of a pregnant woman.

The issue to be determined was what did the words 'to participate in any treatment authorised by this Act' to which the person has a conscientious objection mean.

Facts

The petitioners were two experienced midwives employed at Southern General Hospital in Glasgow. Each worked in the Labour Ward at the hospital and was a 'Labour Ward co-ordinator'. Both of the petitioners were practising Roman Catholics who believed that termination of pregnancy was a grave offence and that any involvement in the process of termination rendered them accomplices to and culpable for that grave offence. Each informed their employer, the Greater Glasgow Health Board, of their conscientious objection to taking part in the termination of pregnancy when they began work in the Labour Ward in 1988 and 1992 respectively. The petitioners had been able to 'work around' their conscientious objections to playing any part at all in the procedures conducted in the Labour Ward by organising others to undertake tasks which might otherwise have fallen to them.

Medical terminations of pregnancy on ground (a) above at Southern General Hospital occur in the Gynaecology Ward, not the Labour Ward. However, terminations on the remaining grounds and in the emergency situations provided for by section 1(4) of the Act occur in the Labour Ward.

The proceedings came about because the petitioners became concerned that the reorganisation of maternity services at Southern General Hospital would result in an increased number of abortions being carried out on the Labour Ward. They sought assurances from the hospital that their objections would continue to be respected and accommodated. The contentious issue concerned the petitioners' objection to 'delegating, supervising and/or supporting staff to participate in and provide care to patients throughout the termination process'.[2] The hospital took the view that those tasks did not constitute providing one-to-one care to patients and that the petitioners could be required to do that work.

The petitioners brought judicial review proceedings challenging the decision of the hospital. They were unsuccessful at first instance[3] but successful on appeal where the Inner House[4] granted a declaration that the petitioners' entitlement to conscientious objection to participation in treatment for termination of pregnancy pursuant to section 4(1) of the Act:

> includes the entitlement to refuse to delegate, supervise and/or support staff in the provision of care to patients undergoing termination of pregnancy or feticide throughout the termination process save as required of the petitioners in terms of section 4(2) of the said Act.[5]

The Inner Court reasoned that 'the right was given because it was recognised that the process of abortion is felt by many people to be morally repugnant' and that it is 'in keeping with the reason for the exemption that the wide interpretation which we favour should be given to it'.[6]

Arguments before the Supreme Court

No party submitted that the clause 4 was limited to the actual ending of the pregnancy. Lady Hale (with whom Lord Wilson, Lord Reed, Lord Hughes and Lord Hodge agreed) stated that

in a medical termination (as opposed to a surgical termination), it would make no sense to make lawful the ending of the pregnancy without also making lawful the prescribing and administration of the drugs which bring that termination about.[7]

The three arguments before the Supreme Court were as follows. The Royal College of Midwives, which intervened in the case, said that the expression 'treatment authorised by this Act' in clause 4 was limited to the treatment which actually caused the termination, that is, the administration of the drugs which induce premature labour. It did not extend to the care of the pregnant woman during labour, or to the delivery of the foetus or to anything that happens after the delivery.[8] In contrast, the petitioners argued that they had the right to object to any involvement with patients in connection with the termination of pregnancy. This would involve receiving and dealing with the telephone calls booking the patient into the Labour Ward, the admission of the patient, the assigning of a midwife to look after the patient and the supervision of the staff looking after the patient.[9]

The Greater Glasgow Health Board argued for an interpretation between the other two arguments. It submitted that the 'treatment authorised by this Act' began with the administration of the drugs and ended with the delivery of the foetus. Accordingly, clause 4 did not cover making bookings or aftercare for patients who have undergone a termination. Further, 'participating' was limited to direct participation in the treatment involved and did not cover administrative and managerial tasks, such as allocating ward resources, assigning staff or supervisory duties.[10]

Reasoning of the Supreme Court

Lady Hale stated that the issue was 'a pure question of statutory construction'.[11] Section 4 of the Act was required to be read with section 1. Although section 1(1) did not use the term 'treatment' which is used in section 4, the termination of pregnancy was the treatment referred to in section 4. This had been stated by the House of Lords in an earlier case concerning the Act, namely, Royal College of Nursing of the *United Kingdom v Department of Health and Social Security*.[12] Accordingly, what is authorised by the Act was the whole course of medical treatment bringing about the ending of the pregnancy. [13]

Accordingly, Lady Hale agreed with the Greater Glasgow Health Board that the course of treatment to which the petitioners could object was 'the whole course of medical treatment bringing about the termination of the pregnancy' which 'begins with the administration of the drugs designed to induce labour and normally ends with the ending of the pregnancy by delivery of the foetus, placenta and membrane'.[14] Her Ladyship considered that treatment under section 4 also would include the medical and nursing care which was connected with the process of undergoing labour and giving birth such as the monitoring of the progress of labour, the administration of pain relief and the giving of advice and support to the patient.[15]

As to the question of the meaning of 'to participate in' the treatment, Lady Hale said that on any view, it would not cover things done before the course of treatment began, such as making the booking before the first drug was administered. However, a broad meaning might cover things done in connection with that treatment after it had begun such as assigning staff to work with the patient and supervising and supporting such staff. On the other hand a narrow meaning would restrict the participation to 'actually taking part', that is actually performing the tasks involved in the course of treatment.[16]

Lady Hale favoured the narrow meaning. Her Ladyship stated that that meaning was 'more likely to have been in the contemplation of parliament when the Act was passed'. Since the focus of section 4 was on the acts made lawful by section 1, Lady Hale said it was unlikely that, in enacting the conscience clause, parliament had in mind the host of 'ancillary, administrative and managerial tasks' that might be associated with those acts. Lady Hale said that those tasks would extend to hospital administrators who decide how best the service can be organised within the hospital, the caterers who provide the patients with food and the cleaners who provide them with a safe and hygienic environment. In Lady Hale's opinion, participate 'means taking part in a 'hands-on' capacity'.[17]

Her Ladyship proceeded to set out how the above construction applied to an agreed list of 13 tasks which the petitioners' role as Labour Ward co-ordinators required them to undertake.

Conclusion

As noted above, Lady Hale considered the issue as one of statutory construction. An argument raised in an early stage of the case concerned the relevance of the petitioners' rights under article 9 of the European Convention on Human Rights 'to freedom of thought, conscience and religion' including the freedom 'to manifest his religion or belief, in worship, teaching, practice and observance'. Lady Hale noted that the argument that the hospital should have made reasonable adjustments to the requirements of the job in order to cater for their religious beliefs depended, to some extent at least, 'upon issues of

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practicability which are much better suited to resolution in the employment tribunal proceedings ... than in judicial review proceedings such as these'. Accordingly, the Supreme Court did not consider the effect of the European Convention on Human Rights on the construction issue to be decided.

Endnotes

1. [2014] UKSC 68 at [13].
2. [2014] UKSC 68 at [19].
3. Before the Lord Ordinary, Lady Smith.
4. Lord Mackay of Drumadoon, Lady Dorrian and Lord McEwan.
5. [2014] UKSC 68 at [20].
6. [2014] UKSC 68 at [21].
7. [2014] UKSC 68 at [29].
8. [2014] UKSC 68 at [29].
9. [2014] UKSC 68 at [31].
10. [2014] UKSC 68 at [32].
11. [2014] UKSC 68 at [33].
12. [1981] AC 800.
13. [2014] UKSC 68 at [28], [33].
14. [2014] UKSC 68 at [34].
15. [2014] UKSC 68 at [34].
16. [2014] UKSC 68 at [37].
17. [2014] UKSC 68 at [38].

Police duty of care

Daniel Klineberg reports on *Michael v Chief Constable of South Wales Police* [2015] UKSC 2

On 5 August 2009, Joanna Michael died. In the early hours of 5 August 2009, Ms Michael's ex-boyfriend turned up at her house, assaulted her physically and threatened to kill her. Following the assault, at 2.29am Ms Michael called the emergency 999 number and reported the assault and the threat to her life. Although Ms Michael lived in Cardiff which was in the area of South Wales Police, the emergency call was routed to Gwent Police. The call ended with Ms Michael being told that the information would be passed on to the police in Cardiff. The call was graded by Gwent Police as 'G1' meaning it required an immediate response from police officers. There was a police station no more than six minutes' drive away from Ms Michael's house.

The Gwent call handler immediately called South Wales Police and gave an abbreviated version of what Ms Michael had said. However, no mention was made of the threat to kill. South Wales Police graded the priority of the call as 'G2'. This meant that officers assigned to the case should respond to the call within 60 minutes.

At 2.43am Ms Michael again called 999. The call also was received by Gwent Police. Ms Michael was heard to scream and the line went dead. South Wales Police were immediately informed. Police officers arrived at Ms Michael's address at 2.51am. They found that she had been brutally attacked and was dead. Her attacker was soon found and arrested. He subsequently pleaded guilty to murder and was sentenced to life imprisonment.

Data held by South Wales Police recorded a history of abuse or suspected domestic abuse towards Ms Michael by the same man. On four occasions between September 2007 and April 2009, incidents had been reported to the police and entries had been made on a public protection referral for domestic abuse form, but in two instances the risk indications section of the form was not completed.

An investigation by the Independent Police Complaints Commission led to a lengthy report. It contained serious criticisms of both police forces for individual and organisational failures.

Procedural history

The claimants were the parents of Ms Michael and her two children. They sought damages for negligence at common law (as well as under certain legislation). They also sought damages under the *Human Rights Act 1998* for breach of the defendants' duties as public authorities to protect Ms Michael's right to life under article 2 of the European Convention on Human Rights. Originally, there was also a claim for misfeasance in public office. This note will consider only the issues arising out of the negligence claim.

The police applied for the claim to be struck out or for summary judgment to be entered in their favour. They were unsuccessful at first instance but, on appeal, the Court of Appeal held unanimously that there should be summary judgment in favour of the defendants on the negligence claim. The claimants