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# STRIKING THE BALANCE BETWEEN COMMON SENSE AND LEGAL REASONING

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When one is asked to deliver a talk – or, as it is attractively called by Barnard's Inn, – a reading, the first challenge is to come up with a title. And the temptation is to choose something from one's recent experience. And, almost inevitably, one instantly regrets the choice. So it is with tonight's reading, "Striking the Balance between Common Sense and Legal Reasoning". It implies (at least) that there is a divergence between legal reasoning and the application of common sense to perennial problems. As a judge one likes to believe that, if common sense does not infuse legal reasoning, it at least provides a backdrop to how judicial decisions are reached. I would therefore propose an adjustment to the title of this evening's talk – not "striking a balance between common sense and legal reasoning"; more "the enrichment of legal reasoning by remembering common sense".

The judicial function conventionally demands arid legal analysis; the unpicking of precedents; the identification of principle; and the interpretation of statutory provisions. But there can be no doubt that, when the opportunity arises, it should be leavened with a healthy dose of realism or common sense. The need to stand back from a contemplated outcome and to ask oneself the question, "does this accord with reality" arises more often than many might imagine. Of course, that is the excuse that I offer for being the most frequent dissenter in the Supreme Court!

But, even I must acknowledge that there is no monopoly of wisdom on what constitutes common sense and that what to some may appear entirely sensible will to others seem utterly outlandish. So, common sense, as a check or voucher for the correctness of a legal outcome is to be handled with care and circumspection.

The exercise of deciding what the common-sense answer is arises in a stark way in the law of defamation. In particular, it concerns the meaning of the words said to constitute the alleged defamation. In the days when defamation actions were tried by judge and jury, the question of what the alleged libellous or slanderous words meant was determined by the jury, after, of course, appropriate direction from the judge. What happened was that the judge would determine the various meanings which the words were capable of bearing and these would then be put to the jury, who would decide on the single correct meaning to be attributed to the statement. The task for the jury was to decide what the ordinary reasonable reader would understand from the words used. After the 2013 Defamation Act abolished (for the most part) trial by jury for defamation cases, that task passed to the judge.

Central to the exercise is the choice of a single meaning. In one sense this is counter-intuitive, for the variety of meanings that might be given to a controversial statement could be as many as the number of people who read it. But that is incidental to the main purpose of this evening's talk. It is no part of my mission this evening to question that well-established position. What I am concerned about is the exercise that a trial judge must undertake in order to come up with that single meaning. As I have said, this should reflect what the ordinary reasonable reader would understand the words to mean. So, the judge must place himself or herself in the position of the notional ordinary reader. That presents a not inconsiderable challenge, especially when one is dealing with the type of publication involved in the case that will predominate in my talk this evening.

That case was *Stocker v Stocker*, which came before the Supreme Court earlier this year. It was a case which, in some respects, was magnificently mundane but which, in other aspects, was quite remarkable. Mr and Mrs Stocker had a relationship which, towards the end of their marriage, was decidedly disharmonious. First, the mundanity. On 23 March 2003, Mrs Stocker was pinning up her husband's trousers in order to shorten them. He was standing on a chair or a stool. She pricked his leg with a pin. An altercation ensued. Mrs Stocker alleged that her husband placed his hands around her neck and gripped her throat tightly. The police were called. When they arrived some two hours later, they saw red marks on Mrs Stocker's neck.

Next the remarkable. After his divorce from his wife, Mr Stocker began a relationship with a Ms Bligh. Remarkably – at least it is to me – Ms Bligh accepted a Facebook friend request from Mrs Stocker. In a public comment on one of Ms Bligh's status updates, Mrs Stocker said that her husband had tried to strangle her. "Tried to strangle" – what does that mean? No, that is not the relevant question. The correct question is what is the single meaning that an ordinary reasonable reader would take from that statement. Expressed thus, one can immediately see the essential artificiality of the exercise. "Ordinary, reasonable readers" might differ wildly in their estimation of what the words might mean but the single meaning rule (a relic of jury trials) remains deeply embedded in defamation jurisprudence. The trial judge must therefore opt for a single meaning, whether or not he or she feels that any of a number of meanings might occur to an ordinary reader and that each of those could be considered to be reasonable. But, as I have said, it is not part of my task to seek to undermine the single meaning rule; I merely acknowledge its existence and advert mildly to its incongruity and the challenge which it presents to trial judges. I think, as we shall see, that it played no small part in the outcome in the *Stocker* case at first instance.

Mr Stocker issued proceedings against his former wife alleging defamation. He forwent any claim for damages. But success for him in the contested proceedings carried a heavy penalty for Mrs Stocker in terms of costs. So, there was a lot at stake for both when the case went to trial. In advance of the hearing, the judge received representations on what meaning should be attributed to the words, "he tried to strangle me". But, in search of the single meaning of the principal defamation alleged (that Mr Stocker had tried to strangle his wife), he then had resort to the Oxford English Dictionary's definition of the verb 'to strangle'. Looking at dictionary definitions might be regarded as not strictly forbidden in all circumstances. But, as Sharp LJ observed in the Court of Appeal, "the use of dictionaries does not form part of the process of determining the natural and ordinary meaning of words, because what matters is the impression conveyed by the words to the ordinary reader when they are read, and it is this that the judge must identify." But the Court of Appeal considered that the trial judge had merely used the dictionary definitions "as a check and no more". As it happens, we disagreed with that analysis, but it is interesting - and perhaps instructive for future cases – to consider when recourse to dictionary definitions might properly be had in defamation cases. It seems to me that the opportunity to do so, if it exists at all, is extremely limited. Only when such definitions could be said to conduce directly to an understanding of and insight into the meaning that an ordinary reasonable reader would give to the relevant words, is it legitimate to rely on a dictionary definition. And I find it difficult to conceive how consulting a dictionary would bring that about. It is a prosaic but self-evident truth that ordinary readers do not look at a dictionary when deciding on the question of what they have read, actually means.

As I have said, we did not agree that the trial judge had used the dictionary definitions as a check. By "a check" one must assume that the Court of Appeal meant that the judge came to a conclusion as to what meaning the ordinary reasonable reader would have given to the words and then vouched that against the dictionary definition. In fact, neither in his judgment nor in exchanges with counsel, did the judge use the word "check". Moreover, at the start of the trial, albeit after he had received submissions as to meaning, he commended to counsel the two possible definitions that he had found for the word 'strangle' in the Oxford English Dictionary. That did not suggest to us that he had striven first to conclude what the ordinary reasonable reader would have understood the words to mean and then looked at the dictionary definitions as some sort of verifying mechanism. But, even if the judge had used those definitions as a check, it is not easy to see how the process of 'checking' would operate. Given what I consider is the unexceptionable proposition that people reading an article or internet post do not have in mind technical, linguistically precise definitions, it is difficult to see how recourse to the dictionary could fortify a preliminary conclusion as to what the ordinary reasonable reader would make of the statement.

Be all that as it may, however, we concluded that, whatever was the judge's purpose in referring to the dictionary definition, it led him into error in the performance of his central role, namely, deciding what the ordinary reasonable reader would understand the words to mean. One can sympathise with his decision to have resort to whatever materials might be available in order to undertake what I believe can be an intensely difficult task – deciding what single meaning an ordinary reasonable reader would give to the relevant words. But, unfortunately, by having regard to the dictionary definitions, especially on a pre-emptive basis, the judge was, we considered, distracted from the context in which the words were uttered.

Lord Steyn famously said in the case of *Daly* (*R (Daly) v Secretary of State for the Home Department* [2001] 3 All ER 433 and 447) that "in law context is everything". That aphorism has perhaps been somewhat overworked in subsequent cases, but it is unquestionably apt here.

The reader of a Facebook post is not to be compared with a contemplative consumer of books, who ponders over and reflects on the delicious possibilities of every well-turned phrase. As our judgment in the *Stocker* case observed: the advent of the twenty-first century has brought with it a new class of reader: the social media user. And that circumstance exemplifies the difficulty faced by the judge in a defamation case dealing with a tweet, a Facebook posting or the like. It really is not open to the judge to reflect on and to adumbrate various, theoretically possible, meanings and then, as an intellectual or academic exercise, choose the one that commends itself to him or her.

No, she or he must place herself or himself in the position of the normal Facebook reader. And the judge must then decide what the reasonable reaction of such a reader would be. To do that the judge must have some knowledge of – or, at least give consideration to – how a social media user deals with a Facebook post. Now, it will hardly come as a surprise to this audience that not all judges use Facebook or Twitter or Instagram or Snapchat or the various other social media outlets that are available. I certainly don't use any of them. But these are emphatically a significant, if not indeed predominant, means of social intercourse between younger members – and, indeed, not so young members - of contemporary society. It behoves the older members of the judiciary, unfamiliar with this phenomenon, to become acquainted with it, at least.

As it happens, members of the judiciary much younger than the superannuated cohort which I represent, are clearly au fait with the use of social media and we older members of the bench would do well, I believe, to pay close attention to their observations on the topic. In the *Stocker* case we found two examples of astute comment by Warby J and Nicklin J as to the appropriate approach to be taken to social media messages. 42. In *Monroe v Hopkins* [2017] EWHC 433, Warby J at para 35 said this about tweets posted on Twitter:

> "… it would be wrong to engage in elaborate analysis of a 140-character tweet; … an impressionistic approach is much more fitting and appropriate to the medium …"

And in in *Monir v Wood* [2018] EWHC 3525 where Nicklin J said, "Twitter is a fast-moving medium. People will tend to scroll through messages relatively quickly." And then:

> "It is very important when assessing the meaning of a Tweet not to be over-analytical. … Largely, the meaning that an ordinary reasonable reader will receive from a Tweet is likely to be more impressionistic than, say, from a newspaper article which, simply in terms of the amount of time that it takes to read, allows for at least some element of reflection and consideration. The essential message that is being conveyed by a Tweet is likely to be absorbed quickly by the reader."

The trial judge in *Stocker* had identified two possible meanings of the principal allegation made by Mrs Stocker *viz* that her husband had tried to strangle her. He had concentrated on the verb, "to strangle". He found that the dictionary definitions of 'strangle' were: (i) killing someone by choking them to death; or (ii) grasping them by the throat. Mr Stocker had *in fact* grasped his wife by the throat. He had not *tried* to do so. And since Mrs

Stocker was not dead, she must have meant that her husband tried to kill her - no other meaning was conceivable, in the view of the judge.

As a matter of purely logical analysis of the text, this process of deduction is, of course, impeccable. The view could be taken, therefore, that, as a matter of traditional legal reasoning, the judge's approach was beyond reproach. But that is precisely where the dimension of common sense intrudes. Well, on reflection, not so much common sense as recognition of how practical, real-life experience should influence, indeed shape, legal outcomes. So, perhaps, I should amend the title to this talk for a second time. Something along the lines, "the marriage of legal principle with practical experience to produce just outcomes".

Let me try to illustrate how this might be a better title by reference to *Stocker*. If the words, "he tried to strangle me" are isolated from their context; if they are considered separately from the medium in which they have been uttered and if one considers that Mrs Stocker has not in fact been strangled (in the sense that she has not been done to death by her husband's attack) but she has had her throat constricted, then one can see how it might be said that the only feasible meaning of the statement, "my husband tried to strangle me" was that he tried to kill me.

But to approach the question in this way involved, in our view, an impermissible divorce of the bare words from the circumstances in which they were written. In the first place, why would Mrs Stocker not say that her husband had tried to kill her, if that is what she intended to convey? That is not to say, of course, that what the person who makes the alleged defamatory statement intends is conclusive as to its meaning. But, what an ordinary reasonable reader would consider was the meaning of the words is surely not dissociated from what he considers the maker of the statement meant. To bring that point home to the *Stocker* case, if the reader of the Facebook post was mulling over whether the meaning to be given to the statement, "my husband tried to strangle me" was that he had tried to kill her, would he or she not reflect on the fact that she did not say that explicitly.

Of far greater importance, however, is the circumstance that this was a Facebook post. As we said in our judgment in *Stocker*, "The imperative is to ascertain how a typical (i.e. an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on."

Ironically, as we said in *Stocker,* the fact that the ordinary reasonable reader must fasten on a *single* meaning of the words militates strongly against interpreting the words of Mrs Stocker's Facebook post as meaning *only* that Mr Stocker intended to kill her. If one has to choose a single meaning, would it be that he had tried to kill her?

But, the essential theme of this talk is how the role of the judge is expanded beyond the dissection and distillation of legal principle by taking into account the factual circumstances which should contribute to the just result from disputed litigation. Another – and perhaps more appropriate – way of expressing that is to ask how a judge should bring into account relevant facts and to combine those with legal principle, to ensure that they influence the application of legal principle to fashion and secure a rounded, holistic solution.

There can be a tendency to disregard the outcome that a particular approach can bring about, despite compelling factual considerations which might cry out for a different result. It is summed up in the epithet, "hard cases make bad law". It is argued by some that judges should cleave to a pure approach to the law, regardless of the destination which that may lead to. I recognise the fallibility of allowing oneself to be influenced unduly by what might be seen by some as the just outcome to a case. But to forswear consideration of the result that a particular decision will wreak is, to my mind, just as objectionable. Keeping in mind what the inflexible application of principle or precedent will bring provides a sensible check on the continued relevance of such principle or precedent and prompts consideration of whether they require to be modified or disapplied. There will be, of course, occasions where the principle is so well entrenched, or the precedent is so strong that departure from them is impossible, even if that leads to an anomalous - or even unjust – result. But this should not deflect a judge from a clear-sighted recognition and express acknowledgment that this is the case, if for no other reason

than that a firm judicial statement that an incongruous or unfair outcome has ensued, might lead to a correction of the position by Executive or legislative action.

It is right, of course, to admit that timeous intervention by government does not always follow on judicial statements concerning anomalies in the law. But there have been some recent examples, particularly in cases from Northern Ireland. In *R(A and B) v SSH* [2017] UKSC 41 the Supreme Court held by a majority of three to two that the refusal by the Secretary of State for Health to provide abortion services on the NHS for women travelling from Northern Ireland was lawful. Lady Hale and I dissented. But Lord Wilson, who gave the principal majority judgment, in a telling paragraph (para 5) captured the deeply unenviable plight of women from NI who had to travel to England to obtain an abortion and how the fact that many of them experienced great hardship in raising the necessary funds increased their predicament. I adverted to the obvious anomaly that a woman from NI would be treated on the NHS if she suffered an attack of appendicitis while in England but could not receive an abortion. Lady Hale considered that the Secretary of State's policy denied pregnant women from Northern Ireland the same right to choose what is done with their bodies as is enjoyed by all other pregnant citizens of the United Kingdom. This, she considered, was inconsistent with the principle of equal treatment which underlies so much of our law.

Although A and B lost their appeal to the Supreme Court, there was a swift political reaction to their case. It was taken up in particular by Stella Creasey MP and, within an improbably short time, the Secretary of State had reversed his policy. Women who are resident in Northern Ireland are now able to access abortion services free of charge in England and Wales. Moreover, financial support for travel and accommodation is also available to those on the lowest incomes. Now, one cannot be sure that what the justices of the Supreme Court had said was pivotal in achieving that result. But, it is surely not fanciful to suggest that the judgments must have had some part to play in the volte-face of the Secretary of State, given that he had opposed the challenge to his policy at all three levels of legal challenge.

And, if that is so, can it not reasonably be claimed as an example of where common sense (or, perhaps, more aptly, the judicial exposure of the anomalous result that would follow from the application of a technically correct legal approach) led to an eminently sensible outcome?

The second case was *Northern Ireland Human Rights Commission's application* [2018] UKSC 27. The Supreme Court's judgments (apparently the longest on record of not only the Supreme Court but also of the Appellate Committee of the House of Lords) were handed down just over a year ago on 8 June 2018. The case involved a challenge to the retention in the law of Northern Ireland of sections 58 and 59 of the Offences against the Person Act 1861. These severely curtail the circumstances in which abortion may lawfully be performed in that jurisdiction. Five of the seven-member panel were of the clear opinion that the current law in Northern Ireland on abortion is not compatible with article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), insofar as it relates to fatal foetal abnormality. The two justices who felt unable to subscribe to that view, nevertheless, expressly refrained from saying that the law is compatible. Indeed, in his judgment, Lord Reed (with whom Lord Lloyd Jones agreed) said that "it appears from the accounts of individual cases put forward in these proceedings that there is every reason to fear that violations of the Convention rights will occur, if the arrangements in place in Northern Ireland remain as they are."

Notwithstanding this, the appeal was dismissed. This was because a majority held that NIHRC did not have legal standing to bring the challenge to the 1861 Act. This resulted from a meticulous, painstaking analysis of a number of statutory provisions (principally of the Northern Ireland Act 1998) which Lord Mance conducted and which can be found in paras 49-73 of his judgment. Lady Hale and I did not agree that the Commission was not competent to take the proceedings. Not least of the reasons that we thought that NIHRC had standing was that the Equality and Human Rights Commission for England and Wales (EHRC) does have such standing in respect of this jurisdiction. I drew attention to this anomaly in para 197 of my judgment:

> "The practical effects of a finding that NIHRC does not have standing should not be shied away from. These can be considered at a general and at a particular level. The first is to deny the body instituted for the precise purpose of defending and promoting human rights protection in

> Northern Ireland of one of the most obvious means of securing that protection. It introduces a perplexing and unaccountable discrepancy between the powers available to EHRC and NIHRC. Most importantly, as this case vividly illustrates, it makes a significant inroad into the practicality and effectiveness of the article 3 and 8 rights of pregnant girls and women in Northern Ireland. Women suffering from the ill-effects of a pregnancy where there is a fatal foetal abnormality or who are pregnant because of rape or incest do not have the luxury of time within which to seek vindication of their rights. This is pre-eminently a situation where an independent body such as NIHRC should be invested with the power to mount a challenge to legislation which violates, and will violate if it continues in force, the rights of some members of the female population of Northern Ireland."

The government has indicated that it will bring forward legislation to make it unequivocally clear that NIHRC will have standing to take proceedings such as those involved in the appeal. The key statement was made by the Secretary of State for Northern Ireland, Karen Bradley, to the Women and Equalities Committee on 27 February 2019. She said:

> "The frustration with the Supreme Court case was that it was about the legal standing that the Human Rights Commission in Northern Ireland had. We have now discovered there was an error in the explanatory memorandum in 1998 when the Northern Ireland Act was enacted; it was not clear, unlike for other human rights commissions across the United Kingdom, about whether the Northern Ireland Human Rights Commission had legal standing.
> That is something we have committed to rectifying. We will rectify it at the earliest legislative opportunity. It does require primary legislation, unfortunately, but we will ensure that that is appropriately rectified because, like you, I do not want to have to be the case. I would much rather it was a case brought by a human rights commission."

Once again, I like to believe that this is, at least in part, due to the common-sense conclusion that to deny the Commission (the obvious agency to take this type of proceedings) was plainly an example of the law of unintended consequences.

I hope that I am not deluded in my belief that these are examples of cases where rational conclusions as to what the legal outcome should be, rather than that impelled by adherence to a literal approach to statutory interpretation has helped steer the law in a sensible and enlightened direction. Standing back and taking a broad over view of where one's preliminary view might lead is good strategy in law and in life.

And, I believe that it led us to the correct conclusion in *Stocker*. Taking a step outside the legal niceties and intricacies of the case led us unmistakably to the conclusion that, when, possibly on an impulse, Mrs Stocker felt unable to resist sending a Facebook post to her former husband's new partner that he had tried to strangle her, the last thing that she intended to convey and the last thing that she should be taken to mean was that he tried to kill her.