

Proving lack of consent

David Robertson reports on *White v Johnston* [2015] NSWCA 18

This case heard recently by the New South Wales Court of Appeal (Barrett, Emmett and Leeming JJA) raised for consideration the question of which party bears the onus of proving lack of consent in the cause of action of assault and battery. The question was raised in the context of consent to medical treatment.

The background is as follows. The respondent/plaintiff, Ms Johnston, was a patient of the appellant/defendant, Ms White, a dentist. The plaintiff attended the defendant's dental surgery on a number of occasions for two different dental treatments, involving filling and building up teeth that were affected by decay. By an amended statement of claim filed in the District Court of New South Wales, the plaintiff alleged that the two treatments had been performed by the defendant negligently, and also that the treatments constituted an assault because they were 'unnecessary and ineffective and known to be so by [the defendant]' and were carried out solely to derive financial benefit for the defendant.

Therefore, there was no dispute between the parties that the plaintiff had voluntarily attended the defendant's surgery and had consented to the treatments at the time the defendant carried them out. Rather, the issue was whether the plaintiff's consent was vitiated because the plaintiff's purpose in carrying out the treatments was to extract money from the plaintiff rather than for any therapeutic purpose.

The primary judge (Finnane DCJ) entered a verdict in favour of the plaintiff on her case of assault, on the basis that the treatments were 'totally unnecessary' and carried out 'on every occasion for the purpose of extracting money from the Department of Veteran's Affairs [which was paying for the treatment], and not for the purpose of treating the plaintiff'. In his reasons, the primary judge held that it was for the defendant to prove that the plaintiff's consent to the treatments was genuine and valid. The primary judge found that the defendant had failed to discharge this onus. The primary judge awarded the plaintiff general damages and exemplary damages. The primary judge did not determine the plaintiff's alternative claim for negligence. The defendant appealed.

The Court of Appeal unanimously allowed the defendant's appeal. Leeming JA gave the leading judgment. The main issue on appeal was whether the primary judge's finding that the plaintiff's consent was vitiated because the treatments administered by the defendant were 'wholly unnecessary' and not for any therapeutic purposes was a finding open to be made on the evidence (at [76]). This raised an anterior question: which party bore the onus of proving that the plaintiff's consent to the treatments had been vitiated?

The primary judge (Finnane DCJ) entered a verdict in favour of the plaintiff on her case of assault, on the basis that the treatments were 'totally unnecessary'

Leeming JA held that, where a plaintiff sought to establish lack of consent by alleging that the treatments bore no therapeutic purpose, the onus is on the plaintiff to prove lack of consent (at [96]). There were three steps in his Honour's reasoning. First, the plaintiff's allegation was tantamount to an allegation of fraud, since where 'a medical practitioner performs treatment with the undisclosed intention of achieving no therapeutic purpose, then there is a knowing deceit practised upon the patient' (at [82]). Second, since it is an essential element of her cause of action to establish fraud, on ordinary principles the legal burden to do so rests with the plaintiff (at [87]–[89]). Third, given the variety of fraud that may be alleged, the onus of establishing fraud is ordinarily on the party advancing the allegation (at [90]). For these reasons, Leeming JA held that the primary judge's approach which placed the onus on the defendant was erroneous and so allowed the appeal.

Leeming JA also undertook an extensive review of the authorities on the question of which party bears the onus of establishing lack of consent in assault and battery *simpliciter*. Although strictly *obiter*, the review of the authorities is useful given the unsettled state of the law on this point. Leeming JA concluded that since absence of consent was the gist of the cause of action of assault and battery, the plaintiff bears the legal burden of proving absence of consent (at [125]). In so concluding, his Honour relied on an 1848 decision of the Court of Queen's Bench, sitting en banc, *Christopherson v Bare* (1848) 11 QB 473, which held that absence of consent was an essential to a plaintiff's case and was not for a defendant to plead by way of confession and avoidance (at [118]).

However, his Honour's conclusion is contrary to McHugh J's view on the same point in *Marion's Case* (1992) 175 CLR 218 at 310–311 (although McHugh J was in dissent in that case), as well as two first instance decisions that had been cited by McHugh J in his discussion. Although it is left for another case to answer the question conclusively, with respect Leeming JA's analysis is persuasive and likely to be so when the question does arise.

Goods trademarked in a foreign language

Catherine Gleeson reports on *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* [2014] HCA 48

This case concerned whether certain trade marked words in a foreign language were inherently adapted to distinguish goods from those of other persons within the meaning of s 41(3) of the *Trade Marks Act 1995* (Cth).

Cantarella imports and markets coffee beans under a number of marks including Vittoria. It markets some coffee blends by use of the registered marks 'Oro' and 'Cinque Stelle'. Modena imports and distributes coffee beans using the brand name Molinari. Molinari products also used the marks 'Oro' and 'Cinque Stelle'. It was common ground that the two disputed marks were Italian words for 'gold' and 'five star' respectively.

Cantarella brought trademark infringement proceedings against Modena in the Federal Court of Australia. Modena by cross-claim sought for the marks to be cancelled under s 88 of the Act on the basis that s 41 of the Act prevented their registration.

Section 41(2) at the relevant time prevented registration of a mark that is not capable of distinguishing the subject goods from the goods of other persons. Section 41(3) required the Registrar to consider, in applying s 41(2), whether the mark is inherently adapted to distinguish the goods from the goods of other persons.¹

At first instance, Emmett J found for Cantarella, holding that, while Italian speakers would understand the marks as having the English meanings identified above (which were agreed to

be generally accepted signifiers of quality and not of themselves distinctive), that would not be the general understanding of those words amongst English speakers in Australia.² On appeal to the Full Federal Court, Modena was successful, with the court holding that the test for whether a mark was inherently adapted to distinguish goods turned not upon the general understanding of the meaning of the mark but rather upon whether other traders would want to use the mark in connection with the same goods.³

The difference between the positions stated by the primary judge and the full court turned on the import of Kitto J's statement of the test in respect of whether a mark is 'inherently adapted to distinguish' in *Clark Equipment Co v Registrar of Trade Marks* (1964) 111 CLR 511 at 514:

...by reference to the likelihood that other persons, trading in goods of the relevant kind and being actuated only by proper motives — in the exercise, that is to say, of the common right of the public to make honest use of words forming part of the common heritage, for the sake of the signification which they ordinarily possess — will think of the word and want to use it in connexion with similar goods in any manner which would infringe a registered trade mark granted in respect of it.

French CJ, Hayne, Crennan and Kiefel J gave a joint judgment in Cantarella's appeal from the full court. The plurality held that the inherent adaptation of a mark to distinguish goods is

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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;