

READING AT BARNARD'S INN

BY MASTER THE LORD KERR OF TONAGHMORE

Report by Master Clare Noon

STRIKING THE BALANCE BETWEEN COMMON SENSE AND LEGAL REASONING

Lord Kerr's choice of subject matter for his Reading was inspired by the recent decision of the Supreme Court in *Stocker v Stocker* [2019] UKSC 17 and the challenges confronting judges when required to take on the role of a jury in applying a common sense approach to the meaning of words.

He espoused the need sometimes to stand back from a contemplated outcome and ask: Does this accord with reality? and offered that as justification for being 'the most frequent dissenter' in the Supreme Court, while conceding that such an approach had to be handled 'with care and circumspection'.

But to return to *Stocker v Stocker*, in which Mr Stocker was suing his ex-wife for defamation, when she claimed, in a public comment on Facebook, that he had 'tried to strangle' her. What was the single meaning that an ordinary reasonable reader would take from that statement? It was the impression conveyed by the words, not dictionary definitions of the words, that mattered. Ordinary readers did not look at a dictionary when deciding that what they had read actually meant. As Lord Steyn said in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 'in law context is everything'.

The trial judge had to decide what the reasonable reaction of a Facebook reader – a new class of 'social media user' – would be. Not all judges used the various social media outlets available but they were a significant, if not predominant, means of social intercourse between members of contemporary society, and it behoved members of the judiciary, unfamiliar with these phenomena, to become acquainted with them.

The trial judge had concentrated on the verb 'to strangle' and found that the dictionary definitions were (i) killing someone by choking them to death and (ii) grasping someone by the throat. Mr Stocker had *in fact* grasped his wife by the throat – he had not *tried* to do so. Since Mrs Stocker was not dead, so the reasoning went, she must have meant that her husband had *tried* to kill her.



As Lord Kerr observed, as a matter of purely logical analysis, that process of deduction was impeccable. However, that was 'precisely where the dimension of common sense' intruded. Or, rather, of how practical, real life experience should influence legal outcomes. 'Why would Mrs Stocker not say that her husband had tried to kill her, if that is what she had intended to convey?'

But, as Lord Kerr said, of far greater importance was the circumstance that this was a Facebook post. It was not a carefully chosen expression. As the Supreme Court said, the fact that the ordinary reasonable reader had to fasten on a *single* meaning of the words militated strongly against interpreting them as meaning only that her husband had tried to kill her.

Reverting from the particular to the essential theme of the Reading, Lord Kerr asked how a judge should bring into account relevant facts and combine them with legal principle to ensure that they secured a 'rounded, holistic solution'. While recognising the fallibility of being influenced unduly by what might be seen as the just outcome to a case, Lord Kerr felt that forswearing consideration of the result that a particular decision would wreak was just as objectionable. Accepting that there would be occasions where principle was so entrenched or precedent so strong that departure was impossible, even if that led to even an unjust result, Lord Kerr felt that should not deflect a judge from express acknowledgement that an incongruous or

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unfair outcome had ensued, since that might lead to a correction by Executive or legislative action.

As examples of intervention by government following judicial statements concerning anomalies in the law, Lord Kerr cited *R (A and B) v SSH* [2017] UKSC 41, concerning abortion services on the NHS for women travelling from Northern Ireland, and *In re Northern Ireland Human Rights Commission's Application* [2018] UKSC 27, which involved a challenge to Northern Ireland's retention of provisions of the Offences Against the Person Act 1861 that severely curtailed the circumstances in which abortion could be lawfully performed.

In the latter case, while five of the seven-member court were of the opinion that the law was not compatible with article 8 of the European Convention on Human Rights, the appeal failed because the majority held that the Commission did not have legal standing to make the challenge. The government has since indicated that it would bring forward legislation to make it clear that the Commission would have standing to take such proceedings.

As for the *Stocker* case, Lord Kerr believed that standing back and taking a broad over view of where one's preliminary view might lead had led the Supreme Court to the correct conclusion – the last thing Mrs Stocker meant was that her husband had tried to kill her. ■