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Fighting for Rights

The “Gay Cake” case



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The “Gay Cake” case: Why should a case about a cake matter to me?

Important legal precedents can be about all kinds of events.

*Donoghue v Stevenson*¹ - one of the most important of all time - concerned the discovery of a snail in a ginger – beer bottle! Ms Donoghue became ill after drinking from the bottle and sued the manufacturer. The House of Lords’ ruling in 1932 firmly established that we must all take care not to do anything that could reasonably be foreseen to be likely to injure anyone whom we ought reasonably to have in mind. Every student of law will read this case, and perhaps likewise every student of law will also come to learn about a case decided by the Supreme Court in 2018, about a cake: *Lee v. Ashers Bakery Ltd.*²

The facts were very simple. On a Friday in May 2014, Mr Lee walked into Ashers’ shop in Belfast and paid £36.50 to purchase a cake to be iced with a picture of Bert and Ernie from Sesame Street and the message “Support Gay Marriage”. Over the weekend, the owners, who were Evangelical Christians who believed that marriage was the union of one man with one woman, decided not to fulfil the order. They contacted Mr Lee and repaid the money.

Why was this an issue?

To understand that we need to consider two things: first the prohibitions on discrimination, and secondly the context in which these prohibitions become important.

In Northern Ireland, as in the rest of the United Kingdom, the law prohibits less favourable treatment on the grounds of religion and belief, or political opinion, and, also, on the grounds of sexual orientation. Obviously, these prohibitions are very important: they allow people to think freely, to have political ideas, to exercise freedom of religion, and to be able to express their sexuality. These freedoms have been hard won; each has been wholly or partially denied in the past, often with devastating effect. They go to the very heart of democracy.

The problem in this case was that these rights came into conflict. That is why the Equality Commission for Northern Ireland (ECNI) became involved. They took up Mr Lee’s case.

Their involvement also reflected the second point – the context in which Mr Lee and Ashers had this exchange. The role of the ECNI is to try to secure equal treatment in Northern Ireland where the divisions between Republican and Unionist, Catholic and Protestant, Believer and Atheist, Gay or Straight, are so sharp. They knew in their divided community that

1 [1931] UKHL 3; see <http://www.bailii.org/uk/cases/UKHL/1932/100.html>

2 [2018] UKSC 49; see <http://www.bailii.org/uk/cases/UKSC/2018/49.html>

there were two types of discrimination. One was relatively straightforward to litigate, such as discrimination in employment or housing. The other was more difficult to bring to court; this concerned small events where one part of the community refused to engage with the other. Yet, although individually small, the ECNI well knew that cumulatively these acts perpetuate and reinforce division. So, Mr Lee's denial of service seemed like a very good case to bring this sort of issue to court and to make a point.

That is why the ECNI supported Mr Lee in complaining that he had suffered sexual orientation discrimination. He also argued that he had suffered political opinion discrimination since the message on the cake reflected support for the growing campaign to bring Northern Ireland into line with the rest of the UK where same-sex marriage was recognised.

The owners of the Bakery vigorously defended the case, arguing that they had nothing against Mr Lee personally, it was only the message with which they disagreed, and that to impose liability on them would offend against their rights, in the European Convention on Human Rights, to exercise freedom of religion and speech. They said that making them liable would amount to "forced speech" contrary to their religious beliefs.

Four judges in Northern Ireland all agreed with Mr Lee; but when the case came to the Supreme Court five disagreed siding with

the Bakery's owners. The Court held that the owners had not discriminated against Mr Lee personally, but against the message and that was not proscribed by law as being sexual orientation discrimination.

The Court did accept that County Court, the fact-finding court, had decided that the owners acted partly because they disagreed with Mr Lee's political views on the need for change to the state's laws on marriage. However, they held that the European Convention protected them from being forced to be involved in any way in which they thought – rightly or wrongly – that they might be connected with a message with which they disagreed.

This is very significant. The County Court had already held that no one could reasonably conclude that the Bakery's owners supported Gay Marriage just from the cake; yet the Supreme Court held that did not matter, it was enough that the owners thought that this might happen.

Since the case concluded, Gay Marriage has been legalised in Northern Ireland. So, Mr Lee's support has not been in vain. Yet that is not the case's only significance. The Court's support for the owners' conscientious objection to obeying the law will no doubt be used in the future, who knows when, perhaps by XRebellion. It was actually invoked immediately by a company contracted to photograph the Bakery's supporters outside the Supreme Court, which, on hearing what their photographs would be used for and not wishing to be

associated with these extreme Evangelical views, also refused to honour the contract on grounds of conscience³.

So, we can be sure that the last word on this has not yet been spoken. Not least because Mr Lee has taken his case to the European Court of Human Rights arguing that his rights have not been upheld because the Court's judgment in allowing a business suddenly to refuse service for reasons of private conscience, lacks legal certainty and will lead to confusion.

If the debate continues, lawyers will be at the heart of it, slowly working out how such conflicts of rights at the heart of democracy should be resolved.

What could be more important?

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(who acted for Mr Lee)

3 Perfocal's statement can be seen here <https://www.perfocal.com/gay-cake-case-statement-on-equality-diversity-by-perfocal-photography/>

