

KEY CASES IN CHARITY LAW – LOOKING BACK AND LOOKING FORWARD

Debra Morris and Warren Barr¹

This special issue follows on from a Symposium entitled ‘Key Developments in Charity Law’ which was hosted by the Charity Law & Policy Unit, University of Liverpool, in May 2013. There have been a number of collections that have focussed on ‘landmark’ cases in particular broad areas of law² but at the Charity Law & Policy Unit, we thought it would be very beneficial to produce such a collection that focussed entirely on charity law. We therefore gathered together experts in charity law to discuss eight key cases that have shaped charity law over the centuries. Focussing on its history and its impact, each presentation examined the selected case in detail so as to justify (or refute) its designation as a key case in charity law. Presenters either chose to examine the case within its contemporary setting and / or they took a longer view to consider the impact which the case has had over time. When examining the context, they looked at the social, economic or political background to the relevant decision. The invited audience of charity law practitioners and academics with interests in this area then discussed the importance of the selected cases and analysed how each one had earned its place as a key case.

When considering the cases identified by the experts, we grouped them into three broad areas. First, ‘Foundations’, which dealt with fundamental issues. The three cases discussed were: *IRC v Pemsel*³ (Sir John Mummery); *Re Macduff*⁴ (Jonathan

1 Both of Charity Law & Policy Unit, University of Liverpool. Email: Debra.Morris@liverpool.ac.uk. The Symposium was supported by the Charity Law & Policy Unit’s sponsors, the law firm Brabners.

2 See, e.g., of most interest to this area of law, C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart 2012) 529, 541.

3 [1891] AC 531.

4 [1896] 2 Ch 451.

Garton); and *Dingle v Turner*⁵(Peter Luxton). The second grouping, ‘Definitional Boundaries’, considered the difficult boundaries relating to charitable purposes. The cases which were discussion in this section were: *Moggridge v Thackwell*⁶ (John Picton); *Camille & Henry Dreyfus Foundation Inc v IRC*⁷ (Robert Meakin); and *Thornton v Howe*⁸ (Hubert Picarda). Finally, the last selection of cases dealt with broader social issues. Labelled ‘Social Action’, two cases were discussed: *McGovern v Attorney General*⁹ (Alison Dunn) and *R (Weaver) v London and Quadrant Housing Trust*¹⁰ (Ian Alderson).

Spanning four centuries, it is not surprising to learn that the cases reveal the rich diversity of charity law and also some defining shifts in emphasis over the years. For example, the changing view of the pursuit of political purposes by charities is significant. What is more noteworthy, however, is that key themes have changed very little during this time, such as the enduring legacy of the four heads of charity in *Pemsel*. The cases and the discussion of them in the papers that follow suggest that good ideas, like good art, tend to withstand the test of time. Indeed they highlight, pertinently for lawyers and law students, the fine but important distinction between wholesale plagiarism and the adoption of good arguments. That said, there are a number of features of key decisions that merit particular consideration.

One underlying feature of many key charity decisions is the constant search for guiding principles. Lawyers like certainty and a ‘sympathy for settled law’ underpins many of the great judicial speeches in key cases. We like taxonomies, enumerating bright line principles. The classic, of course, is the four heads of *Pemsel*, now re-classified in statute,¹¹ but this is not the only key case to provide clear guidance. For example, *Dingle v Turner* made clear that a personal nexus will not defeat an otherwise charitable trust for the relief of poverty. On a related point, we also note that many of the key cases tend to be definitional, setting out key principles to be followed in the future. *Weaver* presents a modern example of this by making it clear that charities can be considered public bodies for certain purposes related to their other functions (in this case, social housing).

5 [1972] AC 601.

6 [1778] Eng R 40.

7 (1955) 36 TC 126.

8 (1862) 31 Beav 14.

9 [1982] Ch 321.

10 [2009] EWCA Civ 587.

11 Charities Act 2011, s 3.

It goes without saying that charities are known for innovation and their desire to push the boundaries of the areas in which they work. It is ironic therefore that there is evidence of innate conservatism in judicial decision making, with judges tending to want to maintain a sense of status quo in the development of the law. As a result, some key cases may be unwelcome in their unadventurous contribution to the law. *McGovern*, which led in this country¹² to a shutting down of judicial debate in a definitional area of law - what amounts to a political purpose - is a good example.

We were also reminded that often, once a case is designated a key case, its influence can long outlive either its contemporary setting or its status as a guiding principle of law. For example, the principles of *Pemsel*, which have been overtaken by legislative change, still merit close scrutiny in any discussion of charitable purposes.

Another phenomenon that struck us when reading the papers was the overriding importance that the role of context has had in shaping judgments in key cases. Defining features can include the pedigree and experience of the decision makers and the counsel before them. The background to the case, including why it has come to court, can also be a significant factor. With many charity cases, the advantageous tax treatment given to charities is either in the foreground, as in *Dingle v Turner* or, more often, in the background. Decisions in many key cases appear initially to be very much based on their facts and context. Over the years, it is common for these decisions to become hard and fast principles which are then difficult to move away from, even when courts are faced with entirely different sets of facts. It is hard to conceive, for example, of another Joanna Southcott coming before the courts, but the decision in *Thornton v Howe* is still regarded as establishing relevant principles of law, to be referred to in a modern setting. We were also struck by the fact that, on occasion, concessions in cases on what appear to be contentious issues can have a serious effect upon the outcome. This was clearly the case in *Weaver*, for example, where a charitable housing trust conceded that it was a hybrid authority and did not seek to argue that it was a purely private body.

We were reminded of the central role that textbooks can have in determining key cases and in constantly re-publishing defining passages. However, it was made clear (and law students should take note!) that, in order to appreciate the full impact of a case, it must be read in its entirety, together with the decisions of any lower courts, so as to enhance our understanding of the significance of the final decision. Similarly, it is useful to re-visit contemporary comments on such pivotal cases, not just the oft-cited modern equivalents.

¹² Compare now the landmark decision of the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539.

Looking forward, what will the next 300 years bring in term of key cases in charity law? It is trite to say that we need cases to come before the courts in order to identify *key* cases. The major problem facing the charity sector, of course is that litigation costs money, and this acts as a significant deterrent to charities when it comes to resolving disputes. For this reason alone, fewer cases are coming to full trial. In addition, the enhanced role of the Charity Commission as the sector regulator means that it now plays a key part in case management – determining many issues before they get to court and thereby avoiding the possibility of creating a key case for the future. Similarly, the First-tier Tribunal (Charity) is playing a role in ensuring that fewer cases come before the higher courts, providing less of an opportunity to look at broader definitional issues of law. The lack of new key cases coming through the mainstream court system may mean that the ‘key case’ status of the cases discussed in the following papers is not only retained in the future but is further enhanced.

In preparing this special issue we would like to thank Karen Atkinson for her editorial assistance along with the publishers and, finally the law firm Brabners for supporting this fascinating undertaking.

We hope that readers enjoy reading the following papers and re-visiting these key cases in charity law.