

THE KNOWLEDGE

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SERIOUS AND GENERAL CRIME EDITION

Domestic Abuse Prosecutions: Is exclusion of the complainant fair to the defendant?

Maia Cohen-Lask

Friend or foe: the cat out of the bag

Edward Grange

The (electric) lamp... Is it time for juries to be replaced by AI?

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WELCOME



**Danielle
Reece-Greenhalgh**
Partner & Guest Editor

Welcome to this Serious and General Crime Edition of The Knowledge

It is my absolute pleasure, as guest editor, to bring you this special SERIOUS AND GENERAL CRIME EDITION of The Knowledge in which we explore themes relating to Corker Binning's expertise in serious and general crime.

All of our lawyers are experienced in handling cases across the spectrum of non-financial crime; from motoring offences to murder, drugs to domestic abuse, and everything in between. We advise and assist individuals from arrest to trial, through some of the most difficult times of their lives, navigating complex criminal investigations and prosecutions with sensitivity, skill and pragmatism.

In this crime-focused edition, Maia Cohen-Lask considers the implications of the Joey Barton case, and the increasing prevalence of domestic abuse prosecutions being pursued without complainant witnesses attending court for their evidence to be tested. Edward Grange examines *R v Marsden* and the ability of a co-accused to seek an adverse inference under s.34 Criminal Justice and Public Order Act 1994. We also take a look at the role of technology in shaping the criminal landscape. Associate Edward Hodgson considers a world in which juries could be replaced by AI, whilst Cally Harrington looks at deepfake media and whether current legislation is sufficient to handle this ever-growing problem. Claire Cross and Eve Campbell then take an in-depth look at the obligations imposed by the Online Safety Act 2023 from the perspective of service providers. Finally, Jessica Parker provides her expertise on the execution of search warrants and seizure of traditionally protected journalistic material.

We welcome the debut contributions of some new members to the Corker Binning team in Edward Hodgson, Eve Campbell and Cally Harrington who all joined the firm in the last year. We are delighted to present this very special criminal edition to our readers. Enjoy!

Domestic Abuse Prosecutions: Is exclusion of the complainant fair to the defendant?

Maia Cohen-Lask
Partner

Domestic abuse cases have long presented prosecutors with a particular challenge, namely, the much higher prevalence of unwilling complainants i.e. complainants who are not prepared to come to court to give evidence against their alleged abuser. Prosecutors have a range of powers at their disposal in such cases, including the ability to summons a witness (i.e. force them to attend court), and to apply to treat them as “hostile” (i.e. to effectively cross-examine them if they do not appear to be cooperative on the witness stand). However, the advent of police officers wearing body-worn video cameras which record their attendance at police call-outs has given prosecutors much greater access to an alternative possible course of action: not calling the complainant to give evidence at all.

The extent to which it is appropriate for prosecutors to simply exclude a reluctant complainant from proceedings and instead rely on their recorded initial comments to the police, was the topic of a recent appeal in the case of former footballer Joey Barton¹. In that case, Mr Barton’s wife called 999, and stated that her husband had hit her. Police attended and she provided initial accounts at the scene, recorded on police body-worn video, which also recorded that she had a lump on her head. However, after that initial account, she gave

no support to the investigation or prosecution and refused to provide a witness statement. Instead, she wrote a number of letters to the police and CPS in which she said that she had been drinking heavily on the night police attended, did not believe what she told them was accurate, and that she believed that her injury had not in fact been caused by Mr Barton at all.

The prosecution proceeded to trial, with the sole evidence being the 999 call and video footage. The prosecution took no steps to try and get Mrs Barton to court as a witness. The defence complaint was effectively that the prosecution had taken a tactical course. By relying on the camera footage, the usual evidential foundation for a criminal prosecution, where a complainant needs to give their evidence and be cross-examined in court about the alleged crime, thus allowing the tribunal of fact to assess their credibility, had been side-stepped. Whilst the first instance judge agreed with the defence, the High Court did not, finding: “In short, it was not an abuse of process for the prosecution not to call Mrs Barton. This decision was not an improper tactic or manipulation of the court’s process but a legitimate exercise of the prosecution’s well-established discretion to choose which witnesses it calls.”

Mrs Barton was alive and well and available to attend court to give evidence about what in fact happened that evening. So why was it proper for the prosecution to decline to call her as a witness? The answer lies in this fundamental principle as to prosecution duties in relation to witnesses²: “the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, the prosecutor regards a witness’s evidence as unworthy of belief.” In this case, the prosecution said, Mrs Barton’s evidence was incapable of belief. Thus, they were not obliged to call her.

“Domestic abuse cases have long presented prosecutors with a particular challenge, namely, the much higher prevalence of unwilling complainants.”

¹ DPP v Barton [2024] EWHC 1350 (Admin)

² R v Russell-Jones [1995] 1 Cr. App. R. 538

"It appears to reflect an equation of the fact of retraction with being incapable of belief in the context of a domestic abuse allegation."

What, however, does "incapable of belief" really mean in the context of a domestic abuse allegation? In domestic abuse cases, the answer to this question often appears to amount to little more than the fact that the complainant has retracted and is no longer willing to give evidence in support of what was said when police were first called. Inasmuch as it is possible to discern the position in Barton, this appears to be the case i.e. Mrs Barton was going to give evidence in accordance with her retraction letters, which were not consistent with the account on the body-worn video footage and thus was considered incapable of belief. The judgment deals with this factual finding briefly, simply noting that the prosecution has a wide discretion in deciding whether or not a witness is capable of belief.

The prosecution should, of course, exercise its discretion over which witnesses to call in the interests of justice. It could be argued that the interests of justice might require that a witness should only be treated as incapable of belief if there is some objective reason, beyond the change from their initial account, to consider that change unreliable. For example, if a complainant who presented with injuries on police attendance put forward a retraction that amounted to "nothing happened" with no explanation for the injuries. But if, as appears to be the position in the Barton case, the complainant puts forward both that she was very inebriated at the time police attended (although the judgment does not reveal if this was obvious from the footage itself) and unlikely to have given a reliable account and has an alternative explanation for injuries, it is not clear why it is in the interests of justice for the prosecution to conclude that she is incapable of belief. Rather, it appears to reflect an equation of the fact of retraction with being incapable of belief in the context of a domestic abuse allegation.

The court itself recognised that the fact that the case was a domestic abuse allegation was a relevant feature in the decision-making (albeit on the related but separate question of the admissibility of the 999 call / video footage as hearsay in the first place): "As is now well understood, it is not uncommon in [domestic abuse] cases for there to be sufficient evidence to prosecute the alleged perpetrator of the abuse even where the complainant does not to [sic] support the prosecution. In our opinion, in such cases, the public interest may often demand the use of res gestae evidence, particularly recorded evidence, regardless of the cooperation of the complainant." This decision therefore exemplifies the general trend towards treating domestic abuse cases differently from other criminal allegations. Certainly, it is hard to see that if this were, for example, a public order allegation and a complainant retracted, the prosecution would have formed the same conclusion and taken the same course.

Where this is all being determined by prosecutorial discretion rather than, for example, legislation confirming that a different evidential approach should be taken in domestic abuse cases and in an absence of oversight of these decisions by the court, it is not clear that in every case an approach is being taken which is fair to either the defendant or the complainant. Meanwhile, for those who call the police after a domestic incident, the clear message from the courts is that anything said in those first minutes will be used to pursue criminal prosecution, regardless of what is said thereafter.

"For those who call the police after a domestic incident, the clear message from the courts is that anything said in those first minutes will be used to pursue criminal prosecution, regardless of what is said thereafter."

Friend or foe: the cat out of the bag

Edward Grange
Partner

Those familiar with criminal trials will be all too aware of the dangers of a co-defendant instigating a 'cut-throat defence', where that co-defendant gives evidence on his or her own behalf in order to strengthen the prosecution case against a fellow accused. But as the old adage goes, 'there is more than one way to skin a cat' – and this is equally true for defendants seeking to strengthen the case against others and in turn move the spotlight away from themselves.

In *R v Marsden*¹, in what appears to be a legal first, Mr Carter (who was acquitted at trial) sought to invoke a s.34² adverse inference from a co-accused Mr Marsden's failure to mention, when questioned during interview, certain facts upon which he subsequently relied at trial. The novel aspect of this was that the Crown – responsible for prosecuting the case – had not sought such an inference against Mr Marsden (who was subsequently convicted). This raised the point of law on appeal as to whether s.34 can be relied upon by a co-accused in circumstances where the prosecution does not seek to rely upon it.

S.34, where relevant, states:

(1) *Where, in any proceedings against a person for an offence, evidence is given that the accused—*

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed.

(2)

(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

Disappointingly for practitioners, the Court of Appeal deferred determination of this interesting question until another case comes along permitting detailed submissions on the point. For now, s.34 will be available to co-defendants to invoke against a co-defendant. But unlike where the Crown seeks a s.34 inference, the Court of Appeal in *Marsden* held that in any direction to the jury, it will be essential to identify not only:

- (i) the precise matters which the defendant failed to mention but has relied on in his defence;
- (ii) the circumstances existing at the time of the questioning which are capable of leading the jury to the conclusion that the defendant could reasonably have been expected to mention those matters;
- (iii) the inference(s) which it is suggested might properly be drawn from the failure to mention the facts concerned; and
- (iv) any explanation put forward by the defendant as to why he did not mention those matters,

but also the questions asked by the police which the defendant could reasonably have been expected to answer by mentioning the relevant fact(s).

This emphasised requirement was contrary to the dicta in *R v Harewood & Rehman*³, where the Court

"As the old adage goes 'there is more than one way to skin a cat' – and this is equally true for defendants seeking to strengthen the case against others and in turn move the spotlight away from themselves."

¹ [2023] EWCA Crim 1610

² Criminal Justice and Public Order Act 1994

³ [2021] EWCA Crim 1936

"In allowing the appeal in Marsden, the Court held that the jury should not be permitted to draw an adverse inference without any clear direction from the judge as to the evidential basis upon which they might properly do so."

of Appeal considered whether a trial judge was right to give a jury a s.34 direction when prosecution counsel had not identified in the course of cross-examination, the particular questions that had been asked but unanswered, which would have provided the opportunity to mention the facts relied upon in evidence at trial. In making a number of observations about the operation of s.34, the Court of Appeal in Harewood & Rehman noted that the language of s.34 does not impose a requirement that the unmentioned fact must be one about which the accused has specifically been asked a question. Popplewell LJ observed that *"there is no requirement that the unmentioned fact must be one about which the accused has specifically been asked a question"*⁴.

If the facts that an accused fails to mention in interview are central to his defence at trial, it is more likely that the jury may conclude that he could reasonably have been expected to have mentioned those facts when questioned, regardless of whether he was asked specifically about the facts in issue when questioned. Conversely, the less central the matter to a defendant's defence, the less likely a jury could conclude that the defendant should have mentioned the said fact unless it was shown that he had been directly asked about it when questioned under caution.

In allowing the appeal in *Marsden*, the Court held that the jury should not be permitted to draw an adverse inference without any clear direction from the judge as to the evidential basis upon which they might properly do so. It was therefore necessary for the direction to the jury to have identified the questions asked by the police which Marsden could reasonably have been expected to answer at the time, so that they could establish whether the facts that were not mentioned when questioned were indeed central to the defence advanced at trial. In other words, that they were not just facts not mentioned at interview that were later

raised at trial but rather were matters which he relied upon in his defence.

The trial judge, according to the Court of Appeal, may not have been assisted in this task by counsel for Mr Carter who had not identified with any specificity the various points that Mr Marsden had failed to mention when questioned, submitting *"[he] did various other things [other than the wearing of gloves], forgive me, I'm just sort of spouting them off the top of my head"*. A s.34 direction was therefore inappropriately given. Despite the Court of Appeal's recognition that there was strong evidence of guilt, the fact that allegations were made not only by the prosecution but also by the co-accused meant that Mr Marsden was unfairly disadvantaged and the (acquitted) co-accused was unfairly advantaged. The conviction was unsafe and quashed.

Until the Court of Appeal gets an opportunity to consider this issue again, as well as (or in the alternative to) instigating a cut-throat defence, a defendant seeking to distance himself from a co-defendant may seek an adverse inference from his failure to mention, when questioned, a fact relied upon at trial even if the Crown does not seek such a direction. However, unlike the situation where the Crown seeks to invoke s.34, that defendant will have to identify with specificity according to the Court of Appeal's guidance in *Marsden*.

The advantages of doing so, and doing so properly, may strengthen the case against a co-defendant whilst also weakening the case against the defendant seeking the adverse inference.

Admittedly, given the absence of case law addressing the situation whereby a defendant seeks an adverse inference direction relating to a co-defendant where the Crown does not do so, practitioners may be waiting a while for this novel point of law to be authoritatively determined.

⁴ At para 39

"Now that the 'cat is out of the bag' practitioners may see more frequent use of s.34 adverse inferences against their clients from co-defendants, as they turn into quasi-prosecutors seeking to strengthen the case against their co-defendant(s)."

However, now that the 'cat is out of the bag' practitioners may see more frequent use of s.34 adverse inferences against their clients from co-defendants, as they turn into quasi-prosecutors seeking to strengthen the case against their co-defendant(s). This will require solicitors to carefully consider, when representing clients at interview in multi-handed investigations, how a failure to mention a fact when questioned could be utilised at trial not only by the Crown but also a co-suspect. When backed into a corner, the seemingly friendly cat can quickly become the unexpected foe who seeks to save its own skin.

"A failure to mention a fact when questioned could be utilised at trial not only by the Crown but also a co-suspect. "

The (electric) lamp... Is it time for juries to be replaced by AI?

Edward Hodgson

Associate

Juries decide a fraction of all criminal cases. Despite their rarity, almost any proposal to restrict the right to trial by jury has been met with impassioned public and professional opposition.

The jury is often seen as one of the most important facets of our criminal justice system. Sir William Blackstone described it as “the palladium” or “grand bulwark” of our liberties,¹ whilst Sir Patrick Devlin famously spoke of it as a “little parliament”.²

In the near thousand years since its introduction, and despite its veneration as an institution, the jury system is vulnerable to attack, with some suggesting that we should do away with the system entirely and replace it with judge-only trials in the Crown Court.³ Despite this, and in light of the fervent support from legal practitioners and most of the general public,⁴ the jury system has remained functionally similar to that which was likely introduced with the Norman invasion of 1066. That said, technology has come on somewhat since the Battle of Hastings and, as the criminal justice system creaks and organisations rapidly rely upon generative Artificial Intelligence (“AI”) tools, is there an argument to suggest that technology has improved to such an extent that criminal defendants could be tried by machines?

What are the problems with juries and how could AI help?

The backlog

With over 65,000 cases waiting to be heard, Crown Courts in England and Wales are, and have been

for some time, struggling to deal with an enormous backlog.⁵ Defendants and victims of crime are having to wait months or even years for their cases to reach court. The average hearing length of trial cases disposed of in the Crown Court by not guilty plea in Q3 2023 was 19.4 hours.⁶ The length of trials can be drawn out further by the fact that sometimes jurors are late to court or fail to turn up. Occasionally, jurors need to take days off from sitting for planned appointments that cannot be changed. Usually, they can only hear evidence and deliberate during court sitting hours.

Philosopher Nick Bostrom wrote that, “biological neurons operate at a peak speed of about 200 Hz, a full seven orders of magnitude slower than a modern microprocessor (~2 GHz).”⁷ An AI jury, then, could reach a decision around seven times faster than a human one, and drastically reduce the average hearing length as set out above. An AI jury, which would never be late, nor need to take days off, and could process information for 24 hours a day with the need for little more than a reliable power supply and internet connection, could be the solution to the Crown Courts’ backlog.

Consistency of verdicts and hung juries

Channel 4’s recent TV show, “The Jury: Murder Trial”, took place in a reconstructed Crown Court and was billed as a “landmark experiment” in which a “real-life murder trial” would be “restaged in front of two juries of ordinary people”.⁸ The question Channel 4 asked was “will they both reach the same verdict?”

¹ Sir William Blackstone, *Commentaries on the Laws of England* (first published 1769, Clarendon Press) 342-343

² Sir Patrick Devlin, *Trial by Jury* (first published 1956, Stevens & Sons Limited), 164

³ Richard Henriques, “Judge-only trials would let courts get back to work” *The Times*, (London, 1 May 2020).

⁴ “Public opposes curb on jury trials, survey says” *Law Society Gazette*, (London, 1 February 2002).

⁵ HC Deb (20 February 2024), vol. 745, col 584. Available at: <https://hansard.parliament.uk/Commons/2024-02-20/debates/D620E3F4-58AD-40D4-B825-728E44CC1B28/details>.

⁶ Ministry of Justice “Criminal court statistics quarterly: July to September 2023”. Available at: https://assets.publishing.service.gov.uk/media/6578344e095987000d95de6d/ccsq_accessible_publication_tables_2023Q3.xlsx. Note that this figure includes preliminary hearings, etc.

⁷ Nick Bostrom, *Superintelligence: Paths, dangers, strategies* (first published 2014, Oxford University Press).

⁸ <https://www.channel4.com/programmes/the-jury-murder-trial>



The answer was that they did not. One jury returned a verdict of murder, the other manslaughter, despite hearing exactly the same evidence.

Obviously, Channel 4's "experiment" was created for the purposes of entertainment, which should be borne in mind when weighing up its probative value. That said, the programme's conclusion does raise an issue with our method of trying those accused of crime: the fact that a jury can reach one verdict and another jury (considering exactly the same evidence), could reach an entirely different one. We see this problem in practice when a jury fails (following a majority direction), to agree on a verdict. Some members of the jury feel able to convict, and others do not, based on entirely the same evidence. Hung juries represent a societal and financial cost to the court system and the affected parties. A complainant may feel that justice has been denied. A defendant may have languished on remand for a considerable time awaiting their trial. They must now wait for the Crown to decide whether to seek a retrial and, if it does, the emotional turmoil of court proceedings begins afresh.

Jurors may reach inconsistent verdicts because humans make decisions by filtering objective facts and evidence through their personal values and beliefs, regardless of judicial direction. AI, as a non-sentient sequence of code – albeit a complex one – has no (known) values or beliefs. It relies upon a set of rules to be followed when reaching a conclusion as to a set of facts (i.e. its algorithm). It follows that were the same trial to be played out in front of an AI jury over and over again, the AI would always follow the same set of rules and thereby reach entirely the same verdict. In this way, AI juries (using the same algorithm) could contribute to more objective and consistent outcomes.

Unreasoned verdicts and witness evaluation

English juries do not provide reasons for their

verdicts. This longstanding principle of our legal system means that those wishing to appeal against a conviction (on the basis that a jury's decision may have been incorrect) are limited to focusing their grounds of appeal upon the fairness and adequacy of the trial judge's directions to the jury, rather than arguing that their conviction is unsafe due to any deficiency in the quality of jurors' reasoning. Indeed, a jury's reasoning (unlike in the US), is never revealed. Cheryl Thomas, in her 2010 study, "Are Juries Fair?", found that 51% of jurors in a case simulation felt that the judicial directions on the law were "difficult to understand" and, when jurors' actual comprehension was examined, only 31% of them "actually understood the directions fully in the legal terms used by the judge."⁹

The practical effect of this point was illustrated in *R v Jogee* [2016] UKSC 8, in which the Supreme Court ruled that the courts had been wrongly applying the law of "joint enterprise" for three decades. The Court of Appeal subsequently ruled that it would only quash convictions on the basis of joint enterprise where to do otherwise would amount to a "substantial injustice" because "the change in the law would, in fact, have made a difference".¹⁰ In doing so, the Court would examine "the matters before the jury and the jury's verdict (including the findings of fact which would have been essential to reach such a verdict)".¹¹ In most of the relevant cases, judges' directions outlined several "routes" by which a jury could convict a defendant, and only one of these was found to be wrong in *Jogee*. Given that the juries in these cases had not given the reasons behind their decisions to convict, it is impossible to ascertain whether a particular jury reached its decision based on the old (and incorrectly applied) joint enterprise law. This precludes any appeal (or, at least, makes such an appeal very difficult) on the basis that the correct legal direction "would, in fact, have made a

⁹ Cheryl Thomas, *Are Juries Fair?* Ministry of Justice Research Series 01/10 (2010) <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>

¹⁰ *R v Johnson and Others* [2016] EWCA Crim 1613 at para 21.

¹¹ *ibid* [22]

"AI could establish the reliability (or lack thereof) of a witness giving live evidence with a far higher success rate than that offered by human jurors."

difference".

What a witness says in oral evidence is often a decisive factor in the outcome of a trial. What is also crucial, albeit less obviously, is how a witness says what they say. Jurors evaluate non-verbal cues, such as body language, in reaching a conclusion as to the reliability of a witness's evidence. Humans are remarkably poor at spotting a liar. In one study, people were only able to detect accurately whether someone was lying 54% of the time (i.e. just over the level of chance).¹²

Perhaps AI could be used to detect specific behavioural variables such as near imperceptible facial micro-expressions, eye movements, and the time taken to respond to a question associated with lying, or analyse the stress patterns in someone's voice when undergoing cross-examination. In this way, AI could establish the reliability (or lack thereof) of a witness giving live evidence with a far higher success rate than that offered by human jurors.

An AI jury could, at the conclusion of proceedings, be programmed to prepare a comprehensive "route to verdict". This could set out the software's reasoned decisions on all documentary and live evidence presented in a case, thus making an appeal in circumstances such as those similar to the *Jogee* "wrong turn" much easier.

Humans are flawed, but so are computers

Jury tampering

Human juries are vulnerable to tampering, as most famously exemplified by the use of "Diplock Courts" in Northern Ireland at the height of the Troubles. Northern Ireland still has a provision for non-jury trials in exceptional cases.¹³ Similarly, Part 7 of the Criminal Justice Act 2003 ("CJA 2003") provides for judge-only trials in cases where there is a danger of jury tampering or where jury tampering has taken place.

AI, despite being impervious to physical threats from those who might wish to sway the outcome of a trial, will always be vulnerable to hackers whatever the security measures built into the software. It may even be simpler to sway the decision of an AI jury than a human one. Tampering with a human jury would necessarily require the application of force, or threats. Tampering with an AI jury, however, would require only the services of a hacker with a laptop whose cyber-attack may even go unnoticed, if sophisticated enough. Therefore, replacing human juries with AI would not eliminate the risk of jury tampering, and may even make it more prevalent.

Bias

Sajid Qureshi was convicted in 2000 of arson and sentenced to four years' imprisonment. Subsequent to his trial, a woman claiming to have served on the jury wrote to the court to state that racist remarks were made throughout his trial. She claimed that some jurors seemed to have reached a decision as to his guilt before the conclusion of proceedings.¹⁴

A jury, as a randomly selected representative cross-section of society, inevitably suffers from the biases and prejudices that afflict the wider society that it represents. Humans make decisions by filtering facts through their interpretation of events, and people's beliefs colour this interpretation. Some of these beliefs may be, whether consciously or unconsciously, prejudicial, which leads to biased decision-making. These prejudices can, as they did in Mr Qureshi's case, result in jurors placing less weight on the evidence presented to them, and reaching a verdict based, at least in part, upon one or more biases not related to the evidence. This, in turn, can lead to miscarriages of justice.¹⁵

Perhaps AI could be taught to filter out irrelevancies during the decision-making process. It might be possible to programme the algorithm driving it to focus solely on the evidence, and reach a purely

"AI, despite being impervious to physical threats from those who might wish to sway the outcome of a trial, will always be vulnerable to hackers whatever the security measures built into the software."

¹² Curci A., Lanciano T., Battista F., Guaragno S., Ribatti R. M. (2018). Accuracy, confidence, and experiential criteria for lie detection through a videotaped interview. *Frontiers in Psychiatry*, 9, Article 748. doi:10.3389/fpsy.2018.00748

¹³ Section 1 of the Justice and Security (Northern Ireland) Act 2007

¹⁴ R v Qureshi (Sajid) [2002] 1 WLR 518

¹⁵ Note that the Court of Appeal refused to quash Mr Qureshi's conviction, on the basis that it is not permissible to investigate the deliberations of a jury.

objective verdict. However, given its nature, AI suffers from algorithmic bias, which refers to systematic errors in the system upon which AI relies that could create prejudicial outcomes. Generative AI must learn its task. The data set used to “train” an AI system may not represent the entire population. As a result, the algorithm’s decisions may display negative bias towards demographics that did not feature in its training. Similarly, the architects of a particular algorithm will necessarily be human, and will suffer from biases as a result. An AI designer might unknowingly assign their prejudices to the algorithmic software they create, which then automates and perpetuates them. An AI jury, then, is only as objective as its creator or its training. If either is biased, any verdict of the AI could be wrongfully reached.

Part of the rationale behind a jury consisting of 12 people is that a larger number of jurors should give the broadest range of views. If one juror suffers from a particular bias, the input of those on the panel that don’t should prevent the jury as a whole reaching a decision that is tainted by that particular bias. In the case of an AI jury, if the algorithm is infected by bias, there are no other jurors on the panel to cancel it out. The prejudice cannot be rectified before the verdict.

Lack of conscience

A plaque next to Court 1 at the Old Bailey commemorates Bushell’s Case (of 1670) which, as the plaque says:

“[...] established the right of juries to give their verdict according to their convictions.”

In April, the High Court ruled that the Solicitor General had no “reasonable basis in fact and law” to seek proceedings for criminal contempt of court against Trudi Warner, a climate activist.¹⁶ Ms Warner had attended the trial of several persons affiliated with Insulate Britain in respect of acts arising out of

a protest. She raised a placard outside an entrance (used by jurors) to Inner London Crown Court which said “Jurors, you have an absolute right to acquit a defendant according to your conscience”.

Mr Justice Saini ruled, in denying the Solicitor General permission to make a contempt application, that Ms Warner’s placard “reflect[ed] essentially what is regularly read on the Old Bailey plaque by jurors, and what our highest courts recognise as part of our constitutional landscape.”¹⁷

“Jury nullification” is what prompted Sir Devlin’s famous appraisal of the jury as the “lamp that shows that freedom lives”.¹⁸ It is a critical safety valve, representing the right of a jury to correct perceived unfairness and tackle any perceived unjust application of the criminal law which conflicts with societal values and moral conscience.

Perverse verdicts also highlight the key feature of the jury, and one that AI lacks. Human jurors apply the moral conscience of society in coming to their verdict. A jury might return a perverse verdict in the face of police or prosecutorial corruption, or in the light of what it sees as state tyranny (as was the case in the acquittal of Clive Ponting)¹⁹ or, as what may have been the case in the “Colston Four”²⁰ case, in protest at an unjust law. AI lacks a conscience. It possesses no code of ethics nor moral compass. AI cannot apply the moral sentiment of the community in reaching a verdict. In this way, replacing human jurors with AI would result in the loss of a crucial safeguard against oppression.

A proposal

During a speech in the House of Commons in November 1947, Winston Churchill said that “democracy is the worst form of Government, except all those other forms that have been tried from time to time.” The jury system, by analogy to Churchill’s views on democracy, is undeniably flawed, but its proponents argue that it is the best method we have

“AI lacks a conscience. It possesses no code of ethics nor moral compass. AI cannot apply the moral sentiment of the community in reaching a verdict. In this way, replacing human jurors with AI would result in the loss of a crucial safeguard against oppression.”

¹⁶ HM Solicitor General v Warner [2024] EWHC 918 (KB)

¹⁷ ibid [42]

¹⁸ Devlin (n 2) 164

¹⁹ R. v Ponting [1985] Crim. L.R. 318; [1985] 2 WLUK 98 (Central Crim Ct)

²⁰ R v Graham & Ors [2022] Bristol Crown Ct (unreported)

"Replacing human juries with AI would solve some of the problems posed by the former, but might simultaneously exacerbate others, and could well create new obstacles to the administration of justice."

of determining a defendant's guilt, or lack thereof. Replacing human juries with AI would solve some of the problems posed by the former, but might simultaneously exacerbate others, and could well create new obstacles to the administration of justice. In this sense, a direct substitution could be a flawed elixir.

My proposal is that we give defendants the choice. Perhaps the question of how one wants their guilt or innocence decided should be for the accused, as it already is in respect of either-way offences and the choice between a Magistrates' or Crown Court trial. Do they wish to be tried in the Crown Court by their peers, or by an algorithm? Lawyers already advise as to the selection of summary trial or trial on indictment. Why couldn't we counsel clients on the respective advantages and pitfalls of trial by humans and by algorithm?

It is becoming increasingly difficult in the age of information to prevent jurors from seeking details about their case extraneous to that presented in the courtroom. A curious juror (in defiance of judicial direction and despite the risk of criminal prosecution) could easily search the internet for what Fleet Street, or their friends on social media, have to say about the high-profile defendant in their case. An algorithm (unlike the inquisitive juror) could be programmed to reach a decision based only upon the evidence presented at trial. We could create a sequence of code to restrict its ability to search for wider information about a case, rather than relying on trust (and the threat of prosecution) as we do in the case of human jurors. Those in the public eye facing prosecution might seek to avoid the prospect of prejudice caused by such juror misconduct, and have their fate decided by a machine.

Section 43 of the CJA 2003, which was repealed in 2012, would have allowed judge-alone trials in certain serious and complex fraud cases. The provision was

never brought into force and the last attempt to do so proved so controversial that it was blocked by the House of Lords.²¹ Despite this, in civil litigation, judges regularly decide whether a defendant acted fraudulently. We do not assert that we should transplant juries into the civil courts to try a defendant's character or assess the evidence against them, or that civil judges are incapable of doing so. Rather, our Commercial Court is viewed as the globe's elite centre for international commercial litigation.²² The long-running argument as to whether juries are best placed to decide on serious and complex fraud cases is perhaps ill suited to this general and serious crime edition of *The Knowledge*. That said, those in favour of juryless trials tend to argue that lengthy fraud trials cases represent a significant intrusion upon jurors' lives and pose a significant risk of delays should a juror fall ill, and that judges sitting alone would more readily understand the financial and commercial context of the evidence presented. A corporate defendant facing allegations purportedly supported by volumes of abstruse evidence and seeking to advance a complex defence involving highly technical expert testimony might well elect trial by AI.

As to whether the human juror might be replaced, in a recent speech concerning the likely impact of AI upon the legal profession, Sir Geoffrey Vos, Master of the Rolls, refused to be drawn on the question of whether AI is likely to be used for any kind of judicial decision-making. His pithy conclusion: "We shall see."²³

²¹ The Fraud (Trials without a Jury) Bill

²² The Law Society, *International Data Insights Report 2023: Global Position of English Law*. Available at: <https://prdsitecore93.azureedge.net/-/media/files/topics/research/international-data-insights-report-oct-2023-corrected.%20pdf?>

²³ Sir Geoffrey Vos, "AI – Transforming the work of lawyers and judges" (Speech at the Manchester Law Society, 8 March 2024) [https://www.judiciary.uk/wp-content/uploads/2024/03/Manchester-Law-Society-speech-8-March-2024.pdf?](https://www.judiciary.uk/wp-content/uploads/2024/03/Manchester-Law-Society-speech-8-March-2024.pdf)

Insufficient protection for victims of 'deepfake' media

Cally Harrington
Associate

The Online Safety Act 2023 amended the Sexual Offences Act 2003 ("SOA 2003") by introducing a new offence of sharing, or threatening to share, an intimate photograph or film without consent and other more serious offences. Some will be disappointed that internet service providers cannot be made criminally liable for the new offences which are a welcome step in the right direction to protect victims of online abuse although they may not go far enough to protect victims of so-called 'deepfake' images and videos; especially children.

'Deepfakes'

AI technology has made the creation of fake pornographic images and videos (also known as 'deepfakes') astonishingly easy. Even the technology on current mobile phones can be used to produce passable fakes. Photographs of an individual can be taken without consent (or copied from public sources such as social media accounts), and AI can be used to create fake pornographic videos and images of that person by realistically swapping their face and bodies with that of another person. The technology can easily be used to target victims of domestic abuse and children. Ms Ocasio-Cortez, the youngest woman to serve in the United States Congress, has recently been a victim of deepfake media. A photograph of her face was taken and manipulated on a sexually explicit image to make it look like she was performing sex acts. Fake

pornographic images of Taylor Swift also circulated online in January 2024. Similarly her face had been taken from photographs and placed onto pornographic ones. Deepfake images of those in the public eye have made headline news but anyone can be a victim of this form of online abuse.

The first new offence is to be found in section 66B(1) of the SOA 2003. It is committed if a person shares, or threatens to share, intimate photographs or films without consent. This includes sharing photographs and films that 'appear to show' the victim in an intimate state. A person shares something if the person, 'by any means, gives or shows it to another person or makes it available to another person' (s.66D(2) SOA 2003). The explanatory notes to the legislation say that the new offences include images that are made or altered by computer graphics (or in any other way) if they appear to be a photograph or film. It is therefore envisaged that the offences cover genuine photographs or films that have been altered in some way, and those that have been wholly manufactured – so called 'deepfake' images. Only time will tell whether the new legislation is sufficient to afford real protection for the victims of 'deepfake' media. Much will depend on the resources available to investigate this new form of crime which can be committed by a person located anywhere in the world.

Section 66B(1) of the Sexual Offences Act 2003²

The first new offence is summary only. It goes further than section 33 of the Criminal Justice and Courts Act 2015 (commonly known as the 'revenge porn' offence). The 'revenge porn' offence has been repealed following section 190 of the Online Safety Act 2023 so it can no longer be used to protect victims unless the conduct occurred between 13 April 2015 and 30 January 2024. The maximum sentence for the new offence is currently six months' imprisonment.

A person ('A') can be found guilty of the new offence if:

¹ s.66D(3) SOA 2003 provides that they are not to be regarded as a person who shares the intimate photograph or film.

² In force 31 January 2024.

- without reasonable excuse 'A' intentionally shares a photograph or film which shows or appears to show another person ('B') in an intimate state;
- 'B' does not consent to the sharing of the photograph or film; and
- 'A' does not reasonably believe that 'B' consents.

The SOA 2003 has been further amended to create three more serious offences of sharing this kind of image or video:

- (i) section 66B(2), sharing the photograph or film without consent and with the intention of causing 'B' alarm, distress or humiliation (this again goes further than the revenge porn offence);
- (ii) in section 66B(3) doing so for the purpose of obtaining sexual gratification; and
- (iii) section 66B(4) threatening to share a photograph or film with intent to cause fear that the threat will be carried out.

The maximum sentence for these new offences is two years' imprisonment. If a photograph or film is shared without consent for the purpose of sexual gratification an offender may also be subject to notification requirements.

Exemptions apply to the offence under sections 66B (1), (2), and (3) in the following circumstances:

- If the photograph or film was taken somewhere public and
- 'B' had no reasonable expectation of privacy from the photograph or film being taken and
- 'A' reasonably believes that 'B' was in the intimate state voluntarily

or

- The photograph or film had, or 'A' reasonably believes that the photograph or film had, been previously publicly shared and
- 'B' had, or 'A' reasonably believes that 'B' had, consented to the previous sharing.

Comment

Arguably the most serious criticism of the new offence under section 66B SOA 2003 is that it does not focus on the makers of deepfake videos or film but rather the sharers of the content (although not the internet service providers). A specific offence targeting the production of deepfake media should be created to address this issue. Categorisation is needed to differentiate between makers of the videos and those who distribute it. The sentences should be different for each offence reflecting the culpability of the defendant. This could be similar to the categories used in indecent image offences. This would arguably assist with deterring online abuse in the first place.

In relation to sharing the photograph or film with the intention of causing B alarm, distress or humiliation, there is no objective standard; it is the perpetrator's intention that is taken into account and not the effect of the behaviour on the victim. Focussing on the defendant's intention is also counter to other offences addressing domestic abuse and offences against women and girls. For example, the offence of controlling or coercive behaviour in an intimate or family relationship under section 76 of the Serious Crime Act 2015 focuses on the effect of the behaviour on the complainant. Focusing on a defendant may lead to defendants claiming that they did not have the requisite intention when sharing the photos or film, which may make prosecutions difficult to mount. The Metropolitan Police published statistics relating to individuals charged with the previous 'revenge porn' offence revealing that there were only three charges of the offence in 2022. The low prosecution rates may be

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"Arguably though, the exemption constrains an individual's choice regarding the audience that they share their own content with, and raises difficult issues around the definition of 'consent' and 'voluntarily'."

due to the requirement of establishing that the suspect had the intention to cause distress to the complainant. However, in section 66B SOA 2003 the terms 'alarm' and 'harassment' are wider than distress so it may be that more prosecutions will follow than those charged with the revenge porn offence. It would have been better if the new offences had included an element more focused on the impact of the conduct concerned by requiring proof that 'the behaviour caused 'B' alarm, distress or humiliation and that 'A' knew, or ought to have known, that sharing the photograph or film would cause 'B' alarm, distress or humiliation'. The offence would then focus on the effect on the victim, rather than the intention of the perpetrator. It is also not clear what would amount to a reasonable excuse for sharing an image, which is a defence to the new offence.³

The exemptions above are also potentially discriminatory towards those who choose to share intimate content online. If 'B' shares an intimate image online, for example, on a website similar to 'Onlyfans', it is possible that someone may re-share the video or photograph that 'B' has posted with another person, including 'B's' friends, family or colleagues, without being criminally liable if 'A' can successfully argue that they reasonably believed that 'B' had consented to the previous sharing. This may be the case even if they intended to cause 'B' alarm, distress or humiliation.

Some may be of the view that individuals who share intimate content via an online platform run the risk of their photos or films being shared without their consent and therefore they should not be protected by the criminal law. Arguably though, the exemption constrains an individual's choice regarding the audience that they share their own content with, and raises difficult issues around the definition of 'consent' and 'voluntarily'. For the purposes of these offences consent means 'if he agrees by choice, and has the freedom and capacity to make that choice' (s.74 SOA 2003). Has someone consented or made a choice with

freedom if they were heavily influenced, were coerced, or were in an abusive relationship during the period when they were intimate in public or featured in a previously shared image online? It is possible that uploading photographs and film to websites similar to Onlyfans may not be considered a previous 'sharing' of the photograph or film because people often sign up or pay for the content, content creators are unlikely to find their 'close circle' on the website, and they may be able to choose who views their content. Admittedly this is a thorny issue as a blanket ban on sharing intimate media may raise issues concerning the right to freedom of expression as protected by Article 10 ECHR.

Finally, the offence under section 66B SOA 2003 does not differentiate between sharing a photograph or film which shows, or appears to show, a child in an intimate state and those that appear to show adults. Arguably this problem can be avoided by charging offences of this nature under indecent images provisions instead, where the starting point for the sentences are much higher than under section 66B SOA 2003. This will avoid watering down sentences for online child abusers.

Overall section 66B 2003 is a step in the right direction for campaigners who are trying to prevent online abuse but the legislation requires improvement to help protect victims of deepfake media, children and those who post intimate content online. A new offence should be created to specifically target makers of 'deepfake' media and the specific issues that come along with it. The new offences should just focus on adults.

"This is a thorny issue as a blanket ban on sharing intimate media may raise issues concerning the right to freedom of expression as protected by Article 10 ECHR."

³ Section 66C(8) SOA 2003

The Online Safety Act 2023 – “Some things are just illegal”

Claire Cross
Partner

“Now some things are just illegal, child pornography, fraud, telling someone how to rob a bank, that’s illegal before the web and it’s illegal after the web.” – Tim Berners-Lee, 2014

In October of last year the Online Safety Act 2023 (“OSA”) finally entered the UK statute book. Focusing on two key types of internet services, user-to-user services and search services¹, OSA aims to make the internet a safer place for all. A user-to-user service is an internet service that allows people to create and share content online as well as interact with each other. Examples include social media (e.g. Instagram) or instant messaging services (e.g. dating apps). A search service is an internet service or search engine that allows users to search content across the web for e.g. products or services offered by companies. Examples include Google and Bing but also virtual assistants like Siri and Alexa.

The OSA purports to make the internet safer by placing duties on service providers to identify, mitigate and manage risks of harm arising from illegal content and activities, as well as those that pose particular risks to children.

This article explores the approach that the OSA and the Office of Communications (“Ofcom”, the regulator and enforcer of the OSA) now requires regulated services to take in respect of illegal content.

What is “illegal” content?

The definition of illegal content in the OSA is based on UK criminal offences. There are two categories. The first – “Priority offences” – are listed in Schedules 5, 6 and 7 OSA. They cover the most serious and prevalent illegal content and activity online, including, but not limited to, terrorism, child sexual exploitation and abuse (“CSEA”), fraud and proceeds of crime offences. They also include inchoate offences, such as conspiracy. Illegal content that falls under this definition is often referred to as “priority illegal content”.

The second category – “Other offences” – consists of non-priority offences, where the victim or intended victim of the offence is an individual or individuals. Particularly relevant to this category are the new criminal online offences created by the OSA such as epilepsy trolling (s182), cyberflashing (s187), assisting or encouraging self-harm (s184) and false communications (s179). Illegal content that falls under this definition is often referred to as “other illegal content”.

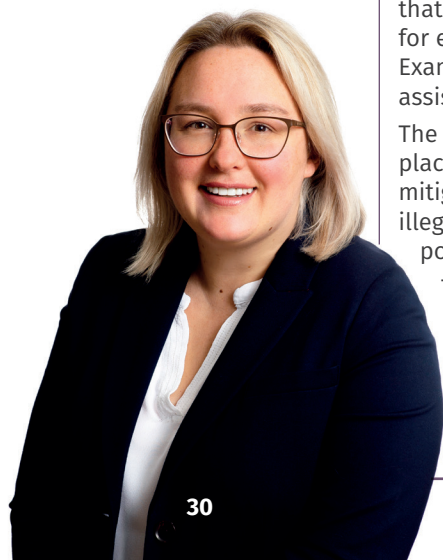
Duties, including risk assessments

Part 3, Chapters 2 and 3 of the OSA impose specific duties regarding illegal content. The duties are largely similar for both user-to-user and search services. The central duty is that providers of both types of service must take proportionate measures to effectively mitigate and manage the risk of harm to individuals in relation to illegal content. This involves preventing users from encountering such content on their services at the outset. This marks a significant change; online service providers were previously only required to act swiftly in removing unlawful content once they were put on notice of its presence.

However, there are some differences in the duties between the respective obligations of

¹ as well as the businesses that provide these services

Eve Campbell
Associate



"In order to comply with the OSA, service providers must follow risk assessment duties in relation to illegal content."

providers of user-to-user and search services. Providers of regulated user-to-user services must take proportionate measures to prevent individuals from encountering priority illegal content by means of the service. However, providers of regulated search services only need to take steps to reduce the risks that users encounter priority illegal content or other illegal content via their services.

In order to comply with the OSA, service providers must follow risk assessment duties in relation to illegal content. These duties are set out in Part 3, Chapter 2 (s.9) for user-to-user services and Chapter 3 (s.26) for search services. Both sections mandate that all service providers, no matter how big or small, will be required to carry out a suitable and sufficient illegal content risk assessment of the content they offer. This will require both types of services to assess all kinds of illegal harm, i.e. user-generated content or behaviour that is illegal. This can include the priority offences and offences such as hate crime or hate speech, harassment, cyber-bullying and online abuse.

As part of the risk assessment, providers will also be required to consider their platform's design, functionalities, algorithms and any other features likely to meet the illegal content and child safety duties. This will require providers to take into account (i) the characteristics of the service (e.g. user base, user numbers etc.); (ii) any relevant aspects of the service's design and operation (use of proactive technology, governance etc.); and (iii) how the service is used (to include both the intended and unintended ways in which it could be used).

This duty will come into force once Ofcom has finalised its guidance on illegal content risk assessments, which is expected to be in autumn 2024. From then, services will have three months to complete their first assessment.

⁵ Paragraph 116

Judgment calls

Both forms of services must treat content as illegal content if, having considered all reasonably available information: a) they have reasonable grounds to infer that all elements necessary for the commission of the offence, including mental elements, are present or satisfied, and b) they do not have reasonable grounds to infer that a defence to the offence may be successfully relied upon.

The OSA requires services to make these judgment calls on a reasonable inference basis² which is to a lower threshold than the criminal standard that is applied in the criminal justice system.

However, UK criminal offences are complex, nuanced and not always fully defined in legislation, for example, those that involve multifaceted allegations including matters related to fraud, sexual offences and evasion of duty prosecutions. This is part of the reason that Ofcom's draft guidance³ on how to approach the task of identifying illegal content currently runs to 390 pages. Ofcom itself admits at the introduction to the draft guidance that "while we have tried to set out clear steers and an easy-to-follow approach, there are limits to how much we can simplify the language and concepts in this document."

Ofcom has been keen to stress that content is not illegal merely because it depicts a crime. Take for example an item of content that depicts one person violently attacking another. The service provider does not need to consider whether the attack itself is a criminal offence and as such it does not need to consider the conduct, state of mind or defences available to the person depicted in the content as carrying out the attack. Rather, it needs to consider whether there are reasonable grounds to infer that the person who has posted, uploaded or shared the piece of content has committed an offence by doing so, for example, if their aim in uploading the content

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² Part 11, s.192 (ss.(5) and (6))

³ https://www.ofcom.org.uk/_data/assets/pdf_file/0025/271168/annex-10-illegal-harms-consultation.pdf

is part of a campaign to harass the victim of the offence.

Terms and Conditions

However, there is nothing in the OSA that requires service providers to make illegal content judgments, so long as the application of that service's own terms and conditions is sufficient to secure compliance with the duties in the Act in other ways. For example, if the service's own terms and conditions of use prohibit content that is wider than the definition of illegal content under the Act, then the service provider would be considered to have fulfilled its legal duties regarding takedown so long as it applied these terms and conditions properly.

Although there is an attractive quality to imposing stricter terms and conditions than those imposed by the OSA, and thus avoiding the hot potato of illegal content judgments, it is an approach that will certainly not be put into practice by all service providers. This is because many user-to-user services prefer relaxed terms and conditions so as to on-board more users – the idea of free speech is very attractive to consumers. More users equals more engagement. More engagement can be good for the platform in terms of advertising revenue.

What happens if a service becomes aware of illegal content?

Both user-to-user and search services are required to implement measures to prevent the dissemination of illegal content. Search services must have mechanisms in place to identify and remove illegal content from search results, as well as take steps to prevent such content from being indexed or displayed prominently in search listings. User-to-user services are required to put in place content safeguards to protect users from encountering harmful or illegal material on their platforms.

Most importantly, where a search provider is alerted

to the presence of any illegal content, or becomes aware of it in any other way, it is required to swiftly take down such content⁴. Failure to do so could lead to enforcement action by Ofcom.

Services are not obliged to report illegal content to law enforcement except where the content in question is subject to requirements to report CSEA content to the National Crime Agency ("NCA"), as set out in section 67 of OSA. Nonetheless, Ofcom has noted that many services do already work closely with the police and other enforcement agencies, and it certainly does not intend to discourage them from continuing to do so.

Non-compliance with duties

Ultimately, Ofcom regulates the services captured by the OSA and has powers to enforce compliance and impose fines of up to £18 million or 10% of global annual turnover (whichever is higher). Ofcom could also apply to the court for 'business disruption measures' such as blocking non-compliant services⁵. In order to apply to the court for a business disruption measure, Ofcom must first consider whether the grounds as set out in Part 7, Chapter 6, s.144, ss.(3) or ss.(4) apply in relation to the service. The grounds in ss.(3) are that (a) the provider has failed to comply with an enforceable requirement, (b) the failure is continuing, and (c) the provider has either failed to comply or is likely to fail to comply with a requirement imposed by a confirmation decision. Alternatively, they have either failed to pay a penalty imposed by a confirmation decision, or the circumstances of the failure or risks of harm to individuals in the UK make it appropriate to apply without provisional notice of a confirmation decision. The grounds set out in ss.(4) are that the provider of the service has failed to comply with a notice under s.121(1) that relates to the service (i.e. notices to deal with terrorism or CSEA content) and that failure must also be continuing. For individuals at a

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⁴ Part 3, Chapter 2, s.10(3)(b)

⁵ Part 7, Chapter 6, s.144(1)

"The OSA is wide-ranging in territorial scope – the internet does not recognise geographical boundaries and nor does the OSA."

senior level within such providers, Ofcom can bring criminal sanctions against those who obstruct its investigatory powers.

The regulator's draft Online Safety Enforcement Guidance is at pains to clarify that in any event Ofcom will not be pursuing enforcement action against every potential compliance breach. The regime is targeted at online safety systems and processes of services and is not about regulating individual pieces of content found on these services. It has also stated that⁶:

"The presence of illegal content [...] does not necessarily mean that a service is failing to fulfil its duties in the Act. We would not therefore necessarily take enforcement action solely based on evidence of harmful content appearing on a service."

"However, evidence of especially harmful material or the prevalence of harmful material on a service (particularly if it is on a service for a prolonged period of time without being removed or presents a particular risk to children because of the type of regulated service on which it appears), would be a potential indicator that a service's systems and processes were insufficient to protect users from such content. This may be relevant to our assessment of whether the issue is a priority for Ofcom such that enforcement action may be taken following our investigation of the issue."

Scope

The OSA is wide-ranging in territorial scope – the internet does not recognise geographical boundaries and nor does the OSA. Much of the content consumed in the UK originates abroad and the OSA would be a blunt tool if it were restricted to purely UK-based companies and services. Overseas service providers who have "links to the UK" and are not exempt by virtue of Schedule 1⁷ to the Act are caught by the OSA. The definition of "links to the UK" is set out in Part 2, s.4 (ss.5) and (ss.6) and broadly refers

to those who target the UK market and/or have a significant number of UK users.

Conclusion

Despite the OSA creating new offences such as false communications and cyberflashing, Mr Berners-Lee is right in that some things are just illegal and have been illegal since long before the Internet came along. In some instances, it may be blindingly obvious for service providers to spot illegal content and exercise their duties in compliance easily. However, not all criminality is as easy to identify as a bank robbery. The challenge for service providers will not be addressing the headline concerns – child pornography and obvious fraud – but the grey areas and untested boundaries of what can be considered illegal or harmful online content, particularly where offences can be inchoate or infringe the right to freedom of expression. Service providers could potentially suppress individuals' Article 10 ECHR rights of freedom of expression by using their own judgment to decipher what is harmful and removing the users' generated content. It is also worth considering whether Ofcom's approach – which at the moment appears to be concerned with systemic failures rather than one-off breaches – will remain so forgiving once service providers have had the opportunity to get their houses in order.

"The challenge for service providers will not be addressing the headline concerns – child pornography and obvious fraud – but the grey areas and untested boundaries of what can be considered illegal or harmful online content, particularly where offences can be inchoate or infringe on right to freedom of expression."

⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0026/271169/annex-11-illegal-harms-consultation.pdf

⁷ This is a tightly defined category and includes services provided by public bodies to exercise their functions and user-to-user services where the only user generated content is either emails/SMS/MMS messages or the ability to post comments generated by the provider itself – such as clicking a "like" button.

What happens when confidential journalistic material is seized by investigators following execution of a search warrant?

Jessica Parker
Partner

This is the general crime issue of The Knowledge, but this article examines the law relating to confidential material seized during the execution of a search warrant. This is an area of law which will be of as much interest to financial crime lawyers as their colleagues at the coalface, given the increasing use of searches by the Serious Fraud Office (“SFO”) – more in the past six months than in the previous director’s entire tenure.

A judgment towards the end of last year examined a number of thorny issues arising from the execution of a search warrant in relation to a person whose property should have been subject to additional protections by virtue of their status as journalist. The judgment sheds light on what happens when the police, or any authority, seize property that should have been protected from seizure and how the courts then resolve how that material should be dealt with.

Warrants and protected material

Search warrants give investigators the power to enter premises and search for, and seize, specified materials. However, the powers of seizure which can be granted by a search warrant are not unfettered. When a warrant is applied for, some types of material are subject to additional safeguards because of their legal status. For the purposes of this article, the relevant example is “journalistic material”.

Journalistic material is defined by section 13 of the Police and Criminal Evidence Act 1984 (“PACE”) as “*material acquired or created for the purposes of journalism in the possession of a person who acquired or created it for the purposes of journalism*”. Case law has confirmed that this definition should be narrowly interpreted to include only material held for the immediate object of journalistic purposes.¹ Journalistic material can fall into one of two legal categories:

1. “Special procedure material” i.e. general journalistic material; or
2. “Excluded material” which is held subject to an undertaking or obligation of confidence. A typical example is material that was acquired by a journalist from a confidential source or that may reveal the identity of a confidential source.

Where material of this type might be on the premises to be searched, then an application for a search warrant must be made under Schedule 1 of PACE.

For “special procedure material” a judge will issue a warrant if there are reasonable grounds for believing:

- (i) that an indictable offence has been committed;
- (ii) that there is special procedure material on the premises;

¹ *Sugar v BBC* [2012] UKSC 1 WLR 439 [67] and [106]

- (iii) that the material is likely to be of substantial value to the investigation in connection with which the application is made;
- (iv) that the material is likely to be relevant evidence; and
- (v) that an order is in the public interest.²

For “excluded material” there must be reasonable grounds for believing:

- (a) that there is excluded material on the premises;
- (b) but for the limitation on search warrants for excluded material, a search warrant could have been authorised by the issue of a warrant under other legislation; and
- (c) the issue of such a warrant would have been appropriate.³

So, in summary, special procedure material requires the court to evaluate the value of the material to the investigation and the case overall. Excluded material requires a specific legislative provision permitting seizure and a decision about whether it is appropriate to seize it (appropriateness taking into account the countervailing public policy considerations in support of the investigation and the reason that the material has excluded status). In practice, in relation to confidentially held journalistic material, the only such pre-PACE legislation permitting seizure is section 9 of the Official Secrets Act 1911 (“OSA 1911”).

This is where the story started in the case of *R (on the application of LXP) v Central Criminal Court* [2023] EWHC 2824. On 8 July 2022 the Metropolitan Police Service (“MPS”) made an ex parte application to a judge for warrants pursuant to s.9 OSA 1911. At the time of the application, the police wrongly believed that the subject of their investigation was not a journalist but that his partner was. Accordingly, their application did not request authorisation to seize

journalistic material and instead explained that they would not seize journalistic material (that was journalistic by virtue of LXP’s partner’s use of it). The warrants were executed at LXP’s residential and work premises and material including electronic devices were seized.

LXP’s solicitors threatened to apply for a judicial review on the grounds that the warrant had been sought on the wrong basis and that journalistic material had been seized because LXP was a journalist. Where property is seized under the purported power of seizure but it should not have been, the police can remedy the situation by making an application under section 59(6) or (7) of the Criminal Justice and Police Act 2001. The MPS could have chosen to take this path rather than defend the warrant via a judicial review but it maintained that it did not have to make such an application as its seizure was lawful. Nonetheless the MPS took the middle ground of making an application under a related section, s.59(5), effectively asking the court to sanction their plans to review the material (and thus implicitly sanction the legality of the warrant).

The MPS argued that the material seized did not contain journalistic material within the meaning of PACE for two reasons: (i) the material could not be “journalistic” if it was stolen; alternatively, (ii) LXP had not conceded that he had received material with the intention that it would be used for journalistic purposes. Thus, no application under s.59(6) or (7) was required. The material did not contain special procedure or excluded material and had been appropriately seized. The judge hearing the application agreed with the MPS and found there was “a clear distinction made between true journalistic material and material that has been stolen”.⁴ He provided directions that might have protected any truly journalistic material to the effect that Independent Counsel should review the material

² Schedule 1, paragraph 2

³ Schedule 1, paragraph 3 PACE

⁴ Para 26

"The case highlights the challenge faced by those subjected to searches in seeking to protect confidential material that the investigator had no power to seize."

based on instructions provided by LXP including the nature and location of any special procedure (journalistic) or excluded (confidential journalistic) material. This process would take place alongside the MPS's review of the material.

LXP applied for a judicial review of this decision on five grounds which all largely turned on whether the judge misdirected himself in holding that stolen material was not journalistic material. The judgment was handed down by Lady Justice Macur in November 2023. The judicial review succeeded on all grounds. Macur LJ held that the judge had made an error in distinguishing between "true journalistic material and material that had been stolen". This finding was not supported by the authorities which held there cannot be an unequivocal bright line test. There was a tension where the person claiming journalistic material did not want to incriminate themselves by accepting where the material came from but also wanted to avail themselves of the protection of Article 10 ECHR. The Court determining whether journalistic material could be reviewed was entitled to take into consideration the conduct of the source (i.e. the theft), but that was merely one factor to be taken into consideration in carrying out the balancing exercise.

Broader significance

The case highlights the challenge faced by those subjected to searches in seeking to protect confidential material that the investigator had no power to seize.

Firstly, the judgment recognises that steps taken by police at the earliest stage of an investigation can have a profound impact on the investigation as a whole, and where an error is made the prejudice caused to the person searched cannot easily be remedied. Macur LJ recognised this in criticising the judge's original directions that the MPS apply search terms to identify journalistic material, saying: "If the

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stable door is opened by the police conducting the search, the horse named "journalistic protection" has already bolted, before the judge has considered where the balance of public interest lies." Quite rightly, she recognised that an abuse of process application or an application to exclude evidence from trial pursuant to s.78 PACE was inadequate relief.

Secondly, the procedure under s.59 effectively gives the police a second bite of the cherry at a time when they are often in a better position to take it. Where material is seized that is outside the permission granted by the warrant, or if the warrant should not have been granted, the position is easily regularised by police provided that a warrant could now be granted. The court will evaluate the position at the time of the remedial s.59(6) or (7) application, not the position as understood at the time of the original application. At the point of making the application for the continued retention of the material, sometime after the warrant was executed, the investigators can be in a better position because of material that they have then seen during and since the application for the warrant.

Therefore, it is essential that investigators are notified immediately of any potential application for judicial review or for application under s.59(5) and requested to desist from review pending the court's decision in an attempt to avoid them improving a second application by reference to improperly seized material.

Ironically, the MPS could arguably have avoided the litigation entirely. Where a suspect is arrested an officer can seize anything, except for legally privileged material, which might be relevant evidence (ss.8 and 18 of PACE). Also, where an officer is lawfully on a premises (s)/he can "seize anything other than legally privileged material which they have reasonable grounds for believing to be evidence

of an offence or obtained in consequence of the commission of an offence, and to be in danger of loss or destruction" (ss.19 and 20). The scope of what can be seized post arrest is "relevant evidence", a narrower test than "material likely to be of substantial value to the investigation" which can be sought under a warrant, and there are no protections for special procedure or excluded procedure material. The whole hoopla described above might have been avoided if the MPS had arrested LXP and used their powers flowing from that arrest.

This anomaly was explored by the Law Commission in its report on search warrants published in 2014. Consultees were wildly divided about whether protections afforded to special procedure and excluded material should extend to other PACE search powers. Notably the SFO and Competition and Markets Authority ("CMA") reportedly found the ability to request that a police officer make an arrest was helpful where they might need to seize otherwise protected material. The Law Commission concluded that it was beyond the scope of its report to propose reform, thus missing an important opportunity to close the gaping loophole. It cannot be right that the scheme in Schedule 1 of PACE and the Criminal Justice and Police Act 2001 ("CJPA"), laid out by Parliament to provide important protections to certain categories of material, can be overridden so easily. A simple fix would be to require that police treat protected material (whether special procedure or excluded material) in the same way they treat material subject to legal professional privilege. It could be bagged for later review and legal argument. For now, the loophole remains and the protections that Schedule 1 has put in place can be completely avoided where grounds for arrest can be made out.

Search warrants are back in the spotlight, following Nick Ephgrave's appointment as Director of the SFO, but they are a routine part of investigations for many

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other agencies. Cases like LXP demonstrate the care that must be taken when considering whether a search warrant application was properly made and whether law enforcement's handling of the material post search is appropriate. To extend the analogy used by Marcur LJ, it can be worth taking the time to ensure the horse – and the information which should remain confidential – remains securely shut away.

"Cases like LXP demonstrate the care that must be taken when considering whether a search warrant application was properly made and whether law enforcement's handling of the material post search is appropriate."

CORKERBINNING

CORKER BINNING
4TH FLOOR
1 ELY PLACE
LONDON EC1N 6RY
+44 (0)20 7353 6000 (24HR)
WWW.CORKERBINNING.COM

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