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SOLICITORS JOURNAL

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Corporate culture and economic crime

Tom McNeill assesses the failure to prevent model

The role of regulators in promoting EDI in the legal profession

John Barwick argues that systemic changes are needed

M&A surge leads to legal hiring boom

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UK banks' crisis preparedness and emerging risks

The recent assessment of UK banks by the Bank of England highlights significant improvements in crisis preparedness, but also underlines ongoing vulnerabilities and potential legal challenges for banks and their customers. As the financial sector continues to navigate the post-2008 landscape, the failures of Silicon Valley Bank (SVB) and Credit Suisse in March 2023 serve as reminders of the importance of robust crisis management. The evolving regulatory environment could still expose banks and their customers to significant legal risks, particularly in the areas of fraud and crisis planning.

THE RESOLVABILITY FRAMEWORK

In August 2024, the Bank of England released its second resolvability assessment framework (RAF), which evaluates the UK's largest banks' ability to manage their own failures without requiring government bailouts. The findings were encouraging, with institutions like NatWest, Nationwide and Santander UK showing no major issues in their crisis plans. HSBC, Barclays, Standard Chartered and Lloyds were found to need 'further enhancements' in their resolution plans insofar as how quickly they were able to provide 'timely' and detailed assessments of their assets. Standard Chartered was singled out for the only 'shortcoming' in the report, related to expectations that banks should be ready to put their restructuring plans into action.

The Bank of England's overall expectation is that major banks continue to embed resolvability into their business practices, with the next RAF assessment expected to take place within the 2026–2027 financial year. In the meantime, the Bank of England has said it will work with the major UK firms to ensure they continue to meet its expectations, and will ask firms to undertake targeted activities ahead of the third RAF assessment. Resolvability is an ongoing obligation for major banks.

The Bank of England's emphasis on continuous improvement could indicate that regulatory expectations on the major banks are set to increase in the coming years. Banks that do not comply with these expectations may face increased regulatory scrutiny from the Bank of England and the Prudential Regulation Authority (PRA). The ongoing scrutiny creates a legal landscape fraught with potential risks for banks, including potential legal challenges from various stakeholders.

LEGAL CHALLENGES FOR BANKS

Banks that fail to adequately plan for crises may face claims from shareholders, customers and regulators. The 2008 financial crisis saw a wave of legal actions, particularly related to the mis-selling of financial products and mortgage-backed securities. If a bank's resolution plan fails, leading to significant financial losses, it could be accused of negligence or breach of fiduciary duty, leading to costly litigation.

The PRA and other regulatory bodies are likely to take a hard line with banks that fail to meet the expectations set out in the RAF. This could result in enforcement action, including fines, sanctions and mandates to overhaul internal processes.

Customers could also bring claims if they suffer financial losses due to a bank's failure to effectively manage a crisis. This could range from delayed access to funds in the event of a bank collapse to inadequate protection against fraud.

One of the more insidious risks that may arise from inadequate crisis planning is an increase in fraud, particularly authorised push payment (APP) fraud. The complexity and chaos that would likely accompany a bank's financial distress could create fertile ground for such fraud to increase. During periods of crisis, banks may be more focused on managing their immediate financial stability, potentially leading to lapses in fraud prevention.

CONCLUSION

The Bank of England's 2024 assessment underscores the ongoing need for UK banks to continue working on their crisis preparedness. While much progress has been made since the 2008 financial crisis, the potential for legal challenges remains significant. Banks must not only comply with evolving regulatory expectations but also anticipate and mitigate the risks associated with fraud and customer litigation. As the financial landscape continues to evolve, proactive crisis planning and robust fraud prevention measures will be critical in navigating the legal complexities that lie ahead.

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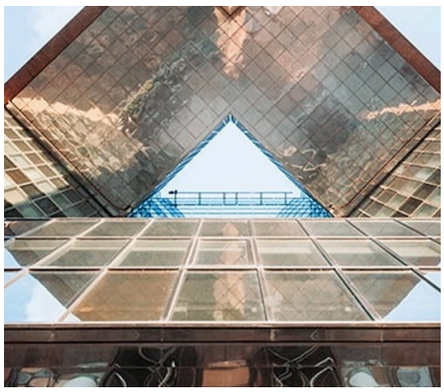

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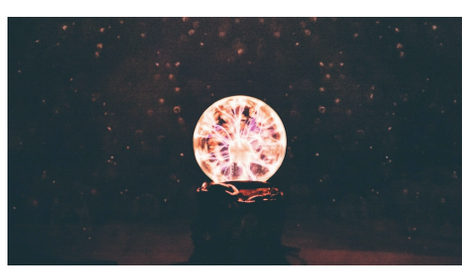


60 SECONDS

HOWARD KENNEDY PROFIT

London-based law firm Howard Kennedy has reported a strong financial performance for the 2023/2024 fiscal year, with revenue growth of 15%, bringing the firm's total revenue to £74.4 million, up from £64.9 million in the previous year.

The firm experienced double-digit growth across three of its key departments:

- **Real Estate**: 19% growth
- **Private Client & Family**: 17% growth
- **Dispute Resolution**: 19% growth

Additionally, the average profit per equity partner rose by 24% to £362,000.

Managing Partner Craig Emden stated, "We have had an excellent year, with not only strong double-digit revenue growth but also robust profit growth too."

FIELDFISHER IN THE VALLEY

Fieldfisher, a leading European law firm, has expanded its Silicon Valley office to include a dedicated employment law practice. This strategic move enhances the office's existing Privacy, Technology, and Corporate services and is driven by the relocation of Director Moira Campbell. Moira joined the West Coast team in August 2024, bringing with her a wealth of experience in both general and contentious employment law.

Moira Campbell expressed her enthusiasm for the new role, stating, "Since the pandemic, people and employment matters have become a top priority for boards, particularly in the tech sector. The evolving legal and regulatory environment means that employment law will remain a critical area of focus for our clients. I'm excited to be here on the West Coast, working with innovative and fast-growing businesses as they expand in the UK and wider Europe."

Mark Webber, Managing Partner of the Silicon Valley office, highlighted the significance of this development: "Bringing employment law advice to the West Coast is a pivotal step for us."

ZEDILLO IBA KEYNOTE

Ernesto Zedillo, Mexico's 61st president (1994–2000), will deliver the keynote address at the Opening Ceremony of the International Bar Association (IBA) 2024 Annual Conference in Mexico City on Sunday, September 15. Zedillo, an advocate for the rule of law, emphasised its crucial role in economic development in a pre-recorded address available for viewing.

Currently, Zedillo is a Senior Fellow at Yale University and a member of The Elders, a group of global leaders committed to promoting peace, justice, and human rights. He also served on the Independent Panel for Pandemic Preparedness and Response (IPPPR) in 2020, analysing the global impacts of the COVID-19 pandemic.

PREMIER LEAGUE PARTNERSHIP

Thackray Williams, a prominent law firm with offices in London and Kent, has announced a new partnership with Premier League football club Crystal Palace. This collaboration is set to showcase the firm's unique offering of affordable legal services tailored specifically to the sports sector. The partnership will see the Thackray Williams brand prominently displayed during Palace's home matches at Selhurst Park, reaching a global audience through pitch-side LED displays and stadium screens.

Football fans will see the Thackray Williams branding for the first time during Palace's first home game of the season on 24 August, when they face West Ham.

LAW FIRMS UNITE

In a strategic move to enhance its presence on the south coast, regional law firm Ellis Jones Solicitors has acquired fellow Dorset-based practice Scott Walby LLP. This acquisition, now official following approval from the Solicitors Regulation Authority, bolsters Ellis Jones' footprint in key areas such as Wimborne and Poole.

The integration adds a second office in Wimborne to Ellis Jones' existing branch on East Street, complementing its established offices in Bournemouth, Poole, Ringwood, Swanage and London. With this move, Scott Walby's seven-person team, including partners John Bulpit and Malcolm Scott Walby, will join Ellis Jones, bringing the firm's total staff count to nearly 200.

FLAWS IN JURY DECISIONS

A new study has uncovered significant "systemic weaknesses" in the way juries make decisions, raising concerns about wrongful convictions, failures to convict the guilty and persistent inequalities in the criminal justice system. The research, published in a book titled *How Juries Work: And How They Could Work Better* by Dr. Rebecca Helm of the University of Exeter, warns that these weaknesses are deeply rooted in the current legal framework, which often relies on outdated procedures rather than robust evidence of how juries actually function.

The book argues that while the legal procedures surrounding juries have evolved over centuries, much of the current framework remains grounded in "common-sense" approaches dating back to the 1200s. However, modern understanding of human psychology and decision-making processes provides an opportunity to redesign these procedures to better support jurors in making accurate and fair decisions.

TRAINEE SALARIES

The Law Society of England and Wales has announced a recommended increase in minimum salaries for aspiring solicitors. Trainees should be paid £24,320 outside of London and £27,418 in the capital for qualifying work experience (QWE) for the Solicitors Qualifying Exam (SQE) or during their training contracts.

Law Society president Nick Emmerson stated, "The increase in recommended salary for aspiring solicitors is considered appropriate at this time. The minimum salary policy and uplift support those seeking to enter the profession with an appropriate salary recommendation."

MISHCON DE REYA RESULTS

This marks a 17% increase from the previous year and represents a doubling of revenues since 2017. The firm also recorded profits of £90 million, slightly down from £93 million in the previous year.

James Libson, Managing Partner, highlighted the successful integration of Taylor Vinters and praised the exceptional contributions of the firm's people. He also noted the completion of the firm's 10 Year Vision and hinted at the forthcoming strategic phase.

Matthew Tilley, Group Chief Financial Officer, expressed satisfaction with the firm's performance and growth trajectory, emphasising Mishcon's unique combination of capabilities and culture.

A £3,000 legal fee might result in only a few hundred pounds being reimbursed, creating an 'innocence tax'

CALL TO REFORM IPP

A coalition of 70 criminal justice experts, civil society organisations, leading activists and campaigners has published an open letter to Keir Starmer's new Labour Government and the Justice Secretary, Shabana Mahmood, calling on them to deliver crucial reforms to Imprisonment for Public Protection (IPP) sentences, a national scandal which has claimed 121 lives since 2005.

Imprisonment for Public Protection (IPP) sentences were a form of 'indefinite' detention introduced by New Labour in 2005 to appear tough on crime. They were abolished in 2012 due to widespread concern over the sentence's implementation and psychological impact on inmates. Many were given IPP sentences for minor offences, including Ronnie Sinclair, who served 15 years in prison for smashing a flowerpot in 2012 and ripping up her friend's betting slips. Thomas White, another IPP prisoner, remains in prison 12 years after stealing and returning a mobile phone.

COSTS PARALEGALS

Following a membership consultation, members of the Association of Costs Lawyers (ACL) have backed the creation of two new membership categories – Fellow and Costs Draftperson. The Council has now launched a further consultation on describing the latter group as Costs Paralegals.

The initial consultation on updating the articles of association and by-laws closed on 7 June and the results have now been considered by the Council. They showed strong support for the changes proposed, with:

- 88% agreeing with the introduction of a Fellow category
- 82% broadly agreeing with the introduction of a 'costs draftsperson' category and with the requirements for it.

PART TIME TRAINING

The Law Society of England and Wales' Disabled Solicitors Network has welcomed Hill Dickinson as the latest firm to join Project Rise. This initiative aims to expand part-time solicitor training within the legal profession, offering more accessible routes to qualification for individuals from diverse backgrounds.

Project Rise has broadened part-time training options, including traditional training contracts, solicitor apprenticeships, and the Solicitors Qualifying Exam.

Firms already in Project Rise report a growing interest in part-time training. One firm noted that 20% of recent applicants expressed a desire to train part-tim another participating firm reported 30% part-time work across all employee levels.

INNOCENT TAX REFORM

James Constable, Senior Associate Solicitor for Crime at Ellis Jones Solicitors, is demanding an overhaul of the system that penalises innocent defendants financially, known as the 'innocence tax'. Despite being acquitted, individuals often face substantial financial losses due to the current reimbursement process for legal costs, which he describes as a "farce."

Previously, acquitted defendants could recover reasonable legal fees from central Treasury funds. However, since 2013, the system only reimburses costs at Legal Aid rates, which are significantly lower than market rates, leaving many individuals with large shortfalls. For example, a £3,000 legal fee might result in only a few hundred pounds being reimbursed, creating an 'innocence tax' that penalises the wrongfully acquitted.

LEGAL AID SAVINGS QUESTIONED

A recent report highlights the urgent need for improved data collection to determine if the 2012 legal aid cuts have truly saved money. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) aimed to reduce civil legal aid costs, but evidence of its effectiveness is lacking. The report, authored by researchers from the University of Exeter in partnership with Public Law Project and Migrants Organise, underscores the necessity for systematic data collection across government entities to assess the actual financial impact of these cuts.

IS YOUR FIRM UNDER ATTACK?

The legal profession is one of the most vulnerable sectors to ransomware attacks due to the vast amounts of sensitive and critical information held by law firms. The unauthorized exposure or loss of such data could not only disrupt business operations but also tarnish reputations and lead to severe financial losses. Unfortunately, this sector is also one of the most frequently attacked by ransomware groups. In the last three years, as ransomware attacks have intensified, companies in the legal industry have suffered more than 200 attacks worldwide.

LAW GUIDE FOR MPS

Law for Lawmakers guide is released to equip MPs with essential legal knowledge, ensuring effective lawmaking and rule of law protection

JUSTICE has published an updated Law for Lawmakers guide aimed at equipping a record number of new MPs with the legal and constitutional knowledge necessary for their roles. This guide seeks to enhance lawmaking, reset relations between the government and legal professions, and protect the rule of law amid concerns of its recent erosion.

The Law for Lawmakers guide, provides crucial support to MPs tasked with addressing major challenges within a complex Parliamentary system. By offering comprehensive guidance on democratic and evidence-based lawmaking, the guide assists MPs in navigating their responsibilities effectively.

IP MINISTER

The Intellectual Property Office has announced the appointment of Feryal Clark MP as the new Parliamentary Under Secretary of State in the Department for Science, Innovation, and Technology, with responsibility for intellectual property.

Adam Williams, Chief Executive and Comptroller-General of the Intellectual Property Office, expressed his enthusiasm: "I am delighted to welcome Feryal Clark as the new minister responsible for IP."

The new government prioritises economic growth, with innovation and creativity being essential to this objective. Intellectual property plays a pivotal role in enabling these sectors within the UK economy.

New survey explores impact of court delays on victims

The Victims' Commissioner, Baroness Newlove, has launched a new survey aimed at understanding the effects of prolonged court waiting times on victims across England and Wales. This initiative comes in response to growing concerns about the impact of the Crown Court backlog and other delays within the criminal justice system.

The survey is open to any victim in England and Wales whose case resulted in the perpetrator being charged. It seeks to gather firsthand experiences from victims about how court delays have affected their lives and their interactions with the justice system. The feedback collected will be used to inform the Commissioner's upcoming work, including a detailed report that will examine the consequences of these delays and propose measures to alleviate the burden on victims.

Recent data from the Ministry of Justice highlights the severity of the issue. As of December 2023, over a quarter (27%) of cases were rescheduled on the day of trial. Additionally, nearly two-thirds (59%) of adult rape investigations were discontinued due to victims withdrawing from the process. The Crown Court currently has a record 67,573 open cases, with 16,031 of these pending for over a year.

Baroness Newlove expressed deep concern about the situation, stating, "No one should be expected to wait years before their case gets to court. Yet justice is not being delivered in a timely or effective way, and it is victims who are ultimately paying the price. With a record backlog in our Crown Courts, the justice system is under immense strain, and we cannot ignore its impact on victims."

She continued, "I often hear from frustrated victims anxiously awaiting their day in court. Stuck in limbo for years, one victim went as far as questioning whether a justice system inflicting such delays on victims can even claim to be delivering justice. It is clear to me that these aren't isolated examples. These are systemic issues, and it is causing victims real and undue distress."

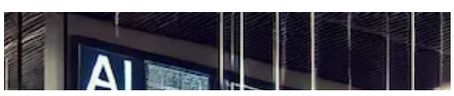
Baroness Newlove emphasised the importance of participation in the survey, urging as many victims as possible to share their experiences. "By using their voice, victims influence the recommendations I put to government and criminal justice agencies and help shape a justice system that puts the needs of victims first," she added. SJ

Lawyers anticipate major AI time savings

A recent survey by Thomson Reuters reveals that UK lawyers are increasingly optimistic about the impact of AI on their profession, predicting significant time savings and productivity gains. The survey, part of the 2024 Future of Professionals report, shows that lawyers expect to save nearly 140 hours annually through AI-powered technology—a time savings valued at up to £51,000 per lawyer.

Kriti Sharma, Chief Product Officer for Legal Tech at Thomson Reuters, highlighted the growing enthusiasm among legal professionals: "The legal profession has recognised the potentially significant productivity benefits of leveraging AI. It's exciting to see law firms running AI pilot programmes and making long-term investments in the technology as trust around safe usage grows."

Kriti Sharma emphasised the broader impact of these advancements: "With 102,000 lawyers working at UK law firms, three hours of time saved per week will help unlock potential for more creativity, strategic thinking, and even better service. It also could translate to a significant boost to the UK economy."



The report estimates that by the third year of AI adoption, lawyers will save seven hours weekly, rising to 11 hours by the fifth year. This would amount to over 1,500 hours saved per lawyer over five years.

UK lawyers are particularly enthusiastic about AI, with 79% believing it will have a "high or transformational impact" on the legal profession within the next five years. Additionally, 73% view AI as a "force for good" in the industry, and 54% estimate that over half of their work will involve AI-powered technology by 2029.

The study also found that UK lawyers are more open to AI's ethical implications than their international counterparts. A striking 92% of UK lawyers consider it ethically acceptable to use AI for basic drafting, a higher percentage than those in Canada (82%), the US (75%), and Latin America (78%).

Regarding the specific benefits of AI, 56% of UK lawyers are most excited about the time savings AI will bring. Of these, 34% are enthusiastic about the time it will free up, while 22% look forward to the increase in productivity. Meanwhile, 36% are excited about the direct value AI will add to their work. SJ

Supreme Court ruling alters RTM law

In a landmark decision, the Supreme Court has ruled on the significant case of **A1 Properties v Tudor Studios**, fundamentally altering the landscape of Right to Manage (RTM) law. The court dismissed the appeal by A1 Properties, the intermediate landlord, which had argued that the failure to serve an RTM claim notice invalidated the transfer of management rights.

The ruling, delivered on 16 August 2024, resets the approach of the courts to minor procedural errors in the complex area of RTM legislation. The decision also partly overrules the 2015 Court of Appeal guidance in **Natt v Osman**, which had previously allowed landlords greater leeway to challenge RTM claims based on procedural missteps.

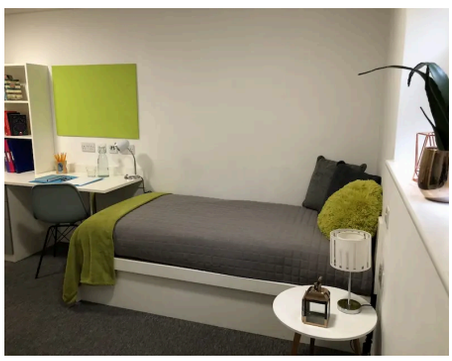
> **This is a significant decision which simplifies the work of enfranchisement - Mark Loveday, Barrister, Tanfield Chambers**

The case arose when Tudor Studios Management Company Limited, the RTM company, inadvertently failed to serve the RTM claim notice on A1 Properties. Despite this oversight, the Supreme Court ruled in favour of Tudor Studios, asserting that minor procedural errors should not invalidate the transfer of management rights unless significant prejudice to the landlord or other stakeholders can be demonstrated.

The Association of Leasehold Enfranchisement Practitioners (ALEP), a not-for-profit organisation representing leasehold enfranchisement professionals, played a critical role in this appeal. ALEP intervened to seek clarification on the service of notices, particularly in light of the complex requirements of RTM legislation. The Supreme Court took the unusual step of allowing ALEP to make oral submissions, with Lord Justice Briggs praising their "scholarly and helpful intervention" and "carefully prepared and very helpful submissions."

Mark Chick, Partner at Bishop & Sewell LLP and a director of ALEP, who acted pro bono for the organisation, commented, "The law relating to notices continues to cause difficulty, particularly where mandatory procedures laid down by Parliament are not followed. The case of A1 v Tudor provides a thorough review of the law in this area and provides greater clarity in that the courts will now look to the consequences of any non-compliance, and in particular the extent of the prejudice to any party affected by that non-compliance."

Mark Loveday, a barrister at Tanfield Chambers who also represented ALEP, noted the significance of the ruling: "This is a significant decision which simplifies the work of enfranchisement and RTM professionals and their clients. ALEP's intervention was timely."



John Midgley, Partner at Seddons Solicitors and another director of ALEP, added, "This decision provides clarity and will be welcomed by advisors looking to serve notices in what can be big and complex exercises where the scope for procedural errors exists."

The ruling arrives as the UK government's 2024 Leasehold and Freehold Reform Act takes effect, with further reforms on the horizon under the new Labour government's Leasehold and Commonhold Reform Bill. The decision marks a critical moment for RTM law, offering greater certainty to tenants and RTM companies while emphasising the importance of substantive compliance over strict adherence to procedural requirements. SJ

Property law firms face continued decline

The property law sector continues to struggle in 2024 as real estate transactions fall by 22% year-on-year, leading to a decline in active law firms and a reduction in caseloads. Data from Search Acumen's Conveyancing Market Tracker shows that the number of active property law firms has decreased by 3% in the first half of the year, with around 130 firms exiting the market. This trend represents an 11% decline in the number of firms over the past decade.

The drop in transactions is also reflected in the caseloads handled by remaining firms. On average, firms dealt with 19% fewer cases in the first half of 2024 compared to the same period in 2023. This decline has been particularly sharp since the peak of the market in early 2022 when firms were handling 94 caseloads per quarter, compared to just 61 in 2024.

> **On average, firms dealt with 19% fewer cases in the first half of 2024**

While some in the industry see this decline as a temporary reprieve following the intense activity of the post-pandemic years, others view it as a sign of stagnation in the real estate market. The top five law firms have also seen their market share decline, with a 9% drop in transaction volumes over the past decade.

Andrew Loyd, Managing Director at Search Acumen, notes that this is a critical time for law firms to adapt, particularly through digital transformation. As the real estate market faces potential changes under new government policies, firms that invest in technology and efficiency may be better positioned to capture future growth. The pressure to balance client demands with operational efficiency is driving mid to large firms to innovate, which could shape the future landscape of the property law sector. SJ

Osbornes Law offers fertility testing

In a groundbreaking move to support its predominantly female workforce, London-based Osbornes Law has announced the introduction of fertility testing as a new healthcare benefit. This initiative, designed to empower employees and their partners to take control of their reproductive health, underscores the firm's commitment to creating a supportive and inclusive work environment.

Osbornes Law, where over 70% of the staff are women, is setting a new standard in the legal industry by offering this proactive and preventative fertility benefit. The firm has partnered with Hertility Health to provide a clinically validated at-home hormone test, along with a comprehensive online health assessment. This test allows employees to check their ovarian reserve or egg count and screen for up to 18 reproductive health conditions, including endometriosis and polycystic ovary syndrome. Additionally, the firm will offer specialist consultations for women navigating perimenopause and menopause, further broadening the scope of support available.

This initiative is one of the first major steps taken by Jo Wescott, who was appointed managing partner earlier this year, making her the first woman to hold this position in the firm's 50-year history. Wescott, a mother of two young children, has personally seen the challenges faced by women struggling with fertility issues, which has fueled her determination to provide meaningful support to her colleagues.

Reflecting on her experience and the new benefit, Jo Wescott said, "I was in my mid-late 30s when I had my children, which in medical terms is classed as geriatric. I had no fertility issues, but I know many friends and colleagues who sadly weren't so lucky. People often think it won't happen to them, and when it does, it's absolutely devastating. It changes relationships, and I have seen this both personally and professionally. What's really important for me is that having access to this benefit will allow colleagues to be proactive and take control of their own health so they can identify any problems at an early stage, hopefully early enough to do something about it."

Jo Wescott emphasised that her primary responsibility as managing partner is to support the well-being of all employees. "I want people to be happy and healthy when they come to work, and this is one small way to help maintain that," she added.

Osbornes Law, with offices in Camden and Hampstead, is the first law firm to be certified as a Reproductively Responsible™ employer by Hertility Health. This certification reflects the firm's dedication to leading the way in employee care, particularly in areas that have traditionally been overlooked in workplace health benefits. SJ

Lawyers urged to embrace thought leadership

In the rapidly evolving legal market, thought leadership has emerged as a critical tool for law firms aiming to attract and retain clients. However, new research from Passle's Legal Marketing Leadership Survey 2024 highlights significant internal challenges that firms must overcome to fully leverage this strategy.

The survey, which gathered insights from managing partners and chief marketers at 200 top law firms in the UK, US and Canada, found that over three-quarters (76%) of respondents believe the value of marketing is not fully understood across their firms. This disconnect is hindering efforts to build online presence and establish thought leadership, despite these being identified as top priorities for driving growth.

Connor Kinnear, Chief Marketing Officer at Passle, emphasised the importance of thought leadership in the current legal landscape. "Law firm leaders recognise the importance of marketing, particularly content marketing, and how much it is valued by clients in helping them to keep abreast of relevant legal news and developments," Connor Kinnear explained. "What many firms still struggle with is engagement from lawyers, with lack of a collaborative culture, time and technical skills cited amongst the reasons they do not get more involved."

Connor Kinnear warned that this hesitance could have tangible consequences for business development. "They may not realise it, but failing to invest in thought leadership could be costing them new clients," he noted. The survey also found that almost three-quarters (72%) of firms acknowledged they could improve in showcasing their expertise, while seven in 10 felt their marketing materials were subpar, potentially leaving clients unaware of the full range of services they offer.

A striking finding from the research was the disconnect between how law firms perceive client engagement with their websites and the reality. While 73% of firms believed clients visited their websites infrequently, a recent survey of general counsel (GCs) revealed that over half (52%) use their law firm's website as their main source of information, visiting at least once a week, with a further 34% visiting at least once a month. SJ

CTA compliance concerns grow globally

A new study by CSC has revealed that 83% of senior in-house legal and compliance executives are worried about their organisation's ability to comply with the Corporate Transparency Act (CTA), which came into effect on 1 January 2024. The survey also found that over 76% believe the CTA is causing broader concern among U.S. businesses, highlighting the widespread impact of this new legislation.

The CTA was introduced to strengthen law enforcement and government agencies' ability to combat national security threats, corruption, terrorism and money laundering. However, its implementation has led to significant uncertainty, as organisations struggle to interpret and meet its requirements.

CSC, a leading global provider of business administration and compliance solutions, conducted the study among 200 senior professionals, including general counsels and corporate secretaries, across a diverse range of industries in the U.S., Continental Europe, the U.K. and APAC. Respondents included both U.S.-based corporations and multinational corporations with entities registered in the United States.

The findings, detailed in CSC's report titled "The Corporate Transparency Act: Readiness, Concerns and Implications," reveal key concerns and compliance challenges faced by organisations as they navigate the complexities of the new law. Despite the CTA being in effect for several months, many businesses are still grappling with its implications.

The research found that nearly all respondents (93%) are aware of the CTA, but only 45% understand its reporting requirements, and just 39% are aware of the reporting deadlines. Familiarity with exemptions under the CTA is even lower, with only a third of respondents being aware of them.

One major concern identified by the study is the lack of guidance on what non-U.S. entities need to do to comply. Nearly two-thirds (62%) of respondents cited this as a significant challenge, ahead of concerns about high fees, costs and a lack of understanding about penalties for non-compliance, which were highlighted by nearly 40% of respondents.

"The extent to which businesses are still feeling unfamiliar or uncomfortable about their organisation's ability to comply with the CTA is worrying but unsurprising," Dallmann commented. "It's clear the subjectiveness of the CTA, including ambiguity around exemptions and the question of who within an organisation meets the definition of being a beneficial owner, is causing uncertainty as to its provisions."

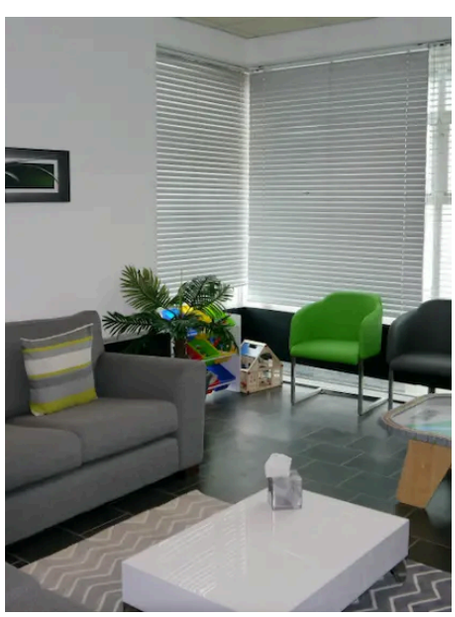
With much of the responsibility for compliance falling on organisations themselves, many businesses are turning to third-party service providers for help. These providers offer expertise in navigating the complexities of the CTA, allowing companies to focus on their core business activities without being bogged down by compliance issues. SJ

Win for witnesses as courts revamp waiting rooms

In a significant move aimed at improving the experience for victims and witnesses of crime, ten court buildings across England and Wales have undergone substantial refurbishments. These upgrades, spearheaded by the Ministry of Justice and HM Courts & Tribunals Service, are designed to provide a more supportive environment for vulnerable court users.

With over £50,000 invested into these projects, the renovations include enhanced video link rooms, new refreshment stations and more comfortable seating, alongside essential maintenance such as damp-proofing, re-painting and re-carpeting. These improvements aim to create a calming and welcoming atmosphere for those who may find the court process intimidating or stressful.

Justice Minister Heidi Alexander highlighted the importance of these changes, stating, "Giving evidence can be an emotional experience for anyone, especially for victims, who deserve to be treated with dignity and respect. This refurbishment project will make the experience more comfortable for witnesses and victims, ensuring they can participate fully in our justice system and that their day in court runs as smoothly as possible."



The initiative is part of a broader effort by the government to prioritise victims within the criminal justice system. This aligns with the upcoming Victims, Courts and Public Protection Bill, announced during the King's Speech this month. The Bill is expected to introduce new measures to support victims, such as empowering the Victims' Commissioner to hold the system accountable and requiring offenders to attend their sentencing hearings.

The refurbished courts include Gloucester Crown Court, Mold Crown Court, Highbury Magistrates' Court and several others, each now equipped with upgraded witness suites designed to make the court experience as positive as possible for those who are often the most vulnerable.

These changes not only ensure that the physical environment is more conducive to supporting witnesses and victims, but also reflect a broader commitment to ensuring justice is both seen and felt by those who have suffered the impacts of crime.

As the Ministry of Justice continues to roll out these improvements, the focus remains on creating a justice system that is as compassionate as it is effective, with the ultimate goal of helping witnesses to participate fully in the legal process and see justice done. SJ



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The reimbursement burden from authorised push payment fraud: are tech companies the new target?

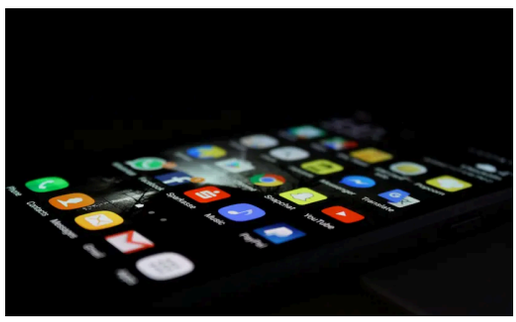
Jon Felce and Rosie Wild, partners at specialist disputes firm CYK, discuss the new Labour government's reported plans to shift some of the burden of compensating victims onto tech companies

Jon Felce

Partner, Cooke, Young & Keidan

Rosie Wild

Partner, Cooke, Young & Keidan



The rise of authorised push payment (APP) fraud has left many victims in despair over how to get their money back. According to UK Finance's Annual Fraud Report, published in June 2024, APP fraud in 2023 was the most common type of financial fraud in the UK, with losses totalling an estimated £459.7 million.

Until now, when not pursuing the fraudsters themselves, the focus for recovery has been the banks, both the victim's bank and in some cases, the bank of the fraudster to which the funds have been sent. However, there have also been recent headlines about the new Labour government's plans to shift some of the focus for combating online fraud and compensating victims onto 'big tech companies', who according to a leaked Labour Party paper 'contribute very little' to tackling online fraud or compensating victims.

In this article, we consider how this might work in practice, and whether this might lead to better prospects of recovery for victims of APP fraud.

THE CURRENT POSITION

Putting to one side claims against the fraudsters themselves, victims of APP fraud have a variety of potential schemes available to them insofar as financial institutions are concerned, including:

- the Contingent Reimbursement Model, a voluntary code, which led to £256.5 million being returned to victims in 2023;
- legislation scheduled to come into force in October, which will mean that banks will have to reimburse eligible fraud victims for claims worth up to £415,000; and
- the Financial Ombudsman.

However, there are notable limits to each of the schemes above, including compensation limits, and eligibility criteria. A discussion of these limits falls outside the scope of this article, but such issues often mean that victims' primary focus ends up being the pursuit of legal claims against either the victim's own bank or the fraudster's bank. Whether or not the banks are liable will often turn on the facts, and there are a number of legal nuances with which victims need to grapple. That said, there has been a wealthy of recent case law in this regard, and three cases this year appear to be helpful to victims, in the right circumstances.

SHOULD THE BANKS BEAR THE REIMBURSEMENT BURDEN ALONE?

With banks in the firing line, earlier this year and before July's general election, the *Financial Times* reported on a leaked Labour Party paper, one of the focuses of which was on making 'big tech companies' assume a share of the responsibility for APP fraud. Meanwhile in July, the UK Payments Association issued a plea to the Chancellor to impose a 'tech levy' on social media giants to pay for the impact of payments fraud originating from their platforms.

Banks have, unsurprisingly, supported this increased focus on tech companies, arguing that making the tech sector contribute would give it an incentive to stop fraud from flourishing in the first place. For example, this could increase the prompt detection and removal of fraudulent ads, not least because a lot of APP fraud stems from false ads posted on social media platform.

It is not yet clear how any model that requires tech companies to contribute to the reimbursement of fraud victims would work or which tech companies would be caught. Despite the aforementioned suggestion of a 'tech levy', the leaked paper outlined a proposal under which banks would still have to refund fraud victims but could later recoup some money from tech companies. Banks and payment companies would regularly submit evidence to an oversight body, which would then determine how much tech companies should contribute. This could generate disputes between banks (of both the victims and fraudsters) and tech companies as to their relative culpability, or indeed between victims and tech companies where the losses exceed compensation limits, and – depending on which tech companies are affected – could be an unsustainable financial burden for many smaller tech companies.

Whilst these proposals seem at a very early stage, and will no doubt have their limits like other schemes, any developments designed to increase efforts to compensate can only be a good thing for victims of fraud. SJ

It is not yet clear how any model that requires tech companies to contribute to the reimbursement of fraud victims would work or which tech companies would be caught

A closer look at the detail of the King's Speech

Bills about crime and the police, it seems, are like buses, says Tim Kiely, a Criminal Barrister at Red Lion Chambers, they have a habit of arriving in groups

Tim Kiely

Barrister, Red Lion Chambers

With the election of a new government and, following the latest King's Speech, the announcement of a new Crime and Policing Bill, those who remember the fraught passage of the Police, Crime Courts and Sentencing Act 2022 and Public Order Act 2023 under the last government may find that their heads are spinning as they try to keep up.

To be sure, the police and criminal justice estate writ large is in a parlous condition. Although the King's Speech only gave broad outlines of what we can expect, there are welcome announcements. Any promises to 'tackle knife crime' and otherwise deal with violent offending ought to be a good thing, though of course the devil will be in the details of any such strategy.

Likewise concerning the delivery of higher standards in policing. It is correct to point out that confidence in the police is at a historic low ebb. There may well be sound reasons for the public to be warier than before of a body whose members enjoy such power over their lives and who have, of late, become increasingly known for abusing that power. A catalogue of recent findings from the Casey Report to the Angiolini Report rises up to confront anyone who observes the recent history of the Metropolitan Police alone.

No doubt, this accounts for the proposals aimed at increasing the powers of HM Inspectorate of Constabulary and introducing higher mandatory national vetting standards, as well as rebuilding neighbourhood policing through police officers who know, and are known by, the communities which they serve.

How this is meant to be squared with the demand for 'efficiency savings' is another question. Arguably much of the recorded deterioration in standards across policing in recent years can be attributed (at least, in part) to pressure from above, to do more with less, which resulted in corner-cutting and missed opportunities to deal with misbehaviour by police officers, until it was much too late.

This also has implications for the proposal to provide a 'specialist response' to gender-based violence; again, in the shadow of Wayne Couzens and others it is hardly surprising if many people, particularly women, feel that they cannot trust the institutions that are supposed to protect them. Ask them if granting greater powers to the police would make them feel safer, and you may receive a very firm answer. Without root-and-branch restructuring of these bodies, as well as more widespread social efforts to educate boys and men out of violent behaviour, these measures may be ineffective at best and counterproductive at worst.

Indeed, any attempt to understand crime without understanding its wider social roots and causes is likely to run aground in the same way. The government should bear this in mind when contemplating new, specific criminal offences like assaulting a shopworker, or tackling anti-social behaviour through new Respect Orders (which themselves sound suspiciously similar to the last Labour innovation in this area, the Anti-Social Behaviour Order).

It may be that the government is banking on the public wanting order and stability first and foremost after the chaos of more recent administrations, and not being all that concerned about whether or not some parts of society must deal with increased and more punitive policing in order to get there – who wants to stand up for the anti-social, after all?

If so, they may find such a calculation is short-sighted. Years of crime statistics, including in a 2022 report from the Sentencing Council, show that there is no obvious correlation between harsher policing and punishment, on the one hand, and decreased incidents of crime, on the other. If being 'tough on crime' were enough, then the shape of our society, and our prison estate, would be very different.

Not just the last government but arguably the last thirty years have been an education in how trying to simply 'get tougher' on crime without investment in society at large does nothing to create a society in which everyone is safer. The government should avoid falling into the trap of redoubling their efforts in a cause which ultimately takes them further away from their purported goal. SJ

It may be that the government is banking on the public wanting order and stability first and foremost after the chaos of more recent administrations

Independent Inquiry into Child Sexual Abuse and civil claims: is time up for the Limitation Act?

Chris Ratcliffe, Senior Lecturer in Law at Nottingham Law School, asks whether civil claims arising from child sexual abuse should continue to be governed by a three-year limitation period

Chris Ratcliffe

Senior Lecturer in Law, Nottingham Law School

The Independent Inquiry into Child Sexual Abuse (IICSA) examined evidence that the application of limitation in civil child sexual abuse (CSA) claims operates unfairly. It concluded that it has a prejudicial effect on the willingness of lawyers to accept claims, valuation and settlement of claims, and trial. The IICSA recommended its removal in CSA cases, with the burden then falling on the defendant to persuade the court that, in the absence of a limitation defence, that a fair hearing was not possible.

CSA claimants have already experienced heinous cruelty, yet the law on limitation throws down further harsh barriers in their search for reparations, and risks further trauma. The unfairness is even more stark as the abuse itself creates barriers to disclosure, such as feelings of shame, which in turn cause or contribute to delay. Seemingly, defendants can therefore benefit from the consequences of their own alleged wrongdoing, or the wrongdoing of those they are vicariously responsible for, to successfully stave off any claim, or settle at an undervalue.

THE BACKGROUND

In CSA cases, limitation runs from the claimant's eighteenth birthday. A claim brought three years after that date is time barred. The majority of civil CSA claims are brought after expiry of that primary limitation period.

The Limitation Act 1980 allows a claimant to request that the court disapply the three-year limitation period if the defendant argues the claim is time barred, which they invariably do. This predictable defence places a heavy burden (and cost) on the claimant, requiring them to satisfy stringent criteria and face the menace of a defence that could extinguish their claim, regardless of any merit in the remaining issues.

THE GOVERNMENT'S STANCE

However, the IICSA's recommendation was not accepted by the government. In its response, the government proposed a consultation on options for limitation reform. That consultation opened in May 2024 and invited responses from several stakeholders who would be most affected by the nine options presented. One option is to maintain the status quo, however, the government has accepted the exceptional nature of CSA claims, that such claims may be brought many years, even decades, after the abuse and the critical limitation issue that the reform recommendation by the IICSA intended to address in reducing some of the barriers faced by CSA victims and survivors in seeking redress (Consultation Impact Assessment: Evidence Base).

In the foreword to the consultation, the government promised to 'consider all responses carefully'. However, despite the range of identified stakeholders being wide enough to reflect a fair and independent balance of consultees, there appears little hope that the result of the consultation will lead to the removal of limitation in CSA cases. The opening position of the government is that it does not support removal of the limitation period, stating that the three-year period is not absolute, there is a need for certainty for defendants who could face litigation at an indeterminate time in the future, and that it would not be in the interests of justice given the potential effect on the cogency of evidence.

Instead, the government favours a reverse burden of proof, meaning that claims will proceed unless the defendant persuades the court that a fair hearing is not possible or they would be substantially prejudiced, along with codification of existing judicial guidance. A reverse burden may be a positive step forward, but it is unlikely to spare the claimant having to, among other things, explain in detail the personal reasons for the delay, describe the insidious effects of the abuse, and respond to arguments about the degradation of evidence. If this option is implemented, it is questionable whether this will achieve anything close to the IICSA's recommendation; it will simply involve the same arguments, with a different side firing first.

In dismissing support for removal of the limitation period, the government has cited evidence from the IICSA, that other categories of claimants may find themselves just as deserving of limitation reform. It is untenable to suggest that unfairness to one group should mean unfairness to all. Perhaps the time has come to reform the whole of limitation, not just in CSA claims. SJ

In dismissing support for removal of the limitation period, the government has cited evidence from the IICSA, that other categories of claimants may find themselves just as deserving of limitation reform

E-scooters and the urgent need for regulation

Joshua Hughes, Head of Bolt Burdon Kemp's complex injury team, looks at the options to regulate e-scooters

Joshua Hughes

Partner, Bolt Burdon Kemp

Another e-scooter battery fire appears to be the explanation for a blaze that tore through seven homes in Hampshire, devastating the properties and lives of the inhabitants. This latest incident has once more shone a spotlight on the need for government to finally grasp the nettle on private e-scooters.

FIRE RISK

Fire and rescue services have voiced concern that the lithium batteries powering e-scooters and e-bikes are leading to increasing numbers of fires. In 2020, figures collated from 38 fire and rescue services demonstrated that there were just 77 incidents involving e-scooters or bikes. By 2023, this rose to nearly 350 incidents. To that end, there can be no denying the correlation between micromobility devices like e-scooters becoming ever-more popular and the incidence of battery-related fires.

Whilst the destructive nature of lithium battery fires is such that determining the exact cause can be difficult, fire services suggest that fires are most common during the charging process. This is where the battery catastrophically fails, causing them to explode and/or catch fire. Worse still, private e-scooter riders will usually bring them inside to charge overnight into hallways or other communal areas that can block escape routes, amplifying the risk of fire-related injury or death.

Battery degradation or damage can precipitate malfunction. Modifications made by e-scooter owners or suppliers, usually to increase speed or power, significantly increases the risk of battery fires. Moreover, the sale of counterfeit e-scooter products including batteries are also a common feature in battery-related incidents.

Despite threats to do so, the outgoing government failed to grasp the nettle of regulating privately owned e-scooters

CALL FOR ACTION

There are now growing calls to legislate against the danger of lithium-ion batteries in e-scooters and bikes. This has manifested in a new Electric-Powered Micro-Mobility Vehicles and Lithium Batteries Bill, championed by Electrical Safety First. If enacted, the legislation would mandate a third-party safety assessment for all e-scooter and e-bike batteries before they enter the UK market. Among other measures, this would go some way to reducing the number of counterfeit batteries and mark a move towards improving standards in a uniform way.

Our firm has called upon government to enact laws to regulate the manufacture and use of private e-scooters in the UK for several years. For example, in 2022, we chaired a roundtable discussion between major stakeholders including the Metropolitan Police, the Motor Insurers Bureau, the Association of British Insurers, the Parliamentary Advisory Council for Transport Safety and solicitors to discuss how the government could approach future regulation of e-scooters in a more standardised way.

As it currently stands, unlike e-bikes, e-scooters are treated by the law in the same way as conventional motor vehicles. This means riders require driving licences, a motor insurance policy, an MOT and tax in order to operate their private e-scooter legally on our road network. This creates a contradiction because it is not currently possible for private owners of e-scooters to achieve any of the above requirements. This in turn means that whilst the sale of private e-scooters is entirely legal, the use of them on public land is not and is subject to prosecution. All the while their popularity spirals and the police have little option but to turn a blind eye to their use in public. The public's confusion is then compounded by the operation of long-running approved e-scooter rental schemes that operate up and down the country.

The current outdated legal framework means e-scooter riders who are injured due to the negligent actions of another road user may be prevented from seeking compensation regardless of how sensibly they may have been riding. This is because the defendant will likely seek to defend their claim on the grounds that the e-scooter was being used on public land.

Conversely, the rider's inability to obtain an insurance policy means those injured by them whilst operating their private e-scooter can't seek compensation from the defendant rider's insurance company in the normal way. Rather, they would have to rely on the Motor Insurers Bureau to step-in and compensate. This means insurance premium paying motorists effectively foot the bill for uninsured e-scooter riders who aren't paying into the system.

Despite threats to do so, the outgoing government failed to grasp the nettle of regulating privately owned e-scooters. However, once the dust has settled for the new Labour government, we should strive for action that will promote the ambition for active travel and the decarbonisation of our transport sector, whilst putting an end to the wild west in which private e-scooters are currently manufactured, sold and used. Approved e-scooter rental trials have been operating across the country for around four years and so sufficient data ought now to be available for the government to base its long-term strategy on. SJ

The controversy involving Olympic boxing

Dr Seema Patel, Associate Professor in Sports Law at Nottingham Law School, shares her opinion on the gender controversy involving boxing at the Paris Olympics

Seema Patel

Associate Professor in Sports Law, Nottingham Law School

If this is indeed about sex and gender, some aspects of the gender controversy in the boxing event at the Paris 2024 Olympic Games are an inevitable consequence of the current disorder with gender eligibility regulation in sport. The traditional binary categorisation of male and female sport is being challenged by gender diverse athletes who do not necessarily align with those norms, such as trans athletes and differences of sexual development (DSD) athletes. This is all taking place at a time when gender identity is evolving and expanding beyond a binary across society. The participation of gender diverse athletes has ignited global debate about fairness, inclusion and safety and the validity of gender eligibility policies.

BEYOND THE BINARY

Gender identity is broad and varied, but the inclusion of gender diverse athletes in the female sport category has been at the centre of attention in recent years following high profile cases involving athletes such as Caster Semenya, Laurel Hubbard and Lia Thomas. Their eligibility is contested because of a perceived unfair biological advantage over typical females which may have fairness, inclusion and safety implications. Increasingly, academics, experts, stakeholders, policy makers and athletes are tussling with the conundrum of how to include gender diverse athletes in a system that has been historically designed for typical female bodies.

The matter itself is far from binary, rather a multidimensional topic concerning sex and gender that reaches to the essence of sporting activity. The debate cuts across a range of disciplines and presents a real challenge of reconciling inclusion and exclusion in sport. The boxing matter forms part of a much deeper narrative about gender which goes beyond the superficial headlines.

THE CURRENT CONTROVERSY

The athletes appear to have complied with boxing rules at every stage, yet their gender identity is speculated, and they are being mistreated and misrepresented in the media. The humiliation of athletes in this way is familiar, with Indian athlete Dutee Chand and South African athlete Caster Semenya previously exposed to similar prejudice. Semenya's legal challenge against athletics gender eligibility rules is currently at the European Court of Human Rights.

The implication that the female boxers have been subject to sex-based chromosomal testing to prove their femininity, is reflective of early versions of gender policing, which were based upon limited knowledge and a limited understanding of gender diversity and fuelled by political tensions between governing bodies and nations. Previous methods were invasive, inaccurate and were seemingly abandoned. The November 2021, IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations is non-binding, but centres around ten key principles of inclusion. The Framework recognises the unique characteristics of each sport and encourages each international sports federation to develop sport-specific knowledge in the context of their own eligibility criteria.

Sports bodies are under significant pressure to address gender eligibility with more rigour and transparency. The current approaches are varied but there is a general trend towards bans and testosterone suppression requirements. The boxing rules seem to be ambiguous at the international and national levels and the regulation of the sport is in a transitional period. The nature of the testing conducted on the boxers is unclear. Suppose gender-based tests did reveal excessive testosterone levels or the presence of a Y chromosome, the situation is much more complicated and the scientific basis for performance advantage in sport is greatly debated across science and humanities disciplines. There are multiple aspects to gender diversity in sport and the discussion cannot be reduced to simplistic arguments relating to male athletic advantage. Overall, the current regulatory approaches are incoherent and piecemeal across and within sports and we are at risk of moving backwards.

Gender eligibility policies are increasingly subject to challenge as athletes who are impacted by the rules, begin to assert their legal rights and human rights

CONCLUSION

Gender eligibility policies are increasingly subject to challenge as athletes who are impacted by the rules, begin to assert their legal rights and human rights. In order to ensure that evidence and respect are observed during gender eligibility considerations, such as those concerning boxing, it is necessary to bring together a diverse range of perspectives to truly value the multidisciplinary nature of gender diversity and sport participation. It is important to eliminate misleading information in favour of developing knowledge and education about gender diversity. In time this will reduce unnecessary fear and division and improve governance in this area. The ambiguity surrounding the gender boxing row should not distract sports bodies or governments from focusing on the key matters and treating gender diversity in sport with sensitivity and care. SJ

The real-life Martha and the defamation case

When news broke that Ms Harvey had commenced legal action against Netflix for defamation in California, it sparked a second wave of media interest focussed on whether her US legal claim will succeed

Alec Cameron

Legal Director (Barrister), Birketts

The hit Netflix show *Baby Reindeer* represents a true cultural moment of 2024. It is fast becoming one of Netflix's most-watched and talked about shows ever. It tells the story of an aspiring comedian played by Richard Gadd, as himself (he also wrote the show), and claims to follow his real-life experiences of being stalked by a character known as Martha. Following the show's release, frenzied speculation ensued as to the identity of the 'real-life Martha'. Internet sleuths eventually revealed her identity as Fiona Harvey.

CALIFORNIAN VS ENGLISH COURTS

Baby Reindeer is set in Edinburgh and London. It features British actors and it was produced by a British production company. However, despite the show's British origins, California (where Netflix is headquartered) is the obvious first choice jurisdiction for any lawsuit.

In addition to defamation laws protecting a claimant's right to reputation, Californian law offers robust protection of the 'right of publicity', i.e. the right to control commercial use of an individual's name, image and likeness. English courts offer no directly equivalent protection. Californian courts may also award vast damages to successful libel claimants, including the award of punitive damages. The law firm acting for Ms Harvey is seeking American-style damages, demanding $170,000,000 from Netflix for 'destroying' its client's reputation with 'brutal lies' (Netflix intends to 'defend this matter vigorously').

The law firm acting for Ms. Harvey is certainly seeking American style damages demanding $170,000,000 from Netflix for 'destroying' its client's reputation with 'brutal lies'

THE PROSPECT OF SUCCESS

US defamation claims are regarded as harder to win than equivalent claims under English law. Under Californian law (but not under English law) a claimant must show that the defendant knew that the statement complained of was untrue, or that they were reckless as to its veracity. The continued right of a claimant to demand trial by jury in defamation claims in California (as Ms Harvey has done) retains an additional element of 'litigation risk' in the Californian courts. However, the US litigation relies on a wider range of causes of action than would be available to Ms Harvey under English law. She alleges that the streaming giant has committed acts of defamation, intentional infliction of emotional distress, negligence, gross negligence and violations of her right of publicity.

In defamation proceedings before the High Court, Ms Harvey would need to prove that the statement complained of referred to her, that the statement was defamatory of her and that the statement was published by the defendant. Publication of the statement complained of would also need to meet the 'serious harm' test under Section 1(1) of the Defamation Act 2013.

IDENTIFICATION

English courts would need to grapple with question of whether viewers would understand each statement complained of to refer to Ms Harvey. The series does not disclose her identity. However, it contained sufficient clues to enable others to work it out. Richard Gadd playing himself, and onscreen Martha bearing a striking physical resemblance to real-life Martha, no doubt aided this process. Two further points present potential difficulties for Netflix: Martha's true identity may have been obvious from the outset to persons acquainted with Ms Harvey, and the show has remained available on Netflix even after the blaze of publicity that revealed Ms Harvey to be the real-life Martha.

DEFAMATORY ALLEGATIONS

The onus would be on Ms Harvey to assert the imputation conveyed by each statement complained of, e.g., that she is a twice convicted stalker who was imprisoned for her crimes, as pleaded in the US proceedings (Ms Harvey asserts that both allegations are defamatory and false). Here again Netflix has created difficulties for itself. *Baby Reindeer's* opening credits baldly state: 'This is a true story'. There is no disclaimer added that it is merely 'based on' or 'inspired by' a true story unlike *The Crown*, where Netflix marketed later series as a 'fictional dramatisation…inspired by real-life events'. Whilst inclusion of a disclaimer would not give Netflix a free pass in its portrayal of Martha, its absence has reduced its legal cover. If Ms Harvey can establish her case, Netflix will need to consider possible substantive defences. Any attempt to defend the drama as 'substantially true' would require a detailed examination of the relationship between Mr Gadd and Ms Harvey.

INDUSTRY IMPACT

The TV genre of biopics covering recent events has grown in popularity. There is clearly potential for an individual featured in such a show to bring a claim for defamation for an unfavourable onscreen portrayal. Regardless of how Ms Harvey's claim plays out, the fallout from *Baby Reindeer* will have a far reaching impact on the TV legal industry for years to come. SJ

An alternative way to develop your own legal talent

Amanda Hamilton, Patron of the National Association of Licensed Paralegals, highlights the flexibility of the training options available to those opting for the paralegal route into law

Amanda Hamilton

Patron, National Association of Licensed Paralegals

Steven Gerrard and Ryan Giggs are just two footballers who joined clubs (Liverpool and Manchester United, respectively) as boys and became incredible assets. Football clubs routinely find and develop talent, and there's no reason solicitors' offices can't do the same. If you have promising junior staff, you may want to encourage them to become paralegals. The route is affordable and flexible.

Let's take a look at the options.

STUDYING AT THEIR OWN PACE

A great way to keep life and work in balance is to choose a course that allows study at the individual's own pace. This can be easily done by enrolling for an online distance learning course. For example, NPC (National Paralegal College) is an online college offering bespoke NALP paralegal qualifications at affordable prices. People can choose the level of qualification and can be given up to two years to complete it (depending on which qualification is chosen). Qualifications range from single subject awards (one year to complete) to a full diploma at Level 3. This is the entry level. There is also progression to a Level 4 Diploma, if someone wishes to continue studying. For all these courses, there is full tutorial support.

FLEXIBLE PAYMENTS

Many courses offer flexible payment terms for UK residents; just pay the deposit and then follow with interest free instalments. Overseas colleges offer different terms, so check first.

WHERE TO START

Level 3 is a good place to start because if someone has never studied law before, or haven't studied since school, it's an excellent way to find out if it's for them. It's then possible to build up qualifications slowly, completing one single subject award and then another, as best suits each individual. Depending on how they get on, they can escalate their studies, or more slowly at their own pace, to the next level.

DURATION

With there being no overall period to complete the course, it is totally up to each person how long it takes them. For example, a Single Subject Level 3 Award can easily be completed within a few months, although there is an overall timeframe of one year. All other NALP paralegal qualifications, which are recognised by Ofqual, have an overall timeframe of two years, which means that there is plenty of time to drop in and out, whether it be to start a family, or to get used to a new job, and still have time to come back to study when ready.

COMPLETED A LAW DEGREE?

If someone has successfully completed a law degree but cannot afford to continue with their career path (perhaps because their circumstances have changed) or if they have got married or decided to start a family, or have caring responsibilities, but they remain interested in working in the legal sector, there are options for them too. They could consider enrolling for the NALP Level 7 Diploma in Paralegal Practice – an affordable way to qualify as a paralegal, after completing a degree, without it taking too much extra time. Completion can be within six to eight months, although the maximum timeframe is, once again, two years. The flexibility of distance learning means that someone can fit their studies around their work and/or home commitments.

ABILITY TO CHANGE MID-WAY THROUGH

Even once someone has started a paralegal qualification, they can change things around. For example, if they start studying via distance learning but find it's not their thing, they can switch to another training provider that offers classroom attendance, and they can gain prior learning exemptions for the NALP paralegal module(s) they have already successfully completed. And if later someone decides to qualify as a solicitor and they have a Level 6 Qualification (it does not have to be in law), they can easily convert their qualifications and experience by initially enrolling for the BARBRI SQE (Solicitor's Qualifying Exams) Prep Course, which is an excellent way to prepare for the SQE 1 and 2. For some, a law career is a dream job, but one that can seem unattainable due to the cost and time needed. By choosing the paralegal route there are many options available. SJ

> **Even once someone has started a paralegal qualification, they can change things around**

Taking control of your career and making the most of development opportunities as a junior lawyer

Emily Joss, Joint Vice-President of the Junior London Solicitors Litigation Association and an Associate at Russell-Cooke, shares her thoughts on how junior lawyers can make the most of development opportunities

Emily Joss

Associate, Russell-Cooke

The legal profession offers a myriad of paths for growth and advancement, presenting junior lawyers with a number of opportunities to shape their career. This article will focus on some of the broad career development opportunities available to junior lawyers that can be vital to them achieving their career ambitions. Although each firm provides different opportunities, by actively engaging with what is on offer both within their firm and through external associations, junior lawyers can actively navigate their career trajectory.

SOMEONE WILLING TO INVEST IN YOU

Day-to-day, junior lawyers have the opportunity to work with and learn from more senior colleagues, which can be key for developing both technical and soft skills. However, a number of firms also encourage and facilitate internal mentoring programmes where junior lawyers are matched up with more senior colleagues. This can provide a number of benefits including a 'safe space' to talk candidly to someone more senior.

The mentor dynamic promotes an environment in which the senior colleague is invested in the junior lawyer's success. As the mentor is generally from a different area of practice, they can often provide an alternative perspective. The mentor's experience can be leveraged to better understand how to deal with clients, navigate the work/life balance and, in particular, benefit networking and business development opportunities. In large part what the mentor can offer will depend on the individual selected, so think carefully about who you choose. Some mentors will also offer a good opportunity for the mentee to be introduced to their wide network.

Mentoring is often focussed on the 'bigger picture' in terms of the junior lawyer's career aspirations, reflecting how they want to progress, what clients they want to target and any areas they want to specialise in. Discussing this with someone more senior can help junior lawyers navigate their career path more effectively.

A DIFFERENT PERSPECTIVE?

Junior lawyers should be on the lookout for opportunities that provide different perspectives that will help them to understand their clients' needs and approach. Opportunities to pursue include international secondments, taking part in pro-bono work or spending time working in-house on a client secondment provide junior lawyers with opportunities to accelerate their careers. These types of opportunities enable junior lawyers to experience a different environment in which they can better understand alternative perspectives and motivations. These types of experiences can help junior lawyers become more rounded in their approach.

In particular, a client secondment can deepen and entrench client relationships and ensure a better working relationship as there is an improved understanding of the client's internal procedures, appetite for risk and commercial considerations. Where possible, junior lawyers should seek out diverse experiences or if they have their own ideas for how they can do this, they should be the driving force to make it happen. This can help junior lawyers build a profile both for themselves and their firm.

> **Junior lawyers should engage with business development whenever they can and, where possible, should seek opportunities to develop their own network**

BUILD THE PRACTICE YOU WANT

Junior lawyers should engage with business development whenever they can and, where possible, should seek opportunities to develop their own network. This can range from writing articles, recording podcasts, attending networking events or even becoming involved with professional associations.

I have found my personal experience of this to be extremely rewarding. Upon qualification I joined the Junior London Solicitors Litigation Association (JLSLA), which is a network for junior litigators up to eight years qualified. This has provided opportunities for me to attend lectures to develop and deepen my legal knowledge. The JLSLA has an annual survey where members can suggest topics that they would like to learn more about. More importantly, the JLSLA has provided an opportunity to meet other junior lawyers at a similar stage of their careers. This has helped expand my personal network, providing opportunities to make and receive referrals, and enhance my reputation through increased recognition and credibility.

CONCLUSION

In summary, the key is to take control of your own career and pursue the opportunities that are available, and play to your strengths. Where possible, seek out more senior colleagues who will invest their time and experience to support your development. Most importantly, don't wait for the opportunity to come to you, get out there and seize it. SJ

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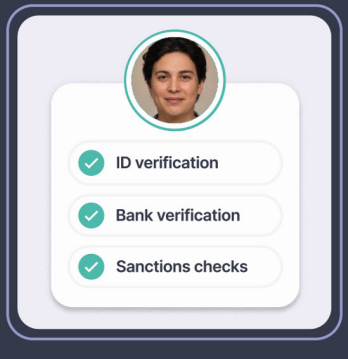

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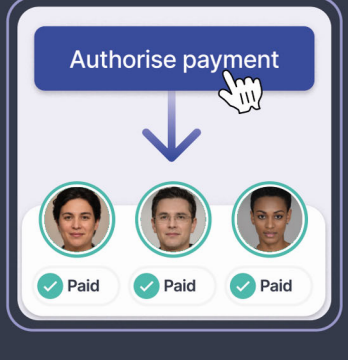

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THE HISTORY OF EMPLOYMENT LAW AND THE TWO NEWLY PROPOSED BILLS

Kaajal Nathwani, Head of Employment Law at Curwens, explains that we've come a long way since the 'master' and 'servant' dystopia of early employment law, and looks what the two new bills might mean for the employee–employer relationship

July 2024 marked the month when under the new Labour government, not one, but two bills on employment law were announced by King Charles III aimed at supporting working people to 'ban exploitative practices and enhance employment rights'. The government has said that changes will be 'mission led' and 'based upon the principles of security, fairness and opportunity for all'. They are as follows: the Employment Rights Bill and the Equality (Race and Disability) Bill. Integral to the Labour Party's manifesto was a commitment to create stronger workers' rights. So how will the proposed changes shake-up employment law as we know it? How far have we come from the 19th century, when the first labour laws appeared to cement the socioeconomic divide further by virtue of the master/servant led framework, which has been somewhat fractured by the Modern Slavery Act of 2015?

WHERE DID IT ALL START

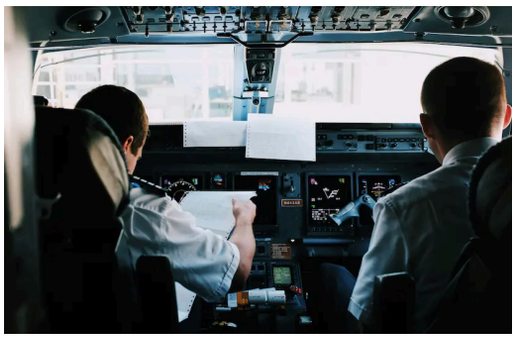
Going back to the medieval period, there was a reliance on local customs and practices and 'manorial' laws. One of the earliest regulations was the Statute of Labourers 1351, aimed at addressing the decline in the labour market caused by the Black Death, by fixing wages and restricting the movement of workers. Just shy of 500 years later, the Master and Servant Act 1823 came into effect and unequivocally favoured employers. If 'servants/workers' breached their employment contract this could lead to imprisonment, such was the imbalance of power and status. Any challenge/revolt by workers would inevitably be a criminal offence.

For those who aren't historians, trade unions came about some 150 years later and this was a distinct marker for change. There was now a group advocating for workers rights. The Trade Union Act 1871 made unions legal and supported workers to collectively bargain and reach agreements with their employers. Less than a handful of years later saw the introduction of a key piece of legislation, the Employers and Workmen Act 1875, which provided that any disputes between employers and workers would no longer be considered criminal, but rather more logically as civil disputes. The foundations of modern employment law, as we know it, were laid in the early 20th century.

The Workmen's Compensation Act 1906 provided for compensating workers if they sustained injuries at work and also set down health and safety regulations, recognising minimum acceptable standards. The same year, in a progressive change which stands true in principle today, the Trade Disputes Act gave immunity from civil law enforcement to trade unions. This gave them the ability to take collective action and strike without fear of reprisal and punitive action. It was not until post-World War II, pursuant to the National Insurance Act 1946, that the welfare state that we know today was established. Social security provisions for workers were established, providing access to benefits in the event of unemployment and sickness, as well as pensions.

It wasn't until relatively recently, in 1975, less than 50 years ago, that one of the most fundamental rights that we know in employment law today was introduced, the right not to be unfairly dismissed. The Employment Protection Act 1975 introduced unfair dismissal protections, redundancy pay and maternity leave.

> **The late 20th century was most definitely a significant progressive milestone in the development of worker friendly rights with the Equal Pay Act 1970 and the Sex Discrimination Act 1975**



The late 20th century was most definitely a significant progressive milestone in the development of worker friendly rights with the Equal Pay Act 1970 and the Sex Discrimination Act 1975, which finally addressed the need for gender equality in the workplace and made discrimination on grounds of sex unlawful.

With a myriad of changes to navigate and be mindful of in what was now becoming a whole new world when it came to workers rights, becoming a member of the EU in 1973 saw a further spate of progressive changes that stand firm today, including the Working Time Regulations, the Agency Workers Regulations and Part-Time Workers Regulations.

A whole 20 years later, saw the introduction of the Disability Discrimination Act 1995 in the legislative suite that governs employment rights, which protects individuals with disabilities from being discriminated against in areas that extend beyond employment. The 21st century brought about the next reform after a hiatus. The Employment Rights Act 1996 added rights, for example, on collective bargaining and the right to be accompanied at disciplinary hearings. Our current go to, the Equality Act 2010, consolidated previous laws, covering protected characteristics and provides protected status on the grounds of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

THE NEW BILLS

The Employment Rights Bill will be introduced in October, including legislation which will deal with the following aspects from the 'New Deal for Working People'. This development will mark a further progressive change, pro-employee. Although more changes are expected, the key changes to note are as follows:

- day one employment rights, including rights not to be unfairly dismissed (though employers will be able to operate probationary periods);
- a ban on 'exploitative' zero-hours contracts, ensuring workers have rights to a contract reflecting the average hours worked and more security over shift scheduling;
- restrictions on 'fire and re-hire' and 'fire and replace' practices;
- making flexible working the default from day one;
- establishing a new state enforcement agency, called the Fair Work Agency; and
- new rights for unions to access workplaces and other union-friendly reforms.

THE DRAFT EQUALITY (RACE AND DISABILITY) BILL

New laws will be created to ensure equality when it comes to pay, in addition to the existing measures that apply to sex only as brought in under the Equal Pay Act 1975; the aim of this change being to 'enshrine full right to equal pay in law'. These changes will extend the equal pay regime so that it covers race and disability, as well as sex; and introduce mandatory ethnicity and disability pay reporting for employers with at least 250 employees. But that's not all. What are the other possible changes? The government has also made commitments to:

- link the National Living Wage to the cost of living;
- remove the lower rate for 18 to 20-year-olds;
- reform the apprenticeship levy;
- establish a body called Skills England;
- introduce a pension schemes bill to help the average earner save more than £11,000; and
- appropriate legislation to regulate artificial intelligence (AI).

WHEN WILL CHANGE HAPPEN?

Labour had said that the bill would be introduced within the first 100 days of office, so that suggests that it will be put before parliament by October, which is already on the horizon. But what exactly happens next? The bill has to go through both houses of parliament, will likely see changes on the way that may take a few months, so it may even be a year or more before the bill is adopted.

It is expected that the bill will undergo a consultation with employers and trade unions to ensure they do not have an adverse impact in practice, including any reluctance to engage people as employees due to the increased day one protections/rights. The key is to make changes that are fair and reasonable and work in practice.

The history of employment law is a journey from basic labour regulations to what we now know, which is a complex multi-statute framework. The aim of modern-day employment law is to ensure the balance of rights and obligations of employers and employees and, as time goes on, to move closer to achieving true equity and parity. The latest legislative changes as a result of the new government will be a step even closer to a fairer working world; a far cry from the very first laws that enshrined the principles of the master/servant relationship that were built on the archaic and unfair expectation of 'one way' obedience and loyalty. SJ

Kaajal Nathwani

Partner, Curwens

IS THERE A CASE TO BE MADE FOR BANNING WORKPLACE NON-DISCLOSURE AGREEMENTS?

Chris Hadrill, a partner in the employment team at Redmans, looks at the potential for misuse and the benefits of non-disclosure agreements in the workplace

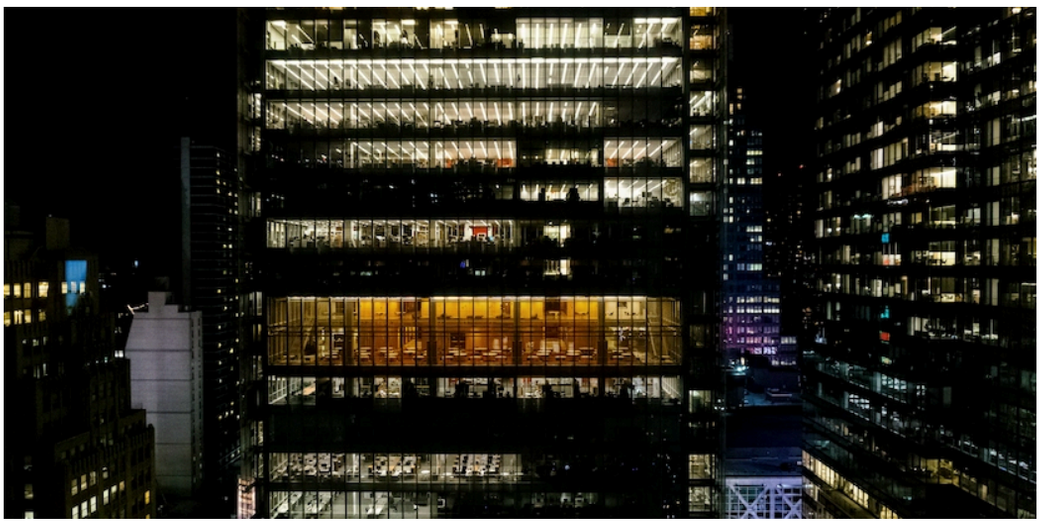
A 'non-disclosure agreement' (NDA) is a confidentiality agreement between two or more parties. A workplace NDA is a colloquialism for confidentiality clauses within a workplace settlement agreement, a contract between an employer and an employee under which the employee agrees not pursue claims against their current or former employer in return for some form of financial and/or non-financial benefit. There are two broad types of settlement agreement – a statutory settlement agreement and an ACAS COT3 agreement.

These confidentiality clauses will, in general, compel the parties to the settlement agreement to maintain confidentiality in relation to the facts of any dispute, the terms of the settlement agreement, the existence of the settlement agreement, and the circumstances and/or negotiations leading up to the settlement agreement. In most circumstances, these confidentiality clauses will not be controversial and, commonly, they are of benefit to both employers and employees. In some circumstances, however, this is not the case.

WHY THE FOCUS ON WORKPLACE NDAS?

The 'Me Too' social movement and awareness campaign, which gained renewed political traction in 2015 and 2017, with new allegations made against the disgraced media mogul Harvey Weinstein relating to sexual impropriety in the workplace, placed a focus on the use of workplace NDAs. It was reported and, subsequently, established that Weinstein had made a practice of compelling his accusers to enter into NDAs, and criticism was made of the use of these NDAs to cover up immoral and/or illegal acts on Weinstein's part.

There are obvious benefits to employers in preventing employees from disclosing, whether internally to colleagues or externally to the general public, the fact and content of their dispute with their employer



In the United Kingdom, in 2017, Zelda Perkins, a former assistant of Harvey Weinstein based in London, made public the fact that she had been sexually harassed by Weinstein and that she had subsequently signed a settlement agreement containing an NDA. She criticised the use of workplace NDAs, arguing that Weinstein's behaviour should have been exposed rather than covered up and, further, that the use of NDAs exacerbated the trauma suffered by victims of workplace abuse. More recently it was reported that, Crispin Odey, the beleaguered hedge fund manager, had allegedly used NDAs to ensure that alleged sexual harassment at his hedge fund was brushed under the carpet.

The campaign by Perkins and others to restrict or further regulate the use of NDAs in the workplace has also caught the attention of parliament, with the Women and Equalities Select Committee investigating the use of workplace NDAs in the music business and Conservative MP Maria Miller attempting to introduce a private members' bill to outlaw the use of NDAs in sexual harassment cases (although this was not subsequently passed into legislation).

In 2018, the Solicitors Regulation Authority (SRA) recognised that there may have been improper use of NDAs and distributed a 'warning notice' to solicitors, effectively warning that they must comply with the SRA Principles when advising on settlement agreements.

THE BENEFITS OF WORKPLACE NDAS

There are clear benefits to the use of workplace NDAs, including (but not limited to): confidentiality; finality; that the parties will have been provided with independent legal advice on the agreement; and that such agreements limit the strain on public resources by settling cases.

Confidentiality

There are obvious benefits to employers in preventing employees from disclosing, whether internally to colleagues or externally to the general public, the fact and content of their dispute with their employer. Preventing such disclosure can limit reputational damage, prevent external scrutiny of misconduct in the workplace, and restrict useful information from being passed to the colleagues of victims of misconduct.

Confidentiality clauses can also be of assistance to employees. It is not uncommon for employees to want to ensure that the circumstances of their dispute with their employer are kept confidential, even in circumstances where the employee has been the victim of serious inappropriate (or even criminal) behaviour in the workplace. How one employee wants to deal with an incident of sexual harassment may, of course, differ quite significantly to how another employee wants to handle it, and quite often employees in more 'vanilla' circumstances may want to prevent disclosure of allegations of underperformance or misconduct to prospective employers.

Finality

Well-drafted confidentiality clauses will prevent future disputes relating to what can and cannot be disclosed once the settlement agreement is signed, which means that there is finality and clarity for both parties as to what can and cannot be said.

Legal advice

If an employee has been offered a statutory settlement agreement, then they will, almost always, be offered a sum of money to pay for the legal fees of a lawyer who will review their agreement and advise them on it; this is also sometimes, but not always, the case with COT3 agreements.

Limiting the use of public resources

Clarity and finality in the drafting of confidentiality clauses prevents the courts from having to adjudicate disputes between the parties if there are alleged breaches of such clauses, as it should normally be clear on the facts whether there has or has not been an actionable breach.

> **Settlement agreements serve an important private and public function**

Safety valve for improper or illegal conduct

A significant point, which seems to be continually missed by the campaigns of Miller and Perkins, is that employers cannot by law prevent employees who have signed workplace NDAs from making protected disclosures' – this is governed by Section 43j of the Employment Rights Act 1996.

Protected disclosures are disclosures of information which show, or tend to show, that the following has been, is being, or is likely to be committed: a criminal offence, a failure to comply with a legal obligation, a miscarriage of justice, the endangering of the health or safety of any individual, or the damaging of the environment (or the covering up of any of these).

Perkins would, presumably, or at the very least should have been, informed when she signed her workplace NDA that the signing of such could not preclude her from making a criminal complaint regarding Weinstein's behaviour.

THE DRAWBACKS OF WORKPLACE NDAS

There are, of course, significant potential disadvantages in using workplace NDAs, including: that they may allow employers to 'cover up' improper behaviour through the use of confidentiality clauses; that the imposition of such agreements is generally undertaken through the prism of the imbalance of power between an employer and an employee; that sometimes the employee is, or perceives that they are being, coerced into entering into such an agreement; and that once the agreement is signed it is incredibly difficult to then 'reverse' out of it.

Confidentiality

Although confidentiality can be an advantage of an NDA, it can also be a disadvantage. It can serve to cover up improper behaviour, behaviour that could influence the decisions of third parties who deal with the employer (such as customers, contractors, suppliers, and the like), and may cause the employer to ignore problems in the workplace rather than to try and solve them. As detailed above, however, conduct which meets the test of Section 43j of the Employment Rights Act 1996 cannot be 'silenced' under the terms of a settlement agreement, and the person subject to a settlement agreement would be able to disclose such behaviour to a relevant third party (such as the police, their MP, or a regulator, depending on the circumstances).

Power imbalance

Given the power imbalance between employers and employees, it may not always be possible to secure terms of settlement which amount to a rational and fair package. An employee may not want to annoy their employer by negotiating, or they may not have a balanced and informed view of the circumstances of the dispute. Equally, employers generally have good access to expert and clear legal advice at an early stage, something that an employee may not be able to rely on. This may mean that the employee is unable to quickly gain access to all the information they may need, whether factual or legal, which would allow them to properly negotiate terms.

Coercion

As detailed in the paragraph above, an employee may feel coerced by their employer into accepting a settlement agreement. Equally, employers sometimes try and bully employees into accepting NDAs by threatening to dismiss them and/or reduce any settlement offered, should the employee not promptly accept the terms that they are offering.

Finality

Finality, as outlined above, is generally a good thing, but can also serve to 'hamstring' an employee by preventing them from taking any further legal action should they enter into a settlement agreement, even should the employee subsequently change their mind as to whether they wish to settle their claims. Once a settlement agreement is signed it is very difficult to vary it or set it aside, save with the employer's permission (which, predictably, is not generally forthcoming).

SHOULD WORKPLACE NDAS BE BANNED?

Settlement agreements serve an important private and public function: they allow for the settlement of private disputes and, thereby, reduce the potential strain on public resources. Their use in general is, therefore, to be recommended.

The case for the continued use of workplace NDAs is much more balanced: the use of such NDAs is, generally, an integral part of why an employer will want to enter into a settlement agreement. They will not only want to resolve the litigation, but they will also want to prevent a (former) employee from damaging their business by making derogatory comments about them or disclosing the circumstances of the dispute. Equally, there are important public policy reasons as to why workplace NDAs should not prevent employees from disclosing particular types of misconduct in the workplace (such as criminal offences, regulatory breaches, and the like).

On balance, our view is that Section 43j of the Employment Rights Act 1996 provides sufficient room for parties who have entered into settlement agreements to disclose particular types of misconduct, without allowing for a coach and horses to be driven through the purpose of the NDA. There are ongoing, and important, debates as to whether (in effect) the ambit of Section 43j should be extended to allow other types of misconduct to be disclosed, notwithstanding the presence of an NDA, but for now the balance is a reasonable one. SJ

Chris Hadrill

Partner, Redmans Solicitors

ACCELERATION FROM AN ORTHOPAEDIC PERSPECTIVE: THE MEDICO-LEGAL INTERFACE

Expert Witness Institute member Andrew Quaile discusses issues surrounding acceleration from the perspective of an orthopaedic surgeon and an expert witness

THE PROBLEM TO BE ADDRESSED

This is the difficulty in describing the medical position the claimant would be in 'but for the accident'. The reason this is difficult for clinicians is due to the problem in identifying the 'normal' ageing trajectory and, therefore, the signs and symptoms the claimant is likely to be displaying at various stages of life. Ageing is an individual experience and dependent upon many factors, including and most importantly genetics. Other factors from a musculoskeletal perspective would include the previous loading history, previous significant trauma, metabolic illness, such as diabetes and rheumatoid arthritis etc, smoking and BMI. The ageing process alone can produce symptoms in the spine and joints without significant trauma and is the reason for the vast majority of outpatient consultations leading to joint replacements or spinal interventions. Dr Mark Burgin stated in *Law Brief* in 2022 that case law suggests that courts see the terms exacerbation and acceleration as meaning a serious deterioration of the underlying condition, which is not how they are used in a report.

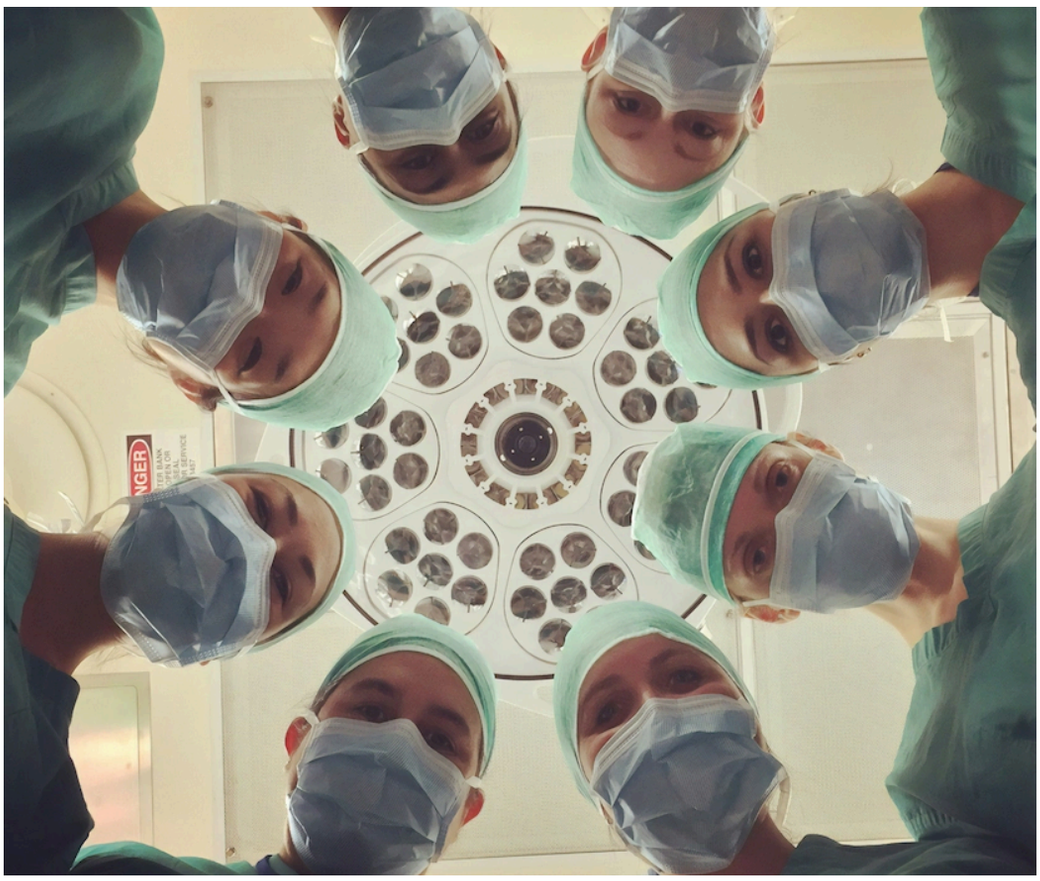
CLINICAL PRACTICE

In clinical practice, there is little attention paid to a previous history of trauma as the attitude is 'we are where we are now' and treatment decisions are based upon the current diagnosis and the level of symptoms experienced by the patient. Ultimately, it is the patient that is treated, not the scan. This is relevant as it can be said that by the age of 50, 80% of the population will have radiological signs of disc degeneration and, by the age of 30, MRI scans will show degenerative changes in 70%. In fact, degenerative changes appear to commence in the spine in the mid-20s. There is, however, a poor correlation between the appearance of degenerative changes and the level of symptoms experienced. There is also a range of tolerance to symptoms with psychological factors being of importance due to the complex interaction between psychology and musculoskeletal symptoms. Invariably those patients that say they have a high pain threshold, do not.

THE CONCEPT OF ACCELERATION

This is the term used in the legal arena to explain where the claimant would be, in terms of symptoms, treatment, effect on activities of daily living, social life and employment if the index accident had not occurred. It is a foreign concept to clinicians as it purports to explain the speed of the ageing process, which is a unique biological experience. It is not likely that the biological clock, which is ticking for all of us, has been

The history detailed in medico-legal reports is by its very nature more comprehensive than in a clinical setting



suddenly accelerated or speeded up, as a result of a musculoligamentous injury. In fact, it is not whole-body acceleration, but an increase in ageing in the affected part. True cases of biological acceleration can occur in fractures into joints where the smooth surface is disrupted or in spinal fractures where an interruption to the nutrient supply to the discs can occur. The majority of 'acceleration' cases are not true acceleration, but the concept is used to explain the position claimants find themselves in after an accident. This, therefore, is more of an attempt to describe whether symptoms they are likely to have experienced as part of their individual ageing process have been advanced. This is then described in terms of years, which can be translated into monetary value for a claim. The term advancement would sit more easily with clinicians trying to explain to the court where the claimant would have been 'but for the accident' as this does not rely on a permanent acceleration of the ageing process.

THE SCIENCE

The article by Professor Adams in *Bone and Joint* published in April 2014 deals with mechanical influences in disc degeneration and prolapse. He states that mechanical loading of a disc cannot entirely be blamed for diverting a disc onto a degeneration pathway as it depends upon the state of the disc when so subjected. He notes that even trivial loading can disrupt a very weak disc and that tissue weakening depends on genetic inheritance and ageing. In the absence of significant force, the symptoms would be blamed on ageing and genetics. Whereas substantial force implicates the injury or work practice. In practice, this may come down to a percentage as genetics and ageing are both continuous variables. A disc is therefore not either 'normal or diseased'. A previous history of relevant symptoms would be important in determining 'vulnerability'.

THE PREDICTORS

To predict 'when but for the accident' a claimant would have developed symptoms is an important consideration. The life time prevalence of back pain is stated to be around 80% and the most accurate predictor of future back pain is regarded as being a positive previous history. In a personal injury claim, a number of other factors are relevant. Elena Sirbu, in *Archives of Medical Science 2023*, noted that the reaction to low back symptoms was influenced by factors such as socio-demographics, including age, sex, work status and BMI. Pain characteristics are also important, including localisation, causes and regularity. Psychological factors including yellow flags of fear inhibition, catastrophising behaviour and hypervigilant behaviour are relevant. It is also argued that if the claimant had no relevant previous symptoms or obvious risk factors, then they were at no more risk than the general

It is only through regularly seeing and treating patients that an understanding of underlying disease processes is obtained

population for developing similar symptoms. They, therefore, would not be cases of true acceleration.

TIMEFRAME CALCULATIONS

To calculate where the claimant would have been if the index accident had not occurred is very difficult for clinicians as there is little or no science and, therefore, relies on experience and opinion. Despite there being a number of individual factors which can aid this calculation, factors arguing for a longer time frame estimation would be a negative previous history, significant trauma or loading, immediate symptoms, emergency medical management, significant radiological findings and structural injury. The previous history of similar symptoms is important. It is often said that the most accurate measure of future back pain is a previous history. That is certainly true with mechanical back pain as it is usually repetitive. A previous history of trauma to the same area and a previous history of surgery or significant therapy to the same area would be important. Factors arguing for a shorter timeframe would be a positive previous history of similar problems, low force trauma, the lack of a requirement for medical attention at the scene or transfer to a medical facility, delayed onset of symptoms, radiological investigations ruling out structural injury and confirming significant degenerative change which was previously symptomatic. Michael Foy in *Bone and Joint* April 2016 points out that corroborative evidence of the symptoms following an accident is important.

The timeframes discussed are difficult to arrive at objectively in view of the lack of science. Estimations are therefore made taking into account the discussion above. A short time period would probably be regarded as up to 2 to 3 years, a moderate period 3 to 6 years and a long timeframe 6 to 10 years. Beyond that the accident-related symptoms are likely to be permanent and it would be expected that the claimant had suffered a significant and structural injury having never had such symptoms in the past. The development of contributing non-orthopaedic conditions would have to be considered, requiring opinions from experts.

In relation to repetitive work practices, opinions vary. It has been stated by Professor Michael Adams that mechanical loading, above the level that an intervertebral disc can accept, can divert a disc from its normal ageing pathway to a separate degenerative pathway. It is not known, however, what the fate of that disc would have been absent the abnormal loading. It would, therefore, be important to determine the relative importance of predisposing and precipitating factors as described above.

The place of exacerbation is different and describes a temporary increase in symptoms already experienced before returning to the pre-accident baseline level. The symptoms exacerbated are likely to be over a short timeframe.

THE LEGAL POSITION

According to Andrew Benzeval, in *Expert Witness Magazine* published in April 2019, the court will, in assessing damages, attempt to put the claimant back in the position they would have been, but for the injury suffered. The concept of acceleration relates to damages being applicable during the acceleration period. The role of the expert is considered to be to determine on balance the 'but for' position considering the following:

- the condition may have been present before the accident but asymptomatic and would have remained so;
- the condition may have been present but would have become symptomatic being relieved by prompt and appropriate treatment;
- the condition may have been present but would have become symptomatic, but in a different way and with different consequences;
- the condition may have been present but would have become symptomatic in the same manner and therefore an acceleration occurred.

WHERE ARE WE NOW

All these factors leave us in the realm of 'opinion', which is based upon a combination of factors. The expert would need to have a background of treating patients in the area in which an opinion is being provided. It is only through regularly seeing and treating patients that an understanding of underlying disease processes is obtained. There is a difference in medical practice between what is seen in the medico-legal environment and what is seen clinically. For example, whiplash-associated disorder is very rarely seen in clinics. Patients do, though, often link their current problems to some incident years before their presentation as many are 'conditioned' to believe their symptoms are a result of trauma rather that the ageing process or another unrelated disease. The history detailed in medico-legal reports is by its very nature more comprehensive than in a clinical setting. This needs to concentrate on the previous history, force applied, immediate symptoms and potentially genetics, to arrive at an opinion on acceleration.

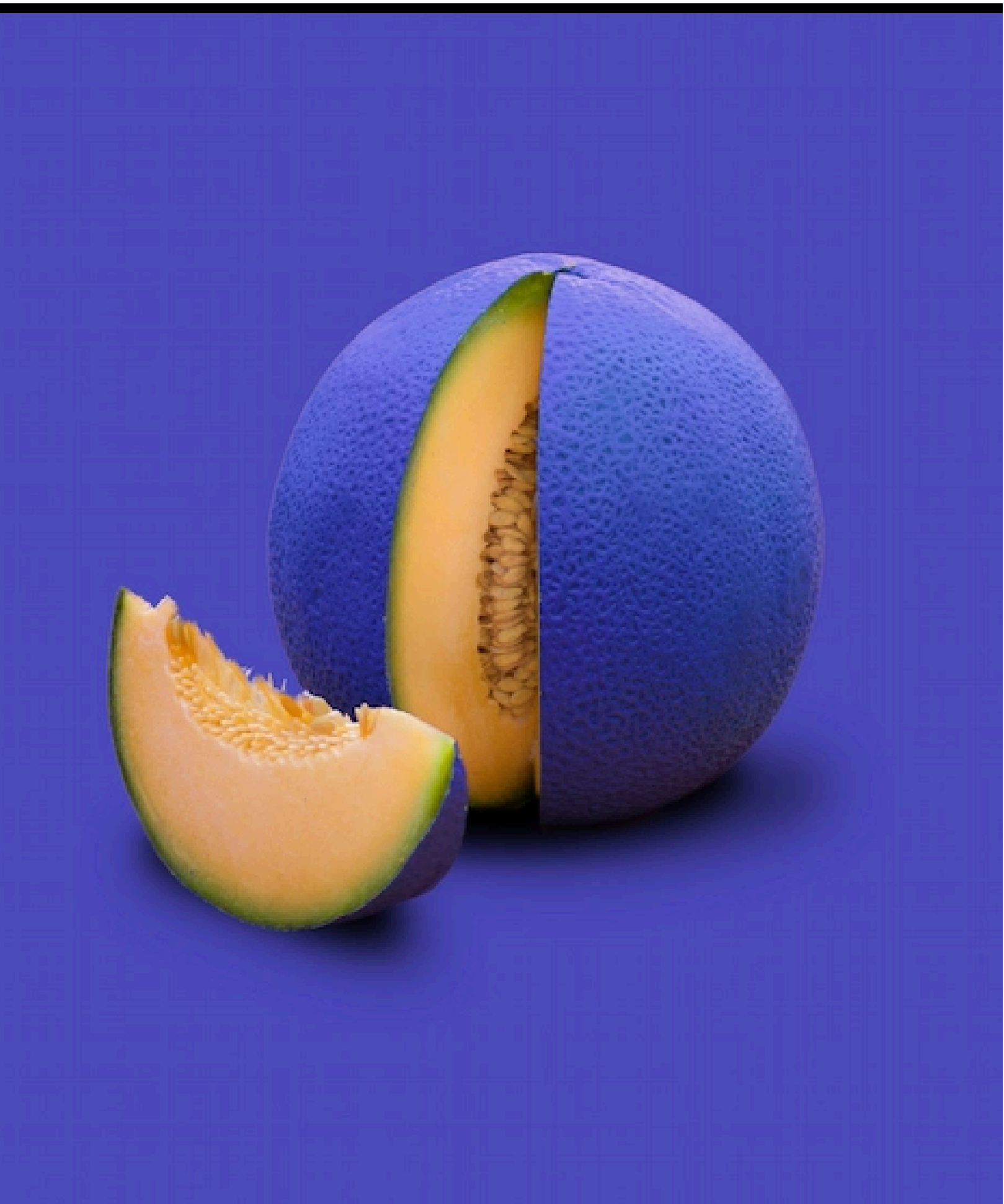
ROUNDTABLE

I will be participating in the Acceleration and Exacerbation Expert Witness Roundtable hosted by the Expert Witness Institute on 17 October 2024 to explore these issues further.

Andrew Quaile FRCS is a Consultant Orthopaedic and Spinal Surgeon, Deputy Editor of *International Orthopaedics* and a Member of the Expert Witness Institute. SJ

Andrew Quaile

Member, Expert Witness Institute



CORPORATE CULTURE AND HOW TO PREVENT BRIBERY, FRAUD AND OTHER ECONOMIC CRIMES

Tom McNeill, a Partner at BCL Solicitors, assesses the failure to prevent model and its application to fraud offences committed by large organisations

The Bribery Act 2010 transformed corporate criminal liability in the UK by introducing the so-called 'failure to prevent' (FTP) model. Initially for bribery, the FTP model has been extended to the facilitation of tax evasion offences and is now being extended to fraud offences for 'large organisations'.

Very broadly, the approach is to make commercial organisations 'strictly liable' for the wrongdoing of persons providing services on their behalf, unless the organisation can prove that it had in place 'reasonable procedures' designed to prevent the offending. The FTP model effectively transfers from law enforcement authorities to commercial organisations a significant part of the responsibility for detecting and preventing economic crimes, where failure risks a criminal conviction and very considerable financial and reputational harm.

Should that not be sufficient encouragement, the 'identification principle' has been reformed so as to significantly expand the category of persons who could be 'identified with' an organisation for the purposes of attributing criminal liability in economic crimes from 'directing minds' (usually Board directors) to 'senior managers' (so broadly defined as potentially to include department heads, for example).

HOW SHOULD COMMERCIAL ORGANISATIONS PREVENT CRIMINAL WRONGDOING? AND WHAT ARE 'REASONABLE PROCEDURES' THAT WOULD AMOUNT TO A DEFENCE TO AN FTP OFFENCE?

The government guidance published to date is a bit thin. It sets out 'guiding principles' and a few practical examples. And while compliance professionals (and now generative artificial intelligence) have stepped up to fill the void, and collectively UK financial services organisations are reportedly spending £34 billion each year on financial crime compliance, it does not appear that anyone yet has discovered a reliable method for preventing individuals from behaving dishonestly (or improperly) for financial gain.

There is of course a limit to what any organisation can do to prevent individual wrongdoing and, in theory at least, the law only requires 'reasonable' procedures, not foolproof ones. In the event of serious offending, however, particularly if relevant conduct has continued for

The government guidance published to date is a bit thin

more than a short period of time, it will be difficult for organisations to persuade law enforcement and ultimately the courts that their procedures were 'reasonable'.

With the benefit of hindsight, there will almost inevitably be red flags that were missed, controls that proved ineffective, measures that could have been implemented but were not. The reason for such failures will involve interesting questions about how humans think and make decisions, about group behaviours and the role of leadership. The criminal justice system, however, is neither equipped to answer nor interested in answering these questions. Instead, in all but the most exceptional cases, you can expect principles of 'strict liability' to be applied alongside largely unexamined notions of corporate 'culture'.

Take Sir Brian Leveson's deferred prosecution agreement judgment in *Tesco Stores Limited*: "It is important to underline that a company is a structure which can only operate through its directors, employees and agents. Stripping out the human beings, a company itself can have no will or ability to decide how it should behave. Thus, as I made clear in *SFO v Rolls-Royce and another* (U20170036) at [48], it is 'of real significance' whether or not those who were implicated in or should have been aware of illegal behaviour, or of **a culture which permitted illegality to thrive**, remain members of the senior management." [emphasis added]

What did Leveson mean by a 'culture which permitted illegality to thrive'? How could the wrongdoing have been prevented? Why was Leveson so sure that senior managers 'should have been aware' (and therefore needed to be replaced)? As it happens, despite Tesco agreeing to pay a £129 million fine and £3 million in costs as part of a Deferred Prosecution Agreement (DPA), no individuals have ever been convicted in relation to that alleged offending (famously, the three individuals prosecuted were acquitted of all charges without troubling a jury) and so it is perhaps unfair to examine why Tesco did not prevent something which may well not have happened.

Let us take another well-known judgment, the Airbus DPA, where Dame Victoria Sharp expressed similar sentiments: "As I have identified, Airbus did have bribery prevention policies and procedures in place at the material time. However, prior to September 2014, those policies and procedures were easily bypassed or breached and **there existed a corporate culture which permitted bribery by Airbus business partners and/or employees to be committed throughout the world**." [emphasis added]

In fact, notwithstanding that Airbus was penalised with a fine of €991 million in the UK as part of a €3.6 billion global resolution, no individuals have ever been convicted in relation to that alleged offending either. However, for these purposes, let us take the judgment at face value.

The alleged FTP bribery took place between July 2011 and June 2015. Most of the conduct involved the use of third parties (i.e., intermediaries or agents) to assist in winning sales contracts in five jurisdictions. In 2012, Airbus commissioned an external consultant to review its compliance programme and Airbus received an award for the design of its anti-bribery compliance programme. Throughout, Airbus had written policies governing payments and contractual relationships with third parties, including policies specifically aimed at ensuring that third parties were used appropriately and only after sufficient due diligence. Airbus operated a series of committees with responsibility for

With the benefit of hindsight, there will almost inevitably be red flags that were missed, controls that proved ineffective, measures that could have been implemented but were not

reviewing the use of and payments to third parties. In 2014, Airbus found significant breaches of compliance policies, the systems were reviewed and updated, and payments frozen. (Airbus eventually self-reported in 2016, following enquiries by UK Export Finance.)

In short, Airbus had extensive anti-bribery procedures, and these procedures were to some degree effective. What did Sharp mean by a corporate culture that permitted bribery?

Sharp noted that some committee members were aware of and/or involved in the material wrongdoing. The information provided to the committees was incomplete, misleading or inaccurate, such that the committees were not able to provide effective or properly informed oversight in the manner intended. And the conduct by some included the creation of false invoices, false payments and other compliance material.

In other words, dishonest individuals used sophisticated methods, including the creation of false documentation, to deliberately circumvent procedures. Some might have turned a blind eye. After a period, the company spotted issues, stopped payments and strengthened its systems. The outcome was that the company was penalised €991 million in the UK alone because their systems 'were easily bypassed' (while the allegedly guilty individuals walked away scot-free).

The lesson here is that company's systems will be judged on their outcomes. A system which does not prevent serious wrongdoing will likely be judged a poor system. Wise judges will identify the corporate culture as being permissive of illegality. And if organisations wish to be sure of avoiding enormous fines and reputational harm for someone else's wrongdoing, they'd better find ways to prevent that wrongdoing in the first place.

On that last point, organisations could learn from the professionals, like the US Securities and Exchange Commission (SEC) (a powerful US agency which enforces the law against market manipulation). Between June 1992 and December 2008, when Bernie Madoff confessed, the SEC received six substantive complaints that raised significant red flags concerning Madoff's hedge fund operations and should have led to questions about whether Madoff was actually engaged in trading. The SEC never properly examined or investigated Madoff's trading and never took the necessary, but basic, steps to determine if Madoff was operating a Ponzi scheme. Had these efforts been made with appropriate follow-up at any time beginning in June of 1992 until December 2008, the SEC could have uncovered the Ponzi scheme well before Madoff confessed (findings from the SEC's 'Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme').

It turns out that no one in the SEC could believe that Bernie Madoff – *the* Bernie Madoff – would have done anything so outrageous as run a $65 billion Ponzi fraud, until afterwards when it turned out to be blindingly obvious. This, indeed, is why fraud is such a prolifically successful strategy, and so difficult to prevent. People are social animals with a tendency to believe one another, particularly those who look and sound the part. They are subject to countless cognitive shortcuts, biases, blind spots and failures of foresight (not to mention off-days and lapses of judgment). In short, people are so notoriously *fallible* that it's a wonder that anyone is able to pronounce confidently on any complex topic, let alone something as untouched by scientific study as the ability of commercial organisations to prevent individuals from committing dishonesty offences. (So great is our fallibility that even when recognised, it doesn't diminish our confidence to prescribe solutions, or analyse what went wrong in the past.)

WHERE DOES ALL THIS LEAVE COMMERCIAL ORGANISATIONS THAT WISH TO MINIMISE THE RISK OF BEING PROSECUTED FOR SOMEONE ELSE'S WRONGDOING?

To engender *a* corporate culture that does not permit illegality, somehow commercial organisations will have to find a way to control for the fallibility of those who design, implement and deliberately circumvent their systems. That would mean understanding and controlling for how humans think and make decisions, group behaviours and the role of leadership. There is much that can and should be done, but it must be recognised that often it will involve countering people's natural instincts. Learning to be sceptical, mistrustful, not relying on the assurances of long-standing colleagues, being coldly analytical. Having well-resourced and imaginative compliance personnel. People who understand the business and with the ability to challenge what does not make sense. Having processes that spot risks and ultimately say 'no'.

Should an organisation's efforts at detecting and preventing economic crimes not greatly exceed the SEC's (or if they do not spot red flags and instruct independent lawyers to investigate thoroughly) and if wrongdoing is subsequently identified, they risk criminal prosecution.

In those circumstances, all is not necessarily lost. When commercial pressures do not dictate otherwise, some organisations may have a shot at defending themselves. As the Serious Fraud Office has discovered repeatedly, correctly identifying and proving wrongdoing by associated persons is not always straightforward. There is also scope to argue that individual failings by particular workers do not necessarily illustrate systemic failures. It will be an exceptional case, however, where notwithstanding serious offending an organisation has scope to argue that its procedures were reasonable. SJ

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SOLICITORS JOURNAL

A TANGLED WEB: 'SUBSTANTIAL INJUSTICE' IN FUNDAMENTAL DISHONESTY CLAIMS

Jim Hester, a Barrister at Parklane Plowden Chambers, unpicks the ruling in Kirsty Williams-Henry v Associated British Ports Holdings Limited [2024] EWHC 806 (KB), Cardiff District Registry, Ritchie J, 10 April 2024

'Oh, what a tangled web we weave, when first we practice to deceive' – Sir Walter Scott.

Case law in relation to 'fundamentally dishonest' (FD) claims continues to develop. In this case the court considered the issue of 'substantial injustice' (SI). SI may provide a lifeline for claimants found to be FD, allowing recovery of damages notwithstanding the finding.

THE LAW

Section 57 of the Criminal Justice and Courts Act 2015 sets out:

'Personal injury claims: cases of fundamental dishonesty

(1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim") -

(a) the Court finds that the Claimant is entitled to damages in

respect of the claim, but

(b) on an application by the Defendant for the dismissal of the claim

under this section, the Court is satisfied on the balance of

probabilities that the Claimant has been fundamentally

dishonest in relation to the primary claim or a related claim.

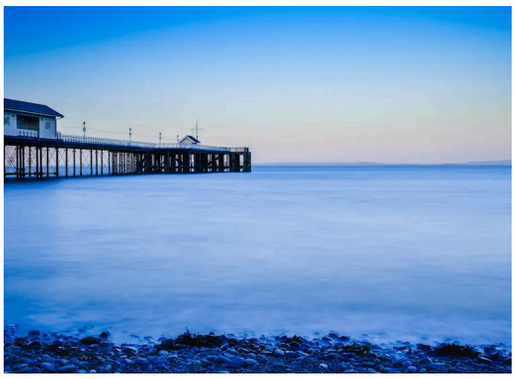
(2) The Court must dismiss the primary claim, unless it is satisfied that the Claimant would suffer substantial injustice if the claim were dismissed.

(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the Claimant has not been dishonest.

(4) The Court's order dismissing the claim must record the amount of damages that the Court would have awarded to the Claimant in respect of the primary claim but for the dismissal of the claim.

(5) When assessing costs in the proceedings, a Court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the Claimant to pay in respect of costs incurred by the Defendant.'

It was what the judge described as a 'gross exaggeration and fabrication' of the effects that led to the FD finding



The normal effect is that the whole of a claimant's claim is dismissed if the claimant has been found to be FD in relation to any aspect of it. However, if SI (under Section 57(2)) were to be found then the dismissal of the claim would not occur.

WHY SUBSTANTIAL INJUSTICE WAS AN ISSUE IN THIS CASE

In many cases, especially those of modest value, there is little that can be said in relation to SI, once a FD finding has been made. It is usually clear that there is no SI. However, in this case, partial liability was admitted (2/3 in the claimant's favour) and damages assessed (based on genuine injuries and consequences) at £596,704, even after liability apportionment. Accordingly, was there SI when the claimant faced losing her genuine claim with an assessed value at almost £600,000?

BACKGROUND

The claimant was visiting Aberavon Pier in July 2018 when she fell onto rocks and sand, four to five metres below. Some railings had, at some point, been present on the pier. The claimant had been drinking prior to the incident. Judgment had been entered and the issues for the court were: whether the claimant had been FD; quantum; and, if FD, whether there would be SI to the claimant.

THE EVIDENCE

The evidence included work performance reviews of the claimant's employment for Admiral Insurance, both before and after the accident; medico-legal medical reports; treating medical records; witness evidence from the claimant and her mother, and other ancillary witnesses; Department for Work and Pensions applications; a life insurance application; video surveillance evidence; and social media evidence.

The judgment was largely based on the consideration of what the claimant told the medico-legal experts and what was contained in her witness evidence, compared to the evidence from the other sources.

THE FACTS AND THE DISHONESTY

It is difficult to sum up the facts of this case briefly; the judgment sets these out in over 80 pages. The judge found that the claimant did sustain skull fractures and a moderately severe traumatic brain injury, with substantial frontal and temporal lobe damage. However, recovery was noted to be very good, intellect and cognition remained intact. There was some fatigue, irritability, anxiety, disinhibition, emotional dysregulation and reduction in short-term memory. There was no substantial loss of memory function, the ability to multi-task or spatial awareness. The NHS care received was high quality. The claimant returned to work in a demanding, challenging and fast-moving job, working 6.5 hours per day, five days per week, within three to four months. Fatigue reduced the number of hours she could work. The claimant maintained social activities including foreign holidays, visiting restaurants and spa weekends, though she had less energy than before.

There was a mild left-sided weakness, which resolved within a year. There was mild, left-sided high-frequency hearing loss and milder loss to the right ear. There was short-term tinnitus and dizziness.

The claimant sustained a fractured left ankle, which healed well within eight months and fully within twelve months.

There was a fractured pelvis, with pain for no more than three months.

There was depression, which was in part due to the accident, as well as other non-accident injuries and for work-related reasons, which ought to have resolved.

Depression returned (which led to the claimant requiring a litigation friend), only once surveillance evidence was delivered and social media disclosure made. This downturn was due to the claimant's dishonesty and the realisation that her claim may be dismissed for FD.

Notwithstanding the above effects on the claimant, it was what the judge described as a 'gross exaggeration and fabrication' of the effects that led to the FD finding.

This exaggeration/fabrication consisted of the true duration and/or extent inter alia of her left-sided hearing loss; her disability when walking; her noise intolerance; her dizziness and balance issues; her fatigue; her lack of spatial awareness; her ankle pain and range of movement; her left-sided hand grip and alleged weakness; her cognitive disability; her memory and cognitive functioning; her light intolerance; her back of head pain; her ability to shower alone; her foreign travel; her ability to socialise and her consumption of alcohol; her ability to drive long distances; her need for help with activities of daily living; and her headaches.

In conclusion, the judge found that:

"Overall, I find that the Claimant has presented her function and disabilities to clinicians, medico-legal experts and the Court dishonestly. The effects of this dishonesty on the claim have been substantial and fundamental."

The claimant maintained before trial, in open court and in her last witness statement, that she had never lied during the claim

FACTORS – SUBSTANTIAL INJUSTICE

The court found that the following factors should be considered when considering SI:

- The amount claimed compared to the amount awarded. If the dishonest damages claimed were small or moderate compared to the size of the assessed genuine damages, which were substantial or very substantial, this will weigh more heavily in favour of an SI ruling;
- The scope and depth of the dishonesty deployed by the claimant. Widespread and gross dishonesty being more weighty against SI than moderate or minor dishonesty;
- The effect of the dishonesty on the construction of the claim by the claimant and the destruction/defence of the claim by the defendant. This would be measured by considering all matters including the costs consequences of the work done in relation to the dishonesty compared with the work done had there been no dishonesty;
- The scope and level of the claimant's assessed genuine disability caused by the defendant. If the claimant is very seriously brain injured or spinally injured, then depriving the claimant of damages would transfer the cost of care to the NHS, social services and the taxpayer generally and that would be more unjust than if the claimant had, for instance, a mild or moderate whiplash injury. The insurer of the defendant (if there is one) has taken a premium for the cover provided. Why should the taxpayer carry the cost?;
- The nature and culpability of the defendant's tort. Brutal long-term sexual abuse, intentional assault or drug-fuelled dangerous driving being more culpable than mere momentary inadvertence;
- The court should consider what the court would do in relation to costs if the claim is not dismissed. The judge should ask: will the court award most of the trial and/or pre-trial costs to the defendant in any event because fundamental dishonesty has been proven? Also, will the claimant have to pay some or all of their own lawyers' costs out of the damages if the claim is not dismissed? These both aim to answer the question: 'what damages will be left for the claimant after costs awards, costs liabilities and adverse costs insurance premiums are satisfied?' If the genuine damages to be received by the claimant will be substantially reduced or eradicated by the adverse costs awards, then it is less likely that SI will be caused by the dismissal;
- Has the defendant made interim payments, how large are these and will the claimant be able to afford to pay them back?; and
- Finally, what effect will dismissing the claim have on the claimant's life. Will she lose her house? Will she have to live on benefits, being unable to work?

THE FACTORS AS APPLIED TO THIS CASE

The judge found, as follows:

The claimant sought £2.5 million and recovered just under £600,000. The dishonest parts of the claim inflated the damages sought by over £1 million. The scope of the claimant's untruths was wide, relating to her asserted pain, her activities of daily living, her social life, her physical and mental disabilities. The level of dishonesty was high. The claimant's dishonesty had a very substantial effect on the trial, its preparation and on the evidence relating to the claims for case management, care, therapies, loss of earnings and the figure for the pain, suffering and loss of amenity. It led to many more experts' reports. The claimant was moderately severely brain-injured, but has made a very good physical and cognitive recovery. Depriving the claimant of damages would not transfer much, if any, cost of care to the NHS, social services and the taxpayer generally.

The defendant's tort was at the lower end of the culpability scale. The pier had stood in the state it was in for years with no previous accidents. The judge estimated that the genuine damages to be received by the claimant would be reduced by adverse costs orders and the standard terms of her own conditional fee agreement. The claimant is capable of work, physically and mentally, from the perspective of the injuries caused by the defendant. Evidence of the claimant's suicidal ideation was taken into account. The claimant's current unstable state of mental health was caused by her own dishonesty. The judge was unclear whether the dismissal of the claim would lead to the claimant being unable to repay her mortgage. The judge found that the interim payments should not be repaid because that would probably mean that the claimant would lose her home.

The claimant maintained before trial, in open court and in her last witness statement, that she had never lied during the claim. It was taken into account that there was excellent recovery which the claimant made from the injuries with high-quality NHS treatment both at hospital and for years afterwards.

On balance, the judge did not find that there would be SI to dismiss the claim. While acknowledging that it appeared that this was a large sum of money to deprive a genuinely injured person of, by drafting and passing Section 57, parliament had sought to stamp out dishonesty, which is fundamental in personal injury claims, and the claimant had breached this law. The judge further noted that the claimant had been wholly unrepentant when she gave evidence and had sought, in parallel, to defraud the Department of Work and Pensions and Legal & General insurance about her disabilities.

This is helpful and the first reported guidance as to the consideration of SI in FD cases. It does appear that few cases will be able to successfully navigate a path through the eight factors set out by Ritchie J. SJ

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THE (ELECTRIC) LAMP… IS IT TIME FOR JURIES TO BE REPLACED BY AI?

Edward Hodgson, an Associate at Corker Binning, assesses whether artificial intelligence has improved to such an extent that criminal defendants could be tried by machines and the potential pitfalls involved

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, and 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, whilst Sir Patrick Devlin famously spoke of it as a 'little parliament'.

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. Despite this, and in light of the fervent support from legal practitioners and most of the general public, 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. 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 a not guilty plea in Q3 2023 was 19.4 hours. 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 Bostrum wrote that 'biological neurons operate at a peak speed of

An AI jury could, at the conclusion of proceedings, be programmed to prepare a comprehensive 'route to verdict'

about 200 Hz, a full seven orders of magnitude slower than a modern microprocessor (~2 GHz)'.

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' was 'restaged in front of two juries of ordinary people'. The question Channel 4 asked was 'will they both reach the same verdict?' 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) can 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. 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 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'.

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'. 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)'. 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 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 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).

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

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

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 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 (Justice and Security (Northern Ireland) Act 2007). 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 cyberattack 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.

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.

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 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 (*HM Solicitor General v Warner* [2024] EWHC 918 (KB)). 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'.

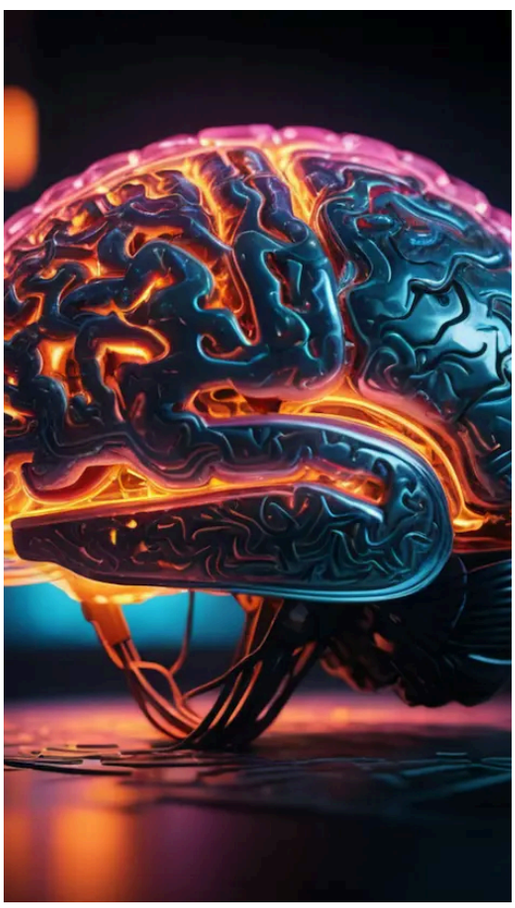
Mr Justice Saini ruled, in denying the Solicitor General permission to make a contempt application, that Ms Warner's placard 'reflect[ed] essentially what is regularly read on the Old Bailey plaque by jurors, and what our highest courts recognise as part of our constitutional landscape'.

'Jury nullification' is what prompted Sir Devlin's appraisal of the jury as the 'lamp that shows that freedom lives'. It is a critical safety valve, representing the right of a jury to correct perceived unfairness and tackle any perceived unjust application of 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

Why couldn't we counsel clients on the respective advantages and pitfalls of trial by humans and by an algorithm?

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) or, as what may have been the case in the 'Colston Four' 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 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 advantages and pitfalls of trial by humans and by an 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. 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. 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 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'. SJ

Edward Hodgson
Associate, Corker Binning

ARTIFICIAL INTELLIGENCE: COULD IT BE MAGIC?

Jane Jarman, Solicitor and Professor of Legal Practice at Nottingham Law School, pontificates on artificial intelligence and asks whether it might be a magic wand

Arthur C Clarke once said, 'Any sufficiently advanced technology is indistinguishable from magic,' in one of his futurist papers. Artificial intelligence (AI) certainly seems to have an element of the magic wand about it.

There is little doubt that the technology will be transformative. How to interpret its work product, in all its guises, will be a big ask. Where do we start?

AI HAS ALREADY LANDED

The risk profiling of AI is well underway, with reports on the risk and benefits to the legal profession published on an almost daily basis. Even if lawyers are reticent in their use of generative AI, clients may have already boarded the train and left the station. We are entering a time when the computer says not only 'no' but a whole lot more. Taking a witness statement in 2028 could be interesting, not to mention cross-examinations. The question as to 'who' made a particular decision might well be reframed as 'which AI package' did so.

DEVELOPING INTERDISCIPLINARY LAWYERS

The interdisciplinary nature of legal work will be one of the most important aspects of working life in the future. Law firms are complex places and employ people with a variety of skills. This is not just idle musing. In October 2023, the Royal Society ran a conference exploring careers at the interface of science and the law.

This kind of expertise and, perhaps, dual qualification in whatever LegalTech becomes, is best developed in situ a lot of the time, rather than bought in or bolted on. Look around first, not just at the software, but the people within your organisations. What do they do and how. Who would want this job?

CHALLENGING LAW SCHOOLS

There will be a change, over time, to the training of lawyers. Even without ChatGPT and other LLMs, we have been on this road for some time. A book like *How to Use a Law Library* seems quaint.

However, there is one area of academic research that has started to move centre stage, especially for students who have had placements in finance and industry: research methods beyond legal research. This is a missing cog in legal education that we should consider in detail now and the management of primary data. At present, this kind of education is the province of, mostly, post-graduate research in qualitative and quantitative research the harder edged data interrogation and inference skills, working with primary data.

THE BETAMAX EFFECT?

What to buy? If we find ourselves just using 30% of an application, if that, it is probably not the greatest buy. Ubiquity and usefulness are not always the same thing.

However, the selection of the type of AI software could become a matter of contention when push comes to shove in the context of a negligence claim in future. The points made by Sir Geoffrey Vos in a lecture to the Professional Negligence Bar Association in May 2024 should be required reading before venturing into the area for the first time.

THE PLACE OF INTUITION AND EXPERTISE

It is easy to get caught up in the breathless excitement of all things AI. However, it cannot do everything.

Interpretative skills and creative flair are likely to be more important when 'some machine' is dealing with the more mundane aspects of legal research with little or no attentional error.

However, if you are about to fall into a great despond, there is solace to be found. Hubert L Dreyfus and Stuart E Dreyfus' *Mind over Machine*, written in 1988 during the infancy of computing, has much to say about the importance of human intuition, creativity and expertise. 'Computers are more precise and more predicable than we, but precision and predictability is not what human intelligence is about.'

Law adapts. The scriveners and the copyists disappeared over a century ago.

AI is not a magic wand. We are not going to switch the AI on and the lights off.

There will be a change, over time, to the training of lawyer

Jane Jarman

Solicitor and Professor of Legal Practice, Nottingham Law School

SJ INTERVIEW: ROBERT SHOOTER

Robert Shooter speaks to the SJ for the September 2024 volume

Robert Shooter is the Managing Partner of Fieldfisher, having taken on the role in May 2022. With a background as the head of the firm's Technology, Outsourcing, and Privacy (TOP) practice, he has been with Fieldfisher since 2002 and became a partner in 2006. Known for his leadership in the tech sector, he has played a crucial role in shaping the firm's strategy, particularly in driving European integration and global expansion

In an interview with the *Solicitors Journal,* Robert offers valuable lessons in leadership, while discussing the evolving impact of technology on the legal profession and Fieldfisher's strategic objectives for continued global growth and innovation.

You've been deeply involved in significant tech-related deals during your time at Fieldfisher. Could you share insights from a notable or interesting deal you've handled?

The thing about deals—and disputes, for that matter—is that they ultimately come down to people. I remember one deal that was particularly challenging. It involved three months of difficult negotiations. On the other side was an experienced in-house lawyer who was new to the company and had something to prove. The final push in these negotiations took place offsite at one of those stay-home-type hotels. We'd been there for a week, and by that point, everyone was feeling a bit on edge and ready to go home.

There were ten remaining issues to resolve, and it was two in the morning. My client was willing to take reasonable positions on all of them, but the other lawyer wasn't budging. The only thing holding up the deal was the other lawyer's pride, and we know we weren't going to get any further with him.

Then, in the middle of the night—about 2:15 AM—the big boss of the client from the other side arrived from the States. In a very direct manner, he walked into the room and said to me, "Shooter, you have five minutes to tell me what the remaining issues are." I quickly laid out the issues, and after five minutes, he adjourned the meeting.

My client and I took a walk around the hotel grounds for about two hours, reflecting on the situation.

When we were finally called back in, we found out that the other lawyer had been sent home. The boss simply said, "Fine, we have a deal."

We then headed to the bar to grab a drink to celebrate closing the deal. That experience was memorable because it was a slog, but it really reminded me that in law and negotiations, it's not about the law itself—it's about people. If you can figure out how to work with or around people, you'll get things done. Maybe that's a lesson for life, but it was certainly a lesson for me that day.

What were the biggest challenges you faced transitioning from leading the technology and privacy practice to becoming the managing partner of Fieldfisher? How did your background in tech/innovation influence your approach to leadership?

As Managing Partner, I must say the learning curve was quite extreme. One of the most significant challenges was shifting my focus from a specialised role to a broader leadership position. In the technology and privacy practice, I was deeply involved in specific cases and strategies,

> **In law and negotiations, it's not about the law itself—it's about people. Figure that out, and you'll get things done.**

but as Managing Partner, the scope expanded to include the entire firm's direction and well-being.

One of the most crucial aspects of this transition was becoming a better listener. Leadership isn't just about coming up with strategies and making decisions; it's about bringing the whole firm along with you—not just the partners, but everyone within the firm. That's a key element of leadership. So, the first thing I focused on was improving my listening skills. Secondly, I made sure that people were on board with the direction we were heading. This doesn't mean you need 100 percent endorsement from everyone—otherwise, you'd never get anything done. However, you do need the courage of your convictions, which is incredibly important.

My background in technology and innovation has had a significant influence on my leadership approach. As a technology lawyer, I've always been fascinated by tech because it allows me to engage with innovation, which is my true passion. I always knew I wanted to be a technology lawyer because it put me at the forefront of technological advancements. In this role, I've learned that technology is an enabler—it helps you achieve your goals, whether that's through cutting-edge artificial intelligence, process automation, or legal tech. It's not a replacement for human insight and judgment.

A few years ago, we held a partners' conference with the theme "The Future is Human." It was a high-tech conference, but at its core, it reinforced the fundamental belief that law is ultimately about people. This goes back to the lesson from the case study I mentioned earlier: the minute you forget that, as Managing Partner, is the minute you start to falter.

In summary, the learning curve was steep, but it was also incredibly empowering. The key is to listen well, bring people along with you, provide clear direction, and always remember that technology is a brilliant enabler, but it's not more than that.

Technology is a hot topic for the legal profession, like in other sectors. How do you see the role of technology and innovation evolving in the legal sector?

When I was at university, I wrote my dissertation on the Computer Misuse Act, so I've always been deeply interested in how technology intersects with law. I remember reading Richard Susskind's book, *The Future of Law,* which discussed how technology might eventually replace lawyers. Susskind has written multiple iterations of this idea, and he's still exploring it, now alongside his son.

I've always been somewhat cynical about the notion that technology would outright replace lawyers. Even with the rise of legal tech over the past five years, there have been claims that it threatens traditional legal roles. While I believe legal tech has an important role to play, I think the advent of AI will accelerate changes in the legal profession at a pace we haven't seen before.

If I can use an analogy: imagine what happened with the Black Cab drivers in London. As Uber came in with their sat navs and online payments, Black Cab drivers who didn't adapt found

Technology is a brilliant enabler, but it's not more than that; human insight and judgment remain irreplaceable

themselves left behind, honking their horns on London Bridge because they had nothing else to do. Similarly, if law firms don't get on board with AI—though I don't mean jumping on every new thing without prudence—there's a real risk of being left behind.

So, I don't see AI as just a game changer; it's something that will reshape the landscape of the legal sector. Lawyers and firms need to be prudent and strategic in how they invest in technology. It's not about technology replacing lawyers, but about lawyers who don't adapt being replaced by those who do.

Under your leadership, Fieldfisher has continued to expand its presence globally. What would you say are your key strategies for driving international growth, especially in more competitive markets?

We are proudly European, and that identity has been a cornerstone of our growth strategy. Previously, I set out to solidify this message, emphasising our commitment to becoming a European powerhouse law firm. We have a unique selling proposition in that while many global law firms have European coverage, we specifically provide European legal advice to a US audience without threatening domestic US law firms. This approach allows us to partner with those firms, where they provide the North American advice, and we complement it with European advice. This strategy has been particularly effective for us, especially in Silicon Valley and increasingly on the East Coast.

In terms of our office network, we've been actively expanding. We opened an office in Vienna in September last year, and we've recently reopened our Milan office, which had been closed for strategic reasons—a story for another time—but its reopening has already shown great success. We're also exploring new office locations, so stay tuned for more developments on that front.

However, our growth strategy isn't solely about opening new offices; it's also about leveraging the potential within our existing network. For example, our offices in Germany have consistently seen growth of over 20 percent year on year. Our Spanish and Brussels offices are also performing exceptionally well – to name but a few.

Not every country in our network is going to pursue aggressive growth, but where it makes sense, we are pushing that agenda. Our strategy is a balance between expanding our footprint with new offices and maximizing the growth potential of our current offices.

Is there anything else in your career that you're particularly proud of?

One initiative that I'm particularly proud of is something we launched post-Covid, during a time when many people were working remotely. We realised that we had lost some of the cultural magic that really defines Fieldfisher. For those within the firm, this culture is something we all understand and value, but it might not be as clear to those outside of Fieldfisher.

In response, we decided to create something that could bring everyone together with a common goal, beyond just the usual pro bono work we had always done. To that end, we established an initiative called "One Firm Action." This was a charity initiative designed to encourage everyone in the firm to get involved—not just the lawyers, but also business services, PAs, postal staff, and everyone else. The idea was to create a competitive, cross-office environment where people could support local charities and also contribute to an environmental charity that spanned the entire firm.

The initiative led to a wide range of activities, both serious and fun. We had people jumping out of planes, climbing mountains, dedicating songs in charity broadcasts, and participating in talent shows. We even had a "Strictly Come Dancing" event in Manchester and our senior partner doing a hobby horse race around the terrace in London. Each office across our network got involved in their own unique way, from Europe to China.

Through these efforts, we raised over half a million pounds for local good causes. Beyond the financial success, it was incredibly rewarding to see the Fieldfisher culture come alive again, with people across the firm participating in something for the common good. It really reinforced the sense of community and shared purpose that defines who we are as a firm.

What advice would you give to someone transitioning from a partner role to a leadership role?

First and foremost, surround yourself with people who support you and aren't afraid to challenge you. I've been fortunate to have brilliant people around me who keep me honest, challenge my decisions, and provide support. That's crucial in any leadership role.

Secondly, and this is a recurring theme in my advice: never forget that this is a people business. This includes the clients, who ultimately decide whether to stay or leave based on their experience with us. It also includes the staff and partners, who are all owners in the business. As a leader, you're answerable to all these groups, and the minute you forget that, you're in serious trouble.

Lastly, understand that being a managing partner is a demanding and often stressful job. It's important to find time to switch off but also remember to enjoy what you do. Despite the stresses, I absolutely love what I do. It's crucial to maintain that passion and enjoyment in your work, even when the pressures are high. SJ

Robert Shooter

Managing Partner, Fieldfisher

The role of regulators in promoting EDI in the legal profession

John Barwick argues that while diversity initiatives in the legal sector have shown progress, systemic changes are still needed

John Barwick

CEO, CILEx Regulation

EDI is on the agenda for many legal organisations. While progress has been made to improve gender, racial and disability diversity, there is a mixed picture regarding the value and impact of various initiatives that have been introduced.

According to the latest SRA figures in December 2023, only 37 per cent of partners are women, an increase of 2 per cent from 2021. This is despite the gender split of solicitors in law firms being roughly 50/50.

Solicitors from a Black, Asian or minority ethnic background making up 19 per cent of the legal profession, a one per cent increase from 2021. However, only 8 per cent of Black, Asian and minority ethnic individuals make partnership in the biggest firms.

Only 6 per cent of solicitors have a disability, in contrast to 16 per cent of the working population (although this figure could be due to 'under-reporting').

Finally, in terms of socio-economic background, solicitors who received a private education were 21 per cent in 2023, slightly down from 23 per cent in 2015.

CHARTERED LEGAL EXECUTIVES

Chartered Legal Executives present a contrasting picture. According to Cilex Regulation's (CRL) Diversity Report 2023, 22.4 per cent of CILEx lawyers, paralegals, and students are male, while 76.5 per cent are female. Despite the higher female representation, men tend to progress faster to partnership.

Additionally, 14.8 per cent of the membership identifies as Black, Asian, or minority ethnic, yet they do not progress as quickly as their White peers. The percentage of CILEX professionals with a disability has risen to 5.8 per cent, up from 4.4 per cent in 2019, although under-reporting is likely. Moreover, only 6 per cent attended a fee-paying school, a slight decrease from 2021.

Regarding barristers, data from the Bar Standard Board's diversity statistics 2023 reveals that women constitute 40.6 per cent of barristers, marking an increase of nearly one per cent from the previous year. The proportion of women achieving King's Counsel (KC) status has also risen to 20.6 per cent in 2023. Minority ethnic barristers represent 17.5 per cent of the profession, but there remains a disparity in attaining KC, with only 10.7 per cent of these individuals reaching this level.

Moreover, 8.2 per cent of barristers report having a disability, an increase from 2022, though under-reporting is a concern. Finally, 19.4 per cent of barristers attended a fee-paying school.

What these statistics demonstrate, is that while there has been progress in improving diversity across the main legal professions, there is a long way to go.

To achieve this, initiatives that promote equality and inclusion are essential. All legal professionals must be afforded equal treatment and opportunities within their firms or chambers, regardless of their background. Furthermore, it is crucial to foster a workplace environment that values and includes all professionals, ensuring that everyone feels respected and supported in their career development.

A stronger focus on these facets could help mitigate the poor current outcomes. The Law Society's 2019 report, "Race for Inclusion," found that solicitors from an ethnic minority background were more likely to leave larger firms to go in-house or establish their own firms. This trend highlights the need for larger firms to create more inclusive environments where minority solicitors feel valued and see clear paths for advancement.

Similarly, although the CILEX route into law is recognized for improving inclusivity in the sector due to its more accessible qualification route, CRL's Diversity Report 2023 revealed that fewer female professionals attained partnership compared to the percentage of females in membership.

The "Race at the Bar Report 2021" from The Bar Council further illustrates the challenges faced by minority groups, finding that Black and Asian female barristers were more likely than white men to be victims of bullying and harassment. Addressing such discriminatory behaviors is crucial for fostering a safe and supportive work environment.

Additionally, a recent study conducted by CRL in collaboration with 11 other professional membership and regulatory chartered bodies across various sectors, along with The Young Foundation, titled "Beyond Buzzwords – Embedding a Systemic Approach to EDI Across UK Professions," found that among the professions, more CRL participants had considered leaving the profession or their organisation due to unequal pay and/or benefits, and burnout or unmanageable workload.

By addressing these issues with targeted initiatives, the legal profession can work towards creating a more equitable and supportive environment for all its members. Promoting equality and inclusion will help ensure that all legal professionals, regardless of their background, have equal opportunities to succeed and feel valued in their workplaces.

By addressing these issues with targeted initiatives, the legal profession can work towards creating a more equitable and supportive environment for all its members.

THE ROLE OF REGULATORS

It is a clear objective of all regulators in the legal sector that we want to encourage a diverse workforce closer in representation to those who use legal services, which has been shown in countless studies to enhance accessibility to justice. It is also now universally accepted that an equal, diverse and inclusive workforce is more productive, and successful.

To enable fair career progression and retention of a diverse profession, we must focus on changing the systems that reinforce marginalisation. Regulators have a lot more work to do, and will need to play even more of an integral role in improving it, by influencing, guiding and monitoring organisations' EDI efforts.

So, what do legal regulators need to do to bring about meaningful change? Professional membership and regulatory bodies hold the levers for positive action and lasting change. Rather than focussing on isolated initiatives, a reframing of how EDI is understood is needed. This reframing includes ensuring EDI becomes a guiding principle for all decision making, with interventions that focus on changing the systems that underpin marginalisation. The standards setting role that regulators and professional bodies can help to influence action and behaviours across organisations and among professionals. Ultimately achieving systemic change demands a joined up multi-stakeholder approach.

As an illustration, our current and next strategy for 2025-2027 is focussed on building a better evidence base, collecting and using data effectively to improve our understanding of the regulated community. Our EDI strategy emphasises our belief that capable individuals should be able to enter and progress their legal careers, or grow their firm, as far as their ambition and talent will allow. They should not be limited by barriers formed from prejudice, unconscious bias or discrimination and should be recognised, valued, and rewarded for the contributions they make. Using this greater understanding from the data collated, we will be able to help those we regulate understand how they barriers to progression can be tackled, by introducing systemic changes.

Each regulator for every role of the profession has an integral role, given its empathy and understanding of the professions they regulate.

This underpins one of CRL's fundamental concerns about CILEX's proposals to redelegate regulation of CILEX professionals to the Solicitors Regulation Authority. Having one regulator with its own established qualification route could sound the death knell for the CILEX route into law. This inclusive route has enabled many people, especially women, who started in administrative roles, to qualify as Chartered Legal Executives, become partners, and establish their own firms.

WHAT FIRMS AND INDIVIDUALS CAN DO

Employers should ensure that EDI guiding principles are included in all aspects of decision-making and implement inclusive recruitment and promotion practices informed by best practices.

They should encourage a 'speak up' culture to address poor practices early and use data, such as staff surveys and exit interviews, to identify and correct discriminatory or exclusionary activities. Additionally, employers should clearly communicate inclusive initiatives and policies while appropriately involving staff in interventions.

Individual professionals should challenge themselves to recognise how their colleagues' experiences may differ from their own and reflect on the personal biases they hold. They should actively work to minimise the impact of these biases on their decision-making and relationships with colleagues. By contributing to positive change, working jointly with colleagues, and taking advantage of learning and development opportunities, individuals can help foster a more inclusive and equitable workplace.

An inclusive and effective legal sector where individuals can progress on merit regardless of their background requires commitment across the range of individuals and organisations that impact the sector. Educators, professional bodies, employers, regulators and individuals all have a part to play in supporting the necessary culture and systems change to deliver a strong and diverse workforce to meet diverse consumers' legal needs. SJ

Solicitors who received a private education were 21 per cent in 2023, slightly down from 23 per cent in 2015

How to deal with vexatious litigants in the civil jurisdiction

Mark Bosworth discusses the impacts of vexatious litigants on the judicial process and those parties in opposition to a vexatious litigant before moving to consider the options available to an opposing party

Matt Bosworth

Partner, Russell-Cooke

Litigation is something most individuals or businesses enter as a last resort, often because there is just no other option left open to them.

The converse of this standard position is the vexatious litigant. The 'berserker' of the legal world – hellbent on pursuing numerous applications in a body of cases repeatedly, simultaneously or recurrently. The hallmark of a vexatious litigant is one who brings claims with little or no legal basis with the sole intention to subject the other party to inconvenience, harassment and expense.

The term 'vexatious litigant' lacks a formal or statutory definition. In civil proceedings, a vexatious litigant can be one who obsessively brings repeated claims, submits numerous applications and ignores orders (such as deadlines to serve documentation or which parties have to be served with the documentation) of the court.

This conduct presents serious injustice to those forced to respond or defend such claims, but also impacts the wider judicial system. Various officers and users of the court will know the pressure within the present-day judicial system after decades in ever-declining investment. Vexatious litigation serves only to exacerbate the issues and waste precious court resources.

RESTRAINING VEXATIOUS LITIGANTS

Those opposing vexatious litigants will also face the emotional taxation that they face from the onslaught of matters instigated by the vexatious parties. Practitioners need to understand the enormous emotional cost as proceedings lengthen to span great expanses of time and create significant pressure on financial resources and ensure their clients are fully prepared for what they could be facing.

The courts have long recognised the need to restrain vexatious litigants for reasons set out by *Staughton LJ in A-G v Jones* [1990] 1WLR 859:

"First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; secondly the resources of the judicial system are barely sufficient to afford justice without unreasonable delay to those who do have genuine grievance, and should not be squandered on those who do not."

The issue that many parties face is the threshold to overcome to achieve effective restraint of a vexatious

litigant. Any party will have to face a number of 'totally without merit' applications, appeals and delays before even beginning to attempt to secure restraint of vexatious litigants.

It is important that in the circumstances a

practitioner is opposing a potentially vexatious litigant, that they are aware of the potential means by which they can attempt to restraint. Before turning to specific means of restraining a vexatious litigant the court does have 'general powers' in their oversight of litigation.

Firstly, the court has an inherent jurisdiction to intervene and regulate the litigation process and ensure the correct administration of justice by preventing abuse of process (*Grepe v Loam* (1887) 37 ChD 168).

This is commonly referred to as the court's inherent jurisdiction, for example, to stay proceedings, to strike out, to vary orders, and a common law power to punish conduct which is contempt of court.

There is also a statutory power under s.42, Senior Courts Act 1981. The courts will exercise such power with care as it is considered to be more serious than a civil restraint order. In summary, there are two forms a section 42 order can take; a civil proceedings order or an all-proceedings order. In both cases a litigant will require permission of the High Court to commence proceedings.

CIVIL PROCEEDINGS

It is also important to note that unless otherwise stated, a civil proceedings order remains in force indefinitely. The opposing party must show that the litigant has habitually and persistently and without any reasonable ground brought claims or made applications to the court. It is important to note, due to the severity of a section 42 order, the occurrence is rare and that it is commonly only used in the circumstances that a litigant is already subject to a civil restraint order. It could be considered an additional method of restraint in the circumstances other methods are ineffective.

In civil proceedings, the Civil Procedure Rules (CPR 2.3(1)) provides for three means of Civil Restraint Order:

- Limited Civil Restraint Order, which is limited to the particular proceedings in which it is made.
- Extended Civil Restraint Order, where any claim or application must first be permitted by the judge identified in the order but the order is limited to a specific group of courts.
- A General Restraint Order, where any claim or application must first be permitted by the judge identified in the order and can apply to all courts.

These are methods of restraining a litigant on finding that their claims are without any legal basis, vexatious, persistent or even obsessive in nature. Civil restraint orders are not dissimilar to section 42 orders but more specific in their operability in the proceedings that individuals may find themselves in with vexatious litigants.

For a court to make a CRO, the litigant must meet defined thresholds. A limited civil restraint order can be made once a party has made two or more applications which are 'totally without merit.'

An extended civil restraint order is made only in the circumstances the party has persistently issued proceedings or made applications which are totally without merit. A general restraint order, being the most severe, will be made only in circumstances where the court deems that an ECRO will not be suitable.

Before applying a civil restraint order, there is the requirement that claims or applications are totally without merit. This is defined by the court to be a claim or application which is bound to fail as there is no legal or factual basis for the claim.

While the court, acting under its own initiative, is able to make a civil restraint order, a party to the litigation is able to make an application.

A party to the litigation may apply under CPR 23 specifying the specific civil restraint order which is sought and must comply with Practice Direction 3C.

The application should be made on notice and correctly pleaded with supporting evidence. It is suggested that witness statements and supporting evidence clearly evidence a full procedural history tainted by claims or applications that the court have held to be totally without merit.

It is a factor that has to be considered when advising any party to enter litigation to look at the nature of their opponent and to ensure that they understand that if they become embroiled in litigation involving vexatious litigants there is a long and winding road to cover before resolution is arrived at.

It is extremely important, when appropriate to do so, to seek to persuade the courts that an application is 'totally without merit' in the first instance. One must also ensure that the conduct of the vexatious party is meticulously recorded and that every court or tribunal dealing with the litigation is aware of the full history of the matter. This serves to streamline the process that has to be entered to successfully apply for a civil restraint order of any type.

Once the CRO has been granted, the named individual is placed on a Vexatious Litigant list maintained by the court service. No further litigation can be instigated, or any application be considered without a judge of the relevant seniority giving their formal approval for it to proceed. The court can also employ its inherent jurisdiction to extend a civil restraint order indefinitely.

Dealing with vexatious litigants has a cost for parties engaged in litigation that far outweighs the usual financial and emotional cost to litigation between rational parties. It is often hard to predict when such vexatious litigants will be encountered.

But those advising clients in such situations must remain strong and clarify that there are various paths that the court can take, or that they can instigate themselves, to end the traumatic vexatious litigation that they face. SJ

...a vexatious litigant is one who brings claims with little or no legal basis with the sole intention to subject the other party to inconvenience, harassment and expense.

AI will impact the labour market, but how will Labour impact the AI market?

Paul Kavanagh, Dylan Balbirnie and Anita Hodea review the future of AI regulation in the UK under the new Labour government

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The previous Conservative Government championed a 'pro-innovation' approach to AI regulation. As part of this strategy, the UK developed a non-binding, cross-sector, principles-based framework to enable existing regulators such as the Information Commissioner's Office, Ofcom and the Financial Conduct Authority to apply bespoke measures within their respective fields of data protection, telecommunications and finance. While this approach anticipated that there may be need for targeted legislative interventions in the future, specifically for General Purpose AI systems, it prioritised remaining agile as new technologies emerged.

Sir Keir Starmer, the new UK Prime Minister, has suggested that a Labour government would move away from the Conservative government's laissez-faire, pro-innovation strategy. Instead, Labour intends to introduce stronger regulation of AI, albeit in targeted areas. Starmer has publicly emphasised the need for an overarching regulatory framework and has expressed concerns about the potential risks and impacts of AI, while also acknowledging its transformative potential for society. The Labour Party's manifesto specifically mentioned implementing binding regulations on the "handful of companies developing the most powerful AI models" and prohibiting the creation of sexually explicit deepfakes.

The King's Speech outlining the government legislative programme fell short of announcing an AI Bill, but repeated the intention to 'establish the appropriate legislation to place requirements on those working to develop the most powerful artificial intelligence models'. This suggests that the Government will be taking time to develop and implement AI legislation.

NEW INITIATIVES

On 26 July, Peter Kyle (the new Secretary of State for Science, Innovation and Technology) announced a new AI Opportunities Action Plan to accelerate use of AI across the public and private sectors, declaring that the Labour Government was "puttingAIat the heart of the government's agenda to boost growth and improve our public services".

The Labour Party's manifesto outlined several initiatives related to AI.

Firstly, there is the Regulatory Innovation Office and Developing Ethical AI. This entails the expectation that existing regulators will regulate AI within their respective fields is potentially problematic where issues span the remits of multiple regulators or, more significantly, fall outside the remit of any existing regulator.

Labour aims to address this by establishing a 'Regulatory Innovation Office'.

It is proposed that the new office will consolidate government functions, streamline approval processes for innovative products and services and manage cross-sectorial issues.

It will also set targets for technology regulators, monitor their decision-making speed against

international benchmarks and guide them according to Labour's industrial strategy. The Regulatory Innovation Office will not, however, be a new AI regulator, but will support and facilitate existing regulators expected to address AI within their respective spheres.

It also remains to be seen how the Regulatory Innovation Office will materially differ from the Conservative Government's proposals to deliver 'central functions to support the [previous Government's] framework [for AI regulation]', or the 'AI Safety Institute', which the Conservative Government established at the beginning of 2024 (as the first state-backed organisation focused on advanced AI safety for public interest).

SUPPORT FOR DATA CENTRES

To support the growth of AI, the Labour government plans to remove planning barriers for new data centres by designating them as Nationally Significant Infrastructure Projects. This reclassification would allow these projects to circumvent local opposition and to consequently speed up their approval process.

CREATION OF NATIONAL DATA LIBRARY

The National Data Library initiative is a component of the Labour Party's broader national industrial strategy. It aims to consolidate existing research programmes and to help deliver data-driven public services "whilst maintaining strong safeguards and ensuring all of the public benefit".

LONG-TERM R&D FUNDING

Labour committed to scrapping short funding cycles for key R&D institutions in favour of ten-year budgets that should allow for meaningful industry partnerships. The government will collaborate with industry to support spinouts and start-ups by providing the necessary financing for their growth. This initiative aims to simplify the procurement process and foster innovation.

THE 'BRUSSELS EFFECT'

The EU has been bolder. Despite a lengthy legislative process, the EU has succeeded in passing what is, in the words of the European Parliament, 'the world's first comprehensive AI law' coming into force on 1 August 2024 (subject to phased implementation). The EU has not just been quicker than the UK, and other jurisdictions, but also more ambitious in the breadth of its regulation. Whereas the Labour Government's proposed AI regulation focuses on the "most powerful AI models" and the "handful" of companies developing them, the EU AI Act imposes obligations along the AI value chain, including on providers of AI systems and users of AI systems, in addition to developers of the foundation models that underpin such systems.

The EU AI Act is precisely the kind of regulation that many advocates of Brexit saw as innovation-stifling red tape. The current UK Government (similarly to the previous Government) is utilising its freedom to regulate differently to the EU with a lighter-touch regime, at least for the majority of businesses that are not behind the most powerful foundation models (although the EU AI Act may, of course, have looked different had the UK been involved in its negotiation).

Nevertheless, Keir Starmer and Peter Kyle will be aware of the actual and potential relevance of EU legislation in the UK. First, ambitious UK-based AI developers will want their systems to conform to EU requirements to exploit the EU market. Second, even where EU legislation is exacting, regulatory alignment can ease the compliance burden for international businesses operating across the EU and UK markets.

Third, the Labour Party has been critical of the current trade deal with the EU – a closer relationship may require closer regulatory alignment.

An alternative to closer alignment to the EU is to position the UK almost as a regulatory sandbox for AI, allowing innovators more freedom to develop products before scaling in compliance with the EU AI Act to take advantage of the EU market.

To date, the EU has also been bolder than other major jurisdictions like the US and China in implementing comprehensive AI legislation. While China and the US have taken steps towards regulating AI, they have avoided broad, sweeping laws. For example, China has introduced specific regulations targeting generative AI and deepfakes.

Meanwhile in the US, the Biden-Harris administration issued an Executive Order on the 'Safe, Secure, and Trustworthy Development and Use of AI' which aims to establish a broad framework for responsible AI use. Unlike binding legislation applicable to the private sector, Executive Orders serve as directives for federal agencies, guiding their actions and policies.

FUTURE OUTLOOK

Under the new Labour Government, the technology sector can likely expect a shift towards more proactive and structured regulatory measures. While there have been indications of an intention to implement stricter regulations around AI, there has been no proposal for a general AI regulation. Any new legislation is expected to be more narrowly focused than the approach taken by the EU.

The Labour Government's manifesto suggested that the UK will maintain a relatively light-touch regulatory approach to AI for the majority of businesses. However, the Labour party ran a cautious election campaign and, having won, it proposals may become bolder. In addition, its plans to re-build the UK's relationship with the EU may lead to greater alignment with EU regulation. SJ

The Labour Party's manifesto specifically mentioned implementing binding regulations on the "handful of companies developing the most powerful AI models" and prohibiting the creation of sexually explicit deepfakes

Ecocide: the next wave of legal actions?

Katie Allard and Teresa Young explore how ecocide laws and rising climate litigation are reshaping accountability for environmental damage.

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With a rise in climate-related cases globally and bold new legislation holding those responsible for preventing climate damage accountable, 'Ecocide' laws are poised to revolutionise ESG litigation in the coming years.

UK courts have received a record number of cases aimed at tackling climate change offenses, per a recent report from the London School of Economics (LSE).

And according to data from Columbia Law School's Sabin Center for Climate Change Law, a total of 133 cases are before the courts in England, Wales, Scotland, and Northern Ireland, with 24 filed in 2023 alone, making the UK the country with the second highest number of climate change cases in the world. Only the US ranks higher, with a staggering 1,745 current climate change lawsuits.

The LSE report, published by the university's Grantham Research Institute in partnership with the Sabin Center, identifies multiple strategy areas to characterise ongoing climate litigation. The majority of global climate-centred cases focus on challenges to government policy, though there are a growing number of lawsuits seeking monetary damages for greenhouse gas emissions and other environmental harm caused by defendants. Other legal strategies employed include challenges to proper environmental licensing for development projects and tackling 'climate-washing', the latter of which assess the validity of environmental claims made about products and services.

UPCOMING DEVELOPMENTS

2024 is expected to be another record-breaking year for climate legislation and legal developments in the UK. The climate crisis has already made headlines this year, following the recent Supreme Court decision in *R (Finch) v Surrey County Council and Ors*, requiring the developers of new UK oil projects to consider the environmental impact of burning fossil fuels in an assessment report before planning permissions can be approved.

Another landmark case is due to be heard by the High Court in London in October 2024, when the Anglo-Australian mining corporation BHP will defend a case concerning the collapse of Brazil's Fundão Dam in 2015. This group action lawsuit, brought on behalf of nearly 700,000 individuals impacted by the disaster, is expected to pave the way for further environmental litigation in the UK.

On the legislative front, the Ecocide Bill, introduced to the House of Lords in November 2023 by crossbench peer Baroness Boycott, is set to usher in drastic change within England and Wales. While still in early stages of discussion, this bill is intended to deter future environmental harm while holding to account those responsible for causing 'severe' ecological destruction.

The proposed legislation would criminalise 'ecocide' – an offence that has been widely defined to include acts, omissions, or knowledge of acts leading to widespread or irreversible damage to the environment. Under the proposed bill, the prohibited acts would extend to anyone found to have aided, abetted, counselled, or procured an actionable offence, in addition to anyone who did not act to prevent the environmental harm.

The bill has specific implications for both individuals and organisations, the latter of which includes companies, public bodies, government agencies, and other entities regarded as servants or agents of the Crown.

It is significant that the bill will place strict liability upon companies, as is the concept of 'superior responsibility' it imposes on directors, senior management, and anyone in a position of authority for actions committed by their staff.

ACCOUNTABILITY

As it currently stands, the draft bill places direct accountability on heads of companies and other high-level managers, who would be required to 'take all reasonable measures within their power to prevent or stop the commission of a crime or to submit the matter to the competent authorities for investigation'. Investigations into potential offences would be carried out by the Environment Agency.

While this bill marks the first of its kind for England and Wales, it would see us join a small but growing number of countries whose national legal systems already prohibit ecocide. These existing frameworks tend to focus on acts causing irreversible pollution and mass damage to people, plants, animals, and local ecosystems. Many frameworks include specific references to the quality of natural resources like soil, water, and air.

The term 'ecocide' originated during the 1970s in the context of global concern regarding the widespread use of chemicals and the destruction of local forests and cropland by the US during the Vietnam War.

Yet, in 1990, Vietnam became the first country to legally prohibit ecocide, defining the offence as a crime against humanity. In the following decades, multiple countries whose natural ecosystems were impacted by nuclear radiation from the 1986 Chernobyl disaster – including Ukraine, Belarus, and Russia – implemented their own national laws against ecocide.

Other countries that have adopted prohibitions against ecocide include Ecuador, Chile, France, and Belgium. In addition, similar proposals for regional ecocide legislation are currently being considered in Scotland, the Netherlands, Mexico, the Catalonia region of Spain, and more.

The expansion of environmental protection laws suggests that legal strategies around climate conservation efforts are changing. Data from the Sabin Center indicates that, of the climate lawsuits currently pending internationally, the vast majority (around 70 per cent) were filed since 2015, the same year the Paris Agreement was introduced. The LSE's report suggests that the total number of new cases may actually be slowing down to strategically concentrate on litigation with the greatest impact.

Recent lawsuits have also highlighted the human rights aspects of climate change litigation: an estimated 45 per cent of all climate cases filed to date globally have been lodged before a variety of human rights courts and tribunals. The use of human rights arguments in climate-focused litigation is unlikely to go away, particularly given the links between community rights and environmental protection and the recent resurgence of local ecocide laws.

INTERNATIONAL SCALE

In addition to the increasing number of national laws, there is increasing support for recognition of ecocide at the international level. In February, Belgium became the first European country to officially call for the adoption of ecocide in the International Criminal Court's Rome Statute. Such a change to existing legislation would see ecocide listed alongside the globally-prohibited atrocities of war crimes, crimes against humanity, and genocide.

While the LSE reports that only 5 per cent of global climate lawsuits have reached international courts and international recognition of ecocide remains wholly theoretical at this time, global support for this movement – along with the proposed national Ecocide Bill for England and Wales – are significant indicators of how the law could be changed in the future, offering greater protection for the natural environment while deterring polluting activities.

Tougher laws holding those responsible for serious ecological damage to account are likely to be warmly welcomed by the general public given the broad consensus to urgently tackle climate change. However, the wide scope of liability proposed by the proposed Ecocide Bill is likely to have profound implications for governments, businesses and individuals, adding a new layer of complexity to supply chain due diligence and management, business governance and production methods.

Enforcement agencies will need to quickly get to grips with their new powers in order to achieve the legislation's intended aims, and professional advisors working alongside polluting industries such as fossil fuel, agriculture and fast fashion (amongst many others) may find themselves walking a very fine line in order to help their clients navigate change. SJ

133 cases are before the courts in England, Wales, Scotland & NI

SOLICITORS JOURNAL

Insufficient protection for victims of 'deepfake' media

The Online Safety Act 2023 introduced new offences for sharing intimate images without consent but faces criticism for not targeting deepfake creators effectively

Cally Harrington

Associate, Corker Binning

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'

The creation of fake pornographic images and videos (also known as 'deepfakes') astonishingly easy can easily be used to target victims of domestic abuse and children.For instance, Alexandria Ocasio-Cortez, the youngest woman to serve in the United States Congress, and Taylor Swift are two notable victims of this deepfake media. While deepfake images of those in the public eye have made headline news, 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 2003

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

The Sexual Offences Act 2003 has been further amended to create three more serious offenses related to the sharing of such images or videos: (i) under section 66B(2), sharing a photograph or film without consent and with the intention of causing 'B' alarm, distress, or humiliation, which extends beyond the existing revenge porn offense; (ii) under section 66B(3), sharing the image or video for the purpose of obtaining sexual gratification; and (iii) under section 66B(4), threatening to share a photograph or film with the 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 to the offense under sections 66B (1), (2), and (3) apply in the following circumstances: If the photograph or film was taken in a public place where 'B' had no reasonable expectation of privacy, and 'A' reasonably believes that 'B' was in the intimate state voluntarily, or if the photograph or film had previously been publicly shared, or 'A' reasonably believes that it had been, and 'B' had consented, or 'A' reasonably believes that 'B' had consented, to the previous sharing.

AREAS FOR IMPROVEMENT

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 focusses 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 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 focussed 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.

ONGOING DANGERS

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. SJ

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 films but rather the sharers of the content

Conducting Source of Funds verification on corporate clients

Harriet Holmes highlights the critical role of Source of Funds verification in combating money laundering and ensuring compliance within corporate transactions

Harriet Holmes

AML Services Manager, Thirdfort

In recent years, Britain has been labelled a 'global money laundering hub," with Transparency International reporting that £6.7bn of questionable funds were invested in UK property between 2016 and 2022.

Source of Funds (SoF) verification is a crucial part of the due diligence process and plays an important role in identifying and preventing money laundering. Carrying out such due diligence on corporate clients is more complex than with individual clients.

So how can firms ensure their SoF verification process for corporate clients is effective and does not fall foul of the regulations?

WHAT IS SOURCE OF FUNDS?

Source of Funds (SoF) verification is a process of establishing where funds came from, and the activity involved in generating them.

The first step is to establish the origin of the funds. Common sources include (but are not limited to): raising capital through debt, equity or government incentives; retained earnings or funding from personal savings; private equity; venture capital; crowdfunding; donations; grants; and subsidiaries.

Once the initial source has been established, the direction of travel for further enquiries will emerge. For example, if the source is the personal savings of a director, SoF checks must follow the trail to understand the ultimate origins of these savings and the activity that generated them.

IDENTIFYING CRIMINALITY

It is worth considering throughout the SoF verification process that all businesses regardless of sector are, to some degree, at risk of exploitation. At the core of the process is the question: how could this corporate entity be used to launder money?

Being aware of common methods used for money laundering will help firms identify where it is present. These can include false invoicing, shell companies, or complex transactions – all of which are designed to obscure the dirty money's original source.

Firms should focus on two areas:

- The original funds that were injected into the company
- The continuous monies which enable the entity to continue trading

Taking into consideration when the company was incorporated and how long it has been in existence may affect the risk profile and the level of focus and due diligence we wish to undertake on each element

Taking a risk-based approach requires you to be curious about the company more generally. Asking relatively straightforward questions will enable you to build a more complete picture, and therefore make more informed decisions on next steps. These should include, but are not limited to:

- Where is the client incorporated?
- How long has the client been established?
- What sector does the company operate in?
- What are the day-to-day business activities?
- Who are the main shareholders and beneficial owners?
- Who controls the company?

THE PARAMETERS OF ONE'S ROLE

It is not the responsibility of regulated firms and their employees to go out seeking evidence of any crime or corruption. For example, firms are not required to undertake detailed due diligence of a business to see if they ever failed to pay for a required licence or their tax return.

However, regulated firms and their employees are required to consider whether the source of funds is consistent with the client's risk profile, transaction, and the nature of the business – including its day-to-day activities and financial profile.

When assessing the funding source, it's important to consider several questions to ensure thorough due diligence. First, do you fully understand the names of the ultimate beneficial owners and the complete identities of the investors or funders? Have these individuals been properly identified and/or verified? If the funding provider is an entity, it is important to determine if they are regulated. If they are, the risk associated with the funding is significantly lower, which directly influences the extent of due diligence required.

Next, consider the purpose of the funding. If there is no apparent connection between the funder and the entity receiving the funds, do you understand the reasons behind their support? Also, examine the complexity of the funding structure. Is it unusually large, or does it seem to lack a clear economic or legal purpose? Understanding why the funding is being sourced in a particular

way is essential. Are you confident with the explanation provided regarding the chosen funding model? Does the funding for the transaction involve a regulated entity?

It's also important to determine whether the funding is intended for the purchase of an asset or if it could potentially be recouped. Are there any conditions attached? If the payment is being processed through an electronic payment service, check whether this service is regulated, and in which jurisdiction. If it's not, consider the controls that the service has in place and associated risks.

For non-regulated entities or funding from individuals, identify and verify the parties involved to the extent possible. Certain funding structures, such as crowdfunding, may complicate the process of conducting due diligence on every source of funding. But consider who you can identify and verify.

For those you cannot, consider if this exposes any additional risks and whether it is legitimate that this should be the case. It may not be possible to verify all funders but can you seek out the controlling individuals or any individual or entity contributing significantly more than others, for example.

This might include identifying and verifying the individuals controlling the funding, or those donating significantly. Ultimately, it's crucial to collect enough information to be comfortable, ensure you document and explain to a third party looking in both internally and/or externally your considerations and rationale.

HOW TO GATHER INFORMATION

The type of evidence required for SoF corroboration depends on the specific source, its origin and the means of transfer.

These documents differ in their integrity, reliability and independence but in general will include: annual report & financial statements; the latest audited accounts; information from a reputable electronic verification service provider; information on the companies or parent company's websites; statements from a bank, building society or credit union; financial statements presented to the annual general meeting or corporate filings or self-declaration.

All private limited and public companies registered in the UK must file their accounts at Companies House. These will usually have to include profit and loss accounts and a balance sheet signed by a director on behalf of the board and the printed name.

Electronic company search providers can help to identify the ultimate ownership structure and beneficial owners. Once aware of the individual(s), firms can utilise technology to obtain independent and secure verification of that individual's identity.

However, for all companies, especially those outside of the UK where records are not as accessible, a reputable electronic screening provider can support the process by collating the required due diligence for review. This can also include copies of any relevant fillings of annual accounts.

Every business is different, and every SoF verification process will inevitably require its own tailored approach. In general, if the transaction and its associated evidence are consistent and there is no suspicion of criminal activity, firms do not have to go further to prove that the funds are clean. However, it is always important to keep a record of all questions asked, answers provided, considerations, rationale and supporting evidence received. This will mean firms/solicitors are prepared for any future inquiries from an auditor, regulator or law enforcement.

If approached with a good understanding of the process and a curious mindset, firms can undertake a thorough SoF verification that will play a crucial role in preventing criminals from using the proceeds of crime. SJ

Regulated firms and their employees are required to consider whether the source of funds is consistent with the client's risk profile, transaction, and the nature of the business

Flat hierarchies: how this business model may benefit some in the legal sector

John Wallace of Ridgemont argues horizontal models may offer a healthier, more inclusive alternative

John Wallace

Managing Director and Head of Real Estate, Ridgemont

The pyramid is as ancient a structure in the legal sector as it is in Egypt. In Ancient Egypt, the pyramid mimicked the primordial mound from which the Egyptians believed the earth was created. The pyramid enabled the few to benefit from the hard toil of the many.

Law firms have traditionally used the pyramid structure, where a small amount of senior, experienced individuals sit at the top, with a greater incremental workforce who are less experienced making up the rest of the firm. In other words, a typical law firm would have few partners, a greater number of senior associates, an even greater number of junior associates and, as for trainees, there would be so many that one would lose count.

The idea is simple. Clients are won-over by smooth talking, experienced partners. The work is given to hard-working senior associates to lead, who then delegate work that more junior colleagues could do to junior associates, trainees and paralegals.

The sell to the client is that work is done at an appropriate level of experience and therefore costs are minimised (though many a law firm client may disagree). For partners, the work is done cost efficiently, from a firm perspective anyway, and they can focus on their Profit Per Equity Partner, or PPEP. In fact, it would not be unfair to say that this is their core focus.

The pursuit of PPEP, as a core focus, has various negative repercussions, probably too many to list here. But as examples, it has the consequence of partners making associate bonus payments contingent on the associate hitting their billable hours targets. That means it is in the associate's personal interest to record as much time as possible on any given matter. Hardly in the best interests of the client.

It is unsurprising, given the reluctance of law firms to embrace change, that the practice of promoting senior technicians to managerial positions is still the norm. Partners who are either experts in their fields, excellent at business development or both are plucked from their positions and placed into the 'executive.' A bit like the very large hand in the cartoon bit of Monty Python's Flying Circus, in some instances, partners may set the strategy and run the show with limited managerial training and experience in the management of a sizeable business.

Therefore, what is the chief strategy of the executive? Well, we've discussed that already, it is to increase PPEP. And, as we have found, chasing PPEP is neither in the interest of associates nor clients.

The evolution of different organisational structures

A recent survey by Lexis Nexis found that only 22 percent of associates wanted to become partners at their existing firms. Why? Not because of a lack of ambition, but a demand for a better work-life balance, a compelling business strategy, superb training and for Associates to have a seat at the table and be heard.

None of those things are necessarily a facet of the pyramid structure and in most cases, a more horizontal organization structure would better serve these Associates.

The birth of the consultancy model, in or around the early 2000s, saw the emergence of a type of horizontal structure that could appeal to disenchanted Associates. It offered autonomy and a share of the spoils. Each consultant running themselves as their own mini law firm. But consultancy is not for everyone. It lacks the guarantee of an annual salary, the collegiality of teamwork and puts pressure on the associate to excel at business development, when it may be something that they have never been given the time to develop and some may never develop those skills.

Another concern is career progression, in circumstances where a consultant, operating their own mini law firm, have no clear development path (something which Big Law has become fairly good at, if a little unimaginative, by offering Legal Director, Of Counsel and other job titles). So that is not the answer for the many. As the consultancy model firm and brand itself is distinct from the mini law firms created by its consultants, consultants necessarily become detached from business decisions made by the firm. As the tail cannot wag the dog with so many consultants with competing demands.

How inhouse isn't that different to private practice

75% of those associates surveyed by Lexis Nexis were not prepared to abandon private practice to work in-house. Working in-house offers something different, but as the research highlighted, the many want a better work-life

balance, a compelling business strategy, superb training and to have a seat at the table and be heard.

In some businesses, there will be a familiar structure to the legal team, with a pyramid structure absent partners. This provides collegiality and a supervisory system, reminiscent of private practice. But workloads can be substantial and internal clients demanding an associate by an expert of five distinct areas of law in one day (which sounds like a Crowded House reference) can be overwhelming and stressful. Training can also be lacking, often externalised and sometimes forgotten about altogether. The purpose of an in-house legal function is to enable commercial, the business itself is not selling legal services, hence why the legal function lacks a voice in the executive. Legal provide a function to the business, but does not have an influence on the business itself beyond the provision of legal services. It is not for the many.

The benefits of a horizontal law firm structure

The answer, dear reader, for those associates that want to remain in private practice, may be a law firm with a horizontal organisation structure, like we have at Ridgemont. Absent a partnership, the law firm is not shackled by the focus on PPEP, taking a more holistic approach to business growth. Associates are released from their hamster wheels and given the opportunity to breathe, enabling them to develop business development skills.

Without a partnership and executive, everyone can have their say and there are no office politics. Everybody is appreciated and heard. We have regular meetings where everyone and anyone can make suggestions or voice an opinion about business decisions. No one's opinion is invalid. Consensus is built before decisions are implemented. Of course, that does not mean that everyone's opinion can be incorporated into the strategy, but everybody is heard.

Our environment is supportive, not competitive. When colleagues need help meeting their KPIs, we help them. And although we provide high quality advice, doing great work, for some of the biggest names in the construction sector, we ensure that our team have their lunch break and generally do not work evenings or weekends. That can offer benefits for them as lawyers, which in turn benefits our clients.

While the pyramid structure is effective at driving profits, it does so at the detriment of many a lawyer's health and wellbeing, creativity and efficiency. As we know from our clients in other sectors, other structures can be effective at bringing in profits. Perhaps the legal sector needs to remove its blinkers on PPEP, if we want future generations of lawyers to stay in the profession.

SJ

The pursuit of PPEP, as a core focus, has various negative repercussions, probably too many to list here

Firm-wide adoption of LinkedIn: managing partners must lead by example

Simon Marshall explains why LinkedIn is essential for legal professionals to stay at the top of their game

Simon Marshall

Founder, TBD Marketing,

There is no escaping the fact that LinkedIn is one of the world's most powerful professional networking and business development platforms. It represents a virtual space in which vast swathes of the business community hang out, and I don't regard it as an overstatement to say that every legal professional, from newly qualified lawyer all the way through to managing partner, should be making active use of it if they want to be at the top of their game.

Yet we still see a certain degree of reluctance within many law firms when it comes to harnessing the power of LinkedIn. In many instances, this reticence starts at the top with the managing partner, whose attitude to social media has a very real impact on everyone else within the business: if leaders don't show their colleagues that it's safe and indeed desirable to post on LinkedIn, this creates a throttling effect that chokes off communication and innovation on this platform.

WHAT IS MARKETING'S ROLE IN RELATION TO MANAGEMENT TEAMS ADOPTING SOCIAL MEDIA?

Arguably, marketing teams often try to constrain or define the remit of what people can and cannot do on social media by creating a centralised communications policy, almost as if it were still 1997. The major problem with this approach is that social media is, of course, a democratised version of communicating with the world: it is inherently decentralised, and therefore resists and elides any attempt to constrain it.

As a result, the firm's social media mavericks (or early adopters, if you prefer) will laugh at what is essentially an unenforceable policy, and will point to their own successes when challenged on their non-adherence to the marketing department's social media guidelines. Comms teams spend too much time embroiled in these arguments, rather than realising that these mavericks are essential allies in getting the entire firm to up its social media game.

In practice, this involves a two-pronged approach. The first prong is asking the mavericks to go beyond their established comfort zone and up their social media game: to graduate from posting words to posting videos, to doing LinkedIn Live streams, to hosting podcasts, and thereby broaden their reach, become even more adept at serving as ambassadors for the firm, and – just as importantly – thereby make these activities safe in the eyes of others.

And the second prong is to get the mavericks to turn their engagement inward and help train their more risk-averse colleagues to follow in their footsteps. In the process, the mavericks should be as honest as possible about any trepidation they felt when they first began using social media, and how they overcame this. By sharing their own vulnerabilities, the mavericks can help their colleagues to be brave and dip their own toe in the water and realise that it is warm and that there is nothing to be afraid of that can't be mitigated.

Yet in order to be fully successful, a firm's social media adoption model must necessarily include a socially enabled senior partnership: no matter how many times the marketing team tells them otherwise, using social media will never feel fully safe to non-maverick junior lawyers, associates and partners unless they can see the managing partner leading by example. Why risk your reputation and promotion opportunities if the people you see in positions of authority aren't using it?

However, in trying to clear this roadblock to firm-wide buy-in, the biggest mistake that either the marketing team or the managing partner could make at this juncture is to have the marketing team run the managing partner's LinkedIn account for them: they must avoid the internal-comms mindset.

THE PERILS OF AN INTERNAL-COMMS MINDSET

The hard truth is that many managing partners have their internal communications written for them by internal comms experts. I believe this is a major part of the equation when it comes to figuring out why many managing partners haven't yet adopted social media: if they are unpractised in drafting the relevant messages for their internal audience, they are even less likely to feel comfortable doing so for a wider, external readership. In other words, if you haven't yet fully grasped that communication is a vital part of leadership, then it is hard for the first step you take in course-correcting to be an external-facing one.

This dynamic breeds the second problem, which is ghost-written external communications. A ghostwriter would have to be an incredibly uncanny mimic to leave none of their own fingerprints behind on their work and convince others that it accurately reflects the tone of voice of the respective managing partner. It is a very tough act to pull off, and I would posit that the overwhelming majority of ghost-written external communications can be identified as such, not least by those readers who know the purported author.

The real problem here is that ghostwriting in the arena of social media doesn't really work, because we're not issuing communications for their own sake, but in order to produce outcomes – whether that's hiring a new partner, celebrating colleagues and successes, winning new business or celebrating the firm's values in action.

For the managing partner to not take the time to author these communications themselves, or indeed to curate their own social media account (that is to say, liking and commenting on others' posts), is a false economy that can backfire badly.

The issue is one of authenticity: the content will always land better with audiences when it sounds like it was written by the person that posted it. And what if the comms team running the personal account unwittingly comments on a message from a colleague about an issue that, unbeknownst to the team, the managing partner and said colleague had discussed face to face over coffee that morning? Such an unfortunate situation would leave a certain amount of egg on the managing partner's face.

In any case, it behoves managing partners to run their own LinkedIn accounts because it is another great way to keep their finger on the pulse of the sector, read about what colleagues and rival firms are up to, and be alert to any ripples that they might otherwise fail to detect. And it also buys them an unquantifiable amount of industry kudos to be seen playing an active role within the legal community's online discourse: it's a highly visible demonstration of what leadership looks like in the digital era.

ONE RADICAL IDEA: MANAGING PARTNERS SHOULD GET IN THE TRENCHES ALONGSIDE THEIR JUNIOR COLLEAGUES

When I worked at Simmons & Simmons in the middle of the financial crisis, the then-managing partner Mark Dawkins informed me that he was having trouble communicating with the firm's associates because there were too many layers of management hierarchy standing in the way; he was struggling to get messages to them and was unable to hear what they had to say about the business, despite them representing the future of the firm.

To resolve this issue, we set up a series of lunches, with Mark as the host and the associates as his guests. While recognising the value of having some access to the power that Mark represented, these lunch guests attended with some initial trepidation at meeting with the managing partner; however, Mark was soon able to put them at their ease and conduct a fruitful dialogue by asking them what they thought he should know about the firm and how it was functioning during this critical time.

This approach removed all the politics from the room and allowed for honest and highly necessary conversations to take place. Mark was then able to take what he had learned from the associates and feed it into his thinking and back to the partnership, providing them with the views and opinions of those working at the coalface and thereby expanding everyone's understanding of the firm's direction of travel during the extremely volatile period of the credit crunch and its immediate aftermath.

If managing partners were to recreate this approach today in relation to social media adoption, they could work with their firm's next-gen lawyers (PQE 4-6) – who are digital natives and have a need to grow their networks, improve their profile within their area of expertise, and win business – and the marketing team to jointly develop and put into action a LinkedIn strategy that empowers this cohort in their business development work.

What really supercharges this approach is the fact that the managing partner shows themselves willing to put themselves back in the shoes of the junior lawyers, to sit with them and learn with them and from them. There is no better way for managing partners to establish their bona fides and build esprit de corps than demonstrating that they are willing to learn alongside their junior colleagues. SJ

There is no better way for managing partners to establish their bona fides and build esprit de corps than demonstrating that they are willing to learn alongside their junior colleagues

M&A surge leads to legal hiring boom

James Lavan explores the surge in legal sector hiring, driven by increasing mergers and acquisitions activity and a stronger economic outlook

James Lavan

Executive Director, Buchanan Law

London-based law firms are pressing hard on the accelerator pedal when it comes to hiring in transactional sectors.

Recent optimism within law firms, driven by a stronger economic outlook and increased business activity, has led to a surge in legal recruitment in the competition, employment and corporate tax departments.

Anticipated interest rate cuts and market confidence in the new government have contributed to an improving macroeconomic picture, which has given a tangible boost to recruitment.

This provides a strong pointer towards an increase in mergers and acquisitions activity over the next twelve months.

DEVELOPMENTS

One recent report by Thomson Reuters found around 40 percent of UK corporations are predicting an increase for their legal spend over the current financial year. Across the board, the reason for this significant growth is higher demand for legal advice on mergers and acquisitions (M&A) transactions.

The most significant growth is in M&A advice, with a net 21 percent of corporate expecting to increase spending, up from a net 2 percent planning cuts three months earlier. This is an extremely significant about-turn, and one which really highlights the changed mood in the sector.

Banking and finance legal advice also saw improvement, according to the same research, with a net 10 percent planning increased spend versus a net 6 percent previously planning cuts.

But it is the surge in M&A spending which is expected to lead to the most notable uptick in legal sector recruitment. This rapid growth in transactional work is expected to lead to a hiring spree.

Firms want to be in a strong position to meet the demand for M&A.

It is no secret that if one looks at where the revenue in those businesses tends to originate from, it is usually led by the transactional side, either through M&A or, more recently, through private equity deals and venture capitalist work.

For those of us in recruitment for firms in areas such as M&A, equity, capital markets, debt, and leveraged finance, the last 18 months would be best described as fairly stagnant or stale.

Today, as the legal sector reacts to the buoyancy in transactional work, we are starting to see vacancies return and filter through in top firms.

SIGNS OF GROWTH

I do not believe that the industry is at the peak of this stage of the cycle right now, but firms are starting to see the positive green shoots of growth again.

This phenomenon is also reflected in the latest revenue figures for the 2023-24 financial year, mostly announced earlier in the summer.

Three Magic Circle firms, Clifford Chance, Allen & Overy (before its merger with Shearman) and Linklaters surpassed £2bn. Others reported double-digit growth year on year, including Macfarlanes, which achieved a remarkable 24 percent increase in profit per equity partner.

With many of these major firms, M&A activity levels are increasing again for the first time in quite some while. Within the industry, we are being told that this is in anticipation of what is expected to come towards the back end of this year, and then very much into next year.

I expect that an increase in M&A activity over the next twelve months will foster concurrent increased activity in recruitment.

Within elite Magic Circle, Silver Circle, and US firms, growth in these areas has a cascading effect, as initial M&A or private equity work leads to increased demand across associated departments.

The overall knock-on impact is an increase in workload in corporate tax, employment and competition law within the same firm. This is definitely what one would expect to see during this financial year.

INCREASING OPTIMISM

There is much more lending taking place now compared to 18 months ago because of the change to interest rates. Firms are lending again, the debt burden is starting to ease, so debt transactions have become easier, which they are able to leverage a lot more. The wheels are definitely moving in terms of the volume of transactions.

It is definitely the case too that the change of government has created a sense of optimism in terms of deals taking place within a less strained and uncertain political environment.

Recruitment in the legal sector typically operates as either a buyer's market or a seller's market. During the pandemic, it was, ironically, a good time to be a candidate, but over the last 18 months that has not been the case. In fact, it has been extremely difficult for all but those in the very highest echelons of the profession to secure a new job.

It would be fair to say that it was very much a client-driven market in which the number of opportunities was way less than the people who could do it.

In 2023, the conversation would often be led by the employer telling candidates that unfortunately they could not facilitate a space for them even though they are highly suitable, now is a great time to be a candidate again.

Now, we are seeing that swing back the other way. Candidates are now in a much stronger position, so much so that they can impose conditions and be far more demanding.

What is also interesting is recruitment for firms is not particularly seasonal, in that it is responsive to the demands of their clients and the overall workload.

I would say, however, it is a rarity to notice so much growth at this time of year. If one considers the lifecycle of a partner and the bonus structure, everyone is aware they leave something on the table should they leave their post halfway through the year.

Newly qualified lawyers would be the only exception to that rule; almost 90 percent of people qualify in September, so it is obviously artificially busy then.

The fact there is so much movement is indicative of the reality that people are hungry to move on and are taking advantage of the shifting market.

INTERNATIONAL MARKETS

This is particularly apparent in the European legal market, with 18 percent of partner vacancies for EU competition law coming at an unconventional time of year for hiring. By leaving during the summer, many departees will have foregone bonuses.

In many ways, the EU competition market acts as bellwether in legal recruitment, due to Brussels' role in shaping global competition law with its regulatory influence and recent flexing of muscles, with record fines and blocked deals.

Many of the huge mergers and acquisitions that reach completion flow through the EU courts, even the competition frameworks that are not beholden to European laws.

When we see increased activity in that world, we can deduce that this is an area in which work is going to pick up in a similar vein.

We have also seen a rise in corporate employment vacancies within US law firms based in London, indicating that they are gearing up for the anticipated increase in workload and hiring.

Meanwhile, the message coming from firms is they are looking for people who can exercise autonomy, who can work with significant responsibility, and who do not have to be hand-held on large projects.

They are looking for senior hires who can take the initiative on business development, because firms are realising that is an important tool with which to increase market share.

Without doubt, this is an exceptional time to be making a move between London-based firms for candidates in the transactional sector.

Nothing illustrates this more clearly than the incredible increase in salaries for newly qualified lawyers, with pay packets soaring by up to 20 percent at some firms. SJ

Today, as the legal sector reacts to the buoyancy in transactional work, we are starting to see vacancies return and filter through in top firms

Emotions, contracts, and culture: six truths for smoother cross-border business relationships

Navigating the complexities of cross-border business relationships requires understanding the cultural nuances that influence emotions, contracts, and dispute resolution strategies, says Ulrich Kopetzki

Ulrich Kopetzki

Acting Director for Europe, ICC Dispute Resolution Services

In today's globalized economy, businesses regularly operate across borders, navigating complex international relationships and the potential frictions that come with them. A recent report by McCann Truth Central, in collaboration with the International Chamber of Commerce (ICC) and Jus Connect, reveals surprising insights into cross-cultural business-to-business (B2B) relationships. This article explores six key truths identified by the report, offering valuable guidance for companies and their legal teams in preparing for different attitudes and approaches when doing business across borders. It also highlights the critical importance of proactive dispute resolution planning as an essential component of risk management in international commerce.

TRUTH 1: EMOTION SIGNIFICANTLY IMPACTS B2B RELATIONSHIPS

Contrary to common perception, the report reveals that emotion plays a crucial role in B2B interactions. B2B decision-makers are twice as likely to be emotionally connected to their business suppliers than to consumer brands. This emotional undercurrent varies significantly across cultures, influencing how business relationships are formed, maintained, and dissolved.

The expression and management of these emotions differ across cultures. For instance, business leaders in India and Nigeria are more likely to address concerns promptly, even if it might cause offense, while their Chinese counterparts prefer a more discreet approach.

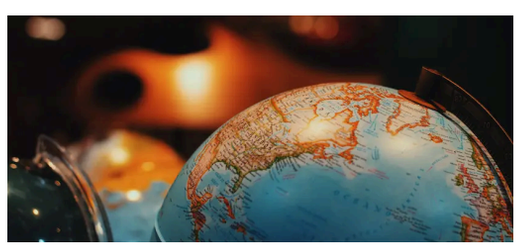
Understanding these cultural nuances in emotional expression is key to building stronger, more resilient business relationships. Developing training programs focused on emotional intelligence and cultural awareness can aid in navigating these nuances, leading to more effective interactions.

TRUTH 2: B2B RELATIONSHIPS ARE AN EMOTIONAL ROLLERCOASTER

B2B relationships follow an emotional journey, with highs and lows throughout the process. The journey often starts with excitement and optimism, peaking when long-term partnerships are established. When problems arise, emotions can take a sharp downturn. However, if partners can work through these challenges constructively, the relationship may recover and grow stronger.

During challenging phases, businesses from different cultures may approach conflict in vastly different ways. Some may prefer direct confrontation, while others might opt for more indirect methods of expressing dissatisfaction.

Recognizing these cultural differences in managing emotional dynamics can help businesses navigate challenging periods more effectively. Implementing regular check-ins with clients and suppliers helps address emotional highs and lows, ensuring strong communication and early resolution of potential issues.



TRUTH 3: CULTURAL FLUENCY IMPROVES BUSINESS FLUIDITY

The report introduces a novel way of mapping business cultures, identifying four distinct segments that transcend traditional geographical boundaries:

- Innovative Explorers: Prefer collaboration, co-creation, and stretching goals (e.g., France, Saudi Arabia).
- Strategic Balancers: Value creativity, calculated risk-taking, and realistic goals (e.g., India).
- Pragmatic Realists: Prefer practical approaches, give second chances, and value clear expectations (e.g., UK, China).
- Decisive Custodians: Value structure, contracts, and directness (e.g., Mexico).

Interestingly, these segments reveal unexpected similarities between geographically distant countries. For instance, France and Saudi Arabia, despite their apparent differences, both fall into the Innovative Explorer category, valuing creativity and stretching goals.

This perspective offers a more nuanced understanding of business behaviors and can improve cross-cultural interactions. It suggests a need to remap the world based on cultural differences and similarities rather than geographical positioning, ensuring that geography doesn't unduly influence expectations when doing business internationally.

TRUTH 4: CONTRACT EXPECTATIONS VARY ACROSS CULTURES

The report highlights significant variations in how different cultures approach contracts. Some view contracts as rigid, set-in-stone agreements, while others see them as flexible starting points for an ongoing relationship.

For example, businesses in Brazil and Mexico often prefer clear-cut, detailed contracts, favoring structure over flexibility. Conversely, businesses in India and Saudi Arabia are more likely to see contracts as starting points for ongoing collaboration, preferring to work out details as the relationship develops.

To handle these differences effectively, businesses should explicitly discuss expectations regarding flexibility during contract negotiations. This open dialogue can ensure mutual understanding and agreement, reducing the likelihood of future disputes.

TRUTH 5: SMALL BEHAVIORS REPRESENT BIGGER CULTURAL PRIORITIES

The report emphasizes the importance of recognizing and interpreting small behavioral cues that often represent larger cultural priorities. These micro-behaviors can provide valuable insights into a culture's approach to business relationships and significantly impact day-to-day interactions.

For instance, attitudes towards meeting agendas vary widely. In France, many business people are comfortable with informal, agenda-free meetings, while in Nigeria, most prefer a clear structure. Similarly, cultures differ in how they handle disagreements. In India, it's often seen as better to address issues head-on, while Chinese business culture tends to favor a more subtle approach to resolving conflicts.

Understanding these micro-behaviors and their cultural context can help businesses avoid unintended offense and tailor their communication styles for more effective interactions.

TRUTH 6: BUSINESS LEADERS FAVOR AMICABLE, INTEREST-BASED DISPUTE RESOLUTIONS

The report reveals a strong preference among business leaders for non-legal, interest-based approaches to dispute resolution. This finding reaffirms the enduring value placed on collaborative and relationship-preserving methods in addressing conflicts in international business.

When faced with a business contract going wrong, a significant majority of businesspeople prioritize solutions that focus on mutual interests rather than adversarial legal proceedings. Arbitration, while still an adversarial process, is seen as a more business-friendly alternative to traditional litigation.

This preference for alternative resolutions indicates a desire to achieve swift resolutions to any disputes while preserving business relationships. It also suggests that business leaders recognize the potential drawbacks of traditional courtroom battles, including high costs, delays, and possible damage to long-term relationships.

NAVIGATING CHALLENGES AND BUILDING RESILIENCE IN CROSS-CULTURAL BUSINESS

Frictions are a natural part of any business relationship, and the cultural differences in cross-border interactions add another layer of complexity. While these challenges can be disruptive, companies equipped with the right resources and mindset can work through them constructively and efficiently.

Understanding and applying the six cultural truths discussed in this article is a crucial first step. They provide a foundation for effective cross-border business relationships. Yet, cultural understanding alone is not sufficient. Effective risk management, particularly in dispute resolution, should complement this awareness.

In this context, foresight and preparation are key. Decision-makers should anticipate potential disputes and consider appropriate resolution methods from the very outset of a business relationship. Alternative dispute resolution methods like arbitration, mediation and dispute boards can be a strategic and business-friendly alternative to litigation. In the context of cross-border business, the global enforceability of arbitral awards is a significant advantage, ensuring that decisions are respected and implemented across different jurisdictions.

Drawing on a century of expertise, the ICC provides model clauses for various dispute resolution mechanisms, under ICC Dispute Resolution Services, and the ICC International Court of Arbitration, allowing businesses to tailor their approach to potential conflicts before they occur. By incorporating these clauses into their contracts, companies can set a clear path for resolving disputes that respects cultural differences and preserves business relationships. These processes, which can be tailored to the specific needs of parties from different cultural backgrounds, help businesses manage and overcome frictions inherent in B2B relationships.

By investing in cultural understanding and leveraging dispute resolution tools from the start, businesses can navigate international trade more effectively. This proactive approach not only paves the way for smoother, more successful cross-border relationships but also provides a crucial safety net in case of disputes. In essence, being prepared for cultural differences and potential disputes isn't just prudent – it's essential for long-term success and sustainability in cross-border business. SJ

B2B decision-makers are twice as likely to be emotionally connected to their business suppliers than to consumer brands

CJEU upholds Country-of-Origin principle for online intermediaries

Nathan Smith and Anita Smith examine the CJEU's affirmation of the "country-of-origin" principle, alleviating regulatory burdens for online intermediaries across the EU

Anita Hodea

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A involving Airbnb Ireland UC (Airbnb) and Amazon Services Europe Sàrl (Amazon) challenged measures imposed by the Italian Communications Regulatory Authority (AGCOM). Airbnb and Amazon argued that, under EU law, they should be regulated solely by the legal systems of their countries of establishment, Ireland and Luxembourg, respectively. Both companies contested the additional obligations imposed by Italian law, leading to the CJEU's significant ruling on the "country-of-origin" principle.

Background

The Court of Justice of the European Union (CJEU) affirmed the 'country-of-origin' principle, confirming that Online Intermediaries are primarily governed by the laws of their home Member State. This decision provides significant relief to tech and media companies operating across the EU, as it alleviates concerns about having to comply with multiple regulatory regimes.

As a result, Online Intermediaries can operate with greater confidence, knowing that their primary regulatory obligations are tied to their country of establishment, thereby reducing the risk of conflicting national regulations. The CJEU also noted that while this principle does not apply to entities without an EU establishment, Italy could not impose its proposed restrictions on a non-EU Online Intermediary, as there was not a sufficient direct link to the regulatory objectives.

The Italian Government introduced new legislation which imposed certain obligations on Online Intermediaries and search engines, such as Airbnb, Google, Expedia, Vacation Rentals and Amazon.

The obligations included:

Registration: Online Intermediaries must be entered in a register (the RCO) maintained by the AGCOM if they offer services in Italy, even if they are not established in Italy.

Reporting: To be entered into the RCO, the Online Intermediaries must share various information that should be updated annually, including information relating to their share capital, the names of their shareholders and their respective shareholdings and voting rights, the composition and term of office of the administrative body and the identity of legal representatives and directors.

Financial Contribution: Online Intermediaries must pay a financial contribution to cover AGCOM's administrative costs. Non-compliance with these new obligations could result in financial penalties ranging from 2 to 5 percent of the concerned entity's turnover in the last financial year.Airbnb, Google, Expedia, Vacation Rentals and Amazon contested the relevant Italian laws; however, this article concentrates on the joint case brought by Airbnb and Amazon before the *Tribunale amministrativo regionale per il Lazio* (the TAR), being the first in the series of cases to be handed down.

QUESTIONS REFERRED TO THE CJEU

Given the complexities of considering and applying various EU laws, the TAR paused the proceedings and sought clarification from the CJEU. The TAR referred several key questions for a preliminary ruling:

Regulation Compliance

Does the P2B Regulation, which seeks to ensure fairness and transparency in the relationship between online platforms and business users, prevent national laws from requiring Online Intermediaries to register, provide organisational information, and pay a financial contribution, with penalties for non-compliance?

Notification Requirement

Does the TRIS Directive, aimed at preventing regulatory barriers in the single market for products and information society services, require Member States to notify the European Commission about measures that mandate Online Intermediaries to register, provide organisational information, and pay a financial contribution? If such measures are not notified, can their enforceability be challenged?

Additional Administrative and Financial Obligations

Does Article 3 of the e-Commerce Directive prevent national authorities from imposing additional administrative and financial obligations on service providers established in another Member State, such as registration and financial contributions, to promote fairness and transparency for business users of Online Intermediaries?

Freedom to Provide Services

Do the principles of freedom to provide services, as laid out in the Treaty on the Functioning of the European Union (TFEU), which outlines the organisational and functional details of the EU, and the Services Directive, which seeks to remove barriers to cross-border trade in services within the EU, prevent national authorities from imposing additional administrative and financial obligations on service providers from other Member States?

CJEU'S EXAMINATION

The CJEU examined the first, third, and fourth questions together, as they all addressed whether certain national measures imposed by a Member State on Online Intermediaries from other Member States are compatible with EU law. The CJEU noted that both the e-Commerce Directive and the Services Directive aim to implement the freedom to provide services within the EU, as specified in the TFEU. Given that Article 3(1) of the Services Directive states that in case of conflict with other EU legislation, the other legislation prevails, the CJEU determined that it would focus on Article 3 of the e-Commerce Directive and concluded that if the Italian measures were prohibited by this article, the remaining questions would be unnecessary to address.

COUNTRY-OF-ORIGIN PRINCIPLE

Article 3(1) of the e-Commerce Directive mandates that Member States ensure Online Intermediaries comply with national provisions within the 'coordinated field.' Article 3(2) prohibits Member States from restricting the freedom to provide these services for reasons within the coordinated field.

The e-Commerce Directive's core principle is home Member State control and mutual recognition by other Member States, meaning services are regulated solely where they are established. This is referred to as the 'country-of-origin' principle and is a cornerstone of the EU's legal framework for Online Intermediaries. The CJEU emphasised that Member States must protect general interest objectives without imposing additional obligations within the coordinated field, respecting the principle of mutual recognition.

The Italian Government argued that the obligations under their proposed legislation did not fall within the "coordinated field" because: (a) service providers could still operate without registering in the RCO; and (b) the obligations to provide information and pay a financial contribution were for AGCOM's supervisory functions, not affecting service access or exercise.

The CJEU rejected these arguments, stating that the ability to operate at the risk of a fine did not negate the registration requirement for lawful service provision. Similarly, the supervisory purpose of the information and financial contribution obligations did not change their nature. The CJEU emphasised that these obligations, regardless of their intent, still imposed additional administrative and financial burdens on service providers from other Member States. This imposition effectively regulated the exercise of their activities, thereby falling within the 'coordinated field.' Consequently, such measures could not be justified unless they met the strict conditions outlined in Article 3(4) of the e-Commerce Directive, which allows for derogations only under specific circumstances related to public policy, public security, public health, or consumer protection. The court concluded that the obligations under the proposed Italian legislation related to the exercise of Online Intermediaries, falling within the 'coordinated field' and thus precluded by Article 3(1) of the e-commerce Directive, unless they met the conditions in Article 3(4).

DEROGATION FROM THE COUNTRY-OF-ORIGIN PRINCIPLE

Article 3(4) of the e-Commerce Directive allows Member States to deviate from Article 3(1) under specific conditions. For example, where the measures are necessary for public policy, public health, public security, or consumer protection; are targeted at a specific information society service that prejudices or poses a serious risk to the aforementioned objectives; are proportionate to the objectives; and follow procedural requirements, including requesting action from the Member State of establishment and notifying the European Commission and the Member State of their intention to take such measures.

The CJEU examined whether the proposed Italian legislation fell within Article 3(4)(b) as necessary for implementing the P2B Regulation. However, the CJEU noted that recitals 7 and 51 of the P2B Regulation indicate its purpose is to establish a targeted set of mandatory rules at the EU level to create a fair, predictable, sustainable and trusted online business environment within the internal market. There was no direct connection between this objective and those listed in Article 3(4)(a) of the E-commerce Directive. It was agreed that the P2B Regulation's objective did not concern public policy, public health, or public security, and it focused on protecting businesses rather than consumers.

Additionally, any exception to the 'country-of-origin' principle must be interpreted strictly. Therefore, such exceptions cannot apply to measures with only an indirect link to the objectives in Article 3(4)(b).

Ultimately, the CJEU concluded that Italy could not impose additional obligations on Online Intermediaries established in other Member States that are not required in their Member State of establishment, as per Article 3 of the e-commerce Directive. SJ

Airbnb and Amazon argued that, under EU law, they should be regulated solely by the legal systems of their countries of establishment

From gun-jumping mergers to cartel conduct

African competition regulators ramp up enforcement - Tamara Dini, Derek Lötter and Nazeera Mia explore recent developments across the continent

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Knowledge and Learning Lawyer, Bowmans

African regulators are also increasingly cracking down on restrictive business practices, particularly cartel conduct and abuse of dominance cases

Competition regulators across Africa are growing in number, with many building up an impressive track record in the scope of their work and enforcement capabilities. This is the case in established national competition authorities, such as those in Egypt, Kenya, Mauritius and South Africa, among others, but also those that have only been in place for a few years.

For example, Mozambique's competition authority, the CRA, has hit the ground running since becoming operational three years ago. It has handled more than 40 merger transactions, filed between August 2021 and November 2023, issued its first prohibition in the context of a horizontal price-fixing case and imposed penalties regarding breaches of procedural obligations and gun-jumping.

Gun-jumping (or unauthorised implementation of mergers) has also been on the radar of other African regulators, including in Angola, Morocco and Tanzania. Morocco's Competition Council, which makes 150 merger control decisions a year, issued its first gun-jumping penalty in 2022 when it imposed a USD 1 million penalty on a Swiss chemical company.

Meanwhile, Tanzania's Fair Competition Commission (FCC) has been vigorously investigating mergers that should have been notified. These have come to light in various sectors, including edible oils and sugars, financial services, hospitality, manufacturing, oil and gas, and plastics and metals. Undisclosed settlement agreements have been reached in two cases.

Anti-competitive conduct

African regulators are also increasingly cracking down on restrictive business practices, particularly cartel conduct and abuse of dominance cases.

No fewer than 16 cartel investigations were on the books of Zambia's Competition and Consumer Protection Commission (CCPC) in 2021 when it also conducted five dawn raids. In the following year, the CCPC pursued seven cartel cases. Several companies have been fined for engaging in price-fixing cartels, most recently three roofing manufacturers that were fined 8.5 per cent of their 2020 turnover.

While it is often local companies that are implicated in restrictive business practices in African jurisdictions, large multinationals have also been in the spotlight.

A large FMCG multinational reached a settlement agreement with the Competition Authority of Kenya in January 2023 over alleged abuse of buyer power. The allegation was that this multinational had unilaterally revised its payment terms with its suppliers, many of whom were small and/or medium-sized businesses.

In Malawi, a multinational company escaped financial and administrative sanctions in July 2023 when the country's High Court ruled that the Competition and Fair Trading Commission did not have a legislative mandate to impose such sanctions.

That gap in the regulator's mandate has now been closed. On July 1, Malawi's Competition and Fair Trading Act 2024 came into effect – specifically empowering the regulator to issue administrative orders, including financial penalties, for competition law and consumer protection contraventions.

Regional regulators show their mettle

While national competition regulators are proving increasingly effective within their own national borders, regional regulators are making their presence felt across borders.

Regional African competition authorities include those for the Common Market for Eastern and Southern Africa (COMESA); the Central African Economic and Monetary Community (CEMAC); the East African Community (EAC); the Economic Community of West African States (ECOWAS); and the West African Economic and Monetary Union (WAEMU).

Further, the Southern African Development Community cooperates on competition matters in the region and the Africa Competition Forum comprises an informal network of African competition authorities with the aim of promoting the implementation of competition polices both regionally and nationally.

The African Continental Free Trade Area (AfCFTA) is also playing an important role in shaping competition law across Africa. The next major milestone in pan-African competition regulation is the establishment of a continental competition regulator under AfCFTA.

The AfCFTA Competition Protocol was adopted in February 2023 and, although it is not yet known when the new continental regulator will be in place, this is expected to further strengthen competition law enforcement capacity and collaboration across Africa.

The protocol aims to create an integrated and unified African continental competition regulation regime that brings together competition policies already in place on a national, regional and continental level. SJ

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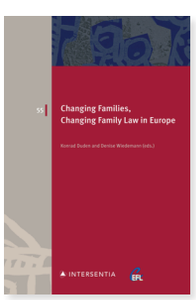

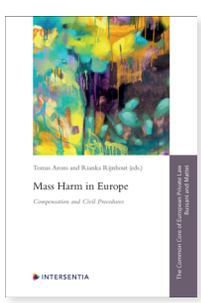

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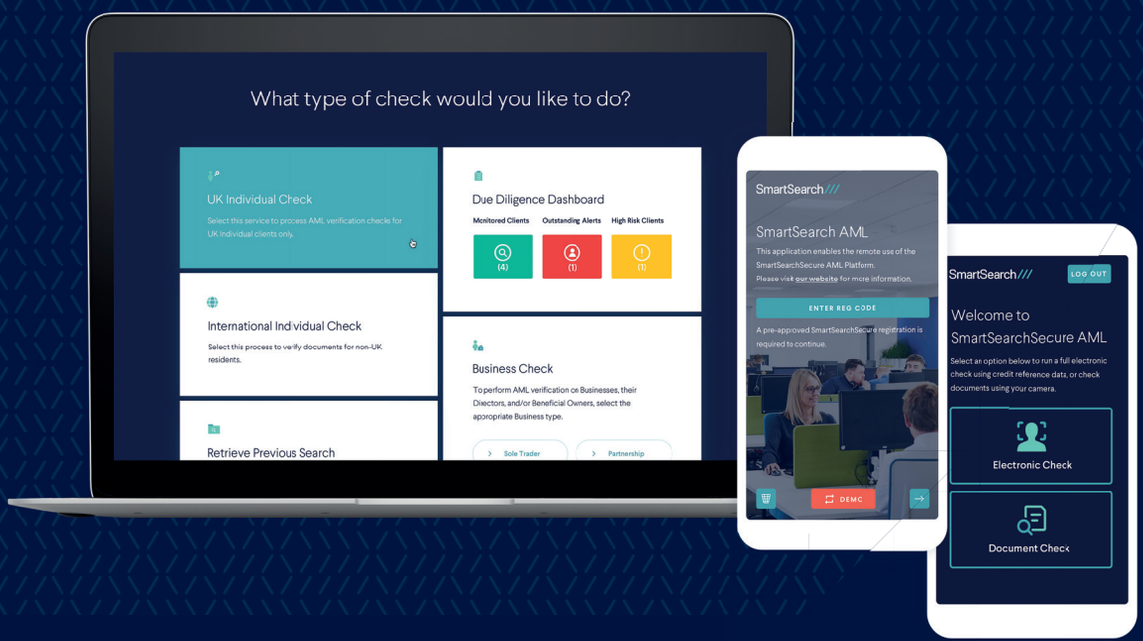

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