ARTICLE:

The harm that judges do – misunderstanding computer evidence: Mr Castleton's story
'an affront to the public conscience'[1]

By **Paul Marshall**

Introduction

The reliability of computer systems, and the reliability of documents produced by computers, is important. The requirement for reliability is not only important in our daily lives, given the pervasiveness of computer technology, it is important in legal proceedings. There is a widely held perception that computers are fundamentally reliable. Further, it is commonly assumed that most computer errors are readily detectable or otherwise the result of user 'input' error. That perception and those assumptions have received a warmly enthusiastic embrace by a judiciary that sometimes struggles in evaluating evidence,[2] especially technical evidence (the book to read is Sir Richard Eggleston, *Evidence Proof and Probability*[3]). In the early days of computers, the Police and Criminal Evidence Act 1984 required that evidence of computers (technically, where there has been human engagement affecting output, hearsay evidence) should be subject to proof of the reliability of its source. A change took place in 1993 and 1997 as the use of computers became more widespread and more people, including some judges, became more familiar with their operation and the fear of unreliability and inaccurate documents produced by computers diminished. The Law Commission papers *The Hearsay Rule in Civil Proceedings*[4] and *Evidence in Criminal Proceedings Hearsay and Related Topics*[5] recommended the repeal of statutory formalities that were seen increasingly as cumbersome and difficult to comply with. Those recommendations were carried into effect. Section 5 of the Civil Evidence Act 1968 was repealed by the Civil Evidence Act 1995, and the provision under s. 69 of PACE was repealed by the Youth and Criminal Evidence Act 1999. In the absence of formal statutory requirements, as the Law Commission suggested, the courts have applied the presumption of the proper functioning of *machines* (see for example *Castle v Cross*[6]) to computers.[7] The

[1] This is a conclusion of the Criminal Cases Review Commission on the (mere) bringing of criminal proceedings by the Post Office against the sub-postmasters and sub-post mistresses in the first tranche of 35 criminal convictions submitted by the CCRC to the Court of Appeal (March 2020). Virtually without precedent, this has been done without there having been a prior unsuccessful appeal against the convictions to the CA – such is the enormity. The same considerations apply, as will be seen, to civil claims brought by the Post Office. 'The CCRC refers eight more Post Office cases for appeal – bringing total to 47 so far', 3 June 2020, https://ccrc.gov.uk/the-ccrc-refers-eight-more-post-office-cases-for-appeal-bringing-total-to-47-so-far/ ; 'CCRC to refer 39 Post Office cases on abuse of process argument', 26 March 2020, https://ccrc.gov.uk/ccrc-to-refer-39-post-office-cases-on-abuse-of-process-argument/.

[2] For a spectacular recent example of this startling proposition, see the decision of the Supreme Court in *Stocker v Stocker* [2019] UKSC 17, [2019] 2 W.L.R. 1033, [2019] 3 All E.R. 647, [2019] 4 WLUK 27, [2019] E.M.L.R. 18, [2019] 2 F.C.R. 788, Times, April 8, 2019, [2019] C.L.Y. 806 where a High Court judge and three judges of the Court of Appeal struggled with interpreting correctly the meaning of a Facebook post as (not) evidence of defamation. I commented on this decision: 'How out of touch are English judges?' at https://www.litigationfutures.com/blog/how-out-of-touch-are-english-judges.

[3] Weidenfeld & Nicholson (2nd edn., 1983). (Eggleston was a judge of the Supreme Court of the Australian Capital Territory and Chancellor of Monash University.)

[4] 1993 Law Com. 245.

[5] 1997 Law Com. No. 216.

[6] [1984] 1 WLR 1372, [1985] 1 All ER 87, [1984] 7 WLUK 180, [1985] RTR 62, [1984] Crim LR 682, (1984) 81 LSG 2596, (1984) 128 SJ 855, [1985] CLY 3048 – effectively a printout from a breath testing machine is treated as real evidence and admitted as 'original' evidence.

[7] In part-justification, the Law Commission cited the paper by Professor Tapper, 'Discovery in Modern Times: A Voyage

practical effect is that when a party adduces evidence of a computer-based or derived document, that party may rely upon the presumption that the computer was operating reliably at the material time. An evidential burden is then on the party objecting to the admission of the document as evidence of the truth of its contents to produce some evidence that it is not.

The Law Commission's perception and suggestion received the *imprimatur* of the highest levels of the judiciary, despite their having no obvious qualification other than the distinction of their office, in making statements accorded weight and respect. Lord Hoffmann in *DPP v McKeown and Jones*[8] expressed his (frankly bizarre and atypically silly) opinion that:

> '[i]t is notorious that one needs no expertise in electronics to be able to know whether a computer is working properly'.

Lord Justice Lloyd in *R v Governor of Pentonville Prison Ex p Osman (No 1)*[9] said that:

> 'Where a lengthy computer printout contains no internal evidence of malfunction, and is retained, e.g. by a bank or a stockbroker as part of its records, it may be legitimate to infer that the computer which made the record was functioning correctly.'

Lord Griffiths in *R v Shephard*[10] opined:

> 'Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. I suspect that it will very rarely be necessary to call an expert and ... in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.'

The danger with the approach advocated by Lord Griffiths is vividly illustrated in Mr Castleton's case by the evidence given by Ms Anne Chambers (below) who was employed by Fujitsu and who gave evidence for the Post Office. As will be seen, the evidential presumption of the reliability of computers is as unsafe in practice as it is unjustified in principle.[11]

The purpose of this article

The effects of the Law Commission's recommendations and the perceptions of senior members of the judiciary were far-reaching and have been, in practice, profoundly harmful. The purpose of this article, by telling Mr Lee Castleton's story, is to demonstrate how the Law Commission's unexamined premise (shared by the senior judiciary) was wrong, and its proposal that the reliability of computers should be presumed is unsafe, and that the burden of challenging this should lie on the party taking objection is prejudicial and inappropriate.

It has taken almost 20 years, culminating in two remarkable judgments of Mr Justice Fraser, a judge of the Queen's Bench Division of the High Court, to expose just how flawed this state of affairs has been since 1997. The judgments were given on trials termed, respectively, the 'Common Issues'[12] and the 'Horizon Issues'[13] trials in group litigation brought by 557 claimants. Beneath the forensic neutrality of the

around the Common Law World' (1991) 67 Chicago-Kent Law Review 217, 248.

[8] [1997] 1 WLR 295 at 301C-D.

[9] [1990] 1 WLR 277 at 306H, emphasis mine.

[10] [1993] AC 380 at 387B-D, emphasis mine. Michael J L Turner, a computer expert, commented upon this questionable decision: "This decision has dismantled what had previously been considered to be a well-balanced set of evidential hurdles. Instead, the law will in future follow the dictum 'it's been printed by a computer, so it must be true'. Clearly something has gone very wrong in this case…", Computer Weekly, 23 January 1993; The Lawyer, January 1993.

[11] For a detailed expert technical analysis of why the presumption recommended by the Law Commission was, and is, unwarranted as a matter of principle, see Peter Bernard Ladkin, Bev Littlewood, Harold Thimbleby and Martyn Thomas CBE, 'The Law Commission presumption concerning the dependability of computer evidence', 17 *Digital Evidence and Electronic Signature Law Review* (2020) 1 – 14.

[12] Bates *and Others v Post Office Limited (No 3)* [2019] EWHC 606, https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html (288 pages, 1,121 paragraphs).

[13] *Bates v the* Post *Office Ltd (No 6: Horizon Issues) (Rev 1)* [2019] EWHC 3408 (QB) https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html (168 pages, 1,030 paragraphs – the Technical Appendix alone extends to 452 paragraphs).

case citations lie individual stories of the miscarriage of justice and mendacity on an epic scale, and the ruin of countless lives (in some cases literal) and livelihoods.[14] In the light of the judgments, the Criminal Cases Review Commission (CCRC) has recently made the single largest group referral in legal history of criminal convictions for review by the Court of Appeal. As is not perhaps surprising, the explanation has a number of strands that include judicial failure and Post Office mendacity, but the main common factors between 2000 and 2019 were the legal *evidential presumption* that (a) *evidence produced by computers is treated by the courts as reliable*, and that (b) *it is for the objector to show why that presumption should be displaced*. That is an evidential burden, as will be seen starkly in Mr Castleton's case, that in English law is (and was) often impossible for a party (particularly a party with limited financial resources) to discharge.

It is surprising that in its referral to the Court of Appeal of the first tranche of 35 criminal convictions that it considers to be arguably unsafe, and despite extensive reliance by it upon the judgments of Mr Justice Fraser and the 'Common Issues' and 'Horizon Issues' in the *Bates v Post Office* litigation, the CCRC in its 'Statement of Reasons' makes no reference to either the Law Commission's 1997 recommendation for the removal of the requirements under s. 69 of PACE 1984 or to the resulting evidential *presumption* of the reliability of computers from which documents are derived. This is despite it being apparent that the judgments of Fraser J in *Bates* were given at the end of the 20 years' over which the Post Office pursued and prosecuted (and made civil claims against) SPMs from the introduction of its Horizon system and, further, that period coinciding, *exactly,* with the period since Parliament abolished the provisions under s. 69 of PACE in response to the Law Commission's 1997 recommendations.

The CCRC's omission is the more striking given the CCRC's emphasis on the difficulty confronting SPMs at their criminal trials in challenging data from the Post Office's Horizon computer system because of unsatisfactory disclosure given by the Post Office and the very limited information otherwise available to an SPM (findings by Fraser J). The point is that, in many cases, the CCRC correctly identifies that SPMs frequently, at their criminal trials, suggested that something was wrong with the Horizon system but were unable, because they simply did not have the necessary information, to point to what the nature of the problem might be. That is to say, they were unable to effectively *challenge the presumption*[15] so that the evidential burden then shifted to the Post Office to prove affirmatively that the Horizon system that generated the documents relied upon by it was reliable. In a criminal trial, the shifting of the burden to the Post Office would have required the Post Office to prove *to the criminal standard of proof* that Horizon was reliable. This, in the light of Fraser's Horizon Issues judgment, it could not have done at *any* trial where the prosecution's case relied wholly or substantially upon data, records and documents from Horizon (because Fraser J found as a fact Horizon to have been *un*reliable over the whole period from its introduction). In my view this is a significant omission in the CCRC's analysis and its Statement of Reasons.

The number of CCRC references to the Court of Appeal, that is likely to increase substantially, provides the Court of Appeal with an important opportunity to consider, as a matter of law, the unsatisfactory evidential position discussed in this article. The essential point is that, while in principle the threshold requirement for challenging the evidential presumption that the computer from which a document is derived is reliable is low, it is one that is nevertheless extremely difficult to discharge in practice – as the *Bates* litigation and Mr Castleton's case itself demonstrate all too vividly.

[14] More than a thousand Post Office sub-postmasters and sub-postmistresses lost their livelihoods and businesses without compensation. Over 900 were convicted of criminal offences of false accounting, fraud and theft. Some were imprisoned – it seems very likely, in the light of Fraser J's judgments and findings and the CCRC references and its statement of reasons, wrongly. That is to say, it is likely that those convicted of offences in Post Office prosecutions on the basis of Horizon evidence have been the victims of a miscarriage of justice.

[15] See on this generally, *Electronic Evidence* Ch. 6 at 6.192 'challenging the presumption'. And see also Professor Rudolf J Peritz "…The concrete result of this attention will be the extension to the objecting party and to the court of a fair opportunity to evaluate the trustworthiness of all documents generated from computerized data". (Computer Data and Reliability 1986, 1001-1002) cited in *Electronic Evidence* at 6.177.

Mr Castleton asserted that shortfalls he experienced at his branch Horizon terminal were in his words 'illusory' and that there must have been something wrong with the Horizon system, but Judge Havery was satisfied with a Fujitsu witness whose (almost self-evidently unsatisfactory) evidence amounted to saying she herself could not see anything wrong with the system[16] (further below – there was no evidence whatever of bugs, error records or the frequency of incidence of either). Mrs Seema Misra, who was prosecuted for theft, on no less than three occasions asked for her criminal trial to be stayed *as an abuse of process* because of inadequate disclosure by the Post Office of Horizon data. Recorder Bruce, Judge Critchlow and the trial judge, Judge Stewart, rejected each of those applications.[17] At Mrs Misra's trial, Mr Jenkins who gave expert evidence for the prosecution, said that he had not even considered the PEAK error records that Fraser J found so important in understanding, and in reaching his conclusion on, the reliability of Horizon (below). Mrs Misra's expert said in his evidence that he had insufficient documents to identify a problem. As with Mr Castleton's case, Mrs Misra's case is a paradigm of the problem. The CCRC (10 years' later) has stated that it considers that Mrs Misra's trial was arguably an abuse of process of the court.

The unsafe nature of the presumption is by no means new, though English courts have been markedly slow in responding to this. Stephen Mason and Daniel Seng, editors of one of the few treatises on the subject, *Electronic Evidence*,[18] provide as a vivid and powerful example of the false propositions that most computer errors are either (i) immediately detectable (Hoffmann, above), or else (ii) result from input errors, the investigation by Toyota in the United States of sudden unintended acceleration in its motor cars. Sudden unexplained acceleration had resulted in fatal consequences. Toyota recalled some of its vehicles between 2009 and 2010, but it included no computer software engineers in its own investigations and ruled out software failure as the cause of death and personal injury. A US Congressional Committee on Energy and Commerce heard evidence on the matter. The National Highway Traffic Safety Administration and the National Aeronautics and Space Administration (NASA) undertook a study of the problem and produced a report *Study of unintended acceleration in Toyota vehicles* published in April 2011.[19] The study concluded that it was not proven that faulty software caused the problems, though it was accepted because no software faults could be found, that did not mean that software faults did not occur. The methods used to investigate the matter were challenged by Michael Barr.[20] Civil claims were subsequently made against Toyota. Mr Barr, an expert in embedded computer software, gave evidence for the plaintiffs in a case reported as *Bookout v Toyota Motor Corporation*.[21] Few will have any appreciation of the extraordinary complexity of a modern motor car engine throttle, or how many software operations (and thousands of lines of coding) go into making it work. Mr Barr's opinion was that the Toyota electronic throttle control system contained many software defects and that at least one of them was capable of causing a malfunction in the electronic throttle control module that could cause unintended acceleration. The jury found in favour of the plaintiffs and awarded US$1.5 million to each of them. The Post Office litigation is a 'Toyota moment' for English courts.

Further, Fraser J's judgments in *Bates v Post Office* reveal structural weaknesses in the English legal system that make it susceptible to abuse and the widespread miscarriage of justice. The circumstances described below may give the judiciary pause for reflection, for they reflect rather badly on the justice system and those engaged in it at the relevant time.

[16] Fraser J, on the basis of documents disclosed in the *Bates* litigation in 2019, found as a fact that at the time of Mr Castleton's trial she knew of problems with Horizon that affected branch terminals (below).

[17] On 10 March 2010, 11 October 2010 and 18 October 2010. Noted by the CCRC in its Statement of Reasons p 56 paragraph [145].

[18] Stephen Mason and Daniel Seng, editors, *Electronic Evidence* (4th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017). See, in particular, Chapter 6 'The presumption that computers are 'reliable'', available as open source at https://ials.sas.ac.uk/digital/humanities-digital-library/observing-law-ials-open-book-service-law/electronic-evidence.

[19] https://one.nhtsa.gov/About-NHTSA/Press-Releases/NHTSA%E2%80%93NASA-Study-of-Unintended-Acceleration-in-Toyota-Vehicles.

[20] Michael Barr, 'Firmware forensics: best practices in embedded software source code discovery' 8 *Digital Evidence and Electronic Signature Law Review* (2011) 148.

[21] Case No. CJ-2008-7969.

The conventional response, that judges do the best they can on the *available* evidence, does not begin to be a satisfactory answer. Nevertheless, an important question remains: why the important documents made available at the trial of the Horizon issues in March-July 2019, that included system error records in hundreds of thousands of KELs[22] and PEAKs[23] (below) were never previously disclosed by the Post Office – over a period of almost 20 years? The courts are virtually helpless to impose effective sanctions for failure to disclose evidence if a party fails to comply with their disclosure obligations under the rules of court. It is to be noted that the origin of these rules is equitable in nature – that is to say they attach, historically, to matters of *conscience*.[24] Compliance with disclosure obligations is ultimately a matter of ethics, as much as of rules. In a different context, in response to public concern relating to a seemingly routine failure by the prosecution to give proper and timely electronic disclosure to defendants in rape cases that resulted in last-minute collapses of criminal trials,[25] the Attorney General, Geoffrey Cox QC MP was recently constrained to make the statement to Parliament that 'for too long, disclosure has been seen as an administrative add-on rather than fundamental pillar of our justice system'.[26] Indeed.

[22] KEL - 'Known Error Log'.

[23] PEAK despite capitalisation, is not an acronym, Fraser J, Horizon Issues judgment paragraph [621]: 'The experts agreed the following about PEAKs and their content. "PEAKs record a timeline of activities to fix a bug or a problem. They sometimes contain information not found in KELs about specific impact on branches or root causes – what needs to be fixed. They are written, by people who know Horizon very well. They do not contain design detail for any change. They are generally about development activities and timeline rather than about potential impact. PEAKs typically stop when development has done its job, so they are not likely to contain information about follow-on activities, such as compensating branches for any losses." It is also agreed, and indeed can be seen from the actual PEAKs themselves, that some of them record observations of financial impact.' (My underlining.)
The derivation of the name is explained by Mr Jenkins, architect of the Horizon system who gave evidence for the Post Office in the prosecution of Seema Misra. The Fujitsu incident error reporting system was previously known as 'Pinnacle'. Sometimes several PEAKs went to make up a single KEL (Known Error Log). In Mrs Misra's trial there was the following exchange with Mr Jenkins and counsel for Mrs Misra during cross-examination:
'Q: So this is the Peak Incident, the management system, it is known as PIMS?
JENKINS: Normally known as Peak, actually Peak, sorry.
Q: Peak, is it?
JENKINS: Yes.
Q: I've got the word PIMS but you say Peak.
JENKINS: No, no. Peak.
Q: I thought it was an acronym, P-I- –
JENKINS: No, I – I had not thought of that before but it is a very good idea.
Q: Well, all right.
JENKINS: It is actually called Peak because the – the previous set of the system was called Pinnacle.'
Regina v Seema Misra, T20090070, in the Crown Court at Guilford before His Honour Judge N. A. Stewart and a jury, 12 *Digital Evidence and Electronic Signature Law Review* (2015) Introduction, 44 – 55; Documents Supplement, Day 4, Thursday 14 October 2010, 93H-94B.

[24] See, as an example, Fraser J's serious criticisms of the Post Office and Fujitsu at paragraphs [457] and [458] of the Horizon Issues judgment:
"The second unsatisfactory aspect … is the approach of Fujitsu as demonstrated in various documents, including the PEAKs and KELs, but also in particular in the Receipts/Payments Mismatch issue notes. To see a concern expressed that if a software bug in Horizon were to become widely known about it might have a potential impact upon "ongoing legal cases" where the integrity of Horizon Data was a central issue, is a very concerning entry to read in a contemporaneous document. Whether these were legal cases concerning civil claims, or criminal cases, there are obligations upon parties in terms of disclosure. So far as criminal cases are concerned, these concern the liberty of the person, and disclosure duties are rightly high. *I do not understand the motivation in keeping this type of matter, recorded in these documents, hidden from view;* regardless of the motivation, *doing so was wholly wrong*. *There can be no proper explanation for keeping the existence of a software bug in Horizon secret* in these circumstances. [My italics.]
[458] The degree to which either, or both of, Fujitsu and/or the Post Office, expressly or constructively, knew exactly what and when, is for future trials in this litigation, and I make no findings in that respect in this judgment. They are not necessary in order to resolve the Horizon Issues and I do not speculate."

[25] 'Disclosure of evidence in criminal cases' Eleventh Report of Session 2017-19, House of Commons Justice Committee, Ordered to be printed by the House of Commons 17 July 2018, https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/859.pdf.

[26] https://www.gov.uk/government/news/creating-a-zero-tolerance-culture-for-disclosure-failings-across-the-criminal-justice-system.

The Post Office: an English public institution and the 'Horizon' system

The Post Office is an important national institution that provides a crucial service to society. The entire share capital in Post Office Limited (for convenience 'the Post Office') is held by UK Government Investments on behalf of the Department for Business, Energy and Industrial Strategy (BEIS) – formerly the Department for Business Innovation and Skills. A government minister is responsible for oversight of the Post Office, an institution that is thus an expressly mandated part of the minister's portfolio. Its public standing is reflected in the fact that its former CEO, Paula Vennells, was appointed by Her Majesty the Queen a Companion of the Order of the British Empire (CBE) in recognition of services to the Post Office (she was instrumental in returning the Post Office to profitability) and, in February 2019, shortly before the first judgment in the litigation discussed below, she was appointed a non-executive board member of the Cabinet Office. The former chairman of the Post Office, Tim Parker, became chairman of Her Majesty's Courts & Tribunals Service. The Post Office enjoys an enviable reputation and standing within communities. Its role, importance and status were of long-standing. In his *English History 1914-1945* the great historian AJP Taylor observed, in the opening paragraph of the opening chapter 'The Effects and Origins of the Great War': '[u]ntil 1914 a sensible, law-abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman'. Even now, branch Post Offices are businesses of particular importance within their communities. In some rural communities the Post Office is the only way that some individuals and businesses can obtain access to cash, banking services and financial services. Branch Post Offices are operated by sub-postmasters and sub-postmistresses who operate these within retail premises.

Between 2000 and 2019 the Post Office operated[27] a computerised accounting and electronic point of sale IT system in its branch Post Offices around the country, originally numbering almost 17,000, called 'Horizon'. The computer system that became Horizon originally began as a government social security payment system, but that plan was abandoned for technical and commercial reasons. The project and the remnant of that system, that became Horizon, was provided to the Post Office in a reduced specification. Nonetheless, at the time of its introduction, Horizon was the largest non-military networked IT system in Europe.

The Horizon system was intentionally designed so that a dispute about a transactional balancing error (shortfall or surplus) in a branch Post Office operated by its sub-postmistress or sub-postmaster ('SPMs') was not capable of being identified, disputed or resolved on the Horizon system itself, but only through a service called the 'Horizon Helpline'. (At trial SPMs gave evidence that, occasionally, the Helpline would advise callers to make up a fictitious transaction in order to balance the account.) If a balancing shortfall occurred, the operation of the Horizon system was such that the SPM in question was required to make it up immediately out of their own money, or else the issue would be 'settled centrally'.[28] This was even where an SPM disputed the error.[29] That meant, in practice, that an SPM could ask for time to pay, say by instalments. In order that the next day's trading account could be opened, the account required to be closed the day before, and any balancing errors resolved. Any surplus from a balancing error was held in a suspense account[30]

[27] The latest iteration of the Horizon system is an updated version known as HNG-A, sometimes referred to as the 'Branch Technology Upgrade'.

[28] The meaning of this important expression only became clear in the course of the Common Issues trial and is explained by Fraser J at paragraph [438] of that judgment.

[29] For example, see Common Issues judgment paragraph [782].

[30] See Horizon Issues judgment, paragraphs [813] and [816]-[818]. The judge referred to there being 'no sensible basis for the [Post Office's] professed lack of understanding' of the suspense account and was severely critical of the Post Office's expert's failure to understand the importance of the point which supported the existence of errors that resulted in money not, in fact disappearing, but unaccountably being credited to the Post Office centrally without attribution. The point is difficult to overstate in its importance – in many cases SPMs were prosecuted for shortfalls where the money was missing in branch accounts but through system failure had been credited to the Post Office centrally. The suspense account represented in effect a fund of unattributed payments. That is to say, the Post Office often *had the money* for which it prosecuted its SPMs for theft – and then pursued for recovery under the Proceeds of Crime 2002. This aspect

operated by the Post Office. If no explanation for the surplus became available (which invariably was the case), the sum was transferred to the Post Office and credited to its profit and loss account and shown under its profits. This central importance of this point (the implications of which are far-reaching) was such that the Post Office's alleged failure in its pleadings/statements of case to understand the reference to 'suspense account', and the failure by the Post Office's own expert to appreciate the importance of how it operated, at the trial of the 'Horizon Issues' in 2019 were considered by the judge sufficiently serious, on their own, to undermine his evidence.[31]

Shortly after the introduction of Horizon in 2000, numbers of SPMs experienced balancing errors that were inexplicable, even on meticulous examination of the transaction, the payments received and made and the inputs on the Horizon system. This resulted in SPMs being required, both under the Horizon system itself and also as a matter of contract as interpreted and applied by the Post Office (for which, see below), to make-up shortfalls from their own funds. This ranged from small amounts to tens of thousands of pounds.

Sometimes SPMs could not and in some cases would not make up the shortfalls. The latter included circumstances where, despite contacting the Horizon Helpline, an SPM was wholly confident that the shortfall was not due to any error, mistake or fault on their part. SPMs who were steadfast in their refusal, or simply had not the resources to make the payment, were made the subject of criminal or civil proceedings brought by the Post Office. Prosecutions for theft and fraud were instituted by the Post Office itself as the prosecuting authority – an historic privilege accorded to the Post Office as, essentially, a state institution. There was no external supervision of the Post Office's prosecutions, by, for example, the Crown Prosecution Service. In some cases, SPMs attended court in the belief that, once they were before a judge or jury, their innocence of any criminal or civil wrongdoing would be easily established. These were people utterly convinced that they were honest people who, like Mr Castleton, imagined (perhaps naïvely) that justice would be done once the facts as these appeared to him were carefully explained to a judge. Mr Castleton was not legally represented at trial and had no insight into how a party can take advantage of the legal process to the detriment of the other party, particularly where not legally represented. He failed at the first obstacle presented to him by making concessions the nature and implications of which in all probability, with no discourtesy to him, he did not understand.

Against the conviction or belief of its SPMs that 'there must be something wrong' with the Horizon system itself, the Post Office for almost 20 years – including at trial of the group litigation in 2019 – contended that at worst its SPMs were thieves, cheats and liars, and at best were seriously inept and incompetent. The Post Office's contention, almost invariably accepted by judges and juries since the early 2000s, was that the Horizon IT system was reliable and 'robust' and that the computer system itself was not, *and could not be,* the source of shortfalls frequently experienced by an SPM – the subject of the relevant proceedings and the debt the Post Office alleged that the SPM owed. The Post Office, until 2019, was not required to demonstrate affirmatively at any trial the reliability and robustness of its Horizon system that it asserted, it was *presumed*. (Had it been required to do so, Fraser J's Horizon Issues judgment shows that this could not have been done – below.)

Judges are human and, like the rest of us, given to human frailty. One consequence is that the English courts are predisposed towards large institutions, particularly reputable large institutions of the kind that the Post Office once was. Further, wrongdoing, if done by a body of sufficient bulk and status, presents the courts and English civil law with particularly intractable problems, both procedural and substantive. I discussed some of these issues in *'English Judges Prefer Bankers to Nuns: changing ethics and the Plover bird'*[32] and outlined some paradoxically unhelpful, if not dangerous, consequences of the 'symbiotic' relationship that Sir Geoffrey Vos, Chancellor of the High Court, has

of the Post Office Horizon story has received insufficient attention – being, understandably, complex.

[31] The point being that if money was absent (e.g. a shortfall) at an SPM's branch, it had to appear elsewhere: Horizon Issues judgment paragraph [818].

[32] *Butterworths Journal of International Banking and Financial Law* (2019) 8 JIBFL 505 (September 2019). A copy is available on the All Party Parliamentary Group on Fair Banking website: http://www.appgbanking.org.uk/useful-resources/.

described as subsisting between the courts and the financial services industry:[33]

> '... In many ways, the law and financial services have an important symbiotic relationship, which will need careful monitoring as the essence of what we all do changes in the coming months and years.'

In the many civil and criminal proceedings brought against them by the Post Office, over almost 20 years, its sub-postmistresses and sub-postmasters were confronted by insuperable legal and evidential difficulties. These rendered the possibility of successfully defending the claims made against them, frequently serious criminal charges, effectively impossible. This was in part because the information required to successfully defend the claims and prosecutions was simply not available to SPMs, or else it was deliberately withheld from them by the Post Office. In particular, this concerned its own knowledge of the nature and extent of the unreliability of its Horizon IT system and related documents. The Post Office persisted in defiance of its disclosure obligations under the rules of court, including before Mr Justice Fraser in 2019, resisting the disclosure of fault records. When ordered to make disclosure, the disclosure made was still incomplete.[34]

Mr Lee Castleton

Mr Lee Castleton was a SPM who had invested his life savings in acquiring a sub-Post Office business at 14 South Marine Drive in Bridlington in Yorkshire. He was appointed sub-postmaster of the Post Office on 18 July 2003. By ill-fortune and through no fault of his own, he became the defendant to a civil claim made against him by the Post Office for a shortfall in his branch accounts of £25,858.95.

It has taken Mr Castleton 13 years to know the truth of what happened, and why, and to be exonerated from blame and the stigma of wrongdoing. He nevertheless remains to this day financially ruined and remains the subject of a judgment given against him by Judge Havery QC[35] sitting as a judge of the Queen's Bench Division on 22 January 2007, reported as *Post Office v Castleton* [2007] EWHC 5 (QB). The judgment followed a 6-day trial in 2006-7. Judge Havery awarded costs against Mr Castleton. The Post Office and its solicitors claimed these costs as £321,000. Mr Castleton was subsequently made the subject of a bankruptcy order. It is perhaps worth reflecting for a moment on those costs. The Post Office is in substance a state institution. What commercial enterprise, or ordinary litigant, would expend £321,000 in costs on a claim for £26,000 – and to what end? What considerations, other than the immediate assertion that he owed the Post Office £25,858, were in play? What is clear, is that the Post Office thought it commercially justifiable to spend thirteen times in costs the amount in issue. Though one cannot know, it seems that, for the Post Office, the judgment given by Judge Havery in January 2007 was of immense importance to it – and far more important than the actual amount at stake.

The well-known solicitors' firm Bond Pearce LLP, now known as Womble Bond Dickinson LLP, represented the Post Office. Counsel for the Post Office was Mr Richard Morgan of Maitland Chambers. Mr Castleton was not represented by either solicitors or counsel. He appeared as a litigant in person.

The meaning of 'an account stated' in law

Some readers may not be familiar with the technical aspects of the English law doctrine of an 'account stated' and its implications. For this reason a summary of the law is provided below, otherwise the

[33] Sir Geoffrey Vos, Chancellor of the High Court of England and Wales, Banking Standards Board Lecture *Integrity and independence in the judiciary and the financial services industry: a comparative study* (Tuesday 20 March 2018), available at https://www.judiciary.uk/announcements/speech-by-sir-geoffrey-vos-chancellor-of-the-high-court-integrity-and-independence-in-the-judiciary-and-the-financial-services-industry-a-comparative-study/.

[34] Horizon Issues judgment paragraph [941].

[35] His Honour Richard Havery QC was educated at St. Paul's School 1947-52, then went on to Magdalen College, Oxford; BA; MA; MSc. He was in receipt of the following scholarships: Eldon Law Scholarship 1960; Harmsworth Entrance Exhibition 1960; Astbury Law Scholar 1960; Barstow Scholarship 1962. He was called to the Bar on 22 May 1962. He was an Assistant Recorder 1982-86; Recorder 1986-93; Circuit Judge and Official Referee 1993-98; Judge of the Technology & Construction Court 1998-2007. He was elected as an Ordinary Bencher of the Honourable Society of the Middle Temple on 21 June 1989, and a Senior Bencher in November 2004: https://www.middletemple.org.uk/bencher-persons-view?cid=31836.

importance of this doctrine, in the circumstances, will be difficult to understand.

The Post Office, at the Common Issues trial, contended that Branch Trading Statements of SPMs were '*an account stated*', both as these are understood in common law and by the terms of the contractual relationships with its SPMs. The formulation of a claim by the Post Office against its SPM as a claim for 'an account' was of enormous importance. Because there was no facility in the Horizon System for highlighting disputes, the Post Office, if it was correct in its contention that a trading statement was properly interpreted as an account stated, that would be, so it contended, the end of the matter. The importance of this point is not possible to overstate. It only eventually unravelled for the Post Office in 2019.

In the ordinary course of commercial litigation, a claim against a defendant will typically be for breach of contract or for a wrong such as, very commonly, negligence. In these circumstances both the legal and evidential burden lies with the claimant under a principle summarised as 'he who asserts must prove'. Sometimes that burden is reversed. In the law of bailment, for example, (effectively custody of chattels, the law on which is more ancient than contract) a bailee is required to prove that he or she took care of the chattel bailed. The burden of proof is not on the person who bailed the goods (bailor) but on the person in whose possession they were (bailee). That is, similarly, the essence of a claim for an account. It reverses the ordinary burden so that the *accounting party* (the party liable to pay under the account) has the burden of showing that the account was wrong and/or there are grounds for re-opening the account. It matters not whether the claim is formulated as a claim for 'an account stated', which is a common law claim, or for a 'settled account' (effectively, the agreed balance of mutual debts) which is an equitable claim. The essential point about a claim for an account is that in either circumstance the claim is for an agreed sum of money.

Perhaps not surprisingly, as with contracts generally, the courts are reluctant to interfere with agreements made between the parties unless there are very good grounds for doing so. There are strong public policy reasons for the law upholding agreements between parties, the most obvious and powerful being commercial certainty (one of the objects of law and legal policy). There are a large number of exceptions and subtle qualifications, in particular, in connection with 'settled accounts', but the essential point is always what has been *agreed*. In simplest terms, the Post Office contended at the Common Issues trial that the nature of a claim by it for a shortfall in the accounts of an SPM, because the accounts were agreed, and was a claim on 'an account'. This is because they could not open a new period's account without agreeing the old accounts, and so could not continue trading. If the Post Office was correct, it was for the SPM a really major problem. It was, so the Post Office contended, *for the SPM to show why the account was wrong*. The problem was, that all an SPM would know was that the account was wrong (because there was a shortfall) – but not *why* it was wrong. It was precisely for this reason that SPMs contacted the Horizon Helpline. SPMs did not have any information about error rates or bugs. The Post Office obviously did, but did not disclose these – and even resisted doing so in 2019.

As will be seen, and as is explained in some detail by Fraser J, *this imposed on an SPM both a legal and an evidential burden that they could not discharge*. Put another way, if the Post Office was right, *a defendant SPM would always fail in defending the Post Office's claim* because the SPM, not having access to the wider Horizon system, was unable to point either to how or why it failed or was otherwise susceptible to the effects of errors and bugs.

In summary, Fraser J neatly cut through the bind by concluding that the whole basis for the contention, *viz* that the account was (contractually) agreed, was flawed. If agreement is the essence of an account, he found, so far as there was nominal or formal agreement, because otherwise an SPM could not continue to operate his or her account, such agreement was not reached freely and was not, in truth, real agreement at all. Accordingly, in his judgment, it was wrong to characterise the account as signed by the SPM as 'an account stated'. *Et voilà,* it followed that if the claim was not a claim for an account, *then the burden was on the Post Office* to show that the SPM was at fault and the cause of the shortfall. As is immediately obvious, this conclusion shifted the entire basis upon which the Post Office had been pursuing and prosecuting its sub-postmistresses and sub-postmasters over so many years.

The treatment of the doctrine in Fraser J's judgment on the Common Issues in *Bates v Post Office* is not

perhaps entirely satisfactory. The distinction between the common law concept of 'an account stated' and equity's concept of 'settled accounts'[36] is not entirely clear in the section from *Bowstead & Reynolds On Agency* cited by Fraser J at [790] and [826]. The confusion arises from the common law principle having effectively merged with the equitable concept.[37] The great Lord Atkin provided a clear formulation of the common law concept. In essence, he explained:

> 'An account stated may take the form of a mere acknowledgement of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise.'[38]

Usually an 'account stated' at common law is a cause of action asserted by a claimant (that is to say, a set of facts that support a conclusion of law, that, if the facts be proved, imports liability). The equitable doctrine of 'settled accounts' (*Anglo American Asphalt* (above)) concerns debts on both sides, and the parties have agreed that the debts of one should be set against the debts of the other and only the balance paid. In practice, it is not always clear when an account will be held by the court to be a settled account. There must be mutual debts. Once the principal has approved the accounts, they are 'settled', and if the principal enters the account as agreed in his books and either pays the balance or recognises in some other way that the account is correct, there is also a settled account. The general rule is that settled accounts will not be reopened. It is not clear, because it was not in issue before Fraser J, how the Post Office advanced particular civil claims and how precisely the Post Office formulated these, whether as an account stated (*Castleton*) or as a settled account. Whichever way it was put, the important point was that it appears that the Post Office sought to put the burden upon the SPM of proving that the account was wrong – and, relatedly, why. The common law principles concerning an account whether 'an account stated' or 'settled accounts' may be incorporated or modified by the express terms of a contract, as was the case under the Post Office's contracts.

With that sketch of the law it is instructive to see how the Post Office relied on this principle of law in practice. In essence, the Post Office at the Common Issues trial in November 2018 contended that its SPMs, by agreeing their accounts under the Horizon system where a shortfall was shown, were thereby acknowledging and agreeing their indebtedness to the Post Office – *both* at common law but *also* by the terms of their contract. This was regardless of the fact that there was no provision under the Horizon system to do otherwise. Accordingly, so the Post Office's argument ran, the SPM was liable to pay, and, in the absence of payment, liable to a claim by the Post Office for 'an account stated'. Fraser J considered that this was untenable in circumstances where an SPM had contacted the Horizon Helpline. His reason was that, if a question was raised by an SPM about a shortfall that was unexplained, it was not sensible to talk about the account being agreed, where there was no provision at all in the Horizon system itself to do otherwise. The judge considered that if he were to have been wrong in that analysis, it would be unconscionable to preclude an SPM from re-opening the account. Unconscionability is an equitable ground for re-opening an account. As will be seen this undermined the entire basis of the Post Office's claim against Mr Castleton at this trial in 2006 and the judgment given against him by Judge Richard Havery QC.

Mr Castleton's experience at trial

Mr Castleton almost immediately experienced inexplicable errors when he became the sub-postmaster. He experienced a shortfall that he paid for in mid-January 2004. In week 43 he started to call the Horizon Helpline for help and support. Just as examples, he made six calls to the Horizon Helpline between 15-28 January explaining problems with apparent shortfalls that by 4 February 2004 had risen to a total of £6,754. In week 45 he made 5 further

[36] See the judgment of Romer J in *Anglo-American Asphalt Co v Crowley Russell & Co* [1945] 2 All ER 324 at 331.

[37] The best summary treatment is to be found in the outstanding Australian textbook (it is rather more than that – a rare repository of immense learning and wisdom): J. D. Heydon, M. J. Leeming and P. G. Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th edn LexisNexis Butterworths, 2015).

[38] The Privy Council decision in *Siqueira v Noronha* [1934] AC 332 at 337. See also *Camillo Tank Steamship Co Ltd v Alexandra Engineering Works* (1921) 38 TLR 134 at 143.

calls. He continued to raise issues and explain problems he was encountering. He submitted trading accounts for weeks 42-52 for the year 2003-2004. The accounts had built-up substantial discrepancies. He has commented that 'We just couldn't understand where the losses were coming from'.[39] He continued frequently to contact the Helpline, repeatedly logging the reason for his call and the nature of the problems he was experiencing at his Horizon Terminal. He did this until 23 March 2004 when he was suspended following an audit. That audit revealed the issue of which he had been complaining – repeated unexplained shortfalls in his trading accounts that by that time had risen to £25,758.75. His contract as sub-postmaster was summarily terminated without compensation. No substantive response from the Horizon Helpline had by that time been received. In any event it frequently merely passed on his comments to others or to other Post Office departments. Mr Castleton himself had no access to the audit trail. There was no facility available for him to establish whether data at his terminal had reached the Horizon server. He was not provided by the Post Office with paper copies of the audit trail. The frequency and detail of Mr Castleton's contacts with the Horizon Helpline do not suggest someone careless in their management.

The Post Office brought civil proceedings against Mr Castleton for an 'account stated'. At the start of his judgment in *Post Office v Castleton*,[40] Judge Havery observed that Mr Castleton admitted that he was the accounting party. That was regrettable, as was the fact that Mr Castleton was not legally represented. It seems Mr Castleton could not afford representation.

Judge Havery began his judgment, at [1], observing that:

> 'The statement of the account, though not its validity, is admitted. Accordingly, the burden of proof lies upon Mr Castleton to show that the account is wrong.'

As Fraser J in his March 2019 judgment pointed out, if this was correct, it placed a burden on Mr Castleton that it was impossible for him to discharge. At paragraph [2] Judge Havery said that 'the identity of the party on whom the burden of proof lies is not important in this case'.[41] The judge seems accurately to have recorded the substance of Mr Castleton's case at paragraph [4] of his judgment:

> 'Mr. Castleton admits that on 23rd March 2004 there was an apparent shortfall in the account of Marine Drive in the sum of £25,758.75. He admits that he produced weekly Balance Lists (the documents in question are headed "Final Balance") and personally produced, signed-off and submitted to the claimant Cash Accounts (Final) up to week 51. *His case was that the losses apparently shown by the Balance Lists and Cash Accounts (Final) were illusory not real. It was entirely the product of problems with the Horizon computer and accounting system used by the claimant. The apparent shortfalls were nothing more than accounting errors arising from the operation of the Horizon system*.' (My emphasis.)

Importantly, given Fraser J's much later findings, Judge Havery QC (rightly) accepted Mr Castleton's evidence that he had contacted the Horizon Helpdesk over problems with balancing discrepancies in his accounts at Marine Drive on a number of occasions.[42] But, unlike Fraser J, the fact or frequency of Mr Castleton's calls for help to the Horizon Helpline, still less the demonstrable inadequacy of the Post Office's response to these, did not appear to concern Judge Havery – the claim was after all in his view a simple claim for an account, and accordingly, in his judgment, it was for Mr Castleton to prove what he had been asking the Post Office for – an explanation as to why he was experiencing shortfalls at his terminal.

Later, at paragraph [22] of his judgment, Judge Havery said this:

[39] For an account of Lee Castleton's experience, see the blog post of the outstanding investigative journalist Nick Wallis at https://becarefulwhatyouwishfornickwallis.blogspot.com/2011/12. Nick Wallis covered the entirety of the Post Office trials and has published what has become an archive of material that is an invaluable public resource and represents a significant public service.

[40] [2007] EWHC 5 (QB), available at https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html.

[41] Judges quite often adopt this expression when they have formed the view that the evidence speaks for itself – that is to say, the facts are so obvious the incidence of the burden of proof does not matter.

[42] [2007] EWHC 5 (QB) at [23].

> 'During the hearing, Mr. Castleton sought to adduce evidence of other complaints from sub postmasters of other post offices about the Horizon system. I admitted in evidence the fact that there were a few such complaints, but *I refused to admit evidence of the facts underlying such complaints, since that would have involved a trial within a trial*.' (My emphasis.)

Judge Havery excluded from consideration the fact that other SPMs had experienced similar problems – however important such similar experience might be or the nature of the commonalities they exhibited. It was only in 2017 that the similarity of experiences between hundreds of SPMs became a powerful factor in supporting the application for a Group Litigation Order that enabled the similar experiences of more than 500 SPMs to be brought to bear. But for this, as Mr Justice Fraser later drily observed, the true position in connection with the Horizon system and its propensity to error and failure would 'simply not have seen the light of day'.[43]

One of the witnesses called by the Post Office to give evidence of how robust and reliable the Horizon system was, was Ms Anne Chambers, a system specialist employed by Fujitsu. Her evidence was that she concluded there was no evidence whatsoever of any problem with the Horizon system. As will be seen, that is not evidence that the Horizon system was working, whether 'properly' or 'reliably'. Courts surprisingly often are not that good at evaluating evidence.[44] Judge Havery was impressed by Ms Chambers. He described her as a 'clear, knowledgeable and reliable witness' whose evidence he enthusiastically accepted. Ms Chambers reliability was not in fact tested in any meaningful way – Mr Castleton had no means at his disposal to do so.

Anne Chambers may not have been quite the reliable witness that Judge Havery imagined her to be. Mr Justice Fraser was far less impressed. Of a statement made by her in December 2007, in connection with a 'PEAK' error record and loss at an SPM's branch Post Office where she had written:[45]

> 'This appears to be a genuine loss at the branch, not a consequence of the problem [PEAK] or correction'

in his December 2019 judgment Fraser J said, at [374], that that statement was

> '… simply insupportable. That is a statement made by Anne Chambers, which in my judgment flies in the face of the documents.'

Further, and rather damagingly in retrospect for the case as it was put by the Post Office before Judge Havery in 2006, at paragraph [413] of his judgment on the Horizon Issues, Mr Justice Fraser said this:

> '… At least Anne Chambers in early 2006, and all those with whom she was corresponding, knew that this problem – now admitted to be a software bug, – had been around "for years". Horizon support were telling the SPM, whose branch accounts were affected by discrepancies, that "they cannot find any problem. The SMC – the part within Fujitsu responsible for providing corrective action for the "event storms" – would not always notice these had occurred in time and by then "the damage may have been done". *I find by "the damage" this can only mean impact upon branch accounts*.' (My emphasis.)

In January 2007, Judge Havery, having heard evidence that there were only three error notices generated in connection with the operation of the Horizon system at Mr Castleton's branch over the period in question, said this at paragraph [26] of his judgment:

> 'The paucity of their number is consistent with the proper working of the Horizon system'.

The judge by his unspoken premise thereby exhibits a striking lack of understanding by him of computers[46] –

[43] Horizon Issues, paragraph [459].

[44] It is this that led to the establishment of the Criminal Cases Review Commission. See the letter of Lords Scarman and Devlin to The Times, 30 November 1988 for a neat illustration. The letter concerned the miscarriage of justice concerning the 'Guildford Four'; see also Clive Walker and Russell Stockdale, 'Forensic evidence and terrorist trials in the United Kingdom', *Cambridge Law Journal*, 54(1), March 1995, 69-99, commenting at the end of the article 'Above all, it is important to instil a conscience about justice, freedom and truth in those with responsibility to act on behalf of the State in the criminal justice system'.

[45] [2019] EWHC 3408 at [371].

[46] For an example where IT administrators, police officers and lawyers in the Crown Prosecution Service collectively failed to understand the complexity of the systems comprising electronic evidence, see *Electronic Evidence*, 'Analysis of a failure' at 9.90-9.95; The Ruling by the judge:

a lack of understanding also apparent in the prosecution of Mrs Seema Misra the full transcripts of whose criminal trial, slightly embarrassingly for the Post Office and the prosecution, are available in full online.[47] (Fraser J's judgments undermine the entire premise of the prosecution by the Post Office of Mrs Misra (a plank of which was that any Horizon error would have been obvious to the operator (Mrs Misra)). Her conviction has now been referred to the Court of Appeal by the CCRC. 'Consistent with', in this context, is of no evidential utility. It shows nothing. The judge appears to have adopted a simplistic approach to the evidence generally. At paragraph [11] he set out the final balances from the cash account and said this:

> 'The total of the discrepancies at the end of week 51, namely £11,210.56, plus the amount in the suspense account is £22,963.34. Thus, the accounts show that sum to be due from Mr. Castleton to the claimants. *Since Mr. Castleton accepts the accuracy of his entries in the accounts and the correctness of the arithmetic, and since the logic of the system is correct, the conclusion is inescapable that the Horizon system was working properly in all material respects, and that the shortfall of £22,963.34 is real, not illusory*.' (My emphasis.)

The conclusion was not 'inescapable' at all, it was merely an assumption presented by the judge as a conclusion.

Devastatingly for Mr Castleton, but wrongly, at paragraph [40] of his January 2006 judgment, Judge Havery said this:

> 'I am satisfied that the substantial unexplained deficiencies incurred in weeks 42 to 51 and in week 52 up to the close of business on 22nd March 2004 are real deficiencies and as such are *irrefutable evidence* that Marine Drive was not properly managed at the material time.' (My emphasis.)

As a conclusion it was wrong, both within its own terms and in the light of what is now known. Within its own terms, the deficiencies were not '*irrefutable* evidence that Marine Drive was not properly managed at the material time'.

Or, if they were, were only on the *unstated premise* that the Horizon system *was reliable and not susceptible to generating errors of the kind* that Mr Castleton complained of. On this there was simply no evidence. It was all assumption. That is to say, *reliability as a conclusion proceeded from reliability as an assumption*. That is neither good logic nor, with the greatest respect to the learned judge, good law. Circular reasoning is rarely persuasive. It is, however, a consequence (though not strictly a necessary consequence) of the Law Commission's recommendations, however unfortunate.

A more accurate statement would have been that the unexplained deficiencies in the accounts were *unrefuted* evidence. Not refuted because the reliability of the Horizon system was (a) not in issue (Mr Castleton was incapable of giving evidence himself on that issue, he could only speak to his own necessarily limited experience and observation of his own branch terminal) and there was no expert evidence led, and (b) the reliability of the Horizon system was simply assumed and taken as a given because there was a bit of anecdotal evidence from a few witnesses, including Fujitsu witnesses who (perhaps not surprisingly) said they could not see anything wrong. There was no disclosure of Horizon error rates or reports or known bugs. I have read Ms Chambers' witness statement given at the *Post Office v Castleton* trial. Competent cross-examination of her might have been revealing. The conflict of interest for Fujitsu under its contractual performance and reliability obligations to the Post Office, was, perhaps understandably, not explored by Mr Castleton – and

R v Cahill; R v Pugh 14 October 2014, Crown Court at Cardiff, T20141094 and T20141061 before HHJ Crowther QC**,** 14 *Digital Evidence and Electronic Signature Law Review* (2017) 67 – 71, https://journals.sas.ac.uk/deeslr/article/view/2541; an up-to-date article regarding the topic: Harold Thimbleby, 'Misunderstanding IT: Hospital cybersecurity and IT problems reach the courts', 15 *Digital Evidence and Electronic Signature Law Review* (2018) 11 – 32, https://journals.sas.ac.uk/deeslr/article/view/4891 .

[47] Regina v Seema Misra, T20090070, in the Crown Court at Guilford before His Honour Judge N. A. Stewart and a jury, 12 *Digital Evidence and Electronic Signature Law Review* (2015) Introduction, 44 – 55; Documents Supplement, https://journals.sas.ac.uk/deeslr/article/view/2217 .

the judge himself seems to have had no interest in this line of inquiry.

In fact, the Horizon system, that in 2006-7 was of a version known as 'Legacy Horizon', was found by Fraser J to have been seriously *un*reliable and particularly susceptible to bugs and errors. Worse, it was prone, as Mr Justice Fraser eventually found in December 2019, to generate exactly the kind of problems of which Mr Castleton complained. (See, in particular, the evidence of Mr Latif and Mr Roll.) Worse still, such errors would not have been visible or detectable to Mr Castleton (though their effects were): Fraser J, Horizon Issues judgment, Issue 2 (for which, see below).

There was no expert evidence, nor could there have been in a claim of the kind made against Mr Castleton. Expert interrogation of the Horizon system and evaluation of its 'robustness' would have cost hundreds of thousands of pounds – indeed in one claim against a sub-postmaster, the Post Office intimated that interrogation of the Horizon system might cost as much as a million pounds sterling. Had Mr Castleton sought to adduce expert evidence, any such an application would probably have been refused. He simply had no material upon which to contend that there were faults in the Horizon system capable of generating cash accounts that were, in his words, 'illusory and not real'. But there were such faults. Mr Castleton was subject to a trial that he could not win. One cannot know, but it might be conjectured that it was a source of satisfaction for the Post Office – who were willing to pay substantially for what on any objective view was a profoundly unsatisfactory judgment.

Mr Castleton's business and arguably his life, and, for reasons touched on below, in all likelihood the businesses and lives of others, were subsequently ruined as a result of this judgment. He lost his home and was made bankrupt. That the judgment was likely (that is to say, almost certainly) procured on a false basis is now history, save to Mr Castleton and his family. Mr Castleton has told me that for a number of years he and his family lived without heating because he could not afford a boiler.

Post Office v Castleton wrong in law

The first question is whether the claim in *Post Office v Castleton* was properly characterised in law as a claim for an 'account stated' at all. It was not. It is unfortunate that Mr Castleton was an unrepresented litigant in person. The judge might perhaps have been given greater assistance, and it is not clear how Mr Castleton's concession that he was 'the accounting party' was obtained. Perhaps it was simply that that is what the contract provided.

Nonetheless, to most lawyers the point is an obvious one. Fundamentally, an account depends upon it being freely agreed. This was not possible under the Horizon system. More particularly, Horizon was intentionally designed by the Post Office and Fujitsu for it not to be possible. Branch Trading Statements (BTS) required even disputed items to be included. Further, the way in which the Horizon system was designed required disputed items to be 'accepted' when included in the BTS. Fraser J in his March 2019 judgment drily observed, at [809], that

> 'If the Post Office chose – as it did – to prescribe a system that would lead to the inclusion of disputed items, the SPM contractually would have to comply with that instruction. In this case, that happened when Horizon was introduced. The Manual was changed to require Horizon to be used within the branch. However, that does not entitle the Post Office to apply common law principles that apply to a *freely agreed account* rendered to a principal by an agent upon a Branch Trading Statement, even though the system instructed to the agent to be used would *include disputed items*. That would have the effect of granting it a status to which it is not entitled.' (My italics.)

He concluded, at [810], on this point:

> 'the Branch Trading Statement did not have the status of an agreed account between agent and principal if it included disputed items'.

If Fraser J is correct, which, given his decision followed full argument – and all parties were represented (unlike unfortunate Mr Castleton), I suggest he is, then the whole legal basis of the claim against Mr Castleton was flawed.

As to an account stated under the contractual arrangements between SPMs and the Post Office, Fraser J held:

> '[819] … [t]hat Branch Trading Statement (whether by a SPM under the SPMC [old form

> contract], or one under the NTC [post-2010 version]) is not therefore subject to the same common law principles that would apply as though it were such an account, namely that the SPM is bound by that account unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account that he should be permitted to correct. Indeed, the imposition of such a principle would, in my judgment, *not only be entirely wrong and unfair*, it would be contrary to the express terms of the contracts. The Horizon system, and the options available to a SPM who disagreed with (for example) a Transaction Correction, were designed by the Post Office and whichever company was responsible for the IT architecture. There was no ability on the part of any SPM to demonstrate there were "mistakes" in the "account" (that is to say the Branch Trading Statement), or its identity within that Branch Trading Statement items or amounts that were disputed. *The whole issue with the information available to an SPM on Horizon is that they could not identify discrepancies or shortfalls, or understand the basis on which TCs with which they disagreed were issued. Telephoning the Helpline was something that was entirely outside the Branch Trading Statement.*
>
> [820] I consider that *if and insofar as, during or at the end of any branch trading period, any SPM contacted the Helpline in relation to any shortfall, discrepancy or disputed TC, the Branch Trading Statement for that period cannot be treated as an account rendered by an agent to the principal which can only be opened up if the SPM can demonstrate a mistake*. I also consider that this conclusion applies regardless of whether the matter is approached (correctly) through the contractual obligation upon a SPM in either the SPMC or the NTC, or whether the Post Office's approach relying upon common law principles were applied (although I do not consider this to be the correct approach).' (My emphasis.)

Fraser J's conclusions are incapable of being reconciled with the basis upon which Judge Havery approached the trial of the claims against Mr Castleton and held him liable for the shortfalls claimed by the Post Office.

As to the burden of proof, Judge Havery said it lay upon Mr Castleton. Fraser J explained the error in Judge Havery's reasoning (though without specific reference to his judgment) in this way:

> '[822] I turn then to the issue of whether SPMs bear the burden of proving [the judge's own emphasis] that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect. *I simply do not see how it can sensibly be suggested that SPMs bear such a burden*, for any branch trading period when a SPM has called the Helpline and sought help for an unexplained shortfall, discrepancy or disputed TC. This is for the following reasons.
>
> [823] Firstly, for an unexplained discrepancy or shortfall, *the very point of dispute by a SPM is that they could not work out the cause of the discrepancy*. *That is why it was an unexplained shortfall or discrepancy*. It is no answer to this point for the Post Office to require a SPM to identify the time and/or product when it occurred, in order that it could be investigated. *That is simply a more refined way of requiring the SPM to do the impossible*. Branch Trading Statements are done on a cycle of 5 weeks, 4 weeks, 4 weeks. These shortfalls and discrepancies would not be likely to become apparent until the end of the particular trading period.
>
> [824] This point was, perhaps presciently, identified by Mr Bates himself as long ago as 2000. With his background knowledge in IT systems, and his high degree of attention to detail, he attempted to get to the root cause of the first unexplained shortfall in his case, and he realised that the information for him to do so was simply not available to him, or any SPM in a branch. The Horizon system did not allow him to do this.
>
> [825] The Post Office's answer to that was, eventually, to write-off the amount in question. In my judgment, that was no "answer" at all, in logical terms. All that approach did, for that unexplained shortfall on that occasion, was entirely to avoid addressing the issue

> [826] The Post Office seeks, in this Common Issues trial, to treat the Branch Trading Statement as though it were an account stated, and/or a settled account, both of which are concepts in the law of agency as has been seen from the extracts from *Bowstead* above. However, I do not consider that such an approach is correct, in either law or fact, for a Branch Trading Statement for any period in respect of which a SPM notified or called the Helpline concerning a dispute. This could be by way of seeking assistance on a disputed item, unexplained shortfall or discrepancy, or otherwise drawing to the Post Office's attention that the trading statement was not agreed, but this had to be done through the Helpline. Further, and for completeness (and to provide maximum utility to the Group Litigation) there can be no requirement for any magic phrase that had to be uttered by an SPM when doing so. This is to deal with a situation which Mrs Stubbs experienced, after she had phoned the Helpline multiple times, disputing the shortfall shown. Eventually she was asked by the Helpline whether she wanted to report this particular issue as "a dispute". This surprised her, as she was fairly certain that was what she had been doing all along, in her many phone calls on the same subject. If there were such a magic phrase, the SPMs should have been told what it was, and the evidence is that they were not told any such thing….'. (My emphasis.)

It follows that, if Fraser J's judgment is to be preferred to Judge Havery's, (a) the claim against Mr Castleton was not properly characterised as a claim on an account stated, and (b) accordingly, the burden was not upon him to establish error in the account, but upon the Post Office to establish the cause of the shortfall (whether negligence or otherwise). The important issue that was not considered at Mr Castleton's trial, was the reliability of the Horizon system and whether or not it was capable of generating the kind of errors (and shortfalls) which Mr Castleton experienced. Mr Castleton had no means available to him of establishing that the Horizon system might generate 'illusory' shortfalls. Accordingly, the failure of his defence to the Post Office's claim against him was both inevitable and wrong for reasons identified by Fraser J. It is most unsatisfactory that it took 13 years to establish these, it might be thought, rather elementary, things. It is now 16 years' since Mr Castleton made his inquiries of the Horizon helpline as to why he was encountering balancing shortfalls at his branch terminal.

Judge Havery's judgment in *Castleton* is an unsatisfactory decision. To Mr Castleton, and no doubt to many others against whom the decision was relied upon by the Post Office, it brought ruin.

On 19 June 2019, Fraser J refused the Post Office permission to appeal to the Court of Appeal against his judgment on the Common Issues. (His refusal of that application was set out in a ruling that ran to 91 paragraphs.)

Dissatisfied, the Post Office then applied to the Court of Appeal for permission to appeal. In that application, the Post Office engaged the services of Herbert Smith Freehills LLP, the energetic solicitors' firm that acted for Lloyds Bank in connection with the compensation scheme for the Reading Impaired Assets Unit (IAU) fraud, and Helen Davies QC of Brick Court Chambers. Lord Justice Coulson, in deference to the application being made by the Post Office and to its arguments, heard, unusually, an oral application for permission to appeal. His decision refusing permission, remarkably, runs to 119 paragraphs.[48] He commented that the Post Office consistently put its arguments too high and made sweeping statements about the trial and the judgment 'which were demonstrably wrong'. As to the application on findings that the judge made, these, Coulson LJ said, were 'either wholly out of context, mis-stated or otherwise not correctly summarised'.[49] Were it not for the fact that it was the Post Office that was the subject of these trenchant criticisms, any ordinary applicant and ordinary application for permission to appeal would have been peremptorily dismissed. Coulson LJ said this at [11]:

> ' ... this application is founded on the premise that the nation's most trusted brand was not obliged to treat their SPMs with good faith, and instead treat them in capricious or

[48] Editorial note: this judgment is not officially reported, but will be published by the journal with the transcript of the trial in due course.

[49] Case No: A1/2019/1387/PTA at [5].

> arbitrary ways which would not be unfamiliar to a mid-Victorian factory owner (the PO's right to terminate contracts arbitrarily, and the SPMs alleged strict liability to the PO for errors made by the PO's own computer system, being just two of many examples). Given the unique relationship that the PO has with its SPMs that position is a startling starting point for any consideration of these grounds of appeal'.

In addressing the particular grounds of appeal, Coulson LJ described the application made by the Post Office and its lawyers as including sweeping and incorrect statements 'based on a failure to understand the judgment'[50] and he described other challenges to Fraser J's judgment as 'fanciful and wholly unpersuasive' at [113]. While Coulson LJ's decision refusing permission is not a judgment of the court on the issue in terms of precedent, he said that Fraser J was right to reject the Post Office's argument on the issue of characterising the Post Office's claims for shortfalls as claims for an account, on the facts as Fraser J found these to be, and that there was no realistic prospect in his judgment of a successful appeal against Fraser J's analysis.

This was an expensive and futile exercise for the Post Office that elicited nothing but lengthy and sustained criticism of the whole of its application and all its arguments.

The actual unreliability of the Horizon system

At trial of the Horizon Issues, the fundamental issue for the judge to determine was set out at [18] as follows:

> '(1) To what extent was it possible or likely for bugs, errors or defects of the nature alleged at §§23 and 24 of the [Group Particulars of Claim] and referred to in §§49 to 56 of the Generic Defence to have the potential (a) to cause apparent or alleged discrepancies or shortfalls relating to Subpostmasters' branch accounts or transactions, or (b) undermine the reliability of Horizon accurately to process and to record transactions…?'.

To understand Fraser J's answer to that question, an important factual witness for the SPMs on this issue was Mr Andrees Latif, a very experienced long-serving former SPM, because of his own particular experience. The reason for his importance is that the Post Office was driven in response, as was essentially its *modus operandi*, to characterise him as an untruthful and unreliable witness.

Mr Latif was the SPM at Caddington Post Office in Caddington, Bedfordshire, from 2001 until late September 2018. His appointment with the Post Office therefore ended after the litigation commenced. He was subjected to an audit in September 2018. He gave evidence about two specific incidents. The first occurred in July 2015 and related to the transfer of £2,000 from the AA stock unit to the stock unit designated SP1. He successfully transferred the £2,000 from AA, but when he went to the SP1 unit, the same sum had not transferred into that unit successfully. There was no explanation for this that he could come up with, including having checked his own CCTV, and he was sure he had carried out the transaction correctly – it was not an unusual transaction. He described the sum of £2,000 as having 'simply disappeared from Horizon'[51] and explained that this would lead to a shortfall in the branch account for that sum.

The Post Office's case on the £2,000 was summed up in the evidence of Ms Van Den Bogerd, who stated that, provided certain steps or actions were carried out correctly, what Mr Latif had said happened simply would not occur. She said in her written statement, that 'providing these two actions are completed, the stock unit from where the cash is transferred should not show a discrepancy'.[52] She said that her 'strong belief is that Mr Latif has recalled these events incorrectly'.[53] She also said that 'the records that Post Office has reviewed do not support what Mr Latif has said and I believe that he may have mis-recollected events from 3 years ago'.[54] The Post Office's case was essentially that Mr Latif had not done the steps correctly, because had he done so, what he said happened could not have happened. The judge found Mr Latif's response to be both consistent, considered and credible, and best summarised in one of his answers:[55]

[50] Case No: A1/2019/1387/PTA at [75].
[51] Day 2: 12 March 2019, 15.
[52] Day 2: 12 March 2019, 11.
[53] Day 6: 19 March 2019, 15.
[54] [2019] EWHC 3408 (QB), [88].
[55] Day 2: 12 March 2019, 17-18.

> 'A. I'm experienced -- I have been running a post office for 17 years, sir. I have also worked for the Post Office on training other offices how to run a post office. I was also involved in running and introducing the new Horizon software changes in 2006 onwards, where I went to several offices on behalf of the Post Office to give them training. So I'm an experienced, trained subpostmaster and I ran my business successfully for 17 years. So I may have been a bit brief in the statement but obviously I can run through those -- exactly those steps that we would take to make sure that there is no operator error on our behalf.'

At paragraph [90] of his judgment Fraser J said that:

> '[t]he conflicting evidence on this particular point is a good illustration of the "poles apart" position to Horizon by the Post Office and the claimant SPMs in this litigation. Because of the Post Office's position on Horizon, *almost all and any of the criticisms or accounts of factual events which the claimants made, or make, about how this system worked in practice are attributed to fault or carelessness by the SPM or their assistants*. Indeed, without fault or carelessness by an SPM, the Post Office simply cannot explain these occurrences. The Post Office's position is therefore to challenge the factual account – which it is entitled to do – because if the factual account by an SPM is accepted as truthful and accurate, then the Post Office would have to accept that there must be a fault or faults within Horizon. Therefore, the Post Office cannot accept that the factual account is truthful and/or accurate. Thus the dispute goes around and around in endless circles…'. (My emphasis.)

The judge continued:

> '[91] It is also the case that Mr Latif had the following point positively put to him about why he had checked the CCTV that he had within his branch. "So you now say you looked at the CCTV because your colleagues were concerned that you hadn't done the transaction properly?" even though Mr Latif had said no such thing. Mr Latif was subject to a fairly robust attack, not only on his account, how it matched up with other records which the Post Office said contradicted it, what he and his assistants had or had not been doing, and indeed upon the full scope of his evidence and his credibility – as shown by the question I have reproduced. That question was framed as though even his own colleagues had concerns about what he had done. It was positively put to him by the Post Office that he had not even complained to the Post Office, although he provided the name of his Area Manager Mr Navjot Jando and said he had complained to him many times. The Post Office did not call Mr Jando to rebut this. One exchange will suffice as an example of the type of attack upon Mr Latif:
>
> > "Q. [Question by Mr de Garr Robinson QC]
> > You don't say anywhere in your witness statement that the £2,000 physical cash also somehow disappeared, but that seems to be what you are now saying, is that right?
> >
> > A. [Answer by Mr Latif]
> > Well, the system gave a shortfall of £2,000 and that's been my statement all the way through, sir, so I don't know what you're trying to confuse me, but there's a shortfall of £2,000 in stock unit AA and there should not be a stock shortfall. The money is physically there."'
>
> [92] Mr Latif's evidence had never been, so far as his witness statement and evidence orally before the court, that £2,000 in cash had physically disappeared. His evidence was that there was a shortfall of that amount shown in Horizon as a result of what he had done… .'

Fraser J accepted Mr Latif's evidence. Its striking similarity to Mr Castleton's helpless protests to Judge Havery will be noted. Fraser J said that:

> '[98] I accept the evidence of Mr Latif, who struck me as a reliable and careful person, and who had personally been the one who had tried to perform the transfer from one stock unit to another. He had personally experienced what he explained to the court in this respect. I accept his direct evidence on

> this in preference to that of the Post Office, which effectively was from people who were not there, who maintained, more or less, that it simply *could not have happened*, and who had nothing to substantiate or corroborate the challenge made to Mr Latif's primary evidence. I find as a fact that it did happen as Mr Latif explained. I find that Mr Latif performed the required steps correctly in respect of the stock transfer between units, as one would expect of someone who had 17 years of experience, and was sufficiently skilled at his role such that the Post Office had, prior to the litigation, been sufficiently satisfied of his competence that he was used by the Post Office as a trainer for training other SPMs…'. (My emphasis.)

Of the challenges to the lead claimants' factual accounts the judge said, at [938]:

> 'The Post Office's approach to evidence, even despite their considerable resources which are being liberally deployed at considerable cost, amounts to attack and disparagement of the claimants individually and collectively, together with the wholly unsatisfactory evidence of Fujitsu personnel such as Mr Parker. The Post Office evidence also includes a very high-level overview of Horizon by its expert which amounts to little more than a claim that it has worked quite or very well, most of the time.'

In December 2019, twenty years after the introduction of Horizon, Mr Justice Fraser answered the first, and central, issue in the Horizon Issues trial, at [968]:

> '(1) It was possible for bugs, errors or defects of the nature alleged by the claimants to have the potential both (a) to cause apparent or alleged discrepancies or shortfalls relating to Subpostmasters' branch accounts or transactions, and also (b) to undermine the reliability of Horizon accurately to process and to record transactions as alleged by the claimants.'

He added, at [970]:

> 'I accept the claimants' submissions that, in terms of likelihood, there was a significant and material risk on occasion of branch accounts being affected in the way alleged by the claimants by bugs, errors and defects ….'.

So, 13 years after Mr Castleton was ruined by the claim brought against him by the Post Office, the court in *Bates v Post Office* found that very similar experiences of shortfalls and errors to those experienced by him were experienced by other SPMs. Balancing errors occurring as he described in his evidence in his defence at his trial in 2006 were similarly described in 2019 by the lead claimants and their witnesses in the *Bates* litigation. Further, those shortfalls were capable of being caused in the way described by Mr Latif – sums simply 'disappeared'. In contrast with the judgment of Judge Havery in 2007 in *Castleton*, Mr Justice Fraser held:

> (i) That the claims made by the Post Office for shortfalls in accounts of SPMs, where SPMs had contacted the Horizon Helpline were not, as a matter of law, for an 'account stated' whether in common law or as modified by contract – contrary to the legal position as put by counsel, Mr Richard Morgan, for the Post Office in Mr Castleton's trial.[56]
>
> (2) That the burden of proof did not lie on the (SPM) defendant and could not 'sensibly be suggested' to do so – otherwise it was burden 'impossible' for an SPM to discharge – as Mr Castleton found.[57]
>
> (3) Bugs and defects in the Horizon system were prone to cause discrepancies and to undermine the reliability of the system to record transactions accurately – as Mr Castleton had contended.[58]

Thus, on every point, in December 2019 Mr Justice Fraser took a view diametrically opposite to that taken by Judge Havery in his judgment given against Lee Castleton in January 2007.

As to the popular (mis)conception, reflected in Lord Hoffmann's observation referred to at the start of this article and that lay also at the root of Toyota's approach to its accelerator problem, namely that any fool can tell when a computer is not working properly, the second principal issue in the Horizon Issues trial

[56] Common Issues, paragraph [826].
[57] Common Issues paragraphs [822]-[823].
[58] Horizon Issues paragraph [968].

was the Post Office's contention that if there were errors these would have been apparent to SPMs, Mr Justice Fraser easily dismissed this in his judgment:

> '[972] Issue (2): Did the Horizon IT system itself alert Subpostmasters of such bugs, errors or defects as described in (1) above and if so how?
>
> [973] Answer: Although the experts were agreed that the extent to which any IT system can automatically alert its users to bugs within the system itself is necessarily limited, and although Horizon has automated checks which would detect certain bugs, they were also agreed that there are types of bugs which would not be detected by such checks. Indeed, the evidence showed that some bugs lay undiscovered in the Horizon system for years. This issue is very easy, therefore, to answer. The correct answer is very short. The answer to Issue 2 is "No, the Horizon system did not alert SPMs". The second part of the issue does not therefore arise.'

However unsatisfactory Judge Havery's judgment is, it was of great importance for the Post Office as a precedent[59] for subsequent claims against its SPMs, because other courts might be expected to follow it (if not plainly wrong), because it was a judgment of the High Court. No doubt they did. I have not been able to find another reported decision of the High Court in a claim brought against an SPM in similar circumstances to its claim *Post Office v Castleton*. It follows that most of the many hundreds of SPMs who were subject of claims by the Post Office were sued by the Post Office in the County Court. Further, and perhaps more importantly, the Havery *Castleton* judgment could be provided to any SPM that the Post Office considered to be objecting to the position taken by the Post office. The costs of £321,000 awarded against Mr Castleton might also be expected to discourage those who might consider challenging the Post Office in its approach.[60]

It can only be surmised as to how frequently the Post Office, or Bond Pearce LLP as its solicitors, or later Womble Bond Dickinson LLP, relied on the *Castleton* decision in communications with other SPMs.

'Distinguishing' Judge Havery's judgment in *Castleton* or successfully contending the judgment to be plainly wrong (as it is) would have been effectively impossible for an individual SPM until a trial of the scale of the *Bates* litigation enabled the issues of both fact and law to be properly considered and evaluated. Mr Justice Fraser said as much in his judgment. Mr Castleton had to wait 13 years.

The enormous scale of the injustice thereby done is yet to be ascertained. It is unlikely that Judge Havery's judgment in *Castleton* will ever be relied upon again.

It is worthy of note that in the US Toyota case, it was established that Toyota intentionally concealed information and misled the public about the safety issues behind the recalls. It was alleged that Toyota made misleading public statement to consumers and gave inaccurate facts to Members of Congress and concealed the extent of problems from federal regulators. In its settlement with the Department of Justice, Toyota admitted its wrongdoing in making such misleading statements in the Statement of Facts filed with the criminal information, and also admitted that it undertook these actions as an act of concealment as part of efforts to defend its brand. Toyota paid a financial penalty of US$1.2 billion under the settlement. In the United States, the making of false statements by corporations is treated seriously.

Amongst other misleading statements, it is to be noted that in 2015 the Post Office publicly stated, in response to the BBC Panorama programme,[61] that it was not possible for a third party to access and manipulate the Horizon terminal of a sub-postmaster. That statement was false. Fraser J at paragraph [535] went so far as to say that the Post Office's statement in 2015 about remote access to a branch SPM's Horizon terminal 'was not true'. In short, it was a lie. The fact would have undermined the Post Office's prosecutions. The position was sought to be maintained by witnesses from Fujitsu in the Horizon Issues trial in 2019. It only became untenable after Mr Roll, a witness for the claimants who was formerly employed by Fujitsu, had filed a statement (his second) in which he explained that not only was it possible, but that he had done it. Initially, the Fujitsu witnesses (a bit optimistically) contended that Mr Roll

[59] Though not technically 'binding', being a first instance decision.

[60] I have been given to understand that this in fact happened.

[61] BBC 1 Panorama 'Trouble at the Post Office' broadcast on Monday 17 August 2015 at 7:30 pm.

was wrong. The section to read and Fraser J's strictures on Fujitsu's witnesses, whom he said sought to mislead him, is to be found at paragraphs [517] to [555] of the Horizon Issues judgment.

Conclusion

Mr Castleton's case – and indeed the entire Post Office litigation and history of prosecutions – stands as a monument to judicial and legal failure (confirmed, were this necessary, by the scale of the CCRC references of convictions to the Court of Appeal – the largest single group reference by the CCRC in English legal history). Mr Castleton was one of around a thousand SPMs who lost their livelihoods as a result of alleged Horizon shortfalls falsely claimed by the Post Office to be the result of dishonesty or the incompetence of its SPMs, but in truth the result of system errors, bugs and failures.

The Criminal Cases Review Commission in its 'Statement of Reasons' in referring the first 35 criminal convictions of SPMs for consideration by the Court of Appeal has stated:[62]

> '(5) The CCRC considers that the findings of the High Court represent a fundamental shift in understanding with regard to the operation of the Post Office Horizon system, and particularly on the reliability of that system and the accuracy of the branch accounts which it produced. The CCRC observes that over the course of many years the foundation of POL's prosecution of individual SPMs, managers and counter assistants was that the data produced by the Horizon system was accurate and could be relied upon. It was on that basis that prosecutions were commenced and pursued, and defendants were provided with legal advice and considered how to plead in the same context.
>
> (6) The CCRC considers [omitted text] the most important points are:
>
> 1) That there were significant problems with the Horizon system and with the accuracy of the branch accounts which it produced. There was a material risk that apparent branch shortfalls were caused by bugs, errors and defects in Horizon.
>
> 2) That POL failed to disclose the full and accurate position regarding the reliability of Horizon.
>
> 3) That the level of investigation by POL into the causes of apparent shortfalls was poor, and that the Post Office applicants were at a significant disadvantage in seeking to undertake their own enquiries into such shortfalls.'

The CCRC under paragraph [7] of its reference expresses its conclusion that: '(1) The reliability of Horizon data was essential to the prosecution and conviction of the Post Office applicant and that, in the light of the High Court's findings, *it was not possible for the trial process to be fair*' and that '(2) The reliability of Horizon data was essential to the prosecution and conviction of the Post Office applicant and that, in the light of the High Court's findings, it was an affront to the public conscience for the Post Office applicant to face criminal proceedings.' (Italics mine.)

In short, the CCRC in its reference to the Court of Appeal has expressed the thrust of the argument of this article, drafted before sight of the CCRC's Statement of Reasons.[63] The 'fundamental shift in understanding' has occurred because, for the first time, before Fraser J in 2019 the Post Office was required to prove affirmatively what it had previously merely asserted, namely that the Horizon system was 'robust' and 'reliable'. That was an assertion that for almost 20 years judges and juries were uncritically willing to accept under the 'presumption' of reliability, that the Law Commission had recommended, and in deference to the Post Office as an important public institution. The danger and systemic weakness in this course is exposed, not least, by the CCRC's second numbered point under paragraph [6] and the incentive that the presumption of reliability provides to the unscrupulous. The result was that 'it was not

[62] Taken from the CCRC 'Statement of Reasons for a Reference to the Court of Appeal' sent on 3 June 2020 to all of those identified by the CCRC whose cases are referred to the Court of Appeal.

[63] Though, as noted, without reference to the central issue of the presumption of reliability that followed upon the Law Commission's recommendations or to the structural or systemic difficulty presented to 'objectors' in 'challenging the presumption'.

possible for the trial process to be fair'. The implications of that conclusion are far-reaching. What precisely those implications are, now requires to be addressed.

Part of Mr Castleton's problem was the flawed legal analysis of his alleged liability to the Post Office as being for 'an account stated'. That analysis imposed upon him the (impossible, as Mr Justice Fraser recognised) legal burden of showing that – and why – the account was wrong and should be re-opened. That is to say, Judge Havery required Mr Castleton to prove the very thing that he had been making requests of the Horizon Helpline to explain – why he experienced repeated balancing errors/shortfalls.

The root of Mr Castleton's misfortune, and his financial and personal ruin, was that he was confronted with an evidential burden that it was impossible for him to discharge. This was the evidential burden that the Law Commission in 1993 and 1997 recommended and the courts have readily adopted. The central insurmountable difficulty was the burden upon Mr Castleton to demonstrate that the Horizon computer system was arguably unreliable, so that the Post Office was required to prove *affirmatively* (not merely anecdotally) that it *was reliable*. He simply had no means or material available to him to do this. Crucially, had the Post Office, at Mr Castleton's trial or, indeed at any other properly conducted trial, been required to demonstrate *affirmatively* that the Horizon system *was working reliably*, it could not have done so – because it was not (a finding of fact by Fraser J). That is a sobering conclusion that the judiciary and others would do well to reflect upon.

The undischargeable burden imposed on Mr Castleton was the direct consequence of the Law Commission's recommendations referred to at the start of this article. Because the Post Office was not giving anything away about its own knowledge of the unreliability of the system, still less specific vulnerabilities and failures, there was nothing to which Mr Castleton could point for the purpose of seeking disclosure and there was no evidence available to him to support even a *prima facie* issue on which (circumscribed proportionate) disclosure might have been ordered by the court. He simply did not know (and the Post Office was not telling[64]). Had he (improbably as a litigant in person) asked for disclosure, he would almost certainly have been met with the Post Office's objection, likely to have been readily acceded to by the court, that, unable to point to anything specific, he was simply 'on a fishing expedition' – to which the courts are implacably hostile (despite the purpose of a fishing expedition, unexceptionably, is in fact to catch fish). Alternatively, the Post Office would successfully have objected that giving widespread general disclosure of the Horizon system would have been disproportionate. As Mr Justice Fraser observed, but for the joining of more than 550 claimants in group litigation, the issues eventually exposed to scrutiny in the Horizon Issues trial 'would not have seen the light of day'.[65]

One embarrassing aspect of the Post Office litigation is that it reveals that the burden that the Law Commission recommended should lie with an objector to demonstrate why the documents obtained from a computer system should not be presumed to emanate from a system operating reliably, is that, in recommending the incidence of that burden, the Law Commission thereby unwittingly provided an incentive to an unscrupulous party such as the Post Office to limit its disclosure. In hard-edged commercial decision making, particularly where reputational issues are at stake, ethical conduct may readily become a first casualty. As noted above, a party's duties of disclosure are equitable in origin and attach to conscience and are thus a matter of legal ethics, as much as of rules. There remains an unanswered serious question as to how, for almost 20 years, the Post Office with its lawyers was able to resist giving proper disclosure of the hundreds of thousands of PEAK and KEL error records – records that Mr Justice Fraser found to be so helpful in arriving at his conclusion on the unreliability of the Horizon system. That is a question that, given the scale of human misery and suffering that was inflicted as a result (Tracy Felstead was imprisoned at the age of 19, Mrs Seema Misra was imprisoned when 8 weeks' pregnant), demands proper investigation and an answer. Both Fraser J and the CCRC have emphasised the seriously unsatisfactory disclosure made by the Post Office.

[64] One example being given by Fraser J at Horizon Issues judgment paragraphs [457] and [458] – this was not disclosure failure but *deliberate concealment* – note the judge's word "secret".

[65] [2019] EWHC 3408 (QB) at [459].

The question is, what is to be done? The presumption still applies.

Coda

On 16 December 2019, having handed-down his judgment on the Horizon Issues, Fraser J said this:[66]

> 'Based on the knowledge that I have gained both from conducting the trial and writing the Horizon Issues judgment, I have very grave concerns regarding the veracity of evidence given by Fujitsu employees to other courts in previous proceedings about the known existence of bugs, errors and defects in the Horizon system. These previous proceedings include the High Court in at least one civil case[67] brought by the Post Office against a sub-postmaster; and the Crown Court in a greater number of criminal cases, also brought as prosecutions by the Post Office against a number of sub-postmasters and sub-postmistresses.
>
> After very careful consideration, I have therefore decided, in the interests of justice, to send the papers in the case to the Director of Public Prosecutions, Mr Max Hill QC, so he may consider whether the matter to which I have referred should be the subject of any prosecution.'

The response that there is always a right of appeal suggests a naïve unfamiliarity with commercial reality, innocence of how the legal system actually works, or a lack of elementary knowledge of game theory (or all of these). Further, as will be seen, a right of appeal is valueless where a would-be appellant is confronted by a combination of mendacity and ethical failure on the one hand, and judicial error and inadequate intellectual engagement on the other. Mr Castleton had a theoretical right of appeal. It was precisely that. Further, the exercise of a right of appeal – let alone its success – depends critically upon relevant information being disclosed, rather than being withheld. The legal system can be exploited by the unscrupulous and, as can be seen, the law and legal processes readily may become potent instruments of oppression of the weak and vulnerable by the powerful.

It is understood, that out of the successful group litigation, Mr Castleton is likely to receive in his hands less than £20,000. The settlement reached resulted in payment of some £58 million by the Post Office. After legal, insurance and funding costs, the total distributable sum between the 557 claimants, who variously were sued or prosecuted, lost their businesses, in many cases served terms of imprisonment and suffered serious mental anguish and physical illness as a result, was some £11.5 million.

It is now known that well-over 900 SPMs were prosecuted.[68] The vast majority were convicted. Those convictions were secured by unreliable evidence of an unreliable computer system that judges, juries, and lawyers failed to properly understand – and the failure by the Post Office to give proper disclosure.

> 'The majority of problems and defects … simply would not have seen the light of day without this group litigation.'
>
> Fraser J paragraph [459] of the Horizon Issues judgment.

Epitaph

In 2015 there was an inquest into the death of Mr Martin Griffiths, 59, an SPM from Chester. He had stepped out in front of a bus one morning in September 2013. The inquest heard that at the time Mr Griffiths was being pursued by the Post Office for an alleged shortfall of tens of thousands of pounds. It is not known if he had been provided with a copy of the judgment of Judge Havery QC in *Post Office Ltd v Castleton* [2007] EWHC 5 (QB). Maybe he had been. Many ordinary people, including judges, will share a hope that his death was not in vain.

I am grateful to Nicholas Bohm, retired solicitor, former partner in a large City law firm, former member of the Law Society's Electronic Law Committee and member of the Law Commission's advisory panel for its project on the *Electronic*

[66] Day 23: 16 December 2019, Handing-down of judgment, No. QB-2016-004710 at 3-4. (Taken from the transcript of Proceedings, as approved by Fraser J, provided for future publication to the editor of *Digital Evidence and Electronic Signature Law Review* by the Civil Team, Digital Transcription, Opus 2).

[67] That is *Post Office Ltd v Castleton* [2007] EWHC 5 (QB).

[68] Announced by the BBC on the Today Program, 25 May 2020. There are over 900 criminal convictions. As to results of various requests under the Freedom of Information legislation see: https://www.postofficetrial.com/.

execution of documents (Law Com No 386, HC2624), and to Bev Littlewood, Emeritus Professor of Software Engineering, Centre for Software Reliability, City University of London, and to Martin Newby, Emeritus Professor of Statistical Science, City University of London, and to Harold Thimbleby. Emeritus Professor, Gresham College, London and See Change Digital Health Fellow, Swansea University, Wales and Visiting Professor, UCL, London, and to Martyn Thomas CBE, Emeritus Professor, Gresham College, London and Visiting Professor of Software Engineering at Aberystwyth University, Wales for their helpful comments on a draft of this article and to Stephen Mason for his encouragement to write it.

I would add that the thesis of *Electronic Evidence*, namely, that electronic evidence is poorly understood by judges and lawyers, has been all too plainly validated. I alone am responsible for any error of fact or analysis.

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