

Scandal at the Post Office: The Intersection of law, ethics and politics

By Paul Marshall

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Introduction

I am talking to you today about the most extensive series of miscarriages of justice in recent English history. On 23 April 2021 the Court of Appeal Criminal Division (Holroyde LJ, Picken, Farbey JJ) handed down judgment in 42 appeals.¹ Thirty-nine appellants had their convictions for theft and false accounting quashed. That number of conjoined appeals arising out of similar circumstances is without precedent in English law. Each of the appeals, with one exception, was 'exceptional', there having been no previous unsuccessful appeal, otherwise an invariable statutory requirement under the Criminal Appeal Act 1995 for a 'reference'² by the Criminal Cases Review Commission to the Court of Appeal. In journalistic terms, for 20 years the Post Office hijacked the English criminal justice system and used it, essentially, as an instrument of the Post Office. It effectively manipulated and withheld from the courts important evidence from its Horizon computer system, and its known unreliability, and thereby secured the wrongful conviction of hundreds of innocent subpostmasters and subpostmistresses for offences of dishonesty. The Post Office continued to withhold evidence from those it had convicted, even after it was aware, from 2013 at the latest, that the criminal convictions that it had secured, in many cases, might be unsafe. In the process, it ruined the lives and livelihoods of hundreds of innocent people. At the time of publication, most are still yet to receive any proper or satisfactory compensation for the grievous wrongs inflicted upon them by the Post Office.

The Post Office has a public status of long-standing. In his book, *English History 1914-1945*, the great historian AJP Taylor wrote that 'until 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, in some rural communities, the Post Office is the only way that some individuals and businesses can obtain access to cash, banking and financial services. Branch Post Offices are operated by subpostmasters and subpostmistresses who operate these within retail premises as sole traders. In 1999 there were about 17,000 such post offices. It was at that time that, fatefully, the Post Office and the government determined that the Post Office should move from manual to computerised accounting. At precisely the same time statutory evidential (i.e. legal) safeguards for reliance upon computer data given in evidence at criminal and civil trials were removed by Parliament on the recommendation of the Law Commission. That those protections were not modified or replaced with anything at all constitutes, in my view, a substantial error and failure by both the Law Commission and by Parliament.

¹ *Hamilton v Post Office Ltd* [2021] EWCA Crim 577, <https://www.bailii.org/ew/cases/EWCA/Crim/2021/577.html>. The judgment itself is jurisprudentially wholly unremarkable, and to that extent disappointing, despite its importance and the remarkable and extraordinary events and facts with which it is concerned. The Court of Appeal restricted oral argument to a mere four days.

² A reference by the CCRC to the Court of Appeal on reasons given by it has the same statutory effect as if the Court of Appeal had itself granted permission to appeal on the grounds given by the CCRC.

Natural questions arise from what I shall briefly describe; these include, first, the motivation that caused the Post Office, from its main board downwards, to act as it did; second, how is the risk to the integrity of the legal system, specifically the criminal justice system, that such conduct represents, to be avoided in the future? To my knowledge those questions have not previously been publicly raised, still less answered. (The Justice Committee has suggested some protections and constraints on private prosecutions³ that are being implemented. They are likely to have only limited effect, and in any event, in my view, these do not address the core issues.)

I propose to say a little about adversarial assumptions and then I will point out some systemic legal vulnerabilities and how these can be exploited by the unscrupulous – ethical failure in business, when augmented by legal failure by lawyers and judges, becomes incredibly damaging; last, I will provide some examples of what to my mind constitute examples of institutional ethical failure. When politicians run for the hills and disclaim responsibility for the Post Office (a wholly-owned creature of government) as they have, the problem becomes almost insuperable. If, as a citizen harmed by what is in truth an emanation of the state, you cannot look to Parliament, what can you do?

Group litigation

To understand what I am going to say, you need to know that in 2019 there was a settlement of group litigation brought by 550 claimants against the Post Office. The settlement figure paid by the Post Office was £57 million. Most of that sum (about 80 per cent of it) was paid out in costs and expenses to the claimants' lawyers, the funders and the insurers. Sixty-six of the claimants in that civil litigation had criminal convictions. In March 2021 the Court of Appeal heard 42 appeals of convicted postmasters and employees who had been claimants in the civil litigation. It quashed 39 of these on grounds that the Post Office had abused the processes of the court.⁴

The Court of Appeal judgment

The Court of Appeal judgment is remarkable. In a finding that is rare, the Court of Appeal concluded that, not only should the convictions of 39 former postmasters and employees be quashed on grounds of abuse of process, because the appellants did not receive a fair trial (called 'first category abuse of the process of the court'), but, additionally, the court held that the Post Office had acted in such a way as to subvert the integrity of the criminal justice system and to threaten undermining public confidence in it – known as 'second category abuse of the process of the court'. This latter finding by the Court of Appeal was devastating for the Post Office and a finding that it had strenuously contested. I claim some credit for this conclusion because, until the end of December 2020, every other lawyer in the case, other than my solicitors, Aria Grace Law, and my able junior, Ms Flora Page, had been opposed to advancing that ground of appeal. My clients had been subjected to some hostility from other appellants for insisting upon pursuing 'second category abuse' as a separate ground of appeal. The other lawyers and their appellant clients believed the ground of appeal would fail and would be dismissed, even if the Court of Appeal was willing to entertain argument on it, which they thought probably it would not. Eventually, after a full day's hearing in December 2020, the Court of Appeal acceded to the argument that second category abuse of process ought to be heard by the court as a separate ground of appeal, despite the Post Office having indicated that it would not resist the appeals of 39 appellants on grounds that they had been denied a fair trial. This was on the basis that the Post Office accepted that it had failed to give proper disclosure of documents that would have assisted defendants in their defences and/or weakened the prosecution. After December 2020 all the other appellants 'came on board' on 'category two' abuse as a second ground of appeal.

³ Beyond the scope of this paper is a remarkable distinguishing feature of the appeals: the Post Office had a direct commercial interest in the outcome of the appeals, similar to, but also different from, its direct commercial interest in its prosecutions (that included brand protection). This is a most unusual circumstance. There is no recorded example of a commercial enterprise having an interest in the outcome of a large number of conjoined appeals where it was the prosecuting authority. It remains to be seen whether the statutory inquiry chaired by Sir Wyn Williams considers the Post Office's conduct in the appeal proceedings. The appeals represented an existential threat to the Post Office. The government has recently announced that it will meet the claims of those whose convictions were quashed in April 2021, and others since then. In principle these extend to claims for malicious prosecution. The sums involved are beyond anything that the Post Office is able to pay from its own resources.

⁴ *Hamilton v Post Office Ltd* [2021] EWCA Crim 577, <https://www.bailii.org/ew/cases/EWCA/Crim/2021/577.html>.

The importance of the Court of Appeal's finding on second category abuse, for all 39 of the successful appellants, was enormous and is difficult to overstate. The effect of the Court of Appeal's finding, given effect in slightly anachronistic Victorian language – that the Post Office's conduct 'was an affront to the conscience of the court' – is that the appellants should not only not have been convicted, but, further, that they should not have been prosecuted. That is to say, every successful appellant before the Court of Appeal was completely exonerated. My pursuit of that issue, and my perception that the Post Office's conduct was very much worse than merely failing to give proper disclosure of problems with Horizon, that it conceded in October 2020, is what eventually enabled me, with Aria Grace Law, to elicit from the Post Office the 'Clarke Advice', to which I refer later.

The next day after the Court of Appeal's judgment, Mrs Paula Vennells CBE, the Post Office's former CEO, resigned from all her corporate directorial appointments and also gave up her part-time ecclesiastical appointment.

But the many hundreds of miscarriages of justice, now estimated to be around 736 or so, came within a hair's breadth of not being discovered. It cost upwards of £150 million for the civil litigation (antecedent to the criminal appeals resulting in the findings of fact that underpinned the appeals) to get close to the truth of only a part of what happened. The Post Office and its management were willing to expend vast sums of money (ultimately funded by the taxpayer), and to instruct the most expensive lawyers that money can buy, to prevent the truth coming out. They failed, but they very easily might not have done.

Miscarriage of justice

I have suggested that were the English criminal justice system to be an airline, no one would fly it, such is the repeated incidence of disastrous failure. The term 'miscarriage of justice' sounds a bit abstract, so let me introduce you to my former client, Tracy Felstead, to give you a flavour of what a miscarriage of justice really means. A miscarriage of justice is harm inflicted by the state upon an individual. That is why the judicial oath is both so important and also so onerous. It is not a judge's promise to do their best. An oath, like a vow, is not a mere promise.

In 2001 Tracy was a recent school-leaver, proud to have secured employment with the Post Office, at that time still a highly respected national institution. There was a Horizon computer record that showed a shortfall of £11,500 at the till she was working on at her Post Office branch. Under caution, interviewed by Post Office investigators at Peckham police station, she was asked: '*can you demonstrate how you did not steal the money?*' Just reflect on that. She protested her innocence. She was prosecuted by the Post Office. As was invariably the case with Post Office prosecutions, there was no evidence that she had ever physically taken any money. The Post Office and Fujitsu objected to the cost of providing the electronic evidence that had been requested by Tracy's expert witness. In the event the electronic evidence was not provided at her trial; her expert, with whom I have spoken and is highly skilled, was not called at her trial – seemingly on grounds of cost. On 26 April 2002 Tracy was convicted of theft. She was just 19 years' old. She refused to apologise when invited to do so by the trial judge, protesting she had done nothing wrong. She was immediately imprisoned in a young offenders' institution. Whilst incarcerated, she encountered a fellow prisoner, hanged. She has never fully recovered from her experience.

Following settlement of the civil litigation in December 2019, in 2020 Tracy received £17,000 compensation out of the eventual settlement of £57 million (most of which went to pay the claimants' lawyers' fees and other costs in the group litigation, the largest component of which was the cost of funding for the claimants' claims provided by Therium).

Tracy's conviction was quashed by the Court of Appeal on 23 April 2021. The court found that the Post Office denied her a fair trial in not providing to her relevant electronic evidence. Prior to an interlocutory hearing in the Court of Appeal, in November 2020, Tracy was admitted to hospital having suffered a nervous collapse (initially thought to have been a stroke), such was the continuing strain on her. For 20 years, in every job interview since her conviction, Tracy had to declare that she was a convicted thief. Imagine what that would have done for you. Not one of you would be listening to this talk.

There are many who bear responsibility for Tracy's prosecution. Others bear responsibility for it taking 20 years for Tracy, and others like her, to be able to appeal against her conviction. The Post Office, including its Chairman, its Chief Executives, its Chief Accounting Officers, its Board, and its (ineffective) Audit Risk and Compliance Committee

share responsibility for this catastrophe. So do a significant number of lawyers and judges who failed to understand, properly evaluate, or engage with, the evidence.

One of the possibly surprising features of these miscarriages of justice is that, in almost all cases, the only evidence against the defendant in question was an alleged 'shortfall' shown in the Horizon computer system – computer printouts, if you will. If you remember only one thing from this talk, bear in mind that writing on a bit of paper in evidence is only marks on a piece of paper until first, someone explains what it means and, second, if it is a statement of fact, someone proves the truth of that fact.⁵ The simplest explanation for the Post Office scandal is that documents generated by the Horizon computer system were routinely treated by lawyers and judges as though statements of fact that were true, without bothering to consider how their veracity should be established. It was taken as given, that what a computer record showed was correct. The shallowness of this approach, at all levels, is seriously reprehensible.

That apart, some Post Office lawyers knew of information that would have provided a defence to defendants. Other lawyers knew of information that would have enabled convicted defendants to launch appeals to the Court of Appeal long, long before March 2021. I hope that some of them may end up in prison for perverting the course of justice (and probably, in some instances, conspiring to do so). At the outset of your career you will think you will never do this. Some of those lawyers would have imagined the same thing in their 20s. You may ask what is it that caused them to lose their way. I hope to give you some hints as to where the answer lies.

The Post Office

To start with I need to explain a few dry facts about the Post Office. Their relevance will become clear.

The Post Office, although it is a private company limited by shares, is in truth a creature of the government. Its entire shareholding is owned by a company called UK Government Investments Limited (UKGI). UKGI is owned directly by HM Treasury. The duty of the Board of the Post Office under the Companies Act 2006 is to act in the interests of its shareholder, the government. There is a government appointed representative on the Board. The accounting officer for the Post Office reports to the accounting officer of the Department for Business Energy & Industrial Strategy (BEIS). It was previously called the Department for Business Innovation & Skills (BIS). Enterprises such as the Post Office are private enterprises through which the government provides services. Sometimes these are called 'Arm's Length Bodies' or more vogueishly 'Partner Organisations'. In 2012 the Post Office was separated from the Royal Mail. An important government objective for the Post Office was to make it profitable, because for a long time its activities had been loss-making.

Twenty-two years ago, in 1999, the then labour government had brought to an end a private finance initiative (PFI). That PFI project had been to run the state benefits system through the Post Office in collaboration with the Benefits Agency. The advantage the Post Office was seen to offer was its nationwide outlets of 17,000 branch post offices. It was proposed to run the benefits scheme on a grand computer system called 'Horizon'. Horizon was conceived as the largest non-military networked computer system of its kind in Europe. The state benefits payment project did not go happily and incurred wasted cost to the taxpayer of some £720 million. It was a fairly conventional failed government IT project. At a Parliamentary Select Committee in 1999 several government ministers, including a future Chancellor of the Exchequer, Alistair Darling, explained to Members of Parliament that the Horizon computer system was insufficiently tested. It was said that it exposed the government to the prospect of a possible 'fiasco'. (A fiasco did indeed eventuate, if not of the kind then envisaged.)

The government decided that a whizzo way of dealing with the problem was to offload Horizon on to the Post Office. This was in the name of modernisation, and to salvage something from the failed procurement project. Fujitsu, the Japanese technology company that earns billions from a wide-range of government contracts, took over the Horizon computer system and supplied it under a services contract to the Post Office.

⁵ This is a main theme of the practitioner text *Electronic Evidence and Electronic Signatures* (5th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2021), edited by Stephen Mason and Professor Daniel Seng (first edition 2007), <https://humanities-digital-library.org/index.php/hdl/catalog/book/electronic-evidence-and-electronic-signatures> .

Some thinkers

I thought it convenient to mention a couple of thinkers whose thoughts shine a good deal of light upon the Post Office scandal.

Carl von Clausewitz is one of the great thinkers on warfare. He gained experience as a staff officer in the Prussian Army in the Napoleonic wars. He wrote down his reflections. Some of these can readily be transferred to other forms of adversarial activity, including litigation. One of Clausewitz's insights is that warfare naturally tends towards an extreme, because of ever-greater effort to overcome your adversary. He thought that the impediments to the tendency to 'absolute war' were what he called 'frictional' constraints. Two of the most important were: first, constraint upon the material resources allocated to the contest – in effect, cost; a second constraint is moral – if you like, commitment to 'a fight'. These constraints are themselves affected by the issues that are in dispute. The greater the importance of the issue subject of the contest, the greater will be the resources likely to be willingly expended. If core values are in issue and the dispute existential, there is a tendency towards extreme conflict.

These principles can be seen in operation in litigation generally, as a species of adversarial or conflict activity and vividly in the Post Office scandal. By 2019 the Post Office was willing to spend more than a hundred million pounds in costs in defending the group litigation brought by the 500 postmasters and former Post Office employees. That is literally to spare no expense. Part of the explicit thinking (that the journalist Nick Wallis has recorded⁶) was to wear out the claimants in costs. The Post Office had effectively unlimited funds, being backed by the government. The prospect of the subpostmasters and subpostmistresses succeeding in their claims represented (it was expressly recognised) an existential threat to the entire Post Office business method of operating and its brand. The Post Office, in effect, 'bet the farm' (or rather bet the Post Office itself) on defeating the civil claims of the 550 group claimants. It lost that bet. The result is the insolvency of the Post Office. This is because, without government support, it cannot meet the claims of some 2,400 others who have claimed under an 'Historic Shortfall' compensation scheme set-up last year.⁷

The second thinker I shall refer to is the medieval theologian St Thomas Aquinas. Aquinas⁸ postulated a moral dilemma in a commercial situation. A merchant in a sailing vessel arrived at an island with a cargo that the islanders had not received for many months. The cargo was accordingly very valuable in the market. What, however, if the merchant knew that coming behind them was a large number of ships laden with similar cargo? Were they morally obliged to tell the islanders, or could they exploit their ignorance by maintaining a high price? I will leave that to you to decide, but what the dilemma illustrates is that ignorance has commercial value. In law there are a large number of circumstances where the imperative to take advantage of ignorance is powerful. There is a line that can be crossed. Ethics (in a sense, 'what is the *right* thing to do in a particular situation?') can be expensive.

This problem lies at the heart of an ethical conundrum and a conflict of interest. A lawyer owes a duty to their client, but they owe a prior duty to the court. The problem, that is little discussed, is that these duties may, and quite frequently do, collide. The higher the stakes the greater will be the temptation to ask, not what course of action is right, but 'what can I get away with?'

As I shall explain, the Post Office scandal, at a high level of abstraction, is explained by the exploitation by the Post Office of ignorance. The first kind of ignorance exploited was that the Post Office, for 20 years, failed to give proper disclosure of the many known problems with its Horizon system. As I shall illustrate in the case of Mrs Misra's prosecution, the courts were frequently strikingly (wrongly) unwilling to assist defendants. A common disparaging view held by judges is that requests for disclosure often represent little more than a 'fishing expedition'. But the purpose of a fishing expedition is to catch fish. The problem confronting defendants is that, perforce, they had no idea what it was that they should be looking for – and the Post Office was not going to help.

The second kind of ignorance exploited by the Post Office constituted a violation of convicted defendants' Article 6 rights under the European Convention on Human Rights. Article 6 guarantees a right to a fair trial within a

⁶ <https://www.postofficetrial.com/>.

⁷ <https://www.onepostoffice.co.uk/scheme>.

⁸ The ethical question appears to have been first addressed by Diogenes of Babylon and Antipater of Tarsus. It was repeated by Cicero in *De Officiis*. It is a fundamental question – and it will be seen that the tendency in financial markets has been towards full disclosure – Antipater's position.

reasonable time. A fair trial includes any appeal. The Post Office concealed from defendants its knowledge, that it acquired in 2013, that would have enabled many appeals long before March 2021. It did so not by accident, but by design and in pursuit of a deliberate strategy. That was a legal strategy. As a matter of law, where delay is manifestly unreasonable so that Article 6 rights are prima facie violated, the court is *bound* to inquire into the causes of delay. But the Court of Appeal in March 2021 did not do so. Where the explanation for delay is the conduct of the prosecutor, responsibility for the delay lies with the state. The impression given by the Court of Appeal by its April 2021 judgment is that it was concerned to consider nothing more than was strictly necessary to determine the outcome of appeals – that is to say, nothing more (apart from the second category abuse argument) that was not strictly necessary. That is unfortunate, and is one reason for the judgment being unsatisfactory. An obvious question that remains unaddressed, is whether directions given to juries by judges, where the sole evidence against a defendant was typically Horizon data, were adequate. On the face of it they were not.⁹

To put it in concrete terms, between about 2000 and 2014 it seems likely that the Post Office as a prosecuting authority secured more convictions and caused more miscarriages of justice on the basis of flawed, incomplete and misleading evidence than there were executions for witchcraft in England, until the offence of witchcraft was abolished in English law under the Witchcraft Act in 1735. There were around 500 such executions. Present estimates for the number of those prosecuted by the Post Office stand at not far short of a thousand. That figure disregards civil claims and forfeiture of Post Office branch businesses extra-judicially without trial and the forfeiture of residential premises and personal insolvency resulting from the Post Office's actions. The vast majority of the prosecutions were successful. I refer to the witchcraft cases because most people would (I imagine) concede that the evidence in those tragic cases was also seriously unreliable, but that evidence was nonetheless accepted by the courts, with catastrophic consequences.

Adversarial assumptions

All legal systems make assumptions about the way in which truth can be elicited. In mediaeval Europe, trial by ordeal was commonly believed to deliver truth by divine intervention. We now consider ourselves much more sophisticated and believe that the right result is most likely to occur through the competitive presentation of relevant law and facts in which the judge holds the role of neutral umpire. In short, the trial process, whether in civil or criminal law, is a *competition* in which the supposed and expected outcome is 'justice'.

But competition itself entails certain *a priori* assumptions. The English theoretical model is that *all things being equal*, the adversarial process, where facilitated by disinterested robust advocacy on both sides, should provide the right result. The issues of disparity in informational and financial resources, and their effect on outcomes, have received surprisingly little attention, but are fundamental considerations. Clausewitz in his posthumous treatise *On War (Vom Kriege)* postulated that material resources that a state is willing to allocate to conflict are frequently decisive in determining outcomes. Such constraints, he thought, operate as an incumbrance upon the inherent tendency in conflict to move to ever greater extremes. Those resources become proportionately greater where the threat of conflict is existential for the participant, as happened in two world wars.

⁹ At Mrs Misra's trial in October 2010 the judge, His Honour Judge Stewart, gave a direction to the jury along the lines of the evidence given by the Post Office's expert witness at the Horizon Issues trial in 2019 – evidence that Mr Justice Fraser disparaged and rejected in trenchant terms at paragraphs [826], [827] of his Horizon Issues judgment: '[826] ...It is of no assistance to have an exercise that in effect says the statistical likelihood of any bug having an impact upon the branch accounts of that branch in that period is very low. [827] The section 8 analysis is, in my judgment, so riddled with plainly insupportable assumptions as to make it of no evidential value. It is the mathematical or arithmetic equivalent of stating that, given there are 3 million sets of branch accounts, and given there are so many sets of branch accounts of which no complaint is made, the Horizon system is mostly right, most of the time. It is a little more sophisticated than that, but not by very much.' Mrs Misra's jury was told by Judge Stewart: 'Do you accept the prosecution case that there is ample evidence before you to establish that Horizon is a tried and tested system in use at thousands of post offices for several years, fundamentally robust and reliable ...' (*Regina v Seema Misra*, T20090070, in the Crown Court at Guilford, (2015) 12 *Digital Evidence and Electronic Signature Law Review*, Introduction 44; Documents Supplement, Day 7 Tuesday 19 October 2010, 65A-B, <https://journals.sas.ac.uk/deeslr/issue/view/328>). The jury were told that they might draw inferences as to whether Mrs Misra's account of her, allegedly unique experiences, should be accepted. Apart from the obviously flawed nature of the underlying reasoning, other postmasters *did* experience similar problems – the Post Office simply did not disclose that fact.

The Post Office litigation is striking in that, in 2019, it was explicitly recognised by the Post Office's leading counsel that the issues for determination by the court were for the Post Office existential. Prospectively, it was said that a finding for the group claimants would put at risk the Post Office's existing business model. The trial judge, Mr Justice Fraser, criticised the Post Office for attempting to put the court *in terrorem*. Nevertheless, for the Post Office it was a sort of fight to the death. It is, I believe, for this reason that the Post Office at various points abandoned ordinary norms of litigation conduct, even where those norms reflect conventional ethical standards to which most, if not all, lawyers would publicly subscribe. The most basic of these is the requirement to disclose material in your possession that is adverse to your own case. The Post Office's non-disclosure was (i) persistent, (ii) long-term and (iii) systemic. At its extreme, this extended to shredding inconvenient documents. (These were presumably documents considered by the Post Office not to be helpful.)

The claims to which the Post Office is now exposed have rendered it technically insolvent. The Post Office's CEO, Nick Read, recently announced that in the absence of government support the Post Office is unable to afford to pay some 2,400-odd claims for compensation that it has received, under a compensation scheme established for those who were not parties to the group civil litigation. The government has confirmed that it will support the Post Office. In this regard, the Post Office bears similarity with the banks, that during the financial crisis were considered too big to fail. How this may affect and inform corporate conduct is likely to be subject to academic scrutiny. It is arguably unsatisfactory that ordinary market disciplines do not apply to some institutions. There is a difficulty with the concept of holding either institutions or individuals to account, where the practical reality is that, being free from ordinary market constraints, an institution may act and conduct its business with impunity. Professor Richard Moorhead, writing in *The Times*, has recently suggested that a key issue to emerge from the Post Office scandal is that of 'accountability'.

On the other hand, it is fair to say that the Post Office brand, as a result of this scandal, has become contaminated and is arguably virtually worthless. To that extent, there *have been* commercial consequences. But the alternative view is that that does not really matter whilst the government supports it – and there is no alternative. One of the many remarkable features of the Post Office scandal is that the Chair and members of the board of the Post Office – the board that was responsible for what might be called the Post Office's 'scorched-earth' litigation strategy (conducted ultimately at public expense) - remain in place. The board has not been replaced following the catastrophic outcome of that litigation. It might be said that the government, as its owner and shareholder, does not act in the way that an ordinary shareholder might ordinarily be expected to act. The reasons for this remain for the time being a matter of speculation. On one view, the government, that has a director appointee on the Post Office main board who also sits on its Audit Risk and Compliance (ARC) committee, may well have known more about the Post Office's strategy, in particular its strategy of concealment, than for the time being at least it is willing to reveal. That is itself problematic, because the institution that has ultimate authority to establish and determine the parameters of a public inquiry is the very same entity that owns the Post Office, the Department for Business Energy & Industrial Strategy (BEIS). An inquiry, that in June 2021, following the Court of Appeal's April judgment, was elevated by the government from an informal inquiry to a statutory inquiry under the Tribunals and Inquiries Act 1992 with power to compel witnesses and order disclosure of documents, has been established by BEIS, but its terms of reference were originally concerned with the Horizon system and its failure, not institutional failure – nor, importantly, the conduct of the Post Office's legal strategy or its oversight.¹⁰

The problem with the adversarial model is that, while predicated upon the assumption that *all things being equal* truth will emerge from competing arguments on the law and facts, experience shows that in reality things all too rarely are equal. Where there is disparity in access to information and evidence, and disparity in resources, the outcome is apt to be skewed. Further, the impartiality of lawyers is easier to state as a theoretical ideal than is

¹⁰ Since delivery of the lectures that are the basis of this article, the Chair of the Inquiry in response to representations has broadened the scope of the inquiry. The Inquiry, on 17 November 2021, published a revised list of 218 issues that the inquiry is to consider: <https://www.postofficehorizoninquiry.org.uk/publications/completed-list-issues>. The Chair has indicated that he is minded to go where the evidence takes him. He has invited those giving evidence, wherever possible, to waive privilege; an invitation to which the Post Office and government have agreed, subject to certain reservations in relation to ongoing compensation claims.

sometimes found in practice, especially where the imperative to win assumes, possibly existential, importance for a client – and by extension its lawyers.

The Post Office scandal is a scandal not least because it starkly exposes the difference between the theory of the administration of justice and its practice. It is an extraordinary and serious embarrassment for the English judiciary. This is in part, but not only, because it was almost not discovered. That it was exposed at all was because of a class action involving 550 claimants in a civil group action, the costs of which are variously estimated to have been in the order of £150 million. The costs escalated so rapidly as to impel the claimants to agree to a hurried negotiated settlement that was far, far short of expected damages that they might have obtained at trial. About 80 per cent of the settlement recovery of £57 million was expended on lawyers' litigation funding and insurance costs. That itself raises important questions about the effectiveness of English civil courts in affording – in practice, restricting – access to substantive justice (the righting of wrongs) where there exists a significant imbalance in resources; the old ironic, but real, question is 'how much justice can you afford?'

As a state-owned entity, the Post Office has access to effectively unlimited funding (short of the government withdrawing support for it). To put the consequences of settlement of the claims in concrete terms, the theoretical average claim of each of the 500 claimants in the group litigation was considered by some, years ago at the time of the failed mediation, to be about £200,000 (some claims were very much more valuable). At risk of repeating myself, my client Tracy Felstead was imprisoned aged 19 in 2002. For her entire adult life in any job interview she had to declare herself a convicted thief. Her conviction was quashed in April 2021. The Court of Appeal held that she should never have been prosecuted. For the time that she had spent in prison and the subsequent blighting of her whole adult life by her conviction for dishonesty, in 2019 Tracy received a little over £17,000 compensation. When Tracy first told me of this, in late spring of 2020, I was unable to speak, so shocked was I at this outworking of English civil justice – in truth its denial. The inadequacy of the compensation mocks the Post Office's victims in their distress.

Causes of failure

The Post Office scandal defies simple analysis because it resulted from two causes of failure that each augmented the other.

Some will have detected that I stand outside the cheerleading for English justice. It is indeed the case that if you wish to engage in litigation where expense is of no consequence, and you have unlimited resources, English justice will provide the 'Rolls Royce' system for your purpose. For everyone else it provides a mechanism for the resolution of disputes that is ludicrously expensive, fraught with procedural hazard, and delivers a result that is frequently unprincipled and, as a result, unpredictable. It also facilitates and encourages what Clausewitz warned of in connection with war, the tendency to ever-greater extremes.

First cause of failure: misunderstanding how computers fail

There is a widely-held perception (in truth, a *belief*) that computers are fundamentally reliable. It is also commonly assumed that most computer errors are readily detectable or the result of user 'input' error. That perception and those assumptions, that are false, have received a warmly enthusiastic embrace by a judiciary that sometimes struggles in correctly evaluating evidence, especially technical evidence. The book to read is Sir Richard Eggleston, *Evidence Proof and Probability* (a work that the distinguished English judge Tom Bingham held in esteem).

In earlier times, before computers became pervasive, the Police and Criminal Evidence Act 1984 required that evidence from computers, that is technically (ordinarily) hearsay, should be subject to proof of the reliability of its source. A change took place from 2000 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 diminished. The Law Commission in two important papers recommended to Parliament, in 1993 and 1997, that existing statutory formalities, seen increasingly as cumbersome, difficult to comply with and inconvenient, should be repealed. Those recommendations were accepted by Parliament and carried into effect by the Civil Evidence 1995 and the Youth and Criminal Evidence Act 1999 (which removed important safeguards in criminal proceedings formerly provided under s. 69 of PACE 1984).

In the absence of formal statutory requirements, as the Law Commission had recommended, the courts have since 2000 applied the *presumption of the proper functioning of machines* (*Castle v Cross* [1984] 1 WLR 1372) to computers. But computers are not machines, or at least they are not *only* machines. Computers work on coding (software) that is the product of human agency. Nonetheless, the 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.¹¹

The first problem that the Post Office litigation painfully exposes is that judges and lawyers commonly do not understand the propensity of computers to fail – or, rather, *to not work as intended*. Innocent people went to prison because judges were insufficiently critical of the evidence adduced by the Post Office in its prosecutions and in civil proceedings. Judges as a class tend also to be institutionally deferential, and the Post Office is an historic state institution of public standing. The Post Office ruthlessly exploited both the imbalance in technical expertise and also the institutional deference of the courts to the Post Office as a respected public institution. A little bit like the manipulation by banks of the London Interbank Offered Rate (LIBOR), it was virtually unimaginable that the Post Office was engaged in ‘gaming’ the entire justice system. Sometimes imagination of the worst is both prudent and necessary; it is, after all, why we buy insurance.

If you think this comment is harsh, in 1997 Lord Hoffmann, considered by many to have been a clever judge, in *DPP v McKeown and Jones* [1997] 1 WLR 295 301C-D, loftily declared that ‘no one needs a degree in electronics to know whether a computer is working or not’. The *Bates* group civil litigation incurred colossal cost in exposing the fallacy of Lord Hoffmann’s observation. Part of the present problem is that technology advances so rapidly that our means of dealing with it cannot keep pace. In England there is more regulation covering the design of a toaster than there is of someone who writes and sells computer software. To use another example provided to me by Professor Harold Thimbleby, it is striking that, while it is necessary, to operate a ventilator in an ICU at a hospital, for an anaesthetist to undergo many years of rigorous training and assessment, there is no qualification *of any kind* (company or individual) required of the programmer who writes the software on which the ventilator depends for its operation. Amongst the ignorant, there is at present a lot of enthusiasm in English legal circles for Deep Learning Neural Networks, commonly referred to as ‘Artificial Intelligence’.¹² The problem here, is that the output from machine learning systems is not even *predictable*. At present, there are no systems in place for testing or evaluating the reliability of *existing* computer systems (where the output, in principle, should be predictable). Testing the reliability of existing computer systems is in its comparative infancy – with the exception of ‘safety critical’ systems, typically in aircraft and in some, but by no means all, medical systems.

Professors Ladkin, Littlewood, Thimbleby and Thomas recorded the findings of those that undertook extensive evaluation of software errors:¹³

‘Humphrey considered data derived from more than 8,000 programs written by industrial software developers. He wrote, “We now know how many defects experienced software developers inject. On average, they inject a defect about every ten lines of code.” The average number of defects per kLOC¹⁴ was about 120. The best 20% of programmers managed 62 defects per kLOC; the best 10%, 29 defects per kLOC. Even the top 1% still injected 11 defects per kLOC. Typical Operating Technology and IT software have many kLOCs, even thousands of kLOCs, and hence very many defects. The evidence implies that *all software* can be considered to have multiple faults.’

¹¹ For a detailed analysis of this presumption, see Chapter 5 in *Electronic Evidence and Electronic Signatures*.

¹² For which see Daniel Seng and Stephen Mason, ‘Artificial Intelligence and Evidence’, (2021) 33 *Singapore Academy of Law Journal*, 241-279, <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/Current-Issue/ct/eFirstSALPDFJournalView/mid/503/ArticleId/1602/Citation/JournalsOnlinePDF> .

¹³ 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) 1-4, <https://journals.sas.ac.uk/deeslr/issue/view/578> .

¹⁴ kLOC – thousand lines of code – a very small program.

The authors continue:

‘McDermid and Kelly reported on the defect densities in safety-critical industrial software:¹⁵ ‘There is a general consensus in some areas of the safety critical systems community that a fault density of about 1 per kLoC is world class. Some software ... is rather better but fault densities of lower than 0.1 per kLoC are exceptional. The UK Ministry of Defence funded the retrospective static analysis of the *Hercules C130J* transport aircraft software, previously developed to civilian aerospace software standard, and determined that it contained about 1.4 safety-critical faults per kLoC (the overall flaw density was around 23 per kLoC.... whilst a fault density of 1 per kLoC may seem high it is worth noting that commercial software is around 30 faults per kLoC, with initial fault injection rates of over 100 per kLoC).’

Soberingly, ‘safety-critical faults’ means faults whose possible consequences include system failures causing damage, including injury or death and/or damage to the environment. Professor Ladkin and his colleagues express their view that ‘... a court should start with the presumption that *any software system contains or is influenced by errors that make it fallible.*’ It should be a matter of serious public concern and informed debate that that is the diametric *opposite* to the existing presumption in law. They continue:

‘[A computer] will therefore fail from time to time when a combination of circumstances lead to an erroneous path of execution through the software – and such failures may not be obvious, and may even be perverse. In assessing the weight to be placed on specific computer evidence, it follows from this that the trier of fact should ask ‘how likely is it that this particular evidence has been affected in a material way by computer error? Providing an answer to this question involves, first, reviewing *any available evidence for the number, frequency and nature of errors that have been reported in the particular system previously.*’

That last phrase ought in my view to find its way into judicial bench books as soon as possible. (It is to be noted that that *was the approach* adopted by Mr Justice Fraser in his *Horizon Issues* judgment – in which, in robust terms, he almost contemptuously dismissed the approach urged upon him by the Post Office’s expert witness.) For 20 years the Post Office withheld logs of error records from defendants until the Fujitsu Known Error Log was disclosed in the Horizon group litigation in 2018-2019.

At a less abstract level, in 2010 at my client Mrs Seema Misra’s criminal trial in October 2010,¹⁶ prosecuting counsel both opened and closed the case for the Crown by telling the jury that, were there to have been a problem with the Horizon computer system, *any* such problem would have been manifest and obvious to a Horizon computer terminal operator. That is, in effect, Lord Hoffmann’s point (noted above). It is simply wrong.

The Law Commission had expressed similar views to Lord Hoffmann’s in its two reports to Parliament in 1993 and 1997. The Law Commission was significantly influenced by comments made by Professor Colin Tapper. Professor Tapper is an expert on the law of evidence, not computer technology. Until 2000, a person relying on computer evidence at a criminal trial was required to prove that the computer was working properly at the relevant time. It is striking that the Post Office scandal tracks exactly the period since the removal of evidential safeguards hitherto provided by s. 69 of the Police and Criminal Evidence Act 1984.

The mischief of the prosecution’s contention at Mrs Misra’s trial was that, by sleight of hand, it put the *onus* on Mrs Misra to explain to the jury the problems she encountered with Horizon. This was a recurring problem identified in the Court of Appeal’s April 2021 judgment. All Mrs Misra could *actually* do at her trial was point to shortfalls she had experienced at her Horizon branch terminal – that is, all she could show was that the cash that she had received didn’t match the balancing figure on the Horizon computer screen. In leaps it had escalated to £75,000. She called the police and suspected her colleagues of theft. The transcript of her trial shows that she was close to taunted by the prosecution for being unable to point to any specific and identifiable computer problem. To paraphrase the prosecution: *Mrs Misra says that there must be a fault with Horizon, but she can’t point to any*

¹⁵ John McDermid and Tim Kelly, ‘Software in Safety-Critical Systems: Achievement and Prediction’, *Nuclear Future* 02(03), 2006, 3.1.

¹⁶ The transcript of the trial of *Regina v Seema Misra*, T20090070, in the Crown Court at Guilford, Trial dates: 11, 12, 13, 14, 15, 18, 19, 20, 21 October and 11 November 2010, His Honour Judge N. A. Stewart and a jury, was published in full in (2015) 12 *Digital Evidence and Electronic Signature Law Review*, Introduction 44; Documents Supplement, <https://journals.sas.ac.uk/deeslr/issue/view/328> .

problem with the computer that she actually had (other than that she could not reconcile the figures with cash received). As will be apparent, that is a point closely related to the disclosure difficulties experienced by defendant postmasters and others; to obtain further disclosure they were required to show the ‘issue’ to which the requested disclosure was said to go; they simply did not know – but as is apparent from Mr Justice Fraser’s *Horizon Issues* judgment (and its Technical Appendix),¹⁷ *not knowing that there was a problem, less its nature, was not equivalent to there not being a problem, indeed many problems.*

The jury was invited to infer that the only possible cause of the discrepancy must be theft. That should never have happened. Had her trial been conducted properly and fairly, the Post Office should have been required to prove *affirmatively* that the Horizon system was working at the time she experienced shortfalls. As we now know from Mr Justice Fraser’s 2019 *Horizon Issues* judgment,¹⁸ had this been required, the Post Office could not have truthfully discharged that evidential burden. Mrs Misra went to prison. The day upon which she was sentenced to prison she was 8 weeks’ pregnant. She collapsed with shock and was admitted to hospital. Upon release from hospital, she asked the policeman with her to cover her hands with his coat, she was so shamed by being (unnecessarily) handcuffed.

It is a curiosity that English judges have a greater enthusiasm for imprisoning women than almost every other country in Europe. There is at least consistency. England executed more women for witchcraft, as a proportion of those executed, than almost every other European country.

Thus, the first problem that the Post Office litigation painfully exposes is that English judges and English lawyers commonly do not understand the propensity of computers to fail.

Second cause of failure: the importance of computer disclosure

The problem with the Post Office’s litigation and prosecution of its postmasters is that, for 20 years, wholly inadequate disclosure of known problems with its Horizon computer system was given by it.

The most astonishing aspect of this to anyone technically half-literate is that, until 2019, the Post Office declined to disclose the Fujitsu Horizon Known Error Log. In the group litigation, the Post Office had three lines of objection to disclosing the Known Error Log (KEL) – a (dispersed) log maintained to record, as its name suggests, errors in the Horizon computer system, their impact, and fixes undertaken to correct them. (Such logs are routinely kept for large, maintained, IT systems.)

To start with, the Post Office’s solicitors, Womble Bond Dickinson LLP, in correspondence with the claimants’ solicitors, Freeths LLP, questioned whether the Known Error Log existed at all. Mr Justice Fraser concluded that it did. Once the existence of the Known Error Log was established, the Post Office’s leading counsel submitted to the court that the KEL was irrelevant and the claimants’ demand for its disclosure was ‘a red-herring’. Mr Justice Fraser concluded that the KEL was likely relevant to the claimants’ claims. Once established as existing and likely to be of relevance, the Post Office’s final contention by its leading counsel was that, however relevant it might be, very regrettably it could not disclose it because it was not the Post Office’s Known Error Log, but rather Fujitsu’s. The judge’s response to this, was to point out that, in fact, as a matter of contract between the Post Office and Fujitsu, the Post Office was *entitled* to the Known Error Log. The importance of the KEL is impossible to overstate. The judge found it not to be a red herring, but, on the contrary, fundamental in revealing the true and full extent of Horizon’s unreliability over time, the bugs identified in the system, their effects on branch Horizon accounts, and the fixes that were implemented. It is difficult to resist the impression that the Post Office’s submissions on the relevance of the Known Error Log were other than misleading.

In case you are not already disconcerted, Mrs Misra, on no less than *four* separate occasions in the course of her prosecution, requested that the court order disclosure by the Post Office of Horizon error records.¹⁹ Three different

¹⁷ *Bates v Post Office Ltd (No 6 Horizon Issues) Rev 1* [2019] EWHC 3408 QB, <https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html> .

¹⁸ *Bates v Post Office Ltd (No 6 Horizon Issues) Rev 1* [2019] EWHC 3408 QB, <https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html> .

¹⁹ The first application was before Mr Recorder Bruce, 10 March 2010 (Day 1 Monday 11 October 2010, 3C; Judge’s Ruling, Day 1 Monday 11 October 2010, 25, A-C); second application before HH Judge Critchlow, 7 May 2010 (Day 1 Monday 11 October 2010, 3G); third application before the trial judge (Day 1 Monday 11 October 2010, 15H-16H) and fourth application before the trial

judges dismissed each of Mrs Misra's applications. In the last application, at the end of her trial, her defence counsel submitted that she could not have a fair trial without further disclosure. The trial judge disagreed and said she could have a fair trial without it. Ten years' later the Criminal Cases Review Commission concluded that Mrs Misra did not receive a fair trial. Why? Because she was not given proper disclosure by the Post Office.

This ought to be a matter of acute concern to the judiciary, to the legal profession and also to the wider public. The Post Office scandal is concerning, not least, because those who were innocent of any wrongdoing were routinely convicted on incomplete, unreliable and, above all, *misunderstood* evidence.

In November 2020 at the personal invitation of the Under Secretary of State, I submitted a paper to the Ministry of Justice contributed to or endorsed by eight experts, six of whom are, or have been, university professors. I understand that our recommendations have been submitted for consideration by the Attorney General and by the Chair of the Criminal Procedure Rule Committee, the Lord Chief Justice.²⁰

Third cause of failure: Post Office mendacity

What I have called the second complicating stream is Post Office mendacity – institutional ethical failure, if you will. I will give three examples.

It may come as a surprise to you to know that in September 2010, a month before Mrs Misra's trial, a significant number of senior employees of Fujitsu and senior employees of the Post Office held a high-level meeting at which a bug was discussed called the 'Receipts and Payments mismatch' bug. This bug, it was acknowledged, would cause a subpostmaster's receipts and payments to appear to balance at the terminal, but not do so on the Post Office's main servers. In short, an error caused by this bug would *not be apparent or obvious* to an operator. It was recorded in writing that this might present a problem for the Post Office in its 'ongoing legal cases'. A senior Fujitsu employee and computer engineer who was present at that meeting gave evidence a few weeks later at Mrs Misra's trial. He said nothing about it. If you are not deeply shocked by that, you ought to be. Mr Justice Fraser described the bug as having been kept 'secret'. If you have been following me, disclosure of that bug would have undermined statements made by the prosecution, both in opening and closing its case against Seema Misra.

I want to tell you briefly about Lee Castleton. Lee Castleton invested his life savings in acquiring a branch Post Office in Yorkshire in 2003. As explained, Fujitsu acquired the Horizon system and provided it to the Post Office. It was known to have problems with its reliability.

Recognising the systemic risk that it was shouldering, the Post Office with its lawyers devised an extremely adverse contract that purported to shift the legal and technical risk in the system to postmasters. This was achieved by a contractual term that provided that a Horizon account balance stated by a postmaster to the Post Office was an 'account' in law. An 'account' is analogous to acknowledgement of a debt due. The legal effect is that, once stated, the burden is on the paying party, if they want to dispute the account for any reason, to show why the account is wrong. The postmaster was contractually required to make-up, out of their own funds, any shortfall. If a subpostmaster's account was wrong, not by any fault of theirs but because the system had failed, as a matter of *contract* it was down to the postmaster concerned to show and explain why.

It will be apparent that that presented the hapless subpostmaster with insuperable evidential and legal problems.

The first occasion on which the Post Office was required to positively prove that the Horizon system worked properly was in 2019. It then failed dismally. The trial judge dismissively described the Post Office's contentions that Horizon was robust and reliable as the twenty-first century equivalent of maintaining that the earth is flat.

In 2006 Lee Castleton was sued for a shortfall shown at his Horizon terminal of about £26,000. He was careful and knew he had not made mistakes. Mr Castleton was not represented by lawyers at his 6-day trial in 2006. He had run out of money to pay for legal representation. He had called the Horizon helpline many, many times, complaining that

judge (Day 6, Monday 18 October 2010, 24H-25A) – on this precise point, see *Hamilton v Post Office Ltd* [2021] EWCA Crim 577 at [204].

²⁰ The paper was subsequently published, for which see: 'Recommendations for the probity of computer evidence' Paul Marshall, James Christie, Peter Bernard Ladkin, Bev Littlewood, Stephen Mason, Martin Newby, Jonathan Rogers, Harold Thimbleby, Martyn Thomas CBE, , 18 *Digital Evidence and Electronic Signature Law Review* (2021) 18-26, <https://journals.sas.ac.uk/deeslr/article/view/5240> .

he had problems balancing his accounts. Neither the Post Office nor the judge considered those complaints to begin to be a satisfactory answer to the figures and data from Horizon. Mr Castleton was persuaded to accept that the balance that he had provided to the Post Office was in law 'an account'. He accepted that at the outset of the trial. He was doomed from the word go. But in law, the essential feature of an account is that it is the result of *agreement*. It took another 13 years for Mr Castleton's concession in 2006 to be shown by Mr Justice Fraser, in 2019, to have been wrongly made by him. (I suspect that Lee Castleton, unrepresented as he was at his trial, had scant understanding of the legal implications of the concession he was invited to make and neither the judge nor the Post Office's counsel, it seems, thought it necessary to question whether the legal principle properly applied.) That is because there was no *agreement* of the account. There was no contractual mechanism at all for disputing the Horizon computer figure. The contractual term was, in effect, 'agree the Horizon figure or stop operating your Post Office'. Neat for the Post office, but utterly unreasonable and oppressive for the contracting postmaster. The Post Office subsequently attempted to appeal Mr Justice Fraser's conclusion, but without success, its application for permission to appeal being dismissed. In an unusually long judgment dismissing the application,²¹ Lord Justice Coulson said, 'this application is founded on the premise that the nation's most trusted brand was not obliged to treat their Subpostmasters with good faith and instead entitled to treat them in capricious or arbitrary ways which would not be unfamiliar to a mid-Victorian factory-owner.'

The contractual provision had the purported legal effect of transferring the risk of Horizon failure to hapless subpostmasters. It is unsatisfactory that for 20 years it went unchallenged by lawyers and unexamined by judges. Most subpostmasters could never have afforded to instruct a barrister of sufficient experience to challenge the Post Office. Lee went like a lamb to the slaughter. The trial judge, without hearing any expert evidence, rejected Mr Castleton's defence that the Horizon system might not have been working properly. The judge, His Honour Judge Havery QC, sitting as a judge of the High Court, concluded that it was 'inescapable' that Horizon was working perfectly properly²² and loftily dismissed Mr Castleton's arguments that Horizon may not have been functioning correctly as 'misconceived'. You may ask yourself how he arrived at that conclusion without expert evidence. You will remain mystified if you take the trouble to read the judge's judgment.²³

The Post Office obtained a costs order against Mr Castleton for £321,000. The costs order made against him caused Lee Castleton to become bankrupt. For several years he and his family were rendered almost destitute. They lived in accommodation without a hot water boiler because he could not afford one. Ask yourself how many subpostmasters and subpostmistresses the Post Office's solicitors will have shown that hopelessly flawed reported High Court judgment to, to make them think twice before initiating legal action against the Post Office.

The judgment in Mr Castleton's case is now shown to be wrong in virtually every respect, both as to the law and as to its facts.²⁴ Of a Fujitsu witness who gave evidence against Mr Castleton, in 2006, the trial judge, Judge Richard Havery QC, said, at [23]: 'Mrs. Chambers examined the questions raised and concluded that there was no evidence whatsoever of any problem with the system. She was unable to identify any basis upon which the Horizon system could have caused the losses. ... I found Mrs. Chambers to be a clear, knowledgeable and reliable witness, and I accept her evidence'.

Thirteen years' later, Mr Justice Fraser formed a different view, commenting, at [413]: '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".' Referring Mrs Chambers to the Director of Public Prosecutions, in January 2020, the judge wrote: 'Mr Jenkins and Mrs Chambers respectively should have told the

²¹ A1/2019/1387 22 November 2019, rejecting as even arguable all 26 grounds of appeal advanced by the Post Office.

²² Paragraph [11].

²³ *Post Office Ltd v Castleton* [2007] EWHC 5 QB, <https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html> .

²⁴ For a detailed account of Lee Castleton's case, see Paul Marshall, 'The harm that judges do – misunderstanding computer evidence: Mr Castleton's story' 17 *Digital Evidence and Electronic Signature Law Review* (2020) 25-48, <https://journals.sas.ac.uk/deeslr/issue/view/578> .

court of the widespread impact of (at the very least) the bugs, errors and defects in Horizon that they knew about at the time that they gave their evidence and which have been identified.²⁵

But Mr Justice Fraser, in January 2020, had no knowledge of the extraordinary circumstances that I refer to next.

Ethical failure by the Post Office and ‘the cover-up’

In October 2020, in one document dated August 2013, amongst the many thousands I had looked at, I noticed a remarkable couple of lines that referred to the Post Office’s main Board having been told by external solicitors about concerns about the Fujitsu computer engineer who had given evidence at Mrs Misra’s trial. I could not understand why the Board of the Post Office was receiving notice about one of its expert witnesses.

My solicitors, Aria Grace Law, asked a significant number of questions about this. These questions eventually elicited from the Post Office in November 2020 the now famous ‘Clarke Advice’. That document revealed that, as long ago as in 2013, the Post Office knew that its principal expert witness had repeatedly given incomplete and misleading evidence to the court. He was recorded by the author of the advice as having thereby put the Post Office in breach of its obligations to the court as prosecutor. It was suggested that he should not be used by the Post Office as a witness again. It is the single most damning, and, given its content and circumstances of its disclosure, frankly astonishing document that I have encountered in 30 years’ practice at the Bar.

One of the extraordinary aspects of the Clarke Advice, is that it revealed a curious difference. If you read the judgments of Mr Justice Fraser, you will notice that he devotes a good deal of space to the remarkable fact that a particular Fujitsu expert computer engineer, Mr Gareth Jenkins, was the indirect (and unattributed) source of much of the Post Office’s technical evidence at the *Horizon Issues* trial in 2019. But he was not called as a witness. In their written submissions at the close of the *Horizon Issues* trial, the Post Office gave an explanation for Mr Jenkins not being called as a witness. Remarkably, the reason given to Mr Justice Fraser in 2019 by the Post Office is different from, and does not sit easily with, an alternative explanation; the reason suggested by the Clarke Advice. If you are interested, you can pursue this by considering and comparing the Court of Appeal’s judgment of April 2021 with the judgment of Mr Justice Fraser of December 2019, so far as Mr Jenkins is concerned.

The main point, however, is that in my view any reasonably competent and conscientious lawyer in 2013, in possession of that information – that is to say, the known incompleteness of evidence given to the court by their expert – would immediately have grasped that it could potentially render the conviction of a person, convicted on the basis of evidence given by that Fujitsu employee, unsafe. A prosecutor in the possession of such information has an unqualified duty in law to disclose it to a convicted defendant. My three former clients, Tracy Felstead, Janet Skinner and Seema Misra had to wait a combined total of 44 years to have their appeals heard. That delay is vitally important. This is because, as Lord Rodger of Earlsferry observed (in the Supreme Court): ‘[s]ince the harm [caused by delay] is irretrievable, the European Court of Human Rights (“the European Court”) is correct to regard this right as being of “extreme importance” for the proper administration of justice (*Guincho v Portugal* (1984) 7 EHRR 223, 233, para 38).²⁶ The extraordinary delay in the Post Office appeals, and the proper explanation for it,²⁷ is yet to elicit judicial interest of any kind.

I had been puzzled, until November 2020, as to why, from 2014, the Post Office had not undertaken any prosecutions of subpostmasters and subpostmistresses, when in 2012 it had undertaken more than 40. The Clarke Advice provided my answer. The Post Office in 2013-2014 undertook a major change in its policy. But it was keeping (and has remained) quiet about the reasons for this. (It remains unexplained in the letter of Mrs Paula Vennells CBE (former CEO of the Post Office) to Darren Jones MP,²⁸ Chair of the BEIS Select Committee, dated 24 June 2020, when the change in policy was itself identified.)

²⁵ Mr Justice Fraser named Anne Chambers and Gareth Jenkins in his confidential letter to the Director of Public Prosecutions, dated 14 January 2020. This is known because it is in the appendix of the CCRC’s Statement of Reasons, circulated to journalists on 18 November 2020: <https://www.postofficetrial.com/2020/11/fujitsu-staff-under-criminal.html>

²⁶ *AG Reference No 2 of 2001* [2003] UKHL 68 at [151].

²⁷ The Court of Appeal has recorded that the CCRC found the investigation difficult, which is no doubt true. But that offers no satisfactory explanation.

²⁸ <https://committees.parliament.uk/publications/1621/documents/15462/default/> .

A question to whet your appetite

I will leave you with a question. The importance is timing, so keep in mind the dates.

On 17 December 2014 there was an adjournment debate in Westminster Hall moved by Mr James Arbuthnot MP, now Lord Arbuthnot. (An adjournment debate is a debate without a vote. Such debates are usually on subjects of general public importance.) Second Sight Limited, a specialist firm of forensic accountants, in response to pressure from Members of Parliament, had been appointed two years' previously by the Post Office to look into the Post Office's treatment of its postmasters. Sir Anthony Hooper, a former Court of Appeal judge, had been appointed to oversee a mediation process.

At the December 2014 debate, Jo Swinson MP, then the government minister for Postal Services, having heard from MPs a series of shocking stories of the treatment by the Post Office of its postmasters, said this to Parliament:²⁹

'...in such a situation what I would normally propose doing is to get a team of forensic accountants to go through every scenario and to have the report looked at by someone independent, such as a former Court of Appeal judge. We have a system in place to look at cases ... If any information comes to light during the course of the mediation or the investigations, that suggests that any of the convictions that have taken place are unsafe, there is a legal duty for that information to be disclosed.... I fail to see how action can be taken without properly looking in detail at every single one of the cases through exactly the kind of scheme that we have set up... . We have to look at the details and the facts, and that has to be done forensically. That is why Second Sight, the team of forensic accountants, has been employed and why we have someone of the calibre of Sir Anthony Hooper to oversee the process.'

In 2015, the Post Office told Parliament that it had received no evidence that the conviction of any applicant to the mediation scheme was unsafe. Lord Arbuthnot is on record, in 2020, as stating that the Post Office then had lied to Parliament. To my knowledge he has not been contradicted.

Be that as it may, less than six weeks after the minister's statement to Parliament, on 3 February 2015, Ian Henderson of Second Sight gave this evidence to the Business Innovation and Skills Parliamentary Select Committee:³⁰

'we have seen no evidence that the Post Office's own investigators were ever trained or prepared to consider that Horizon was at fault. That was never a factor that was taken into account in any of the investigations by Post Office that we have looked at.

That is a matter of huge concern, and that is why we are determined to get to the bottom of this matter, because we think that there have been prosecutions brought by the Post Office where there has been inadequate investigation and inadequate evidence to support some of the charges brought against defendants ... this ... is why we need to see the full prosecution files.

When we have looked at the evidence made available to us... I have not been satisfied that there is sufficient evidence to support a charge for theft. You can imagine the consequences that flow from that. That is why we, Second Sight, are determined to get to the bottom of this matter, which we regard as extremely serious.'

So Ian Henderson, in February 2015, said that Second Sight wanted to do exactly what Jo Swinson MP, the government minister, in December 2014 had said the government saw to be *necessary*. Within a month of Mr Henderson's evidence to the Select Committee, in March 2015, the Post Office summarily terminated the engagement of Second Sight and abruptly withdrew from the mediation process.

I raise this question for you to reflect upon. Given what the minister had told Parliament on 17 December 2014, is it plausible that the Post Office terminated the contract with Second Sight without briefing the government, as its owner and sole shareholder, on the reason for it doing so? I think it inconceivable that it did not. Assuming the Post

²⁹ House of Commons, Post Office Mediation Scheme Volume 589: debated on Wednesday 17 December 2014, Column 548WH at <https://hansard.parliament.uk/commons/2014-12-17/debates/14121741000002/PostOfficeMediationScheme> .

³⁰ Oral evidence: Post Office Mediation, HC 935, Tuesday 3 February 2015, 37. The record of this evidence does not appear to be available on the Parliament web site, but is available at https://www.ifsa.org.uk/uploads/5/4/3/1/54312921/17926_1.pdf .

Office *did* brief the government on those reasons, the Post Office either gave a truthful account of the reason for ending the contract with Second Sight and withdrawing from mediation, or else it gave an incomplete and misleading explanation. If the Post Office gave a truthful explanation to the government, that would make the government complicit in a six-year cover-up. On the other hand, if the Post Office gave a misleading explanation to government for terminating Second Sight's appointment in 2015 and for withdrawing from the mediation scheme, why has there not been the slightest suggestion of this from the government, given the seismic shocks represented by Mr Justice Fraser's judgment of December 2019 and, even more so, the Court of Appeal's devastating judgment of 23 April 2021? The Post Office's Board remains largely unchanged.

These are very big and important questions. Until now, I do not believe that they have been addressed.

These questions are not academic. The Post Office's behaviour has destroyed peoples' lives. I have provided the links under suggested further reading (below) to two podcasts by *The Guardian* newspaper on my former client Janet Skinner's experience. That her story reduced the journalist interviewing her to tears, says enough.

You might weep too, but weep for English justice.

I record my thanks to the University of Law and to the Queensland Law Society for inviting me to give addresses on this important subject.

Postscript

On 19 November 2020 the Metropolitan Police Service (MPS) informed the Court of Appeal that the author, on 17 November 2020, prior to the directions hearing on 28 November 2020, had provided to the MPS a copy of the 'Clarke Advice'. The Court of Appeal (Holroyde LJ, Picken, Farbey JJ) threatened the author with proceedings for contempt of court. (The grounds for that threat were never formulated and still remain obscure.) That threat caused the author to feel constrained to withdraw from representing his three clients, but not before he had drafted and filed with the court his argument on why second category abuse of process should be heard by the court as a free-standing ground of appeal. That argument was advanced by Lisa Busch QC in oral submissions, alone on behalf of Tracy Felstead, Janet Skinner and Seema Misra, out of the 42 appellants, and was accepted by the court on 17 December 2020.

On 24 November 2020, the Chair of the Criminal Cases Review Commission, seemingly having received an inquiry, wrote to the Court of Appeal suggesting that the court might consider passing the Clarke Advice to the Metropolitan Police Service who were conducting an investigation. The CCRC expressed its doubt that (in the course of several years of its inquiries and investigations of Post Office prosecutions) the Clarke Advice had been disclosed by the Post Office to the CCRC (later confirmed by the Post Office).

Eventually, five months' later, in late April 2021, the Court of Appeal (very sensibly, perhaps) announced its decision that no further steps were to be taken in connection with the threatened contempt proceedings.

On 7 October 2021, without fanfare and almost no media comment, the Court of Appeal (Criminal Division) in a decision reported *Robert Ambrose v Post Office limited* [2021] EWCA Crim 1443 (<https://www.bailii.org/ew/cases/EWCA/Crim/2021/1443.html>) quietly quashed the criminal convictions of another 11 former Post Office postmasters and a branch manager, convicted of offences of dishonesty on the basis of misleading evidence given by the Post Office in prosecutions between 2003 and 2012. These bring to almost 70 the number of convictions quashed by appeal courts since April. There will be many more.

An apology? There is increasing recognition that a timely apology is essential to a positive, open, and safe culture. This is arguably as apposite to the legal system as it is to other areas of social and professional engagement. Sir David Foskett, a former judge of the High Court and author of the indispensable *Foskett on Compromise* (9th edn, Sweet & Maxwell, 2019), made reference to the contextual appropriateness of an apology in a recent address to the Professional Negligence Lawyers' Association. Speaking of the tragic circumstances of the murder of Sarah Everard

and lessons to be taken from it, the Rt. Hon. Robert Buckland QC, MP, formerly Secretary of State for Justice, referred to a need for a ‘... criminal justice system that is more speedy, and responsive and ready to admit fault than the one we have now’. One is tempted to add, in the context of the Post Office tragedy, ‘quite’. The scale and duration of failure by the courts of the Post Office’s victims should be a matter of widespread public and professional concern. The Post Office was to blame, but is not solely to blame.

Further reading:

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) 1-4

Peter Bernard Ladkin, ‘Robustness of software’, 17 *Digital Evidence and Electronic Signature Law Review* (2020) 15-24

Paul Marshall, ‘The harm that judges do – misunderstanding computer evidence: Mr Castleton’s story’, 17 *Digital Evidence and Electronic Signature Law Review* (2020) 25-48

Paul Marshall, James Christie, Peter Bernard Ladkin, Bev Littlewood, Stephen Mason, Martin Newby, Jonathan Rogers, Harold Thimbleby, Martyn Thomas CBE, ‘Recommendations for the probity of computer evidence’, 18 *Digital Evidence and Electronic Signature Law Review* (2021) 18-26

Michael Jackson, ‘An approach to the judicial evaluation of evidence from computers and computer systems’, 18 *Digital Evidence and Electronic Signature Law Review* (2021) 50-55

The Guardian Podcasts on Janet Skinner’s experience (presented by Anushka Asthana with Janet Skinner and Richard Brooks; produced by Sami Kent and Ned Carter Miles; executive producers Phil Maynard and Nicole Jackson)

<https://www.theguardian.com/news/audio/2021/may/10/exposing-the-great-post-office-scandal-part-1>

<https://www.theguardian.com/news/audio/2021/may/11/the-post-office-scandal-part-2>

BBC Radio 4, 11-part Podcast by Nick Wallis, *The Great Post Office Trial*

<https://www.bbc.co.uk/programmes/m000jf7j/episodes/downloads>

For a detailed and highly critical review of some of the questionable litigation strategies adopted by the Post Office’s lawyers, see Working Paper I, ‘Issues arising in the Conduct of the Bates Litigation’, Evidence-Based Justice Lab, University of Exeter, Professor Richard Moorhead, Dr Karen Nokes, Dr Rebecca Helm (2 August 2021)

<https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2021/08/WP1-Conduct-of-the-Bates-Litigation-020821.pdf>

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