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31 May 2012

Should we all be getting the Twitter 'jitters'? – Be careful what you say online

By Susan McLean and Alistair Maughan

History is littered with examples of the law being slow to catch up with the use of technology. Social media is no exception. As our [Socially Aware blog](#) attests, countries around the world are having to think fast to apply legal norms to rapidly evolving communications technologies and practices.

Law enforcement authorities in the UK have not found the absence of a codified “social media law” to be a problem. They have applied a “horses for courses” approach and brought prosecutions or allowed claims under a range of different laws that were designed for other purposes. Of course, this presents problems to social media platform users, developers and providers who can be by no means certain which legal standards apply.

The use of Twitter and other forms of social media is ever increasing and the attraction is obvious – social media gives people a platform to share views and ideas. Online communities can bring like-minded people together to discuss their passions and interests; and, with an increasing number of celebrities harnessing social media for both personal and commercial purposes, Twitter often provides a peek into the lives of the rich and famous.

As an increased number of Twitter-related cases have hit the front pages and the UK courts, it is becoming increasingly clear that, in the UK at least, the authorities are working hard to re-purpose laws designed for other purposes to catch unwary and unlawful online posters.

It's probably hard to argue that someone who maliciously trolls a Facebook page set up in the memory of a dead teenager or sends racist tweets should not be prosecuted for the hurt they cause. But in other cases it may not be so clear-cut – how does the law decide what is and what is not unlawful? For example, would a tweet criticising a religious belief be caught? What about a tweet that criticises someone's weight or looks? Where is the line drawn between our freedom of expression and the rights of others? Aren't people merely restating online what was previously (and still is) being discussed down the pub?

A range of UK laws is currently being used to regulate the content of tweets and other online messages. At the moment, there is no particular consistency as to which laws will be used to regulate which messages. It appears to depend on what evidence is available. As a spokesman of the Crown Prosecution Service currently remarked, “*Cases are prosecuted under different laws. We review the evidence given to us and decide what is the most appropriate legislation to charge under.*”

COMMUNICATIONS ACT 2003

In 2011, there were 2,000 prosecutions in the UK under section 127 of the Communications Act 2003. A recent string of high profile cases has brought the Communications Act under the spotlight.

Under section 127(1)(a), a person is guilty of an offence if he sends “a message or other matter that is grossly offensive or of an indecent, obscene or menacing character” by means of a public electronic communications network. The offence is

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punishable by up to six months' imprisonment or a fine, or both.

So what is “grossly offensive” or “indecent, obscene or menacing”?

In *DPP v Collins [2006]*, proceedings were brought under section 127(1)(a) in relation to a number of offensive and racist phone calls made by Mr. Collins to the offices of his local Member of Parliament. The House of Lords held that whether a message was grossly offensive was to be determined as a question of fact applying the standards of an open and just multi-racial society, and taking into account the context of the words and all relevant circumstances. The yardstick was the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message set in its particular context. The test was whether a message was couched in terms that were liable to cause gross offence to those to whom it related. The defendant had to intend his words to be grossly offensive to those to whom they related, or to be aware that they may be taken to be so. The court made clear that an individual is entitled to express his views and to do so strongly. However, the question was whether he had used language which went beyond the pale of what was tolerable in society. The court considered that at least some of the language used by the defendant could only have been chosen because it was highly abusive, insulting and pejorative. The messages sent by the respondent were grossly offensive and would be found by a reasonable person to be so.

Proceedings are also being brought under section 127(1)(a) for racist messages. In March 2012, Joshua Cryer, a student who sent racially abusive messages on Twitter to the ex-footballer, Stan Collymore, was successfully prosecuted under section 127(1)(a) and sentenced to two years' community service and ordered to pay £150 costs. (However, interestingly, Liam Stacey, who was sentenced to 56 days' imprisonment for 26 racially offensive tweets in relation to Bolton Wanderers footballer Fabrice Muamba, was charged with racially aggravated disorderly behaviour with intent to cause harassment, alarm or distress under section 31 of the Crime and Disorder Act 1998, rather than under the Communications Act).

Similarly, religious abuse is also being caught under the Act. In April 2012, Amy Graham, a former police cadet, was charged under the Communications Act for abusive anti-Muslim messages posted on Twitter. She awaits sentence.

These cases may appear relatively clear-cut, but there have been some other high profile cases where the grounds for prosecution appear more questionable.

In April 2012, John Kerlen was found guilty of sending tweets that the Court determined were both grossly offensive and menacing, for posting a picture of a Bexley councilor's house and asking: “Which c**t lives in a house like this. Answers on a postcard to #bexleycouncil”; followed by a second tweet saying: “*It's silly posting a picture of a house on Twitter without an address, that will come later. Please feel free to post actual s**t.*” He avoided a jail sentence – instead, he was sentenced to 80 hours of unpaid labour over 12 months, he was asked to pay £620 in prosecution costs, and he was made subject to a five-year restraining order. However, were these messages really menacing or grossly offensive? If he was going to be prosecuted, was the Communications Act the appropriate law or should he have been prosecuted for incitement to cause criminal damage (if he was genuinely inciting others to post faeces) or for harassment?

Even more controversial is the case that has become widely known as the “Twitter joke trial.” Paul Chambers was prosecuted under section 127(1)(a) for sending the following tweet: “*Crap! Robin Hood airport is closed. You've got a week and a bit to get your s**t together otherwise I'm blowing the airport sky high!!*” He appealed against his conviction to the Crown Court. In dismissing the appeal, the judge said his tweet was “*menacing in its content and obviously so. It could not be more clear. Any ordinary person reading this would see it in that way and be alarmed.*” This was despite the fact that Robin Hood Airport had classified the threat as non-credible on the basis that “*there is no evidence at this stage to suggest that this is anything other than a foolish comment posted as a joke for only his close friends to see.*” The case

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attracted a huge following among Twitter users including high profile users such as Stephen Fry and Al Murray. Following an appeal to the High Court in February 2012, it has recently been announced that the High Court judges who heard the case have been unable to reach agreement and so a new appeal will need to be re-heard by a three-judge panel. Such a 'split decision' is extremely unusual. No date has yet been set for the new hearing.

MALICIOUS COMMUNICATIONS ACT 1988

Cases are also being brought under section 1 of the Malicious Communications Act 1988. Under this Act, it is an offence to send an electronic communication which conveys a message which is grossly offensive to another person, where the message is sent with the purpose of causing distress or anxiety to that person.

In February 2012, Sunderland fan, Peter Copeland, received a 4 month suspended sentence after posting racist comments on Twitter aimed at Newcastle United fans. More recently, a thirteenth person was arrested by police investigating the alleged naming of a rape victim on social media sites after Sheffield United Striker, Ched Evans, was jailed for raping a 19 year old woman. The individuals involved have been arrested for offences under various laws, including the Malicious Communications Act.

WHAT'S NEXT?

So, what's next for malicious communications? What else could be caught by the net – sexist remarks, perhaps?

Earlier this month, Louise Mensch, a Member of Parliament, highlighted a variety of sexist comments that had been sent to her Twitter account. In response to this, Stuart Hyde, who is the Chief Constable of Cumbria Police and lead on e-crime prevention for the Association of Chief Police Officers, remarked that the comments made to Mrs Mensch were "horrendous" and "sexist bigotry at its worst." He referred to the offences available to the authorities: "*We are taking people to court. People do need to understand that while this is a social media it's also a media with responsibilities and if you are going to act illegally using social media expect to face the full consequences of the law. Accepting that this is fairly new, even for policing ... we do need to take action where necessary.*" Whether any of these comments will lead to charges remains to be seen.

In another example of online abuse, Alexa Chung, the TV presenter, recently received nasty comments criticising her weight in response to some Instagram photos she had posted on Twitter. She removed the photos in response, but is it possible that these kinds of messages could be considered grossly offensive and therefore unlawful?

We will have to wait and see what other cases are brought under the Communications Act and Malicious Communications Act and what balance is ultimately struck between freedom of expression and protecting individuals from receiving malicious messages. However, it is not just criminal laws relating to communications that could apply to online behaviour. Recent events have also led to broader legislation such as the Contempt of Court Act and the Serious Crime Act being considered in connection with messages posted on Twitter and other social media services.

CONTEMPT OF COURT ACT 1981

If someone posts information online that is banned from publication by the UK courts they could be found in contempt of court under the Contempt of Court Act 1981 and liable for an unlimited fine or a two-year prison sentence. However, as we saw in 2011, the viability of injunctions in the age of social media is questionable. When the footballer, Ryan Giggs, requested that Twitter hand over details about Twitter users who had revealed his identity in breach of the terms of a "super-injunction," hundreds of Twitter users simply responded by naming him again. No users have, to date, been prosecuted for their breach of the injunction.

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In another high profile case, in February 2012, the footballer, Joey Barton, was examined for contempt of court when he tweeted some comments regarding the trial of footballer, John Terry. Under the Contempt of Court Act 1981, once someone has been arrested or charged, there should be no public comments about them which could risk seriously prejudicing the trial. In that case, it was found that Barton's comments would not compromise the trial and therefore he was not prosecuted for his comments.

SERIOUS CRIME ACT 2007

Last summer's riots in England led to Jordan Blackshaw and Perry Sutcliffe-Keenan being found guilty under sections 44 and 46 of the Serious Crime Act and jailed for having encouraged others to riot. Blackshaw had created a Facebook event entitled "*Smash d[ow]n in Northwich Town*" and Sutcliffe-Keenan had invited people to "riot" in Warrington. Both men were imprisoned for four years.

DEFAMATION ACT 1996

Of course, posting controversial messages online is not just a criminal issue. Messages can also attract civil claims for defamation under the Defamation Act 1996.

In March 2012, in the first UK ruling of its kind, former New Zealand cricket captain Chris Cairns won a defamation claim against former Indian Premier League (IPL) chairman Lalit Modi for defamatory tweets. Mr Modi had tweeted that Mr Cairns had been removed from the IPL list of players eligible and available to play in the IPL "due to his past record of match fixing." Mr. Cairns was awarded damages of £90,000 (approximately £3,750 per word tweeted).

CONCLUSION

As in other countries, a whole host of UK laws that were designed in an age before social media – even, in some cases, far before the Internet as we know it – are now being used to regulate digital speech. Digital speech, by its very nature, has permanent records that are easily searchable, making the police and the prosecution's job much easier.

Accordingly, these types of cases are only going to increase, and it will be interesting to see where the UK courts decide to draw the line between freedom of expression and the law. One would hope that a sense of proportionality and common sense will be used so that freedom of expression offers protection for ill-judged comments said in the heat of the moment or "close to the knuckle" jokes, whilst ensuring that the victims of abusive and threatening trolls are rightly protected. In the meantime, users need to be very careful when tweeting and posting messages online, particularly in terms of the language they use. Tone can be extremely difficult to convey in 140 characters or less.

One has to feel sorry for the UK holidaymakers who were barred from entering the United States for tweeting that they were going to "destroy America" (despite making clear to the US airport officials who detained them that "destroy" was simply British slang for "party"). No doubt, they will think twice before clicking that Tweet button in future.

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