

“Fault lines” exposed in the Criminal Justice System

By Neil Hawes QC¹ and Dr Thomas Walford²

Introduction

This article examines whether the *Hamilton* Post Office litigation has revealed new failures in disclosure or simply highlighted existing ones, and whether after a little time since the judgment lessons have been learned or ignored.

We consider the issue from an expert witness’s and legal professional’s perspective. This is a piece designed to provoke debate and we hope to bring about change. We highlight the problems in the way the prosecutions were presented, and disclosure was managed. We consider whether because the Post Office was a private prosecutor that this contributed to the failure.

CPIA Disclosure

The Post Office cases, and indeed the wider history of criminal litigation, unfortunately demonstrates that there continue to be flaws with the Criminal Procedure and Investigations Act 1996³ (‘CPIA’). *Hamilton* and the ensuing Post Office litigation is the largest example of a systemic disclosure failure to date. Unfortunately, these are not an isolated examples. Appellant courts have regularly grappled with disclosure failures⁴ and have done so despite the introduction of the CPIA in 1996, which was specifically brought into law to *improve* disclosure, following earlier high-profile miscarriages of justice.

Over time the CPIA has undergone reviews and adaptations. There has been judge led reviews, specific case type disclosure protocols developed, updated Attorney General’s Guidelines (the last being 31 December 2020) and updated Codes to the CPIA. All of these have been designed to improve and adapt disclosure to changing modern circumstances, including the significant increase in digital material. From the experts’ perspective there have been changes to the requirements in recent years by rules for the Forensic Science Regulator (issue 7 in 2019). These have all been aimed at ensuring material connected to investigations are recorded, retained, reviewed and where relevant, disclosed.

Despite constant amendments and adaptations to the law, flawed disclosure decisions continue to remain a far too familiar problem in modern criminal litigation.

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³ This is the Act of Parliament that controls how disclosure should be provided in criminal proceedings.

⁴ Examples include cases such as the Cardiff 3, Joof [2012] EWCA Crim 1475, Choudhery and Others [2005] EWCA Crim 1788.

The Post Office – The Specific Disclosure Failures

An analysis of *Hamilton* lead many to focus on senior Post Office management and consultant IT services as being the cause of the disclosure failures. Whilst there can be no doubt that fault can be attributed to historical decisions made in each of the appellants cases, is the analysis of what went wrong that simple?

Society expects a system of checks and balances to exist to ensure that false prosecutions do not occur, and when they do, that the disclosure system operates to ensure that we avoid wrongful conviction. In the appeal cases clear disclosure failures were compounded some 736 times⁵ with devastating consequences for the accused. The way the Post Office treated the sub-postmasters caused real trauma. Many were pillars of respectability, who had worked tirelessly for years to provide an essential service to their local communities, but were accused of theft or false accounting. They were people of good character, who had no material motive to steal from their own Post Offices. Evidentially, no banking transactions were available to show that they had taken monies, that their standard of living had changed or that their Post Office was otherwise running deficiently, save for the suggested “loss” of monies identified by the Horizon computer accounting system.

A core disclosure failure was that the Post Office suggested that each of the defendants were the only one to have lost funds in their sub-post office, i.e. the Horizon software was operating normally, accurately and that there were no faults that could have contributed to the shortfall. This was not true. This failure meant each accused did not know or recognise that there were wider problems associated with Horizon. The Post Office materially misled defendants about the accuracy of its systems, where it was incumbent on it under the CPIA to have disclosed the existence of bugs and faults that could have explained such shortfalls. Consequently, each accused’s ability to mount a defence was materially undermined. The failure took time to identify before a common understanding emerged that there were serious problems with the Horizon software. Alan Bates, who formed the Justice for Sub-postmasters Alliance, lead the way in identifying these errors, but valuable time was lost, and early criminal proceedings against many defendants meant they were deprived not only of disclosable material, but for some of them, evidence that demonstrated that they should never have been charged with any criminal offence at all. The Post Offices’ failure to make full and proper disclosure had a contrary effect, with the apparent “successes” of earlier cases only reinforcing the position as to the suggested “regularity” and “accuracy” of Horizon. This in turn gave rise to a body of guilty verdicts by some defendants in subsequent cases, where they were faced with the unenviable task of trying to challenge an apparently accurate accounting computer system.

Now it is known that The Post Office’s stance was simply false and misleading. As an institution (to include its subcontracted supplier, Fujitsu) it knew that it held disclosable

⁵ Figure reported in the press, but no independent check has been possible despite a FoI enquiry to the MoJ.

information about Horizon which it failed to disclose under the CPIA to defendants it was prosecuting.

How did this occur? We look at two possible causes.

(i) Private Prosecution – An Effect?

The Post Office brought the cases as a private prosecutor.

The right to bring a private prosecution remains in statute but it is a right that should once again come under some scrutiny, and *Hamilton* should form an important part of that debate.

There should be disquiet about larger private prosecutions where they are conducted by commercial companies which also involve significant disclosure exercises, and specifically where that organisation has a real and direct financial or reputational interest in the outcome of the proceedings. Where a company is prosecuting a case whilst simultaneously holding the reins of disclosure, which requires it to identify material that undermines its own case against an accused and/or assists that of the defendant⁶ and where it has a direct commercial interest in the outcome that would normally be regarded in any other walk of public life as being an obvious conflict of interest.

Hamilton graphically illustrates how it can and did go terribly wrong.

The Post Office prosecutors made a conscious decision to uphold the rigour and alleged “accuracy” of Horizon. Decisions were made to not disclose material which undermined that position, due, we suggest, in part to its clear financial and commercial self-interest and a desire to avoid a crisis of confidence in the institution. These were all improper and completely irrelevant considerations for the purposes of disclosure.

We suggest that there are therefore strong grounds to conclude that as these were private prosecutions, where self-interest overtook statutory obligations owed to the court and defendants under the CPIA or at common law, that in fact *did* materially contribute to the disclosure failures that took place.

(ii) The Performance of the Lawyers and Judges

We accept that this is a controversial issue. Dr Richard Moorhead has already written⁷ about the performance of lawyers in these cases but we suggest that there is a wider problem.

The problem can be illustrated in several ways, but we single out one example. Many judges will have sat on Post Office cases. Some will have seen a sequence with similar facts. Some may have identified that the presentation of the case was not complete, yet the repeated

⁶ The statutory test for disclosure in the CPIA

⁷ Accountability is key to unravelling Post Office scandal by Richard Moorhead, Thursday September 09 2021, in The Times - <https://www.thetimes.co.uk/article/accountability-is-key-to-unravelling-post-office-scandal-8h32bwvry>

common themes of successive defences did not result in any effective action by the court in individual cases as to the completeness of disclosure. This is not to be critical of judges but rather reflective of the reality of practice. A judge's role is to look at each case in isolation. They do not have the space, opportunity or responsibility to carry out a "wider" holistic review of disclosure over a sequence of cases before them. Any concern about the wider nature of a disclosure exercise by the prosecution over a series of cases – which may be felt by them privately – could not be (or was not) expressed. However, if there were wider concerns about disclosure (which history shows that there should have been) other than questioning the prosecution in each case as to whether disclosure had been completed, there were no formal routes whereby judges could air their wider concerns. The result was that there was no material change in the Post Office's behaviour.

The issue is not isolated to judges. It can be levelled against lawyers and experts alike, many of whom will no doubt also have been personally concerned about the state of disclosure in a specific case and raised specific issues about disclosure with trial judges. Ultimately however they could not bring about disclosure despite frequent applications which were denied.

It is an uncomfortable truth that too often lawyers, experts and judges all failed in pursuing full and proper disclosure from the Post Office. Early instruction of an expert could have materially assisted the defence (and court) to identify the extent to which the prosecution had failed to identify and disclose relevant material.

The Future

An essential question now arises, is the CPIA "*fit for purpose*" and does it continue to be the right way to identify that there might be a disclosure problem in future cases? If it is, can it be used to identify disclosure issues much earlier than it has in the past?

Controversially we suggest that the CPIA is not fit for purpose at present (at least it is not fit in the way the Act has come to be applied by the courts). We come to this conclusion because it is incredible that there was a growing body of Post Office convictions taking place throughout England & Wales where defendants – unconnected to one another save their common employment – were running similar defences about the failure of Horizon yet it was not identified as being a disclosure failure under the Act. Whilst the defendants' claim about Horizon were mis-characterised by the Post Office, importantly the courts failed to see that what lay beneath these defences was a genuine failure with the Horizon system and an ongoing disclosure disaster. This leads to the unavoidable and uncomfortable conclusion that the way in which the court approach its obligations under the CPIA was erroneous as it did not result in the defendants obtaining the protection that proper and fair disclosure was designed to provide.

We acknowledge that in the Post Office cases disclosure had been actively hidden from the appellants. Many may suggest that this was why the CPIA and the courts' application of it did not work. However, that fact alone cannot be relied on as a complete explanation or excuse.

Any statutory system of disclosure which is *genuinely* fit for purpose should be able to cope with errant and or misleading behaviour, even if it is by a malevolent individual or prosecutor. It is precisely that type of failure which the court and the Act *should* be capable of identifying if it is going to provide an effective future safeguard.

We do not see there is an appetite to change the CPIA or introduce new disclosure legislation post *Hamilton*, although we think there could be grounds to do so and to take the opportunity to critically re-evaluate how disclosure should operate in criminal cases in the 21st century. Assuming that there is no immediate clamour for change, in the meantime it falls to the courts and their approach to the CPIA which needs to change to make the present scheme we have more proactively effective.

One of the main problems with the CPIA is that it relies on the prosecutor as the gatekeeper of disclosure to be accurate, enquiring, and truthful. In practise this is coupled with a too frequent presumption by the courts that the prosecutions disclosure is error free. The courts can no longer approach disclosure in this way. The one clear lesson from *Hamilton* is that the courts superintendence of disclosure requires it to be far more critical, and less accepting of the prosecution's disclosure position, and specifically where it is being challenged by the defence.

Nor should *Hamilton* be regarded as being a "localised" disclosure failure specific to its own facts and circumstances. To think of it in that way misses the core learning point that should emerge from it, which is that the present disclosure system in the way that it has been operated has on too many occasions lead to failure. If there is not action by the courts around this, we will miss a golden opportunity to ensure that similar failures are not repeated. *Hamilton*, in our view, exposed this clear fault line in disclosure.

The consequences of the Post Office litigation strongly suggests that lessons *still* remain to be learned, and that it will not be viewed as a catalyst for change. Errors of the past should identify solutions for the future. A disclosure system that is fit for the 21st century, must be capable of identifying failures not simply after the event, but as and when they are occurring. If issues or failures can be quickly identified, they can be remedied, avoiding the implications of a wrongful conviction.

Conclusion

We suggest that an appropriate legacy of *Hamilton* to prevent the reoccurrence of these failures should include among other matters, the following:

- A review of the right to privately prosecute cases where there are large and complex disclosure exercises associated with them. Consideration should be given to whether disclosure in these cases should be handled by an independent third party answerable to the court.
- There is a clear need for a more proactive judicial overview of disclosure to take place generally in *all* prosecutions (private or State). This should *critically* examine the

state of the prosecution's disclosure. The introduction of such an overview system should extend well beyond that which is presently undertaken at present in cases at PTPH or stage ends. It must involve a genuine and vigorous "health check" of disclosure before the trial starts. It requires searching judicial questions to be asked and answered by someone in the prosecution who is accountable.

- The CPIA *might* be the foundation for continued disclosure in the future, *but* it cannot be regarded as being sufficient unless there is a significant and real sea change in the approach to it by the courts to ensure the purpose of the Act is met. Disclosure now requires a much higher level of superintendence and *Hamilton* illustrates why.
- Where disclosure is stated to be complete, the prosecutor should sign a witness statement to that effect. There must be greater identification of and accountability for specific disclosure decisions to underline its importance.
- Where there are failures of disclosure, the courts should be ready to ensure that those failures have consequences, which can include, if the need arises, stopping cases entirely. A failure by the court to sanction, only encourages future non-compliance and risks miscarriages of justice.
- There should be an active review of the courts ability to appoint their own expert where issues are complex and or there is a suspicion that appropriate evidence or disclosure may not be being adequately interrogated. Lessons could be learned from civil litigation in this regard. An expert can play a vital role where they are instructed early in a case. They can assist the court with the type of material they would expect to see in their field of expertise aimed at aiding the courts' examination of the accuracy of ongoing disclosure. The expert's duty will always remain to the court. The use of an expert is not limited to non lawyers. There are existing models which can be adapted for this purpose, where a courts' instruction can include third party lawyers for review purposes such as independent counsel that undertakes an LPP review or where special counsel is instructed. Appointments by the courts for these purposes should not be confined to being a "rare event" as defined by *R v. Austin (Herbert)* [2014] 1 WLR 1045. Our proposal requires the courts to embrace a new proactive and critically enquiring review process.
- There must be adequate funding to support each element of an enhanced disclosure system.
- Consideration should be given to the Ministry of Justice centrally collecting information on cases where there are a series of prosecutions across the country. Data should be centrally recorded and made available to judges and justices who are hearing these cases so that they are alive to possible common themes and issues, which will allow for a wider overview of disclosure to be conducted.

Post Script

The lessons of the Post Office litigation are there to be learned. Is there an appetite to do so? We suggest that the *Hamilton* failures must not be ignored. If they are, there is a real danger that history will continue to repeat itself with more innocent people being wrongly prosecuted

and convicted of crimes they have not committed. Now is the time for a review of the way the CPIA is applied, so that judges, professionals, experts and defendants alike can all be assured cases are conducted on the basis that the parties have a fair trial and have received all relevant and disclosable material.

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