# [GB] When is Public Communication “Grossly (Including Racially) Offensive”?

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A recent decision of the House of Lords, although arising out of the use of the telephone, is nonetheless of general audiovisual media interest as the case involves the act of sending a message over the public communications network. It clarifies the meaning and application of “grossly offensive”, including racially offensive, under the Communications Act 2003.

Section 127(1)(a), prescribes that “a person is guilty of an offence (a) if he sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character” (i.e. otherwise than by means of a programme service).

The wording has its origins in section 10(2)(a) of the Post Office (Amendment) Act 1935.

The question in the case was: although the sender of the message “was entitled to make his views known, and entitled to express them strongly” could he do so by using language “...which is beyond the pale of what is tolerable in our society”?

Over a period of two years, a middle-aged male made telephone calls (and left messages) to the offices of his Member of Parliament. The man held particular views on immigration and asylum policy and the provision of public support to immigrants and applicants for asylum. His expressions (described in court as “ranting and shouting”) included references to "Wogs", "Pakis", "Black bastards" and "Niggers". One person who heard the messages found them shocking and alarming, another did not, and a third is said to have been depressed by them. As a matter of fact, none of the people who heard the messages was a member of an ethnic minority.

The trial court found that the use of the terms was fuelled by the man’s frustration at how his concerns were being addressed. It did not find the man guilty however, arguing that: “The conversations and messages left were 'offensive' but not 'grossly' offensive. A reasonable person would not find the terms used to be grossly offensive.”

On appeal to the High Court, the judge was of the view that, in principle, the words complained of were grossly offensive. But, he recognised the dilemma faced by the lower court: it appreciated, on the one hand, that Parliament had narrowed freedom of expression by criminalising some speech but, on the other hand, it had to ask whether, in the specific circumstances, there was the “added value” that would justify criminalising the respondent’s behaviour (i.e. the speech was not merely offensive but “grossly” so). He found that the lower court was entitled to decide as it did. In general, he said that: “the reason for criminalising certain messages sent by post, telephone or public electronic communications network was to protect people against receipt of unsolicited messages which they might find seriously objectionable.” Thus, the legislation “…struck a balance between the respect for private life enjoined by article 8 and the right of free expression protected by article 10.

He distinguished between the message and its content. It is the message which is the “basic ingredient” of the crime, because the “same content may be menacing or grossly offensive in one message and innocuous in another”. For example, “A script writer e-mailing his or her director about dialogue for a new film is not likely to fall foul of the law, however intrinsically menacing or offensive the text they are discussing: “Here, as elsewhere, context is everything."

The judge analysed the meanings, in the communications legislation, of obscene, indecent, and menacing messages and concluded that grossly offensive messages “…can be seen to lie somewhere near the centre of the spectrum. What is offensive [an ordinary English phrase with no special legal content] has to be judged…By the standards of an open and just multi-racial society” and then applied to the facts of the case.

Does any telephone message fall into this category? This depends “not only on its content but on the circumstances in which the message has been sent and, at least as background, on Parliament's objective in making the sending of certain messages a crime.”

In the case at hand, relevant facts were:

- The man neither had any idea, nor did he care, whether the person he was addressing, or who would pick up his recorded message, would be personally offended - grossly offended - by his abusive and intemperate language;

- It was his Member of Parliament to whom he was trying to address his opinions;

- The man didn’t actually speak to any ethnic minority member and no messages was picked up by one either;

-It is not every transmission of grossly offensive language which is punishable, but only messages which, in their particular circumstances and context, are to be regarded in the wider society which the justices represent as grossly offensive and which secure Parliament's essential objective of protecting people from being involuntarily subjected to grossly offensive messages.

On appeal to clarify the law, the highest court disagreed with the lower Court. Whether a message is grossly offensive is a question of fact. In deciding, judges should apply "the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances…Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ('Old Contemptibles'). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates."

The House of Lords found that the trial court: "may have placed some weight on the reaction of the actual listeners to the messages, *rather than considering the reactions of reasonable members of society in general"* " (emphasis added).

Amongst the Court's key findings are:

- The purpose of Section 127 is "…not to protect people against receipt of unsolicited messages which they may find seriously objectionable….[but]…to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society." The former purpose is caught by section 1 of the Malicious Communications Act 1988.

Section 1(1) of the 1988 Act (as amended by section 43(1) of the Criminal Justice and Police Act 2001) provides that:

"Any person who sends to another person (a) a letter, electronic communication or article of any description which conveys (i) a message which is . . . grossly offensive . . . is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should . . . cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated".

Thus: "A letter dropped through the letterbox may be grossly offensive, obscene, indecent or menacing, and may well be covered by section 1 of the 1988 Act, but it does not fall within the legislation now under consideration" [i.e., the Communications Act 2003]. So, if one racist talks to another over the telephone,

using language as used in the case, there would be no offence under the Malicious Communications Act "but it *would* constitute an offence under section 127(1)(a) because the speakers would certainly know that the grossly offensive terms used were insulting to those to whom they applied and would intend them to be understood in that sense" and, added the Court, neither law would be engaged if the racists were talking to each other, even in the street.

2. The *actus reus* of the offence, is:

"the sending of a message of the proscribed character by the defined means. The offence is complete when the message is sent" so, even if a voicemail is erased before anyone listens to it an offence has been committed. Also, the criminality of the behaviour does not depend on whether, if the message is received, it is received by someone who is, or who is not, deeply offended: "On such an approach criminal liability would turn on an unforeseeable contingency".

3. The *mens rea* is not specified in the section. If the offence is not to be an absolute offence, what else must be proved beyond an intention to send the message?

"the defendant must intend his words to be grossly offensive to those to whom they relate, or be aware that they may be taken to be so."

On the one hand:

"Parliament cannot have intended to criminalise the conduct of a person using language which is, for reasons unknown to him, grossly offensive to those to whom it relates, or which may even be thought, however wrongly, to represent a polite or acceptable usage."

On the other hand:

"a culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender."

4. Concerning Article 10 of the European Convention, the House of Lords concluded that Section 127 (1)(a): "does interfere with a person's right to freedom of expression. But it is a restriction clearly prescribed by statute. It is directed to a legitimate objective, preventing the use of a public electronic communications network for attacking the reputations and rights of others. It goes no further than is necessary in a democratic society to achieve that end. Effect must also be given to article 17 of the Convention…"

***Director of Public Prosecutions (Appellant) v. Collins (Respondent)***

http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060719/collin-1.htm