Romance Fraud, Catfishing and the Law: Is there really nothing that can be done?

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This Presentation

• Focuses on the issue of ‘catfishing’ which is also known as Romance Fraud.

• Questions whether it is true that it is only a financial crime.

• Briefly considers new ways that the behaviour has branched out.
Catfishing

- Perhaps the first issue to consider is what catfishing is.

- Why does it challenge the law?
Catfishing

• The online urban dictionary(!) defines catfishing as:

  To lure (someone) into a relationship by adopting a fictional online persona.

• The growth of internet dating has meant that this is becoming an increasing problem.

  – Ascertaining the problem is however extremely difficult as it is under-reported.
Victims of Catfishing

• Defining who is the ‘victim’ is quite complicated (as we will see).

• Stereotypical belief is a middle-aged+ female.

• Reality is it is from all backgrounds.
  – LGBTQ+ community is considered particularly vulnerable.
  – Online dating is principal recruitment ground although others target speed-dating, singles events etc.
Catfishing

- Press has turned the term into a catch-all for romance fraud, but that’s not quite true.

- Key features:
  
  - False identity.
  
  - Establishes a romance (usually online).
  
  - For ulterior motive.
    - Financial.
    - Sexual.

Some doubt as to whether this is always necessary.
Catfishing

- Why is there any doubt as to whether catfishing is illegal?
Catfishing

• Fraud.
  – Easiest issue to proceed with.
  – Where there is tangible loss then the *Fraud Act 2006* is completely fit for purpose.

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Catfishing

• Not all frauds demonstrate financial loss (although we’ll come back to that later as that may not be true).

• Also, in many instances, the financial element is the bit that people are least concerned with.

• It is the abuse of trust that makes them angry. Where there has been sexual contact, that anger is greater.
  – Is there anything other than fraud that would apply?
Sexual Offences

• The difficulty with catfishing is that there is genuinely ostensible consent to sexual activity.

• X agrees to have sexual activity with y.

• The question is whether it matters that x believes that y is actually somebody else or is doing something for a different reason.

  – In other words, is consent set aside under these circumstances?
Sexual Offences

• SOA 2003 introduced a statutory definition of consent:

A person consents if he agrees by choice, and has the freedom and capacity to make that choice (s.74, SOA 2003).

– By itself, this does not assist us in understanding how fraud affects consent.

– One reading is it does not. So long as a person chooses to have sex with x then consent is not vitiated just because a lie has been told.

– The other reading is that the circumstances of the consent are relevant to the freedom and capacity to give consent.
Sexual Offences

• Do lies alter consent?
  – Assange v Sweden (2011).
    • “[The victim] chooses to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by defendant’s deception” (per Leveson LJ).
    • Factors such as wealth “would obviously” not vitiate consent.
Sexual Offences

• Jonathan Herring believes that any ‘material fact’ should vitiate consent.
• He defines this as:

  If V is mistaken about a fact and, if he or she had known the truth about the fact, would not have given consent, then it should be held that the deception vitiates the consent.

A and B meet on an internet site and have been chatting ever since. B believes that A is a major in the Royal Marines and is to be shortly discharged. They meet on a couple of occasions and on the last occasion they have sexual intercourse when A says that he wants to marry B and move in with her when he leaves the Marines. In fact, B is not a Royal Marine and is simply setting all of this up as a ‘back story’ whereby he can later ask for help in selling his house, thus defrauding B.
Sexual Offences

• To be clear, when we talk about vitiating consent we mean that the conduct would amount to:

  – Rape.

  – Sexual assault.

Is that a problem?
Sexual Offences

• Before the SOA 2003 introduced there was a solution.
  – Section 3, Sexual Offences Act 1956 criminalised the procurement of a woman by false pretences or false representations to have sexual intercourse.
  
  – It was repealed and not replaced by the SOA 2003.

  – However, there is no equivalent in the SOA 2003.
    • Nearest is arguably s.62 (Committing an offence with intent to commit a sexual offence) but that would not work as it is still premised on the basis of committing a substantive offence, i.e. a lack of consent.
Sexual Offences

• Does it make any difference if the sexual activity was virtual?

• Law would still (primarily) be the SOA 2003 and requires a vitiation of consent.

• This time the most likely offence would be causing a person to engage in sexual activity without consent.

• Again, however, proving vitiating consent could be tricky...
Sexual Offences

A meets B online. They begin to flirt and eventually A agrees to pose naked in front of a webcam. She believes B to be a white, 20-year-old male. In fact, he is a 22-year-old black man.

A meets B online. They begin to flirt and eventually A agrees to pose naked in front of a webcam. She believes B to be a 32-year-old Naval officer. In fact, he is a 53-year-old unemployed man.

A meets B online. They begin to flirt and eventually A agrees to pose naked in front of a webcam. She believes B to be a male, 44-year-old banker. In fact B is a female, 44-year-old banker.
Pornography

- Sexting is prevalent.
- Research suggests that one thing that worries victims of catfishing is about what happens to sexual photographs or footage that is sent.
- Can anything be done here?

A and B meet on an online dating site. They chat frequently and A sends intimate pictures of herself to B (believing she has received photographs from B in return). Unbeknown to A, B is actually a trickster. He has kept the photos and passed them onto picture-hosting sites who pay him for the photos. He never uses A’s real name and A is completely unaware that the images are being used in this way.
The Impact on the Victim

- Catfishing has significant impact on its victims.
- Feelings of embarrassment and distress.
- Not infrequently blamed by their families who believe them to be stupid and to have lost an inheritance.
- Feelings of betrayal.
  - It has been likened to bereavement.
Non-fatal offences

• Psychiatric harm is recognised by the law.

• Psychological harm (e.g. distress) is not recognised by the law.

• Need to be able to demonstrate that D’s actions caused recognised psychological illness *and* that he intended or (more likely) was reckless as to that.
Catfishing: A hidden crime?

- Whilst catfishing has attracted media attention thanks, in part, to a small number of brave victims, the true extent is unknown.

- It is thought that it is a chronically under-reported crime.

- Why...?
Catfishing

• Sadly there are some reports of similar responses from police officers when the matter was reported.

• The shame and embarrassment of being “that stupid” means that less likely to report it unless there has been financial loss.
Catfishing and the other victim

• It will be remembered at the beginning that I drew a distinction between catfishing and other romance fraud.
• Catfishing is considered to involve a stolen identity.
• This creates another victim.
Stolen Identity

• Using someone else’s picture and name for catfishing may not seem much but can have major effect.

• Belief that a person is cheating on someone.

• Being mistaken for the culprit, meaning a string of very angry people believing you used them.
Stolen Identity

- Law again focuses on fraud.

- Importantly, however, the wording of the Fraud Act 2006 requires only an intention to make a gain or cause loss.
  - No requirement to actually make a gain or loss.
  - Interesting question about why else they would steal someone’s identity...
  - If they foresaw that they would be taken out for dinner then that would suffice.
  - If, however, they intend it to get sex then the Fraud Act 2006 would not apply.
A “new” phenomenon?

• The last week has seen attention turned to the notion of pigging.

• Again, it is described as “new” but there are reports of this behaviour for 5+ years.
Pigging

• A person (usually a man) asks out another (usually a woman) on a date. The person asked out is considered to be less than aesthetically pleasing.

• They agree to meet up and the victim travels to the date.

• She is stood up and usually some reference is made to the fact that she has been pigged (for example, the sending of a pig emoji).
Pigging

What is the harm that is caused?

- Emotional distress.
- Embarrassment.
- Financial loss.
- Humiliation (where posted).

No liability

Fraud Act 2006?

Communications?
Pigging: Financial Loss

- If a person pays to travel to the date, or purchases clothes etc? does it become a financial crime?

**s.2, Fraud Act 2006**

Dishonestly

Makes a false representation.

Intending it to cause a gain to himself or another, or a loss to another (or expose a person to a loss).

Is dishonesty present?

False representation would seem to be present if person never intends the date.

Remember, it’s not whether loss or gain is caused, but whether it is his *intent*. It would include oblique intent so depending on the nature of the invite it is possible this will be satisfied, but sometimes it will not.
Pigging: Financial Loss

• Dishonesty has no statutory definition so we are left with *R v Ghosh* (1982).

  a) Would a reasonable and honest person consider the actions of the defendant to be dishonest? If so,
  b) Does the defendant realise that his actions would be considered dishonest by reasonable and honest persons?

• It is surprisingly difficult to be able to answer that question.
• If dishonesty equates with deceit then it is probably satisfied.
Pigging: Humiliation

- One of the features of pigging is that in some instances the person is ‘shamed’ through the posting of the messages to social media etc.
- Does that provide us with an offence?

s.1, Malicious Communications Act 1988.
Sends...a message which is indecent or grossly offensive, a threat or information which is false and known or believed to be false...if one of his purposes...is to cause distress or anxiety to the recipient or to any other person...he intends it to be communicated.

s.127(1), Communications Act 2003.
Sends...a message or other matter that is grossly offensive, or of an indecent, obscene or menacing character.
Romance Frauds and the Criminal Law

• This presentation has shown that romance frauds pose challenges for the criminal law.

• Catfishing may be a criminal act, but it depends on whether D had any intention to cause a (pecuniary) gain or loss.
  – If they did not, then it is unlikely that the criminal law could intervene.

• The person whose identity is stolen will also have limited recourse to the criminal law if there is no financial element.
Romance Frauds and the Criminal Law

• Pigging also requires a financial element for a crime to be triggered.

• Non-financial romance frauds however raise difficult issues for the criminal law.
  – Before the Internet how prevalent was this?
  – If A met B in a pub and A had sex with B because she believed that B was a wealthy business man whereas he is a low-level employee, was that a matter for the criminal law?
  – Should it be a matter for the criminal law?
Romance Fraud and the Criminal Law.

• There is undoubtedly pressure to criminalise catfishing.

• The argument is that catfishing is a breach of the sexual autonomy of an individual.

• Our current sexual offences laws do not appear to protect all forms of breaches of sexual autonomy.

• The old s.3, SOA 1956 provided a platform but it would need to be gender-neutral.
  – However, how does one draft a law that criminalises this but does not criminalise the art of seduction...?
Thats all Folks!

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