THE FAULT REQUIREMENT OF INDECENT PHOTOGRAPHS OF CHILDREN

Alisdair A. Gillespie*

In November 2019, a senior Metropolitan Police officer was found guilty by a jury of possessing an indecent photograph of a child (IPoC).[1] Acting Chief Superintendent Williams accepted that a video depicting the sexual abuse of a child was found on her mobile telephone, but she denied knowing what the video was. At the time of her arrest and conviction, press attention focused on how someone who had not seen an image could be convicted of a serious offence. As will be seen, it was not that simple, but the case reinforced the importance of fault for these offences.

This chapter considers the fault requirement for IPoC offences.[2] It will consider the mental requirement for those who possess, take, make, or disseminate IPoCs. It will be seen that it differs between the offences in an inconsistent way. This chapter also considers how the statutory defences to some offences affect the fault requirement. It concludes that the law is ripe for reform.

THE OFFENCES

Before considering the fault requirement, it is necessary to identify the offences themselves. Under the law in England & Wales, there are two relevant statutes; the *Protection of Children Act 1978* (PoCA) and the *Criminal Justice Act 1988* (CJA).

PoCA 1978 provides the basic definitions for both it and the CJA 1988. An IPoC is a photograph (including a pseudo-photograph[3]) that shows a child and is indecent.[4] A 'child' is a person

* Professor of Criminal Law and Justice, Lancaster University.

[1] See, for example, 'Police chief convicted for having child sexual abuse image on phone' (2019) *The Guardian*, November 19.

[2] Indecent Photographs of Children are the legal terms used for photograph-based Child Sexual Abuse Material (that which would previously have been known as 'child pornography').

[3] A pseudo-photograph is 'an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph' (PoCA 1978, s.7(7)). The definition is not relevant for our purposes, but an explanation can be found in Alisdair A. Gillespie, *Child Pornography: Law and Policy* (Routledge 2012) at 48-50.

[4] *Protection of Children Act 1978*, s.7(3).

under the age of 18.[5] 'Indecent' is not defined in the statute and has been left to the courts to develop, which will be discussed briefly below.[6]

PoCA 1978, s.1 sets out a series of offences:

> (1) Subject to sections 1A and 1B, it is an offence for a person-
> (a) to take, or permit to be taken, or to make, any indecent photograph or pseudo-photograph of a child; or
> (b) to distribute or show such indecent photographs of pseudo-photographs; or
> (c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or
> (d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so.

Depending on how one counts, there are upward of twenty offences created by s.1. That said, the principal actions are creation ('take', 'make'), dissemination ('distribute', 'show') and possession with intent to distribute or show. The CJA 1988 is shorter and establishes the offence of simple possession.[7]

Digital technology has led to the conflation of PoCA 1978 and CJA 1988. Where an image is downloaded from the internet (to a device or screen), should this be considered possession or making? In *R v Bowden,*[8] the Court of Appeal held that it constitutes making because downloading causes a file to exist. While technically correct, the image itself is not new, and the file folder would seem the electronic equipment of a photo album. While at sentencing, downloading is considered the equivalent of possession,[9] there are different fault

[5] *Protection of Children Act 1978*, s.7(6). At the time the legislation was passed, the relevant age was 16.
[6] A more comprehensive analysis can be found in Gillespie, n 3 above, pp.51-59.
[7] *Criminal Justice Act 1988*, s.160(1).
[8] [2001] QB 88.
[9] *Sexual Offences: Definitive Guideline* (2014, Sentencing Council) *76*.

requirements between 'making' and 'possession', meaning that *Bowden* can have significant consequences for the defendant.

FAULT AS TO ACTION

The first issue to consider is whether a fault element accompanies the action. On the face of it, neither PoCA 1978 nor CJA 1988 imposes a fault requirement. However, in *DPP v Atkins*[10] the Divisional Court rejected a submission that the offences were crimes of absolute liability.

Making

The court in *Atkins* held that making requires intent, holding 'to encompass also the unintentional making…would go altogether too far'.[11] Thus, a person must intentionally make (either by downloading,[12] calling an image to the screen[13] or otherwise making a pseudo-photograph[14]) an IPoC.

There then began a shift of emphasis. In *R v Smith*[15] the Court of Appeal was asked to rule on a case where a person had been sent an email containing an IPoC. The email was not unsolicited, but the appellant argued that the offence of making was not satisfied by simply opening an email. After considering *Atkins*, the court held:

> *[the] mens rea is that the act of making should be a deliberate and intentional act with knowledge that the image made is,* ***or is likely to be*** *an indecent photograph or pseudo-photograph of a child* [my emphasis].[16]

In this case, the appellant had previously swapped material and asked for a particular child's photos. There could be no doubt that he appreciated that, at the very least, the email was likely to include an IPoC.

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[10] [2000] 1 WLR 1427.
[11] *Ibid*., p.1438 per Simon Brown LJ.
[12] *R v Bowden* [2001] QB 88.
[13] *R v Jayson* [2002] EWCA Crim 683.
[14] A pseudo-photograph can be made in various ways, usually using graphic manipulation software. See, for example, Gillespie, n 3 above, at 49.
[15] [2002] EWCA Crim 683.
[16] *Ibid*., at [34].

'Likelihood' was arguably extended in *R v Harrison.*[17] The appellant was convicted of several counts of making IPoCs. He admitted to browsing pornography websites. Some of the images found on his computer were potentially created through 'pop-ups', i.e., where windows or images are automatically opened when viewing a website. He indicated that he was shocked to see the images; he had not intended to obtain IPoCs and did not know they were being stored in the computer's cache.

In dismissing the appeal, the Court of Appeal noted that the jury must have rejected the suggestion he did not know how the cache operated.[18] The Court also rejected the suggestion that he did not realise that pop-ups could occur when browsing the pornographic website. Therefore, the only question was whether he knew that it was likely that some of the pop-up images would be of children. While he denied being interested in child pornography, there was sufficient evidence before the jury to decide that this was not true.[19]

The decision in *Harrison* could be summarised as a person knowingly allowing pop-ups, knowing that they are, or are likely to be, IPoCs. Put like that, *Harrison* seems in line with *Smith*. The variance in terminology between intention and knowledge is unhelpful, but the principle remains. When it was said in *Atkins* that a person should not be guilty of unintentional copying, the court meant that a person who did not *know* that the images were being created could not be guilty. Here, the defendant did know that images would be created, so the only question was the likelihood that they portrayed children.

Several subsequent decisions have confirmed this shift to likelihood,[20] but, notably, the courts have never explained why they extended the *mens rea*. That said, the court in *Atkins* was not required to consider likelihood as the appellant admitted deliberately downloading IPoCs.

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[17] [2007] EWCA Crim 2976.
[18] *Ibid*., at [17].
[19] In particular, he admitted searching for 'Lolita' images but denied that he knew that was a euphemism for underage girls, something that is somewhat improbable, not least because that was the central premise of Vladimir Nabokov's work.
[20] Alongside the cases cited previously, see R *v Steen* [2014] EWCA Crim 1390 and *R v W(P)* [2016] EWCA Crim 745.

While it has been noted that there is little commentary on 'knowledge',[21] there is at least some authority to suggest it should be constructed narrowly.[22] Indeed, some have argued that this means that terms such as 'likely' should not be used as it potentially permits suspicion or belief.[23] In the offence of handling stolen goods, it has been held that D believing that it is likely that the items are stolen will not suffice.[24] However, that is in the context of Parliament setting the fault requirement as knowledge, and nothing in the Act suggesting it envisaged anything other than this.

The same is not true here. Parliament did not initially include *mens rea*, leaving it to the courts. 'Knowledge' in its true sense would be a very high threshold. The courts have consistently noted that the overarching aim of PoCA 1978 is to protect children[25] and accepted that this will sometimes require a tough response. 'Likely' can be the equivalent of recklessness. Public policy almost certainly justifies the criminalisation of someone reckless as to whether they access IPoCs.

Takes

Section 1(1)(a) also criminalises the taking of an IPoC. The *mens rea* for this offence is simpler. In *R v DM,*[26] it was confirmed that an offender must take a photograph deliberately or intentionally. In *R v Graham-Kerr,*[27] the Court of Appeal, albeit *in obiter*, stated that where a person took a photograph accidentally, they could not be guilty.[28] Two examples were presented. The first (implausibly) is when a person stumbles and accidentally presses the shutter. The second is where a photograph is deliberately taken but, unknown to the

[21] David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15 edn, Oxford University Press 2018) 114.
[22] *R v Griffiths* (1974) 60 Cr App R 14.
[23] Ormerod and Laird, n 21 above, at 115.
[24] *R v Griffiths* (1974) 60 Cr App R 14.
[25] See, for example, *R v Land* [1999] QB 65 at 70.
[26] [2011] EWCA Crim 2752.
[27] [1988] 1 WLR 1098.
[28] *Ibid*., at p.1104.

photographer, a child is featured. Again, the latter seems implausible, although it may be that, for example, the child is in the background of an indecent photograph.[29]

Could 'accidentally' cover situations where the child shifts pose, making an innocent photograph indecent? *Graham-Kerr* did not rule this out, but the later decision of *R v W(P)*[30] suggests the answer is 'no'. It considered whether it was necessary to prove that the defendant knew that the photograph would, or would likely be, an IPoC. The court held it was not,[31] stating the only requirement was that a person deliberately takes a photograph. The logic of this is presumably the fact that taking a photograph produces original material, requiring a strict approach. While worthy, it does mean that those who innocently capture a photo when the subject moves may have to rely on prosecutorial discretion.[32]

Distributes or Shows

In *R v Price,*[33] it was held that the fault element for dissemination is that the defendant must knowingly or intentionally distribute images. As there are statutory defences to distribution or showing,[34] the Court of Appeal held that the prosecution doesn't need to prove that D knew the images were or were likely to be IPoCs. To require otherwise would leave no room for the statutory defences, something expanded on below.

Possession

While s.160 creates an offence of simple possession, the offence itself is not necessarily simple. It has been noted that the digital age has caused problems for the concept of possession. In *R v Lambert*[35] , the House of Lords held that possession meant that an item was either in his physical custody or control. 'Custody' can be challenging in the digital context,

[29] A literal interpretation of PoCA 1978 does not require the child to be posed indecently. It suffices that there is an indecent photograph, and a child is seen in that image. This is to cater for situations where, for example, a child is photographed watching two adults engaging in sexual activity.
[30] [2016] EWCA Crim 745.
[31] *Ibid*., at [31].
[32] Presumably, the time it takes to dispose of such an image is likely to be a factor the prosecution will consider when deciding whether to prosecute.
[33] [2006] EWCA Crim 3363.
[34] *Protection of Children Act 1978*, s.1(4). Discussed further below.
[35] [2001] UKHL 37.

where files may be found on cloud storage, but 'control' is more readily understood. Control also resolves difficulties where more than one person uses a device.[36]

In *R v Atkins* the Divisional Court held that 'knowledge is an essential element in the offence of possession…so that a defendant cannot be convicted where…he cannot be shown to be aware of a cache of photographs in the first place'.[37] In other words, a person must know that they have custody or control of the images.

The limits of this statement should be understood. It does not mean that D must know that he has an IPoC. As a general principle, the criminal law typically does not require that D knows the exact nature of what he has, it suffices that he recognises that he has *something*.[38]

Assuming that D is aware that he possesses electronic data, does he need to know that the data contains an image or simply that he possesses computer files? While on most computers, it would be obvious to a user whether a file is an image, video, audio clip or document, that does not help the user understand what is in the file. So, for example, a file that is ostensibly a word processor document may contain an image, yet the file type will show as a document.

One reading of *Warner* is that a person must have had the ability to determine what the 'thing' is and that if they did not have that opportunity, there is not the requisite knowledge for possession. In *McNamara,*[39]the Court of Appeal distanced itself from this remark, although Simester et al believe this was because of the existence of a statutory defence.[40] In *Lewis*[41] , the principle was turned on its head. The Court of Appeal stated that a person who was not aware of an item was still in possession if they had the opportunity to discover the

[36] As more than one person can exercise control over a device or file.
[37] [2000] 1 WLR 1427 at 1440.
[38] *R v Warner* [1969] 2 AC 256 and see Ormerod and Laird, n 21 above, at 163.
[39] (1988) 87 Cr App R 246.
[40] Andrew P. Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (6 edn, Hart Publishing 2016) 171.
[41] (1987) 87 Cr App R 270.

item and identify what it was. However, that is still premised on the *actus reus* point that a person must have custody of the item.[42]

How does this apply to s.160? In *Atkins,* the court expressly referred to 'photographs', suggesting that is the relevant knowledge. However, there was never any real doubt that the defendant knew that the files were IPoCs. The same is true in other cases where the knowledge of IPoCs is not an issue.[43] The Court of Appeal clarified the position in *R v Okaro (No 3)*.[44] There, the Court made express reference to 'files' rather than to images or photographs. The Court held, 'it cannot be the law that a defendant must be shown to be aware of all the relevant digital file on his device'[45] because to do so would mean there is no room for the statutory defences. They continued, '…we are clear that possession is established if the accused can be shown to have been aware of a relevant digital file or package of files which he can access, even if he cannot be shown to have opened or scrutinised the material'.[46]

Thus, so long as a person is aware that they have digital content, they are deemed to possess these files regardless of whether they were accessed. The latter words in *Okaro* echo the decision in *Lewis*. While statutory defences may apply for the truly innocent, they are limited in scope. The decision in *Okaro* undoubtedly places a significant burden on the defence. They bear the burden of proving that the defendant had no cause to suspect that a file they were aware of contained an IPoC.[47]

Deleted files

Following *Atkins,* a person must know that he possesses files to show control. Developments in computer forensic technologies mean that it is possible to recover files that a user has

[42] *R v Kousar* [2009] EWCA Crim 139.
[43] See, for example, *R v Porter* [2006] 1 WLR 2633 where the issue was whether D remained in possession of files that had been deleted but remained recoverable from the device.
[44] [2018] EWCA Crim 1929.
[45] *Ibid*., at [43].
[46] *Ibid*., at [45].
[47] Of course, where a file does not obviously appear to contain an image, the jury may be more likely to believe the defendant.

deleted. These images will show that someone has accessed or downloaded IPoCs. However, it does not follow that it will be possible to identify who downloaded an image. Can it be said that a person is in control of these images? If so, that must negate the need to show who made them.[48]

This issue was addressed in *R v Porter*[49] where the appellant was convicted of fifteen counts of making IPoCs, and two counts of possession. The files alleged to have been possessed were recovered forensically, conceding that the appellant had deleted them.

A literal interpretation of possession would mean that someone who controls the device would possess all images on it. The Court of Appeal held that this would be unreasonable, noting that the only way that the offender could have accessed these images was to use specialist computer software.[50] They conclude that, 'if a person cannot retrieve or gain access to an image, in our view he no longer has custody or control of it',[51] meaning that he would not be guilty of possession.

Thus, the central issue is whether a person can recover the images. This will depend on several factors, including how the file was deleted and the offender's knowledge. Where a person owns software that allows files to be recovered,[52] and the prosecution can prove that they know how to operate it, then a person may still control the files and be convicted.

Porter raises an interesting question in terms of cloud storage. With some devices, images are automatically uploaded to cloud storage. If a person deletes the local copy, it does not necessarily follow that the copy in the cloud is deleted. Thus, while the local copy is no longer accessible, the version on the cloud may be. Does the defendant possess these cloud images?

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[48] A defendant who will no doubt not being put forward as 'father of the week' is Neil Harrison who sought to blame his son for the images found on his computer. The prosecution rebutted this suggestion using, *inter alia*, school attendance records (*R v Harrison* [2007] EWCA Crim 2976 at [5], [21]-[22].
[49] [2006] EWCA Crim 560.
[50] *Ibid*., at [17].
[51] *Ibid*., at [21].
[52] There are several programs that will allow this and, indeed, some operating systems do too.

The answer must surely depend on whether D knew of the automatic uploading feature. If he did, then it must follow that he is guilty of possession.

Possession with a view to

While s.160 establishes the offence of simple possession, s.1(1)(c) creates the offences of possessing an indecent photograph with a view to their being distributed or shown. All of what was said previously about possession must apply equally to this offence. However, there is the additional ulterior fault requirement, that being 'with a view to'.

The meaning of this term was considered in *R v Dooley*.[53] The appellant used Peer-to-Peer (P2P) software to exchange files. P2P systems create a 'shared folder' where images obtained from others are stored and allow others to obtain files from the user. Six IPoCs were found in the shared folder. He was charged with possessing them with a view to distributing them. While not denying possession, he denied that he intended the files to be distributed, claiming he had simply failed to move them from the shared folder.

The judge at first instance ruled that if D knew that the photographs were likely to be seen by others, he possessed them with a view to distributing them. The Court of Appeal quashed his conviction stating there is a difference between 'with a view to' and 'with the intention of',[54] the latter being significantly more restrictive. The court drew a comparison with the offence of blackmail.[55] The court approved the commentary in Smith & Hogan that 'with a view to' requires that at least one of the reasons must be the relevant act, although it need not be the primary purpose. In other words, if at least one reason for the files being in the shared folder was so that others could access them, then the offence would be complete.

The Court accepted that foresight could be important, but distinguished foresight and purpose, stating 'To take the far-fetched example, a general may foresee the likelihood of his

[53] [2005] EWCA Crim 3093.
[54] *Ibid*., at [13].
[55] *Theft Act 1968*, s.21 which requires a person to make an unwarranted demand with menaces 'with a view to gain for himself or another'.

soldiers being killed in battle, but he surely does not send his troops into battle with a view to their being killed'.[56]

Ormerod notes that the decision undoubtedly makes it more difficult for the prosecution. However, he notes that while foresight may not legally constitute 'view to', it would surely provide *evidence* of motivation that a jury could consider when determining whether dissemination was one of the aims of the defendant.[57] This must be correct. Where it can be shown that an individual is aware of how P2P operates, a jury will be rightfully sceptical at a denial that at least one reason for retaining the file in the shared folder was to allow others access.

This approach was adopted in the Scottish case of *Peebles v HM Advocate*.[58] The facts were remarkably like *Dooley*, and the police during interview obtained evidence that the defendant knew how P2P worked. The High Court of Justiciary, dismissing an appeal based on *Porter*, stated:

> On the evidence that the appellant had positively enabled the fire-sharing function in the Kazaa programme, the jury were entitled to infer that one of his reasons for doing so was to allow others to have access to the files and therefore to conclude that he held the files with a view to their being distributed or shown…[59]

This must be correct and demonstrates that *Dooley* may not pose as many difficulties as was initially thought.

FAULT AS TO INDECENCY

The offence of making requires a person does a deliberate act with the knowledge or likelihood that the image is an IPoC. Distribution and possession do not require the likelihood

[56] [2005] EWCA Crim 3093 at [17].
[57] David Ormerod, 'Indecent Photographs of Children: Meaning of Words "with a View To"' [2006] Criminal Law Review 544, 546.
[58] [2007] HCJAC 6.
[59] *Ibid*., at [30].

that it is an IPoC, but clearly, the prosecution must show that it is indecent as a matter of proof.

The term 'indecent' tends to be considered part of the *actus reus*. It is not defined within PoCA 1978 and was left to the courts. In *R v Graham-Kerr*[60] it was held that the test set out in *R v Stamford*,[61] a case concerning the offence of sending indecent materials through the postal service,[62] should be applied to PoCA 1978. This requires the jury to consider whether the image offends against 'recognised standards of propriety'.[63] Graham-Kerr argued that a fault requirement should exist, namely that unless it was obviously indecent, there should be an indecent motive. This was based on the law of indecent assault.[64] The court rejected this submission, stating, '[a]n assault is an ephemeral matter, the mens rea of the offence being the subjective intent of the person who committed the assault. A photograph is a permanent matter. The question, as it seems to us, is whether the photograph is indecent'.[65] They continued:

> In our view it is not possible to relate the question of whether or not a photograph is indecent with the original motivation of the person who took it. It may be that the original motivation was perfectly innocently subjectively regarded; but if the photograph is one which right-thinking people would regard as indecent, the motivation of the original taker, in our view, cannot be a relevant matter.[66]

While the court appeared concerned about innocent photographs that could be misused, the objective test has led to other problems. There have been well-documented examples of

[60] [1988] 1 WLR 1098.
[61] [1972] 2 QB 391.
[62] *Post Office Act 1953*, s.11.
[63] [1988] 1 WLR 1098 at 1102.
[64] *R v Court* [1988] 2 WLR 1071. This test later formed the test of 'sexual' within the *Sexual Offences Act 2003*, s.78.
[65] *Ibid*., at 1104.
[66] *Ibid*.

photographs taken for legitimate purposes falling foul of law enforcement because they arguably meet the definition of indecent.[67]

The need for fault was revisited in *R v Smethurst*[68] which concerned downloading rather than taking a photograph. The appellant obtained a series of photographs depicting girls that he said were aged at least 16.[69] He argued that the images were artistic and that he had no sexual motivation. He argued that *Graham-Kerr* was wrong and that it was incompatible with Article 10.

After rejecting an argument that the test of indecency was too uncertain,[70] the court provided the example of a photographer who takes a photograph and gives it to another. That person then distributes it, causing harm to the child. Their concern was that despite the fact the photographer brought the image into being, they could argue that it was the distributor who did the indecent act and thus escape culpability.[71]

It is difficult to see from this example why the photographer would not also have indecent intent. The example presumes that the photographer and distributor are different people, but that does not mean that there is no indecent motivation. Perhaps it is recognition that some produce IPoCs for commercial rather than sexual purposes.[72] That does not, however, mean that the photographer does not have indecent motivation. 'Indecent' is wider than sexual. It simply means that the act offends recognised standards of propriety.[73] A jury is likely to think that the photographer who is prepared to take IPoCs for commercial purposes is

[67] The newsreader Julia Somerville and her then husband was arrested on suspicion of offences under PoCA 1978 because they took a photograph of their daughter in the bath. Photographs by the artist Tierney Gearon have also attracted press attention. For a discussion see Alisdair A. Gillespie, *Child Pornography: Law and Policy* (Routledge 2012) 56 et seq.
[68] [2001] EWCA Crim 772.
[69] At the time of arrest, the age of 'a child' for the purposes of PoCA 1978 was 16 not 18.
[70] [2001] EWCA Crim 772 at [21].
[71] [2001] EWCA Crim 772 at [23].
[72] Indeed, it remains a lucrative trade. See, for example, UNCHR 'Report of the Special Rapporteur on the sake and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material' (202) UN Doc A/HRC/43/40 at 4-5.
[73] *R v Stanley* [1965] 2 QB 527.

acting in a way that offends recognised standards of propriety. In any event, there is (now) a separate offence that would tackle this behaviour.[74]

The actions of a photographer and a distributor are separate. Requiring indecent motivation by the photographer would exempt those who take a photograph for legitimate reasonsand yet capture those taking photographs for more sinister reasons. If an indecent photograph was later distributed (e.g., because it was stolen or obtained through a social media hack), then the circumstances of that act (the distribution) could be considered, not the photographer's motivation.

What about those who possess or download an image? Here, it is conceded the position could get complicated because two people who possess the same image could be dealt with differently, depending on their motivation. However, is that necessarily wrong? It would only be a subset of images that would be subject to this test. The majority of IPoCs are obviously indecent. The purpose of the legislation is, in part, to tackle the exploitation of children. Where an offender has an (artistic) image in his possession for indecent purposes, does that not meet the mischief of the Act? Providing motivation may seem challenging, but digital evidence is likely to assist, including search terms, web addresses, and the collection size.[75]

FAULT AS TO AGE

PoCA 1978 states that a person is to be taken as a child 'if it appears from the evidence as a whole that he was under the age of 18'.[76] This formulation is used because the victim will never be identified in many instances, so their age will not be known. Where the age is known (which is perhaps more likely with the taking of the photograph), clearly, that would be 'evidence' within the meaning of s.2(3).

[74] *Sexual Offences Act 2003*, s.48: causing [the] sexual exploitation of a child. In fairness to the Court of Appeal, this offence did not exist at the time of *Smethurst*.
[75] If someone downloaded an image from a pornographic website, it is likely that the jury would consider that they had a sexual interest in the image.
[76] PoCA 1978, s.2(3).

In other instances, the age of the child will need to be estimated. In *R v Land,*[77] the Court of Appeal rejected a suggestion that this was something that required expert evidence. Instead, they held that 'a quick glance will quickly show whether the material is or may be depicting someone who is under 16'.[78] Now the age of 'a child' is 18, that may no longer be true. Is it easy to tell whether someone is aged 15 or 18, particularly as people's bodies develop differently? Some would argue the answer is 'no', and it is notable that in some countries, for example, the USA, expert evidence is admitted to age a child.[79] However, at least one study has suggested that experts are no better than lay persons at ageing people from photographs.[80]

If the decision as to age is, in most instances, a judgement call, then should there be a fault requirement? For example, should there be a defence where the defendant makes a mistake as to age? The facts of *R v Smethurst*[81] are perhaps insightful. The appellant was convicted of making (through downloading) ten images of children. He claimed (and it did not appear to be disputed by the prosecution) that the images were downloaded from a site that certified all models were aged 16 or over,[82] although he conceded that at least one photograph showed someone who looked under 16.[83]

Any question of mistake was not litigated in *Smethurst*, with the decision instead being confined to whether ulterior intent was required, but it does raise the question about what to do about a mistake.

The Court of Appeal in *R v Land*[84] dismissed the suggestion that there could be a defence of mistake:

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[77] [1999] 1 QB 65.
[78] *Ibid*., at p.70.
[79] Gillespie, n 3 above, at 66.
[80] Cristina Cattaneo and others 'The difficult issue of age assessment on pedo-pornographic material' (2009) 183 *Forensic Science International* e21-e24.
[81] [2001] EWCA Crim 772.
[82] *Ibid*., at [5].
[83] *Ibid*., at [4].
[84] [1999] QB 65.

> Once it is or should be appreciated that the material is indecent then its continued retention or distribution is subject to the risk of prosecution of the source of the material proves to be a child or children.[85]

The Court held that if Parliament had intended there to be a defence as to age, they could have easily inserted one when they created the other statutory defences. The fact that they did not suggests that there is strict liability as to age.

The learned editors of Rook & Ward disagree. They argue that in light of the House of Lords' decision in *DPP v B*,[86] a person should have a defence where they honestly believe that the image portrays someone over 18.[87] It is conceded that *Land* predated *DPP v B,* although *W(P)*, which was equally dismissive about mistakes as to age, was not.

DPP v B was a landmark case, albeit one that Parliament subsequently overruled. The defendant (B) was a 15-year-old boy who sat next to a 13-year-old girl on the bus. He repeatedly asked her to perform oral sex, which she refused to do. After being reported to the police, B was charged with inciting a child under 14 to commit an act of gross indecency.[88] B stated that he honestly believed that she was aged over 14. The justices in the youth court held that this was no defence, as did the Queen's Bench Division on appeal by way of case stated. The House of Lords, however, disagreed.

The House held that *mens rea* was required for every offence unless Parliament could be said to have expressly or implicitly confirmed that it was a strict liability offence.[89] The House held that there was no evidence that this offence was intended to be one of strict liability, and so they held that where a defendant honestly believed the victim was aged 14 or over, there could be no liability.

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[85] *Ibid*., at p.70.
[86] [2000] 2 AC 428.
[87] Peter Rook and Robert Ward, *Rook & Ward on Sexual Offences: Law and Practice* (5th edn, Sweet & Maxwell 2016) p.692.
[88] Contrary to *Indecency with Children Act 1960*, s.1(1).
[89] Applying *Sweet v Parsley* [1970] AC 132.

This was then followed by *R v K,*[90] where the courts were called upon to rule on the fault requirement regarding indecent assault.[91] This included a provision that a girl under 16 could not, in law, give valid consent.[92] The appellant (K) was aged 26, and he admitted having sexual activity with the 14-year-old victim but said that it was consensual and that he believed that she was aged 16, in part because this is what she told him.

The judge at first instance held that there was a defence where the defendant honestly believed the victim to be 16 or over. The matter eventually ended up before the House, who confirmed a defence existed for a defendant who honestly believes the victim to be aged at least 16. Again, they found no evidence that Parliament intended for there to be a crime of strict liability. Counsel for the Crown pointed out that other sections of the Act provided defences, meaning Parliament may have intended there to be none for indecent assault. The House accepted, in principle, this logic[93] but held it did not apply. The *Sexual Offences Act 1956* was a consolidating act, and there was no inherent consistency to the Act, as it was simply bringing together earlier (separate) pieces of legislation.

Lord Bingham noted an apparent contradiction between the offence of intercourse with a girl between 13 and 16[94] and indecent assault. The former had a statutory defence,[95] whereas the latter did not. It is impossible to have sexual intercourse with a girl under 16 without indecently assaulting her.[96] A person under 24 could be charged under s.14 rather than s.6 and would have no defence. The House held that Parliament could not have intended this and permitted a defence of (honest) mistaken belief.[97]

[90] [2001] UKHL 41
[91] *Sexual Offences Act 1956*, s.14.
[92] *Sexual Offences Act 1956*, s.14(2).
[93] [2001] UKHL41 at [3].
[94] *Sexual Offences Act 1956*, s.6.
[95] *Sexual Offences Act 1956,* s.6(3) provides a defence to a defendant aged under 24 and who had never been charged with a like offence if he honestly believed that the victim was aged at least 16.
[96] Sexual intercourse must invariably involve touching, but consent to the touching where V is under 16 was not a defence (SOA 1956, s.14(2)).
[97] Ironically, the defence under s.6 would not have applied in *R v K* because the appellant was aged 26.

While *DPP v B* and *R v K* raised questions over the extent to which strict liability offences would be permitted, Ormerod and Laird note that the courts have subsequently confirmed that several offences are strict-liability offences.[98] The test is whether Parliament intended the offence to be one of strict liability.

B v DPP and *CPS v K* can be distinguished. In *B,* there was no other fault element, whereas it has been seen from this chapter that other fault elements exist in respect of PoCA 1978. Similarly, there was no statutory defence in *B*, yet there are for some of the offences contained in ss.1 and 160. For similar reasons, *K* can be distinguished. There is no inherent contradiction within PoCA 1978.[99] It is not a consolidation Act; it is an original piece of legislation. In *R v W(P),*[100] Treacy LJ noted that the purpose of PoCA 1978 was 'to protect children from others, and from themselves if need be'.[101] The courts have been clear that there is clear public policy justification in adopting a strict approach. Nothing in PoCA 1978 or CJA 1988 suggests Parliament intended there to be a defence of mistaken belief. Further support for this can be found from the fact that Parliament introduced new defences into the legislation in 2003.[102] By then, the absence of a mistake as to age was well known. If Parliament wanted to introduce such a defence, it had the opportunity to do so.

That said, the absence of a defence of mistaken belief does appear harsh for those who believe, even on reasonable grounds, that an image they download is of someone aged at least 18. It also potentially creates an oddity in respect of taking. (Consensual) recording sex acts is not uncommon these days.[103] Let us take an example:

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[98] Ormerod and Laird, n 23 above, at 353.
[99] While *R v Bowden* has, as noted previously, introduced an unhelpful overlap, this is not necessarily incoherent (for the reasons put forward by Bingham LJ in that case) and it is also a creation of the courts rather than the statute.
[100] [2016] EWCA Crim 745.
[101] *Ibid*., at [28].
[102] *Sexual Offences Act 2003*, ss.45-46.
[103] Non-consensual recording is a problem, but the law already has a law to tackle this: see *Sexual Offences Act 2003*, s.67. There is also a problem about non-consensual distribution of recorded material, but that is outside the scope of this chapter.

D meets V, aged 15, believing that she is 18 (because V says she is, and they meet in a pub where V is drinking). D (consensually) records himself having sex with V.

As the law stands, D would have a defence to the sexual intercourse[104] but not to the offence of taking an indecent photograph of a child. The law says that defendants must 'take care', but that ignores the reality of sexual intercourse in the digital age.

THE STATUTORY DEFENCES

The statutory defences have been noted already, but it is necessary to consider them in detail because they affect fault. In *R v Collier,* the Court of Appeal noted that statutory defences make the prosecution role easier.[105] This is because the defences impose a legal burden.[106] This places the burden on the defendant to prove a lack of knowledge rather than require the prosecution to prove it.

PoCA 1978, s.1(4) provides two statutory defences where a person is charged with either distribution or showing or being in possession of them with the intent to distribute or show. These defences are:

(a) they had a legitimate reason for distributing, showing or possessing them; or
(b) that the defendant had not seen the photographs and did not know, nor had any cause to suspect, them to be indecent.

The Criminal Justice Act 1988 provides three statutory defences.[107] The first two replicate the two above. The third is 'that the photograph…was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time'.[108]

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[104] *Sexual Offences Act 2003*, s.9(1)(c). Technically it is not a defence. The prosecution would need to prove, to the required standard, that the defendant did *not* have a reasonable belief. They may struggle to do so in the example above.
[105] [2004] EWCA Crim 1411.
[106] See, for example, *R v Johnstone* [2003] 1 WLR 1736 and *Attorney-General's Reference (No 4 of 2002); Sheldrake v DPP* [2004] UKHL 43.
[107] *Criminal Justice Act 1988*, s.160(2).
[108] *Criminal Justice Act 1988*, s.160(2)(c).

The *Sexual Offences Act 2003* introduced two new defences. The first relates to marriage or equivalent relationship,[109] and the second refers to law enforcement.[110] The latter discloses no issue as to fault and so will not be considered.[111]

Legitimate Reason

The first defence is that a person either distributed, showed, or possesses an indecent photograph of a child for a legitimate reason. In *Atkins v DPP*[112] Simon Brown LJ said, 'the question of what constitutes a "legitimate reason"….is a pure question of fact, for the magistrate or jury in each case'.[113] Thus, there is no fault element in respect of this defence. Atkins was an academic who claimed that he was doing *bona fide* research, but the magistrate rejected that as implausible. Thus, it is irrelevant whether the defendant *believes* he is doing legitimate research, it is solely a matter of fact.

Had not seen the photographs

Unlike for the offence of making, the prosecution does not need to prove D knew that the relevant content was an IPoC. In *R v Price,*[114] it was explained that this was because if it were otherwise – and the prosecution needed to prove knowledge – there would be no need for the statutory defence as written.

The prosecution need only show the deliberate act. The burden then shifts to the defendant, who must prove on the balance of probabilities that (a) he had not seen them, and (b) he did not know, nor have any cause to suspect, them to be indecent. In *R v Collier*[115] it was held that 'suspect them to be indecent' meant suspect them to be an IPoC. Thus, a person who suspects the images are adult pornography could still have a defence.

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[109] *Protection of Children Act 1978*, s.1A; *Criminal Justice Act 1988*, s.160A.
[110] *Protection of Children Act 1978*, s.1B; *Criminal Justice Act 1988*, s.160B.
[111] A discussion of the defence can be found in Gillespie, n 3 above, at 126-129 and Rook & Ward, n 89 above, pp.685-687.
[112] [2000] 1 WLR 1427
[113] *Ibid*., p.1435.
[114] [2006] EWCA Crim 3363.
[115] [2004] EWCA Crim 1411

The defence does not apply to someone who looks at the image and decides that it does not meet the test of indecency or that the person portrayed is not a child. A mistake in either instance is irrelevant where the person has seen the photograph, severely limiting the reach of these defences.

What of the second aspect? D must not know *nor have cause to suspect* that they are IPoCs. Knowledge has been discussed already, but what is 'cause to suspect'? It is a much lower threshold. In *Hussien v Chang Fook Kam*[116] Lord Devlin stated that it 'is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove"'.[117] Thus, a person cannot escape liability by saying that he thought it was possible that the images were IPoCs but kept them. It would also seem to criminalise those who do not care whether the images are IPoCs or not. That said, suspicion is subjective, and so if D honestly does not suspect that they may be IPoCs even though a reasonable person would, it is irrelevant.[118] However, a tribunal of fact may be sceptical.

How will a jury conclude whether the defendant had any cause to suspect that they were indecent photographs of a child? Often it will be other evidence, including any police interview, that will be relevant. This was the position in respect of Acting Chief Superintendent Williams.

Williams did not deny that she had an IPoC. She denied seeing it. The photograph in question was a short video clip that showed a child being sexually assaulted. The clip had been sent via WhatsApp by Williams' sister, ostensibly to show people how disgusting such behaviour is. There was no forensic evidence that could show whether Williams had viewed the video,[119] but it was possible to show the jury the 'tile' that would have been visible on Williams' phone. This was the preview shown on the chat, and it was the first frame of the video.[120] This clearly showed a sexually explicit photograph of a child being orally raped.[121]

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[116] [1970] AC 942.
[117] *Ibid*., p.948.
[118] See *R v Da Silva* [2006] EWCA Crim 1664.
[119] *R v Williams et al* [2021] EWCA Crim 327 at [19].
[120] *Ibid.*, at [13].
[121] *Ibid*., at [14].

Williams consistently stated that she had not seen the image, but the evidence before the jury cast doubt on this. When the message (rather than the image) was opened, the message was open for at least 12 seconds.[122] Within one minute of entering that chat, Williams had rung her sister, although her sister did not take the call. Williams then immediately sent a message to her sister saying, 'please call'. That was directly under the image that would have been visible. Later that evening, a message was sent from the sister asking whether 'it' had been reported, and they then spoke for three minutes. The next day, they met even though they had not previously arranged to meet.

In her first police interview, the sister confirmed that the sisters had spoken about the image during the telephone call, although she later retracted that statement.[123] She also said in her subsequent interview that while they had spent most of the next day with each other, the sister had forgotten to raise it with Williams. When rejecting leave to appeal, the single judge stated that 'there was clearly evidence upon which the jury could convict you…'.[124] That must be correct. It demonstrates that while it may be thought that the tribunal of fact is being asked to look into an individual's mind, that is rarely the case. Other evidence can help the jury decide how credible it is that a defendant did not, at the very least, suspect that a relevant file was an IPoC.

Unsolicited image

Section 160(2)(c) provides a defence where an image 'was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time'. While it does not say so expressly, reference to 'did not keep it' must mean that the tribunal of fact is being asked to consider how quickly the defendant deleted it.

[122] *Ibid*.
[123] *Ibid*., at [15].
[124] [2021] EWCA Crim 327 at [25].

Whether an image is unsolicited is a matter of fact that will need to be ascertained by the jury, as is what constitutes 'an unreasonable time', suggesting that there is no fault element in this defence.

There is no requirement that a person does not know that it is an IPoC. The defence applies even if the defendant knows or suspects that it is an IPoC. That said, where the contents are known, a jury would likely take account of that knowledge when deciding whether D kept it for an unreasonable length of time.

One point to note is that the blurring between s.160 and s.1 caused by *Bowden* means that this defence, in essence, can only be used once (per picture). When it is unsolicited, the person who opens the file will not 'make' the indecent photograph of a child, assuming that he was unaware of its contents.[125] However, once seen, then any subsequent viewings of the image would constitute 'making' because the defendant now knows the file's contents.

Marriage

Rook & Ward label this defence as 'exceptions for consent within marriage or other relationship',[126] which is undoubtedly correct, although, as will be seen, the role of consent is somewhat obscured. The defence has been criticised,[127] not least because of the convoluted wording.

It is a defence for a person to prove that at the time of the relevant offence[128] the defendant and child were married (or in a civil partnership) or lived together 'as partners in an enduring family relationship'. While the latter is not defined, the courts have construed it narrowly.[129]

The section later introduces consent.[130] For example, s.1A(4) states:

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[125] See *Atkins v DPP* [2000] 1 WLR 1427 discussed above.
[126] Rook & Ward, n 89 above, p.681.
[127] See, for example, Andrew Ashworth 'Case commentary on R v M' [2012] Crim LR 789 at 791-792.
[128] Taking, making, distributing, showing, possession with intent to distribute or show, or simple possession. Note, the defence does not apply where D permitted a person to take an indecent photograph.
[129] *R v DM* [2011] EWCA Crim 2752.
[130] *Protection of Children Act 1978*, ss.1A(4),(6) and *Criminal Justice Act 1988*, s.160A(4).

> if sufficient evidence is adduced to raise an issue as to whether the child consented to the photograph being taken or made, or as to whether the defendant reasonably believed that the child so consented, the defendant is not guilty of the offence unless it is proved that the child did not so consent and that the defendant did not reasonably believe that the child so consented.

Not only is this inelegant, but it also makes things very confusing as it alters the burden of proof. Indeed, Rook & Ward suggest it will be challenging for a jury to understand.[131] The defendant must prove, to the civil standard, that he was married etc., with the child portrayed in the photograph. Once proven, the defendant then must adduce evidence to 'raise an issue' as to consent. At that point, the burden flips to the prosecution, who must prove, to the criminal standard, that the child did not consent, and D did not have reasonable grounds to believe that she consented.

What evidence will 'raise an issue'? There must be something beyond mere speculation. Rook & Ward question whether the photograph itself may raise the issue 'e.g. if she appears relaxed and happy'.[132] While entirely possible, it does demonstrate a problem with this defence because the literature suggests that children are often drugged or groomed into looking happy even when there is no consent.[133]

Unlike the position in the majority of IPoC cases, the child will be identifiable. The defendant must know who the child is because they need to prove that they were married or in an equivalent relationship with them. Thus, presumably, the intention would, in many instances, be to call the child as a witness. Even if the parties are still married, the child portrayed would be capable of being compelled to testify,[134] although the usefulness of that may be questioned.

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[131] Rook & Ward, n 89 above, p.683.
[132] *Ibid*.
[133] Max Taylor and Ethel Quayle, *Child Pornography: An Internet Crime* (Routledge 2003) pp.22, 54-56.
[134] The *Protection of Children Act 1978* is classed as a 'sexual offence' for the purposes of the *Police and Criminal Evidence Act 1984*, s.80 (see s.80(7)).

It is, however, not enough for the prosecution to prove that the child did not consent. They need to prove that D did not reasonably believe that V consented. It is important to note that there must be reasonable grounds to believe the victim consented, and a subjective belief not based on other grounds will not satisfy this test.[135] It probably applies to the person who does not take any steps to discover whether the victim consents. Unlike rape, there is no legislative statement that the jury can consider 'any steps A has taken to ascertain whether B consents',[136] although whether the defendant has taken any steps is likely to be something the jury would consider when determining the reasonableness of any belief.

Where the jury is satisfied, to the criminal standard, that D did not know nor reasonably believe that B consented, then the defence fails irrespective of whether the defendant and child were married or in an equivalent relationship. If they are not satisfied, so long as the defendant proved the necessary relationship, D must be acquitted.

CONCLUSION

Much of the legal literature on IPoCs looks at the *actus reus*. However, this chapter has shown that there are numerous issues concerning the *mens rea* too. It has been seen that while the courts have, quite properly, decided that these are not crimes of strict liability, their interpretation of what the fault element is differs depending on the offence. This leads to inconsistency.

Where a person makes an image electronically (be that by opening a file, downloading an image or otherwise), it would seem fitting that D should know that it is an IPoC or that it is likely to be an IPoC. While 'likelihood' does dilute the mental requirement, it is the equivalent of recklessness, and public policy can justify the protection of children by criminalising those who are reckless as to whether they are accessing IPoCs.

[135] See, for example, *R v Ciccarelli* [2011] EWCA Crim 2665.
[136] *Sexual Offences Act 2003*, s.1(2).

The presence of the statutory defences means, quite rightly, that the same *mens rea* cannot apply to distribution (including showing) or possession (either simple or with ulterior intent). The law, in essence, presumes that a person knows what they possess or distribute and provides a (limited) defence for those who do not.

However, the *mens rea* for taking is strict. It simply requires that a person intentionally takes a picture. While, in many instances, this will not be problematic, as the defendant intended to take an IPoC, in others it could. There are circumstances when a person may move as the photograph is being taken. Is this 'unintentional taking'? The courts have not been clear. If the *mens rea* of a photograph is deliberately taking a photograph, then the answer is 'no'. If it is to take an IPoC deliberately, the answer is 'yes'. However, where would 'likelihood' fit in? A person may realise that there is a risk that an indecent photograph may be taken but, nonetheless, goes on to take it. That is catered for in downloading but might not be in taking. It would be better if the courts interpreted the *mens rea* in the same way.

Perhaps the most controversial issue of fault relates to the age of a child. Currently, a person who knows that he possesses (including by making) an IPoC has no defence if he believes that the subject of the photograph is not a child, but the jury disagree. While it can be argued that there are public policy reasons for this matter to be strict, it has the potential to cause injustice, and the position should change. There should be a defence for those who make a mistake as to age. The common law tends to impute a defence of honest belief,[137] but it would be better if the requirement were for reasonable belief, allowing the jury to consider the reasoning of the accused.

This author[138] and others[139] have suggested that the law on IPoCs is incoherent, and this chapter adds further weight to that conclusion. Realistically, it is unlikely that anything will change quickly because it is an offence that is readily prosecuted. Thus the perception is there

[137] See, for example, *B v DPP* [2000] 2 AC 428 and *R v K* [2001] UKHL 41 discussed above.
[138] See, for example, Gillespie, n 3 above, and see Alisdair A Gillespie 'Child Pornography' (2018) 27 *Information & Communications Technology Law* 30.
[139] See, for example, David Ormerod 'Indecent photograph: possession of indecent pseudo-photograph of children' [2004] Crim LR 1039 at 1041.

is nothing ‘to fix’. However, clarity and fairness are important, and there are areas of these offences that have neither. The legislation is now over forty years old. The way IPoCs are produced, distributed, and accessed has changed considerably since the law was enacted. A new law could account for technological change and ensure a new law is robust, fair, and targeted towards protecting children. That new law should have a coherent position on the fault requirement, something missing at present.