

Addressing the emotional impact of mobile phone theft

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Corporate Crime analysis: A new guideline from the Sentencing Council means the court will now be able to take into account the emotional impact on or the loss of confidence of a victim when sentencing an offender for the theft of a device such as a tablet computer or smartphone. Peter Binder at Pump Court Chambers and Farrhat Arshad at Doughty Street Chambers comment on the new guideline.

What has prompted the changes to laws around mobile phone theft, and what are they intended to achieve?

Peter Binder (PB): The changes are part and parcel of the recent general trend of putting the impact on the victim of crime higher up the sentencing agenda. The proliferation of mobile phone, tablet and laptop use has meant that these are not only frequently the most valuable individual items stolen in domestic burglaries and/or thefts from the individual in monetary terms, but are also of considerable importance in terms of personal value because of the nature of the data stored on such items--be it photographs, contact details or other private information.

The current guidance on theft offences was published in 2008, together with guidance relating to domestic burglary. The burglary guidance was updated in 2012. Practitioners now have guidance for almost all types of theft offence within one self-contained, comprehensive document.

Farrhat Arshad (FA): I am not sure it can be said that the new definitive guideline has changed the law in relation to mobile phone theft. The guideline seeks to provide more comprehensive guidance as to the factors to be taken into account in assessing harm and bring to the forefront factors other than the financial value of an item.

The previous guideline from 2008 included the impact on the victim as a matter relevant to assessing harm, but the new guideline places much more emphasis on this and losses other than financial loss. As to what has prompted this re-focusing, the guideline was preceded by a public consultation in which consultation respondents--according to the press release accompanying the guideline--'strongly supported the Council's decision to consider the wider impact of thefts on victims'. It may also be of note that in 2014 the government's Behavioural Insights Team published a study entitled 'Reducing mobile phone theft and improving security' which set out the extent of mobile phone theft and the impact on victims due to loss of data on smartphones.

Is the guideline sufficiently clear or are there any grey areas?

PB: The guideline is set out with detail and clarity. It has been welcomed by the Magistrates Association, and I anticipate judges and practitioners will find it a useful tool in achieving consistency of sentencing, while at the same time it provides greater transparency than previously regarding the approach to be taken to sentencing in theft offences--two of the stated aims of the new guideline.

FA: The guideline is clear in structure and the approach advocated--for each area of theft the guideline sets out the approach to be taken. The offence category is determined with reference only to two matters:

- o the culpability of the offender
- o the harm caused

Culpability is sub-divided into three categories:

- o A--High
- o B--Medium
- o C--Lesser

Harm is also sub-divided into four categories:

- o Category 1--Very high value goods stolen (£100,000+) or high value with significant additional harm to the

- o victim or others
- o Category 2--High value goods stolen (between £10,000 and £100,000) and no significant additional harm or medium value with significant additional harm to the victim or others
- o Category 3--Medium value goods stolen (between £500 and £10,000) and no significant additional harm or low value with significant additional harm to the victim or others
- o Category 4--Low value goods stolen (up to £500) and little or no significant additional harm to the victim or others

The starting-point and range then vary according to where the offence falls in the grid. Following that aggravating and mitigating factors should be taken into account, after which further reduction can be made for assisting the prosecution. Any reduction for a guilty plea is made thereafter.

However, the only area which could be problematic is the use of the term 'significant additional harm'. Examples of significant additional harm are given and they include:

- o emotional distress
- o fear or loss of confidence after the crime

Therefore it appears that any manifestation of such harm would be labelled as 'significant' harm, regardless of the extent of it. This can be contrasted with the other examples given of 'significant additional harm' such as 'high level of inconvenience caused to the victim' and 'items stolen were of substantial value to the loser' where there is a threshold which that factor must reach.

To what extent do you think 'emotional distress' can be suitably and fairly quantified? How will the court assess this?

PB: Where the victim's emotional distress is not obvious from what is contained in the prosecution evidence--for example, from their demeanour immediately after the offence--it will be incumbent on the prosecution to obtain a victim impact statement along the lines of those that are presently taken from victims of violence and sexual offences. Sentencers are not bound to accept these at face-value however, and in practice most judges take a very balanced approach to claims of emotional or other distress if they range beyond what is reasonable in the individual circumstances of the particular case.

FA: This is connected to the above point--the guideline would appear to indicate that any emotional distress would represent 'significant additional harm'. Therefore it would seem that if an offence involves a victim who having had their phone snatched cries shortly afterwards, but then very quickly manages to shrug off the incident, it would nevertheless involve 'significant additional harm'.

Presumably a court will assess this by having regard to a victim impact statement or witness statement.

Do you think there could be any unintended consequences?

PB: I don't see it at present. I think the guideline is well thought out, well-constructed, comprehensive and balanced. It provides clarity and structure. On that basis, I feel it is likely to achieve its objectives.

FA: As there does not appear to be a threshold for certain factors to qualify as 'significant additional harm' the presence of more than one such factor may have the effect of taking the offence into a higher category where that is not actually merited by the overall harm caused by the offence.

Conversely, a high level of harm by the presence of only one kind of 'significant additional harm' may not be adequately reflected in the category.

What should lawyers advising in this area take note of? What should they advise their clients?

PB: Post-arrest, it is incumbent on lawyers to advise clients on any relevant sentencing guidelines, and that applies equally here. It may be of significant value from a mitigation perspective if clients who intend to plead guilty are willing, if able so, to make good or minimise the victim's loss, for example by arranging for the return of personal items.

FA: Lawyers should follow how the higher courts will deal with the assessment of 'significant additional harm' and what can fall within this category. In relation to shoplifting offences clients should be advised that the emphasis has changed so that the low value of the goods is less significant than before.

How do these changes fit in with current trends?

PB: As stated above, the changes are in keeping with the recent trend for putting victims' rights nearer to the forefront of the criminal justice agenda. This is to be welcomed, and it is likely to continue. In the short term I would expect some of the existing guidance in other areas to be modified--certainly in practice if not in form--so as to include some of the specific new changes, for example in the current Burglary Definitive Guideline, factors indicative of greater harm include 'a significant degree of loss to the victim (whether economic, sentimental or personal value)' and 'trauma to the victim, beyond the normal inevitable consequence of intrusion and theft'.

The new changes are more comprehensive and more expansive. Judges are likely to have regard to them when sentencing in other areas where victims have suffered inconvenience, emotional distress, personal inconvenience, disruption, and so on, whether or not they are specifically directed to do so in the existing guidance.

FA: The guideline is more comprehensive, the intended consequence of which is to have more uniformity in sentencing such offences, which fits in with current trends. I do think the use of the word 'significant' in relation to additional harm and whether there is a minimum threshold will have to be dealt with by the higher courts on appeal in due course.

Interviewed by David Bowden.

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