



With so many people using emojis in texts, email and messaging apps, these little digital pictures were bound to enter the courts. And they have – appearing in evidence in a variety of legal cases from criminal threats to contractual issues and even free speech arguments. KATE ALLMAN investigates whether Australian courts are properly equipped to interpret their meanings.

I have a group text message conversation going with two of my closest friends. It started about a year ago and bears a very un-original nickname: “send nudes”. Like almost every group conversation in history that has borne this title, no one in the group has ever sent the requested images of “nudes”.

While my friends and I are aware of the humour implied in the name, an outsider might interpret this message thread quite differently. Likewise, the emojis lacing our messages could be construed in numerous ways. To my mother – thank goodness – an eggplant emoji is just a fruit (not a vegetable – it has seeds, you see). I do not have the heart to explain that it means something very different to most emoji users.

A new paper published in April by two legal researchers at Melbourne’s Deakin University highlights the interpretative problems that arise when emojis go beyond innuendo-

fuelled conversations between friends and enter the courts in evidence. The 61-page study by Professors Elizabeth Kirley and Marilyn McMahon, *The EmojiFactor: Humanizing the Emerging Law of Digital Speech*, discusses how emojis were once “widely perceived as a whimsical, humorous or affectionate adjunct to online communications”, but can have very serious legal implications.

“People are using emojis to communicate via text, email, and messaging apps like WhatsApp,” says Kirley. “These digital characters have come up in evidence for cases surrounding criminal threats, revenge porn, even terrorism. Judges and juries are scratching their heads trying to deal with them.”

In 2016, a young man in France was convicted of criminal threats for sending a gun emoji in a text message to his girlfriend. The court ruled that the gun-shaped character at the end of the message constituted a “death threat in the form of an image” and the man was sentenced to six months

imprisonment and a 1,000 Euro fine.

Last year in Australia, the Queensland Supreme Court found an unsent text message with a smiley emoji, saved in the drafts folder of a dead man’s phone, could constitute a valid will for the deceased owner of the phone. The judge ruled that the informal nature of the message did not negate the possibility that it was a valid expression of the deceased’s intentions.

Kirley, a professor of law who has worked in the courts for more than 15 years as both a defence lawyer and crown prosecutor in Canada, became interested in the legal meaning of emojis when she noticed interpretation arguments arising in serious criminal cases.

“In 2016, I read about the case of a 12-year-old girl in Virginia, USA,” says Kirley. “She was charged with criminal threats for posting emojis on her Instagram account. It all kind of snowballed and it was her first entry into the criminal justice system, at 12 years old. It really highlighted how seriously the law views emojis.” ▶ ▶ ▶



**Emoji cases on the rise**

The first prominent example of emojis entering the courts was in the 2015 trial of Ross Ulbricht in the US, creator of the online dark web marketplace Silk Road.

Ulbricht was tried and convicted of money laundering, computer hacking and conspiracy to traffic more than \$200 million in illegal drugs over the dark web. When the prosecution began to read online communications between Ulbricht, his contacts and employees aloud in evidence, it quickly became obvious that emojis and their meanings would be integral to the case. Judge Katherine Forrest of Manhattan's District Court instructed that all internet communications be shown in text – emojis included – to the jury instead of reading the messages aloud, and that counsel and jury members should incorporate the emojis in their deliberations of the accused's intentions.

"That was an important case and it has just been appealed to the highest court of the US – the Supreme Court," says Kirley. Her paper notes that it represented emoji taking "a significant step towards legal legitimacy".

The incidence of such legal cases has increased as emoji use has skyrocketed in recent years. International social intelligence company Brandwatch reported last year that 95 per cent of internet users have sent an emoji at some point. According to Emojipedia, 9.9 million Australians regularly use emojis to communicate, and 6 million claim that emojis are better than words at communicating how they feel.

“ People are increasingly communicating on text message and social media. This means, naturally, that emojis are entering evidence. The complication is that emojis are often difficult to interpret precisely, even if one is familiar with the emojis in question. ”

ANDREW TIEDT



A search on the Australian Legal Information Institute (AustLII) reveals the word "emoji" has come up in 19 Australian cases on that database – all occurring from 2015 onwards. Research by Professor Eric Goldman at the Santa Clara University School of Law says the number of cases that mention emojis in the US has doubled in two years, growing from about 14 in 2015 to at least 33 in 2017.

"These days, text messages and emails will often include emojis," says Sydney silk Michael McHugh, who practises across civil and criminal jurisdictions. "If I'm before a jury I will read the text and then point to the emoji and may comment in some, usually self-deprecating way: 'Hmm, matter for you as to what that means.' It is the surrounding words or circumstances that can give context."

Emojis can be shown in their original form in court, so that judges and juries can decide on their meaning within the context of the digital message. However, the lack of emoji symbols on computer keyboards means they are still being left out of court transcripts. There is only one English example of a judge including a smiley face in the record of his judgment in 2016 – when UK High Court Justice Peter Jackson included the emoji in a family court judgment to recount a note left by a parent that had a smiley face drawn on it.

Kirley believes this is an area in which the courts need to modernise.

"The Ulbricht case showed that visual communication methods like emojis are an important part of modern conversation," says Kirley. "I think it sets a precedent that emojis should be included in court transcripts."



**Pictures can tell a thousand words**  
Emojis cause plenty of confusion in daily life, let alone legal situations. My friends and I have an ongoing debate over whether the two hands with blue sleeves held together are clapping or praying (the majority verdict is praying). But in January, The Wall Street Journal reported that even a gathering of senior partners of America's largest law firms could not agree what the "unamused face" emoji with raised eyebrows and a frown meant. Apparently, every lawyer said it meant something different



when they attended an "Emoji 101" conference at the Atlanta office of big law firm Bryan Cave LLP last year.

"One of the problems is that interpretation from the sender's point of view is not at all guaranteed to be the same interpretation from the receiver's point of view," says Kirley. "Even if it's the same image – because images change on different devices. If I send you an emoji on my iPhone and you get it on Samsung, it's not going to be the same. The graphics are different."

The other obvious issue, says Kirley, is that people using emoji are most often young people and children – far removed from the standard demographic of judges presiding on court benches.

"It's like a code, a separate language for these young people," says Kirley. "Judges in court are aged 40-60 and are mostly men. I remember reading

that some US Supreme Court judges still write judgments by hand. How can we expect them to be experts in digital speech?"

Andrew Tiedt, an accredited specialist in criminal law and partner at Armstrong Legal, confirms that emojis are increasingly becoming an issue in criminal matters involving children, including in sexual assault cases.

"People are increasingly communicating on text message and social media. This means, naturally, that emojis are entering evidence," says Tiedt. "The complication is that emojis are often difficult to interpret precisely, even if one is familiar with the emojis in question."

"In a recent case I am aware of, had the matter gone to trial, a jury would have had to consider what the 'side-eye' emoji should be understood to mean."





**McLennan Steege Smith**

---

Stamp Duty Valuations

---

Family Law single expert witness Valuations

---

Conciliation Valuations

---

1300 859 641  
frontreception@mcssa.com.au  
**mcssa.com.au**

Offices at Miranda and North Sydney



**Conference Travel Club**  
Adventures Educating Professionals

---

**Bucket List:**  
**The Ghan & Red Centre**  
11 – 22 July 2018

- Relaxed conferencing
- Hosted by your professional colleagues
- Opportunities to network with like-minded professionals

**CONFERENCE TRAVEL CLUB.COM.AU**



**Emojis in different areas of law**

Emojis have particular implications for criminal law, because their meaning is not determined by one judge but by a panel of jurors who may view emojis differently according to personal background, age and experience.

Like in my friends' group conversation, irony is common. An accused might intend an emoji to say one thing, but the victim might argue it was the opposite. But whose sides should the court take?

"There are so many potential meanings in emojis and they can rely on context and subtext that is hard to replicate in court," says Kirley. "The standard for criminal intent is very high – beyond reasonable doubt. How can you find that type of specific intent via emoji?"

While many cases involving emojis seem to be criminal, civil cases have shown that emojis can demonstrate intention to form contracts, that they can be defamatory, or raise legal issues surrounding freedom of speech. One significant decision for contract law featured a couple exchanging text messages of emojis with a landlord in Israel. The judge determined that the couple had shown intention to rent an

apartment by texting a string of positive emojis including a smiley face, a comet, champagne bottle and dancing figures.

A Sydney employment lawyer says he is currently acting in a sexual harassment case where "the significance of the eggplant emoji is likely to loom, err, large".

"The alleged harasser used the eggplant emoji in a text message to the alleged victim," says the lawyer – who does not want to be identified because the case is ongoing.

"The alleged harasser agrees that the eggplant has a sexual connotation but says that it was used in the context of welcome back-and-forth flirting. So, that aspect of the case may turn on the true and correct construction not of a contract – but of an eggplant."

Hopefully my mother doesn't read that one.

**Shrugging emoji: solutions?**

The Emoji Factor points out that legal interpretation of nonverbal messaging is not new to the judiciary – it has been seen "in decisions involving American sign language, Pitman Shorthand, gang symbols, marketing logos and tattoos".

The paper goes so far as proposing formation of a "discrete legal space"

or a speciality court – like the Drug Court, Children's Court or Land and Environment Court – to resolve emoji interpretation arguments.

While an Emoji Court seems a fair way off, it is true that courts have for centuries employed interpreters and expert witnesses to help guided decision-makers through foreign languages and niche topics.

Is the logical next step that we bring in emoji experts to help us interpret these digital characters? Kirley's answer offers the spoken version of a thumbs-up emoji.

"We have to bring in linguists and experts who deal with signs and symbols, as well as people who deal with AI, because the whole emoji system is mediated by artificial language," says Kirley. "Even cultural anthropologists, because there are cultural differences between how different nations use emoji."

It's hard to say whether these digital conversation code-breakers will ever have the insider knowledge to conclusively determine the meaning of particular emojis in context, post-fact. For now, at least, the secrets of my group message conversation remain safe. 🏠

**The developing case law of emojis**

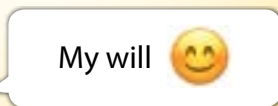
USA, 2015 – Two men were arrested for stalking when they sent threatening messages to another man via Facebook Messenger, without ever using words. The message that led to their arrest consisted of just three emojis – a fist emoji, followed by a hand pointing to an ambulance emoji.



France, 2016 – A young man in France was convicted of criminal threats for sending a gun emoji in a text message to his girlfriend. The court ruled that the gun-shaped character at the end of the message constituted a "death threat in the form of an image" and the man was sentenced to six months imprisonment and a 1,000 Euro fine.



Australia, 2017 – A Supreme Court Judge in Queensland ruled that a valid will could be expressed via text message with an emoji at the end. A deceased man had saved a text message in his phone's drafts folder labelled "my will" with a smiley face, and the judge found the informal nature of this "will" did not invalidate it.



Israel, 2017 – A Judge in a Tel Aviv small claims court ruled that a string of positive emojis sent in text messages between a couple and a landlord formed part of a contract showing intention to rent an apartment. After the landlord had relied on that intention in taking the apartment off the market, he sued the couple for almost \$3,000 when they did not hold up their end of the bargain.

