

EDITORIAL NOTE: SOME NAMES AND/OR DETAILS IN THIS JUDGMENT
HAVE BEEN ANONYMISED.

**IN THE DISTRICT COURT
AT DUNEDIN**

**CRI-2017-012-000288
[2017] NZDC 13464**

NEW ZEALAND POLICE
Prosecutor

v

DEANE MARTIN ELLISON
Defendant

Hearing: 6 June 2017

Appearances: T Hambleton for the Prosecutor
N Raynor for the Defendant

Judgment: 6 June 2017

ORAL JUDGMENT OF JUDGE D FLATLEY

[1] Mr Ellison is charged that he posted a digital communication, namely a Facebook message with the intent that it caused harm to [the victim] where posting that communication would cause harm to an ordinary reasonable person in the position of the victim, and by posting that communication caused serious emotional distress to her under s 22 of the Harmful Digital Communications Act 2015.

[2] The charge carries a maximum penalty of two years imprisonment, or a fine of \$50,000.

[3] Mr Ellison has pleaded not guilty and I have presided over a Judge-alone trial today and heard evidence from the complainant and from Mr Ellison.

[4] My role in a summary hearing of this type is to decide whether the elements of the alleged offence have been established to enable me to conclude that the charge is proved. The standard requires that I am satisfied beyond all reasonable doubt.

[5] Reaching my decision, I have to decide what actually happened, that is the facts. Once I have decided what happened, I have to decide whether the facts enable me to conclude that the elements of the offence have been established such that the charge can be proved.

[6] In reaching a decision as to the facts, I have considered all of the evidence that has been presented. I have decided which parts of the evidence I accept and which parts I do not accept. In doing so, I have considered the reasonableness, coherence, and probabilities of the evidence of each witness, thought about the extent to which the evidence is consistent with or is supported by other evidence from other sources which I have accepted as true.

[7] I have particularly taken into account the age and character of the witnesses, memory and judgement of the witnesses, the knowledge the witnesses have of the material facts. I have also borne in mind the interests that the witnesses may have in the outcome of the case, particularly the complainant, and I have borne in mind any motivation that might exist for what witnesses have said in evidence. I have also taken into account any apparent bias or prejudice exhibited by the witnesses.

[8] I note that just because I have not referred to all of the evidence that does not mean that I have not heard or considered it. An exhaustive analysis is not necessary of the totality of the evidence, where other evidence points to the proof of a particular fact. In other words, the evidence I refer to is the evidence I consider to be relevant to the establishment of the facts of the elements of the charge.

[9] The charge here, as set out in s 22 of the Harmful Digital Communications Act, is that a person commits an offence if the person posts a digital communication with the intention that it cause harm to the victim, and posting the communication would cause harm to an ordinary, reasonable person in the position of the victim, and posting the communication causes harm to the victim.

[10] There are a number of facts to take into account in determining the elements of the charge to which I shall refer subsequently, but the main elements are that the communication is posted and with the intention that it cause harm to a victim, and the posting would cause harm to an ordinary person in the position of the victim, and the posting of the communication did in fact cause harm.

[11] There is no issue in relation to the first element that the communication was posted. That is accepted. The defendant, Mr Ellison, posted a lengthy communication on the social media platform Facebook.

[12] Then I have to consider whether there was intention on the part of Mr Ellison to cause harm. He says not. Mr Ellison's position is that he was simply providing other people with information for the purpose of seeking help for individuals, particularly his former partner, the daughter of the complainant. He says that he has information about the victim which leads him to conclude that she has acted in/behaved in ways which he has described in his communication.

[13] I have considered the communication in detail and I can see nowhere in it where Mr Ellison seeks any help for any person.

[14] When I asked him about this, he said that I should read the last sentence or so of the communication. The last two sentences read as follows:

I am so relieved and thankful that I no longer have her crap in my life.
Hopefully there is Karma enough to bring her victims justice so that they're able to heal. Peace.

[15] I do not see any request for help in that. Rather, I read in that comment a hope that something happens to the complainant (victim), as a result of what Mr Ellison believes she might have done in the past. I take from that, that Mr Ellison would like to see something happen to the victim that might be detrimental to her wellbeing. My interpretation of karma is that for every action there is a reaction, and that seems to be the flavour of the comment made by Mr Ellison.

[16] I then go to the beginning of Mr Ellison's post which, in my view, entirely supports a conclusion that he had the intention of causing harm to the complainant

victim. That is because he starts by saying, “I do not often make, if ever, assertions of others, let alone negative comments, or severe allegations of someone as I am about to do.” Mr Ellison is clearly indicating that he is about to make disparaging, negative comments and allegations about an individual.

[17] He then goes on to say, in the body of his post:

This person is, according to [detail deleted], the worst child abuser I have ever heard of.

Later:

Her name is [the victim] and she can only be described as a lethal injection of toxicity who walks between raindrops looking down her nose at everyone she comes in contact with. She is the worst kind of perpetrator who has never been held accountable for all her daily, physical, mental, emotional and systematic manipulating abuse [details alleged deleted].

Then of concern to me is this comment:

She adds no value to the world, having never worked a day in her life, and offers nothing but chaotic conflict to those unfortunate souls that truly, and I mean truly, know her.

[18] I put those statements together, particularly with Mr Ellison’s opening statements about what he was about to say, and can only conclude that he had every intention of communicating with those who might want to read his post, a statement that would no doubt cause harm to the victim.

[19] I have no doubt that the posting of this communication would cause harm to an ordinary, reasonable person in the position of the victim. Anybody who was to read a communication of this type about them would be extremely upset and harmed.

[20] I have no doubt that the posting of the communication has caused harm to the victim. I have heard evidence today about the victims’ physical ailments. She has, [medical details deleted]. She has said in evidence today that those problems have been exacerbated since she learned of this Facebook post.

[21] It is not clear whether her physical ailments and the exacerbation of them are directly related to this communication, but the legislation does not require that there

be physical harm to a victim. It may well be that the victim's physical ailments have been exacerbated by this posting, but I cannot reach any conclusive finding about that. What I can conclude is, based on what the victim said in evidence, that she has been harmed. She is extremely upset by what has been posted about her, and understandably so.

[22] Considering the relevant factors that the Court might take into account in reaching a conclusion in a charge of this type, set out in s 22(2), Mr Raynor has submitted that there are a number of factors that are relevant and that could enable me to conclude that the elements of the charge are not established.

[23] I shall work through those factors quickly:

The extremity of language used

- (a) In my view, the language used here is extreme. Any claim that an individual is a child abuser can be seen as nothing other than an extreme claim and involving extreme language. Beyond that, Mr Ellison refers to the victim by name and then talks about her in extremely derogatory terms.

The age and characteristics of the victim

- (b) The victim is vulnerable, in my view, given her age and her physical ailments. She is perhaps more likely to be affected by this type of offending behaviour than other people. And in my view, Mr Ellison will have known that. Mr Ellison was a counsellor at the Milton Prison near Dunedin dealing with addiction issues. He would have known more than anybody else how a communication of this type would have affected the victim here.

Whether the digital communication was anonymous

- (c) It was not.

Whether the digital communication was repeated

- (d) That is not known by the Court. It is not known whether Mr Ellison repeated it and it is not known whether others who received it repeated it, but the very strong assumption that I can make is that it was repeated, because numerous people have seen the communication who may not have received it in the first instance. That is how Facebook works.

The extent of circulation of the digital communication

- (e) Mr Ellison contends that he did not intend for the victim to see the communication. In evidence, he said he had approximately 250 Facebook friends, that he had made an earlier enquiry as to whether anybody knew [the victim], and had received only one communication in response and that he had spoken to that person.

[24] Mr Ellison said that he was not aware that the post would be seen by others outside of this friend list. Having said that, Mr Ellison did accept that he knew how Facebook worked generally and that communications received by people could be read and then seen by other people who might be friends attached to their accounts and that is how postings on Facebook can spread, and often do, like wildfire.

[25] I do not accept Mr Ellison's evidence for one moment that he did not think this would happen. As it turns out, the communication was immediately seen by members of the victim's family, including her daughter, but it was a granddaughter who contacted her almost immediately to tell her what had been posted by Mr Ellison. She read the communication to the victim who was very upset about it.

[26] In my view, Mr Ellison knew that the communication would be seen by many, many people and would find its way back to the victim.

[27] It is hard to say what the extent of the circulation of the communication is definitively, but, knowing how Facebook works, as I am sure everybody in this room does, then it is fair to say that the extent of circulation is going to be extensive.

[28] Section 22(2)(f) relates to whether the digital communication is true or false. Mr Raynor has placed some emphasis on this part of the section in support of the defence. Mr Raynor submits that Mr Ellison was only passing on information that he had obtained from others, that it was not his statement and that it was based on information that was true. I do not accept those propositions. This was Mr Ellison's statement. He has referred to stories that he has heard from other individuals, [details deleted], but what he has recorded in this communication amounts to his view, his interpretations, his assumptions, and this is clearly his statement. He has used words that are his and particularly where he refers to the victim by name and then describes her.

[29] Further, it is not clear to this Court that what Mr Ellison has said is true. There is evidence to the contrary. The victim has given evidence about the strength of her relationship with [detail deleted]. I am not able to conclude that the statements made by Mr Ellison are true.

[30] Even if they are, this does not excuse him. He made a decision to post information that he knew would upset the victim. There is no question about that. Whether a communication is true or false is only one factor to be taken into account and depends on the type of information being referred to in the context in which it is released.

[31] This communication involves distressing and harmful statements about a victim which should not have been communicated.

[32] The final factor to take into account is the context within which the digital communication appeared. There is no issue in relation to this. The communication was placed on Facebook, as I have said, for whoever who might have contact with original viewers to see, and that included a number of the victim's extended family members.

[33] Mr Raynor has argued through questions asked that there was no direct harm caused to the victim because it was not intended for her direct viewing.

[34] Section 22 does not require direct harm by viewing the communication. The harm can be caused by other people seeing it and reporting it. This then causes direct harm, but also indirect, resulting from the impact on those others who have seen it and responded to it in some way.

[35] I have already referred to Mr Raynor's argument in relation to it being a statement not made by Mr Ellison but by others. I do not accept that.

[36] Mr Raynor has also argued that the communication was not harmful because it referred to no specific details of abuse. I do not accept that. There is sufficient in the communication to enable me to conclude that it was harmful indeed.

[37] I have covered, I think, all of the arguments put forward by Mr Raynor through his questions, in an effort to have me determine that the elements of the charge are not proved. But, Mr Raynor is unsuccessful.

[38] I conclude that the communication was posted with the intention of causing harm to the victim, that it would have caused harm to ordinary persons, and that it did in fact cause harm.

[39] The elements are established, the charge is proved, conviction will be entered.

D Flatley
District Court Judge