

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES),
OCCUPATION(S) OR IDENTIFYING PARTICULARS OF
WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO SS 202 & 205
CRIMINAL PROCEDURE ACT 2011.**

**ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES),
OCCUPATION(S) OR IDENTIFYING PARTICULARS OF
APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PURSUANT
TO S 200 CRIMINAL PROCEDURE ACT 2011.**

**IN THE DISTRICT COURT
AT WAITAKERE**

**CRI-2016-090-002217
[2017] NZDC 8269**

NEW ZEALAND POLICE
Prosecutor

v

[LIAM VAN DEVENTER]
Defendant

Hearing: 21 April 2017
Appearances: L Tatila for the Prosecution
S Tait for the Defendant
Judgment: 26 April 2017

**RESERVED JUDGMENT OF JUDGE A J JOHNS
(Re prosecution under S 22 of the Harmful Digital Communications Act 2005)**

[1] The defendant faces one representative charge that from 13 April 2016 to 21 April 2016 he posted digital communications namely emails and voice recordings with intent that it cause harm to [Isobel Howarth] where posting that communication would

cause harm to an ordinary reasonable person in the position of [Isobel Howarth] and that by posting that communication caused serious emotional distress to her.

[2] The defendant pleaded not guilty and the matter proceeded before me by way of judge alone trial on 1 March 2017. The matter was adjourned for counsel to file submissions in relation to the law and was subsequently adjourned pending the outcome of a High Court appeal in relation to the first decision delivered in relation to this particular section. That appeal decision has been delivered and I will refer to it later in my decision.

[3] The prosecution called Ms [Howarth] to give evidence. She and the defendant had been in a relationship for approximately 10 years, married in [date deleted] and have a [child] who was [under 10 years old] at the time of the alleged offending. The defendant left the marital home on [date deleted] January 2016. In February Ms [Howarth] sent the defendant some intimate pictures of herself in an attempt to reconcile and she said that was something they did when they were together.

[4] In [month deleted] 2016 Ms [Howarth] and [the child] spent a weekend in [location deleted]. When they returned [the child] rang the defendant and during the course of that conversation [the child] mentioned that when they had been away [William] had come with them. Ms [Howarth] had recently started a relationship with this gentleman.

[5] She gave evidence about what transpired thereafter which is essentially unchallenged by the defendant. The defendant became angry when he found out that she was seeing someone else and as a result started bombarding her with phone calls and emails. She blocked his number but he left a number of voicemail messages.

[6] The voice mail messages were retrieved and translated (they are in [language deleted]) and there is no issue over the translation. The emails have been retrieved and transcripts of both were produced as exhibits one and two.

[7] Eventually there was a threat in an email from the defendant to forward the pictures she had taken in February to others. She took advice from her lawyer who told her to involve the police which she subsequently did.

[8] I don't propose to refer to all of the emails and text messages but refer to the following which clearly display the basis for this prosecution.

Emails

[9] An email to Ms [Howarth] on 13 April at 11.26am concluded with "you are truly a disgusting person" followed by an email at 11.37am that concluded with "oh you know why I hardly eat you, it stank". At 1.15pm an email included "you are a despicable person" and concluded with "every time I see you I will spit".

[10] On 14 April at 2.23pm Ms [Howarth] responded to Mr [Van Deventer] saying "I will never call you again, do not ask me to in fact I am getting to the point that I think that all conversation should go through my lawyer your emails and threats are simply unacceptable". The defendant responded at 2.24pm saying "oh just lie back and get your fill".

[11] Moving to 19 April at 00.42am, the defendant sent an email saying "but then I fucked you after just a few hours of meeting you. As per my closing statement. You are a slut, shithole licking slut. Poor [name deleted]. Wonder what he will say if he just knows how much cock has been through your cunt. I know I was fucking you as well as that other guy, I was so so stupid. You are not worth [the child]. Your tits are horrible and droopy. If you didn't have a cunt you would have had fuck all, your cunt stinks" and at 5.51am "U sat having breakfast with me while sperm was dripping out of ur cunt. Fuck [Isobel] how low can you go. Google – self worth and self respect which u have very little of. U r a classic "I have daddy issues" got a [age deleted] yr old guy pregnant. Wow u low piece of shit" Ms [Howarth] sent an email to the defendant at 9.45am saying "No. It's not fair to ask. I am not a bad mother. Your emails are nothing short of traumatic."

[12] After some interchange about involvement of lawyers the defendant sent an email to the respondent on 20 April at 8.53am saying “it’s amazing what a little protein can do for one. U have become dislikeable person but then I have disliked u for a long time already. I just hope time will be on your side. I have a cunt picture of you and now you can’t answer a private question, really. I have spoken to [Alex] who is also split up with his wife. He has been shafting a lady now for three months and I asked him if his kids had met her yet and looked rather surprised at me and said not at least for another six months. But I guess you are special. I spit on [Isobel] for what you are doing with [the child]”.

[13] On Thursday 21 April at 10.02am the defendant sent an email saying “You have to talk to me bitch it’s about the house call me”. On the same day at 11.42am he sent a lengthy email and at the end of the first paragraph he said “please don’t call on privacy, remember the photos. There was no privacy – photos”.

Voicemail messages

[14] Turning now to the voicemail messages, thirteen were recorded between 18 and 21 April. Again, I won’t refer to them all. The first one on 18 April at 7.21pm was relatively benign but was followed by another at 8.40pm which said “Fucking coward. Just to let you know please start with full custody. I don’t wanna see [the child] again. I want to see fuckin nothing, I want to have absolutely fuckin nothing to do with you, fuckin to do with it. Fuck fuck fuckin cunt of yours. You fuckin”. Then at 9.59pm “Well done [Isobel]. You have now a [age deleted] year old man fuckin crying like a baby. Well done for that cunt of yours has done a good fuckin job. You lied to me for [number of years deleted] . You’re fuckin useless fuckin filthy fuckin bitch. I fuckin hate you, you cunt”. Then at 10.04pm “I can see you opening his arse and licking his shithole. Licking his shit in your mouth. I can see it you fuckin dirty piece of shit. You fuckin ... shithole licker. Fuck you fuck you fuck you, fuck you and every guy that’s gonna fuck you as well fuck you”.

[15] The following day the first message was recorded at 10.25am and was not abusive. The next message recorded at 11.06am was an attempt to apologise and a discussion about maintenance.

[16] The next voicemail was recorded at 3.05pm on 20 April and again was not abusive but on 21 April at 6.57am the defendant left the following message “ Okay [Isobel] you’re a coward, I accept that. You can’t face up to it. Um yes I did make a mistake. In a moment of weakness I’ve said horrible things. Um, because I sacrificed [number of years deleted] of my [number of years deleted] of my life with you. I tried to do what I could for you. You do something in a mo- moment of weakness, sending me naked [term deleted] pictures, naked pictures to me not understanding what I need to do with them. Okay. You threaten me by sending my emails to lawyers, now you want to get the police on me, because you sent me naked photograph? Is that right [Isobel]? Is that morally correct what you have just done? Is it morally correct what you have just done to “[nickname deleted]” with regard to your fuck pic aye? Is that morally right if you think it is then don’t ever talk to me again cos ill fuckin spit on you when I see you. Cunt”. A second message was received at 10.05am that day saying “Look you fucked up bitch. It’s about the house. Fuckin answer my call or fuckin call me bitch”. The next messages were received at 4.23pm and 7.33pm and are not abusive but indicated that the defendant wished to go to Ms [Howarth]’s home to see [the child]. The next message received at 7.40pm says “[Isobel] please I might be a bit relaxed. So if you don’t want me to come and see [the child], don’t wanna keep [the child] away, cos ill get there probably in half an hour. Please let me know, fuck [Isobel] I’m fuckin begging you jesus christ woman. I’m fuckin (inaudible). Please, you made your point, understand I’m a cunt. Please, just let me know please”. This message was followed by the last message recorded at 8.58pm the defendant said “Fuck you played me hey. Jesus you played me six love. You fuckin knew [the child] wasn’t gonna be there. You waited until I came, call the police now you are (inaudible) like its your fault. Fuck [Isobel]. What happened to you hey everything I have said every single word I’ve said and every single email is exactly true. That’s who and what you are. You and [the child] can go get fucked. You are dead to me. Dead. If you want something from me you will have to go to court fuck you and fuck the [term deleted] who carried you. You [term deleted] bitch. Fuck you. And record this and take me to court and do as you want to. I would just love, I would just love to stand there and watch you. I’d love it. So please go ahead. I’m going to the police now and I’m going to report you not allowing me to see [the child]. You very well know what the situation was. You decided not to tell me so let’s see let’s see who who’s gonna win this one. Yeah I’ll see you in court”.

[17] Ms [Howarth] had tried to reason with the defendant during this period, to no avail. She became very scared so she got in touch with the defendant's family, the defendant found out and at that point he made veiled threats about what he could or would do with the photos. When she spoke to her lawyer, he advised her to get in touch with the police.

[18] In describing the effect that the bombardment of phone messages and emails had on her she said at page 3 line 28: "I was afraid, I was genuinely scared of [Liam] because he had just become so unhinged. So I tried to get our lawyers to intervene by sending, asking all communication could be through our lawyers, and when things just started to escalate and [Liam] started threatening to send photos that I had sent him a couple of months ago".

[19] Ms [Howarth] described that she has a lot of complexes about her appearance and that the messages made her question herself and wonder what drives someone to that level of hatred. She described it causing her a lot of questioning about who she is and who she is in the eyes of her child and the eyes of her partner. She also said that she was scared of the person she had married and at page 7 line 1 said: "At that time, at that time I was just completely out of control, but I had no control over where we were at and I was to be perfectly honest I was enjoying the start of a new relationship but it is no way to start a new relationship. So it was just the anxiety, and I couldn't sleep and it was just it was just the most unbelievably stressful time now which has just continued to just get stressful. The biggest issue for me was his, my fear for [the child] as well. He in those emails makes it very clear and the voicemails, he makes it very clear that he wants nothing to do with [the child] because [the child] came from my body and to say that to [a] mother about her child and about the child that you share is so devastating, it's just devastating".

[20] When asked on a scale of 1 to 10, 0 being essentially relaxed and 10 being significantly highly stressed during this time she said "Even though I am a tough girl I put it up to 8 or 9".

[21] The defendant elected not to give or call evidence.

[22] In any defended hearing it is for the prosecution to establish the essential elements of a charge beyond reasonable doubt. There is no obligation on a defendant to prove his innocence nor is there any obligation on a defendant to give or call evidence.

[23] In relation to the essential elements here, I have to be satisfied of the following:

- (i) Identification of the defendant which is accepted; and
- (ii) That the defendant posted a digital communication, namely the emails and voice messages, which is accepted; and
- (iii) That he intended the postings to cause harm to Ms [Howarth];
and
- (iv) That the postings would cause harm to an ordinary reasonable person in Ms [Howarth]'s position;
- (v) That the posting caused serious emotional distress to Ms [Howarth].

[24] Harm is defined under the Act as serious emotional distress and harm does not have to be physical, it can be emotional.

[25] In the recent High Court decision of *Police v B*¹ Justice Down referred to five observations about the definition of harm as serious emotional distress.² His Honour said:

- (a) The definition is exhaustive. The Act is only concerned with emotional harm: “serious emotional distress;”
- (b) The Act eschews all distress short of that amounting to serious emotional distress. However, as observed by the trial judge, harm is

¹ *Police v B* 2017 NZHC 256.

² At para 18 to 21.

not equated with mental injury, nor must it be established by an identifiable psychological or psychiatric condition;

- (c) The determination of whether the defendant causes the complainant serious emotional distress is part fact, part value judgment determination;
- (d) In determining whether serious emotional distress has been caused, consideration should be given to factors such as: the nature of the emotional distress; its intensity; duration; manifestation; and context, including whether a reasonable person in the complainant's position would have suffered serious emotional distress.
- (e) The phrase "serious emotional distress" is a broad compendious expression that means what it says. Reference to dictionary definitions or broadly similar offence provisions in cognate jurisdictions is of little assistance as is elaboration upon the truncation of the statutory language.

[26] The District Court Judge was found to have erred in concluding that the complainant's evidence did not establish harm. The court found this was a result of the trial judge holding that more detailed evidence was required to cross the threshold from emotional distress to serious emotional distress which was an approach that Down J found neglected to consider the complainants evidence in its totality.

[27] The complainant had said in evidence that she was "Very upset for a long time; stressed ... frustrated, angry ... anxious ... unfit to work, which was unchallenged". His Honour concluded that the evidence was sufficient to conclude that the complainant had suffered serious emotional distress as a consequence of the respondent's unsolicited digital communication. His Honour concluded that the complainant's emotional response was consistent with how a reasonable person would feel in the circumstances and noted that as a useful cross check on whether the evidence was capable of establishing harm as serious emotional distress. The Court found the evidence was capable of establishing harm as defined by the Act.

Decision

[28] Obviously without evidence from the defendant the Court has to infer beyond reasonable doubt from the evidence heard that he intended to cause harm to Ms [Howarth].

[29] I am satisfied beyond reasonable doubt that the defendant did intend to cause harm to Ms [Howarth] and I draw this inference for the following reasons:

- (i) The volume of emails and voice messages delivered over this time; and
- (ii) The degrading, vile and abusive content of a number of the emails and also most all of the voice mail messages; and
- (iii) The threat to forward intimate pictures to others; and
- (iv) The duration of the posting of the emails and messages - from 13 April through to 21 April.

[30] His actions were clearly intended to intimidate, humiliate, demoralise her and threaten her reputation. The digital postings speak for themselves. The defendant was motivated by his jealousy and clearly sought revenge, and clearly his intention was to cause her harm. He continued even after she had emailed him and said she found his behaviour traumatic.

[31] Having found that the defendant intended to cause harm to Ms [Howarth], as a matter of commonsense and for the same reasons, I am satisfied beyond reasonable doubt that the postings would cause harm to an ordinary reasonable person in Ms [Howarth]'s position.

[32] It was clear when Ms [Howarth] gave evidence that the combined effect of the emails and voicemail messages had an enormous impact on her emotionally. She was tearful at times and it was obvious she was scared of the defendant.

[33] The effects of the defendant's conduct as captured in Ms [Howarth]'s evidence clearly show she suffered serious emotional distress. She described being genuinely scared of the defendant, that his behaviour caused her to question who she is. She describes being completely out of control, anxious and unable to sleep. It was an extremely stressful time for her. She was also devastated by comments made by the defendant indicating he didn't want anything to do with [the child] because [the child] came from her body.

[34] I am therefore satisfied beyond reasonable doubt that all three elements of the charge have been proved. The defendant wishes to apply to be discharged without conviction so no conviction has been entered.

[35] Pursuant to ss 202(1)(b) and 205(1), interim suppression of name to continue until order of the court.

Signed at this day of , at am/pm.

A J Johns
District Court Judge