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

IN THE DISTRICT COURT
AT MANUKAU

CRI-2015-092-010077
CRI-2015-092-013167
[2016] NZDC 23957

THE QUEEN

v

PARTHA IYER

Hearing: 19 September 2016

Appearances: Sgt Dijkstra for Police
P Borich for Defendant

Judgment: 28 November 2016

RESERVED DECISION OF JUDGE C J DOHERTY
ON APPLICATION FOR DISMISSAL PURSUANT TO S 147(4)(B)
CRIMINAL PROCEDURE ACT 2011

Introduction

[1] The defendant is charged with two offences.

[2] The first is of breaching a protection order between the 1st and 31st of July 2015 ("the first charge"). It is alleged that the defendant breached s 49(1)(b) of the Domestic Violence Act 1995, in that he carried out psychological abuse of the protected person (his wife, Mrs Rani Iyer) during a telephone conversation on 5 August 2015, and by following the complainant the day before.

[3] The second charge alleges a breach of s 22 of the Harmful Digital Communications Act 2015 (HDCA) ("the second charge"). It is alleged that the

defendant posted a digital communication, being semi-nude images of Mrs Iyer, from whom he is separated. The prosecution alleges that: in posting the communication, the defendant intended to cause Mrs Iyer harm; that posting the communication would cause harm to an ordinary reasonable person in Mrs Iyer's position; and that posting the communication caused serious emotional distress to Mrs Iyer.

[4] At the conclusion of the prosecution case the defendant applied, pursuant to s 147(4)(b) of the Criminal Procedure Act 2011, for both charges to be dismissed on the basis that there is no case to answer. I must only allow the application if, at this stage of the proceeding, the prosecution has not been able to present any credible evidence that would prove each essential element in the alleged offence.[1]

Findings of fact

[5] For the purposes of determining whether there is a case to answer, I make the following findings of fact:

[6] On 26 June 2015, the Defendant was served with a Temporary Protection Order made on 25 June 2015 in favour of Mrs Iyer.

[7] On 28 September 2015 that Order was made final.

[8] On or about 5 August 2015 the defendant, in a conversation with Mrs Iyer, told her he had been able to access her Google Maps account on her smartphone and use it to track and "follow" her while she was in the company of another man the day before.

[9] In the same conversation, he told Mrs Iyer the details of the car that she had been travelling in, a description of the man she was with, where she had been and where she had parked the car. He admitted to the police he had followed Mrs Iyer and her male friend for a short distance.

[1] *Haw Tua Tau v Public Prosecutor* [1982] AC 136, [1981] 3 All ER 14 (PC) at 151-152.

[10] Sometime between the 5th and 29th of August 2015, the defendant and his wife met at [location deleted]. At that meeting, Mr Iyer threatened to post pictures of Ms Iyer online.

[11] At some time before 29 August 2015, pictures of Ms Iyer lying on a bed in her underwear were posted on the Facebook social media website. They were posted on a profile account named [name of account deleted]).

[12] On 29 August 2015, Ms Shroad, a friend of Ms Iyer, received an "invite" via Facebook. The "invite" stated that [name of account deleted] wants to follow you".

[13] After Ms Shroad brought the Facebook page to her attention, Mrs Iyer viewed the photographs posted on the [name of account deleted] account, using her iPad. Ms Shroad observed that upon viewing the [name of account deleted] account, Mrs Iyer became "very depressed", was "almost crying" and required someone to be with her for support.

[14] Mrs Iyer was frustrated, angry, anxious and very upset. For several days she felt unfit for work, although she did not recall taking any time off work.

[15] The defendant admitted to the police he had created the [name of account deleted] account and uploaded two photographs to it.

The First Charge: Breach of Protection Order (CRN-1509-201-4092)

[16] In order to establish a case to answer in respect of the first charge, the prosecution must have established a prima facie case that: a protection order was in force; and that, while the protection order was in force, the defendant engaged in behaviour which amounted to psychological abuse of Mrs Iyer.

[17] Both elements have been established, to at least a prima facie standard.

[18] The first element is satisfied by the production of the protection order.

[19] The second element is satisfied by evidence that in a phone call on or about 5 August 2015, the defendant used intimidatory language so as to lead Mrs Iyer to believe that he knew or had access to her every move. This evidence was provided

by Mrs Iyer, and corroborated by the defendant's admission to Police that he had followed her in his car and had tracked her phone, enabling him to know her whereabouts. Such behaviour could be classified as intimidatory.

[20] I find that the prosecution has established a case to answer in respect of the first charge.

The Second Charge: Posting of a Digital Communication (CRN-1509-201-6296)

[21] In order to progress the second charge, the prosecution must have established a prima facie case in respect of five elements:[2]

(a) the defendant posted a digital communication;

(b) on or about 29 August 2015;

(c) with intention to cause harm to Mrs Iyer;

(d) where posting the communication would cause harm to an ordinary reasonable person in her position; and

(e) posting the photographs did cause harm, being serious emotional distress, to Mrs Iyer.[3]

The first element: posting a digital communication

[22] In respect of this element, the defendant claims the prosecution has not proved that a Facebook post qualifies as a digital communication, as defined by s 4 of the HDCA. The defendant claims that, in the absence of expert evidence, the prosecution has not been able to establish how Facebook works, and that the workings of Facebook are not sufficiently well-known to allow for judicial notice to be taken. As this is the first defended hearing to be decided under the HDCA, there is no body of law which definitively determines that posting an image on a Facebook page is a digital communication.

[23] In this context, expert evidence is relevant only insofar as it assists in ascertaining whether the definition of "posts a digital communication" has been met.

---

[2] Harmful Digital Communications Act 2015 s 22(1).
[3] Sections 4, 22(1)(c).

For the reasons that follow, I find that such a conclusion can be reached without the assistance of expert evidence.

[24] Regardless of the platform — whether by email, short messaging service (SMS) or social media such as Facebook — the HDCA's focus is whether the relevant material was a "digital communication". This phrase is defined in s 4 of the HDCA:

> **digital communication—**
>
> (a) means any form of electronic communication; and
>
> (b) includes any text message, writing, photograph, picture, recording, or other matter that is communicated electronically.

[25] Section 4 clarifies that "posts a digital communication" means:

> (a) means transfers, sends, posts, publishes, disseminates or otherwise communicates by means of digital communication:
>
> (i) any information, whether truthful or untruthful, about the victim; or
>
> (ii) an intimate visual recording of another individual; and
>
> (b) includes an attempt to do anything referred to in paragraph (a).

[26] In order to determine the present application, I do not consider that an in-depth knowledge of how Facebook operates is necessary in and of itself. What the prosecution is required to prove is that the defendant posted a digital communication for the purpose of the HDCA. This is not a question of taking judicial notice, but rather establishing whether the actions of the defendant met the statutory definition of the offence. In the present case, this specifically means determining whether the prosecution has established a prima facie case that uploading photographs to the [name of account deleted] account constituted the posting of a digital communication.

[27] As this is the first defended hearing under the HDCA, s 22 of the HDCA has not been the subject of judicial interpretation by higher courts. I am therefore

required to simply interpret it as required by the Interpretation Act 1999 s 5: "from its text and in light of its purpose".

[28] In reading the text of the HDCA, it is clear that the definition is intended to be broad. Part (a) of the s 4 definition of "digital communication" emphasises that a digital communication may be "*any* form of electronic communication". The definition is expansive, and does not purport to limit the communication to certain media or platforms. Part (b) of the definition focuses mainly on the content, rather than the method of delivery.[4] It does not limit the broad scope of part (a), but rather, by using the word "includes", provides a non-exhaustive list of examples that qualify as digital communications. This includes a photograph or picture.

[29] The definition of "posts a digital communication" is similarly broad. The list of verbs which constitute the act of posting, provided in part (a) of the definition, is wide-ranging and non-exhaustive. It is sufficiently broad to include the act of uploading a picture onto a Facebook account. Part (a)(i) of the definition requires only that the pictures (which constitute the "digital communication") contain "any information, whether truthful or untruthful, about the victim", or constitute an intimate visual recording. The photos at issue in this case could be said to convey information about Mrs Iyer's appearance or body. They also qualify as an intimate visual recording, notwithstanding that they may have been made by Mrs Iyer herself.

[30] The definition of "intimate visual recording" is also set out in HDCA s 4:

> (a) means a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device with or without the knowledge or consent of the individual who is the subject of the recording, and that is of—
>
> (i) an individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the individual is—
>
> (A) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments;

[4] With, perhaps, the exception of "text message", which suggests a form of delivery such as SMS.

[31] Significantly, the HDCA definition of "intimate visual recording" differs from the definition found in the Crimes Act 1961 s 216G, in that the HDCA definition includes recordings made with the knowledge or consent of the individual who is the subject of the recording.

[32] I consider that both photographs of Mrs Iyer posted to the [name of account deleted] account constitute intimate visual recordings. They were created by Mrs Iyer for the purpose of personal use, or use in a confined setting (possibly for a dating website). They were not intended to be made available to friends, family, strangers or persons invited to follow the [name of account deleted] account. They were taken in Mrs Iyer's bedroom, which is plainly a place that an ordinary person in the prevailing circumstances would expect a degree of privacy.[5] Finally, the photographs depict the body parts and level of exposure required by the s 4(a)(i)(A) definition.

[33] The overall effect of the definitions in the HDCA suggests that uploading the photographs to the [name of account deleted] account constituted the posting of a digital communication for the purposes of s 22(1).

[34] This conclusion is bolstered by analysis of the purpose of the HDCA.

[35] To determine the purpose of the HDCA, it is first useful to turn to the purposive section. The purposes of the HDCA are stated as follows:[6]

> **3 Purpose**
>
> The purpose of this Act is to—
>
> (a) deter, prevent, and mitigate harm caused to individuals by digital communications; and
>
> (b) provide victims of harmful digital communications with a quick and efficient form of redress.

[5] This is the test adopted in the identical (bar the issue of knowledge of consent referred to in [31]) statutory definition of intimate visual recording contained in the Crimes Act 1961 s 216G. See *Adams on Criminal Law* (online ed, Thomson Reuters, at CA216G.02).

[6] Harmful Digital Communications Act 2015 s 3.

[36] This purposive section incorporates the phrase "digital communications" without further definition. As such, it does not assist in ascertaining whether the posting of an image on a Facebook account constitutes a digital communication for the purposes of the HDCA.

[37] Therefore, it is useful to look to the parliamentary origins of the legislation. The legislative use of the term "digital communication" has its genesis in the work of the Law Commission, which led to the drafting of the bill that became the HDCA. In its Ministerial Briefing on this issue, the Law Commission commented that:[7]

> 16. The term applies not only to one-to-one communication but more broadly the range of digital publishing which occurs in cyberspace. This includes the uploading of user-generated content (audio-visual, pictures or text) on websites and platforms such as YouTube and Facebook, and the use of micro-blogging sites like Twitter to disseminate information and opinions.
>
> 17. The distinguishing feature of electronic communication is that it has the capacity to spread beyond the original sender and recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing.

[38] The preparatory work of the Law Commission was referred to by Parliament throughout the passage of the HDCA,[8] and in the Select Committee's report on the Bill.[9]

[39] The preparatory materials clearly indicate that communications of the type at issue in the present case were intended to fall within the definition of "digital communications". Indeed, the [name of account deleted] account, as a page on the Facebook platform, is precisely the type of communication that has "the capacity to spread beyond the original sender and the recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing". Not to include the present communication within this category would run counter to the purpose of the HDCA.

---

[7] Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at 7.

[8] See for example (23 June 2015) 706 NZPD 4646; (25 June 2015) 706 NZPD 4830; (30 June 2015) 706 NZPD 4850.

[9] Harmful Digital Communications Bill 168—2 as reported from the Justice and Electoral Committee at 2.

[40] The prosecution has established a prima facie case that a photograph was communicated electronically. In this case, the medium of that communication happened to be Facebook. It was communication in that there was a sender and at least two recipients, namely Ms Iyer and Ms Shroad, who viewed the photographs on their electronic devices. I am satisfied, without evidence of the precise protocol and technological basis of Facebook, that the photographs included on the [name of account deleted] account constituted digital communications. Thus, the first element of the offence has been made out to a prima facie standard.

[41] The defendant further argues that the representation of the digital communication produced at trial, namely a copy of a screenshot of the [name of account deleted] account, should also be fully explained by further evidence.

[42] I do not believe that such explanation is necessary. The screenshot has been produced as a hard-copy image of the material that was communicated to the electronic devices of Mrs Iyer and Ms Shroad. If the defendant alleges that the material has been fraudulently created, or misrepresents the nature of the communication, then that would be a matter to be tested by evidence as part of the defence case. For present purposes, however, I consider that the screenshot is sufficient to establish a prima facie case for the first element being satisfied.

Element two: time that the digital communication was posted

[43] Section 22(1)(a) of the HDCA requires that the offender must have "posted" the digital communication. Thus, in order to establish a prima facie case, the evidence must be capable of proving that the photos were posted via the [name of account deleted] account on or after 1 July 2015 which is the day the HDCA came into force. It is not sufficient that the communication was viewed, or caused harm, at the time that the HDCA was in force.

[44] The charge alleges that the photos were posted "on or about 29 August 2015". The prosecution did not introduce any documentary or expert evidence to demonstrate the date on which the photographs were posted. Although Ms Shroad was invited to "follow" the [name of account deleted] account on 28 or 29 August

2015 — when the HDCA was in force — the invitation does not constitute the actus reus of the offence.

[45] Ms Shroad suggested that the invitation to follow the [name of account deleted] account would have naturally followed immediately after the account was created, and the photos posted. Ms Shroad was not qualified as an expert, and cannot provide technical evidence as to exactly when the photographs were posted in relation to the time she received the invitation to follow.

[46] The defendant claimed to the police that the page was deactivated after it was created, and then automatically "reactivated" by Facebook after 28 days. This would tend to mean that the account could have been created before 1 July 2015, when the HDCA came into force.

[47] This claim would require expert evidence on the nature of Facebook page "reactivation" in order to be proved or disproved beyond reasonable doubt. However, if accepted, it might raise doubt by establishing a possibility that the digital communications could have been posted before the HCDA came into force. But at this stage I cannot consider the defendant to be an expert either.

[48] The answer to proof of a prima facie case for this element lies in the evidence of Ms Iyer and whether a reasonable inference might be drawn at this stage to determine the timing of the posting of the photographs.

[49] My findings of fact that "sometime between the 5th and 29th of August 2015, the defendant and his wife met at [location deleted]" and "at that meeting, Mr Iyer threatened to post pictures of Ms Iyer online" enables me to draw the inference that the posting of the photographs was carried out sometime after the meeting. From her evidence it seems he was attempting to force her to have the protection order against him removed and if she didn't, he would post the photographs. I find it implausible that in the context of this discussion with his former wife, the defendant would have threatened to do something that he had already done; it would have been a hollow threat and from my assessment of him in the police video interview, is not likely one a man of his disposition would make.

[50] I find there is a prima facie case to answer in respect of this element.

Element three: With intention to cause harm to the complainant

[51] The evidence must tend to prove that the defendant posted the "digital communication with the intention that it cause harm to a victim" (in this case Mrs Iyer). Harm is further defined in s 4 of the HDCA as "serious emotional distress".

[52] I have been unable to find the phrase "serious emotional distress" in any other piece of legislation. Accordingly, it does not appear to have been judicially defined, thus I must consider the definition in terms of the plain meaning of the words, and the wider purpose of the HDCA.

[53] On the basis of the words of s 4, the harm does not need to be physical. The statute plainly states that emotional harm will qualify. As the Law Commission has observed, "the distinction between physical and emotional harm has been broken down over a considerable period of years".[10] The text of s 4 reinforces observations made by courts in many cases that emotional harm can be serious and may require similar sanction to physical harm.[11]

[54] It is clear from the inclusion of the word "serious" that the intended harm must be more than trivial. Being merely upset or annoyed as a consequence of a digital communication would not be sufficient to invoke the sanction of criminal law. Also, I emphasise that the conduct criminalised by the HDCA is *harmful* conduct. Offensive, morally repugnant or merely upsetting conduct will not suffice. In order to attract criminal sanction, the conduct must go further.

[55] However, I also consider that the use of the word "distress" suggests that the intended harm need not extend as far as mental injury or a recognised psychiatric disorder. The legislature has avoided the phrase "mental injury", which elsewhere has been defined as exclusively designating a recognisable psychiatric disorder or illness.[12] Furthermore, s 22 of the HDCA directly invites comparison to s 750.411s

---

[10] Law Commission Ministerial Briefing, above n 7, at [4.71].
[11] See for example *R v Ireland* [1998] AC 147 (HL) at 156; *R v Mwai* [1995] 3 NZLR 149 (CA) at 154–155; Health and Safety at Work Act 2015 s 2.
[12] *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA) at [65].

of the Michigan Penal Code.[13] Subsection (g) of that provision defines emotional distress as:

> … significant mental suffering or distress that may, but does not necessarily, require medical or other treatment or counselling.

[56] Turning to the purposive approach, in my view it is clear that the definition of serious emotional distress is designed to balance two competing concerns: the serious effects of calculated emotional harm, and the importance of maintaining free speech.

[57] The deterrence, prevention and mitigation of harm caused by digital communications is the first purpose set out in the HDCA, at s 3(a). By enacting the HDCA, Parliament has sent a clear message that harm caused by digital communications must be taken seriously. In the Parliamentary debates that led to the passage of the HDCA, the responsible Minister HDCA commented that:[14]

> … there is a real, significant harm that can be caused through digital means. It is a new threat, and it is a very real, very serious threat that Parliament has to respond to. …
>
> … the legislation … creates new criminal offences to deal with the most serious of harmful digital communications. … These new offences send a clear, strong message that serious and harmful instances of online bullying and harassment can be criminal behaviour, and, where appropriate, those who torment others can and will be held to account.

[58] This Parliamentary discussion reveals that any harm associated with digital communication must be taken seriously. It is important that the court does not assume that emotional distress caused by digital communications is inherently any less harmful than other forms of harm. From this, I interpret that the bar to a successful criminal prosecution must not be set too high.

[59] However, it is also clear that the need to deter harmful online conduct must be weighed against the value of freedom of expression. Freedom of expression is a right protected by s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA). It includes the right to "impart information and opinions of any kind in any form".

---

[13] Section 22 includes a comparative note at the bottom of the section. As per the Interpretation Act 1999 s 5(3), I consider that this may be used as an aid to interpretation.

[14] (25 June 2015) 706 NZPD 4830 (Hon Amy Adams).

Although NZBORA rights are not absolute, s 6 of NZBORA requires that I consider s 14 when interpreting other statutes, a requirement that is reinforced by s 6(2)(b) of the HDCA. This demands that the courts do not give an interpretation that would have an unduly restrictive effect on free speech. Indeed, this risk is heightened in the HDCA context, which criminalises expression that would not attract liability if it were communicated through a different medium. Accordingly, I consider I must not reach an interpretation of "serious emotional distress" that is set too low. Taking a purposive approach requires that I balance the deterrence of online harm with the preservation of freedom of speech.

[60] The text of the statute and the wider purposive context both bring me to the same conclusion. In order to attract liability under s 22 of HDCA, conduct must be harmful to an identifiable victim. I conclude that the definition of "harm", being "serious emotional distress", may include a condition short of a psychiatric illness or disorder, or distress that requires medical or other treatment or counselling.

[61] The nub of this element is the intention of the defendant. An intention to elicit a serious response of grief, anguish, anxiety or feelings of insecurity would, in my view, qualify as intention to cause harm for the purposes of HDCA s 22(1).

[62] The prosecution case alleges that the defendant's primary motivation for posting the digital communications was to coerce the plaintiff into his desired course of action: namely, to dissuade Mrs Iyer from communicating with other men and pursuing what the defendant considered to be inappropriate romantic relationships. Mrs Iyer's evidence was that at the time of the discussion in [location deleted] she thought the defendant was attempting to blackmail her into removing the protection order as well as warning her to stay away from other men. I have determined that this discussion was likely to have been prior to the posting of the photographs and there is no other evidence of any later intention. In his statement to the police, the defendant said he required the protection order removed in order that he might visit his parents abroad. However, while there is nothing in Mrs Iyer's evidence of what was discussed at the meeting in [location deleted] to suggest that the defendant gave the impression he was intending to cause her harm, or that he considered serious emotional distress to be an inevitable consequence of his actions, the infliction or manifestation of serious emotional distress cannot be separated from his aim or aims.

In order to achieve this alleged motive, the defendant would have had to inflict feelings of serious shame, fear and insecurity. It is these forms of emotional distress that would have allowed the defendant to achieve the intended consequences of his actions.

[63] I stress that at this stage I need only find that the prosecution has made out a prima facie case. It is open to the defence to prove that the defendant was not motivated to control the complainant's life, or that he could have achieved his motive without inflicting serious emotional distress. However, at this stage of proceedings I find that the prosecution has established a case to answer for this element.

Element four: where posting the digital communication would cause harm to a reasonable person in the position of the victim

[64] The prosecution must prove that the communication would cause harm to an ordinary reasonable person in the position of Mrs Iyer (HDCA s 22(1)(b)). Section 22(2) sets out a non-exhaustive list of factors which the court may consider, including:

(a) the extremity of the language used:

(b) the age and characteristics of the victim:

(c) whether the digital communication was anonymous:

(d) whether the digital communication was repeated:

(e) the extent of circulation of the digital communication:

(f) whether the digital communication is true or false:

(g) the context in which the digital communication appeared.

[65] I consider that factors (b); (c); (d); (e); and (g) are relevant to the present case.

[66] For present purposes, I consider factors (b) and (g) together. Factor (b) invites me to consider the characteristics of Mrs Iyer as she is "the individual who is the target of the post" (HDCA s 22(4)). The most relevant characteristic of Mrs Iyer is

that she is the defendant's estranged wife. It is also important to consider the overall context of the relationship (as per factor (g)), and the pattern of control that has been exerted upon her. Although there is no evidence why, a protection order against the defendant had issued in her favour. Through the evidence of Mrs Iyer, as well as the record of the defendant's police interview, the prosecution has been able to establish that the defendant sought to control her behaviour. The digital communications must be seen in this context. From the evidence so far presented, it appears that the defendant had knowledge of Mrs Iyer's online accounts (including her phone applications), her address, where she had been meeting another man, and the identity of that man. The defendant used this information to convey to her that he was capable of controlling her life, and had threatened to use this information to embarrass and shame her to her friends and family. In this context, the digital communications represent not only an attempt to embarrass Mrs Iyer, but to control her through emotional manipulation. It is reasonable that a person whose former partner is using intimate details of her life in order to influence her behaviour will experience serious feelings of insecurity and shame. In my view, it is reasonable that such feelings could manifest as anxiety, depression or trauma, approaching the threshold of serious emotional distress. In this sense, the characteristics of Mrs Iyer and overall context of the communications suggest that they would be capable of serious emotional distress to the objective person.

[67] Factor (c) invites me to consider the relevance of the anonymity (or otherwise) of the digital communication. The statute suggests that communications which are posted anonymously may have a greater psychological impact on the victim. Indeed, the Law Commission commented that "from the victim's perspective, anonymity of the abuser can exacerbate the victim's sense of powerlessness".[15] The Law Commission identified the potential for anonymity as one of the distinguishing features of digital communications, which made its harm more pernicious than other communications media. In the present context, where the defendant's motivation relates directly to the issue of power and control, the anonymity of the communication must be taken into account. The [name of account deleted] account purported to take on the identity of Mrs Iyer. It did not reveal to her exactly who had assumed her identity. Although Mrs Iyer and her friend quickly identified the

[15] Law Commission Ministerial Briefing, above n 7, at [2.42(a)].

defendant as the person responsible, the anonymity of the account would inevitably lead to doubt and fear as to who may be responsible for the posts, and who had access to the intimate images of her. In establishing a prima facie case as to the anonymity of the digital communications, I consider that the prosecution has identified a factor that tends toward satisfying the requirement of s 22(1)(b).

[68] Factor (d) invites me to consider whether the digital communication was repeated. The statute implies that repeated harmful digital communications are more likely to cause harm to an objective person. In the present case, the post was not repeated. Consequently, Mrs Iyer was not repeatedly exposed to direct communications, which suggests a lower degree of harm. However, it should be noted that a post on a platform such as Facebook — unlike, for example, a harmful telephone call — has the potential to be accessed multiple times, so that although the communication is not repeated, the effect of the post is ongoing.

[69] Finally, factor (g) invites me to consider the extent of circulation of the digital communication. The nature of digital communications is that they may be disseminated widely. Even a communication intended for only private dissemination, such as an SMS message or privately-sent photo, may be copied and circulated to a wide audience. In the normal course of events, it is reasonable to assume that harmful communications that are widely circulated will likely have more of a distressing impact than communications which are sent only to a narrow audience. In the present circumstances, the post had potential to be widely communicated. However, the prosecution has provided only limited evidence as to the extent of the communication. On the basis of the evidence presented, I can only be sure that Ms Shroad and Mrs Iyer herself received the communication. The prosecution has not provided any other evidence, expert or otherwise, to suggest that the post was publicly available or in fact accessed by anyone else. I must accept that the audience to whom the post was communicated was small.

[70] Taken together, by a narrow margin I consider that these factors mean that the post would cause harm to an ordinary reasonable person in the position of Mrs Iyer. I make this finding on the basis that it reflects the prosecution case thus far, and would be capable of refutation by the defence case. The main factor that leads me to this conclusion is the overall context of the relationship. The defendant utilised the

digital communication to exert power over his former wife, in the wider context of a relationship breakdown. He made specific threats that he would do so. The posting of the digital communication effectively suggested to Mrs Iyer that the defendant had access to her intimate details and data. The anonymity of the communication could exacerbate the distress, as it would raise doubt as to exactly who had access to the photographs. Although I am not satisfied that the communication was disseminated to a wide audience, the medium of the communication — Facebook — would have immediately raised concerns to a person in Mrs Iyer's position that the post could be widely circulated, including to family and friends (including the couple's children). This would add to feelings of powerlessness. The communication could cause serious anxiety, stress and insecurity to a person in this situation.

[71] I find that the prosecution has established a prima facie case that the posting would cause serious emotional distress to an objective person in the position of Mrs Iyer.

Element five: whether posting the communication causes harm to the victim

[72] It is not enough to prove that the digital communication would cause harm to an objective person. The prosecution must establish that the communication did, in fact, cause harm to the victim.

[73] I have found that discovering the post of the photographs resulted in Mrs Iyer being frustrated, angry, anxious and very upset and that she considered taking time off work (although she did not recall that she did so). The only other evidence was from Ms Shroad who reported that at the time she viewed the post, Mrs Iyer almost cried and appeared "very depressed" and required someone to be with her for support. I hasten to add this was not a clinical diagnosis but a lay person's description of what she observed. Mrs Iyer did not elaborate on her frustration, anger, anxiety or upset. Ms Shroad did not elaborate on what she meant by "depressed" nor describe Mrs Iyer as exhibiting feelings of serious anxiety or insecurity. What Ms Shroad meant by Mrs Iyer needing "someone to be with her for support" was not elaborated upon. While the evidence clearly points to some degree of emotional distress, it is not sufficient to satisfy me it has reached the threshold of serious emotional distress (as explored above at paragraphs [52]–-[60]). I do not

overlook the fact that Ms Shroad's observation, while proximate to the time of discovery of the post, is not necessary determinative of the distress of Mrs Iyer; the distress may have manifest itself later. Nor have I ignored the notion that an inference might be drawn that the needing of support itself meant Mrs Iyer was suffering serious emotional distress. But the absence of specific evidence as to the root cause of her need is a telling factor against the drawing of such an inference.

[74] The prosecution need only prove that the electronic communication caused harm; not that it caused harm immediately. Whether harm in the form of serious emotional distress was caused is a matter of fact. The prosecution has not led cogent evidence to this effect. Such evidence could have been provided by more detailed and specific evidence from Mrs Iyer as to her reactions, feelings or physical symptoms and their duration or by expert evidence, such as the evidence of a psychologist or counsellor. However, none has been led.

[75] On this basis, I consider that the prosecution has not established a prima facie case that the complainant in fact suffered harm as defined in s 4.

Outcome

[76] The application in respect to the first charge (breach of a protection order) is dismissed.

[77] Because the prosecution has failed to cross the prima facie threshold in respect of element five of the second charge (s 22 HCDA), the application under the Criminal Procedure Act 2011 s 147(4)(b) to dismiss that charge is granted and the second charge is dismissed.

[78] The case will resume at 10am on 14 December 2016 in respect of the first charge.

C J Doherty
District Court Judge