CASE NOTE: *POLICE V B* [2017] NZHC 526, [2017] 3 NZLR 203

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I. INTRODUCTION

Police v Iyer was the first case where judicial consideration was given to the provisions of s 22 of the Harmful Digital Communications Act 2015 (HDCA, or the Act) — which creates the offence of causing harm by posting a digital communication.[1]

The decision, delivered on 28 November 2016, was a ruling on a submission of no case to answer. The prosecution under the HDCA was dismissed. But the case is significant for the detailed analysis and interpretation of the provisions of the section and should provide some guidance for the future. It was also significant for another reason. It became the first case dealing with the HDCA to receive appellate consideration.

The Police appealed to the High Court against the decision to dismiss, arguing that the District Court Judge set the threshold for harm or serious emotional distress too high, and that his finding that there was an absence of evidence of actual harm arose as a result of an incorrect evaluation of the information that was placed before him.[2]

In this article, I shall consider first the facts of the case and proceed to briefly consider the lower court decision. I shall then move to consider the High Court approach before embarking upon a discussion of the issue of harm under s 22, and the care that must be taken in assessing whether or not a communication was causative of harm.

II. THE FACTS[3]

The respondent and complainant were married but had separated in May 2015. The complainant obtained a protection order against the respondent which was made final in September 2015. The events that were the subject of the charge occurred in August 2015.[4]

The complainant and the respondent were technologically literate. They used smartphones and the Internet. The defendant had access to the complainant's whereabouts by tracking her iPhone and also had access to her iCloud storage. For her part, the complainant — after the separation — set up a page on an online dating service upon which she posted photographs of herself.

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* District Court Judge (retired)

[1] *Police v Iyer* [2016] NZDC 23957 [*Iyer*].

[2] Appellant's submissions on appeal (28 February 2017) at [4].

[3] The facts are taken from the decision of Downs J in *Police v B* [2017] NZHC 526, [2017] 3 NZLR 203 at [3]–[6] (*B)* and supplemented by material from the decision of Doherty J in *Iyer*, above n 1.

[4] *Iyer,* above n 1, at [5]–[10]; *B*, above n 3, at [3].

Early in August the complainant started dating. The respondent was aware of this and communicated with both the complainant and her date, making it clear that he knew where they had been and what they had been doing.

Later that month the complainant and the respondent met. He asked her to cancel the protection order. He also advised that he had a number of photos of her and that he would post these online if she did not stop seeing other men. The complainant was scared, anxious and felt that she was being blackmailed.

The event which gave rise to the charge occurred on 29 August. The attention of J, a friend of the complainant, was drawn to a link to a Facebook page which contained photos of the complainant in a state of semi-undress. J took a screenshot which she sent to the complainant. The complainant recognised the images as photos she had taken of herself after she had separated. She was unaware how the respondent obtained them. She was upset and made a complaint to the Police.[5]

The respondent admitted posting the image and creating the Facebook page when questioned by the Police. He subsequently was charged with an offence against s 22 of the Harmful Digital Communications Act 2015.

III. The District Court Decision

Judge Doherty identified the elements that had to be established under s 22. These are:[6]

> (a) that the respondent posted a digital communication;
> (b) that the communication was posted on or about 29 August 2015;
> (c) that the communication was posted by the respondent with the intention that it would cause harm to the complainant;
> (d) that the posting of the communication would cause harm to an ordinary reasonable person in her position;
> (e) that posting the photographs did cause harm, being serious emotional distress to the complainant.

There was little difficulty in finding that in creating the Facebook page and including the photos of the complainant the defendant posted a digital communication.

The Judge emphasised the expansive definition of a digital communication as any form of digital communication, and noted that the second part of the definition focused upon the nature of the content. A digital communication includes a photo or picture. In the definition of posting, again, the definition was wide and sufficient to include uploading a picture to a Facebook account.[7]

The Judge considered the act of posting in reference to the nature of the material posted. In this case he held that the photographs posted constituted intimate visual recordings, created by the complainant for personal use or within a confined setting

[5] *B*, above n 3, at [4]–[6].
[6] *Iyer*, above n 1, at [21].
[7] At [22]–[29].

such as a dating website. They were taken within a bedroom setting where there would be an expectation of a degree of privacy. The exposure of body parts — in this case partially exposed breasts — and undergarments brought the photographs within the scope of the definition.[8]

The Judge considered the legislative history and the genesis of the use of the term "digital communication" and in particular the discussion of the distinguishing features of digital communications, referring especially to the digital paradigm property of exponential dissemination: the "capacity to spread beyond the original sender and the recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing".[9] There was no issue taken on appeal with the Judge's approach or his finding.

The timing of the post was an issue. This was because it was argued for the defendant that there was a lack of certainty as to whether the communication was posted before or after the commencement of the HDCA. This element was resolved on the facts, and it was found that the communication in question was posted between 5 August and 29 August 2015, after the commencement of the Act.[10]

An interesting technical issue was raised by the respondent in that he claimed to the police that the Facebook page that he had created was "deactivated" after its creation. However, he claimed that Facebook reactivated the page after 28 days. This could give rise to the conclusion that the account had been created before the Act came into force on 1 July 2015.[11] No evidence was given to support such a contention, and Judge Doherty observed that expert evidence would be needed to prove or disprove the "reactivation" claim.[12]

The Judge resolved the problem by observing that the complainant and respondent had met sometime between 5 and 29 August. At that meeting the respondent threatened to post pictures of her online, allowing the Court to infer that the posting of the material took place after the meeting. The Judge found it implausible that the respondent would threaten to do something he had already done.[13]

Although this argument was raised as a timing issue, the suggestion that a deactivated or disabled Facebook account may be reactivated at the behest of Facebook raises a possible issue as to the intervention of a third party in the chain of causation leading to posting material. If material has been posted on a social media site and then taken down or disabled, the act of posting at that time at the instigation of the individual would be complete. If, after the material had been taken down, it was reactivated and

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[8] *Iyer*, above n 1, at [30]–[32]. This discussion of the nature of the photographs is not so relevant to the issue of posting a digital communication – although intimate visual recordings fall within that definition – as it is to the element of harm and the likely response of the complainant to seeing such photographs available online.

[9] At [39].

[10] At [10]–[11].

[11] At [46].

[12] At [47].

[13] At [49].

therefore reposted, such an action would not be at the behest of the original poster but would be the actions of a third party.

It is possible for an account holder to disable or deactivate a Facebook account. In such a case the reactivation of the account will take place at the behest of the account holder.[14] Facebook will not unilaterally reactivate the account. Facebook may deactivate the account for a number of reasons including a breach of terms and conditions, impersonation or engaging in conduct that is not permitted. However, reactivation of the page requires an application by the account holder.[15]

Judge Doherty went on to consider the issue of intention. Liability requires intent to cause harm to an identifiable victim. Harm is defined as "serious emotional distress".[16] The relevant harm may include a condition short of a psychiatric illness or disorder, or distress that requires medical or other treatment or counselling.[17] In considering the type of intent required, Judge Doherty referred to the need to protect free expression under s 14 of the New Zealand Bill of Rights Act 1990.[18]

The Judge was satisfied that there was evidence of the requisite intent on the part of the respondent. It was clear that the breakdown of the relationship was accompanied by bitterness on his part. The Judge accepted the evidence of the discussion that the complainant had with the respondent in which he threatened to post pictures of her online. There was sufficient evidence to support the prosecution contention that the respondent wanted to dissuade the complainant from associating with other men. There was also available the suggestion that the respondent wished to inflict feelings of shame, fear and insecurity on the complainant — forms of emotional distress that would have allowed him to achieve his goal.[19] It was, however, open to the defence to lead evidence that the respondent was not motivated to control the complainant's life, or that he could have achieved his motive without inflicting serious emotional distress.

The Judge then moved on to consider the evaluative test that the Court must apply to determine whether the communication was harmful pursuant to s 22(1)(b) of the Act. This is a mixed objective/ subjective test. It is necessary for the prosecution to prove that the communication would cause harm to an ordinary reasonable person (the objective limb) in the position of the complainant (the subjective limb).

Section 22(2) sets out a non-exhaustive list of factors which the Court may consider. These are:

> (a) the extremity of the language used;
> (b) the age and characteristics of the victim;

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[14] "How to Recover a Disabled Facebook Account" <http://www.wikihow.com/Recover-a-Disabled-Facebook-Account> (last accessed 16 June 2017).
[15] Facebook Help Center "My personal Facebook account is disabled" <https://www.facebook.com/help/103873106370583> (last accessed 16 June 2017).
[16] Harmful Digital Communications Act 2015, s 4.
[17] Iyer, above n 1, at [60].
[18] At [59].
[19] At [62].

(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.

The Judge considered that factors (b), (c), (d), (e) and (g) were relevant. He concluded that the complainant was, in fact, the individual who was the target of the communication. It was also a relevant characteristic that she was the estranged wife of the defendant. The context of the relationship was likewise important. There was a protection order in place and it was clear from the respondent's police interview that he sought to control the complainant's behaviour. It was against this context that the communication should be viewed.

As Judge Doherty explained, the digital communications represented "not only an attempt to embarrass Mrs Iyer, but to control her through emotional manipulation". [20] Thus, feelings such as anxiety, depression or trauma would approach the serious emotional distress threshold. The complainant's characteristics together with the context of the communication would objectively be capable of causing serious emotional distress.[21]

The Judge also considered the aspect of anonymity or, in this case, pseudonymity, in that the Facebook page had been created in a name very similar to that of the complainant.[22] The complainant and her supporting witness to whom the respondent had sent a message quickly concluded that it was, in fact, he who had created the page. That was a factor that the Judge took into account.[23]

Although the post was not "repeated" in the sense that a deluge of SMS text messages was received, the Judge recognised that a post on a platform such as Facebook had the potential to be accessed many times so that the effect of the post was ongoing. In this discussion, Judge Doherty tacitly recognised another quality of information in the Digital Paradigm, that of "information persistence", which has: (a) been described as "the document that does not die"; and (b) means that the repetition and circulation of a digital communication are matters which may be taken into account in determining whether a post would cause harm[24]

Information persistence, of course, goes beyond the appearance of information on one platform but recognises that the information may be redistributed by other users to other locations, making it extremely difficult if not impossible, to eliminate the information altogether. However, in this context, the complainant had lost control of the information — that is, her pictures, — and as long as the information remained on

[20] At [66].
[21] At [66].
[22] Harmful Digital Communications Act, s 22(c).
[23] *Iyer*, above n 1, at [67].
[24] Harmful Digital Communications Act, s 22(2)(d) and (e). For a discussion of the qualities of information in the Digital Paradigm see David Harvey *Collisions in the Digital Paradigm: Law and Rulemaking in the Internet Age* (Hart Publishing, Oxford, 2017) at 28 [*Collisions in the Digital Paradigm*].

Facebook it was accessible by other Facebook users. As it happens, a complaint was made to Facebook and the "false" page was subsequently disabled.

The potential disseminatory quality[25] of the Digital Paradigm was recognised by the Judge in his consideration of the extent of circulation of the digital communication — his Honour stating that "the nature of digital communications is that they may be disseminated widely."[26] In this case, there was no evidence of widespread circulation but of the potential for dissemination. There was no evidence that the post was publicly available or in fact was accessed by anyone else, and so the audience to whom the post was communicated was small.

On the basis of these factors the evaluation of the communication was that, by a narrow margin, it would cause harm to an ordinary reasonable person in the position of Mrs Iyer. The Judge was at pains to observe that this was a finding on the basis of the prosecution evidence only, and that the evaluation could be capable of refutation by the defence.[27]

What was critical in the evaluation was: the context of the relationship; the use of the digital communication by the respondent to exert power over his wife (with accompanying threats to do so); and the fact that, by posting the communication he did, the respondent suggested that he had access to the complainant's intimate details and data.

The final element that had to be proven was whether or not harm, in fact, had actually been suffered. Although the prospective evaluation test in s 22(1)(b) involves a consideration of the potential for harm based upon the objective\ subjective test, it is necessary for the complainant to have actually suffered harm.

The Judge found that the complainant was frustrated, anxious, angry and very upset. She considered taking time off work but did not, in fact, recall that she had done so. Although an independent witness observed that the complainant was depressed, the Judge noted that this was not a clinical diagnosis. Although the evidence pointed to some degree of emotional distress, the Judge was not satisfied that it had reached the threshold required.[28] Accordingly, proof of actual harm and its immediacy to the communication was not proven.[29]

Significantly the Judge found that the prosecution had not led cogent evidence on this last element, pointing out that there should have been more detailed and specific evidence from the complainant as to her reactions, feelings or physical symptoms and their duration. He observed that an alternative might have been to call expert evidence.

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[25] For a discussion of the quality of exponential dissemination, see *Collisions in the Digital Paradigm*, above n 24, at 30.

[26] *Iyer*, above n 1, at[69].

[27] At [70].

[28] At [52]–[60].

[29] At [73].

This Judge's conclusions on this final matter became the central issue on appeal.

IV. The Case on Appeal: *Police v B* [2017] NZHC 526 — Background Considerations

In the High Court, Downs J considered the nature of the legislation and its objectives, observing that there were both civil and criminal remedies provided. His Honour noted the provisions of s 22 and the elements of the offence it created.[30]

Downs J likewise noted the work of the Law Commission, which advocated criminalisation of digital messages that: (a) would cause substantial emotional distress and that were grossly offensive; or (b) were of an indecent, obscene or menacing character; or (c) were knowingly false. The maximum penalty proposed was three months' imprisonment.

The legislature provided for a more significant penalty of a maximum of two years imprisonment for an offence against s 22, and modified the test for a digital communication that fell within the ambit of the section.

The reference to the content of the communication was removed. Thus Downs J described the offence as content neutral. All that was necessary was that the post cause harm.

V. The Significance of Harm

Harm was pivotal to the Law Commission approach, and there was a recognition in the Ministerial briefing paper that there was a threshold which, when communications crossed it, justified the intervention of the law.[31] Remedies for emotional distress were not unknown to the law, and the question was whether a threshold of seriousness had to be exceeded. The Law Commission classified this as substantial emotional distress. The legislation described it as serious emotional distress — a slightly lower threshold.

How should this be proven? The Law Commission did not see great difficulties in this regard:[32]

> Proof of significant emotional distress may be thought to be problematic. Usually it will be sufficiently demonstrated by the nature of the communication itself: much of the material coming before the tribunal is likely to be of such a kind that it would clearly cause real distress to any reasonable person in the position of the applicant. This blended objective/subjective standard is reflected in the Harassment Act which requires, as a condition of making a restraining order, that the behaviour causes distress to the applicant, and is of such a kind that would it cause distress to a reasonable person in the applicant's particular circumstances. The Privacy Act requirement that an interference with privacy must cause damage including 'significant humiliation, significant loss of dignity or significant injury to the feelings of the complainant' appears not to have been problematic.

[30] *B*, above n 3, at [12]–[25].

[31] New Zealand Law Commission *Harmful Digital Communications* Ministerial Briefing Paper (August 2012) <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20MB3.pdf> (last accessed 16 June 2017) at [1.27] ff [Law Commission Briefing Paper].

[32] Law Commission Briefing Paper, above n 31, at [5.56] (citations omitted).

VI. DEFINING HARM[33]

Downs J went on to make five observations about the way in which harm had been defined as serious emotional distress.

First, the definition was exhaustive. The Judge observed that the Act was concerned only with serious emotional harm.

Secondly, minor emotional distress was not covered – indeed all distress short of serious emotional distress fell outside the ambit of the Act. The level of emotional distress had to be serious. The intentional causation of serious emotional distress by posting a digital communication was criminalised and the threshold had been set at the serious level to give recognition to New Zealand's ongoing commitment to freedom of expression. The Judge also observed that the words "serious emotional distress" stood alone. They were not equated with mental injury or an identifiable psychological or psychiatric condition.[34]

Thirdly, Downs J observed that the determination of serious emotional distress is part fact, part value judgement. He observed that Parliament had set out a number of factors that he described as permissive in the context of whether or not a post would cause harm to an ordinary reasonable person in the position of the complainant.[35] These factors appear in s 22(2) and provide guidance in evaluating whether or not a communication may potentially be harmful pursuant to s 22(1)(b).

Fourthly, Downs J set out factors or indicia of the nature of emotional distress — that is, its intensity, duration, manifestation, and context (including whether a reasonable person in the complainant's position would have suffered serious emotional distress). These indicia appear to reflect the matters contained in s 22(2) and which are relevant to a consideration of the s 22(1)(b) evaluative element of the offending.

Finally, his Honour considered that little assistance could be derived from reference to a dictionary or thesaurus in interpreting or applying the phrase 'serious emotional distress'. Indeed, he observed that in *StockCo v Gibson*[36] the Court of Appeal noted that statutory words "are everyday terms having common meaning and are reasonably clear in their own right. The hard part was applying them to the facts of the case".[37] Little was to be gained by using synonyms of statutory language. In addition, Downs J observed that it was "a dangerous method of statutory interpretation to substitute words which the legislature had not chosen", referring to the warning of Cooke P in *Telecom Corporation of New Zealand v Commerce Commission.*[38]

[33] At [21]–[25].
[34] In this respect, Downs J endorsed the observations of Doherty DCJ. See *B*, above n 3, at [22].
[35] *B*, above n 3, at [23].
[36] *StockCo v Gibson* [2012] NZCA 330, (2012) 11 NZCLC 98-010 at [44].
[37] *StockCo v Gibson*, above n 36, at [44].
[38] *B*, above n 3, at [25], quoting *Telecom Corporation of New Zealand v Commerce Commission* [1992] 3 NZLR 429 (CA) at 434.

Reference to broadly similar offence provisions in other jurisdictions was likewise considered of little assistance, as was elaboration upon or truncation of the statutory language. The phrase means what it says.

Definitional Substitution[39]

It was argued for the Crown that, in fact, Judge Doherty had engaged in substituting different types of emotional distress for the statutory language, rather than applying the statute itself. As discussed above, that approach was rejected by Downs J. Likewise, Downs J rejected the suggestion that the District Court had done just that. His Honour observed that the Judge had noted that serious emotional distress did not require mental injury or a recognised psychiatric disorder, and was aware of the importance of balancing the serious effects of calculated emotional harm with the importance of preserving free speech.

What Judge Doherty had done was simply make some observations about the types of distress that the complainant had suffered.[40] In addition, his Honour had clearly observed that, although these exemplifications amounted to emotional distress, the serious threshold had not been reached.

Downs J then noted that he reached a different conclusion to that of the lower Court. He observed that Judge Doherty considered that more detailed evidence was required, but this was because he had dealt with the various descriptions of how the complainant felt in isolation. By contrast, Downs J considered that the evidence should be assessed in its totality.[41]

VII. Dealing with Evidence of Actual Harm

Downs J noted that many of the descriptors of emotional distress were not challenged nor scrutinised in cross-examination. The use of terms like "shock" and "depressed" could well be manifestations of what Downs J described as "the age of hyperbole"[42] (as opposed to a term's medical meaning). Thus, although caution must be adopted when considering the lay use of such terms, his Honour concluded that the evidence did support a finding that the complainant suffered serious emotional distress. The emphasis was upon *emotional* distress rather than physical harm.[43]

Taken cumulatively, the indicia of emotional distress Downs J identified — intensity, duration, manifestation and context — together with: (a) the threats made by the respondent; (b) the intimate nature of the photos; and (c) links to pornographic sites that had been included on the Facebook page, meant that the emotional response suffered was consistent with how a reasonable person would feel in circumstances analogous to the (non-exclusive) matters listed in s 22(2).[44]

[39] At [32]–[34].
[40] At [34].
[41] At [35].
[42] At [36].
[43] At [36].
[44] At [38]–[42].

Downs J held that Judge Doherty erred by failing to consider the evidence in its totality and without reference to context. The matter was therefore returned to the District Court for further findings and disposition.

VIII. COMMENTS

A. Proving Harm

As the judgement of Downs J makes clear, proof of harm requires a consideration of the evidence in its totality. Given that emotional harm has significant subjective features, there must be a careful critical evaluation of the evidence and a proper articulation of the circumstances relied upon by the fact finder.

A difficulty arises regarding evidence in what Downs J described as the age of hyperbole. At a time where words such as "outraged", "infuriated" "indignant" and "offended" are bandied about on social media with apparent abandon, one wonders whether or not the currency and strength of the language has been somewhat devalued. Thus self-analytical articulation of feelings or responses must be subjected to careful and critical scrutiny. Indeed, s 22 is a criminal provision that has an impact upon freedom of expression.

The element contained in s 22(1)(b) specifically provides for a mixed objective/ subjective test. The problem arises in the consideration of proof of *actual* harm. How is this established? Downs J has helpfully identified the four features: intensity; duration; manifestation and context[45] — words that convey those factors referred to in s 22(2) which may be taken into account in determining whether a post *would* cause harm.

But the enquiry into the actual harm element under s 22(1)(c) must be carried out separately from what could be called the "likelihood evaluation" provided in s 22(1)(b) (as I shall discuss shortly). Is Downs J suggesting that the causation issue for the actual harm element under s 22(1)(c) can be the subject of a cross-check as to how a reasonable person might feel in the circumstances?[46] This seems to suggest that the s 22(2) factors may be taken into account in the actual harm evaluation.

With respect, it seems that s 22(1)(c) addresses the *particular* complainant and whether the communication cause harm to that individual, rather than the possibility of harm to a reasonable person. It is suggested that courts must be careful not to conflate the enquiries under ss 22(1)(b) and 22(1)(c). The result could be that a finding that there is a likelihood of harm under s 22(1)(b) could lead automatically to a conclusion that there must be actual harm to the particular complainant under s 22(1)(c).

[45] At [24].
[46] The element set out in s 22(1)(b).

B. Communications Evaluation

Do the provisions of s 22(2) apply only to s 22(1)(b) — likelihood of harm — but not to s 22(1)(c) — actual harm? An element of the offence under s 22 is the necessity for a consideration of whether or not the posting of the communication would cause harm to an ordinary reasonable person in the position of the victim, the target of the posted digital communication.[47]

Section 22(2) sets out a non-exhaustive list of factors that may be taken into account in determining whether a post would cause harm. These factors, as identified by Downs J are listed above but bear restating:

> (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.

Items (a) and (f) refer to the content of the communication. Item (b) addresses particular circumstances of the victim. Items (c)–(e) address some of the technical realities of the online environment, that is: the ability to mask identity; the frequency of the communication; and whether it was subject to exponential dissemination (went viral). Item (g) is something of a catch-all, but an important one. It allows for a consideration of the surrounding circumstances as a placeholder for the communication.

The nature of the subjective arm of the test is quite expansive because it allows the position of the victim to colour the objective arm. The Court is asked to decide if a reasonable person standing in the shoes of the victim would be harmed. Thus the Court may embark upon the objective enquiry and then factor in the circumstances as seen from the perspective of the victim. Reasonableness may, therefore, be judged in light of the victim and of his or her age and characteristics (including what they were experiencing at the time, particular vulnerability, and sensitivities or life circumstances). For example, if the court is provided with evidence that shows a communication is part of a concerted strategy to attack the victim, then it can rightly decide that a communication is harmful when it might not be so minded if there were no such concerted strategy (and thus the communication was a single or isolated one).

It must be emphasised that the enquiry under s 22(1)(b) does not involve a finding of actual harm but is evaluative: *would* the communication cause harm. It implies likelihood.

This evaluative or prospective process is referred to in s 22(2) where, it will be remembered, the non-exclusive list of factors is set out. Are these factors applicable, as hinted by Downs J, to the enquiry as to actual harm?[48] The language of s 22(2)

[47] Harmful Digital Communications Act, s 22(4).
[48] *B*, above n 3, at [27].

allows the Court to take into account the factors "in determining whether a post *would* cause harm". Thus it would appear that the factors can be utilised only for determining the prospective element. The use of the word "would" in s 22(2) links the application of that section to s 22(1)(b), where the same word is used. It is therefore referring to a prospective evaluation. The language does not say "in determining whether a post caused harm", which would catch s 22(1)(c).[49] But this may be a somewhat restrictive approach to the interpretation of the statute.

Such a restrictive approach would mean that the Court is unable to take into account the circumstances set out in s 22(2). Although those factors are not expressly available, certainly the surrounding facts and context would be important in assessing whether or not harm was actually caused by the post. The causative effect of the post could not be viewed in a vacuum or in isolation. Although s 22(1)(c) requires that posting the communication caused the harm, causation cannot be limited to a consideration of the post alone. The factors in s 22(2) could be used as part of the background factual matrix to assess whether actual harm had been caused. The factors may be part of the evidence necessary for the Court to conclude beyond a reasonable doubt whether a person had been harmed.

For example, if the victim was a child, such a factor would colour the fact-finder's determination of whether a post would be harmful under s 22(1)(b). That factor would also be taken into account by the Court to assess actual harm under s 22(1)(c). If the child is crying and unable to sleep, the court may be more minded to consider serious emotional distress. However, for an adult, something more may be required — such as evidence of behavioural change, unexplained and spontaneous weeping, or time away from work. Such matters may or may not be the subject of expert evidence.

It may well be that the communication is innocuous. But it might, on the other hand, be the final element of a chain of circumstances leading to the post and the consequence. To understand that, it would be necessary for the Court to understand the background and the context, to assess whether the posted communication actually caused harm. The communication in isolation may be nothing. In context, it may take on an entirely different meaning.

This does not mean that one immediately translates the potential for harm as evaluated in s 22(1)(b) to proof of actual harm under s 22(1)(c). It may well be that, at the time of the communication, the victim was in a particularly robust frame of mind and able to dismiss the post. That means that there must be evidence viewed in totality, as stated by Downs J, that proves serious emotional distress actually happened to the "beyond reasonable doubt" level.

The evaluative test and the subsequent enquiry into actual harm may be something that could work to the benefit of the defence. A defendant may wish to bring background facts and context before the Court where there may have been "tit for tat" exchanges. The "flame war" — a mutual exchange of abusive posts — is a

[49] But which might not catch section 22(1)(b).

phenomenon well known to many Internet users. Context, in such circumstances, may thus be of assistance to the defence.

It might well be that, viewed objectively, an abusive Twitter exchange was harmful. However, this could be modified when the fact finder takes into account contextual factors such as the robustness of exchanges, the apparently thick skin of the participants, and the propensity of one or both of the participants to engage in this type of exchange. These matters could also be taken into account in determining whether there was actual harm, but care needs to be taken to avoid conflating the s 22(1)(b) test with that required under s 22(1)(c). For example, evidence of the victim's previous behaviour on Twitter may be relevant to an assessment of whether, in the instant case, evidence of her being upset by something posted on Twitter really caused her harm.

The temptation might be for the Judge to apply a "he who lives by the sword dies by the sword" approach, suggesting that an abusive contributor to social media should not complain or claim serious emotional distress when the tables turn. The difficulty with that approach arises where an aggressive social media contributor becomes the target of a sustained and brutal torrent of social media abuse. The serious emotional distress arising from such an incident is no less real or damaging for that person than for anyone else.

C. Downstream Consequences

Harm underpins the entire structure of the Harmful Digital Communications Act, and some of the remarks of Downs J are of assistance in how to evaluate and consider harm (especially within the civil enforcement regime). The analysis of harm contained at [21]–[25] of the High Court decision — and particularly the matters to be taken into account in assessing harm or serious emotional distress — will be of considerable assistance to Netsafe in carrying out its tasks as the "Approved Agency" under s 7 of the HDCA.[50] It will likewise assist the District Court when called upon to consider applications for orders pursuant to ss 18 and 19.

One matter that was absent from the consideration undertaken by Downs J was any direct reference to the "communication principles" contained in s 6 of the Act (other than a mention at [14]). Nor was there a detailed consideration of any Bill of Rights Act implications. It may well be that cases in the future will need to consider these aspects, especially the applicability of a breach of the communication principles.

A breach of a communication principle is critical in considering an application under ss 18 and 19, but s 6 makes it clear that in performing functions or exercising powers under the Act the courts must take account of the communications principles.

[50] Harmful Digital Communications Act, s 7. Pursuant to s 8 of the Harmful Digital Communications Act, the role of the Approved Agency — among other matters — includes: (a) advising on steps that individuals can take to resolve a problem; (b) receiving, investigating and attempting to resolve complaints where harm has been caused; and (c) supplying education and advice regarding policies about online safety and conduct on the Internet.

In the case under appeal, it could well have been noted that: (a) there was disclosure of sensitive personal facts about the complainant (the photographs);[51] (b) the communication was (possibly) grossly offensive to a reasonable person in the position of the affected individual;[52] (c) the digital communication was indecent;[53] and (d) the digital communication should not make a false allegation.[54] Although Downs J gave examples of the communication principles, none of them were specifically tied to the facts in this case.[55]

Because the factors in s 22(2) are non-exclusive, it may be that, in evaluating the potential harm of the communication, a Court could derive some assistance by considering whether there has been a breach of a communication principle or principles.

IX. Conclusion

The decision of Downs J is helpful. It offers guidance on some of the parameters that may be taken into account when assessing harm. It makes it clear that the totality of circumstances must be taken into account when considering both the likelihood and actuality of harm.

The Judge was careful to ensure that his observations on harm were general. His Honour's preference to avoid the thesaurus approach recognises the almost infinite variety of human circumstances. Providing examples that were too specific could likewise be seen to have a restrictive effect.

Does the decision definitively answer the question: "what constitutes serious emotional distress?" No, but it provides signposts for the road that advisers and factfinders must travel. As is so often the case in the law, what amounts to serious emotional distress depends upon the circumstances. As Justice Potter Stewart of the United States Supreme Court said when trying to define pornography: "I know it when I see it".[56]

[51] Section 6(1), Principle 1.
[52] Section 6(1), Principle 3.
[53] Section 6(1), Principle 4.
[54] Section 6(1), Principle 6 (associating the complainant with a Facebook page that was not hers).
[55] The examples involved disclosing sensitive personal facts about an individual, being threatening, intimidating, menacing, indecent or obscene, or harassing an individual. *B*, above n 3, at [14].
[56] *Jacobellis v Ohio* 378 US 186 (1964).

X. POSTSCRIPT

While this article was being considered for publication, the case came again before Judge Doherty on 24 May 2017.[57] No evidence was called for the defence and the Judge had to consider whether the evidence satisfied him beyond a reasonable doubt that actual harm was caused by the posting of the digital communication.

Judge Doherty noted that the specific evidence of the effects of the posts had to be considered against a background of a marriage breakup and the interactions and conversations that had occurred since then.[58]

He reviewed the evidence of the complainant and her friend, which was largely unchallenged.[59] He found that the complainant suffered the emotional reactions of anger, frustration and anxiety, together with a degree of emotional distress.[60] However, there was an absence of elaboration of these reactions.[61] There was likewise little or no evidence of the intensity or duration of these reactions.

The Judge noted that he had considered the evidence collectively and cumulatively.[62] He was satisfied that there was evidence of emotional distress. He was not satisfied that the prosecution evidence established that the emotional distress suffered was "serious". [63]

Accordingly, the charge was dismissed.

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[57] *Police v Iyer* [2017] NZDC 9627.
[58] At [18].
[59] At [19]–[27].
[60] At [29].
[61] At [29].
[62] At [32].
[63] At [32].