NOTE: HIGH COURT ORDER IN [2014] NZHC 550 PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF DEFENDANTS IN [2014] NZHC 550 AND [2014] NZHC 1848 REMAINS IN FORCE.

NOTE: DISTRICT COURT ORDER IN [2018] NZDC 15368 PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF T, C, H, B AND M REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA472/2018
[2019] NZCA 344

BETWEEN	DERMOT GREGORY NOTTINGHAM Appellant
AND	THE QUEEN Respondent

CA492/2018

BETWEEN	THE QUEEN Appellant
AND	DERMOT GREGORY NOTTINGHAM Respondent

Hearing:	25 June 2019
Court:	Wild, Thomas and Muir JJ
Counsel:	Appellant in person in CA472/2018, Respondent in person in CA492/2018 C A Brook for Respondent in CA472/2018 and Appellant in CA492/2018 J G Krebs as counsel to assist the Court
Judgment:	30 July 2019 at 3.00 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence in CA472/2018 is declined.

B The appeal against conviction in CA472/2018 is dismissed.

C The appeal against sentence in CA472/2018 is dismissed.

D The appeal against sentence in CA492/2018 is allowed.

E The existing (part-served) sentence of home detention is quashed. A new sentence of 12 months' home detention (with identified concurrent home detention sentences) plus 100 hours' community work is imposed, subject to the same conditions as imposed by the District Court.

REASONS OF THE COURT

(Given by Muir J)

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[1] Following a five-week jury trial before Judge Down, Mr Nottingham was convicted in May 2018 of five charges of criminal harassment[1] and two charges of publishing information in breach of a suppression order.[2] He was subsequently sentenced by the Judge to 12 months' home detention and 100 hours of community work.[3] He appeals both his conviction and sentence. The Solicitor-General also appeals the sentence, on the grounds of manifest inadequacy and error in principle.

Background

Breaches of name suppression

[2] In June 2013, 15-year-old Stephen Dudley (Stephen) was assaulted by two teenage brothers after rugby practice. He subsequently died. The brothers were charged with manslaughter. However, it was subsequently discovered that Stephen suffered from a congenital heart condition which had not previously been diagnosed. The Crown accepted that it was unable to prove that his death resulted from the attack, as opposed to his underlying condition. The charges against the brothers were accordingly reduced to common assault, to which they pleaded guilty. Winkelmann J discharged the brothers without conviction and granted permanent name suppression.[4]

[3] The case generated national publicity. It was taken up by Mr Nottingham. He contacted Stephen's father and subsequently received information from him, including the names of the brothers and various documents relating to the police investigation. It was the Crown case that Mr Nottingham subsequently published as either principal, co-principal or party, two articles on a website known as Lauda Finem (LF).[5] The articles included the names of the brothers and photographs of them — both in breach of the High Court's suppression orders.

[4] In his summing-up, Judge Down directed that publication of the brothers' names had occurred in New Zealand in breach of the suppression order. The key issues

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1 Harassment Act 1997, s 8(2) (maximum penalty two years' imprisonment).
2 Criminal Procedure Act 2011, s 211(1) (maximum penalty six months' imprisonment).
3 *R v Nottingham* [2018] NZDC 15373.
4 *R v M* [2014] NZHC 1848; and *R v Q* [2014] NZHC 550.
5 The first article was published on 14 August 2014 and the second on 11 December 2014.

for the jury were, therefore, whether Mr Nottingham was the publisher or a party to the publication, and whether he had done so knowingly or recklessly in breach of the suppression order.

Criminal harassment

[5] In the course of investigating the breaches of name suppression, the police identified a number of LF articles which they considered amounted to criminal harassment. Charges were laid in respect of five complainants, all of whom have been granted permanent name suppression and who we will refer to as T, C, H, B and M.[6] The common denominator between them all was that they had at some stage crossed Mr Nottingham's path in circumstances he took issue with.

[6] In respect of each complainant, articles appeared on the LF website[7] containing material the Crown alleged was "offensive" in terms of the Harassment Act 1997. We will refer to specific examples later. The articles included names, photographs (in one case of a teenager getting into a car with the complainant) and other personal details indicating extensive background research on each of the targets. It was alleged that some of the photographs had been obtained by Mr Nottingham or by one of his associates at Mr Nottingham's direction. It was common for Mr Nottingham to ensure that articles were drawn to his complainants' attention by providing them with the electronic links. The Crown also alleged various other acts of harassment — including "following"[8] and in one case initiating a private prosecution.

Application to adduce further evidence

[7] Mr Nottingham filed four affidavits, including one of 333 paragraphs by his brother, P R Nottingham. We assume the premise to be that they represent fresh or relevant new evidence. Both Mr P R Nottingham and deponent Ms West gave evidence for the defence at trial.

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6 *R v Nottingham* [2018] NZDC 15368.

7 Four articles in relation to T, three articles in relation to C, three articles in relation to H, two articles in relation to B and three articles in relation to M.

8 Harassment Act, s 4(1)(b).

[8] We do not regard any of this material as meeting the test for admission in *Lundy v R*.[9] It is neither fresh, nor (in most cases) relevant. Much of it simply attempts to revisit the same credibility issues which featured prominently in the cross-examination of each of T, C, H, B and M. As this Court observed in its decision declining Mr Nottingham's application for non-party disclosure:[10]

> That cross-examination was an opportunity to test their evidence, both as to its credibility and its reliability. Mr Krebs is a very experienced trial counsel. He was well placed to do just that.

[9] We note also that the apparent purpose of Ms West's affidavit is to revisit and better explain evidence given under cross-examination. To the extent that was necessary, it was appropriately addressed in re-examination. The application is, in that context, misconceived.

[10] Apart from a reference to the possible involvement of Stephen's parents in respect of the breach of suppression orders (to which we will briefly refer later) none of this material was specifically addressed by Mr Nottingham in oral submissions. We agree with Mr Krebs that it is "difficult to see how the *Lundy* test is met here" and therefore decline to admit the affidavits.

Conviction appeal — the breach of suppression order charges

[11] Mr Nottingham pursues two arguments:

(a) LF is overseas domiciled and "you cannot be a party to a crime that never occurred in an overseas jurisdiction".

(b) The Crown failed to establish to the criminal standard that he was either the publisher of the material or a party to its publication.

[12] Like the Crown and counsel assisting, Mr Krebs, we treat the second ground as a challenge to the reasonableness of the jury's verdicts.

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9 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.
10 *Nottingham v R* [2019] NZCA 154.

The first ground

[13] In his summing-up, the Judge directed that, as a matter of law, publication occurs where material is comprehended and downloaded and that accordingly there was publication in New Zealand irrespective of LF's domicile. He said that this was a function of "Judge-made" law and that it was also a feature of s 7 of the Crimes Act 1961.

[14] We identify no error in that direction. It did not involve any assumption of extra-territorial jurisdiction. It stated what we regard as a now uncontentious proposition: that a blog available to New Zealand internet users is regarded as published in New Zealand.[11] We agree also that s 7 provided a pathway to successful prosecution. As the Judge summarised its effect to the jury:

> … even if the main parts of a crime are committed abroad, if you do something to further that crime, and you have done it in New Zealand, that crime, the whole thing can be prosecuted in New Zealand.

[15] Physical location of the LF server was, in that context, irrelevant. What was required was proof either of direct publication (that Mr Nottingham was LF), indirect publication (that Mr Nottingham was a co-principal with LF, working directly with it to effect publication in New Zealand) or that he was a party to LF's publication. That is exactly as the trial Judge put it to the jury, supported by an accurate description of the "party" requirements. Mr Krebs is correct that the question of whether Mr Nottingham "caused" the publication (in any of the legal senses relevant) was a matter of fact for the jury. No error of law was made by the trial Judge.

The second ground

[16] We take Mr Nottingham to submit that no reasonable jury could be satisfied to the criminal standard that he either published or was a party to the publication of the offending articles.[12] There are also aspects of his appeal which are probably better

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[11] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, (2002) 210 CLR 575; and *Police v Slater* [2011] DCR 6. In *Nationwide News Pty Ltd v University of Newlands* CA202/04, 9 December 2005, this Court proceeded on the basis *Dow Jones & Co Inc v Gutnick* stated the law in New Zealand, although not specifically deciding that point.

[12] Criminal Procedure Act, s 232(2)(a).

analysed within the "miscarriage of justice" framework,[13] requiring that he establish an error where there is a real risk it may have affected the outcome of the trial or rendered it unfair or a nullity.[14]

[17] Verdicts may be unreasonable having regard either to the evidence or to inconsistency of verdict. Mr Nottingham's argument is directed to the former. The principles in this respect are clear and were endorsed by the Supreme Court in *R v Owen*.[15] Relevantly the weight to be given to individual pieces of evidence is essentially a jury function and because it is the jury which is charged with finding the facts, appellate courts should not lightly interfere in this area. Underscoring that approach is the proposition that reasonable minds may disagree on matters of fact.

[18] The Crown advanced a circumstantial case. As Mr Nottingham reminded us, there was no "smoking gun" in the sense of an email attaching a final draft of the articles sent to LF. Nor was there any "electronic footprint" on any of the computers searched by the police which demonstrated that the article, as published, had originated from Mr Nottingham.

[19] He also emphasises that there were two other individuals, identified in the Judge's summing-up as "Uncle Albert" and "Ruth Money" who had been given the same police statements by Stephen's father and that the police had not excluded them as a possible source of information to LF.

[20] He then attempted to bolster that submission by applying to admit additional evidence of motive and opportunity on the part of Stephen's parents to supply relevant information to LF. We do not regard such evidence as fresh, and because it simply adds to an existing list of speculative LF sources, nor do we regard it as having sufficient potential strength to impact on the safety of the conviction.

[21] The point that Mr Nottingham most emphasised, however, is what he called "fabricated and prejudicial" evidence from Detective Constable (DC) Robinson about

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13 Section 232(2)(c).
14 Section 232(4); and *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [23]–[24].
15 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13]. Citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

the ability to upload material to a website like LF without leaving a record on the computer from which the upload occurred. We take his complaint to be that admission of that evidence caused a miscarriage of justice.

[22] Some context is necessary. The LF site was hosted through WordPress.com — a content management site which allows users to publish web pages and manage their content. In that sense it is what is now known as a "blogging platform". DC Robinson gave evidence that he purchased a "very basic" WordPress package so that he and Detective Sergeant (DS) Litherland could "understand more about the [LF] web site". They created a mock blog site. DC Robinson explained how easy it was to anonymise the person registering the relevant domain name. He then gave evidence about posting material to the site from his own computer and was asked by Crown counsel whether this left a "trace" on his computer. His response was that if the post originated in a word document then it would leave such a trace, even if the document had been deleted and erased. But, he said, he could log directly into the blog site, construct an article online, save it, come back to it later, change it and re-edit it and when ultimately posted "none of that would have been done on [his] computer PC that [he] was using, it would have all been done online on the WordPress website".

[23] In his examination-in-chief, the following question and answer then occurred.

> Q. So subsequent to posting like that, you wouldn't have a trace on your computer as such?
>
> A. That's correct, not like we were talking about before like a saved document or a copy of the article, no.

[24] In cross-examination by Mr Nottingham, he was asked whether there were any IP addresses on the computers searched by the police linking them to the LF web site. He said "no". The following further exchange then occurred:

> Q. Because that would mean that they weren't published from those computers?
>
> A. No it wouldn't.
>
> Q. Explain?
>
> A. I wouldn't expect to find any IP addresses on the computer.

Q. Right, why not?

A. It's not something that the computer would retain a record of, certainly not if you know interfacing with WordPress online and publishing your articles online.

Q. Right, but you're not an expert are you?

A. No.

[25] There was no objection to any of this evidence at trial. That can be contrasted with evidence given by DS Litherland and DC Robinson about the functionality of various coloured controls, illustrated on a screen shot taken from one of the searched computers. They said such controls seemed to indicate that the computer was used by a person controlling LF, because they gave options for deleting, accepting and editing comments that had been made on LF articles. Such evidence was later challenged[16] on the basis that it was inadmissible opinion evidence given by persons who acknowledged that they were not experts. The Judge accepted that submission[17] and his summing-up specifically directed the jury to ignore that aspect of the evidence and the relevant documentary exhibits.[18] There was no similar direction in relation to DC Robinson's "no trace" evidence. That evidence was identified by the Crown in closing as observational evidence. Referring to the WordPress package which the Detective had purchased, counsel said:

> That was a very basic package he was using but he could go straight in and publish and he said that there was no trace that he could see when he did it on his computer. Now, he did that, it's not that he's an expert. It's that he did it. Did the exercise of it to look back and see what would happen and there wasn't the trace.

[26] It is unclear to us whether the relevant evidence was observational or in fact inadmissible opinion evidence. The question put to DC Robinson — "you wouldn't [as opposed to "didn't"] have a trace" on your computer — suggests the latter. However, we do not consider any miscarriage of justice to have resulted for the following reasons:

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16 In a memorandum filed by Mr Nottingham on 9 May 2018.

17 *R v Nottingham* [2018] NZDC 9265.

18 To the extent Mr Nottingham now asserts a miscarriage of justice, in this respect we reject his submission. The Judge was clear in his direction that the opinion evidence about the functionality of the controls (and associated documents) was inadmissible and was to be put to one side and not relied on, stating this was something judges had to do "all the time".

(a) As indicated, no objection was taken to the evidence. Although Mr Nottingham was not represented, Mr Krebs appeared as counsel assisting. The record includes over 500 pages of in-chambers discussions during the course of the trial. Multiple challenges to admissibility were made and multiple rulings issued, in many cases at the instigation of Mr Nottingham who the Judge complimented at the conclusion of the trial for having represented himself "intelligently", "carefully" and "very well actually".

(b) DC Robinson stated in his evidence-in-chief that he was "not expert at all when it comes to IT" and that position was confirmed by the Judge in summing up. The jury was therefore well aware of the limitations of the evidence.

(c) Mr Nottingham called Mr Slater, former publisher of the Whale Oil blog, who gave extensive evidence (without Crown objection to his status), refuting what DC Robinson had said about the absence of a trace. His unambiguous position was that it was impossible to do anything on any browser whether it be a PC, laptop or even cell phone which did not leave "footprints everywhere".

(d) The "no trace" evidence was only advanced in closing as one of three possible explanations for the absence of a "smoking gun". Respectively, the other two were:

    (i) The Crown did not know what other devices, (apart from those located at Mr Nottingham's address) could have been used by him with the result that the "draft may have been sent from a device we don't have". It also pointed out that one of the devices (an iPad), was inaccessible to its IT expert, Mr Stewart.

(ii) Mr Stewart's evidence was that:

(a) if documents had been encrypted and then deleted it would not be possible to recover them; and

(b) depending on how often a computer is used, deleted material would eventually be written over and would be irrecoverable;

the overall result is that "The absence of something doesn't mean it was never there, it just means that any trace of it being there is not available anymore".

[27] The absence of a "smoking gun" was therefore always only one consideration (in that sense, a defence circumstance) in what was a circumstantial case.

[28] Turning then to the circumstantial evidence relied on by the Crown to establish publication, we agree with Ms Brook that it was very strong, if not overwhelming. We summarise the key points:

(a) A week before publication of the first article, Mr Nottingham contacted Stephen's father, introducing himself as "Dermott Nottingham from Advantage Advocacy". Among the contact details for Advantage Advocacy was included the email address aa1@ihug.co.nz. They arranged to meet.

(b) Text messaging revealed Mr Nottingham was trying to obtain information about the case and in particular the names of the defendants. Similarly, his internet search history suggested he was doing research into material which was related to the case, including on the day before the first article was published.

(c) The police search of computers to which Mr Nottingham had access identified a number of key documents (likely obtained from Stephen's

father), relating to the assault and subsequent prosecution, including the sentencing notes in which the permanent name suppression was ordered, witness statements and a witness list.

(d) Copies of the photographic images which appeared in the first article were found on a computer to which Mr Nottingham had access. They had been taken as screenshots or sent to Mr Nottingham shortly before the article was published.

(e) Seven hours before publication, Mr Nottingham wrote to the police officer heading the inquiry with the subject line "Report I Am authoring on the Dudley killing". The email was sent from the same aa1@ihug.co.nz address.

(f) Mr Nottingham alerted Mr Dudley to the fact that the assailants' names had been published on the internet on the same day the first offending article appeared on LF.

(g) A document with content matching some of the internet searches Mr Nottingham had conducted and which was ostensibly a draft LF post was located on a computer to which Mr Nottingham had access.

(h) Significantly, there was the evidence from the criminal harassment charges that Mr Nottingham was the publisher or was a party to the publication of the offending LF articles.

[29] We are not therefore satisfied that the verdicts on the breach of suppression charges were unreasonable or that the convictions resulted from a miscarriage of justice.

Conviction appeal — the criminal harassment charges

Overview

[30] Again, both the Crown and Mr Krebs submit that the appropriate approach is to treat Mr Nottingham's appeal as essentially a challenge to the reasonableness of the jury verdicts. We agree, although noting that the main focus of Mr Nottingham's second set of written submissions (filed on the morning of the appeal hearing), and of his oral submissions, was on the proposition that he ought not to have been convicted because the statements made in the articles (whether by him or not) were true or, alternatively, opinions based in truth.

[31] We start with the relevant statutory provisions. Section 8 of the Harassment Act creates an offence of criminal harassment.

> **8 Criminal harassment**
>
> (1) Every person commits an offence who harasses another person in any case where—
>
> (a) the first-mentioned person intends that harassment to cause that other person to fear for—
>
> (i) that other person's safety; or
>
> …
>
> (b) The first-mentioned person knows that the harassment is likely to cause the other person, given his or her particular circumstances, to reasonably fear for—
>
> (i) that other person's safety; or
>
> …

[32] Importantly, in the context of the prosecutions, "safety" is a defined term, which in relation to any person includes that person's "mental well-being".[19]

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[19] Harassment Act, s 2(1).

[33] "Harassment" is defined in s 3 of the Act:

> **3 Meaning of harassment**
>
> (1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.
>
> (2) To avoid any doubt,—
>
> (a) the specified acts required for the purposes of subsection (1) may be the same type of specified act on each separate occasion, or different types of specified acts:
>
> (b) the specified acts need not be done to the same person on each separate occasion, as long as the pattern of behaviour is directed against the same person.
>
> (3) For the purposes of this Act, a person also harasses another person if—
>
> (a) he or she engages in a pattern of behaviour that is directed against that other person; and
>
> (b) that pattern of behaviour includes doing any specified act to the other person that is one continuing act carried out over any period.
>
> (4) For the purposes of subsection (3), **continuing act** includes a specified act done on any one occasion that continues to have effect over a protracted period (for example, where offensive material about a person is placed in any electronic media and remains there for a protracted period).

[34] Section 4 in turn defines "specified act" as follows:

> **4 Meaning of specified act**
>
> (1) For the purposes of this Act, a **specified act**, in relation to a person, means any of the following acts:
>
> (a) watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:
>
> (b) following, stopping, or accosting that person:
>
> (c) entering, or interfering with, property in that person's possession:

(d) making contact with that person (whether by telephone, correspondence, electronic communication, or in any other way):

(e) giving offensive material to that person or leaving it where it will be found by, given to, or brought to the attention of that person:

(ea) giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person:

(f) acting in any other way—

(i) that causes that person (**person A**) to fear for his or her safety; and

(ii) that would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

(2) To avoid any doubt, subsection (1)(f) includes the situation where—

(a) a person acts in a particular way; and

(b) the act is done in relation to a person (**person B**) in circumstances in which the act is to be regarded, in accordance with section 5(b), as done to another person (**person A**); and

(c) acting in that way—

(i) causes person A to fear for his or her safety; and

(ii) would cause a reasonable person in person A's particular circumstances to fear for his or her safety,—

whether or not acting in that way causes or is likely to cause person B to fear for person B's safety.

(3) Subsection (2) does not limit the generality of subsection (1)(f).

[35] We also regard as relevant the object of the Act, which is stated to be provision of greater protection to victims of harassment by:[20]

(a) recognising the behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context; and

[20] Section 6.

(b) ensuring that there is adequate legal protection for all victims of harassment.

[36] Significantly, the Act aims to achieve this object by, among other things, making the most serious types of harassment criminal offences.[21]

[37] To succeed on the charges the Crown was therefore required to establish beyond reasonable doubt the following elements:

(a) at least two specified acts (or one continuing act) within a 12-month period;

(b) that Mr Nottingham was responsible for the act(s); and

(c) that he either intended the complainants to fear for their safety or knew that was likely to result.

Identity

[38] Identity (in the sense of responsibility for the acts either as principal or party) was therefore in issue on all charges. Again, Mr Nottingham's position (both at trial and on appeal) was that there was no evidence of information being communicated from computers under his control to the LF website. And again, the Crown case was (and is) the evidence identifying him as the "driving force" behind the harassment was, if not overwhelming, certainly very strong. We start with that issue, because of its relevance also to the breach of suppression convictions.

[39] We do not consider it necessary to set out all of the circumstantial evidence relied on by the Crown to establish identity in respect of each of the harassment charges. We agree that the jury's conclusion on the facts was one reasonably available to it. Indeed, we consider it almost inevitable.

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[21] Section 6(2)(a).

[40] For a start, each of the complainants had "crossed" him in some way, with several receiving aggressive correspondence from him in advance of the articles.

[41] In the case of T, Mr Nottingham sent her a link to the first article immediately after it was published and a draft, created two days before publication, was found on a computer to which he had access. In addition, images appearing in the other articles were found on the same computer. In the case of C, word versions of all three articles were found on a computer to which Mr Nottingham had access together with images from the articles. Likewise, drafts of other unpublished articles were also found. In the case of B, although no draft of the principal article (published on 24 April 2013) was identified, the draft of another "unpublished" article (prepared approximately a year later) was found, and this contained very similar references to the 2013 publication. For example, the published article interposed the description "belted" between the complainant's first and last names, and the draft contained the phrase "Beat Me". The published article described her as "a stupid troll", the draft as a "dumb cow" and "complete fuckwit". In the case of H, a word version of the first article was found on one of the computers, together with photographic images which were included in the articles and a screen shot of H's Facebook profile. Likewise, screenshots of images in the third article were identified, as was the draft of another unpublished article in a similar vein. And in respect of M, a word version of the first article was found on a computer to which Mr Nottingham had access together with the image of H which appeared in the same article.

[42] In addition to this specific evidence, there was also a body of general evidence establishing either that Mr Nottingham was LF, a co-principal of LF or was, at a minimum, a party to the publications. We cite some examples:

(a) Although much was made of the fact that others had access to the computers at Mr Nottingham's Hillsborough residence, particularly his brothers Anthony and Phillip, there was ample evidence that Mr Nottingham had overall responsibility and control. For example, there was an email in which Anthony told Mr Nottingham to stop treating him "like one of your fucking employees".

(b) There was evidence of Mr Nottingham's wife asking him not to publish a "takedown" article on another person, because "as far as I am concerned no story is needed on this guy", and her subsequently thanking Mr Nottingham for not putting the story up. That draft article also referenced C, whose first and last names were interposed with the words "slutguts" and referred to another article about her "coming soon". So there was strong evidence of editorial control over LF, with a direct linkage to one of the complainants.

(c) There is the factor of the coincidence in time between publication of some of the articles and communications by the complainants to Mr Nottingham. For example, one of the articles about C was published shortly after she applied for a protection order against Mr Nottingham, and an article about M was published on the evening of the same day that M corresponded with him.

(d) Mr Nottingham was consistently referred on LF in glowing terms, including as a "justice campaigner" and the like.

(e) The fact that LF is the motto of the Nottingham High School in Nottingham, England.

[43] The weight to be given to all of these individual pieces of evidence was essentially a jury function. By a wide margin we conclude that on the issue of "identity", Mr Nottingham fails to satisfy us that the jury's verdict was unreasonable.

Alleged truth of articles

[44] Mr Nottingham cast the prosecution as an attack on his unalienable rights of free speech and as having a "chilling effect" on his "legitimate exercise of natural and legal rights". He said that truth is a complete answer to any allegation that material given to any person or placed on electronic media[22] was offensive within the terms of the Harassment Act. Much of the trial was accordingly devoted to

[22] Harassment Act, section 4(1)(e) and (ea).

the cross-examination of complainants about issues featuring in the various articles and to evidence of defence witnesses purporting to establish truth in the factual allegations made.

[45] In that context Mr Nottingham liberally invoked United States Supreme Court jurisprudence relating to First Amendment rights. We can dispose of that argument quickly. Mr Krebs is correct that the New Zealand Bill of Rights Act 1990 (the NZBORA) does not invest New Zealand courts with a jurisdiction equivalent to that exercised by American courts to strike down legislation. Indeed, s 4 of the NZBORA specifically recognises that inconsistency with the provisions of the Act does not in itself establish invalidity. Likewise, s 5 recognises that restrictions on rights, even as fundamental as free speech, may in certain circumstances be demonstrably justified in a free and democratic society.

[46] The trial Judge addressed this issue in his summing-up. He said:

> The defendant has raised issues of freedom of thought, expression, speech, arising legitimately from an Act we have here in New Zealand called NZBORA, it is the New Zealand Bill of Rights Act. Freedom of thought and expression and speech, those are rights that are enshrined in that Act.
>
> Although such rights are protected in a free and democratic society, so are the rights of other people in that society, who may be affected by those expressions. Therefore society needs to reach a balance between those two sets of rights. That is why there are civil libel laws, laws against inciting violence, laws against making threats of violence and, as here, laws against speech or other acts that are designed to harass others. So, freedom of speech can only go so far and there are in our society and legal system counterbalances for it.

[47] To that list, the Judge could also have added references to s 237 of the Crimes Act 1961 (blackmail) and s 131 of the Human Rights Act 1993 (criminal incitement of racial disharmony).

[48] In relation to whether truth was a defence to the charges, the Judge said:

> The truth of matters stated in the various acts; the messages, the letters, the articles in particular; the truth of the contents is not a defence. However, it may be relevant to your determination of whether what was said is offensive (the first element) and perhaps whether the writer, publisher, caller intended to cause harm or fear (the third element).

> It has been pointed out already that given the highly inflammatory and abusive language used to impart the truth in some of these Lauda Finem articles, the Crown says that claim of truth is something of a red herring. It is also fair to say that even truthful allegations can be made and repeated in ways that are intended to and do in fact harass. You might remember [C] in cross-examination saying effectively that these things are not true (was her response) but, even if they were, it does not mean that they can be repeated and presented in this way, in a way that makes me feel harassed and frightened. I am not repeating her direct words, that was the effect of what she was saying. So even the truth can be used to harass. There are significant limitations on the use that you can put to the proposition that the truth is of assistance to you in this case. It may be of marginal assistance to help you to determine whether in fact the act was harassing and it may be of some help to you to determine what the state of mind was of the person who was doing that act, what their intention was, what their hope was.

[49] This largely mirrored the Crown closing, in which counsel reminded the jury that the determination of what was offensive involved an objective test (of which it was the arbiter), but suggested that the mere fact that truth might be asserted in a statement, at least at some level, did not preclude its categorisation as offensive. Mr Dickey used, for example, the description of an overweight person as a "fat pig".

[50] We do not consider the trial Judge to have erred in his approach to this issue. The jury was legitimately entitled to take into account truth or falsity in its assessment of offensiveness, but it was only one part of a composite of considerations relevant in that respect.

[51] In any event, the binary truth or falsity analysis on which this submission is premised is, in the context of the case, an academic construct. Much of what was published could at best be described as virulent opinion with only a tangential connection to anything arguably true. And in respect of many of the comments, we regard even that description as excessively generous. As the Crown said in closing, the posts were littered with "hate-filled [invective]" and were strongly misogynistic. T was, for example, described as a "useless fucktard" and "scum of scum of scum and then some scum". It was said that she wanted an identified person dead and was operating "in a similar fashion to the manner in which the [Nazis] singled out the Jewish community". In respect of C, her surname was predicated by the sobriquet "cumsac". And it was said she needed to be "brought to justice before she commits very serious offending such as murder". B was referred to, in the article dated 24 April 2013, in the following terms:

> First it was her burgeoning awareness of breast cancer; what the fuck would [B] know about breasts — she clearly ain't got no breasts; although she is herself one prize tit; A prize shitbag in fact. … LF posted a few pieces a year or so back about how dishonest, corrupt, and stupid this troll was …

[52] In a second article, the corruption allegation was repeated although, as Mr Nottingham acknowledged in his submissions before us, B had simply acted on the information of a constituent who had been complaining about his conduct.

[53] H was in turn described in sexualised terms by interposing the phrase "juggs bunny" between her first and last names, followed by reference to the fact that she was a "co-conspirator" with her husband who had "dumped [her] for a later model". M was described as a "bent ex-cop" with the suggestion he was "on the take" (allegations vehemently denied and never established).

[54] It was not unreasonable for the jury to identify such material as offensive. The assessment was one appropriately informed by the composite of community values which it represented. It is one that an appellate court would be more than usually reluctant to interfere with. And to the extent truth or falsity did impact on the analysis (as the Judge recognised it had the potential to do, at least at the margins), assessment of the honesty and reliability of witnesses was again a classic jury function.

[55] Nor are we persuaded that it was unreasonable for the jury to regard as "specified acts" any of the other actions relied on by the Crown to establish the requisite pattern of behaviour within the one-year period. We include the private prosecution of H (ultimately dismissed after a three-week hearing)[23] in that category. And although the articles in respect of M (the only male complainant) did not share the same belittling and objectifying themes as those written about the female complainants, they nevertheless involved such a significant attack on his integrity that again we see no basis to interfere with the jury verdicts.

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[23] *Nottingham v [H]* [2016] NZDC 9272. Subsequent appeals to the High Court and Court of Appeal were dismissed: *Nottingham v District Court at Auckland* [2017] NZHC 1715; and *Nottingham v District Court at Auckland* [2018] NZCA 345, [2018] NZAR 1308. A subsequent application for leave to appeal the Supreme Court was also dismissed: *Nottingham v Taka* [2018] NZSC 102, [2018] NZAR 1759.

[56] Mr Nottingham also placed significant emphasis on the fact that although complainant C commenced proceedings for a temporary Protection Order naming her former partner and Mr Nottingham as respectively Respondent and Associated Respondent, these were subsequently discontinued. He said that in support of her discontinuance she filed an affidavit which acknowledged that earlier claims made on the LF site, including claims relied on by the Crown as specified acts, were true.

[57] We do not regard that as an accurate reflection of the evidence. Paragraph 3 of the affidavit stated that the election to discontinue was based on the fact that the respondents "are no longer harassing me and therefore subjecting me to psychological abuse". Paragraph 31 then stated:

> Since last December 2013 the Respondent and Associated Respondent have not harassed me. I am aware that Lauda Finem have not published anymore new articles about me since 1 November 2013. Accordingly currently there are no articles on the website making false and defamatory allegations about me.

[58] Mr Nottingham seized on the last sentence and says that because C must have been aware that the original article could still be accessed by a Google search (something which under cross-examination by Mr Krebs she acknowledged as possible), she must be taken as accepting the allegations in that article were true.

[59] In our view, that takes the sentence out of context. C's decision to discontinue was expressed by her to be based on the absence of ongoing harassment, specifically that she was "not experiencing any *current* psychological abuse" (emphasis added). She repeated that position at trial and referred also to the cost of her continuing with the application. She confirmed in evidence that the material (insofar as it was ever amenable to a truth or falsity analysis) was untrue.

[60] We note the Judge's observation (during the course of Mr Nottingham's examination of his brother about the same affidavit) that "we've had that evidence trawled through with her ad infinitum" and that "the ambiguities around it have been considered in cross-examination as well". To the extent the jury was required to, it was, in our view, well open to it to resolve those ambiguities in C's favour.

[61] Finally, in respect of this aspect of the appeal, we note Mr Nottingham's submission that a specified act cannot be relied on if done for a "lawful purpose". He relied in that respect on s 17 of the Harassment Act. We reject that submission. Section 17 prevents such reliance for the purposes of s 16(1)(a) alone. That section relates to the court's civil jurisdiction to make restraining orders. It is not directed to a prosecution under s 8.

[62] We also note that the "lawful purpose" which Mr Nottingham asserted at trial was his ability to respond to actions by the complainants which he considered to be unlawful or unjust (H was alleged to have been complicit in her husband's operation of a website Mr Nottingham considered to be fraudulent; M was alleged to have misconducted himself in office in a way which resulted in financial loss to Mr Nottingham; C had made a police complaint about an associate of Mr Nottingham's he alleged to be false; T had made accusations he considered baseless and B had assisted H's husband). A similar point appears in his written submissions on appeal, where he refers to "the issue as to whether the complainants had contributed to their problems", albeit in a paragraph which combines submissions in relation to both conviction and sentencing. In oral submissions he further urged on us the fact that "they started it". We note the inconsistency of that argument with his underlying proposition that there was inadequate proof he was either the publisher of the LF articles or a party thereto. However, that aside, the proposition that "they deserved it" was self-evidently not a defence to the charges Mr Nottingham faced.

[63] We are also satisfied that the jury's verdict was not unreasonable in its implicit acceptance that the intention/knowledge requirements in s 8 of the Harassment Act were proven. The Crown case was that anyone who discovered they were a target of LF would reasonably fear for, among other things, their mental wellbeing and that this was plainly intended by Mr Nottingham, or at least he knew that it was a likely result. Consistent with that submission, each of the complainants gave evidence of how the articles had impacted on them.

[64] T's concerns included to her physical wellbeing. This was because of photographs posted to the site from someone who had clearly been tracking her movements and because the phrase "two head shots to be sure", had been inserted

between her first and last names in the 29 April 2013 article. Her fears were compounded by the fact that the article was forwarded to her with a link to a scene from the Quentin Tarantino film "Pulp Fiction" which showed a person being shot in the head. Although Mr Nottingham suggested that this was a reference to T's treatment of certain people, we agree with the Judge that "it is not unreasonable and should have been foreseeable that those statements would be read as a threat towards [T]".[24]

[65] C said she felt so threatened and terrified that for a period she could not leave her house and the articles "completely and utterly destroyed [her] life". The jury's conclusion that Mr Nottingham intended this or at least knew it to be a likely result was clearly one available to it. The fact that a copy of one of the articles was sent to a close relative of C emphasises the point.

[66] Likewise, B said she felt sickened, threatened and humiliated and took the reference to "belted" between her first and second names as physically threatening. H said that she was scared, distressed, "upset a lot", "a bit of a wreck" and that she "didn't sleep very well". And M regarded the attacks as relentless, leaving him lying awake at night anxious and debilitated. All of this was, in our view, entirely predictable and fully justified the conclusions to which the jury came.

General appeal points

[67] We have endeavoured to distil from Mr Nottingham's written material the other points on which he relies.[25]

[68] Firstly he submitted that the Judge:

> … did not fairly sum up the competing evidence, effectively casting aside the evidence that established that [the complainants] were not telling the truth, when the prosecution was alleging defamation.

[69] We do not accept that submission. On appeal, minute dissection of a judge's summing-up will often invite the argument that some aspect or other of the evidence

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24 *R v Nottingham*, above n 3, at [30].

25 We do not discuss points raised in his Notice of Appeal which were not the subject of submission.

might have been better emphasised. The overriding question is whether there has been a miscarriage of justice. In this case, we regard as compelling the following exchange between the Judge and Mr Nottingham which occurred in chambers immediately after the summing-up:

> The Court: All right, now any matters arising?
>
> Mr Nottingham: Sir, may I comment that that was a very fair summing up.
>
> The Court: Thank you. I tried very hard to ensure that it was.
>
> Mr Nottingham: It was.

[70] Secondly, Mr Nottingham maintained his trial position that the case against him was a "fit up" by the police or more particularly DS Litherland. He relied on the fact that DS Litherland approached the complainants after identifying offending material on the LF site during the course of his investigations about the breach of the suppression order. We do not consider there to be anything in the point. The police have a statutory duty to investigate (and subject to their discretion) prosecute criminal offending. In any event, the evidence was that a number of the complainants had earlier approached the police, but at the time the police considered there to be insufficient evidence to establish who was responsible for the site.

[71] Thirdly, he submitted that the Judge was in error in the way in which he answered jury questions D2 and 3. These were as follows:

> 1. Does the complainant need to be aware of the specified act within the 12 month period?
>
> 2. Does each specified act have to be offensive of itself? E.g. a specific article that has been identified as a specified act may not be offensive when read in isolation but may be offensive in the context of other behaviour that has occurred outside the 12 month period.

[72] The Judge's response to the first question was lengthy.[26] We do not need to set it out in full. His Honour correctly distinguished between specified acts such as making contact with a complainant or acting in a way which caused them to fear for their safety (both of which assumed knowledge by the complainant of the act within

[26] The transcript of the answer is three pages long.

the 12-month period) and the giving of offensive material under s 4(1)(e) and (ea). In respect of the latter, he said:

> Does the complainant need to be aware of the specified act within the 12 month period? As long as you're talking about the giving of offensive material then the answer is no.

[73] Earlier in the direction he stated that the same approach applied if the specified act was "following" a person[27] with the result that the complainant likewise did not, within the relevant 12-month period, need to be aware of the following provided it had occurred within that timeframe.

[74] In respect of the second question the Judge gave the following direction:

> The answer to the question is "yes" but you consider whether something is offensive in context. So, this is what I said to you in the summing up. Remember that behaviour that may seem trivial in isolation may amount to harassment when seen in context. Making a judgment about whether a specified act is offensive, and that's your question. Yes, it needs on its face to be potentially offensive but you can make the [judgment] about whether it is offensive by looking at all of what was happening to that person.
>
> "And can that be outside the 12 month period?" is what you're asking. Yes, it can. Because it's only the two specified acts that have to be within a 12 month period. The context of it, the circumstances around it are not constrained by that 12 month period.

[75] These answers were given after input from counsel and Mr Nottingham (Mr Krebs' input was by email). Mr Nottingham contended for the corollary of the answers given. Mr Krebs agreed with the second answer but considered the first question should be answered yes (apparently in respect of all specified acts).

[76] We do not consider the answers were in error. In respect of the first, s 4(1)(ea) of the Harassment Act recognises placement on electronic media where "it is likely that [offensive material] will be seen" qualifies as a specified act. It does not require actual observation within the 12-month period. Likewise, the Judge correctly pointed out that under s 8(a) and (b) the focus is not on whether the person harassed feared for

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[27] Harassment Act, s 4(1)(b).

their safety (whether during the 12-month period or after), but on the harasser's intention that it cause fear for safety or knowledge that it was likely to.[28]

[77] In respect of the second answer, the Act itself recognises (s 6(1)(a)) the importance of context in deciding whether particular material was offensive. We agree the jury was entitled to look to context outside the 12-month qualifying period. Importantly, the Judge confirmed that each specified act did indeed need to be offensive in itself, albeit assessment of offensiveness could be assisted by context.

[78] Mr Nottingham's next complaint is about the conduct of one of the jurors, who shortly before the summing-up revealed that he had been using the internet to seek definitions of terms he did not fully understand. That resulted in the judge questioning the juror with counsel and Mr Nottingham present. The Judge asked the witness directly whether he had googled the website LF, Mr Nottingham or any other witnesses' names, to which he responded "no". The Judge recorded his concern to "make sure that you're not doing research about the case" to which the juror again answered "no". It is clear from the exchange that the juror was using the internet effectively as a dictionary. Indeed, he asked whether a "legal dictionary" might be made available. Significantly, at the conclusion of the Judge's questioning, the Judge asked Mr Nottingham "Any concerns?" — to which the response was "No, no Sir".

[79] Accordingly, Mr Nottingham's appeal against conviction is dismissed.

The sentence appeals

The Judge's approach

[80] Judge Down sentenced Mr Nottingham to a total of 12 months' home detention, imposed post-detention conditions for a period of six months and

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[28] Thus, for example, if the harassment is by "following" (s 4(1)(b)) but the person is unaware of being followed until subsequently told by a witness, harassment will have occurred at the time of the following assuming the harasser intended that he/she be seen. Contrast someone who follows from a distance intending not to be seen but who takes photographs which are subsequently posted to the internet or sent to the person. The "following" in that case will not amount to harassment but the posting may well do.

ordered him to undertake 100 hours of community work.[29] The component parts of the sentence were as follows:

(a) for each of the five criminal harassment charges — concurrent sentences of nine months' home detention, together with post-detention conditions;[30]

(b) for the two breaches of suppression — concurrent sentences of three months' home detention cumulative on the nine months already imposed;[31] and

(c) in respect of the first of the breaches, he imposed the community work requirements.[32]

[81] The sentence was premised on the following findings of fact which we agree were consistent with the jury's verdicts:[33]

(a) Mr Nottingham either was LF (in other words the leading mind of that blog) or he was so intimately related to it that it was proper to conclude that he provided information and draft articles to that blog knowing and intending that they would be published.

(b) Publication and other intimidating and harassing conduct was either carried out by Mr Nottingham himself or at his direction and he knew his conduct was likely to cause the individuals involved to fear for their safety or that of family members.

(c) Although Mr Nottingham may, at least initially, have reasonably believed he had legitimate grievances in respect of the complainants, he elected to pursue these, not by lawful and reasonable means, but by personal attacks on an "anything goes" basis.

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29 *R v Nottingham*, above n 3, at [62]–[64].
30 At [61].
31 At [63].
32 At [64].
33 At [22]–[24].

[82] The Judge's approach was then to treat the harassment charges (in respect of which it is clear that he agreed with the jury's verdicts) as the lead offences.[34] He said that although it went "without saying" that all of the offences were sufficiently serious to justify a starting point of imprisonment,[35] he considered C and T to have been more severely and persistently harassed than H, B and M.[36] He appears to have considered that in respect of either C or T the offending justified a 12-month term.[37] Taking one year's imprisonment as his starting point, he said that the other four charges "on their own" might justify a start point of somewhere between six and 12 months.[38] However, he rejected a Crown invitation to impose cumulative sentences on the grounds that this would result in a sentence "wholly out of proportion with the gravity of the offending and the personal circumstances of the defendant".[39] He considered the appropriate approach to be the imposition of concurrent sentences for each of the four offences in addition to C or T, "reflecting the seriousness of those charges by imposing modest uplifts and having regard to the totality of the sentence that I impose".[40] He identified three months as being the appropriate uplift for each, bringing the overall start point for the harassment charges to two years imprisonment (the statutory maximum for a single offence).[41]

[83] In respect of the breach of non-publication orders, the Judge noted the Crown submission that the maximum penalty of six months' imprisonment be adopted as the start point.[42] The Judge categorised these breaches as blatant and contemptuous and noted Mr Nottingham showed no remorse.[43] Nevertheless, the Judge considered they were not the most serious examples of a breach of name suppression and adopted a start point of three months for the first breach, uplifted by a further one month to reflect the second breach.[44]

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34 At [44].
35 At [48].
36 At [47].
37 At [47]–[48].
38 At [48].
39 At [37].
40 At [47].
41 At [48].
42 At [50].
43 At [50] and [52].
44 At [50]–[51].

[84] In respect of the combined total starting point of two years and four months' imprisonment, he then gave a four-month discount to reflect what he described as Mr Nottingham's "multi-faceted and complex" health problems, which in the Judge's view meant that a sentence of imprisonment would be much harder for him than for an average middle-aged man in reasonable health.[45] He identified this as the only mitigating factor resulting in a provisional end sentence of two years' imprisonment. That required that the Judge give consideration to home detention which, consistent with authority,[46] he recognised as having a general and specific deterrence value.[47] He said he regarded home detention as an appropriate and sufficient response, particularly because of the ability to impose restrictive conditions limiting Mr Nottingham's activities and assisting his rehabilitation.[48] The indicated 12 months' home detention sentence was then apportioned in the way we have previously indicated. Special conditions were imposed including that Mr Nottingham attend counselling or treatment programmes as directed by a probation officer and that he not use any electronic device capable of accessing the internet without prior approval from a probation officer.[49]

[85] The overall sentence was therefore one consistent with the indication the Judge gave to the jury on delivery of its verdicts, namely, that Mr Nottingham was "unlikely [to receive] a sentence of imprisonment simply because of the nature of these charges and [his] position and needs".

The respective positions

[86] Mr Nottingham said that the sentences should be commuted to time served (three and a half months home detention) and without the requirement for community work on the primary ground that the LF articles on which the harassment charges were based were "not designed to make anyone fear for their safety". By contrast, the Crown submitted the sentence was manifestly inadequate and that nothing less than a custodial sentence is sufficient to capture the level of denunciation and

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45 At [55]–[56].
46 *Iosefa v R* [2008] NZCA 453 at [41]; and *Fairbrother v R* [2013] NZCA 340 at [28]–[29].
47 *R v Nottingham*, above n 3, at [57].
48 At [58].
49 At [61].

deterrence required for what it says was an egregious breach of non-publication orders and malicious and misogynistic attacks on members of the public.

[87] We intend to address the Solicitor-General's appeal first because of our conclusion that it is dispositive.

[88] Ms Brook submitted that manifest inadequacy arises primarily from the way in which the sentences were structured, and in particular, what she says was an excessive discount for totality. She submitted that the final sentence should have been in the region of three years five months' imprisonment, made up of cumulative sentences, save that the sentences for the two breaches of the suppression order were properly imposed concurrently with each other and cumulatively on the sentences for criminal harassment.

[89] She said that the Judge fell into error by determining that concurrent sentences were required for the harassment offending. She said that although the offending was similar in kind it did not arise out of a single course of conduct or connected series of offences, with each campaign of harassment independent of the others and with a unique genesis and unique consequences for the individual complainants. She relied on a number of High Court cases where cumulative sentences for criminal harassment have been upheld or imposed.[50] She also referred to this Court's decision in *Butler v R*,[51] where starting points of 17 months' and 20 months' imprisonment in respect of a campaign against two former domestic partners were identified as within range (and not at all severe) and where the Court held that the Judge's cumulative approach to sentencing could not be criticised.[52]

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50 *Smaill v Police* HC Dunedin AP17/99, 25 June 1999, where three cumulative sentences of six months' imprisonment were upheld for offending against three married couples, who were the defendant's neighbours; and *Green v Police* [2012] NZHC 3228, where starting points of two 17-month cumulative sentences were upheld for a "flood" of abusive text messages, letters and photographs to unconnected women.

51 *Butler v R* [2019] NZCA 65.

52 At [17]. The Court nevertheless allowed the appeal on the basis that the cumulative sentences invited a totality discount and because insufficient weight had been given to the defendant's voluntary return to New Zealand.

[90] Ms Brook submitted that the sentence should have been constructed with minimum 12-month cumulative starting points for the offending against C and T, uplifted by nine months for each of the other three harassment charges.

[91] In respect of the breaches of suppression, she said this was serious offending because Winkelmann J was motivated to ensure that unfounded allegations of manslaughter not follow the defendants for the rest of their lives. She submitted therefore that the articles undermined the whole purpose of the order. She proposed starting points of three months' imprisonment for each of the offences.

[92] From this overall global starting point of four years and nine months' imprisonment, Ms Brook suggested a totality adjustment of 12 months (just over 21 per cent) resulting in a notional sentence of three years and nine months' imprisonment for all offending. She submitted that no discount should be given on account of Mr Nottingham's medical conditions because there was insufficient evidence that these could not be managed in a prison environment. If recognised, however, she says that the discount should be no more than the four months allowed by the Judge.[53] She then acknowledged that a further discount of seven months is necessary to reflect the three and a half months already served on home detention. She recognised the orthodox position in that respect.[54]

[93] Ms Brook therefore submitted that the Judge's sentence should be quashed and a new sentence imposed in the region of two years and 10 months' imprisonment, calculated by reference to two cumulative sentences of eight months' imprisonment (offending against C and T), three cumulative sentences of five months' imprisonment (offending against H, B and M) and sentences of three months' and two months' imprisonment (concurrent but imposed cumulatively on the other sentences) for breach of the suppression orders.

[94] Mr Krebs did not take issue with the way the Solicitor-General's sought to structure the sentence but submits that a totality adjustment of up to one third may be

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53 A nine per cent discount on the Solicitor-General's proposed notional starting point, as opposed to the 17 per cent discount on the Judge's lower starting point.

54 See *Gardner v Department of Corrections* [2017] NZHC 2895, [2018] NZAR 49.

appropriate, to capture fully the fact that denunciation and deterrence are better applied to the entire course of conduct rather than requiring discrete and repeated applications across each charge.

Discussion

[95] In stating that imposition of cumulative sentences "would result in a sentence which would be wholly out of proportion with the gravity of the offending and the personal circumstances of the defendant",[55] the Judge was clearly invoking the mandatory provisions of s 85(2) of the Sentencing Act 2002. However, having determined that a concurrent approach to sentencing was appropriate, the Judge then calculated the sentence (by way of discrete uplifts) as if it was being imposed by way of a series of short cumulative sentences.

[96] Faced with the totality problem which he had identified the Judge had a range of options. He could:

(a) Adopt a cumulative approach and make a straightforward totality adjustment as in *Butler v R*.[56]

(b) Impose longer concurrent sentences as recognised in s 85(3) of the Sentencing Act.

(c) Adopt a combination of concurrent and cumulative sentences as also recognised in s 85(3).

[97] If adopting the second of these alternatives, it was necessary to impose one long sentence on the lead offence which reflected the totality of all of the offending with lesser concurrent sentences appropriate to each of the individual offences.

[98] The Crown submitted that the Judge's approach was wrong in principle and likely to have resulted from his recognition that the two-year maximum penalty for criminal harassment would provide insufficient head room if (a) the matter was dealt

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55 *R v Nottingham*, above n 3, at [37].
56 *Butler v R*, above n 51.

with on a concurrent basis and (b) a sentence was imposed on the lead offence properly reflecting the totality of the offending. We agree that the approach which he adopted had the effect of suppressing the legislative mandate that individual sentences be reflective of the seriousness of each offence[57] and had the ultimate result of allowing an excessive totality adjustment. For example, although the Judge recognised that offending against both T and C each justified 12-month starting points, his approach meant that the offending against one or the other attracted only a three-month uplift (and thus a 75 per cent totality discount).

[99] Although several sentencing constructs were available to the Judge, the preferred approach was likely to have started with a series of cumulative sentences properly reflecting the severity of the individual harassment charges, with a further cumulative sentence for the breach of suppression charges (treated concurrently as between themselves), subject to an overall totality adjustment and then with a deduction for ill health (if allowed). Because we consider the Judge to have erred in the way he approached the sentencing, we adopt this construct to test the end result against the benchmark for appellate intervention.

[100] We accept Ms Brook's submission that the offending against C and T justified a 12-month starting point for each.[58] The language used was particularly demeaning and offensive and the fact that a photograph was taken of T without her knowledge and subsequently published must have been calculated to add to her insecurity. The offending against B, H and M was not as serious, although there were strongly misogynistic elements in the articles about B and H and the implication that M was corrupt was clearly a very damaging one given the nature of his employment. We consider cumulative sentences of six months (in relation to the offending against B), five months (in relation to the offending against H) and five months (in relation to the offending against M) appropriate.

[101] In respect of the breach of suppression offences, we agree with the Judge that they were sufficiently interconnected and similar in kind to attract concurrent

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57 Sentencing Act 2002, s 85(1).

58 Ms Brook submitted that a starting point of up to 18 months could be justified for each, but because this was a Solicitor-General's appeal, adopted 12 months.

sentences. The Judge's approach was to impose a sentence in respect of the first offence (three months' imprisonment) and then to uplift it by one month for the second offence, reflecting, he said, totality considerations. We consider this wrong: totality should have been considered at the conclusion of the sentencing exercise. We agree with the Crown that the suppression offending was serious for the reasons already detailed, and that its gravity was further compounded by the fact that, based on the personal circumstances of the defendants, Winkelmann J saw fit to discharge them without conviction. We agree also with the Judge that this was blatant and contemptuous offending. We therefore consider s 8(d) of the Sentencing Act was engaged, namely, that in sentencing or otherwise dealing with an offender the court:

> … must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; …

[102] Sentenced concurrently, we consider a starting point of five months' imprisonment (before totality adjustment) was appropriate. On that basis we consider the appropriate combined starting point for all offences was in the order of three years and nine months' imprisonment.

[103] We agree with Mr Krebs that assessment of the required totality adjustment to this starting point is difficult. We cannot, however, accept that it was in the order of one third. The Crown contends for an adjustment of at or about 20 per cent, which is consistent with the approach of this Court in *Butler v R*.[59] We agree with Mr Krebs that the principal focus of the adjustment is to ensure that the element of denunciation and deterrence is applied once to the entire course of the harassment conduct. We agree also that where there are multiple offences sentenced cumulatively, a higher percentage discount may be necessary to ensure, as s 85(2) requires, that the total period of imprisonment is not wholly out of proportion to the gravity of the overall offending. In our view, a 10-month discount (equating to approximately 22 per cent) was appropriate across the seven charges.

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[59] *Butler v R*, above n 51.

[104] In respect of the Judge's four-month discount for ill health, we consider that he was particularly well placed to make the necessary assessment. The trial had been scheduled to take place before him in August 2017 but was adjourned because of Mr Nottingham's two hospital admissions over the preceding week. Before agreeing to the adjournment, the Judge summonsed Mr Nottingham's specialist, Dr Walls, to give evidence. He was satisfied that an adjournment was appropriate. The Judge also presided at a subsequent hearing to determine Mr Nottingham's fitness to stand trial on the index offending.[60]

[105] In his sentencing notes, the Judge observed that Mr Nottingham's medical problems were also "ever present in the course of the jury trial, and indeed in the middle part of that trial there was [a] full week where the trial was unable to proceed due to Mr Nottingham's hospitalisation".[61] As we have said, he went on to describe his problems as "multi-faceted and complex".[62]

[106] At our request, Mr Nottingham provided a number of hospital admission forms, specialist reports and GP reports from the last two years. These include the s 38 report[63] prepared by Dr Jeremy Skipworth, Director of Area Mental Health Services for the Waitemata District Health Board to assess Mr Nottingham's fitness to stand trial.

[107] We agree with the Judge that Mr Nottingham presented with a complex combination of physical and mental health problems. Several reports identify him as suffering from Post Traumatic Stress Disorder (PTSD) attributable to childhood trauma and although Dr Skipworth says this diagnosis "is controversial in cases of life-long trauma such as Mr Nottingham describes", nevertheless he accepts it is one way clinicians choose to diagnose and understand "long-term personality dysfunction, interpersonal relational difficulties, cognitive impairment and mood dysregulation in presentations such as Mr Nottingham's".

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60 *R v Nottingham* DC Auckland CRI-2015-004-003536, 28 September 2017.
61 *R v Nottingham*, above n 3, at [54].
62 At [55].
63 Report under s 38(2)(a) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 dated 18 September 2017.

[108] We also note a diagnosis of a traumatic brain injury sustained in a high-speed motorcycle accident in 1996 and a further serious motorcycle accident in 2016 which Dr Walls was concerned had "significantly aggravated the old traumatic brain injury". There is also evidence of recurrent depressive disorder and periodic suicidal ideation.

[109] Likewise, Mr Nottingham suffers from a significant number of physical impairments, principal among them recurrent and serious atrial fibrillation. This condition in turn compounds the congestive heart failure from which he also suffers. Multiple hospital admissions have resulted.

[110] Overall, we are not persuaded that the Judge was wrong to make the allowance he did. The combination of neuropsychological and physical impairments are, in our view, likely to increase the punitive impact of a custodial sentence. We reach that conclusion because of the association in many of the reports between periods of excessive anxiety and episodes of severe atrial fibrillation. We note that as a percentage of the totality adjusted sentence we have adopted, the discount equates to approximately 12 per cent, which is broadly consistent with that upheld by this Court in *P (CA593/2008) v R*.[64] That case again involved a defendant with numerous (but ostensibly more severe) cardiac impairments.

[111] Combining the totality and health discounts, we therefore arrive at a sentence of 31 months' imprisonment which is approximately 30 per cent higher than the Judge's end point. That margin, in our view, satisfies the test for appellate intervention, even allowing for the 100 hours of community work the Judge also imposed in respect of the first suppression charge. We allow the Solicitor-General's appeal accordingly.

[112] In re-sentencing Mr Nottingham we are, however, obliged to take into account the three and a half months of home detention he has already served. Allowing a seven-month discount in this respect again brings Mr Nottingham's sentence to a level where the Court is obliged to consider home detention. We consider that to be an appropriate sentence, particularly having regard to:

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64 *P (CA593/2008) v R* [2009] NZCA 10.

(a) Mr Nottingham's physical and mental health, which we consider would make the consequences of imprisonment disproportionately severe;

(b) the opportunity to direct participation in rehabilitative programmes, as recognised by the Judge; and

(c) the ability to protect the interests of the complainants and the community by the imposition of restrictive conditions of internet access, again as recognised and directed by the Judge.

[113] In terms of the final structure of the replacement sentence, we consider s 85(3) of the Sentencing Act is engaged because the imposition of a series of short cumulative home detention sentences would fail to reflect the seriousness of each offence. Our approach is therefore to impose concurrent sentences, as follows:

(a) in respect of the offending against C, 12 months' home detention, concurrent with all other sentences;

(b) in respect of the offending against T, 12 months' home detention, concurrent with all other sentences;

(c) in respect of the offending against B, eight months' home detention, concurrent with all other sentences;

(d) in respect of the offending against H, six months' home detention, concurrent with all other sentences;

(e) in respect of the offending against M, six months' home detention, concurrent with all other sentences; and

(f) in respect of each breach of suppression, five months' home detention concurrent with all other sentences.

[114] We adopt the sentencing Judge's special conditions of home detention and likewise confirm the application of standard conditions and six-month post-detention

conditions as specified in his sentencing notes.[65] Thus, the sentence is to be served at 82 Goodall Street, Auckland. We encourage the Department of Corrections Community Probation Service to consider a requirement that Mr Nottingham attend such counselling or courses as would assist him in management of his PTSD and in his incipient understanding (as recorded by the Judge)[66] that his abrasive and combative approach to others may, in part, be consequential on this diagnosis.

[115] We do not see any reason to depart from the sentencing Judge's imposition of 100 hours of community work on the first breach of suppression charge. We therefore confirm that sentence.

Result

[116] The application to adduce further evidence in CA472/2018 is declined.

[117] The appeal against conviction in CA472/2018 is dismissed.

[118] The appeal against sentence in CA472/2018 is dismissed.

[119] The appeal against sentence in CA492/2018 is allowed.

[120] The existing (part-served) sentence of home detention is quashed. A new sentence of 12 months' home detention (with identified concurrent home detention sentences) plus 100 hours' community work is imposed, subject to the same conditions as imposed by the District Court.

Solicitors:
Crown Law Office, Wellington for Respondent in CA472/2018 and Appellant in CA492/2018

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65 *R v Nottingham*, above n 3, at [61]
66 At [42].