THE EPIDEMIOGLOGY OF OFFENCE

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The overview to the New Zealand Broadcasting Standards Authority's decisions contains the following: "*Warning! Some of the decisions and summaries on this website contain language that some people may find offensive."* The font in which it appears on the authority's website is nudista. The typeface is appropriate because, just as nudity is not offensive to nudists, what is offensive to 'some people' is not offensive to others. It is a form of injury that is wholly subjective.

The BSA is no stranger to subjectivity. Complaints against the decency and good taste standard and, to the lesser extent, the denigration and discrimination standard, require it to adjudicate in a manner that recognises a spectrum of attitudes while reflecting a broadly-held consensus. Its decisions in many respects apply the same test as those used in defamation actions under English common law – that it would be proven in the estimation of Lord Atkin's ubiquitous 'right thinking members of society generally'.[1] In other words it has sought to reflect the general attitudes prevailing in New Zealand society at any given time. The unique nature of New Zealand society at times requires the application of a different test: that employed in defamation proceedings in the United States where the notional arbiter may be 'a considerable and respected class in the community'.[2] In other words, the class may be a minority but a significant one – Maori, for example.

However, in either case the test is seen to be based on the premise that the limits of acceptability should be set by reasonableness and common sense. When put to the general public they should be capable of receiving widespread consent. Litmus test focus group research remains an appropriate means of gauging how close the authority's decisions are to reflecting this broad middle ground, which changes over time. So, too, are the satisfaction surveys conducted each year, although polling complainants and broadcasters must be seen against a backdrop of those parties' self-interest.

The BSA standards against which complaints are judged do not refer to 'offence' or 'harm' and the guidelines attached to them are sparing in their use of such terms. Likewise, neither the New Zealand Press Council nor the Online Media Standards Authority principles and standards use the terms. This does not prevent regulatory bodies from considering material that may be 'offensive' or even 'harmful' but adjudicators have been understandably circumspect in their handling of such claims and have had the benefit of their carefully constructed standards to ring-fence their deliberations.[3] The public should, therefore, be aware that to complain merely because they are offended is unlikely to gain much traction.

That, however, may change if public expectations are raised by the complaint provisions of the Harmful Digital Communications Act [HDCA]. Administrative agency and judicial decisions made under the new legislation may present precedents that place the existing regulatory bodies under pressure to amend their own standards.

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[1] Sim v Stretch [1936] 2 All ER 1237 at 1240.

[2] Peck v. Tribune Co. [1909] 214 U. S. 185

[3] The decision on a complaint to OMSA [Case number 2487] in January 2016 over a One News Now website item titled "Mitchell Pearce stood down over lewd act with dog" acknowledged the complainant found the item offensive but declined to proceed because it failed to reach a threshold where it caused "unwarranted distress to most readers".

The purpose of the HDCA is to deter, prevent, and mitigate harm caused to individuals by digital communications; and provide victims of harmful digital communications with a quick and efficient means of redress. It defines 'digital communication' as 'any form of electronic communication' and 'harm' as 'serious emotional distress'. It sets out three grounds that constitute an offence under the Act. The relevant definitions are added here:

> (a) the person posts a digital communication [any form of electronic communication] with the intention that it cause harm [serious emotional distress] to a victim; and
> (b) posting the communication would cause harm [serious emotional distress] to an ordinary reasonable person in the position of the victim; and
> (c) posting the communication causes harm [serious emotional distress] to the victim.

The Act presents three immediate issues: The definition of 'serious emotional distress'; a move away from the test of 'right thinking members of society generally' to one where the bar is set by 'ordinary reasonable person in the position of the victim'; and the broadly defined 'digital communication' that may include mainstream news media for whom there is no statutory exemption.

In the United States the tort of intentional infliction of emotional distress has four elements: the defendant must act intentionally or recklessly; the defendant's conduct must be extreme and outrageous; the conduct must be the cause; and there must be severe emotional distress. Professor Betsy Grey, in an article examining the future of emotional harm cases,[4] states that judicial skepticism about negligent infliction of emotional harm (NIEH) is 'long entrenched' for an amalgam of reasons including the lack of medical expertise, inherent proof difficulties for causation, the need to curtail fraudulent claims, the ubiquity of the injury, and the overriding concern of open-ended liability. Professor Grey's paper argues the removal of a series of limited duty barriers but, for the purposes of this paper, the existence of long-standing judicial reticence – due in no small part to the fact that the tort relies to a large extent on self-reporting by the victim – is relevant. So, too, are the elements of the tort and the necessary link between 'extreme and outrageous' conduct and 'severe' (not 'serious') emotional distress.

There is existing New Zealand case law on 'emotional distress' in other fields such as employment and in the developing tort of privacy but the special nature of the HDCA raises the possibility that we will see new interpretations of 'serious emotional distress'. The Act gives considerable discretion to the agency administering the law – and ultimately to the courts – to determine what that means. Given the genesis of the legislation – cyber bullying that has led in some cases to suicide or attempted suicide – the threshold may be set lower than in litigious American jurisdictions or in allegations of workplace bullying. In addition, the HDCA creates a new criminal offence and the development of its definitive elements may differ to those in civil law. There is a real danger of that which 'harms' becoming conflated with that which 'offends'.
The first warning light in the HDCA, then, is possibility that we will see a new, more liberal definition of 'serious emotional distress'.

As noted, there are three components to what constitutes an offence under the HDCA but it is the second element that is a cause for concern. By applying a test based on 'an ordinary reasonable person *in the position of the victim*' (emphasis added) there is an inevitable narrowing of the field. If, for example, a fundamentalist Christian claims to have suffered

[4] Grey, B.J., The Future of Emotional Harm, *Fordham Law Review* Vol 83, pp. 101-151

'serious emotional distress' one might argue that the question becomes "Will this cause serious emotional distress to fundamentalist Christians generally?" rather than "Will this cause serious emotional distress to the man on the Clapham omnibus?"[5] It may appear obvious that the intention is to prevent charges being laid over complaints by the unreasonably sensitive and would have in mind, say, a teenage girl's reaction to cyber bullying being weighed against the likely reaction of her peer group. That pre-supposes, however, a particular class of victim while the scope of the legislation is potentially considerably wider.

BSA decisions take into account the target audience of radio stations, in particular, and give considerable latitude to hosts of particular shows as a result.[6] It could be argued that the HDCA test is no more than such an application. However, it could equally be argued that the phrase 'in the position of the victim' is not a reference to exposure to the communication but a description of the factors that contribute to belief systems, attitudes and sensitivities. It illuminates the second warning light – the replacement of the deliberate generality inherent in previous tests of subjective values with a potentially narrow set of specifics.

The third issue – applicability to mainstream media – again arises out of definitional latitude. By defining 'digital communication' as 'any form of electronic communication [including] any text message, writing, photograph, picture, recording, or other matter that is communicated electronically', legislators may have intended to allow for future technological developments but they also created a catch-all description that includes the activities of every mainstream media organisation in New Zealand.

Lawmakers may not have had *OneNews, The Edge* or the Stuff website in mind when drafting the definition because they saw little likelihood of mainstream media producing the type of communication they had in mind. However, the Act is capable of accommodating a determined complainant 'seriously emotionally distressed' by what what they have seen, heard or read in those environments about themselves or things they hold dear. Radio 'shock jocks' would likely be the first target. It is easy to see, for example, how a controversial radio host might tick a number of the boxes listed in the legislation as factors that the court may take into account in considering offences:

- The extremity of the language used
- The age and characteristics of the victim
- Whether the digital communication was anonymous
- Whether the digital communication was repeated
- The extent of circulation of the digital communication
- Whether the digital communication is true or false
- The context in which the digital communication appeared

If cases are made under the HDCA against mainstream media by special interest groups and committed individuals, the way will be open for them to push for a duplication of HDCA tests and standards by other media regulators. There would be some moral force behind the argument that emerging rulings and case law under the Act should provide compelling

[5] A variant of 'right-thinking people generally'.

[6] See, for example Brennan and MediaWorks (2015-029) and Parlane & Wilson and MediaWorks (2015-009). The approach extends to television programme such as the Paul Henry Show (see Kilpatrick and MediaWorks 2014-105). A useful comparison could be made by using such 'good taste and decency' complaints in a BSA Litmus Test between the acceptable limits expressed by target audiences and those of a sample of the wider general public.

precedents for statutory – if not self-regulating – media regulatory bodies. The third warning light is that mainstream media may be caught by a process that was created to combat a growing problem on social media but which is capable of being captured by special interest groups for broader purposes. Three warning lights suggest the Harmful Digital Communications Act may be a law of unintended consequences.

While it is possible that complaints under the HDCA will be laid against media companies, it is more likely that the impact on media regulation will be a secondary effect. Patterns and definitions will emerge as the 'approved agency' responsible for administering the Act builds a body of rulings. These standards will be built from, among other things, the interpretation of 'serious emotional distress' and 'the position of the victim'. This, in turn, will create a public perception and expectation that could bring pressure to bear on other regulatory bodies such as the BSA. Given the weight of legal precedent they may trump the free speech provisions of the Bill of Rights Act.

There were warnings issued on the looseness of definitions during the Parliamentary debate on the Bill. Labour Justice spokesperson, Jacinda Adern, warned the House that leaving it to an 'approved agency' to determine the meaning of 'harm' ('serious emotional distress') left the meaning 'wide open'. She called on Parliament to 'play a greater role in determining where the line in the sand is'. The Green Party ICT spokesperson, Gareth Hughes, called the definition 'irresponsibly broad' but the provision proceeded into law unaltered.

The Act Party leader, David Seymour, labelled the Bill "a case study in bad law-making". Any legislation that relies on an 'approved agency' and the courts to imbue it with common sense does, indeed, exhibit shortcomings. Its development requires close surveillance. In the meantime, regulatory bodies like the BSA might shore up their defences by taking it upon themselves to address the definition of 'harm' but they must beware that it is a small word that has given rise to enormous philosophical controversies.

I do not presume to have the better of the great Western philosophers but I do address the issue of 'harm' in the introduction to a forthcoming text.[7] This short extract recalls how, as a newspaper editor, I balanced it against free speech rights.

> The limits of free speech have been encapsulated by an American literary theorist, Stanley Fish, in an aptly titled essay, *There's no such thing as free speech . . . and it's a good thing, too.*[8] Fish does not see speech as having inherent value but as something that takes its value from 'the good to which it must yield in the event of conflict'. As an editor I was always mindful of this carved-out space because part of my job was to decide where to set the limits of what I regarded as acceptable content in our newspaper.
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> My principal guideline was the concept of harm. Perceptions of harm are at the core of journalistic ethics as well as much of the jurisprudence relating to a free press. Justice Oliver Wendell Holmes provided a perfect example of harmful speech – falsely shouting 'fire' in a crowded theatre.[9] Not publishing

[7] Ellis, G.P., BWB Text on the erosion of the New Zealand public's right to know (publication May 2016)

[8] Fish, Stanley, *There's no such thing as free speech . . . and it's a good thing, too.* New York, Oxford University Press, 1994.

[9] *Schenck v. United States*, 249 U.S. 47 (1919)

information that could cause unnecessary harm was always a good starting point for me. However, 'harm' is a deceptively simple word.

I drew on more than one occasion on the work of 19th-century political economist John Stuart Mill. To gain an insight into the proper exercise of power, I took considerable guidance from his essay *On Liberty*[10] in which he stated that the only purpose for which power can be rightfully exercised over any member of a civilised community, against his (sic) will, is to prevent harm to others. Compulsion could only be justified where the conduct being deterred is calculated to 'produce evil to some one else'. He went on to say that the only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

By 'harm' he meant acts that were prejudicial to the interests of others. In an essay on Utilitarianism he addressed injustice: wrongful aggression and wrongful exercise of power. I saw the news media as a check on these phenomena. His discussion of injustice listed various forms of harm including direct suffering, deprivation of a physical or social good that could reasonably be expected, and the wrongful interference with another's freedoms. It is clear from Mill's writings that he made a clear distinction between harm and offence. Editors must do likewise, on an all-too-regular basis.

I didn't have the benefit of Jeremy Waldron's writing on the subject while I was an editor, but his 2012 book *The Harm in Hate Speech*[11] has since helped to close the circle for me on how we should make that distinction between harm and being offence. He advocates substituting 'offence' with 'assault on dignity', a phrase that admirably captures the real harm that certain categories of speech can cause. He uses 'dignity' in the sense of a person's status as anyone's equal in the community they inhabit. He extends it to their entitlement to basic justice, and to the fundamental elements of their reputation. This, he says, is worthy of protection by legal sanction while protecting people's feelings against offence 'is not an appropriate objective of the law'.

Dignity is not just decoration; it is sustained and upheld for a purpose. The social support of individual dignity furnishes for people the basis of a general assurance of decent treatment and respect as they live their lives and go about their business. Protecting people from assaults on their dignity indirectly protects their feelings, but it does so only because it protects them from a social reality – a radical denigration of status and an undermining of assurance – which, as it happens, naturally impacts upon their feelings.

The right of free expression and the right to be protected from harm would be better served if the HDCA was amended to replace the definition of 'offence' with a definition that reflected Waldron's 'assault on dignity'. He articulates the term in such a way that it has a collective effect in protecting society but has an equal

[10] Mill, John Stuart, *On Liberty and other essays*, Oxford, Oxford University Press, 1991.
[11] Waldron, Jeremy, *The Harm in Hate Speech*, Cambridge MA, Harvard University Press, 2012.

application in protecting the individual and her or his rights within society. He acknowledges that ‘dignity’ may be “a soft and mushy term” then gives it the form and substance that renders it a preferable means of measuring the ‘harm’ of mere words.