CITATION: [2006] NTMC 029

PARTIES:	PAUL FRANCIS TUDOR-STACK
	v
	NICHOLAS GILL
TITLE OF COURT:	Summary Jurisdiction
JURISDICTION:	Darwin
FILE NO(s):	20424008
DELIVERED ON:	7.4.06
DELIVERED AT:	Darwin
HEARING DATE(s):	20 – 22.2.06
JUDGMENT OF:	Mr D. Trigg

CATCHWORDS:

Criminal Code – sections 30, 31, 125A, 125B, 379.
Classification (Publications, Films and Computer Games) Act 1995 (Cth) – sections 5, 7(1), 46, 87.
Words and phrases – "possess"

REPRESENTATION:

Counsel:

Complainant:	Mr Geary
Defendant:	Mr Smith

Solicitors:

Complainant:	DPP
Defendant:	NTLAC

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 029
Number of paragraphs:	153

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20424008 [2006] NTMC 029

BETWEEN:

PAUL FRANCIS TUDOR-STACK
Complainant

AND:

NICHOLAS GILL
Defendant

REASONS FOR DECISION

(Delivered 7 April 2006)

DAYNOR TRIGG SM:

1. The defendant was charged with a single charge on complaint that on 21 October 2004 at Darwin in the Northern Territory of Australia he did possess child pornography, contrary to *section 125B(1)(a) of the Criminal Code.*

2. The complaint was laid on the 24th day of December 2004. The matter came before me on the 20th day of February 2006 at which time the charge was read and the defendant pleaded not guilty. The hearing then proceeded on 20 February, 21 February and concluded on 22 February 2006.

3. On the second day of hearing the prosecutor (Mr Geary) sought to amend the charge to change the date of the alleged offence from 21 October 2004 to 21 September 2004. Mr Smith, Counsel for the defendant, objected to the amendment. However, given the evidence which had been given on 20 February 2006 it was clear that the date was in error (20/9/04 was the date that the defendant's computers were seized under a search warrant, and 20/10/04 was the date that the defendant took part in a record of interview

with police), and as no prejudice was pointed to by the defendant I granted the amendment.

4. *Section 125B(1)* was amended on 10 November 2004, but as at 21 September 2004 stated as follows:

> (1) A person who has in his or her possession -
>
> (a) child pornography; or
>
> (b) an article that is an indecent article by virtue of paragraph (b)(vi) of the definition "indecent article",
>
> is guilty of an offence and is liable –
>
> (c) in the case of an individual to imprisonment for 2 years; and
>
> (d) in the case of a corporation to a fine of $20,000.

5. Pursuant to *section 118 of the Sentencing Act*, in the event that the defendant is found guilty, he may be fined (in addition to or instead of being imprisoned) a maximum of 100 penalty units. Pursuant to *section 3(1) of the Penalty Units Act 1999*, each penalty unit is equivalent to $110. Hence the maximum fine applicable is $11,000.

6. The onus is upon the prosecution to prove beyond all reasonable doubt that:

- On 21 September 2004;
- At Darwin;
- The defendant;
- Possessed;
- Child pornography.

7. "Possessed" is not defined in the specific definition section (namely *section 125A*) relating to this Division of offences. Nor is it defined in the general definition section of the Code (namely *section 1*). Accordingly, it would

have it's natural and ordinary meaning. In the *Concise Oxford Dictionary (1990)* "possess" means "to hold as property, own".

8. In my view, in order to have "possessed" any item complained of the prosecution must prove beyond all reasonable doubt that the defendant intended to possess the item or foresaw it as a possible consequence of his conduct (*section 31(1) of the Criminal Code*). And if I am not satisfied beyond all reasonable doubt that he did intend to possess the items but am satisfied to the requisite standard that he foresaw it as a possible consequence of his conduct, then the prosecution must prove beyond all reasonable doubt that "in all the circumstances, including the chance of it occurring and it's nature, an ordinary person similarly circumstanced and having such foresight would" not "have proceeded with that conduct" (*section 31(2) of the Criminal Code*).

9. Child pornography was at the relevant date defined in *section 125A(1) of the Criminal Code* as follows:

> "child pornography" means a film, publication or computer game classified RC, or an unclassified film, publication or computer game that would, if classified, be classified RC, on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is a child who has not attained the age of 16 years or who looks like a child who has not attained that age. (emphasis added)

10. The prosecution has proceeded on the basis that the items "possessed" by the defendant were a "film".

11. In the definition section (*section 5) of the Classification (Publications, Films and Computer Games) Act 1995*(hereinafter referred to as *"the Commonwealth Act"* the following relevant definitions appear:

> " film" includes a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, including a computer generated image, can be produced (together with its sound track), but does not include:

(a) a computer game; or
(b) an advertisement for a publication, a film or a computer game.

"computer generated image" means an image (including an image in the form of text) produced by use of a computer on a computer monitor, television screen, liquid crystal display or similar medium from electronically recorded data.

12. In the instant case the prosecution allege that the offending material was not photographs, but rather text in the form of emails received on the defendant's computer. I find that such text would fall within the definition of "computer generated image" and accordingly would also come within the definition of "film" in the *Commonwealth Act*.

13. The matters the subject of the charge herein were (on the prosecution case) not "classified" at the time of the alleged possession, and accordingly the Crown seeks to rely upon the extended definition in *section 125A*, as underlined above.

14. "Classified" is defined in *section 125A(1) of the Criminal Code* to mean "classified under the Commonwealth Act". "Commonwealth Act" is defined to mean the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth.

15. Pursuant to *section 7(1) of the Commonwealth Act* the classification "RC" refers to "refused classification".

16. If the prosecution are able to prove (beyond all reasonable doubt) each of the elements referred to above then the defendant can still avoid a finding of guilt if he can prove the defence that is available to him under section *125B(5) of the Criminal Code* on the balance of probabilities. At the relevant time this section stated:

> "(5) It is a defence to a prosecution for an offence against this section to prove that –
>
> (a) the defendant did not know, or could not reasonably be expected to have known, that the film, publication or computer game concerned is classified RC or would be classified RC; or

(b) the person depicted in the material had attained the age of 16 years at the time when the film, computer game or publication was made, taken, produced or published."

17. However, it is important to bear in mind that the defendant will only be called upon to prove this defence if the Court is otherwise satisfied that the charge has been made out beyond all reasonable doubt. Until then no legal or evidentiary burden passes to the defendant at all.

18. When *subsection (5)(a)* is looked at more closely it is clear that the defendant has a defence to the charge if he can prove on the balance of probabilities that he, either:

1) did not know that the film, publication or computer game concerned is classified RC; or

2) could not reasonably be expected to have known, that the film, publication or computer game concerned is classified RC; or

3) did not know that the film, publication or computer game concerned would be classified RC; or

4) could not reasonably be expected to have known, that the film, publication or computer game concerned would be classified RC.

19. Options 1) and 2) are not relevant as it is clear from the evidence (referred to later in these reasons) that at the time of the alleged possession, the items, the subject of the charge, had not been classified at all, let alone classified RC. However, options 3) and 4) remain live issues.

20. It is further clear from the evidence that the possible defence in *subsection (5) (b)* is not available herein, as the stories the subject of the charge clearly refer to boys under the age of 16.

21. As a preliminary issue (and also at the close of the prosecution case) Mr Smith (counsel for the defendant) submitted that the charge was misconceived. His argument was that as the prosecution alleged (as Mr Geary, from the DPP, confirmed) that the possession concerned some 90 different items which allegedly made up some 66 separate stories, then the

prosecution should have laid a separate charge for each. He then went on to submit that the prosecution should produce a separate "RC" classification for each item. He went on to add that as the time for laying a complaint had now passed, the prosecution should amend the current charge to specify 1 item or story only. I invited Mr Smith to produce any authority to support his argument, but none was forthcoming. Mr Geary submitted that the charge was sufficient as it was. The DPP also did not refer to any authority. I took the matter on notice and allowed the evidence to proceed. At the end of the prosecution case I ruled that the complaint was proper in it's current form.

22. As will become apparent later in these reasons the prosecution case against the defendant is that when the defendant's desktop computer was seized on 20/9/04 there were some 90 items on it in his "stories" folder that involved child pornography as defined in the *Criminal Code*. It is further alleged by the prosecution that these items had been sent from 3 sources and were received onto the defendant's computer at different times. That in the case of each item they had been "opened" and permitted to remain on the defendant's computer prior to the computer being received. The alleged offending items were downloaded onto a CD-Rom and sent off for classification, which came back as "RC".

23. If a person possessed 20 offending images would there need to be 20 separate charges? I think not. Such a consequence could create unfairness to a defendant. The items were all found on the one computer. They were all in the same folder in outlook express. Further the defendant has formally admitted (ExP1) "that 66 stories contained in 04080_stories which is a CD-Rom are child pornography as defined in the NT Criminal Code".

24. The defence in the course of the hearing clearly accepted that the 90 items the subject of the charge would each attract a classification of "RC". Neither the prosecution or defence believed it was necessary for me to read all or any of the 5 volumes of text that were tendered as ExP6. They were tendered by Mr Geary without objection on the basis that "these contain text, the agreed fact that they purport to be child pornography" (T20

of 21/2/06). I note that the admission in ExP1 did not have the word "purport" or any such connotation.

25. I have perused some of the stories by random selection and am satisfied beyond all reasonable doubt that they each would have been classified RC if they had been separately classified. The content was such that, in my view, no ordinary person could think otherwise than that they were child pornography (whether as defined or generally). In my view, no right minded person would invite such material onto their computer. Further, in my view, if such material were received unintentionally then an ordinary person would take immediate and all necessary steps to remove the material, and ensure that such material was not received again.

26. It would have been open to the prosecution to have sought a separate classification for each of the 90 items, but I understand that this may have attracted a considerable cost. If the legislature has chosen a particular method of proof, fiscal concerns are not to the point. It may be prudent for prosecution to seek separate classifications where the circumstances of the case require. On the evidence in this matter, and the defendant's formal admissions, I do not consider that it was necessary in this case.

27. The facts in this matter do not appear to be substantially at issue between the parties, and the real issue appears to be one of the defendant's intention and knowledge.

28. On 21 September 2004 the defendant was the director of the Alcohol and Other Drug Programme for the Northern Territory Department of Health and Community Services.

29. As at 21 September 2004 the defendant resided in Darwin at 3 Murray Street Larrakeyah and in Alice Springs at 49 Giles Street. I was not told and am unable to find whether he resided in one residence more than the other or equally.

30. On the 20th Day of September 2004 Mr Luppino SM granted a search warrant to Detective Senior Constable John Worrall pursuant to section

117(2) of the Police Administration Act authorising him to search 3 Murray Street Larrakeyah to look for:

> "Computer discs, floppy discs, computer hard drives, data storage devices, digital cameras, CD's, DVD's and writings containing information relating to child pornography. Any documents or other images related to sexual activity with children being a thing related to or in connection with an offence against the law in force in the Northern Territory namely an offence of possession of child pornography, as per *section 125B of the Northern Territory Criminal Code*"

31. The search warrant (which became Exhibit P10) was executed by Senior Constable Worrall (with the assistance of Detective Sergeant Nicholson and Detective Senior Constable Grant) at about 1220 am on 21 September 2004. Hence the date of the alleged offending the subject of the charge herein. At the time of the search the defendant was present, and various items were seized including two desktop computers and one laptop computer.

32. One of the desktop computers and the laptop computer were the property of the defendant (ExP9 at pages 7 to 10). Another of the desktop computers belonged to a male who shared the residence with the defendant, and is not the subject of any allegations in this matter.

33. At the conclusion of the search various seized items were conveyed back to the Peter McAuley Centre where items were entered into the computer crime exhibit book.

34. Detective Senior Constable Grant was at that time attached to the Computer Crime Unit. He gave evidence that he removed the hard drive from a desktop and attached it to their forensic computer through a program called "Fast Block", and by this process they "acquired" the hard drive from the desktop computer and placed it onto their own computer. He later performed the same process with the other desktop computer and the laptop computer.

35. Having "acquired" the hard drives from the various computers he then commenced to examine them using a program called "Encase", but I

understand that this did not produce any material relevant to the charge herein.

36. Detective Senior Constable Grant then used "data lifter" which apparently is a program that extracts emails and puts them into a readable form, and having done this he then exported all the email files to another folder. He began to examine them, and located what he suspected was child pornography in written form.

37. Melanie Johnston (who was a police officer, but I was not told her rank, although on ExP9 she referred to herself as a detective senior constable) appears to have been senior to Detective Senior Constable Grant in the Computer Crime Unit at the relevant time. However, when Grant performed the tasks referred to above Johnston was not in Darwin, and accordingly he stated that he was "unsupervised". Upon the return of Johnston to Darwin Grant asked her to "check my work, double check it".

38. In the course of the evidence of Johnston a hard drive was tendered and became ExP8. It was an agreed fact (ExP3):

> "That the hard-drive to be tendered by Melanie Johnston is the hard-drive from Mr Gill's desktop computer. It is also agreed that the transfer of material from the hard-drive to other formats for the identification of evidence contained on Mr Gill's computer is an accurate record of its contents."

39. Detective Senior Constable Grant also spoke to federal agent Taylor and she gave him a spreadsheet with various items highlighted and he placed those items onto a disc and then prepared a letter to the Office of Film and Classification. He said that he sent the material off to the classification office on 17 November. Although no year was referred to in his evidence at this time, it is clear that this occurred in 2004.

40. The defendant voluntarily took part in a taped record of interview with Detective Acting Sergeant Gavin and Detective Senior Constable Johnston on 21 October 2004. The tape of this interview was not played in court or tendered into evidence, but what purported to be a transcript of this interview was admitted into evidence as ExP9 without objection. Mr Smith

was happy for me to have regard to the transcript without having or listening to the tape.

41. As noted previously, it was an agreed fact (ExP1):

> That 66 stories contained in 04080_stories which is a C-D Rom are child pornography as defined in the *NT Criminal Code*.

42. In my view, ExP1 is a mixture of law and fact, and it is only "facts" that are capable of admission under *section 379 of the Criminal Code*. However, it appears clear (from the cross-examination, from the record of interview of the defendant (ExP9), from the evidence of the defendant, from the way the defence conducted the hearing, from the documents that were tendered without objection, and from the final defence submissions) that the defendant conceded that the items downloaded from the defendant's computer onto the CD-Rom (ExP7) were a film, which although unclassified at the time, would if classified be classified RC on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a child under the age of 16 years who is engaged in sexual and/or other activity. It also forms no part of the defence submissions that the CD-Rom was not in fact classified RC before the prosecution herein was commenced.

43. In the course of the prosecution case Mr Geary advised the court on a number of occasions that certain matters were not in issue, without specifying exactly what those matters were. In my view, as I advised Mr Geary, unless the defence made a formal admission of a relevant fact in accordance with *section 379(1) of the Criminal Code*, then it was incumbent upon the prosecution to prove each such fact by admissible evidence. As a consequence ExP1 and ExP3 were placed before the court, and a further oral admission (referred to later in these reasons) was made, on instructions, by Mr Smith.

44. *Section 379 of the Criminal Code* states:

> (1) An accused person may by himself or his counsel admit on the trial any fact alleged against him and such admission is sufficient proof of the fact without other evidence.
>
> (2) The prosecution may admit on the trial any fact alleged by the accused person and such admission is sufficient proof of the fact without other evidence.
>
> (3) In this section "trial" also includes proceedings before justices of the peace dealing summarily with a crime.

45. Accordingly, where the defence makes any admission of fact under this section it is not necessary for the prosecution to adduce evidence on this issue as “such admission is sufficient proof of the fact without other evidence”.

46. The agreed fact (ExP1) requires some closer analysis. An envelope labelled:

> “T04/4752 AFP – AUXIN
>
> (NT POLICE)
>
> 04080_STORIES
>
> rec’d: 19 nov 2004”

And sealed with an adhesive label allegedly from “Australian Government Office of Film and Literature Classification” referring to the same file number and a CD-Rom format, dated 23/11/04, asserting a decision “RC” had been classified by “Board”; and bearing a signature was tendered into evidence and became ExP7. The envelope appears to contain something, but I was not invited to open the envelope or check it’s contents. It was the unchallenged evidence of Officer Johnston (T21) that ExP7 was “the original CD that we sent down and which they’ve classified.” She went on to add that she was aware of the contents of the CD, which was the material that was on the defendant’s computer.

47. Accordingly, ExP7 affords some evidence that the C-D Rom 04080_Stories had been classified “RC” by the relevant Board.

48. Pursuant to *section 125B(6) of the Criminal Code* at the relevant time:

> "In proceedings for an offence against this section, a certificate issued under section 87 of the Commonwealth Act purporting to be signed by the Director of the Classification Board (or by the Deputy Director of the Classification Board) and stating that the film, publication or computer game concerned is classified RC on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is a child who has not attained the age of 16 years or who looks like a child who has not attained that age is admissible in any court of law and is prima facie evidence of the matter stated in the certificate." (emphasis added)

49. *Section 87 of the Commonwealth Act* states:

> (1) A person may apply to the Director for a certificate about action taken, or not taken, under this Act.

50. A certificate purportedly issued pursuant to *section 87 of the Classification (Publications, Films and Computer Games) Act 1995*, and purportedly signed by Ms Banfield, became ExP4 and stated:

> "I, Wendy Banfield, Senior Classifier of the Classification Board appointed under section 48 of the Commonwealth Classification (Publications, Films and Computer Games) Act 1995, ('the Act') CERTIFY pursuant to section 87 of the Act that the action described in the schedule to this certificate has been taken by the Classification Board and that the schedule is an accurate summary of the action taken by the Classification Board in relation to the item described in the schedule.
>
> ——————————————————————————————————
>
> SCHEDULE
>
> TITLE: 04080_STORIES
> VERSION: ORIGINAL
> FORMAT: CD-ROM
> DURATION: VARIABLE
> PRODUCER: NOT SHOWN
> DIRECTOR: NOT SHOWN
> PRODUCTION COMPANY: NOT SHOWN
> COUNTRY OF ORIGIN: NOT SHOWN

ACTION: RC (Refused Classification)
REASON FOR DECISION: The film is classified RC in accordance with the National Classification Code, Films Table, 1. (a) as films that "depict, express or otherwise deal with mailers of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified," and
(b) "depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not)."
CERTIFICATE DATE: 25 NOVEMBER 2004" (emphasis added)

51. Directly under the signature at the bottom of the certificate appears the name "Wendy Banfield" and the title "Senior Classifier". I note that nowhere on the face of the certificate does Ms Banfield assert that she is the Director or Deputy Director of the Classification Board. According to *section 125B(6) of the Criminal Code* it is only a certificate signed by a person holding one of these positions which "is admissible in any court of law and is prima facie evidence of the matter stated in the certificate."

52. Pursuant to *section 46 of the Commonwealth Act*:

> The Board is to consist of:
> (a) a Director; and
> (b) a Deputy Director; and
> (c) Senior Classifiers; and
> (d) other members.

53. Accordingly, senior classifiers may be members of the Board, but Ms Banfield does not assert that she holds either of the two requisite positions to enable *section 125B(6)* to apply. I note that *section 59(1) of the Commonwealth Act* gives the Director of the Board the power to delegate his powers under the *Commonwealth Act*. But even if this could be read to modify the requirement in *section 125B(6),* a matter on which I do not decide, there is no evidence of any delegation to Ms Banfield in any event.

54. However, Mr Smith (counsel for the defendant) made no objection to the tender of ExP4, and no submissions were put to me by either counsel as to the evidentiary value (or any lack thereof) of ExP4.

55. In my view, ExP4 could only be prima facie evidence of the matters contained in it that go to those matters expressly referred to in *section 125B(6)*. Hence, it could only be prima facie evidence of the matters which I have underlined. However, given that ExP4 is not signed by the Director or Deputy Director of the Board, as it is required to be, it is not, in my view, prima facie evidence of any of the matters in *section 125B(6)* at all. If objection had been taken to it's tender, that objection would likely have been successful. However, it was tendered without objection. Accordingly, although ExP4 cannot, in my view, attain the status of prima facie evidence that would have been afforded to it if it had complied with the requirements of *section 125B(6)*, it still remains to be considered as evidence in the case.

56. I note that within ExP4 there is also a "classification certificate for a film" which is dated 25 November 2004 and appears to be also signed by Ms Banfield, but this time "for Des Clark Director". Although this document does not purport to be a certificate under *section 87* (and a separate document within the exhibit expressly does) it might be arguable that it is, but again there is the problem that it is not signed by the "Director or Deputy Director".

57. However, I have come to the conclusion that given the admission in ExP1, the envelope ExP7, and the fact that ExP4 is part of the evidence in the case (albeit not under *section 125B(6)*), this is all academic.

58. Accordingly, I find beyond all reasonable doubt that the 66 stories contained in 04080_stories which is a CD-Rom was a film, which although unclassified at the time, would if classified be classified RC on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a child under the age of 16 years who is engaged in sexual and/or other activity. I further find that 04080_stories was classified RC under the *Commonwealth Act* on or before 25 November 2004. I therefore find that they are child pornography as defined in the *NT Criminal Code*.

59. *Section 125B(4) of the Criminal Code* at the relevant time stated:

> (4) Proceedings for an offence against this section in relation to a film, publication or computer game that is unclassified at the time of the alleged offence, shall not be commenced until the film, publication or computer game concerned has been classified.

60. According to the seal on the envelope (ExP7) the classification decision of "RC" was dated 23/11/04. It is unclear whether this relates to the date the decision was made or the seal was affixed or completed. According to ExP4, the certificate classifying the CD-Rom "RC" was dated 25 November 2004. The complaint herein was laid on 24 December 2004. Hence, whichever date is correct it is clear, and I find, that the CD-Rom was classified "RC" prior to the complaint being laid. Accordingly, *section 125B(4)* has been complied with.

61. Officer Johnston had been attached to the Computer Crime Unit of the Northern Territory Police Force since July 2002. She called herself a specialist analyst and she said she analyses any electronic data whether from computers, telephones or other devices. She completed an intermediate and advance course in "Encase" in Melbourne and she is currently studying for a degree at Charles Darwin University in Information Technology.

62. As noted earlier, when the defendant's hard drive was originally "acquired" Johnston was in Alice Springs. Upon her return from Alice Springs she continued on the work that Detective Senior Constable Grant had commenced.

63. Officer Johnston had the defendant's hard drive (Exhibit P8) in court and she opened it in court through a computer onto a screen. Mr Smith admitted on behalf of the defendant that "the defendant accepts that whatever is on the screen at this moment is his".

64. Officer Johnston said that what was on the screen was an exact image from the defendant's hard drive which they had notified as "hardware 45". She

said that they had given the hard drive the label “04080_01HD020704”. She explained that the “04080” was their computer drive job number; the reference to “01” means it is the first computer they have labelled out of the exhibits that were collected; “HD” refers to hard drive; and “020704” is their forensic label that they attach to their paperwork as well as to the hard drive.

65. Officer Johnston said that on the screen we were currently looking at “Encase version five” which was the main screen for the defendant’s computer. She said that by going to documents and settings you find Outlook Express then clicking on “stories”, she found “numerous text stories which relate to child porn” (at transcript page 9, hereinafter referred to as “T9”, and similar for other transcript page numbers).

66. She stated (T9) that the Outlook Express that was being viewed was an exact copy of the defendant’s hard-drive, but it also “contain deleted data that Mr Gill would not see”.

67. Officer Johnston said she found 99 files of interest (which was later cut down). The final 90 files of interest contained about 66 stories. A table setting out 90 files (which was a document created by Officer Johnston) was tendered and became ExP2. A copy of ExP2 is annexed hereto and forms part of the reasons herein. All of the 90 files were contained in the stories folder of Outlook Express from the defendants desk top computer (T18).

68. On ExP2 were a number of items which started with [assgm-list] Officer Johnston stated that this was a subscription from a particular yahoo user group. In relation to this group the defendant said at page 14 of ExP9:

> “And I also belong to a couple of yahoo story groups. One of which is called ASSGM, which is named after the new group that it - it relates to which, is Alt Sex Stories Gay Moderated.”

69. The defendant gave oral evidence in his defence. He expanded further on this group at T2-3 of his evidence as follows:

The full name of the group is actually assgm-list and, Your Honour, I need to perhaps explain or describe some features of the Internet here. Assgm stands for alt.sex.stories.gay.moderated. Now, Assgm itself is not a Yahoo group. It's what's called a news group. And news groups belong on a different part of the Internet from the world wide web on which the Yahoo group is situated, or from e-mail. It belongs to a section of the Internet called usenet, which is also known as newsgroups. Every Internet service provider world wide provides access to usenet that is these newsgroups. And Ozemail, for instance, which was my Internet service provider, provided access to some of 36,000 different groups which are organised by topic. The topics vary from research scientists discussing particular — their field of expertise, to recreation to matters of sexuality, matters of politics and so on. Some of these newsgroups are dedicated to provision of pornography. And some of those newsgroups, obviously, are dedicated to the provision of pornographic photographs and others of them to the provision of pornographic text. I, by utilising the appropriate program, became aware of the existence of the newsgroup called alt.sex.stories.gay.moderated, which was solely devoted to the provision of adult — of pornographic text stories designed for gay men. And this would have been about, I think probably about six years ago that I discovered this group. About four years ago a notice was posted on that newsgroup saying that if you didn't want to you didn't have to use your newsreader software to read these stories, you could instead join a Yahoo group, which archived all the stories which were — which were part of the newsgroup, and this Yahoo group would simply e-mail them to you. And I thought this was a good idea.

Is that what you did?---And that's what I did, I joined, then, the Yahoo group by submitting my e-mail on the world wide web and was duly informed that I was now a member, and I then proceeded to receive e-mails on a daily basis.

When you joined that group, what was your understanding of what things you'd receive? What did you expect to receive?---Adult gay male pornography, which is what the — the — what's called the home page on Yahoo of the story says that it provides.

Perhaps to just deal with this issue. You are a gay male?---I am a gay male, yes.

70. Across the page on ExP2 for each file item there were various columns for "sent" "received" and "modified".

71. Officer Johnston said that in the "received" column it shows "the time that Mr Gill's computer marks it as having been received" (T10).

72. In relation to "modified" column Officer Johnston said that "is the date that that file on Mr Gill's hard drive has changed. Something has to change within that file for that date to be recorded" (T10). She further stated that

"generally in emails, especially in Outlook Express, Outlook Express will change or flag the email as being read and that's the only data that'll change in that email, causing that date to change." (T11)

73. Officer Johnston stated that "modified" did not refer to when a file may have been deleted, as there has to be some data that changes within that file (in order to record it as "modified").

74. At T11-12 Officer Johnston gave the following evidence:

> So by modified, it means it has to have been opened?---Something has to have happened to it.
>
> Well what else can happen to it other than being opened?---Well that's my theory. That.....
>
> What else can happen to it?---Well like I'm saying, the user may not have necessarily opened it, because Outlook Express, if you click on that file and leave the cursor on there for a moment, it will flag it. It doesn't mean that you've actually opened the file. Outlook Express will change that flag from unread to read.
>
> Well the fact it's been recorded as modified doesn't mean it was ever actually opened?---Not double clicked and opened, but you might – you have to click the cursor on that file, which still allows you to read it within the preview pane.
>
> I'm trying to clarify. In the modified, to be modified does it mean 100 per cent, no question, it has to have been opened on that computer so that it could be read?---Yes.
>
> 100 per cent, no question. No other options available?---No.

75. It was the evidence of Officer Johnston that when new mail comes into the defendant's "stories" folder, this folder (appearing on the left side of the screen) would appear in bold with a bracket after it containing a number showing how many unopened items there were in the folder. She illustrated

this on the screen and I accept this evidence. Further, she stated if somebody went into the folder the unopened items in that folder would appear in bold (as opposed to normal type) and there would be an unopened envelope on the left hand side. She also illustrated this on the screen and I accept this evidence.

76. She stated that the defendant could single click on any item, which would enable the item to be read in the preview pane at the bottom of Outlook Express. The whole file is opened and you can read it all within the preview pane. By single clicking, it would change the item from unread to read, which would mean that the file had been modified. Again she illustrated this on the screen and I accept this evidence. In the alternative, she said that the defendant could double click on each item which would then open the whole file so that it can be seen in a separate window, and you can scroll through the whole file. This would also have the effect of changing the envelope from unopened to opened and removing the bold type and also modifying the document. Again she illustrated this on the screen and I accept this evidence.

77. There were no files in the “stories” folder of the defendant’s computer that were marked as unread (T16).

78. When the defendant’s desk top computer was seized on 21/9/04 the Outlook Express window was configured (although Officer Johnston could not say that the stories folder itself was open at that time – T33) so that it took up about 80% of the whole screen size. In this configuration some 14 lines of the subject file were displayed and visible in the preview pane (T28).

79. In cross-examination of Officer Johnston, Mr Smith had her manipulate the Outlook Express window to a size and configuration that would not enable the codes and the story to be visible in the preview pane. This was not how the defendant had it configured at the time it was seized. When the defendant gave evidence he stated that he sometimes had the outlook express screen small (although not as small as Mr Smith had Officer

Johnston reduce it to). I did not find his evidence on this or his explanation either convincing or plausible. On the contrary I found it contrived.

80. In addition to [assgm-list] there were also items from [choreoacanthocytosis] and [GayNCHumilStories2] as separate sources of mail into the "stories" folder of the defendant's computer. In relation to these two groups the defendant said at T3-4 of his evidence:

> There's two other groups that have been referred to?---Yes. Yes.
>
> Whether you can explain them - -- - - in any short fashion?---Yes, I will do. These are much simpler. These are simply other Yahoo groups, they don't have an associated newsgroup, so its simply the case that members submit e-mails, stories, to those — those Yahoo groups and they are automatically e-mailed out to all the other members. I became aware of these because notices were posted — were e-mailed out from the assgm-list Yahoo group saying, 'If you have an interest in bondage, humiliation or sadomasochism, these are two groups that specialise in those sorts of stories and which you can join'. And those notices on the — those emails from the Yahoo group included a web link to the home page of each of those groups, which, when I clicked on, gave me the ability to — to join in the same way as I had joined the others.
>
> What was your anticipation of the material that would be received on those?—-That I would receive stories relating to bondage, sadomasochism and humiliation and so on.
>
> At the time that you signed up for these groups, did you have any reason to believe you would receive child pornography?---No I didn't.

81. In relation to choreoacanthocytosis the defendant stated, at page 14 of ExP9, as follows:

> GAVIN: I was wondering how you were going to pronounce that. Cause I wasn't game to try. I would have misspelled it. And

what does that group represent?
GILL: It's a - I mean I'm - my interest in it is that is it offers sodomachistic gay stories. But I will add that it also produces child pornographic stories, which I'm in the habit of deleting.
GAVIN: Yep. And would you have kept any of those?
GILL: I don't think so, no. Though I mean I - I would not deliberately have kept any of them. As, as your computer expert analyst realises, I have a - I have some message rules set up in my in my outlook express e-mail account so that stories from stories groups goes straight into an inbox folder called stories. (emphasis added)

82. At T4 of his evidence the defendant was asked to explain his attitude to the child pornographic stories provided by this group:

At some time, as you indicated in your record of interview, you became aware that there were stories involving children?---Yes.

What was your attitude to that?—Complex. I have — I have fairly specialised sexual interests. As I have said, I'm interested in bondage and humiliation and in — and in sadomasochism in a fantasy sense, My interest is in adult males. I have no — I don't know how far to go into this. I find it very difficult, but I — my appreciation is of the adult male physical form and of the — if you like, the mental processes Involved with adult males involved in sadomasochism and those things. I have no interest whatsoever, either physically or imaginatively, in children. And because of my life experience and my work and my convictions, I — I find the idea of children being involved in sexual situations abhorrent. I don't like it. I don't want to know about it. It is not a subject of fantasy that I would indulge In, Yes.

All right. Now you Indicated In your record of interview with police that you became aware that there were stories involving children?---Yes.

What was your understanding at the time about those stories?---I'm sorry I don't quite understand the question.

In terms of whether you could have them in any way?'—-Right. I had — I had no idea that — that fictional stories could be illegal. If I had known that I would have immediately prevented them coming onto my computer by ceasing my membership with the groups. What I believed was that they were things which I personally found distasteful and morally repugnant, and which I would dispose of by deleting.

I'll come back to that in a moment, but did you know anything about the classification of e-mails involving children text-wise?---Sorry, what do you mean by classification?

Classification by the Office of Film Literature?---No, nothing at all. (emphasis added)

83. Within the defendant's computer various message rules had been set up for Outlook Express. These rules were tendered and became Exhibit P5. In ExP5 "New Mail Rule #6" stated:

> "Apply after message arrives
>
> Where the subject line contains "assgm" or "choreoacanthocytosis" or "Gaynchumilstories2"
>
> Move it to the stories folder"

84. Accordingly, the defendant had set up his computer in such a way that if any mail arrived from any of those three sources they were automatically moved into the "stories" folder which was where they were found. Officer Johnston confirmed in her evidence (T15) that "Mr Gill has it set up so as soon as he opens Outlook Express it will log onto the internet and try to download the emails from his mail providers".

85. In addition, Officer Johnston gave the following further evidence at T18:

> Are they the only emails that would be sent into stories?---Yes. By default, yes. But of course the user can move files into that folder as well.
>
> Is it possible to block the emails or---?---Certainly.
>
> How is that done?---You can block the sender. You can add rules, as a user has done here, to state "block anything that's contained in that subject line", by using key words.
>
> Just on those key words, where it's got, say for number 1, you've got – at the end of "transfer on name", you've got "T/T celeb"?---Yes.
>
> Are they actually code words?---Which I could use as key words?

Yes?---Yes.

So you could actually block T/T?---Yes you could.

86. There was nothing in ExP5 to indicate that any attempt to block the receipt of emails involving “boys”, “pedo”, “B” or “b” had been attempted. There was nothing in the defendant’s record of interview, or in his evidence before me that he had taken, or attempted to take, any steps to stop or in any way limit the receipt of stories that might involve boys under the age of 16. I find that he did not. In my view, there is no innocent explanation for this glaring failure. I find that he was “happy” to receive child pornographic stories onto his computer.

87. The defendant had a password “9rosencranz” which he used on both the laptop and the desktop computer (page 11 of ExP9). The defendant supplied this password to police. Officer Johnston stated that you are unable to access the defendant’s computer without using that password (T14).

88. As can be noted from ExP2 after the title of the “story” various letters or words appear in brackets. Some of the words are self explanatory (such as “oral”, “anal” etc) but in relation to the letters the defendant gave the following explanations at pages 29,30, 31, 33 and 34 of ExP9:

> JOHNSTON: Alright and you said in the subject is the title of the story?
> GILL: Yes.
>
> JOHNSTON: And it has letter codes?
> GILL: Well ASSGM has letter codes. Corianthositosis normally doesn’t. So you don’t know what your - what your getting.
>
> JOHNSTON: Alright so how do you know what to keep and what not to keep?
> GILL: Well what I generally do is I read the first few sentences of the story.
>
> JOHNSTON: And is that by opening it up or leaving it like you explained it before that outlook express actually has a preview page.
> GILL: Well that does open it.
>
> JOHNSTON: So you get the whole story comes up?

GILL: I only see the first paragraph or so.

JOHNSTON: In outlook express itself?
GILL: Yes.

JOHNSTON: So it's a preview page?
GILL: Yes that's correct.

JOHNSTON: Alright so - just to so we're on the right page. Outlook express will have the - you've got the program open. It will have the title of that story or the subject, the date its received and then in non bold letters it will have the first couple of lines.
GILL: That's correct, that's correct.

JOHNSTON: Just on some of the letter codes, can you explain them to me what they area?

GILL: Yes. M means man; which means - is generally taken to be adult man over the age of 21 or so. T refers to teen and almost always means somebody over the age of 18 but under the age of 20. B means boy and means somebody under that age. Y, I mean I need to say that whoever the moderators are of the group are not consistent in the use of these codes. Y normally means youth and normally means somebody over the age of 18. F means female and then there are a series of topic codes like SM means sadomachoism, Bond means bondage and Snuff means snuff and but again people are not – are not consistent in their use of these codes.

JOHNSTON: There is one I think you had N/C?
GILL: Non Consensual.

JOHNSTON: T/B?
GILL: Means teen and boy.

JOHNSTON: Humil?
GILL: Humiliation.

JOHNSTON: Celeb?
GILL: Means a celebrity.

JOHNSTON: And is there a list where you can get these - what there explanation is or is it just from?
GILL: There's a - on the actual News group of ASSGM, which is not - no the yahoo group but the actual news group. There is an ASSGM Faq - frequently answered questions - which gets posted sort of every now and then, every few months and that requests people who are posting to use the codes and explains what the codes are. But it's a request only.

GAVIN: Obviously Nick what we've just spoken about with Detective Johnston you get the name of the story plus the letter, letters attached to

what the story contains?
GILL: You, as I say..

GAVIN: If it's ASSGM? Most of the time.
GILL: Most of the time, yes. That's correct.

GAVIN: And obviously if it appears in the printouts that we have then obviously they appeared on this occasion.
GILL: Yep, that's right, yep.

GAVIN: And you said if they have B or C/P or anything you'd ordinarily delete them after you see them.
GILL: That's correct.

GAVIN: Obviously the one's that we've printed out of the 35 so far that we've located, they all contain - well for example Laurence Stevens discoveries it's T/B, B/b, M/B and that all obviously refers to boys.
GILL: Yes.

GAVIN: As with The Village Chapter 15, that's M, there's a couple of B slashes, there's 6 B and it's got CP. So obviously you had to be aware that that contained child pornography?
GILL: Yes, yes I'm - yep.

GAVIN: As you - as you have said, you ordinarily delete them...
GILL: Yes.

GAVIN: … . …..yet these appear on your...
GILL: Yes
(emphasis added)

89. I reject the statement of the defendant in relation to letter codes that "Corianthositosis normally doesn't. So you don't know what your - what your getting." I note from ExP2 that of the 28 items from this source 24 of them do contain letter codes, and in the vast majority of cases (15 of the 24) the letter code made it patently clear what he was getting. And what he was getting was stories involving boys.

90. It is clear that the defendant was only sexually interested in stories involving sexual activity between males. In his evidence it became clear that he would print off stories that interested him and read these when he was in the mood.

91. It is clear, and I find, from ExP2 (as annexed hereto) that a number (exactly half) of the emails (either by their name, or the codes that appeared immediately after the name, or a combination of the two) would have alerted the defendant to the fact they involved "boys". In particular I note the following matters in the "name" column of ExP2 (I have highlighted the detail that is, in my view, particularly relevant):

5	[assgm-list] Airport Jon 1/1 Mmm dad/boy oral anal
6	[assgm-list] Baby Boy/revised and Final (TT Firsttime/oral/romantic)
9	[assgm-list] Cross Country – part 3 (m/m/t,humil,bd,school,sports)
25	[assgm-list] Lil Bros Fanny Get Fried – t/b spank assplay group anal speedos
26	[assgm-list] Lil Bros Gets the Treatment t/b anal enema assplay bondage j/o
27	[assgm-list] Lil Bros Speedo Spanking t/b spank assplay j/o speedos
31	[assgm-list] Pimping Our Jeff 01 by Justin Davis (T/b,mast,oral,anal,incest)
32	[assgm-list] Rodie's Love Chapter 1 (M, b, no sex)
33	[assgm-list] Rodie's Love Chapter 4 (M, b, wet,oral)
34	[assgm-list] Rodie's Love Chapter 5 (M, b, wet dream, oral)
35	[assgm-list] Rodie's Love Chapter 6 (M, b, violence, incest, NC, oral, anal)
36	[assgm-list] Rodie's Love Chapter 7 (M, b, wet)

38	[assgm-list] Secret Agent Game (Part 1, Intro)(bbb/t)_Authoritarian, Young Friends
39	[assgm-list] Secret Agent Game (Part 1, Intro)(bbb/t)_Authoritarian, Young Friends
40	[assgm-list] Secret Agent Game, Part 8 (t/bbb, NC, humil, strip)
41	[assgm-list] Special Secrets: Annual Physicals by Justin Davis (M/t/b,mast,anal,oral)
42	[assgm-list] Special Secrets: Exra Credit by Justin Davis (M/b,mast,oral,anal)
43	[assgm-list] Special Sectets: Addicted by Justin Davis (T/T, T/b, mast,oral,anal)
45	[assgm-list] ST “Labor Day Quickie” M/b, anal,Oral
49	[assgm-list] ST “That 70’s Kid” M/b,Anal,Oral
50	[assgm-list] “The Boys Club” (M/t/b/oral)
54	[assgm-list]St Lil Bro (6) Team
55	[assgm-list] ST Lil Bro (7) Exam Time M/t, m/b, anal, medical, enema, speedos
56	[assgm-list] Story “More of Stephens Discoveries” (3/7)(t/b,b/b,m/b, mast, oral, anal, cons)
57	[assgm-list] Swimming Practice 1 & 2 (M/b, oral, first time)
58	[assgm-list] Swimming Practice 3 & 4 (M/b, oral, first time)
59	[assgm-list] Swimming Practice 5 & 6 (M/b, oral, first time)
60	[assgm-list] Swimming Practice 7 & 8 (M/b, oral, first time)

61	[choreoacanthocytosis] Family Affair Part 1 (b masturbation)
62	[choreoacanthocytosis] LETTERS OF LUCIUS (b/b, m/b) [1/2]
63	[choreoacanthocytosis] LOS TRES AMIGOS Part 2: m/b/b/b Part 2
72	[choreoacanthocytosis] My Son Clay
75	[choreoacanthocytosis] Seducing a Thai Boy Part Four
76	[choreoacanthocytosis] ST Male Bonding 15 (b/m, b/b)
77	[choreoacanthocytosis] ST Male Bonding Weekend – 5 (m/b, incest, NC)
78	[choreoacanthocytosis] ST Male Bonding Weekend – 6 (b/m, t/m, ws, nc)
79	[choreoacanthocytosis] ST Male Bonding Weekend – 7 (b/m, m/m, nc)
81	[choreoacanthocytosis] ST Male Bonding Weekend – 16 (b/m, b/b)
82	[choreoacanthocytosis] Story London 1892: (b/b, m/b_historical) 2/2
83	[choreoacanthocytosis] Thanksgiving (incest, pedo)
84	[choreoacanthocytosis] The Four Dancers (M/t/b/t/b Historical)
85	[choreoacanthocytosis] The Village Chapter 15 Mbbb/bbbbbb cp humil anal oral
86	[choreoacanthocytosis] Tribute Boys II MMMMbb/bbbbbbb sm, cp, anal, oral, tort, humil, snuff etc
87	[choreoacanthocytosis] Tribute Boys III MMMMbb/bbbbbbb sm, cp, anal, oral, tort, snuff etc
88	[choreoacanthocytosis] Tribute Boys Part 1 MMMMbb/bbbbbbb sm, cp, anal, oral, tort, snuff, etc

92. Accordingly, I find that of the 90 items in ExP2, 45 of them (exactly 50%) clearly (from the title and/or codes thereafter) contained stories about children. I find that it would have taken no more than a cursory look to have identified these 45 items as involving stories about male children.

93. At T24-25 of the defendant's cross-examination he gave the following evidence:

> MR GEARY: All right. You've said that you're in the habit of deleting--?---Yes.
>
> Sorry, of marking them read but not going back to them, is that how I understand your evidence'?---If I have — yeah, I don't — well, generally I don't go back to stories.
>
> Well you don't go back to stories perhaps that you've read and they're boring?---I don't go back to stories period.
>
> You mean if you're busy during a half hour period--?---Yes.
>
> - - - something comes in, you mark it as read, you won't go back to it?—-No.
>
> Mr Gill, I put it to you that that is not a true evidence in this court, that you look at each and every one of these particular e-mails. I'm putting it to you, you have to answer the question?---Sorry. That's not true. It's not the case.
>
> Now, as you've said, you're a very thorough person?---I am a thorough person.
>
> And as I think you'd admit, some of the ones it was suggested you wouldn't go back to might contain stories you'd be interested in?---They might indeed.
>
> Why didn't you block those particular sites?---I didn't — I think I've already explained this. These were the only sites that I was aware of from which I could easily get the sort of material in which I was interested in.
>
> Could I suggest to you there are probably hundreds of these particular sites on the internet?---There possibly are.
>
> Possibly are. You could have — knowing that they were sending you child pornographic material, do you agree that you could have looked for other avenues to get this information?---I could have.
>
> Could have. Didn't have?---I could have but I didn't.
>
> Because you knew they were sending you child pornographic material and you accepted them, didn't you?—-I — I accepted them in the sense that I allowed them to continue to come to my computer, yes, sir.

But you're in the habit of deleting?---Yes,

You'd agree that you could see — I think your evidence was that on some occasions you couldn't see the full title of a particular e-mail?---Yes.

But on other occasions you could?---That's correct.

You're aware that at least 40 odd of these particular 90 e-mails have 'b' in it?---I am now, yes.

Which suggests 'boy' do they?---Yes.

And you actually said to the police in the record of interview, on page 15, I've already read this out, your Honour, but (inaudible). 'If they've got "b' in them, which stands for "boy", I generally delete them'?---That's correct.

Well there's 40 odd here you haven't deleted?---Yes. That's true.

Why haven't you deleted them?—-Either because I didn't see the 'boy', the 'b', for one reason or another, or because I hit the down arrow instead of the delete key. Unlikely, though, isn't it? Because you don't have a memory of it, You think you might have?---Sorry? I don't have a memory of what?

Of doing that particular mistake, that deletion?---No, I don't — I don't have a memory of my mistakes, no.

So you're saying that there are matters that are child pornography that you would have deleted?—Yes.

And not on this list?---Yes.

That's all part of the 1600?---Yes.

So we have the 90 here'?---Yes.

Then we've got more?---Yes, Absolutely.

Would it be the majority of the e-mails that came - -

- - - from those particular sites?---No.

But a substantive amount?---Yes.
(emphasis added)

94. I find that the admissions (as highlighted and/or underlined in the previous paragraph) are, by themselves, sufficient for me to find the defendant guilty of the offence herein.

95. In *R v Grant* [1975] 2 NZLR 165 @ 169, Malcolm J ruled: "But to be in possession or to have an article in possession is neither an act or omission. It represents not an act but the passive consequences of a prior act, namely, the act of acquisition of possession." Further, a person remains in possession even though their memory of the presence of the item has faded or disappeared altogether (*R v Martindale* [1986] 1 WLR 1042).

96. If these admissions were not sufficient, I find that the prosecution case (including the defendant's admissions in ExP9, ExP1 and ExP3) taken as a whole satisfies me beyond all reasonable doubt that the defendant is guilty of the charge herein (on the basis that he intended to possess), unless the defendant can bring himself within section *125B(5) of the Criminal Code*. I will now turn to consider this aspect. In doing so, it is to be noted that the matters hereafter are not only relevant to the defendant's defence. They are evidence in the case generally, and accordingly they are also matters that I have taken into consideration in respect to *section 31 of the Criminal Code* (in deciding whether I could be satisfied beyond all reasonable doubt of the defendant's guilt).

97. In relation to his knowledge of the contents of the various offending emails that were located on his computer the defendant offered the following explanations:

> At pages 14 and 15 of ExP9:
>
> > GILL: It's a - I mean I'm - my interest in it is that is it offers sodomachistic gay stories. But I will add that it also produces child pornographic stories, which I'm in the habit of deleting.
> >
> > GAVIN: Yep. And would you have kept any of those?
> >
> > GILL: I don't think so, no. Though I mean I — I would not deliberately have kept any of them. As, as your computer expert analyst realises, I have a — I have some message rules set up in my in my outlook express e-mail account so that stories from stories groups goes straight into an inbox folder called stories.

GAVIN: Yep.
GILL; What I do with those is I — I just — when new stories arrive I. double click on them. If they - if they've got B in them which stands for boy I generally delete them. I certainly don't read them. It is possible however that I've failed to delete some.

GAVIN: Yep.
GILL; And I recognise that. I would like to add though that until, until a couple of weeks ago when I read the Northern Territory Act I had no idea that text files were in anyway illegal: Because I mean I read American - I mean those are American groups and they all have disclaimers on it saying and this - and this is not illegal I'm told. But as I say I have - I have no interest in child pornography and.

And at page 18 of ExP9:

GAVIN: Do you know how you would have obtained this story?
GILL: Yes it would have come either from the Corianthositosis Yahoo group or the ASSGM Yahoo group. And it would
have - yeah because I subscribe to those groups they are automatically mailed to me.

GAVIN; Okay and you've said before that if you - generally you said that if you recognised that they may contain children you'd delete them.
GILL: That's correct

GAVIN: The reason that this story is still on your computer?
GILL: Obviously I didn't notice it and - I mean I get, I get 60 to 80 e-mails a day. I am not thorough about, about deleting those. I .am and obviously most of those e-mails are actually work related and I deal with those and the other ones I will click on and drop. I mean that you will find that story has never been accessed since it was, since it was downloaded.

GAVIN: I mean I can't tell you that but it will have been accessed.
GILL: Well they've all - they've all been accessed once and to see what they were but then, you should be able to retrieve access dates...

GAVIN: Yep.
GILL: .... and information. Yes.

JOHNSTON; Yes. They've all been accessed at least once is that what your saying?
GILL: Yes.

And at pages 20 and 21 of ExP9:

GAVIN: Sure. And the next one is dated 13th of August 2004. And it's from that group that I'm not even going to try to pronounce.
GILL: Corianthositosis. Yep.

GAVIN: That's it. The Village Chapter 15 and it has in here CP and that is - that is a story about a 10-year-old boy who has sexual activity with adults and children. So obviously I can continue on through the list but I don't think it's probably necessary except to say that each of these 35 stories that I've printed today from your computer after an initial analysis all contain explicit stories engaging — children engaging in sexual activity with adults. Some of them are very extreme.
GILL: Yes.

GAVIN: And some of them actually refer to snuff with children.
GILL: Yes.

GAVIN; Have you made any attempts to block these sorts of stories coming?
GILL: No I haven't made any attempt to block them. Though as I've - I mean, as I say I've got my practice is to delete them and I think that if you were to, to analyse the, the actual website of those 2 groups you will see that there is probably an enormous number of, of child sex stories, which - which are not on my computer because — because did delete them. I have no idea how many stories in all are on my computer. I imagine several hundreds and so some have escaped my notice.

And at page 22 of ExP9:

GAVIN: When you have a look at the stories, how – how do you look at them?
GILL: Well I just – they – what happens is that you get the story title appears in as the name of the……

GAVIN: The subject

GILL; . . .e-mail, the subject of the e-mail. Simultaneously it - when you - outlook express goes to the next one that it's received and it opens it. And so I see on the bottom of the outlook express window the usually the title and the first few sentences of the, of the story: And that of course is sufficient to mark the story as having been accessed by my computer and if I find the subject matter distasteful which in the case of child pornography I certainly do, my normal practice is to hit the delete button at the top of the thing: Or as I say If I'm in a hurry I may not - I may simply go onto the next one. And obviously that's what happened.

And at page 26 of ExP9:

JOHNSTON: Okay and how often would you download stories or obtain stories from that group?
GILL; They tend to come sort of every day. One or two and some days there will be a lot of them.

JOHNSTON: So how often do you go into that folder in outlook express to see what's been downloaded.
GILL: Everyday, everyday yes; I mean everyday - when I - when I connect to my e-mail everything downloads. I look at everything.

JOHNSTON: So how much time would you spend looking at them?
GILL: At the stories in particular about 5 minutes.

And at page 30 of ExP9:

JOHNSTON: Alright and you said in the subject is the title of the story?
GILL: Yes.

JOHNSTON: And it has letter codes?
GILL: Well ASSGM has letter codes. Corianthositosis normally doesn't. So you don't know what your - what your getting.

JOHNSTON: Alright so how do you know what to keep and what not to keep?
GILL: Well what I generally do is I read the first few sentences of the story.

JOHNSTON: And is that by opening it up or leaving it like you explained it before that outlook express actually has a preview page.
GILL; Well that does open it.

JOHNSTON: So you get the whole story comes up?
GILL: I only see the first paragraph or so.

JOHNSTON: In outlook express itself?
GILL: Yes.

JOHNSTON: So it's a preview page?
GILL: Yes that's correct.

And at pages 33 and 34 of ExP9:

GAVIN: Obviously Nick what we've just spoken about with

Detective Johnston you get the name of the story plus the letter, letters attached to what the story contains?
GILL: You, as I say..

GAVIN: If it's ASSGM? Most of the time.
GILL: Most of the time, yes. That's correct.

GAVIN: And obviously if it appears in the printouts that we have then obviously they appeared on this occasion.
GILL: Yep, that's right, yep.

GAVIN: And you said if they have B or C/P or anything you'd ordinarily delete them after you see them.
GILL: That's correct.

GAVIN; Obviously the one's that we've printed out of the 35 so far that we've located, they all contain - well for example Laurence Stevens discoveries it's T/B, B/b, M/B and that all obviously refers to boys.
GILL: Yes.

GAVIN: As with The Village Chapter 15, that's M, there's a couple of B slashes, there's 6 B and it's got CP. So obviously you had to be aware that that contained child pornography?
GILL; Yes, yes I'm - yep.

GAVIN; As you - as you have said, you ordinarily delete them...
GILL: Yes.

GAVIN: . . ..yet these appear on your...
GILL: Yes

GAVIN; . . .stories outlook.
GILL: Simply because I - because I --as I said to the best of my—there may have been a lot of stories that day. I was lazy about deleting them and as I - as I've said if your able to look back at history you will see that I would say that they have never been opened since they were downloaded. They've simply sat there on my computer and...

GAVIN: And if they have been looked at? Then your obviously aware of what the content is?
GILL: Yes

And at page 38 of ExP9:

JOHNSTON: You were saying sorry back on the user groups, the yahoo groups, you said you're no longer a member?
GILL: That's correct yes.

JOHNSTON: Since when?
GILL: Well since about 2 weeks ago as soon as I read the Act and realised that text files were illegal.

JOHNSTON: So prior to that you were under the belief that they were okay?
GILL: Yes. Because that's - I mean as I said my information is basically from America and there are warnings and disclaimers on, for instance on the - the nifty or website which is an archive of gay stories and you know they are at pains to point out what they — what they make of the situation are and as I said I have no — I have no interest in sex with children. Either images of it or portrayals of it in any other way. And I find the concept of actually, of it actually happening abhorrent. So I mean anything that is on my computer is simply there accidentally and not - not as a result of interest or desire on my part.
(emphasis added)

98. It is apparent from ExP9 that the defendant asserts that he was not aware that he was committing any offence by possessing "stories" relating to children on his computer. He alleges that he did not know that this was child pornography. He maintained this during his evidence. However, *section 30 of the Criminal Code* states:

> "30. Ignorance of law: Bona fide claim of right, &c.
>
> (1) Subject to subsections (2) and (3), ignorance of the law does not afford an excuse unless knowledge of the law by the offender is expressly declared to be an element of the offence.
>
> (2) A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, property in the exercise of an honest claim of right and without intention to defraud.
>
> (3) A person is excused from criminal responsibility for an act, omission or event done, made or caused in contravention of a statutory instrument if, at the time of doing, making or causing it, the statutory instrument was not known to him and had not been published or otherwise reasonably made available or known to the public or those persons likely to be affected by it.
>
> (4) For the purposes of subsection (3), "published" means published in the Gazette or notified in the Gazette as having been made."

99. Knowledge of the Law is not expressed to be an element of the offence created by *section 125B(1). Sections 125A and 125B* were inserted into the *Criminal Code* by *Act number 13 of 1996* which commenced on 10 April 1996. *Section 30(3)* only relates to a "statutory instrument", which is defined in *section 1 of the Criminal Code* to mean "subordinate legislation

made pursuant to an Act". Accordingly, I find that ignorance of law is not open to the defendant in respect to this charge.

100. There is a difference between ignorance of law and ignorance of fact (*Iannella v French* (1968) 119 CLR 84 @ 112). Hence *section 32 of the Criminal Code*.

101. In *Power v Huffa* (1976) 14 SASR 337 @ 346 Bray CJ said:

> "In my view, any belief which involves a mistaken belief about a general proposition of law, as opposed to a mistaken belief about the legal rights or obligations or status of a particular individual in a particular situation, which may be, but is not necessarily, a mistake of fact (*Cooper v Phibbs* (1867) LR 2 HL 149), cannot be anything but a mistake of law."

102. The offending material in this case would fall within the definition of "property" in *section 1 of the Criminal Code*. Accordingly, the prosecution must negative that the defendant had an honest claim of right to the items, as referred to in *section 30(2).* The leading case in the Northern Territory on this topic is the decision of Martin CJ in *DPP reference No 1 of 1999* (1999) 8 NTLR 148. In that case His Honour held that the accused could only succeed under section 30(2) if he honestly believed that the rights he asserted were recognised by the general law in force in the Northern Territory sufficient to displace the operation of criminal responsibility arising from the commission of the offences, even if this was not the correct legal position.

103. What is the defendant asserting in this case? He understands and accepts that it is a criminal offence to possess any visual images portraying child pornography. However he appears to assert that it was his belief that it was not unlawful to possess stories involving child pornography……and then, just in case that's not accepted, he didn't know he still had any anyway.

104. The defendant stated (T4) that when he was at university in England he read English, and one of the set texts was the Marquis de Sade 120 days of Sodom. He went on to gratuitously give some hearsay evidence (which I have ignored) that he was told by some unidentified member of the NTLAC that "there actually is a copy in the Parliamentary library". I do not find that this or is not the case. I make no finding on it.

105. I am satisfied beyond all reasonable doubt that the defendant did not believe (at the relevant time) that the general law in force in the Northern Territory allowed persons to possess stories involving child pornography. In my view, it would be obvious to any ordinary person that in Australia as a whole anything dealing with sexualisation of children is both morally and legally taboo.

106. Child pornography in any form is clearly contrary to the general law of the Northern Territory (and rightly so). To suggest, as the defendant does, that he thought it would not be an offence to have some child pornography

(albeit that he claims to be offended by it, which I do not believe) is something that I am unable to accept. The revulsion towards, and criminality of such, material is, in my view, obvious.

107. In any event, the defendant's assertions in this regard are, in my view, inconsistent with what he said in evidence in chief at T11, where he said:

> MR SMITH; Are you able to say — when you talk about wrong decisions, what was the wrong decision?---Not to delete or not to be thorough in checking out the contents of an e-mail. I think that was — that was the real nature of the — of the wrong decision.
>
> Did you ever intend to keep stories that contained details about children under the age of 16 - - -?---No I didn't.
>
> - - - engaged in--?---No.
>
> - - - those sorts of acts?---No.
>
> Did you believe that you had stories of that kind in your e-mail box on 21 September?
> ---I didn't believe it at that time, no. After my computer had been taken, I tried to think, what — did I delete everything? And — and then when I was hauled in — and I was unable to make any decision as to whether I had deleted all of them. And when I went to the record of interview on 21 October and the police said, 'We have found these things', obviously I— I recognised that I had not deleted some of them. (emphasis added)

108. Why would he be concerned about whether he had deleted "everything" if he truly believed that having them was no offence? Perhaps he only thought this after he checked the *Criminal Code*, but he did not say this. He did not say "after my computer was seized and I checked the Criminal Code I tried to think, did I delete everything".

109. It is clear, and I find that the defendant was fully aware prior to 21 September 2004 that he was receiving stories of a sexual nature involving boys onto his computer from 3 sites, namely [assgm-list], [choreoacanthocytosis] and [GayNCHumilStories2]. He had been receiving them for about six years. The defendant took no steps to block or prevent such stories being received by himself. In relation to the 90 matters the subject of this charge the defendant made no attempt to delete (I reject his explanation that he may have pushed the "next" button rather than the "delete" button in error) them from his computer. On the contrary, I find that he allowed them to remain on his computer when he could have deleted them at any time if he truly didn't have any interest in them.

110. At T28-29 of the defendant's cross-examination he stated:

> MR GEARY: You called it reckless and careless. You're not a reckless and careless person, Mr Gill?---I clearly am. I'm — I'm reckless and careless when I

know that there are or I believe that there are no possible adverse consequences. I'm — I'm calling it reckless and careless now in retrospect. I wouldn't have described it as reckless and careless before.

When you say you're deleting, you're not deleting because it's child pornography, your evidence is you've been deleting because it's morally offensive'?---Yes.

You talked about that you weren't really aware of the Office of — I'm not sure of its full name, the Office of Classifications. But you're aware that with regard to sexual material generally in society there's censorship?---Yes I am.

You said you went to adult book shops, that there's censorship there?---Yes.

I think they can be marked Category 1 to 3?---Yes.

There's written material that's censored?---That's correct,

Can't be sold to people under 18?---Yes.

So you're aware that it's not just about films, is it, it's about the written material as well?—-I am aware of that, yes.

It doesn't stand to reason that text material that's sent to you also comes under the jurisdiction?---I — I didn't think it did. I understood that this was about material offered for sale, you know, published material and what I understood to be published material is a book.

111. In my view, the defendant was clearly aware at all relevant times that written material (without pictures) was still subject to censorship. He then tries to limit this to "published material and what I understood to be published material is a book". He did not explain his basis for this belief. Clearly, in my view, it is well understood in this day and age that there are many more ways to view words or images other than in a "book". In recent years there have been many well publicised cases of people being found guilty of criminal offences because of material on their computers. Inciting terrorist activities does not escape being a crime if you only do it by e-mails on the internet.

112. He also appears to be trying to further limit his belief to "material offered for sale". I do not accept this as genuine. There have been many well publicised cases of people being convicted of possessing child pornography on there computers without it having been purchased. If possession of anything is illegal (whether drugs, prohibited weapons, pictures, written word) it is the possession that activates the crime, not whether it was bought. In some cases the legislature does make it a specific offence to sell an item, but that is not the case herein. How the defendant came by the material is irrelevant to the charge. I do not accept that the defendant truly held this belief. He is a clever and articulate man.

113. When his computer was first seized he consciously worried about whether he had deleted everything. In my view, he would not have thought this at all if he truly thought that possessing stories was alright. He might have felt somewhat embarrassed, but otherwise he would have been unconcerned. However, I find he was concerned, and with good reason.

114. I find that the defendant knew that he had stories involving child pornography on his computer. He then tried to think of an innocent explanation, which explanations I reject. If there had been only one or two items left on his computer, then the probability of an oversight or mistake occurring might be increased, although it may also indicate that a guilty person had removed other evidence against them. If he only received one or two child pornographic stories amongst hundreds (but this is not the case) then he might not take steps to stop them.

115. At T29-31 of the defendant's cross-examination he attempted to downplay the possibility that he spent any time looking at the stories. The following evidence was given:

> How long would you spend looking at it when it came through, a particular e-mail?---When I was - when I was comparing an e-mail with a text? That might be two hours, three hours. Whatever.
>
> So probably (inaudible) question. When they came through on the particular e-mails that you say you marked as read, how long would you look at them before you did that?-—At the e-mail — at the- . -
>
> At the e-mail?-—At the pornographic e-mails?
>
> Yes?---Two seconds, Long enough for me to — to highlight them, click them and click-clack two.
>
> I'd just like to take you to page 26 of the record of interview, it's about point 4 your Honour. Ms Johnstone asks you, 'So how much time would you spend looking at them?'?---Yes.
>
> And you reply, 'At the stories in particular, about five minute'?---Yeah,
>
> On average it was about five minutes, wasn't it?---That's when I was looking for pornography, yes. Because that's how long it would take me to look through three or four e-mails that had come in that day and print — I mean, the length of time is due to actually waiting for the printer to print.
>
> But about 1600 in a year?—Yes.
>
> Four or five a day, You'd spend at least five minutes before marking them unread — marking them read, sorry?—-No. Not every time.
>
> Well that's what you said to the police. The average was about five minutes,

wasn't it?—The average. When — and I was thinking of when I was looking for pornography, sir.

So when you're actually in the mood for pornography?---That's right.

- - - that was about five minutes?---That's right.

Well I put to you that when you were answering that in the record of interview you were saying, 'When the e-mails actually came in I looked at them for about five minutes', that you then made a decision to delete or keep. I'm putting to you that that's what you were saying in the record of interview?---That's not what I was saying in the record of interview. I was — I was talking about — I was trying to put myself in the — in the remembered position of looking at pornography.

So it's just another thing in the record of interview where you sort of have to feel you have to explain yourself today, because you just didn't get your message across in the record of interview?---I clearly didn't get my message across from the record of interview, yes.

Because you're talking there, the conversation leading up to that particular passage is just about the general e-mails?---Yes.

It's not about when you're in the mood for looking at pornography?---The context was about - about child pornography e-mails.

I'll read you the context. 'Okay, how often—' start of the page?—-Yes.

'Okay, how often would you download stories or obtain stories from that group?' 'They tend to come sort of every day, one or two or some days there'll be a lot of them.' 'So how often do you go into that folder looking to see what's been downloaded? 'Every day.' 'Every day?' 'Yes. I mean, when I — when I connect to my e-mail everything downloads. I look at everything.' 'So how much time would you spend looking at them?' 'At stories in particular, about five minutes'?—Yes.

Well the context there is that you're really just looking to see what you've got, isn't it?---I'm talking about when I get up in the morning I go to my computer and either turn it on and connect or It's been on all night and connected, I look at — I click on Outlook Express, pile of stuff downloads. I'm not involved in doing anything else at that stage, and I will deal with my work e-mails and then I'll spend five minutes on the porn e-mails or whatever.

But at the stories in particular, about five minutes?---That's right.

For the four or five, on average, that come a day?---Yes, except as I say, it's not four
or five a day, it's - - -

116. I did not find this evidence convincing or even persuasive. On the contrary I find it is contrived. The defendant was well aware that he was regularly receiving stories involving child pornography onto his computer, yet he did nothing to stop it or limit it. His attempted explanations were, in my view, untrue.

117. I find that generally the defendant did spend about 5 minutes per day looking at the various stories that came into his stories folder. I find that he knew he had stories of a sexual nature involving boys under the age of 16, but chose not to delete them. At T33 of his cross-examination he eventually conceded:

> MR GEARY: Mr Gill, even when your vision of the stories that you'd seen were in the smallest box, you'd often see at least the first few lines, wouldn't you?—-Yes.
>
> And that would often contain the ages of those contained in the story?---It may, yes.
>
> That was quite normal, wasn't it, that they would contain the ages, even in the first few lines?—They may contain the mention of an age, but it doesn't necessarily follow that the - the people named as being that age are later involved in sexual activity.
>
> All right. Usually it means that the characters in that story who were mentioned in the first couple of lines are going to be significant players in the story that's further to be scrolled down, would that be right?---Yes, but it may say something like, 'When I was a schoolboy of 14 I felt such-and-such' and then go on to describe sexual activity that happened later in that person's life.
>
> But usually its more, 'Bobby is 14'?-—Usually I would say so, yes,
>
> It's more overt than that, isn't it?—Yes.

118. The defendant was well and truly aware that he was receiving both stories involving adults and stories involving boys under the age of 16 into his stories folder. I find that he was aware of this for some years (about 6 years) before his computers were seized by police. Yet he did nothing to stop or limit the receipt of stories about boys.

119. In my view there were a number of things that he could have done. As noted previously, he could have cancelled his membership of each of these groups, but chose not to. He could have looked for other groups that did not have any stories about boys and joined them, and cancelled these 3 groups. He could have tried to put further message rules into outlook express (ExP5) to screen out any stories with "b" in the title or subject. He could have tried to contact the source of each of the 3 groups to request that he not receive any stories about boys. If all else failed he could have (and should have) ceased his association with any user group that continued to send him any material involving inappropriate conduct with children. If all else failed and he was still receiving such stories he could

have changed his email address. I find that an ordinary person (being a person who may have been interested in lawful sexual stories) would have done some or all of these steps if they truly wanted to stop sexual stories about boys coming to them.

120. The defendant gave no evidence to suggest that he did anything to reduce or stop stories about sexual matters involving boys being sent to him. I conclude that he was happy to receive them. If he truly "found the subject matter distasteful" he would have taken steps to stop it. He didn't. I am unable to accept that he did find the subject matter distasteful. I conclude that he did nothing about trying to stop the offending stories being received by him because he wanted to receive them.

121. I conclude that the defendant did not delete the offending stories because he wanted to keep them. In my view, there would be no point in keeping them if he did not intend to read them (as he suggests). I conclude that he did intend to read them and wanted to read them, and had read them (at least in part).

122. If a person received unwanted material on their computer that they truly found "distasteful" then they would not be "lazy" about deleting it. On the contrary I find that an ordinary person would be diligent about deleting it. I am unable to accept the defendant's evidence or explanations as truthful. In my view they are not logical and make no good sense.

123. I have considered the defendant's denials (both in ExP9 and in his oral evidence) that he has any sexual interest in children, but I am unable to accept these denials as genuine.

124. The defendant has put forward as part of his explanation for having these items on his computer that they would come in at times when he was working on other things. He said that he would open them in a reduced size window (not being able to see the whole title or the codes) and then just close them (which would change them from unread to read). The defendant did not explain why (or suggest that) this was necessary. I have come to the conclusion that this was a story concocted by the defendant to create the impression (which impression I find to be false) that he never read any of these offending matters. It appears from an analysis of ExP2 that the 90 various items were received and last modified as follows:

Number	Received	modified
1	29/06/04 4:32 PM	29/06/04 5:10 PM
2	28/04/04 7:02 PM	29/04/04 6:30AM
3	23/04/04 10:29 AM	23/04/04 12:36 PM
4	27/08/04 6:02 AM	27/08/04 6:09 AM

5	18/08/04 5:53 PM	18/08/04 10:31 PM
6	03/06/04 5:34 AM	03/06/04 6:28 AM
7	30/05/04 8:29 AM	30/05/04 11:48 AM
8	07/08/04 5:25 AM	07/08/04 6:16 AM
9	03/05/04 7:37 AM	03/05/04 9:19 AM
10	29/01/04 9:31AM	28/03/04 2:14 PM
11	31/01/04 8:38 AM	28/03/04 2:14 PM
12	04/02/04 2:12 PM	28/03/04 2:14 PM
13	12/02/04 8:07 PM	28/03/04 2:14 PM
14	13/02/04 8:12 AM	28/03/04 2:14 PM
15	22/02/04 1:50 PM	28/0/04 2:14 PM
16	26/02/04 7:46 AM	28/03/04 2:14 PM
17	29/02/04 8:40 AM	28/03/04 2:14 PM
18	05/03/04 5:49 PM	28/03/04 2:14 PM
19	06/03/04 10:47 PM	28/03/04 2:14 PM
20	11/03/04 10:38 AM	28/03/04 2:14 PM
21	16/03/04 8:01 AM	28/03/04 2:14 PM
22	10/12/03 7:50 AM	28/03/04 2:14 PM
23	20/06/04 9:01 PM	21/06/04 5:25 AM
24	21/03/04 4:40 AM	28/03/04 2:14 PM
25	06/02/04 8:45 PM	28/03/04 2:14 PM
26	12/02/04 4:49 AM	28/03/04 2:14 PM
27	05/02/04 11:31 AM	28/03/04 2:14 PM
28	05/01/04 10:31 AM	28/03/04 2:14 PM

29	11/01/04 12:43 PM	28/03/04 2:14 PM
30	28/05/04 4:57 AM	28/05/04 5:48 AM
31	17/04/04 5:14 AM	17/04/04 5:25 AM
32	08/04/04 4:42 AM	08/04/04 5:21 AM
33	29/04/04 5:20 AM	29/04/04 6:30 AM
34	29/04/04 5:25 AM	29/04/04 6:30 AM
35	29/04/04 5:23 AM	29/04/04 6:30 AM
36	29/04/04 5:20 AM	29/04/04 6:30 AM
37	09/06/04 10:33 AM	09/06/04 12:40 PM
38	07/12/03 4:07 PM	28/03/04 2:14 PM
39	07/12/03 4:07 PM	28/03/04 2:14 PM
40	28/03/04 8:16 PM	28/03/04 2:14 PM
41	24/04/04 6:15 AM	24/04/04 6:32 AM
42	21/03/04 8:16 PM	28/03/04 2:14 PM
43	24/03/04 7:57 PM	28/03/04 2:14 PM
44	28/04/04 10:33 AM	28/04/04 12:20 PM
45	10/09/04 4:57 AM	10/09/04 5:08 AM
46	06/01/04 12:20 PM	28/03/04 2:14 PM
47	08/01/04 4:38 AM	28/03/04 2:14 PM
48	02/02/04 4:51 AM	28/03/04 2:14 PM
49	31/05/04 7:08 PM	31/05/04 9:22 PM
50	25/01/04 12:21 AM	28/03/04 2:14 PM
51	05/01/04 10:30 AM	28/03/04 2:14 PM

52	28/03/04 9:58 AM	28/03/04 2:14 PM
53	22/03/04 7:18 PM	28/03/04 2:14 PM
54	26/02/04 7:53 AM	28/03/04 2:14 PM
55	29/02/04 8:39 AM	28/03/04 2:14 PM
56	01/09/04 7:15 PM	02/09/04 6:38 AM
57	13/12/03 10:23AM	28/03/04 2:14 PM
58	13/12/03 10:24 AM	28/03/04 2:14 PM
59	13/12/03 10:11 AM	28/03/04 2:14 PM
60	13/12/03 10:34 AM	28/03/04 2:14 PM
61	10/08/04 5:02 PM	10/08/04 5:36 PM
62	03/09/04 4:16 AM	03/09/04 2:46 AM
63	03/09/04 2:53 AM	03/09/04 6:48 AM
64	05/03/04 2:41 AM	28/03/04 2:14 PM
65	05/03/04 2:41 AM	28/03/04 2:14 PM
66	05/03/04 2:41 AM	28/03/04 2:14 PM
67	05/03/04 2:41 AM	28/03/04 2:14 PM
68	05/03/04 2:40 AM	28/03/04 2:14 PM
69	05/03/04 2:40 AM	28/03/04 2:14 PM
70	05/03/04 2:40 AM	28/03/04 2:14 PM
71	08/05/04 3:54 AM	08/05/04 6:20 AM
72	12/03/04 12:33 AM	28/03/04 2:14 PM

73	08/01/04 2:15 AM	28/03/04 2:14 PM
74	03/01/04 8:00 AM	28/03/04 2:14 PM
75	01/06/04 1:38 AM	01/06/04 6:44 AM
76	07/09/04 5:25 PM	07/09/04 5:50 PM
77	08/01/04 2:16 AM	28/03/04 2:14 PM
78	01/03/04 2:49 AM	28/03/04 2:14 PM
79	18/03/04 5:53 AM	28/03/04 2:14 PM
80	27/03/04 7:38 AM	28/03/04 2:42 PM
81	07/09/04 5:26 PM	07/09/04 5:50 PM
82	03/09/04 4:17 PM	03/09/04 6:48 PM
83	07/04/04 7:20 AM	03/09/04 3:16 AM
84	03/09/04 2:54AM	03/09/04 6:48 PM
85	17/08/04 12:12 AM	17/08/04 5:56 AM
86	04/05/04 6:45 AM	04/05/04 5:24 PM
87	04/05/04 6:44 AM	04/05/04 5:37 PM
88	04/05/04 6:47 AM	04/05/04 5:24 PM
89	19/04/04 12:46 PM	19/04/04 6:23 PM

90	03/05/04 12:07 PM	03/05/04 8:37 PM

125. The first thing to note for the purpose of this analysis is that some 51 of the items were all last modified on “28/3/04” at “2:14 PM”. In cross-examination of Officer Johnston, Mr Smith put to her that if the defendant had emails on his laptop, then downloaded them onto a CD, the CD could then be placed into the desk top and all the files could be imported. She accepted this proposition. She was then asked (T32) whether this would “actually result in the creation of a modified date for each of the emails” but she did not believe that it would, although she had not tested it. As such she agreed (T33) that this “could be” a possible explanation for these multiple entries, but her answer to this question remains as conjecture.

126. The defendant puts forward the possible explanation that these were all emails that he had received on his laptop (rather than his desktop computer) so at that date and time he moved all of them from his laptop onto his desktop computer. However, the defendant also stated in his evidence that he actually had no memory of having done this. Accordingly the explanation is conjecture only. However, the explanation about transferring them all at the same date and time appears plausible and I accept it. It doesn’t necessarily follow that they must have originally been received onto his laptop. They could have been moved a number of times.

127. It is not possible to say when these 51 items were first opened after they had been received.

128. In relation to his desktop computer the defendant said he purchased that in either late December 2003 or early January 2004 (ExP9 at page 10) in Canberra to replace one that was destroyed by fire (EXP9 at page 8). I note that the earliest emails in time that were received were items 38 and 39 that were both received on “7/12/03” at “4:07 PM”. These were presumably either received onto his laptop as they were part of the 51 items that were all last modified on “28/3/04” or received elsewhere, then transferred onto his laptop before being transferred onto his desktop.

129. Of the remaining 39 items (90 less 51) 4 of them (items 23, 30, 31 and 45) were all last modified between 5am and 6am in the morning. I find that it is more probable than not that he opened these items upon waking, and not in the middle of doing other work. I therefore reject his attempted explanation (that he would mark as read, items without reading them, as he was working on other matters)

130. I note, for example item 2 was received at 7:02pm on 28/4/04 and was last modified at 6:30am the next morning. It would have been on his computer as soon as he booted up windows. At page 12 of ExP9 the defendant stated that he had “2 ozemail broadband accounts” and “on both of them I’ve got the highest speed, highest capacity accounts”. He went on to add “I

don't dial up, I just – well with the – with those ADSL accounts it is automatically connected as soon as I boot up windows". If he is travelling he said "In hotels I connect the laptop to the telephone system and dial up to a bigpond account" (page 13 of ExP9).

131. Of the remaining 35 items 15 (items 2, 4, 6, 8, 33-36, 41, 56, 63, 71, 75, 82 and 84) were all last modified between 6am and 7am in the morning. Again I find that it is more probable than not that he opened these items after waking, and not in the middle of doing other work. Of these 15, 2 were received the previous evening and 5 were received in the early hours of the same morning that they were last modified.

132. Of the remaining 20 items 13 (items 1, 5, 32, 49, 61, 76, 81 and 85-90) were all last modified between 5pm and 5am the next morning. Again I find that it is more probable than not that he opened these items after returning home from work, and not in the middle of doing other work.

133. Only 7 (items 3, 7, 9, 37, 44, 62 and 83) of these 39 items were last modified during the hours of 7am and 5pm. Item 7 was received and last modified on 30/5/04 which was a Sunday. Item 9 was received and modified on 3/5/04 which was a public holiday for May Day in the NT that year. Of the remaining 5 items the shortest time delay between receipt and being last modified was 1 hour and 47 minutes for item 44; and the longest time delay was 8 hours and 53 minutes for item 83.

134. In cross-examination of Officer Johnston, Mr Smith had her (whilst the stories folder of Outlook Express was on the screen) mark a number of files as unread. He then asked her to click on the top unread file, then press the shift key and down key, and simultaneously press the control key and the letter "Q" key (at T30-31). The result of this was that all the highlighted emails were marked as read, without any possibility of the operator of the computer knowing their contents if that was done. Whilst this was possible I do not find that this is what the defendant did.

135. I do not accept the defendant's attempted explanation that he would receive items whilst working on other matters and would simply open them without reading them and continue with his work. On the contrary, I find that the defendant would more often than not open the subject emails some hours after they were received, and therefore at a time that suited him.

136. I reject the defendant's evidence that he failed to delete these 90 items due to oversight or mistake. If there were only 1 or 2 items found then this explanation would have been more plausible. I am unable to accept that he made this number of oversights or mistakes.

137. If the defendant's explanations are rejected, which they are, then no explanation is left other than the inevitable, in my view, conclusion that the 90 items were there for the defendant's sexual interest and gratification.

138. I reject the defendant's evidence that he did not read any of the 90 items the subject of this charge.

139. The suggestion that he didn't go back to read stories if he had simply opened them in my view makes no good sense. He had deliberately joined these 3 user groups. He wanted stories sent to him so he could read them for his sexual gratification. He did print some from time to time. There was no point in the defendant receiving these emails if he wasn't going to read them. I have no doubt that some of the stories may have interested him more than others. Some of the stories he may not have read to completion. But I find that he did look at the items received in his stories folder, and then made a conscious decision as to which ones he wished to keep.

140. I find that the defendant made a conscious decision to keep each of the 90 items the subject of this charge on his computer.

141. I find that the defendant had an interest in stories about male sex. I find that the defendant's interest was not limited to stories about adults (given the 90 items he chose to keep), but extended to teenagers and boys. I therefore find that the defendant had an interest in child pornographic stories.

142. I find that the defendant made a conscious and deliberate decision to keep the items the subject of this charge for his own sexual gratification.

143. The defendant has failed to satisfy me on the balance of probabilities that he did not know that the film (being the emails on his computer) would be classified RC. He knew they involved children under the age of 16. He knew they were sexual stories.

144. I find that *section 125B(5) of the Criminal Code* does not permit ignorance of law as a defence.

145. Further, the defendant has failed to satisfy me on the balance of probabilities that he could not reasonably be expected to have known, that the film (being the emails on his computer) would be classified RC. He knew they involved children under the age of 16. In half the items this was obvious from the title and/or letter codes. In the other files it would have been obvious to anyone reading (or even scanning through) the same.

146. I am unable to accept the defendant's evidence that he did not read any of these stories, and reject it.

147. Item 56 (see ExP9 at page 17) referred to Mark who "said he was 14 and only went with bigger boys. Obviously it refers to a child and the story does contain intercourse with this – with this person that is Mark aged 14."

148. Item 2 (see ExP9 at page 19) "it's a child sex story with a 14 year old boy with children and adults engaging in sexual activity".

149. Item 85 (see ExP9 at page 20) "this is a story about a 10 year old boy who has sexual activity with adults and children".

150. I find beyond all reasonable doubt that the defendant did read (or read enough to identify them as containing child pornography) the 66 stories.

151. In relation to these 66 stories the defendant intended to possess them, knowing that they were child pornography (albeit that the defendant may not have known of the wording of the definition at the relevant time). If I am wrong on this then Iwould find beyond all reasonable doubt that he foresaw that they may contain child pornography, and an ordinary person similarly circumstanced to the defendant, and having such foresight, would not have allowed them to have come onto his computer at all, let alone allowed them to remain.

152. I find the defendant guilty of the charge beyond all reasonable doubt.

153. I will hear both counsel on the question of sentencing.

Dated this 7th day of April 2006.

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Daynor Trigg
STIPENDIARY MAGISTRATE