AND SO IT BEGINS…FIRST CONSIDERATION OF "SERIOUS HARM" THRESHOLD IN AUSTRALIAN DEFAMATION CLAIM

Date: 28 March 2022

Australia Complex Commercial Litigation and Disputes Alert

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The New South Wales Supreme Court has recently delivered its judgment in *Newman v Whittington* [2022] NSWSC 249 (*Newman*), providing the first Australian judicial consideration of the "serious harm" threshold now found in the uniform defamation legislation in effect in Victoria, New South Wales, South Australia, Queensland, Tasmania and the Australian Capital Territory.

The "serious harm" threshold was introduced as part of the Stage 1 Defamation reforms which came into effect on 1 July 2021. Plaintiffs in those jurisdictions must now also establish that any defamatory publication made on and from 1 July 2021 causes, or is likely to cause, serious harm to their reputation (click here to read our previous alert).

FACTS

Ms. Newman brought defamation proceedings against Mr. Whittington, alleging that he made 27 defamatory publications about her online, primarily via Facebook.

Some of Mr. Whittington's publications were made after 1 July 2021, meaning Ms. Newman needed to overcome the "serious harm" threshold in respect of them as part of her claim.

Sackar J gave consideration to Australia's formulation of the "serious harm" threshold in considering the adequacy of Ms. Newman's statement of claim.

INTERPRETING AUSTRALIA'S "SERIOUS HARM" THRESHOLD

Sackar J considered the origins of the serious harm threshold and, perhaps unsurprisingly, looked to the "inspiring" United Kingdom provision in interpreting its Australian equivalent.

Sackar J considered that the Australian and United Kingdom formulations of the "serious harm" threshold were in all material aspects the same.

The New South Wales Supreme Court therefore endorsed the well-known reasoning of the United Kingdom Supreme Court in *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 (*Lachaux*).

The United Kingdom Supreme Court held in *Lachaux* that:

- "Serious harm" is to be determined by reference to the actual facts about its impact, not merely the meaning of the words;

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- The "serious harm" threshold abolished the common law presumption that a defamatory publication causes damage to reputation; and
- The plaintiff must prove, on the balance of probabilities that the harm caused by the defamatory publication was or will be serious.

"Serious harm" was established in *Lachaux*. The United Kingdom Supreme Court had regard to evidence on the scale of the defamatory publications, the gravity of the statements made in those publications, as well as the fact that the statements complained of had come to the attention of at least one identifiable person in the United Kingdom who knew the plaintiff and they were likely to have come to the attention of more in the future.

THE DECISION

Ms. Newman failed to overcome the "serious harm" threshold on the basis of her pleaded claim against Mr. Whittington, although Sackar J did provide her with another opportunity to re-plead (that is, reformulate) her claims on that issue.

Unlike *Lachaux*, no evidence was led on the "seriousness" of the harm allegedly caused to Ms. Newman by the subject defamatory publications, meaning Sackar J was regrettably unable to assess the actual impact of the publications and whether they did cause "serious harm" to Ms. Newman's reputation.

Sackar J separately emphasised the ongoing importance of the downloading of online material to establish "publication" of that material to a third party for the purposes of a defamation claim.

Whilst this reasoning may still have application for downloadable blog posts (for example), it is unclear how it reconciles with "likes" or comments on posts made on social media platforms, which could arguably establish "publication" through means other than downloading.

IMPLICATIONS

The key take away from *Newman* is the equivalency drawn between Australia's and the United Kingdom's respective formulations of the "serious harm" threshold.

Perhaps unsurprisingly, it appears that the United Kingdom Supreme Court's reasoning in *Lachaux* will provide helpful guidance in assessing whether a defamation claim will overcome the "serious harm" threshold now in effect in most Australian jurisdictions.

We look forward to the first evidentiary assessment by an Australian court of the actual impact of a defamatory publication on a plaintiff (and whether it did indeed cause "serious harm" to them), as the United Kingdom Supreme Court was able to in *Lachaux*.

The New South Wales Supreme Court's judgment can be accessed here.

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