SOME "SERIOUS" DEVELOPMENTS IN DEFAMATION LAW

Date: 21 September 2023

Australia Litigation and Dispute Resolution Alert

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In 2021, one of the most significant changes to Australian defamation legislation, in most states and territories (save for Western Australia and the Northern Territory), was the introduction of a "serious harm" threshold to the defamation laws in effect. It is now the case in those jurisdictions that a plaintiff must prove that the publication has caused, or is likely to cause, serious harm to their reputation. In the case of an "excluded corporation" who is able to sue for defamation, the plaintiff corporation must prove the publication has caused, or is likely to cause, "serious financial loss."

The "serious harm" threshold was introduced to encourage defamation disputes to resolve without litigation, in particular claims where any potential damages awarded might be modest and out of proportion to the costs of the litigation.

There have now been some recent Australian cases that have considered what is meant by "serious harm" for the purposes of Australian defamation legislation, which we examine below.

CASES

Newman v Whittington [2022] NSWSC 249

In February 2022, the Supreme Court of New South Wales became the first Australian superior court to consider the "serious harm" threshold.

In this case, Sacker 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 UK Supreme Court in *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 which provided:

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

We have previously written a legal insight which considers this case and can be accessed here.

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Rader v Haines [2022] NSWCA 198

In this case, Mr. Rader commenced defamation proceedings against Mr. and Mrs. Haines (the parents of Mr. Rader's ex-wife), arguing that an email sent by Mr. and Mrs. Haines to Mr. Rader's parents was defamatory of him. The email concerned the arrangements for the mutual grandchildren's school fees, but went on to make allegations regarding Mr. Rader's conduct and the ongoing deterioration of the relationship between Mr. Rader and his ex-wife. The imputations pleaded included stalking and taking a car without consent.

As the email in question was received by Mr. Rader's parents in England, section 1 of the *Defamation Act 2013* (UK) (that is, the serious harm provision) applied.

The New South Wales Court of Appeal unanimously upheld the trial judge's decision that Mr Rader failed to satisfy the "serious harm" threshold under the *Defamation Act 2013* (UK). In coming to this conclusion, the New South Wales Court of Appeal had regard to the fact that the publication was limited to the plaintiff's parents (with any adverse impressions having dissipated within weeks) and there was no evidence of reputational harm in any other audience including by reason of the "grapevine effect" (that is, the allegations spreading beyond the immediate recipients).

In determining what is considered "serious," Brereton JA provided the following analysis:

1. "Serious" harm involves harm that is more than merely substantial, though it need not be grave;
2. Serious harm must be caused to one's reputation, arising from a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated;
3. A grave imputation may not result in serious harm, typically where the publication is to a small number of persons well acquainted with the plaintiff who are not disposed to believe the imputation, and any impact of the imputation on the plaintiff's reputation is transitory; and
4. Serious harm should not be conflated with hurt to feelings.

The New South Wales Court of Appeal also took into account the fact that there was a delay of 11 months before commencing proceedings, which was a factor when considering whether serious harm had occurred.

Zimmerman v Perkiss [2022] NSWDC 448

The defendant, the previous employer of the plaintiff, sent private text messages to the plaintiff's new employer, alleging that the plaintiff had stolen company property.

The defendant brought an application as a preliminary issue, arguing that the plaintiff could not satisfy the threshold of "serious harm."

The Court held that the plaintiff failed to prove that the publication caused, or was likely to cause, "serious harm." The Court found that the plaintiff could not prove that her reputation was damaged in the eyes of her current employer, the recipient of the text messages. Further, it was clear that the recipient of the text messages did not discuss them with anyone, except for the plaintiff's mother, and there was no evidence of any "grapevine effect."

Martin v Najem [2022] NSWDC 479

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The plaintiff, a popular food blogger, brought proceedings for defamation for two posts on Instagram posted by the defendant food blogger, calling the plaintiff a paedophile and a racist. The two Instagram posts were a part of a series of ongoing publications regarding the plaintiff, which continued up until a few days before the trial.

The Court accepted the analysis of Brereton JA in *Rader v Haines* [2022] NSWCA 198, as set out above.

In holding that the plaintiff has satisfied the threshold of "serious harm," the Court took into account the "grapevine effect," which may be inferred as the typical result of serious allegations made by a well-known food blogger on a public social media account, of which there was actual evidence. The Court also took into account that the defendant had threatened the plaintiff with serious physical and professional harm.

High Quality Jewellers Pty Ltd & Ors v Ramaihi (Ruling) [2022] VCC 2240

The plaintiffs in this case were all involved in the same family-run jewellery business, Micheli Jewellery. The defendant wrote a one star Google Review of Micheli Jewellery stating that the customer service was rude, the prices were expensive and that he "*recommends you shop elsewhere where you can save yourself some money and enjoy being looked after.*"

In determining that the plaintiffs had not established "serious harm" to their reputations, the Victorian County Court found that the plaintiffs had failed to substantiate (with evidence) their claim for serious harm to their reputation. The court stated that the evidence relied on by the plaintiffs was expressed in general terms and lacked the sort of specific particulars that would identify serious harm to reputation.

The court stated "*this is the type of case the legislation was intended to address – a single Google review on the internet by an individual.*" However the Court did note that a single Google review may cause serious harm to reputation, but the burden rests on the plaintiff to prove the serious harm, which the plaintiffs had not done in this case.

Selkirk v Hocking (No 2) [2023] FCA 1085

The applicant in this recent Federal Court proceeding was aggrieved by an article published online which alleged that she had been found guilty of scamming David Jones by providing fraudulent proofs of purchase.

The Federal Court, noting the purpose of the serious harm threshold is to "*weed out trivial or frivolous defamation claims at the outset*" determined in a pre-trial hearing that the Applicant did not satisfy the threshold of "serious harm."

The Federal Court took into account that the article was only published to three people (one of whom was the applicant) and that the applicant had indeed engaged in the acts of deception that were the subject of the allegations. Consequently, there was no evidence that anyone thought less of the applicant due to the publication.

KEY TAKEAWAYS

The decisions considered above suggest that the serious harm element is serving its purpose in the early disposal of frivolous "neighbourly disputes" and "backyard defamation." It is clear that a plaintiff must provide fulsome evidence that proves that the publication has caused, or is likely to cause, serious harm to their reputation.

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The principles from the above cases clarify that the courts will look to the following factors, among others, when determining "serious harm:"

- The gravity of the imputations;
- The extent of the publication;
- The nature of the recipients and their relationship with the plaintiff;
- Whether there is any evidence of the "grapevine effect"; and
- Any delay in commencing proceedings.

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