Serious harm to reputation in the context of online defamation claims — the Australian position

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Now that the "serious harm" element has formed part of the cause of action in defamation in most Australian states and territories (save for Western Australia and the Northern Territory) for almost 4 years, how has this new element been treated by Australian courts with respect to online defamation claims?

Introduction

Defamation laws in most Australian jurisdictions have undergone significant reform in recent years, including to introduce a new element that plaintiffs must prove in pursuing claims in defamation (save for in Western Australia and the Northern Territory).[1]

In short, for defamatory print and online publications made on and from 1 July 2021, plaintiffs must prove that the publication(s) in question caused, or is/are likely to cause, serious harm to their reputation.

In implementing the "serious harm" element into their defamation laws, Australian jurisdictions have diminished the effect of the longstanding common law presumption of damage to reputation, with a view to discouraging the pursuit of trivial or weak defamation claims by plaintiffs.

Now that the "serious harm" element is almost 4 years old in most Australian jurisdictions, this article considers the philosophy underpinning it and how the element has, in turn, been construed by Australian courts to date.

What is the "serious harm" element?

For any defamatory publication made on and from 1 July 2021 in any Australian jurisdiction (save for Western Australia and the Northern Territory), the plaintiff bears the onus of proving that said publication caused, or is likely to cause, serious harm to their reputation.

Plaintiffs must now establish the "serious harm" element in addition to proving the fundamental elements of publication [of the defamatory matter], identification [of the plaintiff] and that the publication in question carries a defamatory meaning.

The "serious harm" element is intended to operate to reduce the amount of trivial or weak defamation claims being pursued to trial, especially in circumstances where the same reforms to defamation laws in most Australian jurisdictions (save for Western Australia and the Northern Territory) abolished the defence of "triviality".

It is open to the court determine whether the "serious harm" element has been met as a preliminary point, including by reference to the parties' pleadings only. This underscores the need for plaintiffs in particular to ensure they fulsomely address the "serious harm" element at the outset of their claim.

Indeed, plaintiffs should turn their minds to the potentially significant and onerous evidence they will need to adduce to satisfy the "serious harm" element.

Relatedly, albeit not the focus of this article, corporations eligible to sue in defamation must establish that the defamatory publication caused, or is likely to cause, serious financial loss.

Where does the "serious harm" element come from?

The "serious harm" element is similar to the "serious harm" requirement or threshold imposed by s 1 of the Defamation Act 2013 (UK) (UK Defamation Act), which threshold itself developed from English common law principles of proportionality and a minimum threshold of seriousness with respect to claims in defamation.

The United Kingdom (UK) legislation does not go so far as to impose the "serious harm" threshold as an element of the defamation cause of action however.

While English decisions on their "serious harm" threshold have already been found to be of assistance to various Australian courts in construing the "serious harm" element,[2] caution should nevertheless be exercised in relying on them (especially at the expense of Australian authorities) due to the differences in the "serious harm" provisions in each jurisdiction.

What is "serious harm" to reputation?

"Serious harm" concerns only the harm caused to a plaintiff's reputation and not their emotional distress or hurt feelings.[3] While mental anguish and anxiety are appreciable ramifications of a defamatory publication, they are not relevant to the assessment of whether there has been serious harm to the reputation of the plaintiff.[4]

Decisions based on s 1 of the UK Defamation Act suggest that "serious" harm to reputation generally falls somewhere between "substantial" and "grave" harm.[5]

The assessment of serious harm to reputation is as an "inherently impressionistic task" however, requiring the consideration of evidence of a range of matters said to establish harm.[6]

Placing the word "serious" in a spectrum of adjectives (such as "substantial" and "grave") may further (and unnecessarily) complicate the assessment of serious harm to reputation.

Instead, focus should be on assessing the relevant circumstances and evidence, with the word "serious" afforded its ordinary meaning in forming the "impressionistic" view as to whether there has been serious harm to reputation.

Proving "serious harm" to reputation

Plaintiffs can prove serious harm to reputation by adducing direct evidence, by inference or a combination of both.[7]

Direct evidence can include testimony from recipients or readers of the relevant publication (a social media post for example) or from persons that heard others discussing said publication and the negative impact it had on the plaintiff's reputation in their eyes. Especially in the online context, abusive, critical or otherwise negative online comments in response to a defamatory social media post (for example) would also constitute direct evidence.[8]

Serious harm to reputation may be inferred in circumstances where the imputations carried by the publication are seriously grave and the publication is disseminated extensively, likely through mainstream online and traditional media channels. What is known as the "grapevine effect" may also have a role to play, especially where the plaintiff can prove that the defamation has been republished by third parties through social media, forums (such as Reddit) and electronic methods of communication (such as email).

A good example of the "grapevine effect" is where a person publishes a defamatory social media post about someone, which is then "shared" or reposted by a journalist on their platform to their followers, who in turn themselves repost or "share" the screenshot to their followers (and so on) or otherwise comment on the journalist's repost.

That being said, to prove serious harm by inference, the inference in question must overcome any competing inferences that are reasonably open on the evidence.[9] The best and safest approach is therefore to have direct evidence of serious harm to reputation — this is not always easy to obtain, but it must be remembered that one of the primary intentions of the "serious harm" element was to limit the volume of trivial or weak defamation claims coming before the courts.

In *Peros v Nationwide News Pty Ltd (No 3)*[10] (*Peros*), Applegarth J identified five specific considerations relevant to establishing the "serious harm" element:

- the gravity of the defamation (as well as the inherent meaning or tendency of the words in question)
- the extent of the publication
- by whom the matter was published (and their credibility)
- the identity of the recipients (as well as their relationship with, or views on, the plaintiff) and
- the state of the claimant's reputation[11]

The above circumstances are non-exhaustive — other examples of relevant considerations are evidence of the actual impact of the defamatory publication on recipients (including their reaction to it) as well as any steps taken by the publisher to redress the issue (including through an "Offer to Make Amends" issued pursuant to the relevant Australian defamation legislation).

Australian judgments on the "serious harm" element

Given the question of whether a defamatory publication has caused serious harm to reputation will be answered by reference to the individual facts and circumstances of the case,[12] it is difficult to establish any meaningful or reliable "threshold" for the "serious harm" element by comparing the outcomes reached in previous decisions. This is especially so when many of the decisions construing the "serious harm" element are made by inferior courts, such that they are not binding on superior courts and can therefore be overlooked.[13]

Previous decisions (including those made by inferior courts) are still instructive in that they address the nature of the evidence required to establish serious harm to reputation and/or the reasoning underpinning the drawing of inferences in that regard. A reader can also arguably discern a very general "threshold" for the "serious harm" element by reference to previous Australian decisions.

Some recent defamation decisions in the online context are set out below, which illustrate of specific circumstances where the "serious harm" element has been met or otherwise not been proven by plaintiffs.

Greenwich v Latham[14] involved a defamation claim between two members of the New South Wales Parliament, where it was broadly alleged that in a "tweet", Mr Latham conveyed the imputation that Mr Greenwich (an openly gay man) engaged in disgusting sexual activities. There, the serious harm element was proven by Mr Greenwich, by reference to the "hate-filled venom that was unleased [through responding tweets and comments]" (that is, direct evidence),[15] as well as the inherent tendency of the imputation/words in question, the extent of the publication and the related "grapevine effect".[16]

Deeming v Pesutto (No 3)[17] is another instructive case as between two Victorian politicians, where direct evidence of the "hate-filled social media and other [third party] communications" assisted in establishing that each of Mr Pesutto's original defamatory publications caused serious harm to Ms Deeming's reputation.[18] Provided those third party comments and communications are a natural and probable consequence of the original publication(s), then they can be evidence of reputational harm.[19] The gravity of the defamation in this case and the mass media communication of same to the Victorian public were also significant factors assisting Ms Deeming in proving the "serious harm" element.

The "grapevine" effect also had considerable influence in *Martin v Najem*,[20] where the "serious harm" element was met by inferring (with supporting evidence) that the "grapevine effect" would apply with respect to defamatory Instagram posts made by a renowned food blogger alleging that the plaintiff was a paedophile and a racist.

In *Newman v Whittington*, imputations conveyed in two social media posts to the effect that the plaintiff supported and otherwise had a close association with paedophiles were found to be so serious so as to give rise to an inference of serious harm to reputation.[21] This was so despite the plaintiff adducing limited direct evidence as to the actual harm caused to her reputation by the social media posts in question.

Ibrahim v Ye involved a defamation claim arising from nine Google, Yelp and Yellow Pages reviews about Dr Ibrahim made by one person. While it was accepted that those reviews carried serious imputations regarding Dr Ibrahim, he failed to prove the "serious harm" element. This was so despite the court accepting that the reviews caused Dr Ibrahim stress, anxiety, hurt and embarrassment, all of which was insufficient to prove the "serious harm" element.[22] While it was open to infer that the reviews were read by a small audience (based on the limited number of likes and comments in respect of them), Dr Ibrahim failed to adduce evidence from any reader of the review(s), or his colleagues to whom he disclosed the reviews, that thought less of him by reason of them. The evidence adduced by Dr Ibrahim also did not prove, on the balance of probabilities, that he experienced an increase in cancelled appointments as a consequence of the review.

With respect to the readers of online and social media reviews and posts, there is an emerging view in courts that they constitute a new class of reader, in that they will appreciate that online and social media reviews and posts will largely be an expression of personal opinion and should therefore be read with caution.[23] This position reinforces the challenges plaintiffs face in establishing serious harm to reputation with respect to online reviews or posts.

Another instructive example of a plaintiff failing to prove serious harm to their reputation arose in *Mannoun v Ristevski*.[24] There, a Facebook comment in response to a post on a Facebook page titled "Liverpool Council Shenanigans" was alleged to carry imputations to the effect that Mr Mannoun (the Mayor of Liverpool City Council) was a criminal in that he caused a charity to purchase a business at an overvalue by altering its financial records. The Facebook page had approximately 250 followers however and the post in question that attracted the defamatory comment was the subject of 14 comments overall and one "share" only in the approximately 21 months it was visible. There was a lack of direct evidence from readers of the Facebook comment that thought lesser of Mr Mannoun having read it, especially in circumstances where there was already a limited audience in respect of the Facebook comment. It was also recognised that, by nature of the Facebook page itself ("Liverpool Council Shenanigans"), those who commented on the Facebook post already had a low opinion of him, which brought into question whether the specific comment in question had any material impact on Mr Mannoun's reputation. In those circumstances and given the court found that the seriousness of the imputations themselves was insufficient so as to establish serious harm to reputation, the plaintiff failed to prove the "serious harm" element.

Peros considered the "serious harm" element in the context of a plaintiff said to already have a poor reputation, with Applegarth J ultimately reaching the conclusion that evidence of other publications establishing a plaintiff's bad reputation can be admitted in assessing the extent to which the publication actually sued on caused serious harm to their reputation.[25]

There, Mr Peros alleged that episode 13 in a "true crime" podcast series concerning the death of Shandee Blackburn conveyed a defamatory imputation to the effect that he murdered Ms Blackburn. It was accepted that the episode 13 conveyed a grave defamation in respect of the plaintiff, but in circumstances where most listeners of that episode also listened to the preceding

12 episodes, it was held that episode 13 itself did not cause any additional harm to his reputation that amounted to serious harm. In other words, the substantial harm to Mr Peros' reputation was already caused by publications preceding episode 13, meaning that episode was unlikely to cause any material change to the listeners' pre-existing views on Mr Peros' reputation and culpability for Ms Blackburn's death.

Setia v Radio Haanji[26] involved similar analysis to that undertaken in *Peros*, with respect to a plaintiff alleging that a post made on Radio Haanji's Facebook page incorrectly stated that he had been found guilty of wage theft, was to be jailed for 10 years and would be fined $1 million. Instead, the plaintiff had been effectively charged with wage theft, but all charges were later withdrawn. The plaintiff did establish serious harm to his reputation by reference to the gravity of the defamation, notwithstanding the wider [correct] reporting of wage theft charges being laid against him — in distinction to *Peros*, the defamatory publication here went one step further to say that the plaintiff was guilty (rather than charged) and was to be jailed and fined accordingly.

In addition to the gravity of the defamation, the wide extent of the publication contributed to a finding that the plaintiff satisfied the "serious harm" element (especially within the Punjabi and wider Indian communities in Australia, including through the 920 likes, 272 comments and 165 "shares" of the original Facebook post made by Radio Haanji and the subsequent republication of it on other Facebook pages and through third-party comments). The plaintiff also adduced actual evidence of people thinking less of him in light of the defamatory publication which was of assistance in satisfying the "serious harm" element too.

Setia v Radio Haanji also underscores the extensive evidence required to substantiate any allegation of serious harm to reputation by reference to financial losses a plaintiff has sustained — at the very least, financial statements/documents (if not more) will need to be produced to make out any such allegation.

The cases outlined above demonstrate the case-specific analysis underpinning the "serious harm" element in any matter, but they underscore the variety of considerations plaintiffs and defendants must make (especially from an evidentiary standpoint) in assessing whether the "serious harm" element is made out.

Tips for online publishers and platforms to minimise risk

- **Critically, have an accessible complaints mechanism, especially if you are a digital intermediary** — recent reforms to Australian defamation legislation in New South Wales, Victoria and the Australian Capital Territory have enacted a defence for digital intermediaries relating to the availability and operation of an accessible complaints mechanism.[27] It would be prudent to consultant a defamation lawyer at the outset to assist with this bedrock task.
- **Be mindful of the content published on your platform, including by third parties** — your audience may be larger than you anticipate, including through the reposting and/or "sharing" of content
- **Be proactive in dealing with complaints made about content** — the prompt removal of problematic content can go a long way to mitigating your risk, including in a "serious harm" context
- If you do receive a Concerns Notice agitating a claim in defamation and/or you are sued in defamation, **turn your mind to issues relevant to the "serious harm" element**, including, for example, by obtaining evidence of the viewership of and/or engagement with the content in question and on the plaintiff's prior reputation (if it is poor/damaged, including as a consequence of other content/publications).

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Footnotes

1. On 13 February 2025, the Defamation Legislation Amendment Bill 2025 (NT) was introduced into the Northern Territory Parliament, which relevantly proposes to incorporate the statutory "serious harm" element into the Defamation Act 2006 (NT).
2. See eg *Newman v Whittington* [2022] NSWSC 249; BC202201561 at [43], [51] and [67] per Sackar J; see also *Wilks v Qu* [2022] VCC 620 at [24] per Clayton J; *High Quality Jewellers Pty Ltd v Ramaihi* [2022] VCC 2240 at [106] per Clayton J; *Jones v Jackson* [2023] NSWDC 76; BC202340146 at [23] per Gibson DCJ.

3. See eg, *Peros v Nationwide News Pty Ltd (No 3)* [2024] QSC 192; BC202411854 at [97] per Applegarth J.
4. See eg, *Hossain v Ali* [2022] VCC 2195 at [17] per Clayton J.
5. See *Rader v Hanes* [2022] NSWCA 198; BC202210547 (*Rader*) at [27] per Brereton JA (which decision construed s 1 of the Defamation Act 2013 (UK)); see also *Lachaux v Independent Print Ltd* [2018] QB 594 at 611 per David LJ.
6. Above n 3, at [95] per Applegarth J, citing *Rader*, above n 5, at [91] per Basten JA.
7. Above n 3, at [79] per Applegarth J.
8. See eg, above n 3, at [80] per Applegarth J.
9. Above n 3, at [416] per Applegarth J, cited in *Setia v Radio Haanji* [2025] VCC 44 (*Setia*) at [78] per Clayton J.
10. Above n 3.
11. Above n 3, at [58]–[72] per Applegarth J.
12. See eg, *Setia*, above n 9, at [81] per Clayton J.
13. *Setia*, above n 9, at [56] per Clayton J, citing *Mannoun v Ristevski* [2024] NSWDC 564; BC202440818 (*Mannoun*).
14. *Greenwich v Latham* [2024] FCA 1050; BC202412790.
15. Above, at [188] per O'Callaghan J.
16. Above n 14, at [187] and [196] per O'Callaghan J.
17. *Deeming v Pesutto (No 3)* [2024] FCA 1430; BC202418185.
18. Above, at [550] and [590]–[614] per O'Callaghan J.
19. Above n 17, at [531] per O'Callaghan J.
20. See *Martin v Najem* [2022] NSWDC 479; BC202240712.
21. *Newman v Whittington* [2025] NSWSC 275; BC202503657 at [109] per Chen J.
22. *Ibrahim v Ye* [2025] VCC 106 at [138]–[139] per Clayton J.
23. See eg, *Scott v Bodley (No 2)* [2022] NSWDC 651; BC202240970 at [42] per Gibson DCJ, citing *Stocker v Stocker* [2019] UKSC 17 at [41] and *High Quality Jewellers Pty Ltd v Ramaihi (Ruling)* [2022] VCC 1924 at [114]
24. *Mannoun*, above n 13.
25. This analysis involved consideration of the rule developed in *Associated Newspapers Ltd v Dingle* [1964] AC 371, which prevents a defendant from relying on other publications as evidence of a plaintiff's bad reputation in mitigation of damages.
26. *Setia*, above n 9.
27. See eg, Defamation Act (Vic) 2005, s 31A.