

Defamation law and the new serious harm test

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Snapshot

- From 1 July 2021, New South Wales defamation law has had a new ‘serious harm’ test.
- That test has been part of the UK’s defamation law since 2013.
- UK cases could be instructive as to how courts in NSW will determine this test.

From 1 July 2021 the [Defamation Amendment Act 2020](#) (*‘Amendment Act’*) brought into force several changes to NSW’s [Defamation Act 2005](#). The introduction of the serious harm test in s 10A is particularly noteworthy not least because it changes the elements of the cause of action.

Section 10A(1) limits the right to sue for defamation only to cases where the publication of defamatory matter ‘has caused, or is likely to cause, serious harm to the reputation of the person.’ Similarly, a corporation that can sue (an excluded corporation) can only do so if the publication of defamatory matter ‘has caused, or is likely to cause, the corporation serious financial loss’ (s 10A(2)).

Section 10A(3) stipulates that serious harm is to be determined by the judicial officer and ss (4) allows a judicial officer *on their own motion* to decide when to determine the question of serious harm, even before the trial. This gives judicial officers the power to initiate the application to determine serious harm, even if neither party consents. There is much in s 10A that warrants further analysis. However, the purpose of this article is to briefly examine significant UK judicial treatment of the serious harm test. This is because the Explanatory Note to the *Amendment Act* specifically referenced the UK’s serious harm test, it referred to the NSW amendment as being consistent ‘with the approach taken in the UK Defamation Act’ (p 4), and the operative parts of s 10A(1) and the UK section are identical.

You can thank the Brits for that

In the UK, the serious harm test was a response to cases that began applying a ‘seriousness threshold’. For example, *Jameel v Dow Jones* [2005] EWCA Civ 75 found that to ensure a libel action was serving a legitimate purpose, claimants needed to prove some measure of harm to reputation *before* entertaining a libel suit (see e.g. [55] and [70]). Importantly, in *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB) (*‘Thornton’*), Tugendhat J held that the tests of defamatory meaning incorporated a ‘threshold of seriousness’ which is determined by considering whether the publication substantially affects in an adverse manner the attitude of other people towards the claimant or has a tendency to do so (see [89] and [95]).

Cooke & Anor v MGN Ltd & Anor [2014] EWHC 2831 (QB)

The first case to interpret the statutory serious harm test was *Cooke*. Ms Cooke and the company she ran owned and rented houses to people in low-income areas. The hearing was a preliminary issues trial on meaning and on whether the serious harm threshold was met.

The defamatory matter was a *Sunday Mirror* article about a TV show called *Benefits Street*. It documented very poor residents living off social security benefits in Birmingham...think SBS’

Struggle Street but with worse weather. The article, which ran for three pages, including the front page, was almost completely about a person other than Ms Cooke. Ms Cooke was barely mentioned in one single paragraph.

Given the inaugural treatment of the statutory test, there is much in the judgment, but key take-aways are (emphasis added):

- As to what point ‘one looks backwards (to see whether substantial harm *has been* caused) or forwards (to see whether substantial harm is *likely to be* caused)’, Bean J preferred the point at which the claim is issued (at [32]);
- It was agreed that ‘likely to be caused’ means ‘it is *more probable than not* that it will occur in the future’ (at [33]);
- As to what ‘serious’ means, no definition is given, but it is an ‘ordinary word in common usage’ (at [39]);

As to proving and assessing serious harm:

- The claimants said it would be practically impossible to obtain such evidence because the ‘likely serious harm... will be in the estimation of those who do not know them but will now know them in a more negative light.’ Therefore, in determining serious harm the court should give prominence to the seriousness of the allegations and the extent of publication (at [40]-[41]);
- The defendants argued that evidence was required of ‘tangible adverse consequences’ to the claimant (at [42]);
- Bean J found that in some cases evidence would not be required because some ‘statements are so obviously likely to cause serious harm’ (e.g. those wrongly accused of being a terrorist or paedophile in a national newspaper). However, Bean J appeared to find that in every other case ‘specific evidence’ is needed to prove serious harm (at [43], [45])

Serious harm was not established because: there was no specific evidence of serious harm, nor could it be inferred; an apology was published ‘sufficient to eradicate or at least minimise any unfavourable impression’; and for those who had not read the apology, Bean J said it was sufficient that the apology was ‘far more accessible on internet searches than the original Article’ (at [44]-[45]).

Therefore, claimants had to meet a high evidentiary hurdle to establish serious harm. Claimants could not solely rely on the extent of publication and seriousness of any defamatory meaning.

Ames & Anor v Spamhaus [2015] EWHC 127 (QB)

The next significant case was [Ames](#), a decision of Warby J, a specialist defamation judge.

The claimants brought the action based on defamatory materials published by Spamhaus which claimed they were email spammers, engaged in unlawful activities and falsified records.

Spamhaus applied for summary judgment, claiming serious harm could not be established. Therefore, Warby J was determining whether the claimants had a prospect of establishing serious harm at a preliminary trial. Again, there is much in the judgment, however key take-

aways are:

- Warby J did not decide what ‘likely’ meant but expressed agreement with *Cooke* (at [54]);
- His Lordship lowered the evidentiary burden in *Cooke* and said ‘[t]here may be circumstances in which one would naturally expect to see tangible evidence that a statement had caused harm to reputation, *but* as practitioners in this field are well aware, *it is generally impractical* for a claimant to seek out witnesses to say that they read the words complained of and thought the worse of the claimant’ (at [55]);
- Warby J listed 10 factors as to why each claimant had ‘a real prospect of establishing... serious harm’ (at [92]). These included the likelihood of establishing defamatory meaning, extent of publication, seriousness of the imputation and seriousness of the impact. Many of those factors could be ‘proved’ by inference based on the usual effects of defamatory publications;
- Just because claimants cannot identify people who thought less of them did not mean those people did not exist (at [92], (vii)); and
- Finally, his Lordship found that ‘the claimants have a real prospect of establishing that those within the jurisdiction who read and are likely to have believed the words complained of (and the republications of their sting) include people whose opinion of the claimants is of serious consequence to them and their business prospects. Proof of that much could be sufficient to establish that serious harm to reputation has been caused, *even if no such individual was called to give evidence* (at [92](x)) (emphasis added).

***Lachaux v Independent Print Ltd* [2019] UKSC 27**

Lachaux is the only UK Supreme Court decision to have considered the test (as of 1 August 2021).

In the Court of Appeal below, Davis LJ (Sharp and McFarlane LJJ agreeing) rejected Warby J’s first instance interpretation of the serious harm test and said the statutory test was the same as the common law ‘tendency to cause substantial harm’ test in *Thornton* but merely raised to ‘serious harm’. Warby J had found that serious harm had to be established as a proven fact rather than a mere tendency.

However the Supreme Court unanimously rejected Davis LJ’s approach and instead accepted Warby J’s approach, holding that it is not sufficient to prove that the publication has *a tendency* to cause serious harm. Rather, claimants need to establish serious harm has been caused or is likely to be caused *as a fact*: ‘The reference to a situation where the statement “has caused” serious harm is to the *consequences of the publication*, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. *This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had*. It depends on a combination of the inherent tendency of the words and their *actual impact on those to whom they were communicated*. The same must be true of the reference to harm which is “likely” to be caused’ (per Lord Sumption at [14]) (emphasis added).

As to what type of evidence might be required to establish that fact, the Supreme Court approved of the evidence led at first instance, namely: evidence from the claimant and other witnesses of fact; affidavit evidence; agreed figures of publication; and estimated readership (at [21], [25]).

As to assessing and determining serious harm, the Supreme Court accepted Warby J’s

approach of using a combination of the meaning of the words, the situation of the claimant, the circumstances of publication, and the inherent probabilities. The Court said '[t]here is no reason why inferences of fact as to the seriousness of the harm done to Mr Lachaux's reputation should not be drawn from considerations of this kind' (at [21]).

The meaning of 'the inherent probabilities' was not expounded.

Conclusion

In the UK it is now settled that serious harm must be established as a proven fact. As intended, this has made it more difficult to bring a defamation action. That said, *Lachaux* provides support that this threshold can be met by inferences of fact drawn from the meaning of the words, the situation of the plaintiff, the circumstances of publication and 'the inherent probabilities'. Obviously, these cases do not bind courts here. However, it would be a surprise if reference were not made to these cases given the identical test in a similar common law jurisdiction. At time of writing no court here has determined the serious harm test, so whether courts follow the *Lachaux* approach remains to be seen!