

# First Consideration of the ‘Serious Harm’ Test in Australian Defamation Action

The Supreme Court of New South Wales became the first Australian court to consider the serious harm test for a defamation action in *Newman v Whittington* [2022] NSWSC 249 (**Newman**). **Georgie Austin, Zoe Burchill, Blake Pappas and Richard Leder** (Corrs Chambers Westgath) discuss its implications.

The serious harm test was introduced as part of the Stage 1 Defamation Reforms which came into effect on 1 July 2021.<sup>1</sup> The test requires plaintiffs to establish that a defamatory publication has caused, or is likely to cause, serious harm to their reputation.

The decision in *Newman* confirms that a plaintiff is now obliged to prove serious harm as a fact in every case, abolishing the common law rule which presumed reputational damage upon the publication of defamatory material.

While the serious harm threshold remains undefined, the Court in *Newman* endorsed the UK approach in *Lachaux v Independent Print Limited* (**Lachaux**), which looks to the actual impact of a publication on a plaintiff.

## Background

Jasmin Newman, a family dispute resolution practitioner, brought a defamation action against Adam Whittington, an Australian citizen residing overseas.

Newman’s claim related to alleged defamatory publications posted online between 29 December 2019 and 21 October 2021. Of the 27 publications, only those published after 1 July 2021 were assessed in accordance with s 10A, the new serious harm provision of the *Defamation Act 2005* (NSW).

Among other issues, including proof of publication, the Court considered whether the publications had caused, or were likely to cause, serious harm to Newman’s reputation.

## Serious harm test

Justice Sackar confirmed that the issue of serious harm would normally be determined before trial unless special circumstances justified its postponement. These circumstances include, but are not limited to, cost implications, the court’s resources and whether the determination of serious harm is linked to other issues during the trial.

Justice Sackar considered the UK’s equivalent of s 10A in his discussion of how the serious harm test should apply in Australia. Despite minor variations between the two legislative provisions, his Honour observed ‘no material difference’ between the Australian and UK formulations.

Referring specifically to *Lachaux*, his Honour described the decision as a ‘powerful and persuasive analysis’ of an analogous provision. While the decision is not binding on Australian courts, Justice Sackar considered it a persuasive authority.

Adopting the reasoning of Lord Sumption in *Lachaux*, Justice Sackar confirmed that a plaintiff must prove serious harm as a necessary element of the cause of action in New South Wales. His Honour also held that s 10A has the effect of abolishing the common law rule that damage can be presumed upon the publication of defamatory statements.

Though not expressly adopted, his Honour also endorsed the UK threshold for serious harm, where harm is determined by reference to the actual facts of a publication’s impact, not just to the meaning of the words used.

## The decision

In *Lachaux*, serious harm was established by evidence from the plaintiff and other witnesses. Lord Sumption also considered the scale of the publications and readership figures.

As *Newman* was conducted on the pleadings, no evidence was led as to whether Newman had suffered serious harm. The pleadings asserted that serious harm was to be inferred from the inherent seriousness of the defamatory imputations and from Newman’s reputation as a family mediator.

Justice Sackar did not consider that Newman’s pleadings clearly articulated an arguable case. However, given the novelty of the point, his Honour granted leave for the plaintiff to plead her claims and demonstrate a valid cause of action.

## Implications

Following *Newman*, it appears that *Lachaux* may serve as a template for Australian courts to use when establishing a serious harm threshold. The Court’s recognition in *Lachaux* that the extent of the publication is relevant to seriousness is one approach which may be adopted, either in whole or in part.

For now, this decision places plaintiffs on notice of their positive obligation to prove serious harm as a separate element in a defamation action. It also serves as a reminder of the need to set out the particulars of serious harm at the pleadings stage, as merely asserting serious harm will not be enough.

<sup>1</sup> *Defamation Act 2005* (Vic) s 10A.