

Selkirk v Hocking: The Federal Court Provides Guidance on the Serious Harm Test

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Key Takeaways

- *Selkirk* confirms that the serious harm test is a material first hurdle that plaintiffs must meet in defamation claims.
- The serious harm test requires consideration of the actual impact that the publication has had, or is likely to have, on the plaintiff's reputation. A critical element of this assessment is whether there is a genuine causal link between the harm suffered, or likely to be suffered, and the publication itself.
- When determining whether serious harm has been established, courts will consider the:
 - gravity of the defamatory materials;
 - extent of publication;
 - plaintiff's existing reputation amongst the publication's audience; and
 - evidence concerning the harm suffered or likely to be suffered.
- Consequently, plaintiffs should adduce evidence which quantifies (to the extent possible) the harm suffered or likely to be suffered and which establishes the causal link between that harm and the publication.

On 13 September 2023, in *Selkirk v Hocking (No 2)* [2023] FCA 1085 (*Selkirk*), the Federal Court dismissed the plaintiff's defamation claim on the basis that she had failed to meet the recently introduced serious harm element of the cause of action.

The decision in *Selkirk* is the first Federal Court authority on the meaning of serious harm and provides useful guidance on its application.

The facts in *Selkirk*

The plaintiff brought a defamation claim against the publisher of an online article which detailed her criminal convictions, which were overturned on appeal. She had previously been convicted of dishonestly obtaining a financial advantage by deception, using a false document to attempt to obtain financial advantage and dealing with property the proceeds of crime.

The article described her appeal against her criminal convictions, which involved using falsified invoices to receive refunds from retail stores. After publication, the convictions were overturned because the essential element of dishonesty had not been made out.

The plaintiff claimed that the article defamed her by associating her with serious crimes and by describing her as having an untrustworthy and fraudulent character. She alleged that this undermined her professional reputation as a solicitor and caused serious harm by preventing her from being able to obtain employment in a legal or executive role.

The serious harm test

While the serious harm test has received some judicial consideration elsewhere, *Selkirk* is the first Federal Court authority on its application.

Section 10A of the *Defamation Act 2005* (Vic) provides:

It is an element of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.

Key principles arising from *Selkirk*, broadly consistent with other decisions on serious harm so far (except for perhaps the final point), are:

- UK case law concerning the application of the serious harm test under section 1 of the *Defamation Act 2013* (UK) is relevant in interpreting the serious harm test in Australia.
- The plaintiff bears the onus in establishing that the publication has caused, or is likely to cause, serious harm to their reputation.
- Whether serious harm has been caused, or is likely to be caused, is a question of fact. The question of the harm caused requires assessment of the actual impact that the publication has had on the plaintiff's reputation. 'Likely to cause' requires investigation of probable future harm.
- The extent of publication is a key factor in determining serious harm. That is, the likelihood of serious harm may be reduced in cases where publication occurs only to a limited audience. However, serious harm may be established even in cases of limited publication.
- Evidence from a defendant that a plaintiff has no reputation, or a poor reputation, is relevant in determining whether or not serious harm has been established. Proof that the plaintiff has a poor reputation amongst those to whom the publication was provided is relevant not only to the quantum of damages, but also the harm suffered by that person.
- Courts should exercise caution in seeking to place 'serious' harm on a scale or using synonyms to interpret the term.

Application of the serious harm test in *Selkirk*

Justice O'Callaghan found that the plaintiff had failed to establish that she had suffered, or was likely to suffer, serious harm as a result of the publication and dismissed the claim.

In support of her claim for serious harm, the plaintiff primarily relied upon the impact she alleged the article had on her ability to obtain employment. She indicated that she had applied for several roles which had progressed to the reference check and offer stage, but which did not progress. She also asserted that she had a diminished earning capacity but provided no evidence in support of that assertion.

Justice O'Callaghan dismissed the application because:

- The plaintiff had failed to establish causation between the alleged harm suffered and the publication. In any event, difficulty finding employment was not sufficient to establish serious harm.
- The article was viewed by a very limited audience; only three people had viewed it (one of whom was Ms Selkirk herself).
- Although the plaintiff's criminal charges were ultimately withdrawn, the plaintiff had admitted in court to engaging in deception by providing false invoices. The admissions made by the plaintiff had a material impact on her reputation. Consequently, there was no evidence that anyone "thought any the less of [her] by reason of the publication" (that is, that the article could have caused her reputation to be made worse).