Serious Harm to Reputation

- This element was included in the *Defamation Act* on July 1 2021
- Section 10A(1) provides that 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'
- Section 10A(2) provides that a corporation can only establish serious harm to its reputation where the defamation has caused the corporation serious financial loss
- Debated on whether the element is the 1st or 4th
    - Treated as 1st due to its determination before trial in a seperate preliminary hearing, due to s 10A(5)
- Serious harm/financial loss is not defined within the act, leading to its requirements differing on a case-by-case basis
- The approach in the UK is set out by *Lachaux v Independent Print Ltd* [2019] UKSC 27
    - Circumstances to consider when determining whether the harm to reputation is serious include:
        - Circumstances of the publication, including scale of publication
        - Evidence that the publication has, or is likely to have come to the attention of identifiable of persons who know or will know the plaintiff
        - Gravity of statements
    - Have been followed and applied by Australian courts when making serious harm determinations under s 10A
        - *Newman v Whittington* [2022] NSWSC 249: Confirms that onus is on the plaintiff to provide evidence that the defamatory publication in fact caused, or is likely to cause, serious harm to their reputation
        - *Selkirk v Hocking* (*No 2*) [2023] FCA 1085: Plaintiff failed to provide evidence that quantified the harm to her reputation or that established a causal link between any harm and the article:
            - Plaintiff's reputation was already tarnished and no evidence that the publication worsened it further
            - Article was only viewed by a few people
            - Plaintiff provided no evidence linking the specific article and a loss of job opportunities
        - *Zimmermann v Perkiss* [2022] NSWDC 4448
        - *Scott v Bodley (No 2)* [2022] NSWDC 651
- For procedural matters
    - Judge in a defamation proceeding is to determine whether the serious harm element is established[1]
    - A judge can decide whether serious harm element is established at any time before the trial[2]

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[1] 10A(3)
[2] 10A(4)

- Party may apply for serious harm element to be determined before the trial, in which case the judge is to determine the issue as soon as practicable before the trial commences unless there are special circumstances justifying the postponement of the determination to a later stage of the proceedings[3]
  - Special circumstances include a consideration of the cost to the parties, court resources, and the extent to which establishing serious harm is linked to other issues for determination during the trial for the proceeding[4]
    - Might include that serious harm is likely to be established, so that the holding of a preliminary hearing will be a waste of time, costs and resources [5]

Defamatory Matter

- Onus is on the plaintiff to establish that the matter conveys defamatory meanings, involves two steps
  - Plaintiff must establish the meanings conveyed by the matter
  - Plaintiff must establish that the ordinary reasonable person would think less of the plaintiff based on the meanings in step 1

Identifying the meanings conveyed by the matter

- Meaning of the matter is that which would be conveyed
  - To the ORP
  - In the full context of the publication; and
  - Having regard to the mode and manner of publication
- **Concept and characteristics of the ordinary reasonable person (ORP)**
  - Court must determine the meaning of the matter that would be conveyed to the hypothetical ORP
    - *Jones v Skelton* [1964] AC 234
    - *Favell v Queensland Newspapers Pty Ltd* [2005] HCA 52
  - ORP is a hypothetical referee, representing a single standard used by the courts to determine whether the matter conveys the alleged meanings
    - *Lewis v Daily Telegraph Ltd* [1964] AC 234
    - *Trkulja v Google LLC* [2018] HCA 25

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[3] 10A(5)
[4] 10A(6)
[5] *Wilks v Qu (Ruling)* [2022] VCC 620