

AUSTRALIA / JUDGMENT

Mannoun v Ristevski [2024] NSWDC 564

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District Court

New South Wales

Medium Neutral Citation: Mannoun v Ristevski [2024] NSWDC 564

Hearing dates: 30 September 2024

Date of orders: 29 November 2024

Decision date: 29 November 2024

Jurisdiction: Civil

Before: Gibson DCJ

Decision: (1) Pursuant to s 10A of the Defamation Act 2005 (NSW), the plaintiff's statement of claim is struck out and dismissed.

(2) Plaintiff pay defendant's costs, with liberty to apply.

Catchwords: TORT – defamation – early determination of "serious harm" pursuant to s 10A of the Defamation Act 2005 (NSW)

Legislation Cited: Defamation Act 2005 (NSW), s 10A (1) and (4)

Defamation Act 2005 (Qld), s 10A(1)

Defamation Act 2005 (SA), s 10A(1)

Defamation Act 2005 (Tas), s 10A(1)

Defamation Act 2005 (Vic), s 10A(1)

Defamation Act 2013 (UK), s 1

Uniform Civil Procedure Rules 2005 (NSW), rr 14.30(2)(c), 28.2

Cases Cited: Banks v Cadwalladr [2023] 3 WLR 167; [2023] KB 524

Coker v Nwakanma [2021] EWHC 1011 (QB)

Defferos v Google LLC [2021] VSCA 167

Dhir v Saddler [2018] 4 WLR 1

Gayed v Virgin Mary & St Markorious Coptic Orthodox Church [2024] NSWSC 1232

George v Cannell [2021] EWHC 2988 (QB)

Greenwich v Latham [2024] FCA 1050

Lachaux v Independent Print Ltd [2019] UKSC 27; (2020) AC 612

Lee v Brown [2022] EWHC 1699 (QB)

Lorbek v King [2022] VSC 218

McDonald v Dods [2017] VSCA 129

Monroe v Hopkins [2017] EWHC 433; [2017] 4 WLR 68

Newman v Whittington [2022] NSWSC 249

Peros v Nationwide News Pty Ltd & Ors (No 3) [2024] QSC 192

Poniatowska v Channel Seven Sydney Pty Ltd (No 4) [2016] SASC 137

Prouten v Buxton [2024] NSWCA 262

Rader v Haines [2022] NSWCA 198

Russell v S3@Raw Pty Ltd (No 3) [2024] FCA 991

Selkirk v Hocking (No 2) [2023] FCA 1085

Selkirk v Wyatt (2024) 302 FCR 541; [2024] FCAFC 48

Sivananthan v Vasikaran [2022] EWHC 2938 (KB)

Sobrinho v Impresa Publishing SA [2016] EWHC 66 (QB)

Supaphien v Chaiyabarn [2023] ACTSC 240

Thornton v Telegraph Media Group Ltd (Rev 1) [2011] EWHC 1884 (QB)

Webb v Jones [2021] EWHC 1618 (QB)

Wilson v Mendelsohn [2024] EWHC 821 (KB)

ZC v Royal Free London NHS Foundation Trust [2019] EWHC 2040 (QB)

Zimmerman v Perkiss [2022] NSWDC 448

Texts Cited: C Sewell, "More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013", (2020) Journal of Media Law DOI: 10.1080/177577632.2020.1776560

Dr Stephen Bogle and Dr Bobby Lindsay "How serious is the serious harm threshold?" (Working draft as at 22 March 2024), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769366

Professor David Rolph, Rolph on Defamation (2nd ed, 2024, Law Book Co.)

Category: Principal judgment

Parties: Ned Mannoun (Plaintiff)

Peter Ristevski (Defendant)

Representation: Counsel:

Mr Smark SC and Mr Elachkar (Plaintiff)

Mr N Olson (Defendant)

Solicitors:

Hall Partners (Plaintiff)

Mark O'Brien Legal (Defendant)

File Number(s): 2023/00273504

Publication restriction: Nil

Judgment

The application before the court

1. These are proceedings for defamation arising from a Facebook comment pleaded to have been made by the defendant ("the matter complained of") on or around 25 November 2022.
2. The court has, on the application of the parties, made orders for the serious harm element of the claim to be determined as a preliminary issue, pursuant to s 10A(4) of the Defamation Act 2005 (NSW) ("the Act"), the legislation agreed by the parties to be applicable, and pursuant to the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") rr 14.30(2)(c) and 28.2.

The nature of a serious harm application

1. Recent reforms to the uniform defamation laws have resulted in there being an additional jurisdictional requirement of defamation in all Australian jurisdictions, except for the Northern Territory and Western Australia: Civil Law (Wrongs) Act 2002 (ACT) s 122A(1); Defamation Act 2005 (NSW) s 10A(1); Defamation Act 2005 (Qld) s 10A(1); Defamation Act 2005 (SA) s 10A(1); Defamation Act 2005 (Tas) s 10A(1); Defamation Act 2005 (Vic) s 10A(1). That additional jurisdictional requirement is that a plaintiff must now prove that the publication of defamatory matter has caused, or is likely to cause, serious harm to reputation.

2. Section 10A, largely adapted from s 1 of the Defamation Act 2013 (UK) ("the UK Act"), provides as follows:

10A Serious harm element of cause of action for defamation

- (1) It is an element (the serious harm 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.
- (2) For the purposes of subsection (1), harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, the corporation serious financial loss.
- (3) The judicial officer (and not the jury) in defamation proceedings is to determine whether the serious harm element is established.
- (4) Without limiting subsection (3), the judicial officer may (whether on the application of a party or on the judicial officer's own motion)—
 - (a) determine whether the serious harm element is established at any time before the trial for the proceedings commences or during the trial, and
 - (b) make any orders the judicial officer considers appropriate concerning the determination of the issue (including dismissing the proceedings if satisfied the element is not established).
- (5) If a party applies for the serious harm element to be determined before the trial for the proceedings commences, the judicial officer is to determine the issue as soon as practicable before the trial commences unless satisfied that there are special circumstances justifying the postponement of the determination to a later stage of the proceedings (including during the trial).
- (6) The matters a judicial officer may take into account in deciding whether there are special circumstances for the purposes of subsection (5) include (but are not limited to) the following—
 - (a) the cost implications for the parties,
 - (b) the resources available to the court at the time,
 - (c) the extent to which establishing the serious harm element is linked to other issues for determination during the trial for the proceedings.
- (7) Without limiting subsection (5), the judicial officer may determine the serious harm element is not established on the pleadings without the need for further evidence if satisfied that the pleaded particulars are insufficient to establish the element.
- (8) Nothing in this section limits the powers that a judicial officer may have apart from this section to dismiss defamation proceedings (whether before or after the trial commences).

1. The parties have stated, in their written submissions, that they agree that the determination of serious harm is a final, and not an interlocutory, matter.

The parties and the matter complained of

1. The plaintiff is the Mayor of Liverpool City Council.
2. The defendant is a former Councillor who was, at one stage, the plaintiff's accountant, although this is not evident from the matter complained of and there is no pleading of any extrinsic fact to this effect.
3. The text of the matter complained of is as follows:

"Nader Mannoun is a crim. He fraudulently inflated his financials to sell his business to a charity for \$1m. That charity has now lost \$1m as the business was not worth that much.

I dare the grub to sue me for defamation so it can all come out in the public forum."

1. The matter complained of is agreed to have carried an imputation that the plaintiff is a criminal, in that he fraudulently altered the financial records of the business, to cause it to be purchased by charity at an overvalue.

Place of publication

1. The matter complained of was published on a public Facebook page entitled "Liverpool Council Shenanigans" and the parties agree that the relevant place of publication is New South Wales.
2. As the name of this Facebook page suggests, and the layout and contents confirm, those who post and/or follow this group do not have anything nice to say about Liverpool Council, or for those who hold any office in it, including the plaintiff.

The plaintiff's particulars of serious harm

1. The plaintiff bears the onus of proof of establishing serious harm, which is particularised in the statement of claim as follows:

"The Post caused, or was likely to cause, serious harm to Mr Mannoun's reputation by reason of the following facts and matters:

- a. it was likely read by hundreds of people;
- b. the form of publication meant that it was likely that it was shared online to people beyond its initial readership, so as to give rise to grapevine republication;
- c. the meanings carried to readers were serious, and were likely to be believed by readers;
- d. Mr Mannoun, as a publicly elected official, is dependent on the good opinion of electors, including many people he does not know personally;

- e. Mr Mannoun was elected to his position on the Liverpool Council by a narrow margin, meaning that his reputation as Mayor is liable to be damaged in a serious way, by changes in the views of potential future electors.
- f. a number of people have contacted Mr Mannoun and drawn the Post to his attention, thereby clearly indicating that they understood it to refer to him, and to be a serious matter.
- g. further particulars of serious harm will be provided in due course."
- 1. Publication and defamatory meaning are admitted in the defence filed on 31 January 2024. In paragraph 4 of the defence, the defendant denies that the matter caused or was likely to cause serious harm to the plaintiff's reputation within the meaning of s 10A.

What is "serious harm"?

- 1. In jurisdictions where serious harm is now a jurisdictional requirement, courts are developing a body of caselaw as to the establishment of serious harm. The most frequently cited of these decisions, *Rader v Haines* [2022] NSWCA 198 ("Rader"), predates this legislative reform and is in fact a consideration of serious harm under s 1 of the UK Act, as the matter complained of was published in the United Kingdom. The analysis of *Lachaux v Independent Print Ltd* [2019] UKSC 27; (2020) AC 612 ("Lachaux") by Brereton JA (as well as the rider added by Basten AJA at [91]) in *Rader* is reviewed and confirmed in *Selkirk v Wyatt* (2024) 302 FCR 541; [2024] FCAFC 48 at [51] – [52], as is *Lachaux* itself (at [43]-[50] and [91]-[106]). Judgments relevant to a consideration of "serious harm" in Australia may be briefly noted as follows:
 - 1. *Selkirk v Wyatt* is the only determination of s 10A at appellate level.
 - 2. There are decisions of courts of record where serious harm has been determined as a preliminary issue: *Supaphien v Chaiyabarn* [2023] ACTSC 240; *Selkirk v Hocking* (No 2) [2023] FCA 1085 and *Peros v Nationwide News Pty Ltd & Ors* (No 3) [2024] QSC 192.
 - 3. Serious harm was determined at trial level in *Greenwich v Latham* [2024] FCA 1050.
 - 4. There are a number of decisions of inferior courts determining serious harm as a preliminary issue and/or at trial. These are generally disregarded by courts of record (*Gayed v Virgin Mary & St Markoriosis Coptic Orthodox Church* [2024] NSWSC 1232 at [6]). As nearly all "small" defamation claims (i.e. claims likely to give rise to serious harm issues being raised, whether as a preliminary or trial issue) are brought in inferior courts of record, this is unfortunately likely to continue.
- 1. The relevant principles of law have been comprehensively reviewed and analysed by Applegarth J in *Peros v Nationwide News Pty Ltd & Ors* (No 3) ("*Peros* (No 3)"). Both parties urged me to use caution in relation to this judgment. Mr Smark SC submitted that the facts in *Peros* (No 3) were "unique and unusual" (submissions, paragraph 13) and that it may be best, when determining whether harm to reputation is "serious harm", to apply the statutory provisions in the manner approached by Basten AJA in *Rader v Haines* at [9] and in *Selkirk v*

Hocking (No 2) at [29] – [32]. The defendant submitted that Peros (No 3) set out the relevant legal principles but added a similar note of caution.

2. I accept the correctness of Basten JA's observations and of the analysis of issues by the Full Court in *Selkirk v Hocking* (No 2) but I do not accept any implicit criticisms of the principles enunciated by Applegarth J. Nor do I accept the implicit submission that the facts in *Peros* were so unique and unusual that it is a decision of limited utility other than in cases with similar facts. Applegarth J's summary of the relevant principles not only conforms with the discussion in *Rader* and *Selkirk v Hocking* (No 2) but has the added advantage of being able to refer to the very recently published second edition of Professor David Rolph's landmark text on defamation (*Rolph on Defamation*, 2nd ed, 2024, Law Book Co; "Rolph" or "Professor Rolph") which is not only cited (at [53], [89] and [158]) but has clearly informed his Honour's understanding of the principles.
3. As is to be expected given the enactment of the UK Act over a decade ago, the law in relation to serious harm in the United Kingdom is well established and has been the subject of extensive academic as well as judicial commentary. While there are subtle differences between s 10A and s 1 of the UK Act (*Newman v Whittington* [2022] NSWSC 249 at [30] – [46] and [60] – [68]) as well as differences in case management procedure (*Russell v S3@Raw Pty Ltd* (No 3) [2024] FCA 991), and caution must be observed as a result, the decisions on s 1 of the UK Act provide a body of settled principles which may be of assistance to courts in Australia. Nor are these cases difficult to locate; in fact, two studies of serious harm place put them within easy reach of Australian courts. These are:
 1. C Sewell, "More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013", (2020) *Journal of Media Law* DOI: 10.1080/177577632.2020.1776560: This is a study of 57 individual judgments across a total of 44 actions heard over the five-year period from the enactment of s 1 (1 January 2014) to 31 December 2018. I referred to this study in *Zimmerman v Perkiss* [2022] NSWDC 448 but there have been no other references to it.
 2. Dr Stephen Bogle and Dr Bobby Lindsay, "How serious is the serious harm threshold?" (Working draft as at 22 March 2024), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769366: This is a study of the 88 serious harm applications heard over the period from the enactment of s 1 to 82 individual judgments across 75 cases between 2 July 2019 to 1 December 2023.
1. Apart from a six-month time gap between those decisions reviewed by Mr Sewell (up to 31 December 2018) and the commencement of Dr Bogle and Dr Lindsay's study (namely 2 July 2019), these studies encapsulate all discussion of serious harm issues for all available judgments up to 2024.

2. The proper construction of this new statutory requirement requires, inter alia, a consideration of the purposes underlying the reform, not only in relation to the English provisions (*Whittington v Newman* at [30] – [46]) but also in the context of Australian law reform. At [9.50], Professor Rolph explains these as follows:

"[9.50] Given that the proper construction of the new statutory serious harm element will be of importance in defamation litigation in Australia, it is useful to identify the purposes underlying the reform. It is significant that, at the same time as the statutory element of serious harm to reputation was introduced in all Australian jurisdictions except for the Northern Territory and Western Australia, the statutory defence of triviality was abolished. A clear purpose of the reform then was to attempt to deal with trivial or marginal defamation claims at the outset. The legislature clearly intended to raise the threshold for the commencement of a cause of action in a defamation. It equally intended to discourage the initiation of claims where modest damages were likely to result disproportionate to the costs likely to be incurred and the court resources likely to be absorbed. Acting in conjunction with the reforms to the concerns notice provisions, the introduction of the serious harm element was intended to encourage the early resolution and settlement of issues between the parties. In *Hossain v Ali*, Judge Clayton described the purpose of the introduction of the serious harm element thus:

"The purpose of the new regime is to reduce the number of claims going to trial, and in particular to remove the automatic right of plaintiffs to have a court determine whether or not they have been defamed."

Although the introduction of the serious harm element may be intended to address trivial or marginal defamation cases at the outset, it is not confined only to such cases. It should be noted that the statutory provision introducing the serious harm element makes no express reference to frivolous or trivial defamation claims. The introduction of the element of serious harm to reputation into the cause of action for defamation has increased the burden on plaintiffs generally by requiring them to adduce evidence as to the impact of the defamatory publication on their reputation. The introduction of serious harm to reputation as an element of the cause of action in defamation is a significant reform. It creates an additional element to the cause of action in defamation where the elements at common law were well-settled. It does not permit a "business as usual" approach to defamation."

1. As to the evidence which is generally expected to be led, Dr Stephen Bogle and Dr Bobby Lindsay (at p. 23) summarise the position in the United Kingdom as follows:

"Demonstrating harm is a complex and highly contextualised endeavour, which requires diligent case planning by the claimant and careful consideration by the court. It also requires a defendant to be vigilant in reviewing the claimant's case, ensuring that the claim is properly particularised and that a causal chain is established, and that harm is demonstrated. The High Court has taken very seriously the need to display harm. Thus, the emphasis has changed considerably with the introduction of s 1 (1) in England & Wales whereby the claimant needs to establish serious harm. Yet it must be borne in mind that within an adversarial system this still places a requirement on

the defendant to scrutinise and assess the evidence being presented and ensure the court is mindful of weaknesses within the claimant's argument."

1. The first step is the analysis of the evidence. Findings may then be made as to the nature and extent of publication, the trajectory and duration of the harm with regard to the specificity of the matter complained of, and the severity of imputations pleaded, whether the evidence of harm is "serious" and causation issues.

The evidence

1. The plaintiff relied upon the following affidavit evidence:

1. Affidavit of Emma Massound 14 August 2024;
2. Affidavit of Rev Anthony Morgan 14 August 2024;
3. Affidavit of Matthew Harte 15 August 2024;
4. Affidavit of Anthony Hadchiti 15 August 2024;
5. Affidavit of Rached Ammoun 26 September 2024;
6. Affidavit of Nazan Behdject 26 September 2024;
7. Affidavit of Rached Ammoun 27 September 2024;
8. Affidavit of Azam Dabbagh 27 September 2024;
9. Affidavit of Nazan Behdjet 27 September 2024;
10. Affidavit of Ned Mannoun 14 August 2024.

1. The defendant relied upon the following affidavit evidence:

1. Affidavit of Ilia Spasevski 20 September 2024;
2. Affidavit of Bruce Anthony Missen 23 September 2024;
3. Affidavit of Paul Svilans 20 September 2024.

1. Three of the plaintiff's witnesses were cross-examined: the plaintiff, Mr Matthew Harte and Mr Anthony Hadchiti. They are the only persons called as witnesses who read the matter complained of; the remaining deponents provided evidence of the plaintiff's good reputation in a number of sectors. That evidence is unchallenged.
2. Mr Spasevski, the administrator of the site, was also cross-examined.
3. Before considering the evidence of the plaintiff, Mr Harte and Mr Hadchiti, I set out background material which is not in dispute, as it provides a framework for consideration of the oral evidence. This is as follows:

1. A short description of the public Facebook group "Liverpool Council Shenanigans" ("the Group" or "Shenanigans");
2. The post made by Mr Spasevski to which the matter complained of was a comment in reply; and
3. The way that Facebook posts and comments are loaded, particularly in terms of visibility, and the degree to which Facebook records of "likes" and other records of site visits are of assistance.

Publication on the "Liverpool Council Shenanigans" group Facebook page

1. Where a publication is made on social media, the presentation of the Facebook page in terms of its self-description, including the page name, the "About" section which describes the site's interests and the profile and cover photos are important as to context.
2. As the name of the Group ("Liverpool Council Shenanigans") and its "About" section (which defines what "shenanigans" are) make clear, this is a page for followers with a negative opinion of the Liverpool Council and those involved in its management, which it is agreed would include the plaintiff. As is summarised below, this was the very reason why the two witnesses called for the plaintiff, Mr Harte and Mr Hadchiti, were in fact reading this Facebook page, which how they came to read the matter complained of.
3. At the time of publication, the site had about 250 followers. There is no precise evidence of the time and date of the matter complained of coming to the attention of the plaintiff, but it is more likely than not that it was published on or around 25 November 2022. As to the duration of publication, it is not in dispute that it remained on Facebook until shortly before trial.
4. There is also no precise information as to how many persons saw the matter complained of, but the plaintiff has attached a screenshot to his affidavit ("Annexure A") indicating there were 14 comments to the post and one "share" of Mr Spasevski's post at the time that it was captured (14 August 2024), the "newest" of which was the matter complained of, which has one "like" and three comments. By 14 August 2024, however, a search for the word "crim" on the "Shenanig" site was necessary to locate the matter complained of (see the search note on the left hand side of Annexure A), which is relevant as to its visibility.

Publication of the matter as a reply to another post

1. The post by Mr Spasevski, to which the matter complained of was a response, did not refer to the plaintiff or to the subject of the matter complained of. As is set out in the summary of his evidence below, Mr Spasevski was at the council waiting for a decision by the council as to who the new chief executive officer would be. It was in these circumstances that he posted the following:

"3 hours in and we still don't know who the new CEO is.

What we do now:

Ned declared he knows the candidates personally

The Deputy Mayor declares he knows two of them personally

Things unlikely to improve at Liverpool"

1. "Ned" is the plaintiff, but this is the sole factual link between this post and the matter complained of, which was posted as a "reply to it".

The difference between a "post" and a "reply" on Facebook

1. Although the matter complained was at times referred to as a "post" on Facebook during the hearing, it was in fact a comment on a post published by the site administrator, Mr Spasevski. This is an important distinction to draw, as comments to posts do not have the same visibility as a post would have, as the Facebook material attached to the affidavit of Mr Svilans sets out.
2. Facebook does not accord all comments and replies the same treatment as each other. Both parties referred me to Mr Svilans' evidence on these issues, which was as follows:
 1. The visibility of a comment depends on whether Facebook was accessed on a mobile phone or a computer. Where it is accessed by iPhone, only the primary post is displayed, although with a speech bubble icon containing the number of comments; a user must click on this bubble to read the comments. This can be seen in Exhibit E to Mr Svilans' affidavit, which is the mobile phone screenshot of Mr Spasevski to which the matter complained of replied; the matter complained of is not visible unless the user clicks on the number. If the Facebook page is accessed on a computer (see Exhibit G to Mr Svilans' affidavit), a small selection of comments is displayed, but not all. To see other comments the user must select the button "view more comments"; to see all comments, the user must select the button "all comments".
 2. Comments on Facebook are not displayed in chronological order, as its default setting is "most relevant". This gives preference to users who attract the most likes and replies and/or are verified and/or are friends or frequent visitors (Facebook Help Centre, "What Most Relevant means on a Facebook Page post", Exhibit D to Mr Svilans' affidavit). It is possible for the Page manager to change the order of comments on a post, but there is no evidence that this was done.

1. Whether a mobile phone or computer is used, if a reader wants to access the comments made, a further step of pressing a link to get to the comments is required. This is of relevance when considering the evidence of how Mr Harte and Mr Hadchiti came to be able to read the matter complained of, in that, for professional reasons, they were monitoring the Group regularly, and read all new posts and comments since their previous visit (affidavit of Mr Harte, paragraphs 3 – 5; affidavit of Mr Hadchiti, paragraph 5).

The plaintiff's evidence

1. The plaintiff met the defendant in about 2007 or 2008, at a time when the plaintiff was running for election as a Liberal party candidate (and as Mayor). He was elected in September 2008 as a counsellor, but not as mayor. In September 2010 he was elected deputy mayor and, on 8 September 2012, as mayor. Over this period, and in the elections in 2008 and 2012, the defendant was "part of my team as a Liberal" (paragraph 16 of the plaintiff's affidavit). The defendant was, for some of this period of time, the plaintiff's accountant. After a few years, the relationship soured.
2. The plaintiff did not contest the council election in September 2016 and between 2016 and 2020 was involved in a range of business activities at a very senior level. He then resumed his political activities and was elected Mayor in December 2021. The defendant was a candidate in a preselection in 2021 and ran against him.
3. The plaintiff set out in his affidavit evidence that he first saw the matter complained of on or about 25 November 2022 when he was contacted by three people who drew it to his attention, namely Tony Hadchiti, Mathew Harte and Lauren Myers. He described these conversations as follows:
 1. Mr Hadchiti, a personal friend as well as a political ally, showed him the matter complained of and said: "Have you seen what Ristevski has said about you?", adding "it's very bad, he's crossed the line this time." Some weeks later, Mr Hadchiti referred to the post again, asking the plaintiff: "Is it true?". The plaintiff accessed some documents on his phone relating to the sale of his business and showed them to Mr Hadchiti, who responded "okay".
 2. Lauren Myers, his office assistant, approached him shortly after the post's publication and asked: "Did you hear what Ristevski has said about you?" Some days later, she approached the plaintiff a second time and said:

"All the directors are asking whether I have seen that post, and whether it is true. Other staff have been asking me about it as well, and I've been hearing people talk amongst themselves about it." (Paragraph 33)

1. Matthew Harte, who had been the plaintiff's campaign manager since 2021, asked whether he had seen what the defendant had written about him online, adding that "I've been getting calls about it from people asking if it's true". The plaintiff said that he had several further calls from Mr Harte about the post, indicating that he had been contacted by one or more

persons about its contents, and asking whether the allegations were true. He says that Matthew told him that "others were concerned about being associated with me because of the allegations in the post" (paragraph 37).

1. It was put to the plaintiff in cross-examination that there was not merely rivalry between himself and the defendant, but "bad blood" of very long standing. The plaintiff gave combative replies to these questions, namely that this would "depend on the definition of rivalry" and asking rhetorically "what is bad blood?". These answers are representative of his style of responding to questions in cross-examination generally.
2. The first incident was a relatively trivial matter, namely a complaint by the defendant about there being no pork sausages at council social functions. However the situation deteriorated and, in November 2015, the plaintiff made complaints about the defendant to the Liberal Party. The plaintiff was asked if he had told the Liberal party headquarters that the defendant had been photographed with a drug dealer. He responded to this and other questions of a similar nature by saying "I would have to see that letter". The plaintiff added that in terms of preoccupations, the defendant "doesn't occupy much headspace". He acknowledged that the defendant had run against him in a preselection in 2021 and, when asked if the defendant was "generally known" as a political opponent, replied that it was "generally known he has a dislike towards me."
3. The plaintiff's evidence about having to show Mr Hadchiti documents before he was convinced did not appear in Mr Hadchiti's statement; furthermore, Mr Hadchiti was quite definite that he did not think less of the plaintiff as a result and that he did not suggest this to the plaintiff. When the plaintiff was asked about these apparent inconsistencies, he replied "you'd have to ask him".
4. The plaintiff was asked about Mr Harte's different version of a conversation in which he referred to telephone calls from five or six Liberal Party members (whose name he cannot recall) over a week, leading to only one conversation with the plaintiff "the next time" (paragraph 13) that Mr Harte saw him. The plaintiff referred in his affidavit to "several subsequent calls" over an unspecified period from Mr Harte, referring to "others" and "people" (not Liberal Party members) being concerned about associating with the plaintiff. The plaintiff disputed challenges to his recollection of the conversational exchanges he had with Mr Harte. He also disputed that Mr Harte, knowing of the bad blood between himself and the defendant, would not have taken the matter complained of seriously.
5. It was put to the plaintiff that the conversation he described having with Ms Myers had not happened and that the reason she had not been called to give evidence was that he knew she would not support his version of events. The plaintiff replied that Ms Myers "has challenges with mental health issues – I'll leave it at that. I am not free to discuss it".

The evidence of Matthew Harte

1. Mr Harte is the plaintiff's political campaign manager. In his affidavit sworn on 15 August 2024, he sets out that he met the plaintiff in December 2020. Since that time, his relationship with the plaintiff has been "professional", in that he was retained by the plaintiff at that time to assist with his political campaigns, a position he continues to hold up to the present. He has also assisted the plaintiff's wife in relation to a 2023 State election campaign.
2. Part of Mr Harte's work is to monitor online activity relating to the plaintiff, including social media, and it was in these circumstances that he became aware, in about September 2022, of a Facebook page called "Liverpool Council Shenanigans".
3. In late November or early December 2022, Mr Harte saw the defendant's post and sent a screenshot of it to the plaintiff (Mr Harte sets out in his affidavit that this screenshot cannot be located). He asked the plaintiff if he had seen what the defendant had written about him online and asked the question "it's not right, is it?", to which the plaintiff replied "it's all rubbish".
4. Mr Harte knew at the time that the defendant was the plaintiff's former accountant. He was aware that there was what he called "some political competition" between the plaintiff and defendant. He agreed that the Facebook page of the group was highly critical, indeed biased, and that it criticised the Liberal party, the council and the plaintiff in very strident terms. He agreed that this was in fact why he was reading it in the first place. It was his job to keep a keen eye on the plaintiff's political trajectory and he was also for some time working for the plaintiff's wife.
5. When asked why he would have had doubts about the plaintiff, Mr Harte said that, as part of his preparation for work on the plaintiff's campaign, he had researched the defendant and discovered that he was an experienced accountant, with about 20 years in practice. He therefore considered that the defendant was "a reputable person whose words carried weight". It was in those circumstances that he "became apprehensive about continuing my work with the plaintiff, and the post left a lingering doubt in my mind about him" (affidavit, paragraph 9). As what the defendant had said was discordant with his own experiences of the plaintiff, he decided to continue his work with the plaintiff.
6. It was put to Mr Harte that his claim is that the defendant was considered to be a responsible person were not true. Mr Harte acknowledged that he had never met the defendant and said that, in those circumstances, he "didn't make a judgement call" about the sort of person the defendant was.
7. Mr Harte's evidence that he received phone calls from about five or six people about the post in the weeks following its publication is even vaguer than the plaintiff's evidence on this topic. He said that these people were members of the Liberal party, but could not recall the names. He responded to these calls by saying "it's nonsense".

8. One of the callers whose name Mr Harte could not recall said:

"People are becoming concerned about what was said about you by Ristevski. I've received quite a few calls about it, asking if it's true and some have warned me about associating with you." (Affidavit, paragraph 13)

1. In cross-examination, contrary to his earlier evidence that he considered the defendant to be a reputable person, Mr Harte was dismissive of the defendant's reputation generally, noting the plaintiff's resounding victory against him at the 2021 preselection. It was put to him that he did not take the defendant's post seriously if this were the case, to which he responded with the concession that "I believed [the plaintiff]". However, when it was put to him that the defendant's "crim" and "grub" post was just another allegation of the kind routine for politics at this level, Mr Harte returned to his claim that the defendant was "a registered accountant, a former councillor, a highly regarded individual" and that as a result he did "consider" what he said, particularly when one of his callers "warned" him about associating with the plaintiff.

Mr Anthony Hadchiti

1. Anthony Hadchiti has known the plaintiff about 16 years, from a time when the plaintiff was a candidate in the local government elections for Liverpool Council. They are both members of the Liberal party and were on Council together until Mr Hadchiti ceased being a Liverpool counsellor in December 2021. He is currently an employee at the Council. He has continued his relationship with the plaintiff, who over the years has come to be a friend.
2. Mr Hadchiti has been aware of the "Liverpool Council Shenanigans" Facebook page for some years. Although it initially had few followers, he had begun checking the page every day or second day for new posts, as the page often published material that was critical of the Liberal party in Liverpool Council. He would not only read the posts but also check all the comments by pressing the "all comments" tab. It was in these circumstances that he saw the matter complained of. He immediately sent a screenshot to the plaintiff.
3. In the week following, two or three "local" people he "ran into on the street" (affidavit, paragraph 8) spoke to him about the post. They made comments to the effect of: "Have you seen what your mate's done with the charity?" and: "What did Ned do with the million dollars when he sold the business?" These people also asked him whether it was true to which he replied: "I don't think Ned would do that" (paragraph 10).
4. Mr Hadchiti was as unable to remember the names of any of the persons he ran into in the street as Mr Harte had been in relation to the people who telephoned him. He said in his affidavit that he was sure they were not Councillors, and that they were "locals", and was able to add, when I inquired about gender, that they were male, but that was the best he could do.

5. It was put to Mr Hadchiti that he did not take the publication seriously. He agreed that he had seen no evidence or background information for such an allegation, and he agreed that the defendant was "not someone you could rely on".
6. Mr Hadchiti did not give evidence of having had the conversations with the plaintiff that the plaintiff had outlined in his affidavit and oral evidence. Since the plaintiff claimed that this involved showing Mr Hadchiti documents that proved his innocence, which would have been a significant step to take, this must reflect poorly on the credit of the plaintiff. Mr Hadchiti's evidence was consistently that he did not think less of the plaintiff, which would be inconsistent with him having any such discussion with the plaintiff.

Other evidence

1. The remainder of the plaintiff's affidavit evidence relates to his good reputation in the community. These witnesses were not required for cross-examination. None of these witnesses had seen the matter complained of.

Evidence of the grapevine effect

1. The "grapevine effect" is a metaphor for the potential for repetition of the defamatory statements to others who repeated further. The only evidence (as opposed to inference) on this issue is the evidence of the plaintiff, Mr Harte and Mr Hachiti and, if I accept it, Ms Myers.
2. "Platform of facts" evidence (McDonald v Dods [2017] VSCA 129 at [30]; Poniatowska v Channel Seven Sydney Pty Ltd (No 4) [2016] SASC 137 at [414] – [415]) is generally used to establish that the matter complained of must have been read by somebody even though there is little or no evidence of this. It should be treated with caution in the determination of serious harm as it is essentially inference evidence proving publication. However, any "platform of facts" evidence would, if relied upon, be of a de minimis nature (Poniatowska v Channel Seven Sydney Pty Ltd (No 4) at [415]).

The defendant's evidence: Mr Spasevski

1. The defendant called Mr Spasevski, the site administrator. He gave evidence in affidavit form concerning the setting up of the Facebook page and the extent of publication, about both of which he appeared to know very little.
2. During cross-examination, Mr Spasevski's unbridled hostility to the plaintiff was apparent, but incoherent, and his evidence was difficult to follow. He referred to medical problems resulting in about ten years of absence from his role as administrator before returning in 2022. He described his reasons for involvement in the site as being "I'm interested, I'm there, let [sic] people know". Anyone could make a comment; it was a "free page". His description of the kind of comments published confirmed the impression that this was a site for allegations and "zingers", and not for investigations of any serious kind.

3. The parties provided me with an outline of submissions, and I briefly note some of their main points.

The plaintiff's submissions

1. Mr Smark principally points to the gravity and specificity of the imputation, noting that not in dispute that the imputation carried by the matter complained of describes dishonest conduct of a serious nature, if not outright criminality, particularly when levelled at a person holding a high political office such as being the mayor.
2. How specific are the allegations? Mr Smark SC submits that they are "very specific", pointing to the following:
 1. The opening words are that the plaintiff is a "crim" who has "fraudulently" taken advantage of a charity.
 2. It is a substantial fraud in that \$1 million is involved.
 3. It involves a party deserving of better treatment, namely a charity.
 4. The precise nature of the fraudulent act is identified in that it is asserted the plaintiff inflated his financials to sell his business to the charity for \$1 million, when the business was "not worth that much".
 5. The loss is substantial in that the whole of the \$1 million has been lost by the charity.
1. Mr Smark submits that the causation of the harm is the inherent tendency of the words to cause serious harm, the actual impact as demonstrated by the evidence of the plaintiff and Mr Harte and an inference that the publication was circulated to a wider readership (which evidence he asks the court to accept cannot be obtained by the plaintiff without difficulty), when added together, mean that serious harm is established.
2. Mr Smark challenges the defendant's claim that the matter complained of was only published/grapevined to persons who already thought badly of him (namely the readers of "Shenanigans" and their associates or friends), and that the imputation related to the political sector of his reputation. Whatever bad reputation the plaintiff may have had with the followers on this Facebook page, the distinct and particularly serious nature of such an allegation of criminality is not only "new" (Cadwalladr at [54]) but an allegation of a readily identifiable and potentially criminal act which falls outside the political sector of his reputation.
3. Mr Smark emphasises that it is the degree of specificity in the allegations which is the key issue in determining serious harm, regardless of the audience to whom it was published, relying upon the following passages from Cadwalladr at [55] – [56]:

"[55] Where a defendant publishes a specific allegation of a seriously damaging kind in circumstances which would ordinarily lead to an inference of serious reputational harm the fact, if it be so, that those to whom that allegation is published are politically opposed to the claimant or dislike him or have a generally low opinion of him for some other reason is not a proper basis on which to reject that inference. Such an approach would be at odds with well-established and salutary principles. A person's reputation is not a simple question of whether they are liked or disliked. Nor is reputation a single indivisible whole, it is composed of sectors. At common law it is clear that evidence of bad reputation must be confined to the sector of the claimant's character relevant to the libel: see *Gatley on Libel & Slander*, 13th ed (2022), at para 34-083 and cases there cited. If it were otherwise a person who was widely disliked or had a bad reputation in one sector of their reputation would find it hard to succeed in a defamation claim whatever grave falsehood was published about them. That would be unprincipled and contrary to the public interest.

[56] It is for this reason, I believe, that judges of the Media and Communications List have consistently, and in my view correctly, rejected arguments to the effect that a serious allegation of specific wrongdoing does not cause serious harm if the audience dislikes the claimant for some other reason. In *Barron v Collins* [2017] EWHC 162 (QB) at [56] I held that it does not follow from the fact that a publishee is a political opponent of the claimant, that they will think no worse of the claimant if told that he or she has covered up sexual abuse. In *Monroe v Hopkins* [2017] 4 WLR 68 at para 71(8) I accepted the submission that "If someone is hated for their sexuality or their left-wing views, that does not mean they cannot be libelled by being accused of condoning the vandalism of a war memorial". In *Turley v Unite the Union* [2019] EWHC 3547 (QB) the allegation was one of dishonest submission of an application to join the union at a concessionary rate (see para 100). At para 114(iii), Nicklin J observed that proof that readers of the offending words "held some pre-existing hostility towards the claimant" on political grounds "cannot lead to the conclusion that such a reader would discount what they read about the claimant". The point is familiar to judges and practitioners in this field. It was made to Steyn J by the claimant's counsel at the trial and it does not appear to have been in dispute. In *Riley v Sivier* [2023] EMLR 6 at paras 114–115, a judgment handed down the month after her decision in this case, Steyn J herself cited and applied the reasoning in *Monroe* at para 71(8)."

1. Where a specific allegation of such a seriously damaging kind is made, the fact that the recipients are politically opposed or already dislike the plaintiff does not mean that serious harm has not occurred. Mr Smark SC emphasized that, in *Monroe v Hopkins* [2017] EWHC 433; [2017] 4 WLR 68 at [8], Warby J stated:

"...if someone is hated for their sexuality or their left-wing views, that does not mean they cannot be libelled by being accused of condoning the vandalism of a war memorial. It can add to the list of reasons to revile her."

1. Whether or not the plaintiff has a bad reputation with those persons accessing the page or discussing it with third parties, the plaintiff's reputation would be further damaged by reason of the percolation out to others which, if I accept the evidence of the plaintiff and his

witnesses, is what occurred. The onus lies on the defendant to establish bad reputation, and Mr Smark submits that the defendant's evidence does not go so far as to establish that those critical of the plaintiff considered he was a criminal, much less a criminal who would defraud a charity. The evidence called by the defendant is furthermore restricted only to members of the Facebook page, as opposed to readers holding different views of the plaintiff, who may nevertheless access the page for other reasons (which is how Mr Harte and Mr Hadchiti came to see the matter complained of) or hear on the grapevine.

The defendant's submissions

1. The defendant submits that if there is harm, serious harm is not established because:
1. The "specificity" of the allegations present in Cadwalladr is wholly absent here. Ms Cadwalladr was giving a carefully drafted TED talk (the link in the tweet she published), not calling someone a "crim" in a couple of sentences published on a "whinge" website. The matter complained of gives no names, no dates and no sources for this vaguely described and sarcastically worded allegation.
2. There is no evidence of any further spread of the publication beyond the month or even the week of publication and any possibility of harm is long gone. All that the plaintiff is left with is inferences. While the imputation is serious, serious harm cannot be proved "only by reference to the inherent tendency of the words": *Lachaux* at [16].
3. The extent of publication is limited, even on the plaintiff's case at its highest.
4. The plaintiff's reliance on the grapevine effect of "hundreds" of persons is misconceived. Such an inference cannot be drawn in the absence of an evidentiary basis to assert something like this actually occurred.
5. The Facebook page was devoted to "shenanigans", as opposed to being a credible or reliable source of information such as Ms Cadwalladr. An allegation contained in a couple of sentences in a Facebook reply on a "shenanigans" website about an unnamed charity, on an undated occasion, being accused on unknown data of a million dollar fraud would not, without more, be taken seriously. Care should be taken not to have regard to the defendant's occupation as an accountant as there is no evidence that any readers would have recognised him as such.
6. Social media is an ephemeral form of media where, although in the context of defamatory meaning, courts have been satisfied that readers look at posts and pass on without pausing for reflection and that their reaction is impressionistic. Social media's capacity for fake news and false allegations is notorious. The matter complained of was a small drop in the ocean of negative content concerning the plaintiff on this Facebook page. The plaintiff was in politics, where allegations abound generally, and not merely in relation to the political sector of their reputation.

7. This is a small-scale publication where the identity of the recipients would be important. The absence of evidence of those persons forming a bad opinion of the plaintiff is a factor which tends against the finding of serious harm: *ZC v Royal Free London NHS Foundation Trust* [2019] EWHC 2040 (QB) at [114].
8. The plaintiff's prior reputation in the relevant sector is asserted to be bad. In those circumstances, a person will struggle to prove that the publication caused serious harm: *Selkirk v Wyatt* at [98]. The affidavits of Mr Spasevski and Mr Missen describe this in detail. In addition, those who followed the website would be aware of allegations of similar seriousness about him, such as claims that he wanted to use council funds to pay private legal advice, referring to him as a "bad seed" and to "dirty laundry" and calls for investigation. It is submitted that the plaintiff would need to establish not only that his reputation was worse, but seriously worse, as a result of the matter complained of, and that this has not been done.
1. I have taken these submissions into account when making the necessary findings of fact.
2. One issue on which I was not addressed was whether the invitation to "sue me" was a factor of any relevance. According to the Urban Dictionary, this "so sue me" phrase/sentence was commonly used in the 1990s by students as a taunt to large corporations. Both counsel assured me that no such claim was or would be made.

The factual findings to make

1. The issues relevant to the determination of serious harm will relate to:
 1. The extent of publication.
 2. The duration and severity of the harm.
 3. Consideration of the evidence of the plaintiff and his witnesses as in terms of credibility.
 4. The degree to which inference may be relied upon.
 5. Harm issues, including specificity and seriousness of the imputation: is it sufficiently "serious"?
 6. Causation.

Evidence of the extent of publication

1. In *Lachaux* (at [16]), Lord Sumption stated that a statement may not be defamatory, even if it amounts to "a grave allegation against the claimant", if (for example) it is "published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed":

"16. Finally, if serious harm can be demonstrated only by reference to the inherent tendency of the words, it is difficult to see that any substantial change to the law of defamation has been achieved by what was evidently intended as a significant amendment. The main reason why harm which was less than "serious" had given rise to liability before the Act was that damage to reputation was presumed from the words alone and might therefore be very different from any damage which could be established in fact. If, as Ms Page submits, the presumption still works in that way, then this anomaly has been carried through into the Act. Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed. The law's traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that section 1 was intended to make them part of the test of the defamatory character of the statement."

1. These observations have, however, been departed from to a degree, in that courts have since stated that proof of serious harm is not a "numbers game" (*Coker v Nwakanma* [2021] EWHC 1011 (QB) at [33] per Saini J), in that serious harm may be established even if there is publication to only one person (*Dhir v Saddler* [2018] 4 WLR 1 at [55]). In *George v Cannell* [2021] EWHC 2988 (QB) at [118], it was emphasized that the quality of the publications, not their quantity, is the key:

"In respect of the extent of publication, seriousness of harm caused is not merely an arithmetical test: such assessment is not simply a "numbers game": see *Dhir v Saddler* [2017] EWHC 3155 (QB); [2018] 4 W.L.R.1 at [55] (this was pre-Lachaux). In *Hodges v Naish* [2021] EWHC 1805 (QB) Richard Parkes QC considered serious harm in the context of a claim in slander at [144] - [150]. He considered Nicklin J's conclusion in *Dhir* in which Nicklin J concluded that the kind of limited harm which will usually be caused by the very limited publication of a slander could still cause serious harm as understood by s.1. Notably, Nicklin J emphasised that it is the "quality of the publishees, not their quantity, that is likely to determine the issue of serious harm in cases involving relatively small-scale publication": [55]. Richard Parkes QC endorsed these propositions. At [150] he stated that the grapevine effect might also be highly relevant to serious harm."

1. The extent of publication is not determinative, but it is an important factor in the assessment of the likelihood of serious harm.
2. The matter complained of was published to a handful of site followers and readers and those few who can be identified clearly already had a low opinion of his conduct generally. There is no evidence of "hundreds" of persons, or even tens, accessing the Shenanigans page. While the post remained on the Facebook page until shortly before this hearing, it would not have been accessible unless a specific search was made. There is no evidence anyone talked about it or raised it with the plaintiff or his campaign manager or his friend Mr Hadchiti in the following months and in those circumstances, any harm would have been of very brief duration.

Duration and severity

1. The evidence of extent of severity and duration of the publication comes from the following sources:
 1. The plaintiff and his two witnesses (and, if I were to accept it, Ms Myers).
 2. The defendant.
 3. The grapevine effect (George v Cannell and LCA Jobs Limited at [118]).
 4. Readers able to be identified by "likes" and responses, or other technology-based "platform of facts".
1. The plaintiff has led evidence as follows:
 1. Two of the plaintiff's witnesses (Mr Matthew Harte and Mr Anthony Hadchiti) have deposed to having read the matter on the group Facebook page in November (although Mr Harte said in his affidavit it could also have been early December, this appears to be unlikely).
 2. The plaintiff, in his affidavit, refers to a third person, namely a Ms Lauren Myers, telling him that "all the directors" and "other staff" had contacted her asking if the allegations were true, although Ms Myers has not given evidence to this effect; and
 3. As is set out above, the plaintiff, Mr Harte and Mr Hadchiti gave evidence that persons contacting them indicated that they had read the matter complained of, but they were unable to remember who they were.
 4. The rest of the evidence is inference, but there is strong reliance on the asserted specificity of the allegations and the seriousness of the imputation agreed to have been conveyed.
1. The defendant's evidence established that there were other readers who read the matter complained of, all of whom already despised the plaintiff:
 1. Mr Spasevski, who in fact responded to the plaintiff in his reply post by saying "we double-dare you".
 2. A Facebook user named Tony Madden who also wrote a reply ("Peter Ristevski so did you get your defamation court proceedings yet or still waiting", followed by a "laughing" emoji).
 3. A person who "liked" the matter and another person who "shared" it (although there could be some overlap in that one of these persons could have done both, plus been a reader).
 4. As to "platform of facts" evidence, the screenshots attached to the affidavit of Mr Svilans of 20 September 2024 captured only nine comments, but the evidence suggests that this is because some of the comments had been removed. The only comments referring to the matter complained of are those referred to above.

1. The adverb "likely" features prominently in the plaintiff's particularisation of the nature and extent of publication. Beyond the specific evidence of the witnesses who provided statements, the plaintiff provided the following particulars by way of inference:

"a. It was likely read by hundreds of people;

- b. The form of publication meant that it was likely that it was shared online to people beyond its initial readership, so as to give rise to grapevine republication;"

1. The Internet is a vast resource, with the capacity for publications to be read by millions – or by a bare handful of people. It is not enough for a publication to be uploaded onto the internet, even on a frequently accessed page. In *Lorbek v King* [2022] VSC 218, about 1500 people accessed the plaintiffs' business website each day, but there was no electronic evidence of anyone having clicked onto the Google reviews the subject of the defamation proceedings. McDonald J concluded that the most that he could find was that a small number of persons must have read and access the posts but that "beyond this finding there is no platform of facts on which an inference can be drawn as to the extent of publication" (at [71]; see also *Defteros v Google LLC* [2021] VSCA 167 at [245] – [257] in relation to a triviality defence where most of the readers were likely to have been the lawyers retained by the parties).

The credibility of the plaintiff and his witnesses

1. Given the already limited evidence of extent of publication and duration of damage as set out above, the question of whether I accept the evidence of the plaintiff and his witnesses as to what harm, if any, was caused becomes a crucial issue. I have been guided as to credibility findings generally by the observations of Tugendhat J in *Thornton v Telegraph Media Group Ltd (Rev 1)* [2011] EWHC 1884 (QB) at [73] – [74].
2. Even if I were to accept the evidence of the plaintiff and his witnesses uncritically, the quality of their evidence is poor. The best they can point to is that unknown persons expressed reservations about the plaintiff for about a week or two after the matter complained of was published. There is no evidence of any ongoing discussion in the months that followed, or at the time of these proceedings being commenced, or at the time of these proceedings. While the matter remained online, it could not be located unless it was specifically searched for, as the search carried out by the plaintiff demonstrates.
3. However, there are compelling reasons why I should not accept the evidence of Mr Harte and Mr Hadchiti. They were reading posts on this site only because it was part of their duties to keep an eye on the defendant and his fellow troublemakers. They were there to help the plaintiff. Mr Hadchiti conceded that reading it made no difference to his opinion about the plaintiff. Mr Harte changed his evidence on this topic so often that his opinion is valueless. Their evidence cannot demonstrate serious harm.

4. The defendant asks me to draw an inference from the failure of the plaintiff to call Ms Myers. While I am not prepared to do so, in that hearsay evidence of this kind is routinely given in defamation proceedings, the plaintiff's attack on her credit in the witness box must cast doubt on the veracity of the statements which he attributes to her.
5. The plaintiff's reputation would already have been low with the persons who followed or read the "Shenanigans" pages sufficiently closely to locate the defendant's post.
6. That leaves the plaintiff with a case built almost entirely on the inference that one or more persons who knew him from a sector where he had a good reputation either read the matter complained of or heard about it on the grapevine in circumstances where the harm that was done to the plaintiff's reputation was such as to warrant the use of the adjective "serious".

Inference

1. The next issue is the degree to which serious harm findings may arise where the evidence is largely inferential.
2. In *Sivananthan v Vasikaran* [2022] EWHC 2938 (KB) at [53], Collins Rice J explained how largely inferential cases face additional difficulties in terms of establishing serious harm:

"A purely inferential case... is not an alternative to an evidential process for establishing serious harm – it must be an evidential process for establishing serious harm. There is a difference between inference and speculation. The components of an inferential case must themselves be sufficiently evidenced and/or inherently probable to be capable of adding up to something which discharges a claimant's burden."

1. Professor Rolph adds that "the need for direct evidence is increased and the scope for relying solely on inference to establish serious harm is reduced" (at [9.80], citing *Spicer v Commissioner of Police for the Metropolis* [2021] EWHC 1099 (QB) at [372] per Julian Knowles J).
2. It was no doubt with these principles in mind that, in *Greenwich v Latham* at [239], O'Callaghan J emphasised that the inherent tendency of the words was insufficient in that there must be an actual impact shown. The nature of the statement is not the touchstone:

"239. The question of whether a statement has caused or is likely to cause serious reputational harm is a matter 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': *Lachaux v Independent Print Ltd* [2019] UKSC 27; [2020] A.C. 612 at [14]. It is the impact of the publication that is the touchstone, not the nature of the statement (*Banks v Cadwalladr* [2023] EWCA Civ 219; [2023] K.B. 524 . at [43]).

1. I agree with Professor Rolph's observation that, while inference still has a role to play, "the circumstances in which a plaintiff should be able to establish serious harm to reputation purely by inference are, and should be, rare" (at [9.80], citing *Webb v Jones* [2021] EWHC 1618 (QB) at [63] per Griffiths J) and are generally restricted to mass media cases where very grave allegations, such as paedophilia or terrorism, are made (Rolph at p 261).
2. What are the inferences I am asked to draw here? Mr Smark SC points not only to the evidence of Mr Hadchiti and Mr Harte, as well as to the nature of social media and the grapevine effect, but asks me to accept the inference (in paragraph 4 of the statement of claim) that the matter complained of was "likely read by hundreds of people" including a segment of readers who were not followers of the Liverpool Council Shenanigans page (submissions, paragraph 21).
3. I consider such inferences to be unreasonable, and that they should not be drawn. Even on the evidence given for the plaintiff, the period of time over which the matter complained of was referred to was limited to the days following the publication (in relation to Ms Myers) or to the week following (Mr Harte at paragraph 10 of his affidavit and Mr Hadchiti at paragraph 8). Although described as matters of concern, none of these conversations were sufficiently memorable for Mr Harte or Mr Hadchiti to recall the names of any of the persons they spoke to. The statement attributed to Ms Myers does refer to "directors" and "staff" but for the reasons already given, I am not prepared to accept the plaintiff's evidence about what she is claimed to have said. There is no suggestion of any further event giving rise to an inference that there was any kind of ongoing spread of the publication.

"Harm"

1. The next issue is the question of what amounts to "harm" and the period over which the harm should be demonstrated.
2. The plaintiff has the onus of establishing serious harm but the defendant bears the onus if he or she seeks to rely upon bad reputation on the question of serious harm: *Peros* (No 3) at [69]. (I note the observations of Brereton JA in *Rader* at [35] – [40] as to the inferences which a court may draw when a plaintiff delays commencement of proceedings, but I have dealt with this as a credit issue).
3. Two types of harm are contemplated, namely past and future (which are on the same footing: *Lachaux* at 623 – 624). Whether the harm is past, future or both should be identified (*Rader* at [30] – [40]) and the subject of evidence; unfortunately, that has not occurred here.
4. In some cases, the factual evidence of the harm may continue to spread because of the sheer size of the publication (as was the case in *Greenwich v Latham* at [175] – [190(a)]). However, even in mass media publications, the court may consider that, in the absence of evidence of further readership of any kind, that the harm in question had stopped.

5. This is what occurred in *Banks v Cadwalladr* [2023] 3 WLR 167; [2023] KB 524 ("Cadwalladr"). The matters complained of in Cadwalladr were a TED talk and a tweet attaching a link to the talk. In terms of content and research, these could not have been more different to the matter complained of in these proceedings. Ms Cadwalladr, a Pulitzer Prize-winning journalist, made specific statements about Mr Banks in the course of a lengthy TED talk, TED talks being a highly-respected website featuring speeches by hundreds of world leaders, scientists and other luminaries. However, the harm was accepted by the courts, both at first instance and on appeal, to have stopped by a certain point. For this reason, Mr Banks's claim was restricted to publications before a specific date because there was no direct evidence of publication, in terms of metadata or otherwise (at [70]).
6. The allegations against Mr Banks were published to a mass audience and remained newsworthy for a lengthy period. In the present case, the evidence consists of remarks being made which led to the conversations the plaintiff and his witnesses had during that week, or into the following week. Applying the approach taken in Cadwalladr, there being no evidence of any ongoing discussions or harm during that time, the duration of the serious harm would be a few weeks at most. Harm to reputation for such a short period would require evidence of a more compelling nature than has been provided here.

Specificity and seriousness of the imputations

1. A further factor relied upon by Mr Smark is the seriousness of the imputation agreed to be conveyed.
2. When considering the seriousness of an imputation, that imputation must be viewed in context, as Basten AJA stated in *Prouten v Buxton* [2024] NSWCA 262 at [4] – [5]. Mr Smark submitted that, whatever the publication's context, "an allegation of specific wrongdoing may still hit home", especially if it is in a different sector of reputation, citing Cadwalladr at [54] – [56].
3. However, even if I had accepted uncritically that the degree of specificity and seriousness of the imputation were sufficient for the inferences drawn in *Wilson v Mendelsohn* [2024] EWHC 821 (KB) to apply, that is not enough, in itself, to establish serious harm. This is because no matter how serious and specific the imputation may be, there must be identification or evidence of the harm and of its causation.

Measuring the harm

1. In *Rader* at [30] – [34], Brereton JA considered the question of the appropriate time for assessment of harm (at the time of publication, the time of commencing proceedings or the time of the trial), noting that evaluation of the extent of the harm necessarily involved consideration of the period over which it was incurred, as reputational harm for a short period is less likely to be serious. The trajectory of the harm is a factor to take into account.

2. Mr Smark does not identify whether the serious harm is in the past, the future or both. He submits, in a general way, that "in the circumstances, considering the combination of the inherent tendency of the words to cause serious harm, the actual impact demonstrated by the evidence of Mr Mannoun and Mr Harte, and an inference that the publication was circulated to a wider readership from whom evidence cannot be obtained" (submissions, paragraph 24), the plaintiff will satisfy the element of serious harm. Any measurement of the harm asserted to have occurred her, in terms of duration or severity, would be insufficient to support any evidence of harm, let alone serious harm.
3. The next issue is that of causation. The plaintiff not only needs to prove serious harm to reputation, but also that there is a causal connection between the publication of the defamatory matter and the actual or likely serious harm to the plaintiff's reputation.

Causation

1. Even if serious harm were to be demonstrated, it must relate to the publication made by the defendant.
2. Professor Rolph states at [9.130], the law of causation in defamation in Australia is still in its infancy, but these issues have arisen in a number of the English authorities. Dr Stephen Bogle and Dr Bobby Lindsay (at p. 4) observe:

"It is not usually enough to point to scurrilous allegation which has been widely circulated; a claimant must thoroughly plot out for the court a causal chain, even by inference, between the statement and serious harm."

1. The need for this "causal chain" can be seen in *Lee v Brown* [2022] EWHC 1699 (QB). The matters complained of were 22 publications to individuals as well as a Facebook post where Mr Lee was not named. The imputations conveyed not only meanings about domestic abuse and discreditable behaviour but also, relevantly for these proceedings, somewhat similar allegations, namely that the plaintiff's business practices should be, and were being, investigated for "false accounting" (at [25]), corruption and tax evasion.
2. Collins Rice J had no difficulty (at [26]) in accepting that the imputations were serious. They were also of a specific nature. However, that was not enough. Before commencing her analysis of the facts, her Honour observed (at [18]):

"Section 1(1) uses the language of causation prominently (caused or is likely to cause). The 'serious harm' component of libel therefore contains an important causation element. The starting point, as with any other tort or civil wrong, is that a defendant is responsible only for harm to the claimant's reputation caused by the effect of each specific statement complained of in the minds of the readership of that statement. A claimant therefore has to establish a causal link between each item he sues on and serious harm to his reputation, actual or likely."

1. It was for this reason that "serious harm was a factual matter, and facts must be evidenced" (at [35]).

2. The problem for Mr Lee, in terms of causation, was that this evidence was not provided by him. Collins Rice J took into account that Mr Lee called a witness who had read some of the matters complained of, but her evidence did not extend to saying that she thought any the less of the plaintiff (at [37]). Her Honour considered this to be significant. (While Callaghan J states in *Greenwich v Latham* at [193] that "none of the cases suggest that the calling of such evidence is required", failure to call such evidence does not assist the plaintiff.) However, this was not the only evidentiary failing in the case. A plaintiff may give evidence of the damage to his reputation relied upon as serious, and Collins Rice J considered Mr Lee's own evidence to be insufficient as well. Mr Lee generally referred to a coolness towards him at a social club and questions about his business activities but admitted that he could not say that his reputation was lowered in the eyes of a business associate who had read one or more of the matters complained of (at [49]). Although the defendant had sent correspondence to investigatory bodies, there had been no investigation and the plaintiff accepted he had suffered no serious harm as a result (at [55]).
3. Putting these findings together, Collins Rice J held that the plaintiff's failure to "get to grips" (at [85]) in terms of providing specific evidence, not merely of harm, but of serious harm, meant that he had not discharged the onus.
4. Similar observations as to the importance of causation have been made in *George v Cannell* at [173] by Saini J (who stressed that there must be a "causation-focussed factual inquiry as to what actually took place").
5. The plaintiff in these proceedings has the same difficulties that Mr Lee did. First, although Mr Mannoun has called two witnesses, I cannot be satisfied on the evidence of either of them that they had their opinions of the plaintiff changed in any way, let alone any substantial way; Mr Hadchiti admitted as much. Second, the evidence of the plaintiff and his witnesses about others having read the matter complained of was scant in the extreme. The only named witness, Lauren Myers, has not been called and I have inferred from the plaintiff's response to an inquiry about her whereabouts that his account of her evidence may not be as set out in his affidavit.
6. While I take into account that courts should be understanding of the problems plaintiffs face in securing evidence from people willing to say they thought less well of them (*Sobrinho v Impresa Publishing SA* [2016] EWHC 66 (QB)), this should not be an insuperable difficulty here. It is implausible that "the directors" and "the other staff" referred to by Ms Myers in her alleged conversation with the plaintiff cannot be identified, and that the plaintiff and his witnesses cannot remember anyone else by name, and there is no evidence what harm, if any, flowed from this.
7. The plaintiff's case in these proceedings, as is noted above, largely inferential. As Collins Rice J states at [85], "[a]n inferential case has to be more than a speculative one".

8. The components of the inferential case have not been evidenced in the manner described by her Honour. Nor has the causation link to damage (which damage has not been established, whether serious or not) been made out.

Conclusions

1. For the reasons set out above, the plaintiff has failed to establish that the publication of the matter complained of caused serious harm to the plaintiff's reputation, either at the time of publication or prospectively in the future, and the claim is struck out and dismissed.
2. Costs should follow the event, but I have granted liberty to apply.

Orders

1. I make the following orders:
 1. Pursuant to s 10A of the Defamation Act 2005 (NSW), the plaintiff's statement of claim is struck out and dismissed.
 2. Plaintiff pay defendant's costs, with liberty to apply.

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