SUPREME COURT OF QUEENSLAND

CITATION:	*Chu v Huynh* [2026] QCA 106
PARTIES:	**TRANG HIEN THI CHU** (applicant) **v** **BAO NINH HUYNH** (respondent)
FILE NO/S:	Appeal No 5665 of 2025 DC No 2538 of 2025
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2025] QDC 165 (Devereaux SC CJDC)
DELIVERED ON:	9 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2026
JUDGES:	Bond JA, Doyle JA, Gotterson AJA
ORDERS:	**1. The applicant be granted leave to appeal limited to grounds 1 and 2 of the Amended Notice of Appeal filed 27 May 2026.** **2. The appeal is dismissed.** **3. The appellant pay the respondent's costs of the application for leave and of the appeal.**
CATCHWORDS:	DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – REFERENCE TO PLAINTIFF – where the applicant uploaded four posts to Vietnamese community Facebook groups, each of which received significant engagement and remained online for long periods – where the primary judge found that the publications caused or were likely to cause serious harm to the respondent's reputation within the meaning of s 10A of the *Defamation Act 2005* (Qld) (the Act) – where the applicant contends such finding was in error and not reasonably open on the evidence – where there was direct evidence of the respondent's prior good reputation and the ensuing adverse effect of the publications – whether leave should be granted on these grounds – whether the primary judge erred in finding the respondent had proved the serious harm element DEFAMATION – DAMAGES – GENERAL DAMAGES – REVIEW OF ASSESSMENT – EXCESSIVE DAMAGES –

where the primary judge assessed damages under s 34 of the Act in the amount of $40,000 – where the applicant contends there has been an error in principle and that the amount awarded was outside the range reasonably open – whether leave should be granted on these bases

DEFAMATION – ACTIONS FOR DEFAMATIONS – COSTS – INDEMNITY COSTS – where the primary judge ordered the applicant pay indemnity costs on the District Court Scale pursuant to s 40 of the Act – where the applicant did not respond to the respondent's Concerns Notice – where the primary judge found that the applicant's conduct pretrial was unreasonable – where the applicant contends that the interests of justice warranted a departure from s 40(2) of the Act – where the applicant contends that privilege had not been waived in respect of the without prejudice Concerns Notice such that it was an error to receive and consider it – whether leave to appeal should be granted on these bases

Defamation Act 2005 (Qld), s 9(1), s 10A, s 34, s 40

Brose v Baluskas (No 6) [2020] QDC 15, considered
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44; [1993] HCA 31, applied
Cerutti v Crestside Pty Ltd [2016] 1 Qd R 89; [2014] QCA 33, applied
Forrest v Chlanda [2012] NTSC 14, cited
Harrington v Shoard [2023] QDC 11, considered
Manefield v Child Care NSW [2010] NSWSC 1420, cited
McEwan v McDaniel [2020] QDC 321, considered
MG v PJ [2025] QCA 99, applied
Peros v Nationwide News Pty Ltd (No 3) [2024] QSC 192, cited
Petrov v Do [2012] NSWSC 1382, cited
Shandil v Sharma [2010] NSWDC 273, cited
Sharma v Shandil [2011] NSWCA 155, cited

COUNSEL: L E T Henry for the applicant
A M Nelson for the respondent

SOLICITORS: Strafurd York Legal for the applicant
AIP Lawfirm for the respondent

[1] **BOND JA:** I agree with the reasons for judgment of Doyle JA and with the orders proposed by his Honour

[2] **DOYLE JA:** This is an application for leave to appeal from a judgment given in the District Court, awarding the respondent damages in the amount of $40,000 with interest, plus some consequential relief and costs arising from the appellant's publication of defamatory material.[1] Leave is required because of the size of the judgment awarded.

[1] *Huynh v Chu* [2025] QDC 165 (Reasons or R); *Huynh v Chu (No 2)* [2025] QDC 207 (Second Reasons or R2).

Background

[3] Both the appellant and the respondent are members of or associated with the Vietnamese community in South East Queensland. They apparently entered into some arrangement or understanding by which the appellant, together with her husband, may have provided assistance to the respondent for the opening and conduct of a restaurant at Inala. The precise nature of that arrangement or understanding is not relevant for present purposes. It may have been a partnership.

[4] They had a falling out which at least led to the appellant posting, in Vietnamese, four posts which were uploaded to public Facebook pages by the appellant between 26 July 2022 and 21 September 2022. The posts were generally uploaded to Facebook groups which had between approximately 28,500 members and 33,000 members and in each case the posts received a number of likes or reactions, comments or were shared with other pages or groups.

[5] As recorded by the primary judge at R [17]:

> "The [respondent] pleaded that the publications impute that he:
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> (a) breached a promise to pay his share of equipment expenses;
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> (b) conspired with his brother-in-law to cause the [appellant] loss and to misappropriate her trade secrets;
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> (c) misappropriated money intended to be for rent;
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> (d) misappropriated the [appellant's] interest in the partnership – also expressed as intentionally caused financial loss to the [appellant];
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> (e) is dishonest;
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> (f) lied to his customers;
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> (g) cannot be trusted;
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> (h) is disgraceful and shameful."

[6] The defence of the appellant contained non-admissions, and the matter proceeded to trial in the absence of any appearance for the appellant.

[7] The primary judge found, relevantly, that the imputations had been made out and that finding is not an issue in this appeal.

Grounds of Appeal

[8] Four grounds of appeal are urged by the appellant, namely (omitting the particulars):

> "**Ground 1 - Serious harm: error in application of s 10A**
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> 1. The primary judge erred in finding that the respondent had proved that the publications caused, or were likely to cause, serious harm to his reputation for the purposes of s 10A of the *Defamation Act 2005* (Qld).

Ground 2 - Serious harm: finding not reasonably open

2. Further or alternatively, the primary judge's conclusion that the publications caused, or were likely to cause, serious harm to the respondent’s reputation was not reasonably open on the evidence.

Ground 3 - Damages: error of principle/ inappropriate quantum

3. If, contrary to Grounds 1 and 2, serious harm was established, the primary judge erred in principle in assessing general damages under s 34 of the *Defamation Act 2005* (Qld), and in any event awarded an amount outside the range reasonably open.

Ground 5 - Costs

5. His Honour erred by ordering the appellant to pay the respondent’s costs on the indemnity basis.”

Grounds 1 and 2: Serious Harm

[9] These two grounds can be dealt with together (it is not apparent what ground 2 adds to ground 1).

[10] Section 10A of the *Defamation Act 2005* (Qld) (the Act) provides:

“(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.”

[11] The primary judge identified:

(a) The issues in the case included “whether the defamatory statements are likely to cause serious harm to the [respondent’s] reputation”: R [8]; and

(b) The need for the respondent to establish the serious harm element: R [19], [34].

[12] The primary judge concluded that the serious harm element had been made out. His Honour found:

“[29] Despite my concerns about the [respondent’s] reliability, there was a body of evidence, including some from the [respondent] himself, showing that many people in the local Vietnamese community were aware of the publications and talked about them.

[30] Cao Quoc Tien Do gave evidence that he was employed as a chef at the Khoi Restaurant. He met the [respondent] at the badminton courts. The [respondent] asked him to work at his restaurant. He saw relevant Facebook posts on the Vietnamese community pages when he was in Vietnam. Before the

> publications, his experience was that most people were very friendly with the [respondent]. After he read the articles, the witness did not trust the [respondent] for several months. At trial, he said he trusts the [respondent] 'a little bit' but 'not strong like before'. The witness said other people 'don't want to talk about this, I think.' This, I understand, was in the context of playing badminton – they 'just want to play badminton.'
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> [31] Quan Hong Vu, a waiter at a restaurant at Jindalee, also knew the [respondent] from the social badminton club. At the time he read the articles on the community Facebook pages, he did not know the [respondent] well. He had thought of the [respondent] as a nice person. After seeing the publications, he thought he should 'go deeper' to see whether the [respondent] was 'really, uh, good business owner'. Before the publications, he had not heard a negative comment about the [respondent]. After the publications, friends at badminton and at church talked to him about the story and their negative comments made the witness believe the [respondent] was not 'the kind person as I know him before.' He observed that some people at badminton would 'stand back' as if judging the [respondent]. People said the [respondent] was not to be trusted.
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> [32] Nhat Tien Le, already mentioned above, a chef at a restaurant at Jindalee, described the [respondent] as a close friend. He was in Vietnam when he saw the posts and others sent them to him. He was surprised to read the articles because 'it's quite different from the man I know'. He did not speak to the [respondent] until seeing him at a family Christmas party 'two years ago'. The witness gave evidence about some co-workers – 'half of them quit the job …when the new restaurant opened'. This was not clarified and I give the evidence no weight. Asked whether he trusted the [respondent], the witness said, 'not with the business partner' but social contact was 'fine for me right now.'
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> [33] The [respondent] testified that after the publications, friends from the social badminton game stopped inviting him to their homes for parties and family members would call him to ask about the posts. When he read the posts, he was shocked. He decided not to respond or react. He felt many people were attacking him, that people did not trust him. After about a year or two he tried to 'get back to them' and had regained their trust, expressed as 'more trust on them now'.
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> [34] In summary, taking into account the seriousness of the allegations in the publications and the evidence of their actual impact, the number of views and responses, and the [respondent's] position as a manager of a restaurant, I am satisfied the [respondent] has shown, on balance, that he is likely to suffer serious harm to his reputation."

[13] Immediately after expressing that conclusion the primary judge proceeded to consider the quantum of damages. His Honour stated at R [35]:

> "Nonetheless, the evidence allows little more than to conclude that the [the respondent] suffered a degree of social exclusion and some loss of standing in the community. The [respondent's] evidence that, upon the closure of Buncha Buncha Inala, he was unable to find work for a period of time is irrelevant because, as pleaded and proved, the defamatory publications coincided with the recommencement of a restaurant business named Khoi Restaurant in the same premises as the Buncha Buncha Inala restaurant. The [respondent] is the manager of that restaurant."

[14] The appellant contends that these findings reveal an error by the primary judge concluding that the serious harm element had been made out when, it is urged, it was not on the evidence made out.

[15] In part this is advanced on the basis that the primary judge did not find that serious harm to the respondent's reputation had been suffered but only that it is likely to be suffered: R [8] and [34].

[16] Certainly some of the language used by the primary judge suggested that his Honour was addressing the limb of s 10A which refers to a defamation being "likely to cause serious harm to the [respondent's] reputation (*Defamation Act 2005* s 10A)" (R [8]) rather than that limb referring to it having done so. If that was the correct way to read his Honour's reasons that would give rise to some difficulty. The evidence does not suggest that by the time of trial the harm was building so that in prospect it could be characterised as serious, even though serious harm had not to that date occurred.

[17] However, I do not believe the reasons can bear that reading. His Honour employed the word "likely" in R [8] to identify both limbs of s 10A in the sense of whether the terms of that section had been made out. If his Honour had understood the section to only refer to prospective serious harm, then much of the discussion in the reasons as to what had occurred to the date of the trial would be of marginal relevance. A survey of that evidence shows that it is almost entirely concerned with harm which had already occurred. His Honour's use of the same expression (likely) in R [34] should be read in the same way or perhaps merely as identifying the propensity of the defamation to have caused serious harm rather than referring to it only as in prospect. It would be a remarkable reading of his Honour's reasons to say they establish that the posts (in July and September 2022), albeit that they remained in place for some time, at the time of the trial had yet to have their most potent effect on the respondent's reputation. Counsel for the appellant fairly accepted that that would be a surprising reading of the reasons.

[18] I approach the question, then, on the basis that the primary judge has found that serious harm had occurred and deal with the appellant's contention that that conclusion was wrong.

[19] This Court had occasion recently in *MG v PJ* [2025] QCA 99 to consider the content of the serious harm element in s 10A of the Act. His Honour does not appear to have been referred to, or considered, that decision, it having been handed down some months after the hearing before his Honour, and less than a week before his Honour delivered his reasons.

[20] The language of s 10A of the Act requires that there be harm to the reputation of the respondent, and that it be serious harm. From this it is plain that what must be harmed

is the respondent's reputation, not merely his or her feelings. Moreover, the drafter contemplates that there may be harm to the respondent's reputation which is not actionable because it is not serious. Finally, from s 10A(2) it is apparent that for excluded corporations (those which might bring a claim for defamation[2]) harm to their reputation, to be actionable as serious harm, must cause serious financial loss. This is not directly relevant to the present case.

[21] Relevant to the present appeal, and drawing on the discussion in *MG v PJ*, in my view:

(a) The plain and ordinary meaning of the word 'serious' is to be applied when interpreting s 10A;

(b) Serious harm can be established by direct evidence, inference or both, but is never to be presumed. The absence of a presumption extends not only to the impact of the publications but also the nature of the respondent's prior reputation;

(c) Apart from direct evidence as to the impact of the publications, the seriousness of the harm can be inferred from the gravity of the imputation, the extent of the publication (number, duration and distribution), the medium of publication and whether it is likely to be treated as reliable or not, the identity or group of recipients and the respondent's prior reputation.[3]

[22] The primary judge found that the publications conveyed the imputation that the respondent "was dishonest in his business dealings, and so could not be trusted and was shameful": R [18]. This finding is not challenged on appeal.

[23] There were four publications, all posted on Facebook. They were targeted in the sense of being published in Vietnamese and to groups identifiable as connected with the Vietnamese community in Brisbane or Queensland. The posts were available for long periods: the first post from 26 July 2022 until the group to which it was posted disappeared; the second post from 26 July 2022 until 14 February 2025; and the third and fourth posts from 21 September 2022 until 14 February 2025.

[24] The posts did not go unnoticed: as mentioned the groups to which at least the first two were posted had memberships of between 28,500 and 33,000 accounts. They received likes/reactions (ranging between 48 and 149), comments (ranging between 47 and 207) or the post being shared (ranging between 2 and 15 times).[4]

[25] There was direct evidence of both the respondent's prior reputation and the effect on it of the publications. This came from three seemingly independent witnesses and also from the respondent himself (which I have set out above): R [30]-[33]. The primary judge expressed caution about accepting some of the respondent's own testimony. His Honour said that the respondent gave evidence designed to minimise his role in the business at Inala which was inconsistent with other independent evidence. This did not, however, prevent his Honour finding that there was direct evidence of the respondent's prior reputation and the effect on it of the publications. From the evidence it emerged:

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2 Section 9(1) of the Act.
3 See *MG v PJ*, supra, at [89] and [93]; and *Peros v Nationwide News Pty Ltd (No 3)* [2024] QSC 192.
4 Uniquely the primary judge did not find that the third post had been shared.

(a) Prior to the publications: "most people were very friendly with the [respondent]" (at his badminton club); he was trusted; he was thought of "as a nice person"; he was known as "quite different" from the person represented by the publications; and the respondent had friends who used to invite him to their homes for parties.

(b) After the publications: each of these things changed. In particular one witness did not trust him for several months, and that trust had only been partly restored. Another said (seemingly linked to the publications) that people at church made negative comments about the respondent, and that at the badminton club, others said he was not to be trusted. Indeed, a close friend said that prior to seeing the publications he trusted the respondent,[5] but since then social contact with the respondent was "fine for [him] right now" but that "with that history" he did not trust the respondent as a business partner.[6] The respondent himself gave evidence that people from his badminton group stopped inviting him to their homes, and that no one was contacting him.[7]

[26] Accepting that the expression 'serious harm' is to be given its plain and ordinary meaning, nonetheless it was correct to conclude that the respondent had established this element. This follows, in my view, from the following:

(a) The imputations are themselves of a nature which, if believed (or at least not dismissed), would be likely to harm someone's reputation. To someone who has been and continued to be involved in business, to be known as someone who was dishonest in his business dealings, could not be trusted and was shameful would be very significant.

(b) There was direct evidence of the respondent's good reputation prior to the publications.

(c) There was also direct evidence of the caution with which others approached him in terms of his honesty subsequently. This has not been proven to have caused him financial loss in his business but rather has affected his relationships with friends (including a close friend), social contacts and people at church.

(d) In that sense it was right for the primary judge to state that the respondent "suffered a degree of social exclusion and some loss of standing in the community": R [35].

(e) The publications were to a real extent targeted at the community with which the respondent was associated, and well beyond the sphere of those who might know the respondent sufficiently to not be influenced by them. Moreover, they were well circulated and accessible for well over two years.

[27] Accordingly, grounds 1 and 2 fail.

Ground 3

[28] Having concluded that the imputations had been established and that the serious harm element had been made out, the primary judge assessed damages in the amount of $40,000. The starting point of his assessment was to observe, at R [42]:

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5 T1-66 lines 37-38.
6 T1-66 lines 40-43.
7 T1-23 lines 26-41.

> "The purposes of awarding damages to a defamed person include consolation for distress, reparation for harm to personal and business reputation, and vindication." (citations omitted).

[29] His Honour did not find in the evidence any support for an award of damages which included any component directed at the vindication of the respondent: R [45]. The appellant points to this as a feature that suggests the amount awarded can be seen as excessive when compared to other decisions in which vindication was taken into account in the assessment of the award.

[30] However, as appears from R [43]-[44], his Honour seems to employ the word 'vindication' in the sense of there being a proper basis for him to find (and he did not find) that the respondent's version of the underlying dispute between him and the appellant was to be preferred. His Honour's assessment of damages proceeds on that basis. There was no issue in the trial concerning the truth or otherwise of the published defamation. The assessment of damages often is said to serve a purpose of vindication in the sense that "the sum awarded must be at least the minimum necessary to signal to the public the vindication of the [respondent's] reputation": *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 61. It is not evident to me that the award should not have been set with this feature in mind quite apart from any finding being made as to the truth of the posts. The respondent does not seek to disturb the amount awarded and accordingly it is not necessary to further consider this issue save to note that in those circumstances the appellant's reliance on the primary judge's view that no allowance for vindication is required does not greatly assist in drawing comparisons with other decisions.

[31] Similarly, there was no evidence of actual loss of business suffered by the respondent since the publications: R [46]. His Honour rejected the notion of awarding any aggravated damages: R [49]. In the events, the primary judge concluded the damages "… should reflect the [respondent's] distress, harm to personal reputation and business reputation such as the evidence supports.": R [47].

[32] I have identified above the evidence bearing on the serious harm to the respondent's reputation. Additionally, the respondent gave evidence which the primary judge accepted as to the impact on him. He felt shocked and that many people were attacking him. He received fewer social invitations from his badminton club associates which persisted for close to six months and expressed that he "was really struggling".[8] He felt people did not trust him. These are all real and relevant to the assessment of damages.

[33] The primary judge concluded, at R [50], that an award of $40,000 bore "an appropriate and rational relationship with the harm sustained by" the respondent. The appellant contends that that award is outside the range of those reasonably open. The appellant supported this submission by contending that the various comparator cases referred to by the primary judge[9] involved more serious harm and other distinguishing features.[10] But the primary judge explicitly recognised this and after referring to these cases stated that they suggested an award significantly lower than had been made in those cases.

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[8] T1-23 lines 39-43.

[9] *Petrov v Do* [2012] NSWSC 1382; *Forrest v Chlanda* [2012] NTSC 14; *Shandil v Sharma* [2010] NSWDC 273 and on application for leave to appeal [2011] NSWCA 155; *Manefield v Child Care NSW* [2010] NSWSC 1420.

[10] Appellant's submissions at [21].

[34] The appellant also referred to a number of lower court awards as indicative of a much lower range (said to be between $3,000 and $20,000). Each turns on its own facts. Also each of them was decided on the form of the Act before the amendment to introduce s 10A. Three are decisions of the District Court of Queensland. It is appropriate to refer to those decisions.

[35] In *Brose v Baluskas (No 6)* [2020] QDC 15 the award against each of the defendants held liable was very modest ($3,000). However, the facts of that case are fundamentally different. The plaintiff's reputation was already the subject of speculation and damage as a result of her having been suspended from her position as principal of a school. The subsequent posts online by various parents (and others), while overwhelmingly favourable to her, included a number which were not, only a subset of which she sued in relation to. The comments or posts were online for seemingly only a period of about two weeks. Her claims against three of those defendants were settled and she received pursuant to that settlement a significant sum ($182,500), a sum which counsel for the appellant in this appeal accepted must be viewed as having been taken into account in assessing the modest damages awarded. She settled with another defendant on undisclosed terms. She succeeded only on limited bases against only two defendants despite her case being that the posts of all eight defendants had caused harm to her reputation.

[36] The second is *Harrington v Shoard* [2023] QDC 11 where only one limited defamation (comprising a statement by one person to one other) was made out and damages were awarded in the amount of $15,000. Had two other also very limited defamations relied on been shown to have caused non-trivial harm the award would have been $25,000. *McEwan v McDaniel* [2020] QDC 321 to which the appellant also referred this Court is plainly distinguishable. It is doubtful the plaintiff in that case would have succeeded if tried under the Act as now amended. It is enough to quote paragraph [66] of the reasons of the primary judge in that case where his Honour stated:

> "Given the absence of any evidence as to the reputation of the plaintiff or that the posts had any effect upon the plaintiff's reputation, that any harm to the plaintiff's reputation appears to have been caused by his own conduct not by the publication, and that the plaintiff did not suffer in truth any hurt feelings or distress as a result of the publications, the award of damages should be very low."

[37] The decision in *Shandil v Sharma* should however be noted. In that case the defamation arose from publication of allegations of forgery made in relation to the plaintiff, the principal of the school teaching the Hindi language, at a Parents and Citizens Committee meeting. The Committee comprised either five or seven people. At trial the primary judge awarded damages of $80,000. On an application for leave to appeal, the New South Wales Court of Appeal, refusing leave, stated that the award was not out of the reasonable range: at [3]. The nature of the publication in that case was more limited (numerically) than in the present case but more focussed in being directed to a committee of people most concerned with the probity of the conduct of the school. It affords some order of magnitude guide which assists in my view in concluding that the award in the case on appeal is not unreasonable. I note that despite the Act forming part of a national uniform framework, the quantum of damages assessed in other States may not be fully representative of awards in this State.

[38] I note the remarks of Applegarth J in *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89 at [56]-[57] suggesting that (in 2014) awards of $10,000 represented relatively small awards and $50,000 substantial awards. This too (allowing for the decade in between) gives some support for the order made in this case. Further I adopt the observations in that case at [50] in relation to appeals from an assessment of damages for defamation as follows (citations omitted):

> "… Before it interferes an appeal court should be satisfied of such a specific error or that the judge has for other reasons made 'a wholly erroneous estimate of the damages to which the party is entitled'. Error is not shown because the award seems to an appeal court to be very moderate or very generous. In the absence of a specific error, the question is whether the judge was in error in the amount of damages assessed so as to clearly depart from 'the range of results within which a proper exercise of discretion might be bounded'..."

[39] It was also urged by the appellant that regard needs to be taken of the feature of posts on social media platforms as in this case. This is said to be because readers (or viewers) of them treat them differently from more established media and they are transient in that posts soon drop down the page and thus become less prominent. The primary judge was acutely aware of these posts being on social media platforms. It cannot be assumed these features were not taken into account. Moreover, as already mentioned above, these posts were targeted to a particular audience and were noticed by significant number of people. The data as to those readers who reacted, commented or shared the post will inevitably understate the number of viewers.

[40] In this case a finding of serious harm was made out and it did cause distress to the respondent which persisted for some time. There were multiple posts and they remained online for a long time.

[41] In my view the award, though generous, perhaps even very generous, is not shown to be the result of an error in that sense.

[42] There is nothing arising in respect of ground 3 which would warrant a grant of leave to appeal.

Ground 5

[43] Finally, the primary judge awarded costs to the respondent on an indemnity basis and on the District Court scale.

[44] Section 40 of the Act provides:

> "**Costs in defamation proceedings**
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> (1) In awarding costs in defamation proceedings, the court may have regard to—
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> (a) the way in which the parties to the proceedings conducted their cases…; and
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> (b) any other matters that the court considers relevant.
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> (2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise)—

> (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff; or
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> (b) …
>
> (3) In this section—
>
> ***settlement offer*** means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made."

[45] In determining to award costs on an indemnity basis, his Honour concluded that the appellant's conduct pretrial was unreasonable for the purposes of s 40(2): R2 [4].

[46] The respondent had on 12 July 2023 sent a Concerns Notice to the appellant identifying his complaints. The Notice did not seek compensation in the form of damages, but rather sought removal of the publication, an agreement to refrain from repeating such defamatory materials, the publication of an apology and the payment of reasonably incurred expenses, including legal expenses: R2 [6]-[7].

[47] There was no response to that Notice and the primary judge found it was unreasonable not to provide a response and make a settlement offer: R2 [8]. Thereafter, as already mentioned, the appellant did not enter a meaningful defence or take part in the proceedings: R2 [9].

[48] The appellant submits that:

(a) The primary judge erred in not finding that the interests of justice required a departure from the position in s 40(2) of the Act having regard to various factors; and

(b) The primary judge erred in receiving and considering the Concerns Notice because it was 'without prejudice' and the privilege has not been waived.

[49] In my view this ground is not one for which leave to appeal should be granted.

Interests of Justice

[50] The appellant's submission on the issue of indemnity costs is that the interests of justice weighed against making that order. This is because of the following:

(a) The likely disproportion between the damages awarded and the indemnity costs;

(b) The disproportion between the damages awarded and the amount claimed by the respondent;

(c) That but for the injunctive relief the award was comfortably within the jurisdiction of the Magistrates Court;

(d) Credit findings were made adverse to the respondent which led to the exclusion of any component for his vindication.

[51] This submission in my view can be readily rejected. The appellant posted defamatory material. It was targeted in the way I have already mentioned and caused serious harm to the reputation of the respondent. No opportunity was taken to seek to apologise or make good any harm to the respondent. The posts were left up for some years. When the respondent sued, the respondent defended the claim but without admitting any of the facts alleged. Each paragraph of the defence was a non-admission on the basis that "having made reasonable enquiries within the time allowed, the [appellant] remains uncertain as to the truth or falsity of the allegations." That was in no sense a genuine attempt to narrow the issues in dispute. It is true the appellant did not prolong the trial itself by attending and cross-examining any witness or leading evidence. But nonetheless, a trial was necessary because of her conduct in publishing the defamatory material, not taking it down and persisting in making the respondent prove every material fact.

[52] The disproportion between the indemnity costs and the award of damages might be relevant to the scale at which costs were awarded; but that does not establish the interests of justice are against her having to pay costs on an indemnity basis. None of the other features relied on in my view tip the balance of justice in favour of not adopting the default position provided for in s 40.

Without Prejudice Concerns Notice

[53] The appellant contended that there was no foundation for the primary judge's conclusion that the requirements of s 40(2)(a) of the Act had been met so as to require (absent a basis to conclude the interests of justice require otherwise) that the appellant pay the respondent's costs on an indemnity basis.

[54] This was urged on that basis that the primary judge had regard to the terms of the Concerns Notice sent by the respondent prior to commencing proceedings, when that notice was sent on a without prejudice basis and the appellant did not waive the privilege that flows from that.

[55] The events leading to the costs order made by the primary judge can be stated briefly:

(a) The primary judge afforded the parties an opportunity to make submissions on whether indemnity costs should be ordered and on what scale.

(b) Submissions were filed for the respondent supported by an affidavit which exhibited the Concerns Notice. The Concerns Notice had already been tendered at the hearing of the trial.[11]

(c) Submissions were filed on behalf of the appellant prepared by solicitors then acting for her.

(d) Those submissions did not object to the primary judge taking the Concerns Notice into account.

(e) Those submissions invited the primary judge to accept that:

(i) The Concerns Notice was served;

(ii) The Concerns Notice made some form of offer which the appellant did not take up;

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[11] Ex 7.

(iii) The appellant did not respond with an offer of amends;

(iv) The appellant did not voluntarily remove the posts before trial; and

(v) No apology was offered.

(f) Importantly, those submissions included an acceptance that on a bare reading of the chronology s 40(2)(a) was engaged.[12]

[56] On appeal the appellant raised a number of contentions leading to the submission that the Concerns Notice was the subject of without prejudice privilege and that privilege had not been waived. There is also an issue, not directly canvassed in this appeal, as to whether the terms of s 40(2)(a) displace, for the purposes of the operation of that provision, the without prejudice privilege which might otherwise attach to settlement offers made. In the end, however, it is unnecessary (and in one respect undesirable in the absence of full submissions) to decide those issues. This is principally because:

(a) The concession that just from the chronology s 40(2)(a) of the Act was engaged is inconsistent with the submission now made by the appellant that without the tender of the Concerns Notice the basis for the primary judge's finding of unreasonableness falls away: Appellant's Supplementary Outline filed 1 June 2026 at [60].

(b) One consequence of that concession is that it is accepted that the appellant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the respondent, without it being necessary to look into the terms of the Concerns Notice itself.

(c) Leave to appeal would enable the appellant to urge a contention contrary to the course adopted at first instance.

[57] This ground is not one for which leave to appeal should be granted.

Conclusion

[58] In my view the issues raised under grounds 1 and 2 are sufficiently arguable and raise issues of importance not limited to this dispute that I would grant leave to appeal on those grounds. The remaining grounds do not warrant the grant of leave.

[59] I would in any case dismiss the appeal. As the appellant has wholly failed it should pay the costs of the application for leave and of the appeal.

[60] Accordingly, in my view, the appropriate orders are:

1. The applicant be granted leave to appeal limited to grounds 1 and 2 of the Amended Notice of Appeal filed 27 May 2026.
2. The appeal is dismissed.
3. The appellant pay the respondent's costs of the application for leave and of the appeal.

[61] **GOTTERSON AJA:** I agree with the orders proposed by Doyle JA and with his Honour's reasons for them.

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[12] Appellant's Costs Submissions dated 25 November 2024 at [9]-[11].