

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S CI 2017 04600

SRECKO FELIX LORBEK

First Plaintiff

and

DAVID PETER LORBEK

Second Plaintiff

v

PETER LAWRENCE KING

Defendant

JUDGE: McDonald J
WHERE HELD: Melbourne
DATES OF HEARING: 11 to 15, 18 to 20 and 29 October 2021; 1, 5 and 18 November 2021
DATE OF JUDGMENT: 5 May 2022
CASE MAY BE CITED AS: Srecko and David Lorbek v Peter King
MEDIUM NEUTRAL CITATION: [2022] VSC 218

DEFAMATION - Publication - Whether the defendant's Google reviews and online post were communicated to and comprehended by someone other than the plaintiffs - Whether appropriate to infer publication of Google reviews and online post.

DEFAMATION - Imputations - Whether pleaded imputations conveyed by matters complained of.

DEFAMATION - Defences - Statutory qualified privilege - Whether defendant's conduct in publishing defamatory matter was reasonable in the circumstances - Whether defendant's publication of defamatory matter was actuated by malice.

DEFAMATION - Defences - Common law defence of fair comment - Statutory defence of honest opinion - Whether publications contained statements which were untrue - Whether opinions were based on proper material.

DEFAMATION - Defences - Justification - Whether imputations conveyed by publications were substantially true.

DEFAMATION - Defences - Contextual truth - Whether contextual imputations were substantially true - Whether the plaintiffs' pleaded defamatory imputations did not further harm the reputation of the plaintiffs because of the substantial truth of contextual imputations.

Defamation Act 2005 - ss 4, 25, 26, 30, 31, 34.

APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

Mr JD Catlin

MDM Lawyers

For the Defendant

In Person - 11 to 15, 18 to 20
October 2021

Mr TJ Mullen - 29 October 2021,
1, 5 and 18 November 2021

Sanicki Lawyers

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HIS HONOUR:

SUMMARY OF FINDINGS

- (i). The defendant published defamatory material regarding the plaintiffs on 4 April 2017, 12 September 2017, 19 October 2017 and 20 October 2017 by causing the material to be communicated to and comprehended by someone other than the plaintiffs with resulting damage to the plaintiffs' reputation;
- (ii). Each of the four publications identified the plaintiffs;
- (iii). Each of the four publications conveyed an imputation that the first plaintiff deserved no respect as a business owner;
- (iv). The first publication published on 4 April 2017 conveyed the imputations that the first plaintiff:
 - (a) is and was a dishonest car dealer; and
 - (b) is untrustworthy as a car dealer;
- (v). Each of the four publications conveyed the imputations that the second plaintiff:
 - (a) is and was a liar;
 - (b) is and was a dishonest car salesman; and
 - (c) is an untrustworthy car salesman.
- (vi). The defendant has established a defence of statutory qualified privilege under section 30 of the *Defamation Act 2005*. As a result of the investigations which he undertook in the second half of 2016, the defendant had a genuine and reasonably held belief that the plaintiffs knew that the vehicle he purchased on 13 July 2016 was unroadworthy. The defendant's conduct in publishing the four publications was reasonable in the circumstances. The plaintiffs have failed to establish that when publishing the defamatory matters the defendant was actuated by malice.
- (vii). The defendant has failed to establish each of the other defences upon which he relies:

- Fair comment/honest opinion;
- Justification; and
- Contextual truth.

(viii). As the Court has upheld the defence of statutory qualified privilege, the plaintiffs' claim is dismissed.

INTRODUCTION AND BACKGROUND

- 1 The plaintiffs, Srecko and David Lorbek are brothers. Solely for the purpose of avoiding confusion between them, I shall refer to them throughout this judgment as 'SL' and 'DL'. I shall refer to the defendant, Peter King, as 'PK'.
- 2 SL and DL's parents arrived in Australia from Slovenia with nothing.¹ SL completed a motor mechanic apprenticeship in 1979.² Soon after, he commenced operating his own business as a motor mechanic. SL bought his first showroom for selling second-hand cars in 1984, trading as SOS Motors.³ From these relatively humble beginnings, SL has built a very substantial business selling luxury second-hand motor vehicles. The business trades as Lorbek Luxury Cars ('LLC').
- 3 SL is the owner of LLC and its chief executive officer. He purchases all of the vehicles sold by LLC. These vehicles are acquired from wholesalers. He is responsible for the overall running of LLC's business.⁴ LLC has an annual turnover of approximately \$51 million, selling approximately 1,200 cars per calendar year.⁵ Approximately 30 per cent of the cars sold by LLC are Porsches.⁶ LLC also sells Ferrari, McLaren, Bentley, Rolls-Royce and Maserati.⁷

¹ Transcript of Proceedings, T 449 L 5-11 (18 October 2021).

² Ibid T 449 L 14-17 (18 October 2021).

³ Ibid T 449 L 20-23 (18 October 2021); CB351, 'Witness Outline of Srecko Felix Lorbek dated 26 February 2021', [2]-[3].

⁴ Transcript of Proceedings, T 150 L 21-29 (12 October 2021).

⁵ Ibid T 453 L 10-12, T 542 L 27 (18 October 2021); T 181 L 21 (12 October 2021); T 803 L 1-2 (5 November 2021).

⁶ Ibid T 452 L 12-13 (18 October 2021).

⁷ Ibid T 452 L 25-29 (18 October 2021).

- 4 LLC is affiliated with many luxury car clubs. SL is a lifetime member of the Ferrari Car Club, a member of the Porsche Car Club since 1983 and the Maserati Car Club since 1995. SL regularly makes the LLC showroom in Port Melbourne available for these clubs to conduct events.⁸ SL is a member of the Victorian Automobile Chamber of Commerce ('VACC'). He is a committee member of the Used Car Traders Division and a member of the VACC Industry Policy Council.⁹ SL has been actively involved in raising funds for charities, particularly Race Against Dementia and the Cancer Council.¹⁰ One function alone for Race Against Dementia at LLC's showroom raised \$485,000.¹¹
- 5 DL is SL's younger brother. He left school at 14 years of age prior to completing Year 9 and started a motor mechanic apprenticeship working for SL at SOS Motors.¹² DL completed three years of his apprenticeship but decided to pursue a career in car sales. Save for the period between 2001 and 2010 when he worked for another dealership, DL has always worked with SL.¹³ DL is the senior salesperson employed by LLC.¹⁴
- 6 On 13 July 2016 the defendant, PK, purchased a 2011 Porsche Panamera from LLC for \$159,726. The vehicle had 50,267 kilometres recorded on its odometer.¹⁵ LLC purchased the vehicle from a wholesaler, Sullivan Automotive Pty Ltd, on 30 June 2016 for \$117,000.¹⁶ LLC's chief financial officer, Ilija Cicak, transferred the funds for the purchase of the vehicle on 8 July 2016.¹⁷
- 7 Prior to its acquisition by Sullivan Automotive Pty Ltd, the vehicle had been owned by Porsche Centre Brighton ('PCB').¹⁸ Sullivan Automotive Pty Ltd purchased the

⁸ Ibid T 456 L 1-9 (18 October 2021).

⁹ Ibid T 458 L 10-14 (18 October 2021).

¹⁰ Ibid T 461 L 26 - T 462 L 4 (18 October 2021).

¹¹ Ibid T 462 L 7-9 (18 October 2021).

¹² Ibid T 148 L 24 - T 149 L 2 (12 October 2021).

¹³ Ibid T 149 L 17-27 (12 October 2021).

¹⁴ Ibid T 150 L 30-31 (12 October 2021).

¹⁵ CB2000, 'Contract of Sale dated 13 July 2016'.

¹⁶ CB2426, 'Contract of Sale dated 30 June 2016'.

¹⁷ Transcript of Proceedings, T 252 L 23-26 (14 October 2021).

¹⁸ CB354, 'Witness Outline of Srecko Lorbek dated 26 February 2021', [24]; CB2426, 'Contract of Sale

vehicle from PCB on 30 June 2016 and sold it to LLC on the same day.¹⁹

8 Soon after the contract for the purchase of the vehicle was signed on 13 July 2016 the Porsche was sent by LLC to Europei Motori Pty Ltd ('Europei') for the purpose of obtaining a roadworthy certificate ('RWC').²⁰ It is common ground that in Victoria the ownership of a motor vehicle cannot be transferred without the provision of a RWC in respect of the vehicle. On 18 July 2016 Europei issued a RWC in respect of the vehicle. Subsequently, following an investigation of Europei instigated by PK, in February 2017 Europei's licence as a RWC provider was suspended by VicRoads for four weeks.²¹ Europei's licence was suspended because, inter alia, they had issued a RWC for a Porsche when it was unroadworthy by reason of having an undersized front wheel rotor.

9 When the vehicle was sold to PK on 13 July 2016 by LLC the vehicle was unroadworthy because the rotors on the front brakes were less than the prescribed width.²² The unroadworthy condition of the Porsche is first recorded in an internal PCB job card prepared on 22 June 2016.²³ As at 22 June 2016 the Porsche was owned by PCB. PCB is an authorised Porsche dealer. As such, when servicing a vehicle it is required to use only genuine Porsche parts, which are approximately double the price of generic parts.²⁴ Further, if PCB sells a second-hand Porsche it must be sold with a 'Porsche approved' warranty.²⁵ 'Porsche approved' is a much higher standard than that which is required in order for a car to be given a RWC.²⁶

dated 30 June 2016'.

¹⁹ CB2870, 'Contract of Sale to Sullivan Automotive dated 30 June 2016'.

²⁰ CB2716, 'Letter from Europei Motori to VicRoads dated 24 January 2017'; CB2720, 'VicRoads Statement of Evidence, Nino Menolascina'; CB2730, 'Certificate of Roadworthiness dated 18 July 2016'.

²¹ CB2713, 'Letter from VicRoads to Europei Motori dated 1 February 2017'.

²² Transcript of Proceedings, T 78 L 21-22 (11 October 2021); T 193 L 23-24 (12 October 2021); CB1960, 'Porsche Centre Brighton Repair Order Work Card dated 22 June 2016'; CB1963, 'Porsche Centre Brighton Repair Order Work Card dated 4 July 2016'; CB2720-1, 'VicRoads Statement of Evidence, Nino Menolascina'.

²³ CB1960, 'Porsche Centre Brighton Repair Order Work Card dated 22 June 2016'.

²⁴ Transcript of Proceedings, T 407 L 8-19 (15 October 2021).

²⁵ Ibid T 424 L 8-18 (15 October 2021).

²⁶ Ibid T 416 L 30-31 (15 October 2021).

- 10 On 22 June 2016 PCB sent the Porsche to its own workshop for a 'Porsche approved' check.²⁷ PCB's technician identified numerous items which had to be replaced to bring the Porsche up to 'Porsche approved' standard.²⁸ Each of the identified items was costed. The total cost of bringing the car up to 'Porsche approved' standard was \$12,000.²⁹ The job card also contains an entry: 'Front pad NG disc 35.5 min 36'. The abbreviation 'NG' means 'non genuine'.³⁰ This entry in the PCB job card records the vehicle as being unroadworthy.
- 11 On 30 June 2016 the Porsche was sold by PCB to Sullivan Automotive Pty Ltd. It is common ground that none of the work identified in PCB's 22 June 2016 job card had been undertaken. I infer that PCB made a commercial decision to onsell the Porsche rather than spending the \$12,000 necessary to bring the vehicle up to 'Porsche approved' standard. LLC purchased the Porsche on 30 June 2016, the same day Sullivan Automotive had purchased it from PCB. SL only had limited information about the Porsche when he bought it. He was contacted by Simon Sullivan who offered to sell him the car. He was given a general overview of the vehicle: its year of manufacture, model, kilometres, and an assurance that it was in good condition.³¹ He was given three to five minutes to decide whether to buy the vehicle, failing which Simon Sullivan intended to offer it for sale to a competitor.³² Although SL was only given a short period of time in which to decide whether to buy the vehicle, he had an agreement with Simon Sullivan that if he was not satisfied with the Porsche he could 'bounce' it. This means he had the right to return the vehicle to Simon Sullivan without any financial penalty if he was not satisfied with the quality of the car.³³
- 12 Upon receiving the Porsche, SL took it for a test drive, and considered that 'the car

²⁷ Ibid T 416 L 14–16 (15 October 2021).

²⁸ CB1960, 'Porsche Centre Brighton Repair Order Work Card dated 22 June 2016'.

²⁹ Ibid; Transcript of Proceedings, T 417 L 5–6 (15 October 2021).

³⁰ Transcript of Proceedings, T 418 L 24–25 (15 October 2021).

³¹ Ibid T 483 L 30 – T 484 L 5 (18 October 2021).

³² Ibid T 482 L 17–19 (18 October 2021).

³³ Ibid T 485 L 2–24 (18 October 2021).

drove excellent'.³⁴ A member of LLC's sales team noted that the car was due for a service and decided to send it to PCB for an annual service.³⁵ The vehicle was sent to PCB to be serviced because a stamp in the service book from an authorised dealership such as PCB adds to the value of a Porsche.³⁶

13 On 4 July 2016 the Porsche was delivered to PCB for the purpose of having the car serviced. The invoice for the annual service identifies the customer as LLC and the PCB 'advisor' as Jake Parsons.³⁷ The invoice records two email addresses: Jeff@Lorbek.com.au and Ilija@Lorbek.com.au. It is common ground that these are the email addresses of Jeff Devers, a member of LLC's sales team, and Ilija Cicak, LLC's chief financial officer. It is also common ground that a mobile phone number written on the invoice is that of Mr Cicak. The invoice records the cost of the annual service as \$627.73. The invoice also includes a section under the heading 'Recommendations', as follows:³⁸

Car is due for the major service including; [sic]

Spark plugs, engine air filters x 2, cabin pollen filter, brake fluid, POK oil and PDCC reservoir

Front and rear brakes worn low

Both rear jacking points broken

Rear seat cup holder broken

14 Mr Cicak is responsible for paying invoices for mechanical work undertaken at the request of LLC.³⁹ He usually gets SL to sign off on an invoice before it is paid.⁴⁰ As Mr Cicak's email address appears on the invoice of 4 July 2016 I infer that the invoice was sent to him for payment. I also infer that he would have followed his usual practice of seeking SL's approval before paying the invoice.

³⁴ Ibid T 486 L 7–8 (18 October 2021).

³⁵ Ibid T 68 L 26–28 (11 October 2021).

³⁶ Ibid T 526 L 17–19 (18 October 2021).

³⁷ CB1986, 'Porsche Centre Brighton Invoice dated 5 July 2016'.

³⁸ Ibid.

³⁹ Transcript of Proceedings, T 238 L 21 (14 October 2021).

⁴⁰ Ibid T 239 L 7–8 (14 October 2021).

15 PCB's internal job card for the 4 July 2016 annual service of the vehicle identified the cost of undertaking the major service and replacing the front and rear brakes.⁴¹ The job card records the cost of the major service at \$3,100. It records the cost of replacing the brakes at \$3,987. Although the job card includes a notation 'front brakes 3987' it is clear from the itemised costs recorded on the job card that the cost of replacing the front and rear brake pads and discs was \$3,987.⁴²

16 The PCB job card of 4 July 2016 also contains an entry:⁴³

Front 35.7 min 36

Rear 25.2 min 26.

17 The entries set out above in the PCB job card record the Porsche as being unroadworthy by reason of both the front and rear rotors being less than the minimum prescribed width. PCB's internal job card was not forwarded to LLC.⁴⁴ The invoice which was forwarded to LLC includes an entry: 'Front and rear brakes worn low'.⁴⁵ There is an issue, addressed later in this judgment, as to whether PCB's advisor, Mr Parsons, told any employee of LLC that the vehicle was in fact unroadworthy by reason of the undersized rotors.

Mr King buys a Porsche Panamera

18 In July 2016 PK was living in the southern highlands of New South Wales. He travelled to Melbourne to buy a car. Prior to visiting LLC's showroom on 13 July 2016 he had spoken to Jeff Devers by telephone and enquired about the Porsche. Mr Devers explained to him the features of the car and its accessories.⁴⁶ When PK arrived at LLC's showroom, Mr Devers introduced himself and PK replied that he was 'just looking'.⁴⁷ Mr Devers subsequently discovered that DL had sold the

⁴¹ CB1963, 'Porsche Centre Brighton Repair Order Work Card dated 4 July 2016'.

⁴² Transcript of Proceedings, T 616 L 1-2 (19 October 2021).

⁴³ CB1963, 'Porsche Centre Brighton Repair Order Work Card dated 4 July 2016'.

⁴⁴ Transcript of Proceedings, T 440 L 12 (18 October 2021); T 605 L 10-14, T 610 L 8-11 (19 October 2021).

⁴⁵ CB1986, 'Porsche Centre Brighton Invoice dated 5 July 2016'.

⁴⁶ Transcript of Proceedings, T 811 L 13-18 (5 November 2021).

⁴⁷ Ibid T 811 L 21-22 (5 November 2021).

Porsche to PK.⁴⁸

19 There is a significant factual dispute between the parties as to whether, prior to completing the sale, DL and PK discussed the condition of the vehicle's tyres, brakes and suspension. PK, who represented himself for a substantial part of the trial, put to DL during the course of cross-examination that he had specifically asked DL about the condition of the tyres, brakes and the suspension. For his part, DL denies that there was any such discussion.⁴⁹ DL recalls that PK asked whether the vehicle had any structural damage and whether it had been in an accident.⁵⁰ They discussed the vehicle's service history⁵¹ and DL showed PK the vehicle's service booklet.⁵² DL denies that PK asked him about the condition of the brakes:

He didn't ask. He didn't ask at all. In fact he was quite stand-offish right through the whole process. So he wasn't connecting to ask those questions. He was actually very stand-offish, hence why the first sales person, he didn't even want to talk to him.⁵³

20 I do not accept DL's evidence that there was no discussion between himself and PK regarding the condition of the vehicle's brakes and suspension. PK was seriously considering the purchase of a vehicle costing more than \$150,000 which was five years old and which had been driven for in excess of 50,000 kilometres. It is common ground that the vehicle is capable of travelling at speeds exceeding 300 kilometres per hour. PK's account of the discussion with DL whereby he specifically asked about the condition of the brakes and suspension is entirely plausible.

21 So too is his account of having asked DL whether the original tyres from the vehicle were still in good condition. It is common ground that the vehicle was sold with a new set of 20 inch wheels and tyres. The original wheels and tyres were in storage. It is also common ground that PK asked DL whether he could purchase the original

⁴⁸ Ibid T 811 L 24–26 (5 November 2021).

⁴⁹ Ibid T 158 L 6–10 (12 October 2021).

⁵⁰ Ibid T 85 L 6 (11 October 2021).

⁵¹ Ibid T 85 L 9–13 (11 October 2021).

⁵² Ibid T 86 L 14–15 (11 October 2021).

⁵³ Ibid T 86 L 26–30 (11 October 2021).

22 inch wheels and tyres.⁵⁴ DL's evidence is that there was no discussion about the condition of the tyres. I do not accept this evidence. There would have been no point in PK acquiring the original tyres if they were unroadworthy.

22 DL was at pains to present PK as being disinterested or incapable of engaging with him about the condition of the vehicle. However, DL also gave evidence that when he approached PK and they started talking 'he started opening up and he started asking questions about the Porsche Panamera and we just kept talking about the vehicle'.⁵⁵ DL admits that there was discussion about whether the car had structural damage, whether it had been in an accident and its service history. Further, he and PK went for 'a substantial test drive, approximately 25, 30 minutes in total'.⁵⁶

23 PK had a specific recollection that DL told him that he owned three cafes. DL accepts that he did tell PK that he owned three cafes.⁵⁷ This evidence lends credibility to PK's recollection of the discussion he had with DL on 13 July 2016. It is also inconsistent with DL's account of PK as having been stand-offish and unwilling to engage in discussion.

24 There are significant issues in respect of PK's credit as a witness. He denied having any knowledge of how a company, MNPK Pty Ltd, of which he is a shareholder and director, came to be the owner of the registered business name, 'Six Star Models'.⁵⁸ His evidence that some unknown third party had fraudulently lodged and extended the business name registration using his personal details is not credible.⁵⁹ Further, his inability to provide an explanation as to how MNPK Pty Ltd had generated taxable income of \$341,000 in one financial year as a 'booking agent' was also not credible.⁶⁰ His evidence that he had no explanation because 'I look after the kids' is

⁵⁴ CB2000, 'Contract of Sale dated 13 July 2016'.

⁵⁵ Transcript of Proceedings, T 84 L 29-31 (11 October 2021).

⁵⁶ Ibid T 88 L 25-27 (11 October 2021).

⁵⁷ Ibid T 158 L 24-26 (12 October 2021).

⁵⁸ Ibid T 667 L 29-31, T 668 L 5-17 (19 October 2021); T 688 L 8-11 (20 October 2021).

⁵⁹ Ibid T 688 L 19-20 (20 October 2021).

⁶⁰ Ibid T 689 L 16-24 (20 October 2021).

similarly not credible.⁶¹

25 Notwithstanding my adverse assessment of PK's credit as a witness, it does not follow that wherever there is a conflict between the evidence of PK and the plaintiffs, the plaintiffs' evidence should be preferred. PK is an individual with a highly developed sense of his own self-interest. It would not have been in his interest to purchase the Porsche Panamera for in excess of \$150,000 without enquiring as to the condition of the tyres, brakes and suspension.

26 Further, notwithstanding that the proceeding was conducted as a virtual trial, the mutual disregard of the plaintiffs and PK for each other was palpable. The plaintiffs are genuinely aggrieved by what they consider to be a malicious campaign waged against them by PK via social media platforms. For his part, PK is genuinely aggrieved because he believes LLC sold him an unroadworthy and dangerous vehicle. DL was very emotional at times when giving his evidence. For example he stated:

I've seen all these bullying fucking posts over the last five years... I'm so fed [up] of this bullshit bullying that he's been getting away with and it's affecting us.⁶²

I have concluded that DL and PK had a tendency to exaggerate matters which they perceived to be of assistance to their case and to play down matters which they perceived to be potentially disadvantageous.

27 DL refused to make any concession that any aspect of LLC's conduct vis-à-vis PK was deficient. The purchase price for the vehicle included a five year premium platinum warranty at a cost of \$4,950. It was unnecessary for PK to have purchased this warranty because, unbeknownst to him and LLC, the car was still covered by an extended Porsche factory warranty in July 2016.⁶³ LLC received a commission of 'around \$1000' on the sale of the five year platinum warranty.⁶⁴ When PK

⁶¹ Ibid T 690 L 1-10 (20 October 2021).

⁶² Ibid T 136 L 19-25 (12 October 2021).

⁶³ Ibid T 83 L 10-11 (11 October 2021).

⁶⁴ Ibid T 118 L 18 (12 October 2021).

subsequently discovered that it was not necessary for him to have purchased the five year platinum warranty he was very upset. This was compounded by what he considered to be unreasonable delays in securing a refund of the money which he had paid for the warranty.⁶⁵

28 The existence of the extended Porsche factory warranty would have been known to LLC if it had made enquiries of Porsche Australia. When asked why LLC could not simply have contacted Porsche Australia and enquired as to whether PK's vehicle was covered by a Porsche factory warranty, DL stated:

We have to ring on 1,200 cars that we sell. We've got to stop and ring every manufacturer. No dealer does that.⁶⁶

29 When asked whether LLC had changed its practices post-July 2016 in order to ascertain whether vehicles have factory warranties, DL responded:

We try to find out as much information on every motor vehicle as we can. We don't get - we've got to employ another ten people just to do that then, because it's impossible to get every piece of information on every car.⁶⁷

30 When asked whether, post-July 2016, LLC contacts Porsche Australia to enquire whether a vehicle is subject to a factory warranty, SL stated that LLC has now employed one staff member to check whether vehicles sold by LLC are subject to a factory warranty.⁶⁸ Further, SL agreed that the sale of warranty insurance to PK for \$4,950 in circumstances where the vehicle was already subject to an extended factory warranty was 'sub-optimal'.⁶⁹ SL gave evidence that LLC 'learnt from that experience so that we can give better customer service'.⁷⁰

31 The contrast between the evidence of DL and SL regarding the sale of the premium warranty to PK is striking. First, rather than acknowledging that LLC's conduct in failing to check with Porsche Australia if the vehicle was subject to a factory

⁶⁵ CB2053, 'Email from Peter King to Daniel Novak dated 29 August 2016'.

⁶⁶ Transcript of Proceedings, T 117 L 19-21 (12 October 2021).

⁶⁷ Ibid T 117 L 31 - T 118 L 4 (12 October 2021).

⁶⁸ Ibid T 496 L 24-27 (18 October 2021).

⁶⁹ Ibid T 496 L 28-30 (18 October 2021).

⁷⁰ Ibid T 496 L 30-31 (18 October 2021).

warranty, was deficient, DL's response was 'no dealer does that'.⁷¹ Second, his reference to LLC having to employ another ten staff to get information about vehicles is not credible. The true position is that LLC has employed one full-time staff member to check whether vehicles have a factory warranty at point of sale.

32 PK signed the contract to purchase the vehicle on 13 July 2016. On the same day the vehicle was sent to PCB to repair a coolant leak which had manifested itself when the Porsche was being test-driven by DL and PK.⁷² Shortly thereafter the vehicle was sent to Europei for the purpose of obtaining a RWC. LLC does not obtain RWCs for vehicles until after a contract of sale has been signed.⁷³ A vehicle cannot be registered in the purchaser's name unless it has a RWC. A RWC is valid for 28 days. LLC does not obtain RWCs prior to the sale of a vehicle because of the risk that a RWC obtained prior to sale may lapse, resulting in LLC having to incur the cost of obtaining a further RWC.⁷⁴

33 Europei provided a RWC for the Porsche on 18 July 2016.⁷⁵ VicRoads suspended Europei's licence as a RWC provider for a four-week period in February 2017. Europei's licence was suspended, inter alia, because it provided a RWC certificate for PK's vehicle when in fact it was unroadworthy.⁷⁶ It also failed to take certain prescribed photos of the vehicle, including of the car on the hoist whilst it was being inspected. Further, it was found to have pre-signed RWCs prior to undertaking vehicle inspections. Mr Rocco Rossi, the Europei mechanic who provided the RWC for PK's vehicle, told SL in February 2017 that Europei's licence had been suspended because it had provided a RWC for the Porsche when it was unroadworthy.⁷⁷

34 DL stated that he was not aware prior to giving evidence that Europei's licence as a RWC provider had been suspended for issuing a RWC for PK's vehicle when the

⁷¹ Ibid T 117 L 20–21 (12 October 2021).

⁷² CB1988, 'PCB Repair Invoice dated 15 July 2016'.

⁷³ Transcript of Proceedings, T 93 L 9–11 (11 October 2021).

⁷⁴ Ibid T 93 L 6–8 (11 October 2021).

⁷⁵ CB2730, 'Certificate of Roadworthiness dated 18 July 2016'.

⁷⁶ Transcript of Proceedings, T 365 15–19, T 367 L 19–22 (15 October 2021).

⁷⁷ Ibid T 367 L 7–11, 26–29 (15 October 2021).

vehicle was not roadworthy.⁷⁸ I do not accept that DL was unaware prior to giving evidence at trial that Europei's RWC licence had been suspended as a result of providing a RWC for PK's vehicle. In 2016 Europei was providing five to seven RWCs per week to LLC.⁷⁹ When Europei's licence was suspended Mr Rossi told SL that the licence had been suspended because he had given PK's vehicle a RWC when it was not in fact roadworthy.⁸⁰ This discussion would have taken place within two months of Mr King posting on the 'Law Answers' site on 17 December 2016. That post included the following:

The roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne and they are under a very serious investigation from VicRoads. I hope for all the motoring public that they get made an example of and lose their roadworthy certification licence.

35 The Law Answers post is one of four posts which the plaintiffs claim defamed them. The subsequent posts upon which the plaintiffs sue comprise three Google reviews. The first of these Google reviews was posted on 4 April 2017 ('GR1'). It contains the same statement about Europei set out above. In two subsequent Google reviews posted on 19 October 2017 ('GR2') and 20 October 2017 ('GR3') PK stated '[t]he roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne and they have been the subject of an investigation from VicRoads and are being censured for their conduct'.

36 DL was emphatic that he had read all of these 'bullying fucking posts over the last five years'.⁸¹ If he read the posts he would have seen the reference to Europei being under investigation and/or being censured over the provision of a RWC for PK's vehicle. Further, as LLC's sales manager DL would have become aware in February 2017 that Europei was not available to provide RWCs for a period of four weeks when they would have otherwise have provided approximately 20 to 28 RWCs for LLC. Further, SL would have told DL when he was informed by Mr Rossi that

⁷⁸ Ibid T 125 L 24–26; T 126 L 29 – T 127 L 5 (12 October 2021).

⁷⁹ Ibid T 359 L 1–3 (15 October 2021).

⁸⁰ Ibid T 367 L 26–29 (15 October 2021).

⁸¹ Ibid T 136 L 19–20 (12 October 2021).

Europei's RWC provider licence had been suspended by VicRoads because it provided a RWC for PK's vehicle when it was not roadworthy.

37 I do not consider DL gave deliberately false evidence when he denied that he had any knowledge that Europei's RWC licence had been suspended. I accept that when giving evidence he did not have any recollection of having previously been aware that Europei's RWC provider licence had been suspended for providing a RWC for PK's vehicle. DL's failure to recall the details of Europei's suspension supports a finding that he does not have a good recollection of the events relating to the sale of PK's vehicle. This includes the details of his conversation with PK regarding the condition of the vehicle's original tyres, suspension and brakes on 13 July 2016.

Mr King drives into a pothole

38 On the morning of 21 July 2016 PK's vehicle was delivered to his home in the southern highlands of New South Wales.⁸² In early August 2016 PK drove into a large pothole. In a post on Porsche Forum dated 14 January 2017 PK described the pothole as 'a crater'.⁸³ There is a dispute as to whether damage to the Porsche's rear suspension, which also rendered the vehicle unroadworthy, was caused by PK driving into the pothole. I shall address this issue below. For present purposes it is sufficient to record that as a result of PK driving into the pothole he destroyed the vehicle's front left tyre and broke the front left wheel. When PK purchased the vehicle he did so with a new set of 22 inch wheels and tyres. In addition to buying the new set of 22 inch wheels and tyres he also purchased the original 20 inch wheels and tyres.⁸⁴ After hitting the pothole PK had the original wheels and tyres put back on the car.

39 Shortly after driving into the pothole PK took his car to Porsche Centre Canberra ('Gulson') to have a faulty door strap repaired. Gulson discovered that the vehicle was still under factory warranty which would cover the cost of repairs to the door

⁸² CB2162, 'Text Messages from Peter King to David Lorbek dated 21 July 2016'.

⁸³ CB2117, 'Porsche Forum Post dated 14 January 2017'.

⁸⁴ CB2000, 'Contract of Sale dated 13 July 2016'.

strap. On 9 August 2016 PK emailed DL requesting a refund of the \$4,950 he had paid LLC for the five year platinum warranty.⁸⁵ Whilst the vehicle was with Gulson, a number of other defects were identified. These were set out on an email from the service manager, Craig Homann, to PK on 23 August 2016:

As discussed on the phone here are the details of the work required -

- Front tyres worn below legal limit (Pirelli 255/40R20) - \$595 each - total \$1190 fitted
- Front brake pads and rotors worn well below minimum, and rear rotors worn below minimum - \$6017 fitted
- RHF door control strut broken and door has been damaged as a result - this will be covered under the existing factory warranty
- Rear lower control arm bushes are split severely, unable to set wheel alignment as a result - this will be covered under the existing factory warranty

Given the condition of the brakes, tyres and suspension I would deem the vehicle to be in an unsafe, unroadworthy condition. As such I would have to advise the vehicle [not] to be driven until all these issues have been addressed.⁸⁶

40 After Mr Homann advised PK that he considered the vehicle to be in an unsafe, unroadworthy condition, the relationship between PK and LLC rapidly deteriorated. On 23 August 2016 PK emailed Daniel Novak, warranty and sales support at LLC, requesting LLC cover any expenditure necessary to make the vehicle roadworthy, which was not covered by the extended factory warranty.⁸⁷ On 29 August 2016 PK emailed Daniel Novak again requesting a copy of the fully documented roadworthiness file including photos. He also reiterated his request for a refund of the \$4950 which he paid for the platinum warranty: 'Also tell David to send me my refund!!!! It must be the twentieth time I have asked.'⁸⁸ In response, Mr Novak told PK that LLC wished to have the vehicle brought back to Melbourne to undergo an independent inspection of the brakes.⁸⁹ PK did not agree with this request.

⁸⁵ CB2041, 'Email from Peter King to David Lorbek dated 9 August 2016'.

⁸⁶ CB2046, 'Email from Craig Homann to Peter King dated 23 August 2016'.

⁸⁷ CB2046, 'Email from Peter King to Daniel Novak dated 23 August 2016'.

⁸⁸ CB2053, 'Email from Peter King to Daniel Novak dated 29 August 2016'.

⁸⁹ CB2054, 'Email from Daniel Novak to Peter King dated 29 August 2016'.

Mr King's posts in relation to LLC

41 Between 26 August 2016 and March 2018 PK made 13 posts detailing his adverse perception of his dealings with LLC. The chronology of posts is as follows:

| Date | Event |
|------------------|---|
| 29 August 2016 | PK creates Carsales post ⁹⁰ |
| 30 August 2016 | PK posts Google Review under name 'PKavo' ⁹¹ |
| 1 September 2016 | PK posts Google review under his real name ⁹² |
| 17 December 2016 | 'Petez' (PK) posts a comment on Joanne Painter's Law Answers thread (Annexure D) ⁹³ |
| 13 January 2017 | 'Petez' (PK) posts on Porsche Forum ⁹⁴ |
| 14 January 2017 | 'Petez' (PK) posts on Porsche Forum ⁹⁵ |
| 15 January 2017 | 'Petez' (PK) posts on Porsche Forum ⁹⁶ |
| 4 April 2017 | PK posts Google review under his real name (Annexure A) ⁹⁷ ('GR1') |
| 19 October 2017 | PK removes 4 April 2017 Google review (Annexure A) and posts another Google review (Annexure B) ⁹⁸ ('GR2') |
| 20 October 2017 | PK amends Annexure B Google review to replace it with Annexure C ⁹⁹ ('GR3') |
| 21 December 2017 | 'Petez' (PK) publishes Herald Sun article on Porsche Forum ¹⁰⁰ |
| March 2018 | PK comments on Autotalk publication under his real name ¹⁰¹ |
| Undated | PK posts a Google review under name 'Steve Smith' ¹⁰² |

42 The plaintiffs' claim for defamation is based on four of the 13 posts made by PK: three Google reviews posted on 4 April 2017, 19 October 2017 and 20 October 2017 and one Law Answers post dated 17 December 2016. The three Google reviews are in similar terms. The review of 4 April 2017 is set out below. The italicised text indicates variations between the review of 4 April 2017 and the other three publications upon which the plaintiffs sue.

In the end Srecko and David Lorbek sat like naughty schoolboys having being found

⁹⁰ CB2062, 'Carsales Post dated 29 August 2016'.

⁹¹ CB2058, 'Email from Google My Business to LLC dated 30 August 2016'.

⁹² CB2059, 'Peter King Google Review dated 1 September 2016'. For the avoidance of doubt, this post is not the subject of the present litigation.

⁹³ CB2658-9, 'Law Answers Thread dated 17 December 2016'; Plaintiffs, 'Statement of Claim filed 14 November 2017', sch D.

⁹⁴ CB2110-2, 'Porsche Forum dated 13 January 2017'.

⁹⁵ CB2110-8, 'Porsche Forum dated 14 January 2017'.

⁹⁶ CB2119, 'Porsche Forum dated 15 January'.

⁹⁷ Plaintiffs, 'Statement of Claim filed 14 November 2017', sch A.

⁹⁸ Plaintiffs, 'Statement of Claim filed 14 November 2017', sch B.

⁹⁹ Plaintiffs, 'Statement of Claim filed 14 November 2017', sch C.

¹⁰⁰ CB2120-4, 'Porsche Forum dated 21 December 2017'.

¹⁰¹ CB775, 'Autotalk Article dated March 2018'.

¹⁰² CB2273, 'Transcription of 'Steve Smith' Google review'.

*out at the Melbourne Magistrates Court.*¹⁰³ If you think of dealing with Lorbek turn and run away. They don't deserve any stars.

Lorbek Luxury Cars sold me an unroadworthy 2011 Porsche Panamera Turbo in July 2016. Through my own investigations initially they tried selling it to Porsche Brighton who rejected purchasing the car. A full report of that vehicle from the Porsche dealer shows major faults. It appears none of those faults were rectified prior to actually selling the Porsche. I foolishly believed lies about the car from the salesman. Also having very briefly driven the vehicle and that it passed a roadworthy certificate I had faith it was a safe and mechanically sound prestige vehicle.

Soon after delivery the car had some issues which I took to the local Porsche dealer, upon inspecting they told me it is unroadworthy. Brakes, tyres and suspension had to be replaced, this is when Lorbek Luxury Cars stopped being customer focused. Denying any liability and saying it was my treatment of the vehicle that caused these issues. I spent a lot of money to get the car back on the road. In all it has been in Porsche workshops for over a month since purchasing the vehicle.

The roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne *and they have been the subject of an investigation from VIC Roads and are being censured for their conduct.*¹⁰⁴ I hope for all the motoring public that they get made an example of and lose their roadworthy certification licence. Lorbek I understand have a close relationship with them and is where their Roadworthy Certificates are done for their car sales. Lorbek knew the Porsche was never roadworthy from the very detailed pre purchase report from the Melbourne Porsche dealer. The salesman David Lorbek lied to my face about several aspects of the vehicles condition. Lorbek's own website states that all there vehicles are inspected and tested, if so how can a defective vehicle be put up for sale let alone knowingly sold.

*Lorbek Luxury Cars settled in a very long 3.5 hour pre trial hearing at the Melbourne Magistrate court on the 8 March. Srecko and David Lorbek sat looking like naughty schoolboys being found out. The weight of evidence subpoenaed told in the end. I am happy to finally recover the costs of repairing an unroadworthy car to get it roadworthy*¹⁰⁵

This was a very clear case of a company who acts dishonestly with intent to gain financial advantage. Lorbek's warranty department and management treated me with contempt at every stage when thing started unravelling for them. They threatened defamation and sent legal letters to what end. The truth is all I wanted was I paid for, a roadworthy car.

¹⁰³ The italicised text is not included in the Law Answers post dated 17 December 2016, nor the Google reviews posted on 19 and 20 October 2017.

¹⁰⁴ The italicised text is not included in the Law Answers post dated 17 December 2016.

¹⁰⁵ The italicised text appears in an abridged form in the Google Review posted 19 October 2017, which omits reference to the pre-trial proceedings, SL and DL 'looking like naughty schoolboys being found out' and the subpoenaed evidence. The paragraph is absent in its entirety from the Google Review posted 20 October 2017. In lieu of this paragraph, the Law Answers post dated 17 December 2016 reads: 'Now Lorbek are in the process of being sued for the costs of repairing an unroadworthy car to get it roadworthy.'

Lorbek deserve condemnation from the motoring public and industry. Certainly deserve no respect as business owners. The Motor vehicle licensing authority and police need to take a long hard look at this company and it's operations.

You have been warned, It's about time the lawmakers protect us from these dealers.

Peter¹⁰⁶

The three Google reviews and the Law Answers post are Annexures A to D to this judgment.

PUBLICATION

43 It is common ground that PK posted the three Google reviews and the Law Answers post ('the impugned publications'). Publication is an essential element of a cause of action in defamation. In order to prove publication, a plaintiff must establish that the defendant has caused defamatory material to be communicated to and comprehended by somebody other than the plaintiff, with resulting damage to the plaintiff's reputation.¹⁰⁷

44 It is necessary to distinguish between the publisher's act of publication (publication in a colloquial sense) and the fact of publication to a third party. In cases of publication through traditional forms of mass media such as books, magazines, radio and television there is a presumption that the material complained of would have been seen by one or more readers, listeners or viewers whose identity cannot be ascertained with precision.¹⁰⁸ However, there is no equivalent presumption that material posted on the internet will have been downloaded and viewed by someone.¹⁰⁹

45 Where alleged defamatory material has been posted or uploaded to the internet, publication may be proved through direct evidence of a witness that they had seen

¹⁰⁶ Plaintiffs, 'Statement of Claim filed 14 November 2017', sch A (emphasis added).

¹⁰⁷ *Dow Jones & Co Inc v Gutnik* (2002) 210 CLR 575, 606–7 [44]; *Sims v Jooste (No 2)* [2016] WASCA 83, [8]–[9] ('*Sims v Jooste*').

¹⁰⁸ *Sims v Jooste* (n 107) [13].

¹⁰⁹ *Ibid* [10], [18]–[20]; *Stoltenberg v Bolton* (2020) 380 ALR 145, 158–9 [56] ('*Stoltenberg*'); *Dods v McDonald* [2016] VSC 200, [9].

the impugned material themselves. Absent direct evidence, publication may also be established through a 'platform of facts' from which an inference that the material has been downloaded and comprehended by at least one person can be 'properly' or 'reasonably' drawn.¹¹⁰

46 Although publication will not be inferred from the mere fact that material complained of has been posted on a website, an inference that the material has been downloaded by someone might be drawn from a combination of facts such as the number of 'hits' on the relevant website and the period of time over which the material was posted on the internet.¹¹¹ Screenshots or other evidence demonstrating that certain material has been the subject of 'likes' or otherwise responded to or interacted with may also support an inference of publication.¹¹²

47 The nature of the website or platform on which the impugned material is published should also be taken into account when considering whether an inference of publication should be drawn. For example, in *Wilson v Matthys*¹¹³ Kenneth Martin J stated:

Each particular electronic publication situation needs to be carefully evaluated in order to reach a conclusion about electronic or internet publications of this character being read by someone, other than the plaintiffs.¹¹⁴

48 Similarly, in *Sydney Cosmetic Specialist Clinic Pty Ltd v Hu*,¹¹⁵ Gibson DCJ stated:

While the Court may make presumptions from a 'like' or retweet, the mere fact that a website has readers, or a chat group has members, will not, without more, amount to evidence of downloading. The unique scrolling down nature of chat must be taken into account as well as the immediacy of social media.¹¹⁶

¹¹⁰ *Sims v Jooste* (n 107) [18]-[20]; *Stoltenberg* (n 109) 151-2 [28], 152 [33], 158-9 [56]; *MacDonald v Australian Broadcasting Corporation* [2014] NSWSC 206, [28].

¹¹¹ *Sims v Jooste* (n 107) [18]-[19].

¹¹² *Stoltenberg* (n 109) 152 [33], 168 [113]. See also the first instance judgment of Payne J in *Bolton v Stoltenberg* [2018] NSWSC 1518, [136]-[159].

¹¹³ [2018] WASC 281.

¹¹⁴ *Ibid* [109].

¹¹⁵ [2020] NSWDC 786.

¹¹⁶ *Ibid* [59].

49 That the context in which defamatory material appears can affect the Court's ability to draw an inference of publication is illustrated by the approach taken by McCallum J in *Cronau v Nelson (No 2)*:¹¹⁷

It is plain from the pleading that the plaintiff does not know of any person who downloaded the material complained of within that period. In the case of each of the eight matters complained of, the particulars of publication expressly say as much and indicate that the plaintiff will rely rather on an inference that, having regard to the popularity of the 'blocked by Pete Evans' website, some person may have accessed the website and read the comments in question within that one year period.

As submitted by Ms Chrysanthou for the defendant, that appears highly unlikely. The very popularity of the website contributes to the unlikelihood of the inference contended for; in order to read any of the comments referred to, the reader would have to scroll down through many more recent posts to find the small number of small comments attributed to Ms Nelson concerning the plaintiff. The reader would also, it might be added, have to know that the 'Christine' referred to in Ms Nelson's comments was the plaintiff. Some of the comments now sought to be sued on do not name any person at all.¹¹⁸

50 Three of the four publications upon which the plaintiffs sue are Google reviews. It is necessary to set out the evidence as to how Google reviews operate. The plaintiffs called an expert witness, Mr Apostolos Velanas. His evidence addressed the way in which Google reviews operate.

If an Internet user searches for a business, corporate or otherwise, Google provides a package of information viewable on the computer screen or mobile phone including the website if any, directions to the business address and in particular Google reviews...

By activating (clicking) the link to the reviews a computer user can quickly see [sic] these statements.

The statements have a set format in that the name of the reviewer can be seen, the age of the review (whether days, months or years). The review is in interactive form in that an Internet user might 'like' review [sic] or even reply to it. A significant feature of these reviews is that whatever the text might say whether, it be unclear, negative, positive or ambiguous reviews have a star rating manifest in large yellow stars at the top of the review. The maximum rating is five stars.

At any given time Google calculates the accumulated star ratings and gives an overall star rating to the person or entity being reviewed.

¹¹⁷ [2018] NSWSC 1905.

¹¹⁸ Ibid [6]-[7].

The rating system is simply an average of the starred reviews. Subjects of reviews can have a fraction of a star. For example LLC's current rating is 4.8 stars.

There are no Rules, users can apply whichever star they like. There is just an assumption people will do the right thing. The technical effects is [sic] to the SEO ranking system because the lower the Star ranking the harder the business is to find on Google. Plus, businesses with lower stars are less likely to attract customers because people generally only buy online from high ranking businesses.

If a reader of Google reviews wishes to focus on the lowest ratings or worst reviews he or she can simply do so by clicking on the command 'sort by' and then choose 'lowest rating' and google will sort the reviews accordingly...

Google My Business refers generally a [sic] to a suite of google features that manifest to the internet user (phone or PC) by the provision of certain information when they conduct a search such as:

- (a) identifying information (ranked);
- (b) location (ranked)
- (c) reviews;
- (d) opening hours;
- (e) links to web site;
- (f) reviews.

To add the business information to Google Maps, Search, and other Google properties, a user needs to create a Business Profile on Google. Google My Business is a free service, to manage how the business information appears across Google, including Search and Maps.

Reviews on Google provide valuable information about the business to both the business and the customers. Business reviews appear next to the listing in Maps and Search and can help a business stand out on Google.

Google+ displays different reviews and displays these near Google search results, especially for businesses. Other sites which specialise in reviews, such as TripAdvisor and Yelp, will often show companies with good reviews near the top percentage of their search results as well.¹¹⁹

51 The plaintiffs plead publication of GR1 as follows:

On or about 4 April 2017, shortly after Magistrates' Court proceedings were settled between the defendant and Lorbek Luxury Cars Pty Ltd, the defendant published on the website 'Google Reviews' an article of and concerning the first plaintiff and the second plaintiff, a copy of which is

¹¹⁹ Plaintiffs, 'Expert Report of Apostolos Velanas filed 30 June 2020', [8]-[13], [25]-[28] (citations omitted).

annexed hereto and marked 'Schedule A' ('the first article').

The first article was published on the internet worldwide website to an extensive audience of viewers and readers in the states of Victoria, New South Wales and elsewhere throughout the Commonwealth of Australia.¹²⁰

52 The same form of pleading is used in relation to the publication of GR2, GR3 and the Law Answers post.¹²¹

53 By his defence PK has put publication, in the legal sense, squarely in issue. At paragraph 5(a) PK pleads to paragraph 5 of the statement of claim as follows:

He objects to the allegations therein on the basis that they are rolled up and plead a legal conclusion without setting out or particularising the underlying facts, including the downloading and viewing of the particular version of the Google review by a third party or parties, and are thereby embarrassing.¹²²

54 The particulars to paragraph 5(b) of the defence include:

This is not a media publication with a large circulation, such that no inference as to publication to a wide and extensive audience can sensibly be drawn, particularly when the alleged publication relates only to 'the first article' form of the review and no facts are alleged from which an inference can be drawn.¹²³

55 In their reply the plaintiffs respond to paragraph 5 of the defence as follows:

Re 5 the plaintiffs assert as a matter of judicial notice and trite community understanding the internet is ubiquitous, international and widely used.

Further, the worldwide web is where Lorbek Luxury Cars gets most of its sales.

Re 5(b) evidence will be produced at trial of the audience for the internet and also for the phenomena of persons being able to view internet content without registering their viewing by 'likes'.¹²⁴

56 The plaintiffs' pleading of publication of the impugned publications is plainly deficient.¹²⁵ In order to establish publication it is not sufficient to simply allege, as the plaintiffs have, that defamatory material has been posted on the internet and has

¹²⁰ Plaintiffs, 'Statement of Claim filed 14 November 2017', [4]-[5].

¹²¹ Ibid [8]-[9], [12]-[13], [16]-[17].

¹²² Defendant, 'Amended Defence filed 19 September 2018', [5(a)]; A similar defence is pleaded at [9], [13] and [17] of the Amended Defence.

¹²³ Ibid [5(b)].

¹²⁴ Plaintiffs, 'Amended Reply dated 9 October 2018', [14]-[16].

¹²⁵ Mr Catlin, who appeared for the plaintiffs, did not draft the statement of claim.

been accessible in the jurisdiction of the Court. Mr Catlin, who appeared for the plaintiffs, submitted that the Court could infer that each of the impugned publications had been accessed and read by third parties. Mr Catlin's written submissions include the following:

The proof needed of internet publication is set out in *Sims v Jooste* [No 2] [2016] WASCA 83. In essence a plaintiff claiming to have been defamed by material posted on the internet must plead and prove facts which established [sic] that the material of which complaint was made had been downloaded and viewed by somebody, without necessarily having to provide particulars of the identity of the person or persons who downloaded the material. The cases also establish that an inference to the effect that the material of which complaint is made has been downloaded by somebody might be drawn from a combination of facts, such as the number of 'hits' on the site on which the allegedly defamatory material was posted and the period of time over which the material was posted on the internet...

The Plaintiffs rely on the following:

- a. Hamman [sic] said the gateway to reviews, the LLC web site received 1500 hits a day;
- b. The google review material was posted for in excess of three years;
- c. Commentary on Kings [sic] posts can be seen on the Porsche Forum;
- d. The Plaintiffs referred to members of the public talking about the matter;
- e. Witnesses were aware of the matter;
- f. Mr King said he had had responses to his car sales advertisement;
- g. Davd [sic] Lorbek said people not only mentioned the google reviews to him:TT:143:1-5. Some reacted negatively: 143:10;
- h. Srecko gave similar evidence of people reacting to having read the reviews: TT506:22-28.
- i. In no affidavit or in oral evidence did Mr King assert by way of mitigation that he had taken down the reviews to mitigate loss and damage. He did eventually. When is not recorded. Given his sustained belief in his false assertions the court should not infer he did so until recently. When asked when he had taken them down he was repeatedly evasive:TT673:14 - 674.22. He finally said he took it down after the mediation. The mediation did not proceed: CB325(e);
- j. Srecko said he had no choice but to issue proceedings to get the defamatory matter taken down because all else had failed: TT509:2-3;

k. He had tried to use professionals to remove them: TT511:5-12¹²⁶

57 Although the plaintiffs submit that the Court should infer publication, there is direct evidence that the Google reviews and the Law Answers post were accessed and read by a third party other than the plaintiffs themselves. LLC's marketing manager Mr Hamann gave unchallenged evidence that he had read each of PK's Google reviews.¹²⁷ Further, the Law Answers post dated 17 December 2016 contains a notation that it was edited by a moderator on 12 September 2017.¹²⁸ The statement 'David Lorbek lied to the owner's face about several aspects of the vehicles [sic] condition' which appeared in the original post of 17 December 2016 was deleted on 12 September 2017. There is therefore direct evidence of publication of each of the impugned publications.

58 Notwithstanding the direct evidence of publication, there is utility in addressing the plaintiffs' submission that publication should be inferred. The direct evidence of publication only supports a finding of very limited publication. A finding of more extensive publication is relevant to the assessment of damages if the plaintiffs establish that they have been defamed. Further, any finding regarding the identity of any third parties who accessed and comprehended the impugned publications may have a bearing on whether PK can establish the statutory defence of qualified privilege.

59 Before addressing the plaintiffs' contention that there is a proper basis to infer publication, it is important to bear in mind the following matters. First, the plaintiffs did not lead any evidence from Google disclosing the number of people who had clicked on PK's reviews. Mr Catlin submitted that Google does not provide information regarding the number of people who have read a review.¹²⁹ This submission is inconsistent with the evidence of Mr Velanas:

The Expert code of conduct dictates that I set out what further information

¹²⁶ Plaintiffs, 'Closing Submissions filed 17 November 2021', [210]-[211] (citations omitted).

¹²⁷ Transcript of Proceedings, T 343 L 4 (15 October 2021).

¹²⁸ CB2659, 'Law Answers Thread dated 17 December 2016'.

¹²⁹ Transcript of Proceedings, T 948 L 15-22, T 948 L 31 - T 949 L 5 (18 November 2021).

would have informed my report but which was not available to me. There is analytical information most likely in google's possession as to the number of people who would have read the google reviews. This would have informed me as to the audience of the relevant google reviews.¹³⁰

60 Consistent with the evidence of Mr Velanas there are two judgments relating to Google reviews which make specific reference to the number of people who have read impugned publications. In *Cheng v Lok*¹³¹ Bochner J stated:

Google My Business provides data on the number of people who have read a page. It has advised the plaintiff that during the month of April 2009, 887 read the page and in May 2019, 727 viewed the defendant's post.¹³²

61 In *Dean v Puleio*¹³³ Clayton J made a finding that a defamatory Google review had been viewed at least 1,300 times.¹³⁴

62 The plaintiffs have failed to lead direct evidence regarding the number of people who read the impugned Google reviews. Further, there is no evidence that any of the three Google reviews on which the plaintiffs sue have been 'liked' by any third party or been subject to any comment by a third party. In this regard, Mr Velanas gave evidence that 'Google reviews are social media to the extent that people can read them and comment on them'.¹³⁵ 747 Google reviews in respect of LLC were admitted into evidence.¹³⁶ Many of these reviews include comments in response from LLC. None of PK's Google Reviews elicited a response. Further, none of the character witnesses called to give evidence on behalf of the plaintiffs gave evidence of having read any of the impugned Google reviews.

63 Most of the matters referred to in the plaintiffs' written submission do not support an inference of publication of the impugned publications. The submission fails to address the question of whether there was material from which it could be inferred that the four publications on which the plaintiffs sue had been published. The

¹³⁰ Plaintiffs, 'Expert Report of Apostolos Velanas filed 30 June 2020', [110].

¹³¹ [2020] SASC 14.

¹³² Ibid [18].

¹³³ [2021] VCC 848.

¹³⁴ Ibid [19].

¹³⁵ Plaintiffs, 'Expert Report of Apostolos Velanas filed 30 June 2020', [16].

¹³⁶ CB1212-958, 'Lorbek Luxury Cars Google Reviews'.

submission draws no distinction between the four impugned publications and the ten publications on which the plaintiffs do not sue. For example, reliance is placed on the fact that '[c]ommentary on Kings [sic] posts can be seen on the Porsche Forum'.¹³⁷ PK's Porsche Forum post was made in December 2017. It is not one of the publications on which the plaintiffs sue. The comments on the post do not relate to any of the impugned publications.

64 The plaintiffs' written submissions include the following: '[t]he Plaintiffs referred to members of the public talking about the matter' and '[w]itnesses were aware of the matter'.¹³⁸ It is unclear what 'the matter' is a reference to. No evidence was given by the plaintiffs of exchanges with any third parties which supports a finding that third parties had read any of the impugned publications. The plaintiffs' evidence did not address this issue. For example, DL gave the following evidence:

This 'lemon Porsche' comment, the comment on Google Review, 'lemon Porsche', has just gone (demonstrating) and then the Herald Sun, and then - it just, it keeps growing.¹³⁹

None of the impugned publications contain the phrase 'lemon Porsche'. The phrase does appear in PK's post on Car Sales which was posted on 29 August 2016.¹⁴⁰

65 DL gave evidence of reading emails from potential customers: 'Oh just looking at your Google Reviews, we'll give it a miss. Sorry about the enquiry'.¹⁴¹ I place no weight on this evidence. The emails referred to by DL were not tendered in evidence. It is unclear which Google reviews the evidence relates to. PK posted a Google review on 1 September 2016 which the plaintiffs do not sue on.¹⁴² This review remained online for seven months before being replaced by GR1 on 4 April 2017. As the plaintiffs did not tender the emails referred to by DL, it is not possible to make a finding that customers were referring to the Google reviews on which the

¹³⁷ Plaintiffs, 'Closing Submissions filed 17 November 2021', [211(c)].

¹³⁸ Ibid [211(d)-(e)].

¹³⁹ Transcript of Proceedings, T 143 L 20-24 (12 October 2021).

¹⁴⁰ CB2062, 'Carsales Post dated 29 August 2016'.

¹⁴¹ Transcript of Proceedings, T 143 L 9-10 (12 October 2021).

¹⁴² CB2059, 'Peter King Google Review dated 1 September 2016'.

plaintiffs sue, as opposed to the review posted on 1 September 2016 on which they do not sue.

66 Any evidence from the plaintiffs that they were told by third parties that the third parties had read the impugned publications is inadmissible hearsay if led for the purpose of establishing that third parties had read the impugned publications. Although four witnesses gave character evidence on behalf of the plaintiffs, none of these witnesses gave evidence that they had read any of the impugned publications. I reject the plaintiffs' submission that the evidence of SL and DL provides any proper foundation for drawing an inference that any third party had read the impugned publications.

67 The plaintiffs submit that publication of the Google reviews can be inferred from evidence regarding the number of visitors to LLC's website. Mr Hamann gave evidence that LLC's website normally has 1,500 visits per day.¹⁴³ Mr Hamann's evidence did not relate to the number of Google searches for LLC which would bring up the LLC 'Google My Business' panel which incorporates Google reviews. Rather, his evidence was that the LLC website received 1,500 hits per day. While such hits might be the result of a Google search they could also be a consequence of an individual directly typing LLC's web address into the address bar or navigating from other search engines or links to the site on other web pages. Mr Hamann's evidence of 1,500 hits per day was in response to a question regarding an incident which occurred in 2020. Mr Hamann was not asked to give evidence about the number of hits on the website between 4 April 2017 (the date of the first impugned Google review, GR1) and 14 November 2017 when the writ was filed.

68 The plaintiffs' submissions contend that the LLC website is the 'gateway' to the Google reviews posted by PK. To the extent that this submission suggests that the Google reviews were actually on LLC's website it is not correct. The evidence of Mr Velanas is that a link to the Google reviews for LLC was accessible when an

¹⁴³ Transcript of Proceedings, T 306 L 25 (14 October 2021).

individual conducts a Google search for LLC which brings up LLC's 'Google My Business' page in the side bar to the search result.

69 The extract from LLC's Google My Business page in Mr Velanas' report states that LLC had a 4.7 star rating with 707 reviews. No extract from any reviews appear in the side bar. In order to read and comprehend PK's posts it would have been necessary for an individual to have scrolled through the reviews. This could include by clicking on the command 'sort by' and then choosing the lowest rating. This would have taken a reader to one star reviews, which include PK's reviews.

70 There are significant deficiencies in the material which the plaintiffs rely upon for the drawing of an inference of publication of the impugned posts. Foremost amongst these is their failure to lead direct evidence from Google regarding the number of people who clicked on PK's reviews. Nevertheless, I am satisfied that there is a sufficient evidentiary foundation to infer that:

- (i) During the period 4 April 2017 to 14 November 2017 approximately 1,500 people per day would have visited the LLC website;
- (ii) A proportion of those who visited the LLC website would have taken the initial step of entering 'LLC' into the Google search engine;
- (iii) A proportion of those who entered 'LLC' into the Google search engine would have clicked on the Google review for LLC on its Google My Business page; and
- (iv) A proportion of those who looked at the Google reviews would have sorted the reviews from lowest to highest and would have read PK's one star reviews which were posted on 4 April 2017 and 20 October 2017. I do not make any such finding regarding the Google review posted on 19 October 2017. As the review was only posted for 24 hours there is not a proper basis for inferring that a third party, other than the plaintiffs would have read the

review.¹⁴⁴ However, based on the evidence of Mr Hamann the 20 October 2017 review was read by him and thus published.

71 It is not possible to make any finding as to the actual number of people who have accessed and read PK's reviews of 4 April 2017 and 20 October 2017. There is no evidence of the reviews having elicited a 'like' or a comment. The absence of such evidence supports a finding that only a small number of people read the reviews. I infer that a small number of people accessed and read the posts. However, beyond this finding there is no platform of facts on which an inference can be drawn as to the extent of the publication. I infer that those who read the posts were customers or potential customers of LLC who had an interest in reading the reviews of people such as PK who had been dissatisfied with their experience of purchasing a vehicle from LLC.

72 Mr Velanas describes Law Answers as an online forum.¹⁴⁵ Save for this description, the only further evidence given by Mr Velanas regarding Law Answers is as follows:

These sites can be easily referred to as electronic word-of-mouth or eWOM. Google reviews has been the subject of some research and naturally fits into that character category in my opinion. The forums *lawanswers* and *porscheforums* also in my opinion fit into that category by reason of the serious nature of the subject matter of those sites namely as a repository for answers, respectively, on important legal questions and Porsche cars. In this report I have focussed on Google Reviews because the *lawanswers* and *porscheforums* posts are more conventional internet communications.¹⁴⁶

73 Save for this evidence of Mr Velanas there was no direct evidence regarding the operation of Law Answers, its audience and the prominence of the impugned post in Google searches relating to the plaintiffs and/or LLC. There was some evidence given by Ms Joanne Painter during her examination in chief:

Could we bring up the Law Answers? Yes, please. Is this the online website that you were seeking help from?--- LawAnswers.com, yes.

Can we go down to your review? Were you 'Joanne142', was that you?--- Ah, yes, that's me, yes.

¹⁴⁴ Cf *Sands v Channel Seven Adelaide Pty Ltd* [2009] SASC 215, [390]–[391].

¹⁴⁵ Plaintiffs, 'Expert Report of Apostolos Velanas filed 30 June 2020', [1(b)].

¹⁴⁶ *Ibid* 3[H(vi)].

So you wrote this article for what reason on Law Answers?--- To get help, to get some sort of help, knowledge of where we could get help, what we could do, um, because of the continuous faults on the car.¹⁴⁷

74 Ms Painter gave evidence which suggests that she received email updates when new posts were made on her thread.¹⁴⁸ However, she was not asked whether she had in fact seen or read PK's posts which appear on the thread she initiated.

75 The header of the Law Answers webpage includes the following:

Australia's #1 for Law

Join 150,000 Australians every month. Ask a question, respond to a question and better understand the law today.¹⁴⁹

76 The Law Answers forum thread in which PK's impugned post appears is titled 'Purchased Lemon Car at Lorbek Luxury Cars - What to Do?'.¹⁵⁰ It was started by Ms Painter on 8 October 2015.¹⁵¹ Ms Painter's user information for her account which commences her two posts within the thread records that she had posted two messages and received three likes. Her post received a response from another user on 8 October 2015. There is then another response on 7 June 2016 from another user who records their experience with LLC. Ms Painter responded to that post on 28 August 2016. The next response is from another user on 10 September 2016 who states they are 'also a victim of buying a car from Lorbek Luxury Cars'. The next post is PK's post which was posted on 17 December 2016. PK's profile for his account 'Petez' records that he joined the forum on 26 August 2016, had posted one message and received zero likes. His post also states that it was 'last edited by a moderator: 12 September 2017'. Following PK's posts, there are two further posts, the first on 19 March 2018 and the second posted '[y]esterday'. Although this second post is undated it was posted sometime after 19 March 2018. Neither of these subsequent posts respond directly to PK's post. The first, by 'Ivan Stojenavic', makes a generalised comment of:

¹⁴⁷ Transcript of Proceedings, T 580 L 5-13 (19 October 2021).

¹⁴⁸ Ibid T 590 L 23-24 (19 October 2021).

¹⁴⁹ CB2650, 'Law Answers Thread dated 8 October 2015'.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

I have been told that most of Lorbeks [sic] cars are under consignment from other clients who park their cars there and Lorbek sell them. I believe this is also illegal. Someone needs to contact the L.M.C.T. and report him if this is true.¹⁵²

77 The second, by 'Jarrad C', directly responds to Ms Painter's posts and does not respond to any of the matters stated in PK's post. Other than this evidence, there is no evidence recording the number of views of Ms Painter's thread, which included PK's post.

78 I infer from the note which records that PK's post was edited by a moderator that the moderator read and comprehended the post on or about 12 September 2017. I infer that Ivan Stojenavic read PK's post as he made a specific reference to LLC, albeit not addressing PK's particular complaint. I do not infer that Jarrad C read PK's post as the contents of his post respond specifically to Joanne Painter's complaints about the car which she purchased from LLC. Although Mr Stojenavic read PK's post he did not do so until March 2018, four months after the writ was filed. The statement of claim does not plead reliance upon publications occurring after the filing of the writ. I therefore have no regard to any publication of PK's post arising from Mr Stojenavic having read and comprehended the post. Save for the finding that PK's post was published when it was read by the Law Answers moderator on or about 12 September 2017, there is no proper platform of evidence from which an inference can be drawn that anybody else read PK's post.

79 The plaintiffs have established that GR1, GR2 and GR3 were published to Harry Hamann. They have also established that GR1 and GR3 were published to a small number of customers and potential customers of LLC who read the posts via LLC's Google My Business page. The plaintiffs have established that the Law Answers post was published to the moderator who amended the post on 12 September 2017. However save for this limited publication I do not infer that the post was read by anybody else.

¹⁵² CB2660, 'Law Answers Thread dated 19 March 2018'.

IDENTIFICATION

80 The plaintiffs bear the onus of proving that the published statements were made 'of and concerning' the plaintiffs.¹⁵³ The test for whether a plaintiff is identified by words that do not specifically name a plaintiff is as follows:

Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that the plaintiff was the person referred to?¹⁵⁴

81 PK accepts that DL is named and therefore identified in each of the four impugned publications. PK accepts that SL is named in GR1 and the Law Answers post. However, he submits that SL is neither named nor identified in GR2 and GR3.¹⁵⁵ PK submits that as a result SL's claim fails in respect of GR2 and GR3. I reject this submission. SL is the owner and chief executive officer of LLC.¹⁵⁶ GR2 and GR3 were published to Mr Hamann. Each of these reviews contain the statement: 'Certainly deserve no respect as business owners'. Mr Hamann knew that SL was the owner of LLC and would therefore have identified him as the business owner in respect of whom the statement in GR2 and GR3 was made.

82 The same cannot be said of third parties who read GR2 and GR3. SL is not mentioned in GR2 or GR3. Unless a potential customer of LLC knew that SL was the owner of the business, there would be no basis upon which a third party would understand the imputations in GR2 and GR3 as referring to SL. GR2 was only posted for one day. I do not infer that anybody other than Harry Hamann read GR2 and identified SL as LLC's business owner. I infer that a small proportion of the individuals who read GR3 via LLC's Google My Business page would have known that SL is the owner of LLC and would therefore have identified him as the business owner referred to in GR3.

IMPUTATIONS

83 The plaintiffs plead that each impugned publication was defamatory of SL and in its

¹⁵³ *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348, 371.

¹⁵⁴ *David Syme & Co v Canavan* (1918) 25 CLR 234, 238.

¹⁵⁵ Defendant, 'Closing Submissions filed 17 November 2021', 18 [75] n 36-7, 19 [79]-[81].

¹⁵⁶ Cf *Channel Seven Sydney Pty Ltd v Parras & Ors* [2002] NSWCA 202, [45].

natural and ordinary meaning meant and was understood to mean that SL:

- (1) Was fraudulent who [sic] had knowingly sold a vehicle with a fraudulent RWC ('fraud imputation');
- (2) Had engaged in criminal behaviour ('criminal imputation');
- (3) Deserved no respect as a business owner ('no respect imputation');
- (4) Is and was a dishonest car dealer ('dishonest imputation');
- (5) Is untrustworthy ('untrustworthy imputation').

84 The statement of claim also pleads the fraud, criminal, dishonest and untrustworthy imputations in respect of DL. In addition, the statement of claim pleads that each publication in its natural and ordinary meaning meant and was understood to mean that DL is and was a liar ('liar imputation').

85 During final submissions Mr Mullen, who by that time appeared for PK, did not gainsay the proposition that GR1 conveys the pleaded no respect, dishonest and untrustworthy imputations in respect of SL. Mr Mullen also accepted that the impugned publications convey the dishonest and untrustworthy imputations in respect of DL as well as the imputation that he is and was a liar.

86 The dispute between the parties regarding GR1 is whether it conveys the fraud and criminal imputations in respect of SL and/or DL.

87 In *Trkulja v Google LLC*¹⁵⁷ the High Court set out the test for whether a published matter is capable of being defamatory:

The test for whether a published matter is capable of being defamatory is what ordinary reasonable people would understand by the matter complained of. In making that assessment, it is necessary to bear in mind that ordinary men and women have different temperaments and outlooks, degrees of education and life experience. As Lord Reid observed in *Lewis v Daily Telegraph Ltd*, '[s]ome are unusually suspicious and some are unusually naïve'. So also are some unusually well educated and sophisticated while

¹⁵⁷ (2018) 263 CLR 149.

others are deprived of the benefits of those advantages. The exercise is, therefore, one of attempting to envisage a mean or midpoint of temperaments and abilities and on that basis to decide the most damaging meaning that ordinary reasonable people at the midpoint could put on the impugned words or images considering the publication as a whole.

As the Court of Appeal of England and Wales observed in *Berezovsky v Forbes Inc*, that exercise is one in generosity not parsimony. The question is not what the allegedly defamatory words or images in fact say or depict but what a jury could reasonably think they convey to the ordinary reasonable person; and it is often a matter of first impression. The ordinary reasonable person is not a lawyer who examines the impugned publication over-zealously but someone who views the publication casually and is prone to a degree of loose thinking. He or she may be taken to 'read between the lines in the light of his general knowledge and experience of worldly affairs', but such a person also draws implications much more freely than a lawyer, especially derogatory implications, and takes into account emphasis given by conspicuous headlines or captions. Hence, as Kirby J observed in *Chakravarti v Advertiser Newspapers Ltd*, '[w]here words have been used which are imprecise, ambiguous or loose, a very wide latitude will be ascribed to the ordinary person to draw imputations adverse to the subject'.¹⁵⁸

88 In *Charan v Nationwide News Pty Ltd*¹⁵⁹ J Forrest J made the following observations, which I adopt, regarding the correct approach for a Judge sitting alone when considering whether an impugned publication conveys an imputation:

I have set out the thrust of the article at paragraph [22]. I think it important, bearing in mind the principles I have adverted to, that in examining an article such as this, one avoids the trap of parsing and analysing each sentence or paragraph to see whether the article as a whole conveyed the alleged imputations. What is important is the sting of the article in the eye of the reasonable reader of *The Australian* (print and online editions).

Equally, it is important to remember that a judge must disregard his or her legal training (if that be possible) and endeavour to take from the article what a reasonable reader would. There is much to be said for a jury rather than a judge making this determination; that said, I cannot avoid the task given the parties' choice of forum. I should also add the following: given the task that I have described, it is not always possible to spell out satisfactorily the reason for preferring one or more (or perhaps none) of the meanings alleged. This is often exemplified by the principle that a court (be it judge or jury) is not bound by a pleaded imputation but must ensure, as a matter of 'practical justice', that the parties know generally the nature of the asserted imputation and fight the case on that basis.¹⁶⁰

¹⁵⁸ Ibid 160–1 [31]–[32] (citations omitted). See also *Bailey v Win Television NSW Pty Ltd* (2020) 104 NSWLR 541, 551 [48]–[49] ('*Bailey*'); *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496, [72]–[85].

¹⁵⁹ [2018] VSC 3.

¹⁶⁰ Ibid [35]–[36] (citations omitted).

An appeal from J Forrest J's judgment was dismissed.¹⁶¹

Fraud imputation: Each plaintiff was fraudulent in that he knowingly sold a vehicle with a fraudulent RWC

89 The issues for determination in the present proceeding are framed by the plaintiffs' pleading of the alleged imputations and the defendant's pleading of his justification defence.¹⁶² The plaintiffs' case as pleaded and conducted at trial was not confined to an allegation that the impugned publications conveyed an imputation that the plaintiffs sold a vehicle which they knew to be unroadworthy. Rather, the plaintiffs contend that the publications convey the imputation that the plaintiffs were *fraudulent* and knowingly sold a vehicle with a *fraudulent RWC*. The sting of the pleaded imputation is that the plaintiffs knew that the RWC provided by Europei was fraudulent. The pleaded imputation excludes the possibility that the RWC provided by Europei was the product of human error. Rather, the sting of the pleaded imputation is that Europei intentionally issued a RWC for the vehicle despite knowing that the vehicle was unroadworthy and that the plaintiffs knew this to be the case.¹⁶³

90 In their written submissions the plaintiffs contend that the defendant failed to establish the truth of the pleaded imputation because it was not put to Messrs Rossi and Spirodi from Europei that they had been asked by either DL or SL to create a false RWC.¹⁶⁴ The plaintiffs conducted their case on the basis that 'the most obvious route to the alleged fraud was LLC telling Europei to falsely report the brakes as satisfactory'.¹⁶⁵ There is a significant difference between an imputation that the plaintiffs had knowledge that the vehicle was unroadworthy and an imputation that the plaintiffs had knowledge that the RWC provided for the vehicle was a product of fraud rather than human error. I accept the plaintiffs' submission that the sting of the fraud imputation is stronger, in the sense of being more defamatory, than an

¹⁶¹ *Charan v Nationwide News Pty Ltd* [2019] VSCA 36 ('Charan').

¹⁶² *Setka v Abbott* (2014) 44 VR 352, 371 [64].

¹⁶³ See for example the evidence of SL: Transcript of Proceedings, T 533 L 25–27 (18 October 2021).

¹⁶⁴ Plaintiffs, 'Closing Submissions filed 17 November 2021', [23].

¹⁶⁵ *Ibid* [34].

imputation that the plaintiffs sold a vehicle with a RWC knowing that it was not roadworthy.¹⁶⁶

91 In their written submissions the plaintiffs included a table setting out extracts from the impugned publications said to support the existence of the fraud imputation:¹⁶⁷

Each of the plaintiffs was fraudulent in that he knowingly sold a vehicle with a fraudulent roadworthy certificate;

The roadworthy certificate was fraudulent.. Lorbek new [sic] the Porsche was never roadworthy from the detailed pre-purchase report ..David and Srecko sat like naughty school boys on being found out...This is a very clear case of a company that acts dishonestly. ..The motor vehicle licencing authority and police need to take a long hard look at this company and its operations..its [sic] about time lawmakers protect us from these dealers

Each of the plaintiffs engaged in criminal behaviour;

Fraud and false roadworthies are criminal offences¹⁶⁸ very clear case of a company which acts dishonestly with intent to obtain financial advantage.. The motor vehicle licencing authority and police need to take a long hard look at this company and its operations..its [sic] about time lawmakers protect us from these dealers

Each of the plaintiffs deserves no respect as a business owner;

Lorbek deserve condemnation from the motoring public and industry

The first plaintiffs is and was a dishonest car dealer;

Certainly deserve no respect as business owners

The second plaintiffs is and was a dishonest car salesman;

David and Srecko sat like naughty school boys on being found out...This is a very clear case of a company that acts dishonestly

Each of the plaintiffs is untrustworthy

David and Srecko sat like naughty school boys on being found out...This is a very clear case of a company that acts dishonestly..

David lied to my face

All the above generally

92 The statement 'David and Srecko sat like naughty school boys having been found out' only appears in GR1. The statement 'it's about time law makers protect us from these dealers' does not appear in the Law Answers post.

Fraud imputation: Srecko Lorbek

93 An ordinary reasonable person would not understand the impugned publications as conveying the fraud imputation in respect of SL. The only specific references to SL in the impugned publications are:

¹⁶⁶ Ibid [21].

¹⁶⁷ Ibid [9].

¹⁶⁸ This statement does not appear in any of the impugned publications.

- (v) Srecko and David Lorbek sat looking like naughty school boys having been found out (appearing twice in GR1); and
- (vi) An innocent victim of this company was told by Srecko Lorbek to never contact him again (Law Answers post).

94 Whether the fraud imputation is conveyed in respect of SL is to be determined by reading the totality of each impugned publication. There is no allegation in the impugned publications that SL colluded with Europei to have them produce a false RWC in respect of a vehicle that SL knew to be unroadworthy. A reasonable reader would not read the impugned publications as conveying the imputation that SL knew at the time of the sale of the vehicle that it was unroadworthy. It is DL who is singled out as having lied to PK's face about the condition of the vehicle. It is DL rather than SL who is singled out as the representative of LLC who had knowledge that the vehicle was not roadworthy at the time of its sale to PK.

95 GR1 identifies SL as having represented LLC at the pre-trial hearing at the Melbourne Magistrates' Court. An ordinary reasonable person would infer from the fact that SL represented LLC at the pre-trial hearing that he is the owner of LLC. Further, a proportion of the individuals who read GR1 would have known that SL is the owner of LLC. However, an ordinary reasonable person would not understand the references to LLC in the impugned publications as conveying the fraud imputation in respect of SL. Although there are several references to LLC in the impugned publications, the allegation of fraud is only directed at Europei. The publications include the statement 'the roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne'. Shortly thereafter the following statement appears: 'Lorbek I understand have a close relationship with them and [sic] is where their roadworthy certificates are done for their car sales'. This is not an allegation of actual fraud against LLC. Rather, it is an expression of suspicion of collusion between LLC and Europei. As there is no allegation of actual fraud against LLC, an ordinary reasonable person would not understand the reference to LLC as conveying the fraud imputation in respect of SL.

Fraud imputation: David Lorbek

96 Each of the Google reviews contains the following:

The roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne and they have been the subject of an investigation from VicRoads and are being censured for their conduct. I hope for all the motoring public that they get made an example of and lose their roadworthy certification licence. Lorbek I understand have a close relationship with them and is where their Roadworthy Certificates are done for their car sales. Lorbek knew the Porsche was never roadworthy from the very detailed pre-purchase report from the Melbourne Porsche dealer. The salesman David Lorbek lied to my face about several aspects of the vehicles [sic] condition. Lorbek's own website states that all their vehicles are inspected and tested, if so how can a defective vehicle be put up for sale let alone knowingly sold.

This passage also appears in the Law Answers post, save that Europei are described as being 'under a very serious investigation from VicRoads'.

97 In the passage set out above there are a number of express references to DL. However, the allegation of fraud is directed at Europei. The statement 'Lorbek I understand have a close relationship with them and is where their RWCs are done for their car sales', would not convey the fraud imputation to an ordinary reasonable person.

98 An ordinary reasonable person reading PK's one star Google reviews on LLC's Google My Business page would understand that the post has been made by a very disgruntled customer. Having read the express allegations of fraudulent conduct by Europei and the allegation that DL lied to his face, an ordinary reasonable person would not read the passage as also conveying an allegation that DL knew that the RWC issued by Europei was fraudulent. An ordinary reasonable person would regard PK as a very disgruntled customer who showed no restraint when intending to make allegations of fraud and dishonesty. The publications neither expressly nor implicitly convey the imputation that DL knew that the RWC was fraudulent, being the product of intentional dishonesty on the part of Europei rather than mere inadvertence.

99 As the plaintiffs have failed to establish the fraud imputation it is not necessary to consider PK's justification defence pleaded at [28] and [29] of the amended defence.

Had it been necessary to do so, I would have concluded that [28] and [29] do not plead a permissible variant to the fraud imputation. The pleaded defences are premised solely upon SL and DL having sold the vehicle knowing that it was unroadworthy. This premise is substantially different from the allegation of knowledge of Europei's fraudulent conduct which underpins the fraud imputation. It is therefore not a permissible variant of the fraud imputation.¹⁶⁹

Criminal Imputation: Each plaintiff engaged in criminal behaviour

100 None of the impugned publications contain an express allegation that either SL or DL engaged in criminal behaviour. The plaintiffs rely upon the following matters in support of the criminal imputation:

Fraud and false roadworthies are criminal offences very clear case of a company which acts dishonestly with intent to obtain financial advantage.. The motor vehicle licensing authority and police need to take a long hard look at this company and its operations..its about time lawmakers protect us from these dealers.¹⁷⁰

101 As to the reference to 'fraud' in the statement, '[f]raud and false roadworthies are criminal offences', I have concluded that the impugned publications do not convey the fraud imputation.

102 The plaintiffs rely in part upon the fraud imputation as the basis for the criminal imputation. The statement 'this was a very clear case of a company which acts dishonestly with intent to obtain financial advantage' is directed at the company, LLC, not SL or DL. Similarly, the statement 'The Motor Vehicle Licensing Authority and Police need to take a long hard look at this company and its operations', is directed at the company, LLC, rather than SL and/or DL. An ordinary reasonable person would not understand this statement as conveying the criminal imputation in respect of SL and/or DL. When the impugned publications are read as a whole, it is readily apparent that when PK intends to make an allegation against an individual,

¹⁶⁹ *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667, 673-4 [17], 686-7 [53]-[54]; *Setka v Abbott* (2014) 44 VR 352, 367 [48]; *Williams v Katis* [2014] VSC 405, [145]; *Gatto v Australian Broadcasting Corporation* [2021] VSC 83, [24].

¹⁷⁰ Plaintiffs, 'Closing Submissions filed 17 November 2021', [9].

he shows no restraint. Hence, his allegation that DL lied to his face.

103 The statement '[t]he motor vehicle licensing authority and police need to take a long hard look at this company and its operations', would convey to an ordinary reasonable person the imputation that there are reasonable grounds for the police and licensing authority to investigate LLC. An imputation of reasonable grounds to investigate LLC is significantly different to an imputation that criminal conduct has actually been engaged in by SL and/or DL. Further, the statement '[i]t's about time law makers protect us from these dealers', does not convey an imputation that the plaintiffs engaged in criminal conduct. Rather, it conveys an imputation that Parliament should enact laws to further regulate car dealers. The plaintiffs have not established that the impugned publications convey the criminal imputation.

Srecko Lorbek: no respect, dishonest and untrustworthy imputations

104 PK accepts that these imputations are conveyed by GR1 in respect of SL.¹⁷¹ This concession was properly made. GR1 includes the following:

- 'In the end, Srecko and David Lorbek sat like naughty school boys having been found out at the Melbourne Magistrates' Court. If you are thinking of dealing with Lorbek turn and run away. They don't deserve any stars.'
- 'Lorbek Luxury Cars settled in a very long 3.5 hour pre-trial hearing at the Melbourne Magistrates' Court on the 8 March. Srecko and David Lorbek sat looking like naughty school boys being found out'.
- 'Lorbek deserve condemnation from the motoring public and industry. Certainly deserve no respect as business owners'.

105 The no respect imputation in relation to SL is conveyed by GR1. Although not expressly identified as a business owner of LLC he is identified as having represented LLC at the Magistrates' Court hearing on 8 March 2017. An ordinary reasonable person would infer that SL is an owner of the LLC business.

106 The dishonest and untrustworthy imputations are conveyed by the statements in

¹⁷¹ Defendant, 'Closing Submissions filed 17 November 2021', [110].

GR1, '[i]f you are thinking of dealing with Lorbek turn and run away. They don't deserve any stars'. This statement appears in a Google review. As the lowest ranking for a Google review is one star, the statement '[t]hey don't deserve any stars' conveys an imputation of dishonesty and untrustworthiness. The statement appears immediately after the reference to SL and DL 'sitting like naughty school boys having been found out'. A reasonable ordinary person would read this statement as conveying an imputation of dishonesty and untrustworthiness applying equally to SL and DL. In contrast to the dishonest imputation, the untrustworthy imputation is not confined to SL's conduct as a car dealer. However, an ordinary reasonable person would read GR1 as conveying the imputation that SL is untrustworthy *as a car dealer*. I am not constrained by PK's concession that the pleaded imputation, 'the first plaintiff is untrustworthy', was conveyed by GR1. Rather, my task is to determine what is the sting of the publication in the eye of the reasonable reader.¹⁷² A reasonable reader would regard the sting of the untrustworthy imputation as being that SL is untrustworthy as a car dealer.

107 GR2 and GR3 do not contain any reference to SL and DL having sat like naughty school boys having been found out. Nor do the reviews include the statement '[i]f you are thinking of dealing with Lorbek turn and run away. They don't deserve any stars.' SL's name does not appear in GR2 and GR3. GR2 and GR3 do not convey the dishonest and untrustworthy imputations in respect of SL. SL is identified in GR2 and GR3 by reason of the reference to 'deserves no respect as a business owner'. Mr Hamann, who read GR2 and GR3, knows that SL is the owner of LLC. GR2 was only posted for 24 hours. I am not satisfied that there is a proper basis for inferring that anyone other than Mr Hamann read the post. I infer that a small proportion of the individuals who read GR3 would have known that SL is the owner of LLC and would have understood GR3 as conveying the no respect imputation in respect of SL.

108 The Law Answers post contains the statement: '[t]he vehicle owner, an innocent

¹⁷² *Charan* (n 161) [35].

victim of this company was told by Srecko Lorbek to never contact him again after complaining of his company's conduct'. The post identifies SL as the owner of the business. As such the Law Answers moderator who amended the post on 12 September 2017 would have read the statement '[c]ertainly deserves no respect as business owners' as referring to SL. This is the only imputation conveyed in respect of SL by the Law Answers post.

David Lorbek: liar, dishonest and untrustworthy imputations

109 PK accepts that these imputations are conveyed by each of the impugned publications.¹⁷³ Each publication contains the express statement, 'I foolishly believed lies about the car from the salesman' and '[t]he salesman David Lorbek lied to my face about several aspects of the vehicles [sic] condition'. These statements convey the imputation that DL is a liar. The imputation that DL is a dishonest car salesman is conveyed by the statements that DL lied to PK about the condition of the vehicle. The imputation is also conveyed by the statements which would lead a reasonable person to believe that DL knew the vehicle was unroadworthy when he sold it to PK. As regards the imputation that DL is untrustworthy, an ordinary reasonable person would understand the impugned publications as conveying the imputation that DL is untrustworthy *as a car salesman* as distinct from being untrustworthy generally. All of the statements referable to DL in the impugned publications are concerned with his conduct as a car salesman.

Conclusion on imputations

110 I have determined that the following imputations are conveyed by the impugned publications.

Srecko Lorbek:

- (vii) The fraud and criminal imputations are not conveyed by any of the publications;
- (viii) The no respect imputation is conveyed by all four publications.

¹⁷³ Defendant, 'Closing Submissions filed 17 November 2021', [113].

However, in respect of GR2 it was only conveyed to Mr Hamann. In respect of GR3, it was conveyed to Mr Hamann and a small proportion of the individuals who read GR3 via LLC's Google My Business page who knew that SL is the owner of LLC;

- (ix) The dishonest and untrustworthy car dealer imputations are only conveyed by GR1.

David Lorbek:

- (x) The fraud and criminal imputations are not conveyed by any of the publications;
- (xi) The liar/dishonest and untrustworthy car salesman imputations are conveyed by each of the impugned publications.

111 The plaintiffs have established that the above imputations are conveyed by the publications. I now turn to consideration of the defences raised by PK.

STATUTORY QUALIFIED PRIVILEGE

112 PK submits that he has a defence of statutory qualified privilege pursuant to s 30 of the *Defamation Act 2005* ('the Act'). Section 30 provides as follows:

30 Defence of qualified privilege for provision of certain information

(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the 'recipient') if the defendant proves that--

- (a) the recipient has an interest or apparent interest in having information on some subject, and
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
- (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

(2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.

(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account the following factors to the

extent the court considers them applicable in the circumstances--

- (a) the seriousness of any defamatory imputation carried by the matter published,
- (b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
- (c) the nature of the business environment in which the defendant operates,
- (d) whether it was appropriate in the circumstances for the matter to be published expeditiously,
- (e) any other steps taken to verify the information in the matter published.

(3A) Subsection (3) does not--

- (a) require each factor referred to in the subsection to be taken into account, or
- (b) limit the matters that the court may take into account.

(3B) It is not necessary to prove that the matter published concerned an issue of public interest to establish the defence of qualified privilege under subsection (1).

(4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.

(5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

Did the recipients of the publications have an interest in having information in respect of LLC?

113 For the purpose of s 30, 'interest' has been construed more widely than the concept of 'interest' under the defence of common law qualified privilege. In *Defteros v Google LLC*¹⁷⁴ the Court of Appeal stated:

Secondly, the courts have placed a wider construction on the words 'an interest', in s 30 of the Act, than was previously accorded to the concept of 'interest' for the purposes of the common law qualified privilege. Nevertheless, it has been emphasised that the requisite interest must be something more than that of idle curiosity, and it must be definite and of substance.¹⁷⁵

114 I have concluded that GR1, GR2 and GR3 were published to Mr Hamann. GR1 and

¹⁷⁴ [2021] VSCA 167 ('*Defteros*').

¹⁷⁵ *Ibid* 82 [212]. See also *Echo Publications Pty Ltd v Tucker (No 3)* [2007] NSWCA 320, [7]-[9].

GR3 were also published to customers and potential customers of LLC via LLC's Google My Business page. I have concluded that the Law Answers post was published to the moderator who amended the post on 12 September 2017. Each of the recipients of the publications had a definite and/or tangible interest or apparent interest in having information about LLC.¹⁷⁶ Mr Hamann was the employee of LLC with responsibility for responding to adverse Google reviews.¹⁷⁷ Mr Hamann therefore had an interest in receiving the information contained in GR1, GR2 and GR3. Law Answers is a forum which describes itself as being a place for Australians to '[a]sk a question, respond to a question and better understand the law'.¹⁷⁸ PK's post related to his experience and legal dispute with LLC and was made in response to a thread started by another disgruntled LLC customer Joanne Painter. The moderator who read PK's post had an interest, or at least an apparent interest, in having the information relating to PK's dispute with LLC.

115 Each of the impugned publications recorded PK's negative experience of purchasing a vehicle from LLC. The information in the publications was of direct interest to customers and potential customers of LLC. The individuals who read PK's publications did not do so out of idle curiosity.¹⁷⁹ Rather, they did so because of their interest as a customers or potential customers of LLC, in the experience of a dissatisfied customer. For example, the fact that LLC sold PK warranty insurance which he did not need because of an existing factory warranty would be a matter of considerable interest to a potential customer of LLC. So too, the information that the RWC provider utilised by LLC was under investigation from VicRoads. The fact that the impugned publications were published throughout Australia does not militate against a finding that the publications would have been read by customers or potential customers of LLC.¹⁸⁰ The unchallenged evidence of SL is that LLC sells cars to 'every corner of Australia every week'.¹⁸¹ When PK purchased this vehicle he

¹⁷⁶ Cf *Jones v Aussie Networks Pty Ltd* [2018] QSC 219, [55].

¹⁷⁷ Transcript of Proceedings, T 299 L 10-14 (14 October 2021).

¹⁷⁸ CB2650, 'Law Answers Thread dated 8 October 2015'.

¹⁷⁹ Cf *Defteros* (n 174) [234].

¹⁸⁰ *Ibid* [235].

¹⁸¹ Transcript of Proceedings, T 453 L 28-29 (18 October 2021).

was a resident of the southern highlands of New South Wales. He viewed the vehicle online and spoke to LLC's salesman Jeff Devers about the features of the car prior to travelling to Melbourne.¹⁸²

- 116 The requirement under s 30(1)(a) that recipients of PK's post had an interest or apparent interest in having information concerning LLC is satisfied. So too is the requirement under s 30(1)(b) that the posts were published to the recipients in the course of giving them information concerning LLC. Insofar as the recipients had an apparent interest in having information about LLC, PK believed on reasonable grounds that each of the recipients had that apparent interest. PK knew when he posted GR1, GR2 and GR3 that his reviews would be accessible by customers and potential customers of LLC who would be interested in reading about his negative experience purchasing a vehicle from LLC. When he posted his thread on Law Answers, PK believed on reasonable grounds that it would be available to be read by individuals who had an interest in his experience. Hence the post begins with the statement, 'I think this story needs [sic] be told'.

Was the conduct of PK in publishing the defamatory matters reasonable in the circumstances?

- 117 In *Chau v Fairfax Media Publications Pty Ltd*¹⁸³ Wigney J identified seven principles relevant to determining whether the conduct of a defendant in publishing a defamatory matter was reasonable:

First, in most cases, the more serious the imputation that is conveyed, the greater the obligation upon the respondent to ensure that its conduct in relation to the publication was reasonable...

Second, a respondent who intended to convey an imputation that was in fact conveyed must generally establish that they believed in the truth of that imputation and that the imputation conveyed was relevant to the subject...

Third, the fact that the respondent may not have intended to convey the imputation that was in fact conveyed does not necessarily mean that their conduct in publishing was unreasonable...

¹⁸² Ibid T 811 L 10–29, T 829 L 17 – T 830 L 4 (5 November 2021).

¹⁸³ [2019] FCA 185 ('*Chau*'). This was upheld on appeal *Fairfax Media Publications Pty Ltd v Chau* [2020] FCAFC 48, [188]–[193].

Fourth, the respondent must generally establish that reasonable steps were taken before publishing to ensure that the facts and conclusions stated in the publication were accurate...

Fifth, in relation to sources, the respondent's belief or perception of the position, standing, character and opportunities of knowledge of the source must be such as to make the respondent's belief in the truth and accuracy of the information reasonable in the circumstances...

Sixth, a respondent must show that the manner and extent of the publication did not exceed what was reasonably required in the circumstances...

Seventh, the respondent must also establish that the respondent gave the person defamed an opportunity to make a reasonable response to the defamatory imputation..¹⁸⁴

118 GR1, GR2 and GR3 were posted on 4 April 2017, 19 October 2017 and 20 October 2017. The Law Answers post was posted on 17 December 2016 but not published until 12 September 2017 when it was read by the moderator who amended the post. Prior to the publication of the defamatory material PK undertook extensive investigations to try and understand how he had purchased a vehicle which was not roadworthy.

119 On 23 August 2016 PK was informed by Craig Homann of Gulson that his vehicle was unroadworthy.¹⁸⁵ On 29 August 2016 PK emailed Daniel Novak at LLC and asked for a fully documented roadworthiness file for his vehicle.¹⁸⁶ On the same day PK emailed VicRoads advising them that on 18 July 2016 he had purchased a vehicle from LLC with a report stating that it passed a roadworthiness test but three weeks later the vehicle was unroadworthy.¹⁸⁷ This email set in train the VicRoads investigation of Europei which ultimately resulted in the four weeks suspension of their RWC provider licence from 3 February 2017.¹⁸⁸

120 On 16 September 2016 at 10.21am PK emailed Jason Pasco, the after sales manager at PCB as follows:

¹⁸⁴ *Chau* (n 183) [109]-[115]. See also *Fairfax Media Publications Pty Ltd v Gayle* (2019) 100 NSWLR 155, 195 [172]; *Stoltenberg* (n 109) 182-3 [190]-[192]; *Bailey* (n 158) 559-60 [89].

¹⁸⁵ CB2046, 'Email from Craig Homann to Peter King dated 23 August 2016'.

¹⁸⁶ CB2053, 'Email from Peter King to Daniel Novak dated 29 August 2016'.

¹⁸⁷ CB 2771-2, 'Email from Peter King to VicRoads dated 29 August 2016'.

¹⁸⁸ CB2718, 'Letter from VicRoads to Spiro Spiridis dated 13 December 2016'; CB2713, 'Letter from VicRoads to Spiro Spiridis dated 1 February 2017'.

Morning Jason,

I have made several enquiries about the history of the Porsche Panamera Turbo WP0ZZZ97ZAL083560 I purchased from Lorbek in July 19 2016 [sic]. Can you let me know in as much detail as possible;

1. When my car has been at your dealership. I know it had coolant pipes fixed prior to me purchasing the car.
2. What was the purpose every visit?
3. Any service history or vehicle condition reports.

I currently have a VCAT hearing in October against Lorbek selling me a unroadworthy vehicle and for costs associated with getting it roadworthy. VIC Roads I also know will be very interested in information you have as to the condition of the vehicle. Your help would be greatly appreciated. I currently have instructed my lawyers to issue subpoenas for more detailed information you may not be able to give me for issues such as privacy.

Regards

Peter King¹⁸⁹

121 At 11.04am on 16 September 2016 Mr Pasco replied to PK as follows:

Hi Peter,

Thank you for your email.

I can confirm VIN WP0ZZZ97ZAL083560 was presented to our dealership for the following:

22/06/2016 - 50257kms - Pre Purchase Inspection

04/07/2016 - 50269kms - Annual Service

13/07/2016 - 50292kms - Coolant leak

As the documentation for these repairs belong to another client, unfortunately we are unable to supply copies under the privacy Act.

Kind regards

Jason Pasco¹⁹⁰

122 At 11.23am on 16 September 2016 PK replied as follows:

Morning Jason,

Thank you for the information. I will get my paperwork in order to subpoena

¹⁸⁹ CB2762, 'Email from Peter King to Jason Pasco dated 16 September 2016'.

¹⁹⁰ CB2760, 'Email from Jason Pasco to Peter King dated 16 September 2016'.

the information through my VCAT Claim.

Of particular interest is the pre purchase inspection. I am gathering you were offered the car and declined to purchase. I would expect that report will be very beneficial to a successful result in my VCAT hearing.

Please make sure nothing happens to the report, I am sure Lorbek would not want that to see the light of day.

Regards

Peter¹⁹¹

123 It is common ground that PK subsequently obtained the three documents referred to in Mr Pasco's email of 16 September 2016.

124 In an email to Craig Homann which does not record the time and date when it was sent, PK stated:

Hi Craig,

I can't tell you how much I appreciate your help. Jason Pascoe [sic] has been a real help as I have just discovered that Lorbek tried to sell the Panamera to Porsche Brighton and they have all the info on the car which they rejected buying from Lorbek. Reading between the lines as I need a court order to access the information for them to reject it must have had the problems you discovered and fixed for me.

Finally getting to the bottom of this.

Regards

Peter¹⁹²

125 I infer that PK's email was sent to Mr Homann shortly after the email exchange between PK and Mr Pasco on 16 September 2016. In Mr Pasco's email he confirms that PK's vehicle was 'presented to our dealership' for the following:

22/06/2016 - 50257kms - Pre Purchase Inspection

04/07/2016 - 50269kms - Annual Service

13/07/2016 - 50292kms - Coolant leak

Mr Pasco informed PK that the documents 'belong to another client' and he therefore

¹⁹¹ CB2758-9, 'Email from Peter King to Jason Pasco dated 16 September 2016'.

¹⁹² CB2763-4, 'Email from Peter King to Craig Homann n.d.'.

could not provide them to PK.

126 It is apparent from PK's response to Mr Pasco at 11.23am on 16 September 2016 as well as his email to Craig Homann that he believed that the 'client' referred to in Mr Pasco's email was LLC. It is also apparent that he believed that 'pre-purchase inspection' referred to PCB carrying out an inspection of the vehicle to inform a decision as to whether or not PCB would purchase the vehicle from LLC. In his email to Mr Pasco at 11.23am on 16 September 2016 PK stated: '[o]f particular interest is the pre-purchase inspection. I am gathering you were offered the car and declined to purchase.' There is no evidence that at any time after 16 September 2016 Mr Pasco said anything to PK to call into question his belief that LLC had tried to sell the Porsche to PCB.

127 As set out earlier in this judgment the true position is that the Porsche was owned by PCB on 22 June 2016. The 'pre-purchase inspection' was a 'Porsche approved inspection' to determine the cost involved in bringing the car up to 'Porsche approved' standard. Nevertheless, it is understandable that, having received Mr Pasco's email on 16 September 2016, PK assumed that the vehicle was owned by LLC on 22 June 2016. The email refers to the vehicle having been 'presented to our dealership'. It also states that 'the documentation for these repairs belongs to another client'. PK knew that the vehicle was owned by LLC on 13 July 2016 when it was presented to PCB to repair a coolant leak which had developed whilst PK was on a test drive with DL on 13 July 2016, resulting in the vehicle being sent to PCB on the same day for repair. This is one of the three transactions listed in Mr Pasco's email of 16 September 2016. On a fair reading of Mr Pasco's email the vehicle was owned by one client, LLC, when it was presented to PCB on each of 22 June, 4 July and 13 July 2016.

128 In GR1 PK states '[t]he weight of evidence subpoenaed told in the end'. PK had subpoenaed the documents referred to in Mr Pasco's email of 16 September 2016 prior to posting GR1. He believed, reasonably, that these documents established that LLC knew the vehicle was unroadworthy on or about 22 June 2016 because of the

defects disclosed in the pre-purchase inspection report. It is this report which PK refers to in each of the impugned publications as the basis for his statement that LLC knew his vehicle was unroadworthy when they sold it to him. This belief was reinforced by VicRoads' suspension of Europei's licence.

129 Mr Spiridis and Mr Rossi were interviewed by a VicRoads officer on 15 November 2016.¹⁹³ The record of interview refers to Mr Rossi and Mr Spiridis having been shown documents relating to an inspection conducted by PCB which shows the front discs being undersize prior to Europei issuing a RWC. The PCB documents referred to during the interview are the pre-purchase inspection report of 22 June 2016 showing the front discs recorded at 35.5mm and the PCB job card of 4 July 2016 recording the front discs at 35.7mm.¹⁹⁴

130 On 23 August 2016 Mr Homann emailed PK and advised him that: 'Given the condition of the brakes, tyres and suspension I would deem the vehicle to be in an unsafe, unroadworthy condition'.¹⁹⁵ The particular fault identified by Mr Homann in respect of the vehicle's suspension was: 'Rear lower control arm bushes are split severely, unable to set wheel alignment as a result'.¹⁹⁶

131 Upon receipt of Mr Homann's email PK immediately sought clarification as to what had occurred to his vehicle when Europei sent it to Bob Jane T-Marts for a wheel alignment. On 25 August 2016 the assistant manager of Bob Jane Port Melbourne emailed PK attaching a copy of the delivery docket for the wheel alignment.¹⁹⁷ The email states: 'Work was carried out as per customer request, even though the vehicle has 4 wheel adjustment'. The delivery docket records that the vehicle had a thrust alignment of the front wheels only, rather than a full wheel alignment of all four wheels.¹⁹⁸ The statement in the covering email 'work carried out as per customer

¹⁹³ CB2722-9, 'VicRoads Records of Interview with Spiro Spiridis and Tony Rossi dated 15 November 2016'.

¹⁹⁴ CB2720-1, 'VicRoads Statement of Evidence, Nino Menolascina'.

¹⁹⁵ CB2772, 'Email from Craig Homann to Peter King dated 23 August 2016'.

¹⁹⁶ Ibid; Transcript of Proceedings, T 631 L 4-16 (19 October 2021).

¹⁹⁷ CB2667, 'Email from Scott Cannan to Peter King dated 25 August 2016'.

¹⁹⁸ CB2668, 'Bob Jane T-Marts Delivery Docket dated 19 July 2016'.

request' indicates that Europei requested only a front wheel alignment. PK had been advised by Mr Homann on 23 August 2016 that it was not possible to do a full wheel alignment because of the rear control arm bushes being severely split. In light of the information PK received from Bob Jane that Europei had requested a thrust alignment, it was reasonable for PK to have believed that the rear suspension was damaged to such an extent that it could not be given a full four wheel alignment when the vehicle was sent by Europei to Bob Jane T-Marts on 19 July 2016.

132 Mr Catlin submitted that the Court could not be satisfied that the delivery docket from Bob Jane T-Marts related to PK's vehicle. In particular he pointed to the delivery docket recording the odometer reading as 12,500 kilometres. The odometer reading is plainly incorrect. However, in all other respects the delivery docket relates to PK's Porsche Panamera. The date of 19 July 2016 corresponds with the time the vehicle was at Europei. Europei's RWC job card for the vehicle is dated 18 July 2016 and records that the vehicle is to have a front and rear wheel alignment at a cost of \$120.¹⁹⁹ There is no evidence to suggest that in mid-July 2016 Europei sent a black Porsche Panamera to Bob Jane T-Marts other than the vehicle owned by PK.

133 The fact that PK drove into a large pothole shortly after taking delivery of his vehicle is relevant to an assessment of the reasonableness of his conduct. Mr Catlin submitted that the Court should make a finding that any damage to the vehicle's suspension was caused by PK driving into the pothole. Mr Rossi gave evidence that PK hitting a pothole with enough force to break the front left wheel could have caused the split in the rear control arm bushes.²⁰⁰ However, Mr Homann gave evidence that he did not consider that the worn rear control arm bushes were the result of impact with a pothole.²⁰¹ Mr Homann was not challenged on this evidence.

134 Mr Homann was advised on 6 September 2016 in an email from SL that PK had

¹⁹⁹ CB2010, 'Europei Motori Job Card dated 18 July 2016'; see also Transcript of Proceedings, T 360 L 27 – 31 (15 October 2021).

²⁰⁰ Transcript of Proceedings, T 381 L 5–21 (15 October 2021).

²⁰¹ Ibid T 630 L 28 – T 631 L 12 (19 October 2021).

driven into a pothole.²⁰² Notwithstanding this advice, on 13 September 2016, responding to a query from PK regarding the 50,000 kilometre service conducted by PCB on 4 July 2016, Mr Homann stated: 'My thoughts are that Brighton did in fact discover the brake and suspension issues, however as that was a transaction between them and Lorbek I am not able to access that information'.²⁰³ It is clear from this correspondence that notwithstanding the advice he received from SL that PK had driven the vehicle into a pothole, Mr Homann did not consider that the vehicle's defective suspension was caused by PK driving into a pothole.

135 Mr Homann is a qualified motor mechanic with 26 years of experience as a mechanic.²⁰⁴ He has been employed by Gulson since 2010²⁰⁵ and has been service manager since August 2016.²⁰⁶ He was a very impressive witness. I accept his evidence that the damage to the vehicle's suspension was not caused by PK driving into a pothole. I make this finding notwithstanding that neither PCB's pre-inspection report of 22 June 2016 or the job card of 4 July 2016 record the rear control arm bushes as being split. I have concluded that the mechanic(s) who inspected the vehicle on 22 June 2016 and 4 July 2016 failed to identify this particular fault.

136 It was reasonable for PK to have believed from mid-September 2016 that the vehicle was unroadworthy by reason of its defective suspension at the time of purchase from LLC. First, he had received advice from Mr Homann consistent with the suspension being defective as at 13 July 2016. Second, he had been advised by Mr Homann that it was not possible to undertake a full wheel alignment because of the suspension defect. Third, he had made enquiries of Bob Jane T-Mart which established that only the front wheels of the vehicle had been aligned on 19 July 2016.

137 In *Stoltenberg v Bolton*²⁰⁷ Gleeson JA (Macfarlan and Brereton JJA agreeing) stated, in

²⁰² CB2061, 'Email from Srecko Lorbek to Craig Homann dated 6 September 2016'.

²⁰³ CB68, 'Email from Craig Homann to Peter King dated 13 September 2016'.

²⁰⁴ Transcript of Proceedings, T 624 L 20 - T 625 L 9 (19 October 2021).

²⁰⁵ Ibid.

²⁰⁶ Ibid T 624 L 20-21 (19 October 2021).

²⁰⁷ (2020) 380 ALR 145.

respect of whether a defendant's conduct in publishing a defamatory matter is reasonable:

The defendant must also establish:

- (a) that before publishing the matter complained of, he exercised reasonable care to ensure that he got his conclusions right (where appropriate) by making proper enquiries and checking on the accuracy of his sources;
- (b) that his conclusion (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information which he had obtained;
- (c) that the matter and extent of the publication did not exceed what was reasonably required in the circumstances; and
- (d) that each imputation intended to be conveyed was relevant to the subject about which he is giving information to his readers.

The extent to which the enquiries referred to in paragraph 4(a) should have been made will depend upon the circumstances of the case, in particular the nature and the source of the information which the defendant has obtained, and whether the position, standing, character and opportunities of knowledge of the informant (as perceived by the defendant himself) are such as to make his belief in the trust of that information a reasonable one...²⁰⁸

138 PK has established that prior to publishing the Google reviews and the Law Answers post he exercised reasonable care by making proper enquiries. He made direct enquiries of Jason Pasco and obtained documentary evidence which established that the vehicle was unroadworthy when he purchased it. He instigated the VicRoads investigation of Europei which resulted in the suspension of Europei's RWC provider licence for four weeks. He obtained the 22 June 2016 pre-purchase inspection report and the 4 July 2016 job card from PCB which established that the vehicle was unroadworthy because the front rotors were undersized. He obtained the delivery docket from Bob Jane T-Marts which showed the vehicle had only been subject to a front wheel alignment. This was consistent with the vehicle having rear suspension damage at the time it was purchased.

139 It was reasonable for PK to rely on the information provided to him by Mr Pasco, Mr

²⁰⁸ Ibid 182-3 [191] (citations omitted).

Homann and Bob Jane T-Marts. It was reasonable for PK to have concluded that someone within LLC knew the vehicle was unroadworthy. On a fair reading of Mr Pasco's email of 16 September 2016, LLC was the owner of the vehicle on 22 June 2016 when the pre-purchase inspection report was obtained. Mr Pasco said nothing to PK to undermine his belief that LLC had tried to sell the vehicle to PCB in June 2016 but had been unable to do so because the vehicle was unroadworthy. Although the vehicle was not acquired by LLC until 30 June 2016, PK had a genuine and reasonably held belief that LLC owned the vehicle on 22 June 2016. PK had reasonable grounds for concluding that DL lied to his face about several aspects of the vehicle's condition. On 13 July 2016 DL told PK that the vehicle's brakes and suspension were in good condition. The advice PK received from Mr Homann on 23 August 2016, coupled with the documents he received from PCB and Bob Jane T-Marts provided a reasonable basis for PK to conclude that DL had lied to him about the condition of the brakes and suspension.

140 Section 30(3) of the *Defamation Act* provides:

(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account the following factors to the extent the court considers them applicable in the circumstances--

- (a) the seriousness of any defamatory imputation carried by the matter published,
- (b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
- (c) the nature of the business environment in which the defendant operates,
- (d) whether it was appropriate in the circumstances for the matter to be published expeditiously,
- (e) any other steps taken to verify the information in the matter published.

(3A) Subsection (3) does not--

- (a) require each factor referred to in the subsection to be taken into account, or
- (b) limit the matters that the court may take into account.

(3B) It is not necessary to prove that the matter published concerned an issue

of public interest to establish the defence of qualified privilege under subsection (1).

141 Section 30(3) sets out a non-exclusive list of matters which the Court may take into account in assessing reasonableness. The matters listed in s 30(3) should not be treated as a check list.²⁰⁹ No single consideration listed in s 30(3) is determinative.²¹⁰ The weight to be given to any one or more of the matters listed in s 30(3) depends upon the particular facts of the case.²¹¹

Section 30(3)(a): The extent to which the matter published is of public interest

142 One of the matters which may be taken into account in the assessment of reasonableness is the extent to which the matter published is of public interest. Mr Mullen submitted that PK's publications were of public interest because they involved consideration of the safety of a vehicle sold to a member of the public by a used car retailer. He also submitted that it was in the public interest that the Google reviews published in respect of LLC should not be limited to members of the public who have had a positive experience, but should also include members of the public like PK who had a negative experience. I accept Mr Mullen's submission that the matters published by PK were of public interest because they involved the sale of a vehicle which was unroadworthy. This conclusion is reinforced by the fact that VicRoads suspended Europei's RWC provider licence relying upon the pre-purchase inspection report of 22 June 2016 which showed that the vehicle's rotors were undersize.

Section 30(3)(b): The extent to which the matters published relates to the performance of public functions or activities of the plaintiffs

143 Each of the impugned publications relates to the activities of SL as owner of LLC and DL as a salesman employed by LLC. The publications primarily focus on the plaintiffs' involvement in LLC's business as a retailer of used cars. These are public activities.

²⁰⁹ *Schlaepfer v Australian Securities & Investment Commission* [2021] NSWCA 129, [259].

²¹⁰ *Bailey* (n 158) 559–60 [89].

²¹¹ *Chau* (n 183) [188]; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 339 [30].

Section 30(3)(c): The seriousness of any defamatory imputation carried by the matter published

144 I have rejected the plaintiffs' contention that the impugned publications convey the fraud imputation and the criminal imputation. Nevertheless, the imputations which are conveyed by the publications are very serious. I have placed significant weight upon the seriousness of the imputations conveyed by the publications when considering whether PK's conduct in publishing GR1, GR2, GR3 and the Law Answers post was reasonable.

Section 30(3)(d): The extent to which the matter published distinguishes between suspicions, allegations and proven facts

145 Most of the statements in the impugned publications are statements of fact. However, there are statements in each of the publications which are allegations or suspicions:

- 'It appears that none of these faults were rectified prior to actually selling the Porsche';
- 'Lorbek I understand have a close relationship with them [Europei] and [sic] is where their roadworthy certificates are done for their car sales';
- 'The Motor vehicle licensing authority and police need to take a long hard look at this company and it's [sic] operations'.

146 Insofar as the impugned publications consist mainly of statements of fact, this does not support a finding that PK acted unreasonably. The statements of fact in the publications are underpinned by PK's genuine and reasonably held belief that the plaintiffs knew that his vehicle was unroadworthy when it was sold to him.

Section 30(3)(e): Whether it was in the public interest in the circumstances for the matter to be published expeditiously

147 In the circumstances of the present case this is not a matter of particular relevance when assessing the reasonableness of PK's conduct. PK purchased the vehicle on 13 July 2016. PK's Law Answers thread was not posted until 17 December 2016 and was not published until mid-September 2017 when read by the moderator who amended the post. GR1 was published on 4 April 2017, some eight months after PK

purchased the vehicle.

Section 30(3)(f): The nature of the business environment in which the defendant operates

148 This is a matter of limited relevance in the circumstances of the present case. PK purchased the vehicle in a private capacity for his personal use.

Section 30(3)(g): The sources of the information in the matter published and the integrity of those sources

149 I have placed considerable weight upon the sources of the information in the impugned publications and the integrity of those sources. The sources of the information were Mr Homann, Mr Pasco and the assistant manager of Bob Jane T-Marts Port Melbourne. Further, I infer that PK also received information from the VicRoads investigator, Mr Menolascina, regarding the outcome of the VicRoads investigation of Europei. Each of the individuals who provided information to PK had direct knowledge of the matters which they conveyed to him. PK acted reasonably in relying on the information and advice provided to him.

Section 30(3)(h): Whether the matter published contained the substance of the person's side of the story, and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person

150 Each of the impugned publications includes the following statement, referable to LLC:

Denying any liability and saying that it was my treatment of the vehicle that caused these issues.

151 This is an accurate summary of the position taken by LLC in response to PK's claim for damages in the Magistrates' Court proceedings. PK filed a complaint against LLC in the Magistrates' Court of Victoria on 24 November 2016. In his statement of claim, PK alleged:

6. In beach [sic] of the Agreement, the Vehicle was defective and was not fit for its purpose or of merchantable quality.

Particulars

- The right hand front door strut of the Vehicle broke, leaving the Plaintiff unable to close the door without damaging the door panel.

- Front tyres were worn below legal limit.
- Front brake pads and rotors worn well below minimum.
- Rear rotors worn below minimum.
- Rear lower control arm bushes were split severely.

7. From in or around July 2016 to August 2016 the Plaintiff had the Vehicle inspected by a Porsche Dealership in Canberra, namely Gulson Canberra ('Gulson') located at 92 Newcastle Street, Fyshwick ACT 2609. Upon inspection Mr Craig Homann from Gulson advised the Plaintiff that the brake, tyres and suspension of the Vehicle were unsafe and in an unroadworthy condition and should not be driven until all the issues had been addressed.²¹²

152 LLC's defence to paragraphs 6 and 7 of the statement of claim included the following:

6. It denies the allegations contained in paragraph 6 thereof and says:

- (a) The right hand door of the Vehicle was operating at the time of test drive and upon delivery. In any event, the rectification is covered by the factory warranty.

PARTICULARS

...

(b) The Vehicle was sold to the plaintiff with new 22" wheels and new 22" tyres. The plaintiff insisted on being provided with the old 20" wheels with worn 20" tyres. These are noted in the contract of sale. The old wheels were gladwrapped and placed in the boot when transported to the plaintiff. The plaintiff admitted to Srecko Lorbek, director of the defendant, on the telephone, that he smashed a wheel going over a pot hole. The defendant's enquiries revealed that the plaintiff purchased a new wheel from AGR at Sefton. The plaintiff also made enquiries with Daniel Novak, an employee of the defendant, about the purchase of a wheel online for \$429.00. The plaintiff concealed these facts from Gulson Porsche. In fact, the plaintiff changed the wheels over and placed the old 20" wheels with the worn 20" Pirelli tyres on the vehicle before giving it to Gulson Porsche to examine, and the plaintiff had Gulson Porsche write a report about the vehicle's lack of safety and lack of roadworthiness, and then used these comments as a basis for his derogatory statements on Car Sales and Google about the defendant. Gulson Porsche has identified the tyres were "Pirelli 255/40R20", which are the old, worn 20" tyres. The plaintiff's conduct as referred to above was misleading and deceptive.

PARTICULARS

²¹² CB2092, 'Peter King Statement of Claim filed 24 November 2016'.

The defendant refers to and repeats the particulars at subparagraph (ii) sub-joined to paragraph 6(a) hereof.

(c) At the time of the roadworthy test of the Vehicle, the level of the brake pads were acceptable at 36.1mm for the front and 27mm for the rear pads. Further, warning lights would come on when the pads require replacement and the lights did not come on at the time of delivery of the Vehicle to the plaintiff;

(d) The plaintiff drove over 3,000km before undertaking repairs to the brakes;

(e) The severe split of the rear lower control arm bushes is consistent with the wheel of the Vehicle hitting a pot hole on or about 5 August 2016 when the plaintiff emailed Daniel Novak about a replacement wheel to replace the wheel he had smashed.

PARTICULARS

The plaintiff admitted to Mr Srecko Lorbek, director of the defendant, that he had smashed a wheel of the Vehicle going over a pot hole.

The admission was oral and it was during a telephone conversation between the plaintiff and Mr Lorbek in or about September 2016.

7. It denies the allegations contained in paragraph 7 thereof save that the Vehicle was inspected by Gulson Canberra. It further says that:

(a) the brake, tyres and suspension of the Vehicle were roadworthy at the time the plaintiff took delivery;

(b) the plaintiff concealed the true facts from Gulson Canberra when he delivered the Vehicle to them for examination. The defendant refers to and repeats paragraph 6(b) hereof.²¹³

153 When PK posted GR1, GR2 and GR3 he was aware of the basis on which LLC denied the allegation that the vehicle was unroadworthy when he purchased it. Although succinctly stated, the impugned publications set out the substance of LLC's defence to PK's claim that the vehicle was unroadworthy at the time of purchase.

154 Further, the weight to be attached to the matter prescribed by s 30(3)(h) must take account of LLC's capacity to have responded to PK's reviews via the Google My Business page. 747 Google reviews in respect of LLC were admitted into evidence.²¹⁴

²¹³ CB2104-7, 'Lorbek Luxury Cars Defence filed 5 January 2017'.

²¹⁴ CB1212-958, 'Lorbek Luxury Cars Google Reviews'.

Of these reviews, 23 were one star reviews.²¹⁵ LLC posted a reply to 11 of the one star reviews. The replies ranged from brief comments requesting more information from the reviewer, through to rebuttals/denials of the alleged negative experience of the reviewer. Although they did not do so, LLC could have responded to the matters set out in the reviews via the Google My Business page.

155 PK's conduct in publishing the impugned publications was reasonable in the circumstances. As a result of the investigations which he undertook, PK had a genuine and reasonably held belief that LLC knew that the vehicle was unroadworthy when he purchased it on 13 July 2016. In light of this conclusion it is necessary to consider whether the publication of the impugned publications was actuated by malice.

Malice

156 Section 30(4) of the *Defamation Act* provides that a defence of qualified privilege is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice. Malice is any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff.²¹⁶

157 In *Szanto v Melville*²¹⁷ Kaye J (as His Honour then was) summarised the principles relating to malice as follows:

In order to overcome a defence of qualified privilege, the plaintiff must establish that the defendant was actuated by malice in publishing the defamatory matter complained of. In order to establish the existence of malice, the plaintiff must prove that, in publishing the material complained of, the defendant was actuated by a motive which was foreign, or ulterior, to the privileged occasion. It is not sufficient that the plaintiff demonstrate the existence of a potential motive on behalf of the defendant. Rather, the plaintiff must establish that the ulterior motive was the dominant purpose of the publication of the matter by the defendant. Knowledge by the defendant, that the defamatory statement is untrue, may be "almost conclusive evidence" of malice, because it is strong evidence indicating the existence of an improper motive. However, knowledge of the falsity of the defamatory material is not, of itself, equivalent to the existence of the requisite improper

²¹⁵ CB 1936–58, 'Lorbek Luxury Cars One Star Google Reviews'.

²¹⁶ *Roberts v Bass* (2002) 212 CLR 1, 30 [75] ('*Roberts*').

²¹⁷ [2011] VSC 574.

motive.²¹⁸

158 The plaintiffs bear the onus of proving that the improper purpose actuating the publication was the dominant reason for the publication.²¹⁹ A plaintiff has a heavy onus to discharge to establish malice. A finding of malice is a serious matter and is subject to the principles in *Briginshaw v Briginshaw*.²²⁰ Save for a case in which a defendant knows that an impugned publication is false, proof of the defendant's 'ill will, prejudice, bias, recklessness, lack of belief in truth or improper motive is not sufficient to establish malice'. The evidence or the publication must also show some grounds for concluding that the ill will, lack of belief in the truth of the publication, recklessness, bias, prejudice or other motive existed on the privilege occasion *and* actuated the publication.²²¹ Further, as T Forrest JA observed in *Yunghanns v Colquhoun-Denver* it is one thing for a plaintiff to demonstrate animosity on the part of a defendant, however it is quite another thing to demonstrate that it actuated the publication of the defamatory matter.²²²

159 Finally, the plaintiffs' onus is to establish that the publication of the impugned publications on which they sue was actuated by malice. On various dates between 26 August 2016 and March 2018 PK was the author of 13 publications. The plaintiffs' claim that they have been defamed is based upon four of these 13 publications. In order to defeat PK's defence of qualified privilege in respect of these four publications, the plaintiffs must establish that in making each publication PK was actuated by an improper or ulterior purpose. The nine posts made by PK which are not sued on may be relevant to the question of whether the four posts which are sued upon were actuated by malice. However, the question to be determined is whether the publications upon which the plaintiffs sue for defamation were actuated by malice.

²¹⁸ Ibid [96] (citations omitted).

²¹⁹ *Barrow v Bolt* [2014] VSC 599, [30] ('*Barrow*').

²²⁰ *KSMC Holdings Pty Ltd (trading as Hubba Bubba Child Care on Haig) v Bowden* (2020) 101 NSWLR 729, 745 [61].

²²¹ *Roberts* (n 216) [76].

²²² [2019] VSC 433 [396].

160 Mr Catlin submitted that PK's motivation for the impugned publications was solely to injure to the plaintiffs' reputation.²²³ Mr Catlin submitted that PK engaged in a campaign which was improper, unjustifiable and not bona fide and which merits the characterisation of a vendetta.²²⁴ The plaintiffs submitted that malice was made out by the following evidence:

- a. the totality of the evidence about the vehicle was that it was roadworthy;
- b. the content could have been confined to prudent supposition about the adequacy of the Plaintiff's standards to an exaggerated attack [sic];
- c. The posts were calculated and intended to pour ridicule and scorn on the plaintiffs;
- d. The conduct of the defendant in making the posts showed a contumelious disregard for the reputation of the plaintiffs;
- e. The defendant published the posts with reckless indifference as to the truth of the facts alleged in them;
- f. The language used in the address, the written publication and the republications was extravagant and inflammatory including references to 'fraud', 'gaining a financial advantage' and suggesting the police should examine the Plaintiffs and that lawmakers should shut them down;
- g. The publication of the defamatory matter was motivated by a desire to the [sic] injure the Plaintiffs. In particular:
 - i. He called on readers to withhold stars in their ratings;
 - ii. He wished to recruit others in his attacks;
 - iii. It can be inferred he was hoping to trigger a "pile on" effect.
- h. His evidence about not caring and not being serious about his reviews was disingenuous and should be construed accordingly²²⁵

161 The plaintiffs submit that the Court should infer that PK's dominant motive was to injure their reputation. The plaintiffs submit that this is particularly so in respect of GR1, GR2 and GR3 which post-dated the settlement in early April 2017 of PK's claim for damages in the Magistrates' Court of Victoria.²²⁶

²²³ Plaintiffs, 'Closing Submissions filed 17 November 2021', [184].

²²⁴ Ibid [190].

²²⁵ Ibid [192] (citations omitted).

²²⁶ Ibid [193].

162 The plaintiffs have failed to discharge the onus of establishing that the publication of the impugned publications was actuated by malice. PK's predominant motive in publishing the impugned publications was to share with prospective customers of LLC his adverse experience purchasing a vehicle which he believed to be (and which was in fact) unroadworthy. Each of the impugned publications was made after PK had investigated the condition of the vehicle at the time of purchase. The plaintiffs have established that PK did bear animosity towards them. That animosity was the result of PK's belief that LLC had knowingly sold him an unroadworthy vehicle. PK believed that LLC owned the vehicle on 22 June 2016 and had been unsuccessful in trying to sell the vehicle to PCB because it had been assessed as unroadworthy.

163 The plaintiffs have not established that PK's animosity towards them, coupled with the desire to injure their reputations was the dominant reason for the publication of the impugned publications. In reaching this conclusion I have had regard to evidence of two posts which PK made using false names. On 30 August 2016 PK posted a one star Google review of LLC under the name 'PKavo'. The text of the review is not in evidence. However, the notification from Google My Business to LLC on 30 August 2016 advising of the one star review is in evidence.²²⁷ PK admitted to making the post.²²⁸ He gave evidence that he used a different name because the name 'Peter King' was already being used by someone else and he was not able to post under his own name.²²⁹ However, this explanation is hard to reconcile with the fact that on 1 September 2016 PK posted a Google review of LLC under his own name.²³⁰ He subsequently amended this review on 4 April 2017, 19 October 2017 and 20 October 2017. These are the three Google reviews on which the plaintiffs sue.

164 PK also admitted to posting a Google review under the name 'Steve Smith'.²³¹ The original review is not in evidence, so it is unclear when the review was posted. A

²²⁷ CB2058, 'Email from Google My Business to Lorbek Luxury Cars dated 30 August 2016'.

²²⁸ Transcript of Proceedings, T 677 L 8-13 (19 October 2021).

²²⁹ Ibid T 678 L 1-10 (19 October 2021); T 702 L 3-7 (20 October 2021).

²³⁰ CB2059, 'Peter King Google Review Posted 1 September 2016'.

²³¹ Transcript of Proceedings, T 677 L 27-28 (19 October 2021).

document which appears to be a transcription of the review appears in a document headed 'Steve Smith's Google review'.²³² There is no evidence as to how this document came into existence. There is no evidence as to the date the Steve Smith Google review was posted.

165 PK gave evidence that he posted the PKavo and Steve Smith reviews because he wished to create a false impression that there were people other than himself who held the same view of LLC as he did.²³³ He also gave evidence, which I reject, that he did not care whether or not people read his Google reviews, including the Steve Smith review.²³⁴ If the plaintiffs' claim for defamation was based on the PKavo and Steve Smith Google reviews it would be strongly arguable that these publications were motivated by an improper purpose.

166 The plaintiffs do not sue on the PKavo and Steve Smith Google reviews. Nevertheless, the fact that PK posted two Google reviews under false names is relevant to an assessment of whether the impugned publications were actuated by an improper purpose. In considering this question I have also had regard to a post made by PK on Carsales.com.au ('Carsales') on 29 August 2016. This post was in the following form:

Seller's Comment

Bought this car from Lorbek in Melbourne, currently able to view at Porsche Canberra. After 3 weeks I found I was driving an unroadworthy car. Brakes need replaced, rear suspension bushes badly damaged. I don't know how it passed it roadworthy in VIC. Angry to have been sold an unsafe car. Thanks Srecko and David Lorbek for selling me a great looking lemon and not paying to get the car roadworthy. A real quality car dealership. Car will be off the road for another 2 weeks because the spare parts are coming from Germany.

Protect yourself with these features:

Lorbek Satutory [sic] 3 month 5000km used car warranty. Its [sic] a lottery.

Srecko Lorbek failing to refund my Lorbek 5 year \$3950 Platinum Warranty. Why have a warranty if its [sic] useless! Told me to never call him again and I was lucky to have purchased it. The arrogance of the man.

²³² CB2273, 'Transcription of 'Steve Smith' Google review'.

²³³ Transcript of Proceedings, T 705 L 3-8 (20 October 2021).

²³⁴ Ibid T 673 L 1-5 (19 October 2021).

David Lorbek said he got the car wheel alignment done as the car pulled to the left on the test drive. He did, but Bob Janes in Port Melbourne said he wouldn't do all for wheels only the front wheel alignment. Thus hiding the fact the cars [sic] rear suspension was shot. Who in there [sic] right mind doesn't do a four wheel alignment on a performance car when all four wheels are adjustable.

You have been warned from a very unhappy consumer. Come on Australian lawmakers, protect us from companies like Lorbek.²³⁵

167 PK's motivation in making the Carsales post was not to sell the car but to draw attention to his experience with LLC and to warn other potential customers against dealing with LLC. It is common ground that Carsales is an online platform for selling cars, not for posting comments about the experience of purchasing a vehicle.²³⁶ Carsales is the predominant website for car advertising in Australia.²³⁷ PK's post was taken down within a few days after LLC complained about it to Carsales.²³⁸ The Carsales post is not one of the publications upon which the plaintiffs sue.

168 PK was not actuated by malice in making the Carsales post. The 'advertisement' was placed shortly after he was advised by Craig Homann that his vehicle was unroadworthy. It is plain from the text of the post that PK was angry with SL and DL. He sets out the reasons for being angry, namely, the purchase of an unroadworthy vehicle and SL's failure to refund him the cost of the warranty he purchased with the vehicle. He refers to the fact that the vehicle only had a front wheel alignment as evidence that DL knew that the rear suspension was defective. PK uses sarcastic language: 'Thanks Srecko and David Lorbek for selling me a great looking lemon and not paying to get the car roadworthy. A real quality car dealership.' This language is consistent with PK having an improper purpose of damaging the reputation of SL and DL. However, in the context of the post as a whole it is equally consistent with PK having a dominant purpose of wishing to warn prospective customers of LLC in circumstances where he had a genuine belief

²³⁵ CB2062, 'Carsales Post dated 29 August 2016'.

²³⁶ Transcript of Proceedings, T 678 L 18–20 (19 October 2021).

²³⁷ Ibid T 679 L 1–3 (19 October 2021).

²³⁸ Ibid T 501 L 10 (18 October 2021).

that the vehicle which had been sold to him was unroadworthy.

169 PK used the Carsales platform for a purpose for which it is not intended, namely, publishing what he believed to be his adverse experience of purchasing a vehicle from LLC. Mr Catlin submitted that the Carsales post evidences a campaign/vendetta conducted by PK against the plaintiffs. He submits that the four posts on which the plaintiffs sue were similarly part of an ongoing campaign/vendetta on the part of PK to damage the reputation of the plaintiffs.

170 It is true that PK misused the Carsales platform by posting an account of his purchasing experience with LLC rather than posting a genuine advertisement for the sale of his vehicle. However, it does not follow that his predominant motive in posting the 'advertisement' was to injure the reputation of the plaintiffs. The Carsales post went online six days after PK had been advised by Craig Homann that his vehicle was unroadworthy due to defective tyres, suspension and brakes. PK's post explicitly warns prospective customers of the risk of doing business with LLC. The post can be construed as being actuated by an improper motive of injuring the plaintiffs' reputations. Equally, the post can be construed as being actuated by the non-malicious motivation of warning prospective customers of LLC, based upon PK's genuinely held belief that he had been sold an unroadworthy vehicle. Evidence that is equally consistent with malice and an absence of malice does not constitute evidence upon which a finding of malice can be made.²³⁹

171 Mr Catlin points to other posts made by PK as evidencing a campaign/vendetta on his part to damage the plaintiffs' reputations. On 13 January 2017 PK made a post 'My first Porsche' in similar terms to the four posts on which the plaintiffs sue, on an online platform, Porsche Forum.²⁴⁰ The post was made under the name Petez. It was edited by PK on 14 January 2017. The edited version of the post, which is the only version in evidence, makes no mention of LLC or SL and/or DL. However, I infer that in its original form the post did make reference to LLC because comments

²³⁹ *Barrow* (n 219) [41].

²⁴⁰ CB2110-1, 'Petez Porsche Forum Thread dated 13 January 2017'.

posted by third parties on 13 January 2017 refer to LLC.²⁴¹ No evidence was led as to the reason for, or the extent of, the edits made to the post on 14 January 2017.

172 It was put to PK during cross-examination that he knew that LLC was a 'Porsche specialist'.²⁴² PK denied having any such knowledge, pointing to LLC's website which states that LLC sells a wide variety of European luxury cars.²⁴³ PK gave evidence that he posted on Porsche Forum because 'it's a targeted audience, you know, it's the first Porsche I've ever bought. It's a medium you go to for Porsche enthusiasts and I just told my story, it's a factual story.'²⁴⁴ It was not put to PK that the reason he posted on Porsche Forum was to damage the plaintiffs' reputation amongst Porsche enthusiasts. PK's denial of having any knowledge that LLC is a Porsche specialist was not challenged.

173 PK's conduct in posting on Porsche Forum is consistent with the desire to convey to a 'targeted audience' of Porsche enthusiasts, his adverse experience of purchasing a vehicle from LLC. The plaintiffs have failed to establish that PK's dominant purpose in making the post was to damage the plaintiffs' reputations.

174 Mr Catlin sought to rely upon two posts published by PK after GR3 was posted on 20 October 2017, as evidence of malice. First, he points to PK having republished on 21 December 2017 an article which appeared in the Herald Sun on the same date which canvassed the defamation proceedings which had been commenced by the plaintiffs against PK. Those proceedings had been commenced by writ filed 14 November 2017. Second, Mr Catlin relies upon a post made by PK on an online platform, Autotalk.com.au ('Autotalk'). On 22 December 2017 a person by the name of Scott Murray posted an article regarding the plaintiffs' defamation proceedings against PK.²⁴⁵ There are two comments posted in response to the article, one of which is by PK, with a timeline of 'one month ago'. The comments page is dated 27

²⁴¹ CB2112-3 'Petez Porsche Forum Thread dated 13 January 2017'.

²⁴² Transcript of Proceedings, T 680 L 19 (19 October 2021).

²⁴³ Ibid T 680 L 21-23 (19 October 2021).

²⁴⁴ Ibid T 680 L 29 - T 681 L 1 (19 October 2021).

²⁴⁵ CB772-4, 'Autotalk Article dated 22 December 2017'.

April 2018. I infer that PK made his post in late March 2018. His comment is as follows: 'Maybe we should start a class action against Lorbek for there [sic] conduct, I have a forum in the Victorian Supreme Court and would like to get you [sic] experience and any others who have had significant problems from the Lorbek car dealer.'²⁴⁶

175 A defendant's conduct which post-dates an impugned publication may constitute evidence that the impugned publication was actuated by malice. In *Mowlds v Fergusson*²⁴⁷ Jordan CJ stated:

Evidence that a person was animated by express malice in making a defamatory statement upon a privileged occasion, ie that he made the statement for some other purpose than that which the occasion warranted, may be intrinsic or extrinsic. Extrinsic evidence may be supplied by evidence of facts existing before, at, or after the time when the statement was made. It may be supplied by proving that the defendant on a different occasion had some particular disposition or inclination, or desire to serve some particular purpose, if there be also evidence which enables the inference that in making the defamatory statement on the privileged occasion he was actuated by a desire to indulge that disposition or inclination or to promote that purpose, and not to use the occasion for its legitimate purpose. When it is sought to do this, there must be evidence which makes it probable that the mental attitude of the defendant proved to have existed on the other occasion existed on the privileged occasion in question also and was then operative to influence him to make the defamatory statement. When the improper purpose which is alleged to destroy the privilege is a desire on the part of the defendant to injure the plaintiff by reason of personal illwill towards him, evidence that on a later occasion the defendant manifested illwill towards the plaintiff may supply the necessary evidence unless it shows also that the illwill arose out of something occurring subsequently to the privileged occasion.²⁴⁸

176 Subsequent to PK's Google review of 20 October 2017 the plaintiffs filed the writ and statement of claim in the present proceeding. The writ and statement of claim was served on PK on 23 February 2018 and he filed a defence on 23 March 2018. However, he was aware of the proceeding prior to being served by reason of the article in the Herald Sun of 21 December 2017 which he posted on Porsche Forum. The commencement of the defamation proceeding against PK was a significant event. If I am wrong in concluding that the Porsche Forum post of 22 December

²⁴⁶ CB775 'Autotalk Article dated 22 December 2017'.

²⁴⁷ (1939) 40 SR (NSW) 311.

²⁴⁸ Ibid 327-8; see also *Spautz v Williams* [1983] 2 NSWLR 506, 521.

2017 and the Autotalk post of late March 2018 were not actuated by malice, it does not follow that these posts are evidence that the four impugned posts were also motivated by malice. If the December 2017 Porsche Forum post and the Autotalk post were actuated by PK's ill will towards the plaintiffs, this is explicable by his reaction to the plaintiffs having commenced defamation proceedings against him. However, it does not follow that the impugned publications which preceded the commencement of the defamation proceedings were also actuated by ill will towards the plaintiffs.

177 Further, if the Carsales post and the Steve Smith/PKavo posts were actuated by malice, it does not follow that the impugned publications were also actuated by malice. The plaintiffs' bear the onus of establishing that the publications which preceded the impugned publications were actuated by malice and that PK's ill will towards the plaintiffs still existed and was the predominant motive for the subsequent impugned publications.

178 PK posted the Carsales post on 29 August 2016 and posted a Google review under the name PKavo on 30 August 2016. These posts were made within one week of PK having been told by Mr Homann that his vehicle was unroadworthy and unsafe to drive. As stated by PK in the Carsales post he was an angry customer. The Carsales post and the PKavo Google review were posted three and a half months prior to the Law Answers post of 17 December 2016 and seven months prior to GR1 posted on 4 April 2017. By 4 April 2017 PK had resolved his claim for compensation against LLC with a payout of a settlement sum of \$8,000. Given the passage of time between the Carsales post and the PKavo Google review of late August 2016 and the impugned Google reviews of April and October 2017, I am not satisfied that the plaintiffs have established that ill will on the part of PK towards the plaintiffs which existed in August 2016 continued to be his predominant motive actuating the impugned publications. An important distinguishing feature between the three impugned Google reviews and the PKavo and Steve Smith reviews is that the impugned reviews appear under PK's own name. Insofar as PK's use of a false name is

evidence of an improper purpose it is not a feature of the three Google reviews upon which the plaintiffs sue.

179 The plaintiffs have failed to establish that the impugned publications were actuated by malice. PK's defence of qualified privilege is not defeated by reason of the impugned publications having been actuated by malice.

FAIR COMMENT / HONEST OPINION

180 In addition to the defence of qualified privilege, PK invokes the common law defence of fair comment and the statutory defence of honest opinion.

181 Each of the impugned Google reviews contains the statement:

Lorbek knew the Porsche was never roadworthy from the very detailed pre-purchase report from the Melbourne Porsche dealer.

182 The Law Answers post contains the same statement, save that the word 'it' appears in lieu of 'the Porsche'.

183 It is common ground that the statement is untrue. The 'pre-purchase report' did disclose that the vehicle was unroadworthy. However, the report was an internal PCB document prepared for the purposes of determining the cost of bringing the vehicle up to 'Porsche approved' standard.²⁴⁹ It is common ground that the report was never provided to LLC. The statement is a key element of each of the impugned publications. It is a statement of fact which precedes the statements of opinion:

- The salesman David Lorbek lied to my face about several aspects of the vehicles [sic] condition;
- This was a very clear case of a company who acts dishonestly with intent to gain financial advantage;
- Lorbek deserve condemnation from the motoring public and industry. Certainly deserve no respect as business owners.

184 For the defence of fair comment to succeed the facts on which a comment or opinion

²⁴⁹ Transcript of Proceedings, T 415 L 18-23, T 417 L 5-6 (15 October 2021).

is based must appear in the publication or otherwise be apparent to the reader.²⁵⁰ Save for facts which are notorious it is not permissible to have regard to facts which are not referred to in the publication. If the facts in the publication are not true or the facts are not published on a privileged occasion, the defence fails.²⁵¹ The statement that 'Lorbek knew the Porsche was unroadworthy from the very detailed pre-purchase inspection report from the Melbourne Porsche dealer' is untrue. Further, the facts (the pre-purchase inspection report) were not published on a privileged occasion. The common law defence of fair comment fails.

185 PK also relies upon the statutory defence of honest opinion under s 31 of the Act. Section 31(1) provides:

(1) It is a defence to the publication of defamatory matter if the defendant proves that—

- (a) the matter was an expression of opinion of the defendant rather than a statement of fact; and
- (b) the opinion related to a matter of public interest; and
- (c) the opinion is based on proper material.

186 Sections 31(5) and (6) provide:

(5) For the purposes of this section, an opinion is based on proper material if it is based on material that—

- (a) is substantially true; or
- (b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law); or
- (c) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.

(6) An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material.

²⁵⁰ *Herald & Weekly Times Pty Ltd v Buckley* (2009) 21 VR 661, 680–1 [83]–[85] ('*Buckley*'); *Harbour Radio Pty Ltd v Ahmed* (2015) 90 NSWLR 695, 704 [41]–[42]; *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 272 [49]; *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510, 553.

²⁵¹ *Herald & Weekly Times v Popovic* (2003) 9 VR 1, 56 [268] ('*Popovic*'); *Cleary v Hore-Lacy (No 2)* (2009) 21 VR 692, 708–9 [58].

187 There is no difference between the common law defence of fair comment and the statutory defence of honest opinion regarding the necessity for the facts on which the opinion is based to appear in the publication or otherwise be apparent to a reader.²⁵²

188 In order for the defence of honest opinion to be made out PK must establish that the opinion in the impugned publication is based on proper material. To do this he must establish that 'the material' is substantially true. The statement that LLC knew the Porsche was never roadworthy from the very detailed pre-purchase report from the Melbourne Porsche dealer, is not substantially true. Rather, it is untrue. Section 31(6) is not engaged. LLC's knowledge of the vehicle being unroadworthy by reason of the PCB pre-purchase report is a key foundation of the opinion expressed in the impugned publications. The opinion expressed in the impugned articles could not be reasonably based upon other material in the impugned publications which is substantially true. The statement 'Lorbek sold me an unroadworthy 2011 Porsche Panamera turbo in July 2016', appears in each impugned publication. The statement is factually correct. However, it does not provide a reasonable basis for the opinions expressed in the publications. The primary basis for those opinions is the incorrect statement that Lorbek knew that the Porsche was unroadworthy because it had a very detailed pre-purchase inspection report from the Melbourne Porsche dealer.

189 Mr Mullen accepted that if I concluded that LLC's knowledge of the pre-purchase report was a 'fundamental fact' PK's honest opinion defence would fail.²⁵³ I have concluded that LLC's knowledge of the pre-purchase inspection report was a fundamental fact. The defence of honest opinion fails.

JUSTIFICATION

190 PK pleads the defence of justification under s 25 of the Act. Section 25 provides:

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

²⁵² *Buckley* (n 250) 680-1 [84]; *Hanks v Johnston* [2015] VSC 570, [27], [32].

²⁵³ Transcript of Proceedings, T 910 L 29 - T 911 L 11 (18 November 2021).

191 The phrase 'substantially true' is defined in s 4 of the Act as 'true in substance or not materially different from the truth'. PK bears the onus of establishing that the defamatory imputations conveyed by the impugned publications are substantially true. In determining whether PK has discharged this onus I have taken into account the very serious nature of the imputations conveyed by the publications.²⁵⁴ I have found that the fraud imputation and the criminal imputation are not conveyed by the impugned publications. Nevertheless, the imputations which are conveyed by the publications are very serious and reflect most adversely upon both plaintiffs.

Is the imputation that SL deserved no respect as a business owner substantially true?

192 PK has failed to discharge the onus of establishing that this imputation is substantially true. SL has built a very substantial business since the mid-1980s. In doing so he did not have the advantage of family wealth. He is a self-made man. The unchallenged evidence is that he allows LLC's showroom to be used for raising significant funds for charities such as Race Against Dementia and for breast cancer research. He regularly allows LLC's facilities to be used by car clubs with which he is affiliated. He is a committee member of the Victoria Automobile Chamber of Commerce. These are matters which support a positive finding that SL does deserve respect as a business owner.

193 As against the matters set out above, SL's company, LLC, sold PK an unroadworthy vehicle and warranty insurance which he did not need to purchase. Europei, who were engaged by LLC to provide a RWC, certified PK's vehicle as roadworthy when it was not. These are matters which do not reflect favourably on LLC or SL as its owner.

194 The evidence does not support a finding that either SL or DL had knowledge that the vehicle was unroadworthy prior to it being sold to PK on 13 July 2016. However, an employee within LLC's sales team was told by Jake Parsons from PCB on 4 July 2016

²⁵⁴ *Evidence Act 2008* (Vic) ss 140(1)-(2); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449-50; *West v Nationwide News Pty Ltd* [2003] NSWSC 505, [47]-[48].

that the vehicle was unroadworthy by reason of the front rotors being undersized.

195 On 4 July 2016 the Porsche was sent to PCB for an annual service. The job card prepared by PCB's technician records the front rotors as under the prescribed minimum. The job card also lists the work recommended by the technician, the part number, its price, and whether the part was available locally or would have to be shipped from Germany.²⁵⁵

196 Mr Parsons had no specific recollection of any discussion with any employee of LLC on 4 July 2016. However, his 'strict practice' in 2016 was that having received the technician's report he would have contacted LLC and told an employee of the outcome of the service,²⁵⁶ including the recommended items and the fact that the front rotors were under the minimum RWC requirement. He would not have gone to the trouble of getting the technician to report on the condition of the vehicle and not pass on that information to LLC, particularly the fact that the car was unroadworthy.²⁵⁷ Mr Parsons would have sought authority from LLC to proceed to undertake the work recommended by PCB's technician.²⁵⁸

197 It was in PCB's interests to generate revenue by passing on to a customer the details of recommended work in the hope that the customer would approve the work.²⁵⁹ The value of the work which PCB's technician recommended was \$7,087, comprising \$3,100 for a major service and \$3,987 for the repair of the front and rear brakes.²⁶⁰

198 Mr Parsons usually spoke to Jeff Devers when PCB was servicing a vehicle for LLC.²⁶¹ Mr Devers denies that he had any discussion with Mr Parsons on 4 July 2016 or any time thereafter regarding the condition of the Porsche.²⁶² He denied that the

²⁵⁵ CB1963, 'Porsche Centre Brighton Repair Order Work Card dated 4 July 2016'; Transcript of Proceedings, T 596 L 20-23 (19 October 2021).

²⁵⁶ Transcript of Proceedings, T 622 L 14-16 (19 October 2021).

²⁵⁷ Ibid T 599 L 20-28 (19 October 2021).

²⁵⁸ Ibid T 622 L 14-16 (19 October 2021).

²⁵⁹ Ibid T 600 L 27-30 (19 October 2021).

²⁶⁰ CB1963, 'Porsche Centre Brighton Repair Order Work Card dated 4 July 2016'; Transcript of Proceedings, T 616 L 1-2 (19 October 2021).

²⁶¹ Transcript of Proceedings, T 602 L 27-29 (19 October 2021).

²⁶² Ibid T 821 L 10-12 (5 November 2021).

presence of his email address on the 4 July 2016 invoice indicated that Mr Parsons would have spoken to him about the Porsche. His email address and that of LLC's chief financial officer appeared on all PCB invoices by reason of PCB's company profile for LLC which included his contact details.²⁶³ Mr Devers believes that Mr Parsons would most likely have spoken to a member of LLC's after sales team or its sales support team.²⁶⁴ I accept this evidence. Mr Parsons did tell an employee of LLC on 4 July 2016 that the vehicle was unroadworthy. This information, however, was not passed on to either SL or DL. Nevertheless, the fact that an employee of LLC was told that the vehicle was unroadworthy with this information not being passed on to SL or DL reflects poorly on the business practices of LLC. This in turn reflects poorly on SL as the owner of the business. However, it does not support a finding that the imputation that SL deserves no respect as a business owner, is substantially true.

Is the imputation that SL is and was a dishonest car dealer substantially true?

199 PK has failed to discharge the onus of establishing that this imputation is substantially true. The formulation of the imputation, 'is and was a dishonest car dealer', means that in order to establish that the imputation is substantially true PK must establish that SL was dishonest not only in his dealings with PK, but with other customers of LLC as well.

200 In order to establish that the dishonest car dealer imputation is substantially true, PK must establish that every material part of the imputation is true.²⁶⁵ A material part of the dishonest car dealer imputation is that SL is a dishonest car dealer generally, not just in his dealings with PK. The sting of the imputation is that as a car dealer he is generally dishonest.

201 PK has failed to establish that SL was dishonest in respect of the sale of the Porsche. The evidence does not support a finding that SL knew the vehicle was

²⁶³ Ibid T 817 L 20–24 (5 November 2021).

²⁶⁴ Ibid T 823 L 13–14 (5 November 2021).

²⁶⁵ *O'Brien v Australian Broadcasting Corporation* (2017) 97 NSWLR 1, 36 [172] ('O'Brien'); *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, 263–4 [138] ('Mahommed').

unroadworthy when it was sold to PK on 13 July 2016. Nor does the evidence support a finding that SL requested Europei to provide a false RWC for the Porsche. This conclusion is a sufficient basis to reject a defence of substantial truth in respect of the dishonesty imputation.

202 Putting to one side SL's conduct in respect of the sale of the Porsche, there is no basis for concluding that SL 'is and was' a dishonest car dealer. LLC sells approximately 1,200 cars per annum. There is no evidence of any dishonest dealings by SL in respect of the thousands of vehicles sold by LLC in the years prior to or after July 2016. Of the hundreds of Google reviews in evidence relating to LLC the overwhelming majority of these reviews are very favourable.

203 Joanne Painter, who initiated the Law Answers thread on which PK posted on 17 December 2016, had an adverse experience purchasing a second-hand Mercedes from LLC. The car was ten years old when it was purchased in December 2014 for \$40,000.²⁶⁶ Ms Painter brought proceedings in VCAT seeking to recover \$18,000 which she had spent on repairs.²⁶⁷ VCAT ordered LLC to pay Ms Painter \$1,230 being the cost of repairs for faulty shock absorbers.²⁶⁸ VCAT considered that the other faults with the vehicle were due to wear and tear. Ms Painter gave evidence that during the VCAT hearing LLC's salesman, 'Leon' admitted that he knew that there was a fault with the vehicle's suspension when the car was sold.²⁶⁹

204 In Ms Painter's witness outline, which she accepted as being true and correct,²⁷⁰ she states: 'I consider Srecko Lorbek to be a rude, arrogant and dishonest man.'²⁷¹ Ms Painter gave evidence that she believed that SL was dishonest because LLC had sold her a car despite the salesman knowing that there was something wrong with the

²⁶⁶ CB2664, 'Letter from Joanne Painter to Luke Donellan dated 16 May 2018'.

²⁶⁷ CB770, 'Letter from AMK Law to Srecko Lorbek dated 26 April 2018'; CB3011, 'Letter from AMK Law to Srecko Lorbek n.d.'; Transcript of Proceedings, T 583 L 4-7, T 589 L 7-31 (19 October 2021).

²⁶⁸ Transcript of Proceedings, T 581 L 11-16 (19 October 2021).

²⁶⁹ Ibid T 585 L 12-23 (19 October 2021).

²⁷⁰ Ibid T 582 L 6-16 (19 October 2021).

²⁷¹ CB2853, 'Witness Outline of Joanne Painter dated 30 April 2021'.

shock absorbers.²⁷²

205 Ms Painter makes no allegation of dishonesty directly against SL. The evidence of Ms Painter does not support a finding that SL is and was a dishonest car dealer. The sting of the dishonest car dealer imputation is extremely serious. The onus of proving that the imputation is substantially true must reflect the seriousness of the imputation. The evidence falls well short of PK having discharged this onus.

Is the imputation that SL is untrustworthy as a car dealer substantially true?

206 The sting of this imputation is not as serious as the dishonest car dealer imputation. A car dealer may be untrustworthy by reason of being indifferent or complacent to the needs of a customer. Such indifference or complacency would not necessarily involve dishonest conduct. Nevertheless, the sting of the imputation is not limited to SL's dealings with PK. Rather, the sting of the imputation is that SL is generally an untrustworthy car dealer in respect of any customer of LLC. PK has failed to establish that SL is an untrustworthy car dealer. The overwhelming majority of the 774 Google reviews in evidence in respect of LLC are very favourable and record positive experiences of customers of LLC. This evidence does not support a finding that the untrustworthy car dealer imputation is substantially true.

Is the imputation that DL is and was a liar substantially true?

207 I have concluded that DL told PK on 13 July 2016 that the (original) tyres, brakes and suspension on the vehicle were in good condition. The true position is that the car was unroadworthy by reason of the condition of the brakes and suspension. The sting of the liar imputation is not that DL gave PK false information regarding the condition of the vehicle. The sting of the imputation is that DL gave PK false information in circumstances where he knew that the vehicle was unroadworthy. The sting of the imputation arises from the sentence in the impugned publications which precedes the allegation that DL lied to PK: 'Lorbek knew that the Porsche was never roadworthy from the very detailed pre-purchase report from the Melbourne

²⁷² Transcript of Proceedings, T 586 L 28 – T 587 L 21 (19 October 2021).

Porsche dealer. The salesman David Lorbek lied to my face about several aspect of the vehicles [sic] condition.'

208 An ordinary reasonable person would read this statement as being an allegation that DL knew that the vehicle was unroadworthy when he sold it to PK. The words 'the salesman lied to my face' emphasise the brazen nature of DL's conduct, advising PK of something he knew to be false.

209 The defence of substantial truth is concerned with meeting the sting of the defamatory imputation.²⁷³ When giving evidence DL accepted that he did not have any reasonable basis for making any representations to PK, or any statement to him about the condition of the vehicle, because he had only undertaken a visual inspection of the vehicle.²⁷⁴ If the sting of the liar imputation was that DL lied by reason of being recklessly indifferent as to the truth of what he told PK, the substantial truth defence may have been made out. However, the onus upon PK is to meet the sting of the imputation. He has not done so. He has failed to establish that DL knew that the vehicle was unroadworthy when he sold it to PK.

Is the imputation that DL is and was a dishonest car salesman substantially true?

210 The sting of this imputation is that DL was not merely dishonest when dealing with PK, but is by nature a dishonest car salesman. If it had been established that DL had lied to PK about the condition of the vehicle knowing it to be unroadworthy, this finding could be indicative of DL's character being that of a dishonest car salesman.²⁷⁵ DL told PK the original brakes, suspension and tyres were in good condition in circumstances where he did not have any reasonable basis for making any representation to PK regarding the condition of the Porsche. This finding reflects adversely upon DL. However, it is not indicative of DL's character being that of a dishonest car salesman. Further, there is no evidence to support a finding that DL has been dishonest in his dealings with any other customers of LLC. PK has

²⁷³ *O'Brien* (n 265) 36 [172]; *Mahommed* (n 265) 263–4 [138]; *Popovic* (n 251) 57 [274].

²⁷⁴ Transcript of Proceedings, T 222 L 18–22, T 220 L 29 – T 221 L 11 (14 October 2021).

²⁷⁵ *Cf Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299, 375 [328].

failed to establish that the imputation that DL is and was a dishonest car salesman is substantially true.

Is the imputation that DL is an untrustworthy car salesman substantially true?

211 DL made representations to PK about the condition of the Porsche when he knew nothing about the mechanical condition of the vehicle. DL's willingness to express a positive opinion about the mechanical condition of the vehicle in circumstances where he knew nothing about its mechanical condition supports a finding that as a car salesman he is untrustworthy. Further, DL sold PK warranty insurance which he did not need because the vehicle was subject to an existing factory warranty. DL had no basis for knowing whether or not PK needed the warranty because he had not made any enquiries of Porsche Australia as to whether the vehicle was covered by an existing factory warranty. When PK subsequently took his vehicle to Gulson it was readily ascertainable that the vehicle was subject to a factory warranty. DL's willingness to sell PK warranty insurance without first checking whether the vehicle was subject to an existing factory warranty also supports a finding that as a car salesman he is untrustworthy.

212 PK has discharged the onus of establishing that one of the three imputations conveyed by the impugned publications in respect of DL was substantially true. However, DL does not have a defence pursuant to s 25 of the Act in respect of the untrustworthy car salesman imputation. The defence of justification under s 25 operates on an all or nothing basis. All of the defamatory imputations conveyed by an impugned publication must be proved to be substantially true.²⁷⁶ PK has failed to establish the substantial truth of the liar and dishonest car salesman imputations. As PK has failed to prove the substantial truth of two of the three imputations conveyed in respect of DL, s 25 does not provide PK with a defence.

CONTEXTUAL TRUTH

213 Section 26 of the Act provides as follows:

²⁷⁶ *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* (2018) 97 NSWLR 547, 566–7 [96]; *Hutley v Cosco* (2021) 104 NSWLR 421, 445–6 [124] ('Hutley').

It is a defence to the publication of defamatory matter if the defendant proves that—

- (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true; and
- (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

214 PK's amended defence pleads two contextual imputations:

- (a) there are reasonable grounds for the Motor Vehicle Licencing Authority and/or the Police to investigate the conduct and operations of the company operated by the plaintiffs, in that Lorbek Luxury Cars sold the defendant a car, which a reputable Porsche dealership had told them had major faults and was unroadworthy, without rectifying any of those faults prior to sale (**the First Contextual Imputation**); and/or
- (b) the plaintiffs have shown a complete disregard for their customers, in that rather than promptly and appropriately dealing with customer issues and complaints with the vehicles they purchased, they instead treated disgruntled customers terribly, by refusing to resolve their issues and instead threatening them for defamation (**the Second Contextual Imputation**).²⁷⁷

215 In order for the defence under s 26 to succeed PK must establish that the contextual imputations are substantially true (s 26(a)) and that the plaintiffs' defamatory imputations 'do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations' (s 26(b)). The defence will fail if the plaintiffs' imputations would still have some effect on their reputation notwithstanding the effect of the substantial truth of the defendant's contextual imputations.²⁷⁸

216 For the defence to succeed the defendant must plead and prove the substantial truth of contextual implications which are more serious than the plaintiffs' imputations.²⁷⁹ The 'sting' in the pleaded imputations of contextual truth must exceed the 'sting' of the imputations pleaded by the plaintiffs.²⁸⁰ In undertaking the exercise of weighing the plaintiffs' pleaded imputations against the defendant's contextual imputations it

²⁷⁷ Defendant, 'Amended Defence filed 19 September 2018', [33(a)-(b)].

²⁷⁸ *O'Brien* (n 265) 41 [201].

²⁷⁹ *Ibid* 41 [202].

²⁸⁰ *Palmer v McGowan* [2021] FCA 430, [27]-[30].

is necessary to exclude any of the plaintiffs' imputations which have been shown to be substantially true.²⁸¹ It follows that in undertaking the weighing exercise between the plaintiffs' pleaded imputations and the defendant's pleaded contextual imputations, it is necessary to exclude the imputation that DL is an untrustworthy car salesman, which has been proven to be substantially true.

217 PK has not established that the contextual imputations are substantially true. The first imputation is that there are reasonable grounds for the Motor Vehicle Licencing Authority and/or the police to investigate the conduct and operations of the company operated by the plaintiffs. First, LLC is not 'operated' by DL. SL is the owner and sole director of LLC. DL is an employee of the company. Second, PK has failed to establish that there are reasonable grounds for the police to investigate the conduct and operations of LLC arising out of the sale of the Porsche. His failure to do so arises from his failure to establish that either SL or DL knew that the vehicle was unroadworthy at the time it was sold to him.

218 PK has failed to establish that the second contextual imputation is substantially true. First, there is no evidence that DL has ever threatened any customer of LLC with defamation. Second, there is no basis for concluding that the plaintiffs 'treated disgruntled customers terribly, by refusing to resolve their issues and instead threatening them for defamation'.

219 Proceedings were brought against Ms Painter and the publisher of Law Answers in the County Court of Victoria.²⁸² The claim did not allege defamation. Rather, it was a claim for injurious falsehood as well as claims under the Australian Consumer Law. The proceedings were settled. Under the terms of settlement Ms Painter agreed to provide LLC with a signed letter of apology, which LLC was authorised to distribute online.²⁸³ In light of Ms Painter's agreement to provide a written apology to SL there is no basis for concluding that SL behaved terribly by threatening and

²⁸¹ *Hutley* (n 276) 447 [130], 450 [142], 451 [146].

²⁸² CB2636-49, 'Writ Filed by Lorbek Luxury Cars dated 13 April 2018'.

²⁸³ CB2881, 'Deed of Settlement and Release dated 2 July 2018'; CB2890, 'Letter from Joanne Painter to Srecko Lorbek dated 2 July 2018'.

bringing defamation proceedings against Ms Painter. Significant aspects of the second contextual imputation are not substantially true and therefore cannot sustain a defence under s 26.

220 Even if I had concluded that the contextual imputations are substantially true, the defence would not succeed. The contextual imputations are undoubtedly of a less serious character than the pleaded imputations in respect of SL and DL. The sting of the pleaded imputations is that SL and DL were not only dishonest in their dealings with PK, but are generally dishonest, in the case of SL, as a car dealer, and in the case of DL, as a car salesman. Further, the sting of the imputations is that SL and DL deliberately mislead customers by providing them with information about vehicles which they know is untrue. The sting of these imputations is much more serious than the two contextual imputations. Even if PK established the substantial truth of the contextual imputations the defence under s 26 could not succeed.

DAMAGES

221 PK has failed to establish any of the defences he relies upon, save for the defence of statutory qualified privilege. As a result of having established this defence he is not liable to pay the plaintiffs' damages. Absent the finding that the defence of qualified privilege is made out, SL and DL would have been entitled to an award of damages. If I am wrong in concluding that the defence of statutory qualified privilege applies, there is utility in setting out my findings as to the quantum of damages which the plaintiffs would have been entitled to receive.

222 There are three purposes to be served by damages awarded for defamation:

- (xii) Consolation for the personal distress and hurt caused by the publication;
- (xiii) Reparation for the harm done to the plaintiffs' personal and business reputation;

(xiv) Vindication of the plaintiffs' business reputation.²⁸⁴

The first two purposes are often addressed jointly and provide consolation for the wrong done to the plaintiff. Vindication is concerned with the attitude of others to the plaintiff. The amount awarded must be the minimum necessary to convey to the public the vindication of the plaintiffs' reputation.²⁸⁵ Put another way, the amount must be sufficient to 'nail the lie'.²⁸⁶

223 The imputations which are conveyed by the impugned publications in respect of SL reflect adversely upon his standing as a business owner and his honesty. These are matters which weigh in favour of a significant award of damages to vindicate his business reputation. However, when considering the question of vindication it is necessary to have regard to findings which reflect unfavourably on SL's business reputation. First, LLC sold PK a very expensive vehicle which was unroadworthy. Second, Europei, who were engaged by LLC to provide a RWC for the vehicle, certified the vehicle as roadworthy when it was not. Third, LLC sold PK warranty insurance which he did not need because the vehicle was subject to a factory warranty. Fourth, notwithstanding the fact that an employee of LLC was told by Jake Parsons that the vehicle was unroadworthy, this information was not passed on to SL. In light of the fact that SL is the owner of LLC and its chief executive officer, each of these matters reflect adversely on SL's business reputation.

224 It is also necessary to have regard to the limited publication of the impugned publications. GR2 was not published to anybody except Mr Hamann. The Law Answers post was not published to anybody apart from the moderator who amended it. GR1 and GR3 were only published to a small number of customers and potential customers who read the posts via LLC's Google My Business page.

225 Save for Mr Hamann and the Law Answers moderator there is no direct evidence of

²⁸⁴ *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60-1.

²⁸⁵ *Ibid.*

²⁸⁶ *French v Herald & Weekly Times Ltd (No 2)* (2010) 27 VR 171, 194 [87]; *Dods v McDonald (No 2)* [2016] VSC 201, [59].

any individual having read any of the impugned publications, let alone having a diminished opinion of SL as a consequence of having done so. Nor is there any evidence of SL or LLC sustaining any economic loss as a consequence of the impugned publications.

226 Section 34 of the Act requires an appropriate and rational connection between the harm sustained by the plaintiff and the amount of damages awarded. An award of damages of \$75,000 provides an appropriate and rational measure of compensation for the harm sustained by SL as a consequence of the impugned publications. This sum does not include any amount by way of aggravated damages. In order for there to be an award of aggravated damages, a plaintiff must establish a lack of bona fides in the defendant's conduct or conduct which in some relevant way was improper and unjustifiable.²⁸⁷

227 If I am wrong in concluding that PK has a defence of statutory qualified privilege, the matters I have relied upon in concluding that PK acted reasonably would nevertheless militate against a finding that he acted with a lack of bona fides. PK did bear ill will towards the plaintiffs. This was a product of his genuine and reasonably held belief that the plaintiffs knowingly sold him an unroadworthy vehicle. PK's ill will towards the plaintiffs was not the dominant factor actuating the publication of the impugned publications. I am not satisfied that PK's state of mind at the time of the publication of the impugned publications affected any harm sustained by the plaintiffs. As such, s 36 of the Act requires that PK's state of mind is to be disregarded when assessing damages.

228 The plaintiffs submit that PK's conduct as a litigant warrants an award of aggravated damages. I reject this submission. The plaintiffs have failed to establish that any deficiencies in the manner in which PK conducted his defence warrants an award of aggravated damages. The plaintiffs also point to PK's rejection of an open

²⁸⁷ *Hardie v The Herald and Weekly Times Pty Ltd* [2016] VSCA 103, [65]; *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [84]–[88] (not disturbed on appeal in *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674); *Moroney v Zegers* [2018] VSC 446, [241].

offer of settlement on the third day of trial. PK's rejection of the offer of settlement does not warrant an award of aggravated damages. Even if I am wrong in concluding that PK has a defence of statutory qualified privilege, there is no basis for concluding that PK's defence was so lacking in merit that a refusal to accept an offer of settlement warrants an award of aggravated damages.

229 The plaintiffs also submit that they are entitled to an award of *Andrews* damages.²⁸⁸ The plaintiffs submit that even though they have not established actual, particularised financial loss, the Court should nevertheless conclude that they have suffered economic loss as a result of the publication of the impugned publications.²⁸⁹ I reject this submission. No claim for *Andrews* damages was pleaded. Further, there is no evidence which permits a finding that either plaintiff has suffered any economic loss as a consequence of the publication of the impugned publications.

230 I have concluded that the liar and dishonest car salesman imputations conveyed by the impugned publications in respect of DL are not true. I have concluded that the imputation that DL is an untrustworthy car salesman is substantially true. This latter finding militates against a significant award of damages to vindicate DL's business reputation. The limited publication of the impugned publications also militates against an award of significant damages. So too the absence of any evidence of any person having a diminished opinion of DL's reputation as a consequence of reading the impugned publications.

231 I accept that the impugned publications have caused DL personal distress. Such distress was palpable when DL gave evidence. However, there must be an appropriate and rational connection between such distress and any award of damages. I have no hesitation in concluding that DL is distressed by the imputation that he is an untrustworthy car salesman. However it is necessary to disregard this distress in the assessment of damages because I have determined that the imputation is substantially true.

²⁸⁸ *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225.

²⁸⁹ Plaintiffs, 'Closing Submissions filed 17 November 2021', [249].

232 Had the defence of statutory qualified privilege not been upheld, I would have awarded damages of \$25,000. I would not have made any award of aggravated damages, for the reasons set out above in respect of SL.

CONCLUSION

233 PK has a defence of statutory qualified privilege for the publication of the impugned publications. As a result, the plaintiffs' claim for damages and permanent injunctions is dismissed. I will provide the parties with an opportunity to make submissions on the costs of the proceeding.

ANNEXURE A - Google review dated 4 April 2017 ('GR1')

In the end Srecko and David Lorbek sat like naughty schoolboys having being found out at the Melbourne Magistrates Court. If you think of dealing with Lorbek turn and run away. They don't deserve any stars.

Lorbek Luxury Cars sold me an unroadworthy 2011 Porsche Panamera Turbo in July 2016. Through my own investigations initially they tried selling it to Porsche Brighton who rejected purchasing the car. A full report of that vehicle from the Porsche dealer shows major faults. It appears none of those faults were rectified prior to actually selling the Porsche. I foolishly believed lies about the car from the salesman. Also having very briefly driven the vehicle and that it passed a roadworthy certificate I had faith it was a safe and mechanically sound prestige vehicle.

Soon after delivery the car had some issues which I took to the local Porsche dealer, upon inspecting they told me it is unroadworthy. Brakes, tyres and suspension had to be replaced, this is when Lorbek Luxury Cars stopped being customer focused. Denying any liability and saying it was my treatment of the vehicle that caused these issues. I spent a lot of money to get the car back on the road. In all it has been in Porsche workshops for over a month since purchasing the vehicle.

The roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne and they have been the subject of an investigation from VIC Roads and are being censured for their conduct. I hope for all the motoring public that they get made an example of and lose their roadworthy certification licence. Lorbek I understand have a close relationship with them and is where their Roadworthy Certificates are done for their car sales. Lorbek knew the Porsche was never roadworthy from the very detailed pre purchase report from the Melbourne Porsche dealer. The salesman David Lorbek lied to my face about several aspects of the vehicles condition. Lorbek's own website states that all there vehicles are inspected and tested, if so how can a defective vehicle be put up for sale let alone knowingly sold.

Lorbek Luxury Cars settled in a very long 3.5 hour pre trial hearing at the Melbourne Magistrate court on the 8 March. Srecko and David Lorbek sat looking like naughty schoolboys being found out. The weight of evidence subpoenaed told in the end. I am happy to finally recover the costs of repairing an unroadworthy car to get it roadworthy.

This was a very clear case of a company who acts dishonestly with intent to gain financial advantage. Lorbek's warranty department and management treated me with contempt at every stage when thing started unravelling for them. They threatened defamation and sent legal letters to what end. The truth is all I wanted was I paid for, a roadworthy car.

Lorbek deserve condemnation from the motoring public and industry. Certainly deserve no respect as business owners. The Motor vehicle licensing authority and police need to take a long hard look at this company and it's operations.

You have been warned, It's about time the lawmakers protect us from these dealers.

Peter

ANNEXURE B - Google review dated 19 October 2017 ("GR2")

If you think of dealing with Lorbek turn and run away. They don't deserve any stars.

Lorbek Luxury Cars sold me an unroadworthy 2011 Porsche Panamera Turbo in July 2016. Through my own investigations initially they tried selling it to Porsche Brighton who rejected purchasing the car. A full report of that vehicle from the Porsche dealer shows major faults. It appears none of those faults were rectified prior to actually selling the Porsche. I foolishly believed lies about the car from the salesman. Also having very briefly driven the vehicle and that it passed a roadworthy certificate I had faith it was a safe and mechanically sound prestige vehicle.

Soon after delivery the car had some issues which I took to the local Porsche dealer, upon inspecting they told me it is unroadworthy. Brakes, tyres and suspension had to be replaced, this is when Lorbek Luxury Cars stopped being customer focused. Denying any liability and saying it was my treatment of the vehicle that caused these issues. I spent a lot of money to get the car back on the road. In all it has been in Porsche workshops for over a month since purchasing the vehicle.

The roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne and they have been the subject of an investigation from VIC Roads and are being censured for their conduct. I hope for all the motoring public that they get made an example of and lose their roadworthy certification licence. Lorbek I understand have a close relationship with them and is where their Roadworthy Certificates are done for their car sales. Lorbek knew the Porsche was never roadworthy from the very detailed pre purchase report from the Melbourne Porsche dealer. The salesman David Lorbek lied to my face about several aspects of the vehicles condition. Lorbek's own website states that all there vehicles are inspected and tested, if so how can a defective vehicle be put up for sale let alone knowingly sold.

Lorbek Luxury Cars settled. I am happy to finally recover the costs of repairing an unroadworthy car to get it roadworthy.

This was a very clear case of a company who acts dishonestly with intent to gain financial advantage. Lorbek's warranty department and management treated me with contempt at every stage when thing started unravelling for them. They threatened defamation and sent legal letters to what end. The truth is all I wanted was I paid for, a roadworthy car.

Lorbek deserve condemnation from the motoring public and industry. Certainly deserve no respect as business owners. The Motor vehicle licensing authority and police need to take a long hard look at this company and it's operations.

You have been warned, It's about time the lawmakers protect us from these dealers.

Peter

ANNEXURE C - Google review dated 20 October 2017 ("GR3")

If you think of dealing with Lorbek turn and run away. They don't deserve any stars.

Lorbek Luxury Cars sold me an unroadworthy 2011 Porsche Panamera Turbo in July 2016. Through my own investigations initially they tried selling it to Porsche Brighton who rejected purchasing the car. A full report of that vehicle from the Porsche dealer shows major faults. It appears none of those faults were rectified prior to actually selling the Porsche. I foolishly believed lies about the car from the salesman. Also having very briefly driven the vehicle and that it passed a roadworthy certificate I had faith it was a safe and mechanically sound prestige vehicle.

Soon after delivery the car had some issues which I took to the local Porsche dealer, upon inspecting they told me it is unroadworthy. Brakes, tyres and suspension had to be replaced, this is when Lorbek Luxury Cars stopped being customer focused. Denying any liability and saying it was my treatment of the vehicle that caused these issues. I spent a lot of money to get the car back on the road. In all it has been in Porsche workshops for over a month since purchasing the vehicle.

The roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne and they have been the subject of an investigation from VIC Roads and are being censured for their conduct. I hope for all the motoring public that they get made an example of and lose their roadworthy certification licence. Lorbek I understand have a close relationship with them and is where their Roadworthy Certificates are done for their car sales. Lorbek knew the Porsche was never roadworthy from the very detailed pre purchase report from the Melbourne Porsche dealer. The salesman David Lorbek lied to my face about several aspects of the vehicles condition. Lorbek's own website states that all there vehicles are inspected and tested, if so how can a defective vehicle be put up for sale let alone knowingly sold.

This was a very clear case of a company who acts dishonestly with intent to gain financial advantage. Lorbek's warranty department and management treated me with contempt at every stage when thing started unravelling for them. They threatened defamation and sent legal letters to what end. The truth is all I wanted was I paid for, a roadworthy car.

Lorbek deserve condemnation from the motoring public and industry. Certainly deserve no respect as business owners. The Motor vehicle licensing authority and police need to take a long hard look at this company and it's operations.

You have been warned, It's about time the lawmakers protect us from these dealers.

Peter

ANNEXURE D – Law Answers post dated 17 December 2016

Petez comments on law answers (original)

Petez

Posted 17 December 2016

I think this story needs told. Lorbek Luxury Cars sold with full knowledge an unroadworthy 2011 Porsche Panamera Turbo a few months ago. Initially they tried selling it to a Melbourne Porsche dealer who rejected purchasing the car.

A full report of that vehicle from the Porsche dealer shows major faults. It appears none of those faults were rectified prior to actually selling the Porsche. The owner foolishly believed lies about the car from the salesman. Also having very briefly driven the vehicle and that it passed a roadworthy certificate he had faith it was a safe and mechanically sound prestige vehicle.

Soon after delivery the car had some issues which he took to the local Porsche dealer, upon inspecting they told him it is unroadworthy. Brakes, tyeres and suspension had to be replaced, this is when Lorbek stopped being customer focused. Denying any liability and saying it was the owners treatment of the vehicle that caused these issues. The owner spent a lot of money to get his car back on the road. In all it has been in Porsche workshops for over a month since purchasing the vehicle.

The roadworthy certificate without a doubt was fraudulent from Europei Motori in South Melbourne and they are under a very serious investigation from VIC Roads. I hope for all the motoring public that they get made an example of and lose there roadworthy certification licence. Lorbek I understand have a close relationship with them and is where their Roadworthy Certificates are done for their car sales.

Lorbek knew it was never roadworthy from the very detailed pre purchase report from the Melbourne Porsche dealer. David Lorbek lied to the owners face about several aspects of the vehicles condition. Lorbek's website states that all there vehicles are inspected and tested if so how can a defective vehicle be put up for sale let alone knowingly sold.

Now Lorbek are in the process of being sued for the costs of repairing an unroadworthy car to get it roadworthy. This is a very clear case of a company who acts dishonestly with intent to gain financial advantage. Lorbek's warranty department and management treated the owner with contempt. The vehicle owner, an innocent victim of this company was told by the Srecko Lorbek to never contact him again after complaining of his companies conduct.

They threatened defamation and sent legal letters to what end. The truth is all he wanted was he paid for, a roadworthy car. He expected and now demands Lorbek pay for the lawyers bills and repairs to fix what they knew was an unsafe and mechanically flawed vehicle.

Lorbek deserve condemnation from the motoring public and industry. Certainly deserve no respect as business owners. The Motor vehicle licensing authority and police need to take a long hard look at this company and it's operations.

Petez, 17 December 2016

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