SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2022 0048

SRECKO FELIX LORBEK — First Applicant

DAVID PETER LORBEK — Second Applicant

v

PETER LAWRENCE KING — Respondent

JUDGES:	BEACH, WALKER and OSBORN JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	27 April 2023
DATE OF JUDGMENT:	12 May 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 111
JUDGMENT APPEALED FROM:	[2022] VSC 218 (McDonald J)

DEFAMATION – Appeal – Publication – Publication of Google reviews – Extent of publication – Google reviews concerning respondent's experience relating to purchase of used vehicle from applicants' business – Whether judge erred in concluding that Google reviews only published to a small number of customers and potential customers of applicants' business who had an interest in receiving the reviews of other customers who had been dissatisfied with their experience of purchasing a vehicle from applicants' business.

DEFAMATION – Appeal – Qualified privilege – Statutory qualified privilege – Whether persons to whom Google reviews were published had an interest or apparent interest in receiving information – Whether respondent believed on reasonable grounds that persons to whom Google reviews were published had requisite interest in receiving information – Whether respondent's conduct in publishing impugned publications was reasonable – Whether publications actuated by malice – Applications for leave to appeal refused.

Defamation Act 2005, s 30.

Chau v Fairfax Media Publications Pty Ltd [2019] FCA 185; *KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden* (2020) 101 NSWLR 729; *Lee v Lee* (2019) 129; *Stoltenberg v Bolton* (2020) 380 ALR 145, referred to.

Counsel

Applicants:	Mr DP Gilbertson KC with Mr JD Catlin
Respondent:	Mr TJ Mullen

Solicitors

Applicants:	MDM Lawyers
Respondent:	Sanicki Lawyers

BEACH JA
WALKER JA
OSBORN JA:

1 Lorbek Luxury Cars ('LLC')[1] is a very substantial business involved in selling luxury second-hand motor vehicles. It has an annual turnover of approximately $51 million, and sells approximately 1,200 cars a year. Srecko Lorbek ('SL') is the owner and chief executive officer of LLC. His younger brother, David Lorbek ('DL') is the senior salesperson employed by LLC.

2 On 13 July 2016, Peter King ('PK') purchased a 2011 Porsche Panamera from LLC for $159,726. The vehicle had 50,267 kilometres recorded on its odometer. As part of the purchase price, PK paid LLC $4,950 for a five year platinum warranty. The vehicle was sold with a roadworthy certificate, provided on 18 July 2016 by Europei Motori Pty Ltd ('Europei').

3 In early August 2016, PK drove the vehicle into a large pothole. Shortly after driving into the pothole, he took the car to Porsche Centre Canberra[2] ('Gulson') to have a faulty door strap repaired. Gulson discovered that the vehicle was still under a factory warranty which would cover the cost of repairs to the door 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.

4 While the vehicle was with Gulson, a number of other defects were identified. Gulson's service manager advised PK that the vehicle was unsafe and unroadworthy due to the condition of its brakes, tyres and suspension. After PK was advised that the vehicle was unroadworthy, his relationship with LLC rapidly deteriorated. PK's request to have LLC cover the costs of making the vehicle roadworthy were not responded to in a way that PK found acceptable.

5 Between 26 August 2016 and March 2018, PK made 13 online posts detailing his adverse perception of his dealings with LLC. On 14 November 2017, SL and DL (collectively, 'the plaintiffs') filed a writ in the Trial Division claiming damages for defamation from PK in respect of four of these posts, namely:

(a) a post made on 17 December 2016 on a site, 'Law Answers' ('the Law Answers post'); and

(b) three Google review posts made on 4 April 2017, 19 October 2017 and 20 October 2017 (respectively, 'GR1', 'GR2' and 'GR3'). GR2 was an edited version of GR 1, and GR3 was an edited version of GR2.

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1 For ease of reference, we have used the same definitions in these reasons as those used by the trial judge in his reasons for judgment.

2 A business name of Ray Gulson Pty Limited.

6 The Law Answers post and the three Google review posts (GR1, GR2 and GR3) are Annexures A to D of these reasons. The posts are very similar. They cover the same topics and contain some paragraphs which are identical. For example, the three Google review posts each contained the following paragraphs:

> 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 [sic] 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 [sic] started unravelling for them. They threatened defamation and sent legal letters to what end. The truth is all I wanted was I paid for [sic], 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 [sic] operations.
>
> You have been warned, It's about time the lawmakers protect us from these dealers.

7 In their statement of claim, the plaintiffs pleaded that each post was defamatory of SL and DL. In relation to SL, each impugned publication was alleged to mean that SL:

(a) 'was fraudulent who [sic] had knowingly sold a vehicle with a fraudulent roadworthy certificate' ('the fraud imputation');

(b) 'had engaged in criminal behaviour' ('the criminal imputation');

(c) 'deserved no respect as a business owner' ('the no respect imputation');

(d) 'is and was a dishonest car dealer' ('the dishonest imputation'); and

(e) 'is untrustworthy' ('the untrustworthy imputation').

8 In relation to DL, the statement of claim pleaded that each impugned publication conveyed the fraud imputation, the criminal imputation, a variation of the dishonest imputation (namely, that DL is and was a dishonest car salesman, rather than a dishonest car dealer) and the untrustworthy imputation. In lieu of the no respect imputation, the statement of claim alleged that each publication conveyed that DL 'is and was a liar' ('the liar imputation').

9 By his defence, PK admitted some of the plaintiffs' allegations and put others in issue. Additionally, he pleaded the following positive defences:

(a) statutory qualified privilege pursuant to s 30 of the *Defamation Act 2005* ('the Act');

(b) fair comment;

(c) honest opinion pursuant to s 31(1) of the Act;

(d) justification defences, both at common law and pursuant to s 25 of the Act; and

(e) contextual truth pursuant to s 26 of the Act.

10 The plaintiffs' proceeding was tried by McDonald J over 12 days in October and November 2021. On 5 May 2022, his Honour published reasons for judgment[3] in which he concluded that:

(a) in relation to SL, all four publications conveyed the no respect imputation, and GR1 conveyed the dishonest imputation and the untrustworthy imputation;

(b) in relation to DL, all four publications conveyed the liar imputation, the dishonest imputation and the untrustworthy imputation;

(c) PK had established the statutory qualified privilege defence pursuant to s 30 of the Act, and the plaintiffs had failed to establish that PK was actuated by malice; and

(d) the other defences relied upon by PK (fair comment, honest opinion, justification and contextual truth) had not been established.

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3 *Srecko and David Lorbek v Peter King* [2022] VSC 218 ('Reasons').

11 The defence of statutory qualified privilege having been established, PK was not liable to pay any damages to the plaintiffs. However, in the event that he might be wrong in concluding that this defence was made out, the judge went on to assess SL's damages in the sum of $75,000 and DL's damages in the sum of $25,000.

12 On 25 May 2022, pursuant to the Reasons, the judge ordered that there be judgment for PK with costs.

13 The plaintiffs now seek leave to appeal against the judge's orders. They rely upon five proposed grounds of appeal:

(a) proposed grounds 1 to 3 assert that the judge erred in concluding that the statutory qualified privilege defence was made out;

(b) proposed ground 4 asserts that the judge erred in concluding that the plaintiffs had failed to establish that the impugned publications were actuated by malice; and

(c) proposed ground 5 asserts that the assessments of damages made by the judge were manifestly inadequate.

In response, PK has filed a notice of contention, seeking to uphold the judge's orders by asserting that his Honour erred in rejecting PK's defence of honest opinion.[4]

14 For the reasons that follow, we would refuse leave to appeal on proposed grounds 1 to 4. In those circumstances it is not necessary for us to deal with proposed ground 5, or with the notice of contention.

The judge's reasons

15 It is necessary to commence by describing the judge's reasons in some detail.

Background facts

16 In the course of summarising the relevant background facts, the judge set out the circumstances surrounding PK's purchase of the vehicle. Relevantly for present purposes, in June 2016, the vehicle was owned by Porsche Centre Brighton ('PCB'). On 22 June 2016, PCB sent the vehicle to its own workshop for a 'Porsche approved' check. PCB's technician identified numerous items which had to be replaced to bring the vehicle up to Porsche approved standard. An entry made in the PCB job card on that day recorded the vehicle as being unroadworthy.[5]

17 On 30 June 2016, PCB sold the vehicle to a wholesaler, Sullivan Automotive Pty Ltd. On the same day, LLC purchased the vehicle from Sullivan Automotive for $117,000. Upon receiving the vehicle, SL took it for a test drive. He considered that 'the car

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4 The notice of contention also sought to uphold the judge's orders by asserting that his Honour erred in rejecting PK's justification and contextual truth defences. During the course of hearing, however, PK abandoned reliance upon these parts of the notice of contention.

5 Reasons, [6]–[12].

drove excellent'. 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.

18 On 4 July 2016, the vehicle was delivered to PCB. PCB's internal job card for the 4 July 2016 service identified the cost of undertaking the service and replacing the front and rear brakes. Entries in the job card recorded the vehicle as being unroadworthy because the front and rear rotors were less than the minimum prescribed width. While PCB's internal job card was not forwarded to LLC, the judge accepted that, on 4 July 2016, an employee within LLC's sales team was told by an employee of PCB that the vehicle was unroadworthy because its rotors were undersized.[6] The judge said, however, that the evidence did 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.[7]

Publication

19 After summarising the background facts and describing the four impugned publications, the judge turned to the issue of publication. After referring to relevant authority[8] and analysing the evidence,[9] the judge considered the various arguments made to him about the extent of publication of each of the four posts.

20 In relation to the Law Answers post, the judge found that the only relevant publication established by the plaintiffs was one made on 12 September 2017 to the moderator of the Law Answers site when the moderator edited PK's post by deleting the words, 'David Lorbek lied to the owner's face about several aspects of the vehicles [sic] condition'.

21 In relation to the Google reviews, the judge concluded that the plaintiffs had established that GR1, GR2 and GR3 had been published to LLC's marketing manager (Mr Hamann); and that GR1 and GR3 had been published to 'a small number of customers and potential customers of LLC who read the posts via LLC's Google My Business page'.[10] The judge did not accept that GR2 was published to anyone additional to Mr Hamann, because GR2 'was only posted for 24 hours'.[11]

22 In light of the parties' submissions in this Court about whether the Google review posts were published to a 'recipient who has an interest or apparent interest in having information on [the subject of the posts]',[12] it is necessary to summarise in a little detail the reasoning which led the judge to conclude that GR1 and GR3 had been published to 'a small number of customers and potential customers of LLC'.

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6 Ibid [17], [194]–[198].

7 Ibid [194].

8 *Wilson v Matthys* [2018] WASC 281 (Kenneth Martin J); *Sydney Cosmetic Specialist Clinic Pty Ltd v Hu* [2020] NSWDC 786 (Gibson DCJ); and *Cronau v Nelson (No 2)* [2018] NSWSC 1905 (McCallum J).

9 Including the evidence of an expert witness called by the plaintiffs, Apostolos Velanas, who gave evidence about the way in which Google reviews operate; and the evidence of LLC's marketing manager, Henry Hamann, who gave unchallenged evidence that he had read GR1, GR2 and GR3.

10 Reasons, [79].

11 Ibid [70(iv)].

12 See s 30(1)(a) of the Act.

23 In relation to the issue of publication, his Honour observed that the plaintiffs did not lead direct evidence regarding the number of people who read the impugned Google reviews. Similarly, there was no evidence that any of the three Google reviews had been 'liked' by any third party or been the subject of any comment by a third party. The judge noted that 747 Google reviews in respect of LLC had been admitted into evidence and that many of these reviews included comments in response from LLC. He also observed, however, that none of the impugned reviews elicited a response, and none of the reputation witnesses called by the plaintiffs gave evidence of having read any of the impugned reviews.[13]

24 The judge referred to the extract from LLC's Google My Business page in the report of Mr Velanas (the plaintiffs' expert) which stated that LLC had a 4.7 star rating with 707 reviews. No extract from any reviews appeared in the side bar of that extract and, in order to read and comprehend PK's posts, it would have been necessary for an individual to have scrolled through the reviews. As the judge observed, 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 included the impugned posts.[14]

25 In arriving at his conclusion that the people who read the impugned posts were customers or potential customers of LLC who had an interest in reading the reviews of people who had been dissatisfied with their experience of purchasing a vehicle from LLC, the judge said:

> 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:
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> - During the period 4 April 2017 to 14 November 2017 approximately 1,500 people per day would have visited the LLC website;
> - A proportion of those who visited the LLC website would have taken the initial step of entering 'LLC' into the Google search engine;
> - 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
> - 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. However, based on the evidence of Mr Hamann the 20 October 2017 review was read by him

13 Reasons, [62].
14 Ibid [69].

and thus published.

> 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.[15]

Identification

26 The judge noted that PK accepted that DL was named, and therefore identified, in each of the four impugned publications; and that SL was named, and therefore identified, in the Law Answers post and GR1.[16]

27 SL was not named in GR2 or GR3. His Honour concluded, however, that Mr Hamann knew that SL was the owner of LLC, and therefore would have identified him as the business owner in respect of whom the statement, 'Certainly deserve no respect as business owners', was made in GR2 and GR3.[17]

28 Remembering that GR2 was only published to Mr Hamann, the judge turned to the question of whether SL would have been identified by any other person who read GR3. The judge inferred that a small proportion of the individuals who read GR3 via LLC's Google My Business page would have known that SL was the owner of LLC, and would therefore have identified him as the business owner referred to in GR3.[18]

Imputations

29 The judge noted that PK accepted that the no respect, dishonest and untrustworthy imputations were conveyed by GR1 in respect of SL;[19] and that the liar, dishonest and untrustworthy imputations were conveyed by all four of the impugned publications in respect of DL.[20]

30 After analysing the impugned publications and the parties' submissions, the judge concluded that:

(a) the fraud and criminal imputations were not conveyed by any of the impugned publications;

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15 Ibid [70]–[71] (citation omitted).
16 Ibid [81].
17 Ibid.
18 Ibid [82].
19 Ibid [104].
20 Ibid [109].

(b) all four publications conveyed the imputation that SL deserved no respect as a business owner;

(c) GR1 conveyed the imputations that SL is and was a dishonest car dealer; and that he is untrustworthy as a car dealer;

(d) all four publications conveyed the imputations that DL is and was a liar; that he is and was a dishonest car salesman; and that he is an untrustworthy car salesman.[21]

The defences of statutory qualified privilege and honest opinion and damages

31 We will summarise his Honour's conclusions in respect of the defence of statutory qualified privilege in the course of dealing with proposed grounds 1 to 4. Given that it will not be necessary for us to deal with proposed ground 5, or with the notice of contention, we will not refer to his Honour's conclusions in respect of the defence of honest opinion, or to his Honour's conclusions on damages.

Proposed grounds 1 to 3: the statutory defence of qualified privilege

32 It is convenient to deal first with proposed grounds 1 to 3, which relate to the establishment of the statutory defence of qualified privilege. At the time of PK's publications, s 30 of the Act relevantly provided:

> **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
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> (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—
>
> (a) the extent to which the matter published is of public interest;

21 Ibid [110]. See also the summary of his Honour's findings at (iii)–(v).

and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and

(c) the seriousness of any defamatory imputation carried by the matter published; and

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and

(f) the nature of the business environment in which the defendant operates; and

(g) the sources of the information in the matter published and the integrity of those sources; and

(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; and

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

(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.

The judge's reasons

33 The judge commenced his analysis of PK's statutory qualified privilege defence by noting that he had already concluded that:

(a) GR1, GR2 and GR 3 were published to Mr Hamann;

(b) GR1 and GR3 were also published to customers and potential customers of LLC via LLC's Google My Business page; and

(c) the Law Answers post was published to the moderator of that site, who amended the post on 12 September 2017.[22]

34 The judge said that each of the recipients of the publications had a 'definite and/or tangible interest or apparent interest in having information about LLC'.[23] As the judge put it:

22 Ibid [114].

> 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'. 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.
>
> 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. Rather, they did so because of their interest as 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. The unchallenged evidence of SL is that LLC sells cars to 'every corner of Australia every week'. When PK purchased this vehicle he 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.[24]

35 Thus the judge concluded that the requirement under s 30(1)(a) of the Act, that recipients of the posts had an interest or apparent interest in having information concerning LLC, was satisfied.[25] The judge likewise concluded that the requirement under s 30(1)(b) of the Act, that the posts were published to the recipients in the course of giving them information concerning LLC, was satisfied. His Honour said:

> 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 be told'.[26]

36 The judge then turned to the question of whether PK's conduct in publishing the posts was 'reasonable in the circumstances', as required by s 30(1)(c). The judge concluded that, 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

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23 Ibid.
24 Ibid [114]–[115].
25 Ibid [116].
26 Ibid.

roadworthy.[27] The judge summarised these investigations in some detail,[28] before concluding that 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 he purchased the vehicle from LLC.[29]

37 After referring to the New South Wales Court of Appeal's decision in *Stoltenberg v Bolton*,[30] the judge concluded that PK had established that, prior to publishing his posts, he exercised reasonable care by making proper inquiries.[31] The judge detailed these inquiries,[32] before finding that:

(a) it was reasonable for PK to have concluded that someone within LLC knew the vehicle was unroadworthy;

(b) PK had a genuine and reasonably held belief that LLC owned the vehicle on 22 June 2016; and

(c) there was a reasonable basis for PK to conclude that, on 13 July 2016, DL 'lied to his face about several aspects of the vehicle's condition' — specifically, the condition of the vehicle's brakes and suspension.[33]

38 The judge then turned to s 30(3) of the Act, observing that:

(a) section 30(3) sets out a non-exhaustive list of matters which the Court may take into account in assessing reasonableness;

(b) the matters listed in the section should not be treated as a checklist;

(c) no single consideration listed in the section is determinative; and

(d) the weight to be given to any of the matters listed depends upon the particular facts of the case.[34]

39 The judge then considered the matters referred to in the paragraphs of s 30(3) and concluded as follows:

(a) In relation to para (a), the matters published by PK were of public interest because they involved the sale of a vehicle which was unroadworthy.[35]

(b) In relation to para (b), the publications primarily focused on the plaintiffs' involvement in LLC's business as a retailer of used cars, and these were 'public activities'.[36]

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27 Ibid [118].
28 Ibid [119]–[136].
29 Ibid [136].
30 (2020) 380 ALR 145, 182–3 [191] (Gleeson JA, Macfarlan and Brereton JJA agreeing) ('*Stoltenberg*').
31 Reasons, [138].
32 Ibid.
33 Ibid [139].
34 Ibid [141].
35 Ibid [142].

(c) In relation to para (c), while the fraud and criminal imputations had been rejected, the imputations found to have been conveyed were very serious.[37]

(d) In relation to para (d), most of the statements in the impugned publications were statements of fact, although there were statements in each of the publications which were allegations or suspicions, namely:

(i) 'It appears that none of these faults were rectified prior to actually selling the Porsche';

(ii) 'Lorbek I understand have a close relationship with them [Europei] and [sic] is where their roadworthy certificates are done for their car sales'; and

(iii) 'The Motor vehicle licensing authority and police need to take a long hard look at this company and it's [sic] operations'.[38]

The statements of fact in the publications were 'underpinned by PK's genuine and reasonably held belief that the plaintiffs knew that his vehicle was unroadworthy when it was sold to him'.[39]

(e) In relation to para (e), the question of whether it was in the public interest for the impugned publications to be published expeditiously was not a matter of particular relevance when assessing the reasonableness of PK's conduct.[40]

(f) In relation to para (f), the business environment in which PK operated was of 'limited relevance in the circumstances of the present case'.[41]

(g) In relation to para (g), the sources of the information in the matter published and the integrity of those sources were matters on which the judge placed 'considerable weight'. Each of the individuals who provided information to PK had direct knowledge of the matters which they had conveyed to him, and PK acted reasonably in relying on that information.[42]

(h) In relation to para (h), each of the impugned publications contained a statement referable to LLC denying any liability and saying that it was PK's treatment of the vehicle that had caused 'these issues'.[43] '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'.[44]

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36 Ibid [143].
37 Ibid [144].
38 Ibid [145].
39 Ibid [146].
40 Ibid [147].
41 Ibid [148].
42 Ibid [149].
43 Ibid [150].
44 Ibid [153].

40 The judge concluded that PK's conduct in publishing the impugned publications was reasonable in the circumstances. The judge accepted that, as a result of the investigations undertaken by PK, PK had a 'genuine and reasonably held belief that LLC knew that the vehicle was unroadworthy when he purchased it on 13 July 2016'.[45] In light of this conclusion, the judge then turned to the issue of malice. We will summarise the judge's reasons on the issue of malice when we come to deal with proposed ground 4.

Proposed ground 1: plaintiffs' submissions

41 In proposed ground 1, the plaintiffs contend:

> 1. (a) The judge erred in finding that:
>
> (i) those people who read GR1 and GR3 ('publications') were customers or potential customers of LLC who had an interest or apparent interest in reading the reviews of people such as the Respondent who had been dissatisfied with their experience of purchasing a vehicle from LLC (Reasons, [71]);
>
> (ii) each of the recipients of the publications had a definite and/or tangible interest or apparent interest in having information about LLC (Reasons, [114]); and/or
>
> (iii) the individuals who read the publications did not do so out of idle curiosity (Reasons, [115]).
>
> (b) The judge should have found that he was not satisfied that all of the recipients of the publications had the requisite interest.

42 Under proposed ground 1, the plaintiffs submitted that there was no basis for the judge to infer that *all* 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'. They submitted that it was impossible to know why all of the 'unidentified people' to whom the judge found that the Google reviews had been published, visited the LLC website, entered LLC into the Google search engine, clicked on the Google review for LLC on its Google My Business page, and read PK's one star reviews posted on 4 April and 20 October 2017. The plaintiffs submitted that such people could have done so for a multitude of reasons, and it could not be excluded that some of them did so 'out of idle interest or curiosity'. Thus, they submitted, the judge should not have been satisfied that all of the people who read the publications had the interest required by s 30(1) of the Act; alternatively, the judge should have inferred that some of the unidentified people read the publications merely out of idle interest or curiosity.

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45 Ibid [155].

Proposed ground 1: consideration

43 During oral argument, senior counsel for the plaintiffs confirmed that, despite the width of its terms, proposed ground 1 relates only to PK's publication of GR1 and GR3 (the judge having concluded that the Law Answers Post was only published to the moderator of the Law Answers site, and that GR2 was only published to Mr Hamann — LLC's marketing manager).

44 The premise for the plaintiffs' argument under proposed ground 1 is that the judge found that GR1 and GR3 were published by PK to unidentified number of people who did not share any particular feature or interest. The judge, however, did not so find. The judge found that GR1 and GR3 were read by 'only a small number of people' who, the judge inferred, 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 in purchasing a vehicle from LLC'.[46] Moreover, the judge gave detailed reasons for so concluding at Reasons [69]–[71].[47]

45 There can be no dispute (and the plaintiffs did not in fact dispute in this Court or at first instance) that the customers or potential customers of LLC referred to by the judge had the interest required by s 30(1)(a) in receiving (having) information on the subject of other LLC customers' dissatisfaction with their experience of purchasing a vehicle from LLC. Thus, proposed ground 1 ultimately reduces to a complaint by the plaintiffs that the judge should have found that GR1 and GR3 were published to a person or persons who were *not* customers or potential customers of LLC with the requisite interest.

46 In our view, there is no substance in proposed ground 1. On one view, the judge's finding that anyone other than Mr Hamann read GR1 or GR3 was generous to the plaintiffs, given:

(a) no evidence was led of any person other than Mr Hamann reading GR1 or GR3;

(b) no evidence was tendered that any of the Google reviews had been 'liked' by any third party;

(c) no evidence was tendered that any of the Google reviews had been the subject of any comment by a third party;

(d) neither GR1 nor GR3 elicited any response from any person; and

(e) although the plaintiffs called four reputation witnesses at trial, none of these witnesses gave evidence that they had read any of the impugned publications.

47 It is important to recall that, in order to read the impugned publications, it was necessary to take a number of steps: searching for LLC using the Google search engine, clicking through to the Google review page, either scrolling through or sorting the Google reviews, and then opening one of the impugned reviews and reading it. In

46 Ibid [71].

47 See [24]–[25] above.

those circumstances the plaintiffs' failure to call any evidence of the number of people who clicked on the Google reviews was, as the judge described it, a 'significant deficienc[y] in the material which the plaintiffs rel[ied] upon for the drawing of an inference of publication of the impugned posts'.[48]

48 It is *possible* that some person who was not a customer or potential customer of LLC with the requisite interest may have taken all of the steps necessary to access and read one of the impugned publications (GR1 or GR3). However, we do not see any error in the judge failing to be satisfied on the balance of probabilities that some such person or persons did in fact take the necessary steps and read one of the impugned posts, having regard to the paucity of evidence led by the plaintiffs at trial.

49 Further, and bearing in mind that we are in as good a position as the judge to draw inferences from the evidence concerning the steps required to view GR1 and GR3, we consider the judge was correct to infer that all those who read the posts were customers or potential customers of LLC and who thus had a relevant interest in having information about LLC (and its officers and employees).[49] The defamatory statements would not be seen as a result of a simple Google search for LLC, or for SL or DL. Rather, a series of steps was required, as set out above (and about which there was no real dispute). In our opinion it is inherently improbable that a person without a relevant interest would take each of the necessary steps, merely out of idle curiosity.

50 Proposed ground 1 must be rejected.

Proposed ground 2: plaintiffs' submissions

51 In proposed ground 2, the plaintiffs contend:

> 2. (a) The judge erred in finding that Respondent believed on reasonable grounds that each of the recipients had an apparent interest in having information about LLC (Reasons, [116]).
>
> (b) The judge should have found that he was not satisfied that, at the time of the publications in question, the Respondent believed on reasonable grounds that each of the recipients had that interest.

52 Under proposed ground 2, the plaintiffs submitted that, given the judge's finding that a small number of unidentified people accessed and read the posts, and the fact that PK did not know why those people did so, PK did not have any reasonable grounds for any belief that each of the recipients had an apparent interest in having information about LLC. It was thus submitted that PK failed to establish the requirement set out in s 30(2) of the Act.

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48 Reasons, [70].

49 Ibid [71]. In the course of the hearing of the application for leave to appeal there was some discussion about where the onus lay in relation to proof of publication and proof that those persons who read the reviews had a relevant interest for the purposes of s 30. It is not necessary for us to deal with the question of onus because, even assuming that PK bore the onus of proving that all those persons who read the reviews had the requisite interest, he succeeded in doing so.

Proposed ground 2: consideration

53 At trial, PK gave evidence that he published the Google reviews 'as an accurate way to target my experience with the target audience of those who are going to buy — [or] would look on that Google Review for that company, where I purchased the car'. In an answer to an interrogatory served on him by the plaintiffs, and tendered at trial, PK said that he 'believed (and believe[s]) the matters stated in [the Google reviews] were true and that other consumers had an interest in knowing about [his] experiences with Lorbek Luxury Cars'.

54 On the evidence given at trial, PK plainly had a belief that customers and potential customers of LLC had an interest in reading his review about his unsatisfactory experience when purchasing the vehicle from LLC. In this Court, it was not suggested that PK did not have that belief. The plaintiffs' complaint under proposed ground 2 is that he did not have any reasonable grounds for that belief, given that he did not know why all of the 'unidentified' readers of his posts might have read them.

55 The plaintiffs' complaint under proposed ground 2 fails for largely the same reasons that their complaints under proposed ground 1 failed. PK was only found by the judge to have published the Google reviews to customers or potential customers of LLC who had an interest in reading the reviews of other customers about their experiences of purchasing a vehicle from LLC. In our opinion it cannot be doubted that PK believed on reasonable grounds that those recipients had the requisite interest specified in s 30 of the Act, given the limited extent of the publication of the defamatory statements — that is, to a class of recipients who in fact had an interest in receiving his publications about his experience with LLC.[50]

56 Proposed ground 2 must be rejected.

Proposed ground 3: plaintiffs' submissions

57 In proposed ground 3, the plaintiffs contend:

> 3. (a) The judge erred in finding that the Respondent's conduct in publishing the impugned publications was reasonable in the circumstances (Reasons, [155]).
>
> (b) His Honour should have found that the Respondent's conduct was not reasonable in the circumstances.

58 Under proposed ground 3, the plaintiffs submitted that the judge erred in finding that PK's conduct in publishing the impugned publications was reasonable in the circumstances. The plaintiffs submitted that the judge failed to address whether the manner and extent of the publication exceeded what was reasonably required in the circumstances, and failed to consider whether PK's published conclusions followed logically, fairly and reasonably from the information which he had obtained. It was submitted that if his Honour had properly considered these issues, then he would have found against PK on the issue of reasonableness.

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50 Ibid [71].

59 The plaintiffs submitted that, at its highest, the evidence established 'only that perhaps somebody at Lorbek may have been told that the car was unroadworthy'. It was also submitted that PK lacked any basis for the statements made in the publications that SL was 'dishonest, untrustworthy and deserved no respect'. The plaintiffs contended that these statements exceeded what was reasonably required in the circumstances, and the publication of them was therefore unreasonable.

60 Next, the plaintiffs submitted that, when considering the issue of reasonableness, the judge failed to take into account a 'series of evidentiary matters' that PK sought to abandon at trial, as follows:

(a) in evidence-in-chief, PK withdrew, and sought to have deleted from his witness statement, a sentence 'Documents show Porsche Centre Brighton was asked by Lorbek Luxury Cars also to issue a roadworthy certificate which they couldn't do as a reputable car dealer due to the many faults';

(b) a little later in evidence-in-chief, PK sought to have deleted from his witness statement the words 'From my google review listed in the writ I state, Through my own investigations initially they tried selling it to Porsche Brighton who rejected purchasing the car';

(c) again, a little later in evidence-in-chief, PK amended the sentence in his witness statement that 'Lorbek knew the Porsche was never roadworthy from the very detailed pre-purchase report from the Melbourne Porsche dealer', by changing the words 'the very detailed pre-purchase report' to 'an annual service report'; and

(d) in cross-examination, PK withdrew his allegations that LLC and the plaintiffs knew that the rear control arm brushes of the car were damaged at the time they sold it to him.

61 The plaintiffs submitted that the 'series of evidentiary matters' which PK sought to abandon at trial were relevant to s 30(3)(i) of the Act ('any other steps taken to verify the information in the matter published') and the requirement that a respondent who seeks to establish reasonableness 'must generally establish that reasonable steps were taken before publishing to ensure that the facts and conclusions stated in the publication were accurate'.[51]

62 Finally, in attacking the judge's finding on the issue of reasonableness, the plaintiffs relied upon the following additional matters:

(a) as to the front brake pads and rotors being worn well below the legal minimum, there was no evidence that Europei was fraudulent in not detecting this fact, or that SL knew this defect existed (either through fraud or inadvertence);

(b) it was not reasonable to allege that the platinum warranty at a cost of $4,950 constituted an oversell, in circumstances where the vehicle was covered by an

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51 *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185, [112] ('*Chau*') (Wigney J) – upheld on appeal in *Fairfax Media Publications Pty Ltd v Chau* [2020] FCAFC 48, [188]–[193] (Besanko, Bromwich and Wheelahan JJ).

extended factory warranty. The factory warranty at the time on a Porsche vehicle expired after three years or 100,000 km. It would have expired by the time the vehicle was sold to PK save that, unbeknown to the plaintiffs, it had been extended. However, it was only extended until 9 August 2016. PK had demanded a refund in respect of the platinum warranty, and received it from the company that provided the warranty almost immediately upon request;

(c) the judge found that the vehicle was defective at the time of purchase in relation to its suspension. However, the PCB job card for 4 July 2016 made no reference to such a major defect, and no such defect was detected by Europei. It is glaringly improbable that the suspension was defective at the time of purchase;

(d) PK made two posts under false names;[52]

(e) PK 'misused the Carsales platform by posting an account of his experience with LLC [on 29 August 2016] rather than posting a genuine advertisement for the sale of his vehicle';[53] and

(f) on 13 January 2017, on an online platform, Porsche Forum, PK made a post, 'My first Porsche', in similar terms to the posts on which the plaintiffs sued. The post was made under the name 'Petez'.[54]

Proposed ground 3: consideration

63 The judge commenced his analysis of the issue of whether PK's conduct in publishing the impugned publications was reasonable in the circumstances with a detailed description of the investigations undertaken by PK in order to try and understand how he had purchased a vehicle which was not roadworthy.[55] As detailed by the judge, those investigations included:

(a) enquiries made of Gulson's service manager, Craig Homann;

(b) an email sent by PK to Daniel Novak, an employee of LLC, requesting a copy of the fully documented roadworthiness file for the vehicle;

(c) an email from PK to VicRoads, which set in train a VicRoads investigation into Europei, which ultimately resulted in a four week suspension of Europei's licence to provide roadworthy certificates;

(d) email communications between PK and Jason Pasco, the after sales manager at PCB;

(e) further communications between PK and Mr Homann; and

52 Reasons, [163]–[165].
53 Ibid [170].
54 Ibid [171].
55 Ibid [119]–[136].

(f) communications between PK and Bob Jane T-Marts, to whom the vehicle had been sent by Europei for a wheel alignment.

64 In the course of summarising PK's investigations, the judge set out relevant principles concerning the issue of reasonableness. No complaint is made by the plaintiffs about the judge's summary of PK's investigations or his Honour's statement of the relevant principles.

65 In setting out relevant principles, the judge referred to the fact that a defendant relying upon statutory qualified privilege must establish that his conclusion followed logically, fairly and reasonably from the information which he had obtained; and that the manner and extent of the defendant's publication did not exceed what was reasonably required in the circumstances.[56]

66 While the judge did not expressly state that PK's conclusions in the impugned publications followed logically, fairly and reasonably from the information which he had obtained, or that the manner and extent of PK's publication did not exceed what was reasonably required in the circumstances, a fair reading of the Reasons discloses that, in the circumstances of all of the investigations made by PK and the information PK had received by the time of publication, the judge accepted that PK had established these two matters. Indeed, having reviewed the evidence for ourselves, we are unable to see how his Honour could have come to any different conclusion on these issues. Contrary to the plaintiffs' submissions, properly considered, there can be little doubt that PK established that the conclusions he expressed in the impugned publications followed logically, fairly and reasonably from the information which he had obtained, and that the manner and extent of his publications did not exceed what was reasonably required in the circumstances. Specifically, we see no error in the following conclusions made by the judge (summarised broadly by us earlier in these reasons, but which now bear setting out in full):

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

[56] Ibid [137], citing *Stoltenberg* (2020) 380 ALR 145, 183 [191] (Gleeson CJ, Macfarlan and Brereton JJA agreeing).

> 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.[57]

67 In making his findings on the issue of reasonableness, the judge placed specific reliance upon the evidence of Mr Homann. The judge described Mr Homann as a 'very impressive witness'.[58] His Honour accepted Mr Homann's evidence that the damage to the vehicle's suspension was not caused by PK driving the vehicle into a pothole. To the extent that his Honour's conclusion was affected by his impression about the credibility and reliability of Mr Homann, this Court is bound to exercise restraint before interfering with his Honour's finding, unless it is 'glaringly improbable' or 'contrary to compelling inferences'.[59] The plaintiffs did not advance any basis for this Court to overturn his Honour's findings in relation to Mr Homann's evidence. These findings underpinned his Honour's conclusion that 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.[60] We see no basis upon which this Court could overturn that conclusion.

68 Ultimately, we are not persuaded that any of the matters relied upon by the plaintiffs in this Court undermined his Honour's conclusion that PK's conduct in publishing the impugned publications was reasonable in the circumstances. While we will deal with a number of the plaintiffs' other specific complaints made on the issue of reasonableness when we come to the issue of malice, we would at this stage make the following additional observations:

(a) it was not correct for the plaintiffs to submit that, at its highest, the evidence established 'only that perhaps somebody at Lorbek may have been told that the car was unroadworthy'. The judge found specifically that an employee within LLC's sales team was told by an employee of PCB that the vehicle was unroadworthy;[61]

(b) the 'series of evidentiary matters' which PK sought to 'abandon' at trial in 2022 were of little (if any) moment when assessing the reasonableness of PK's conduct in publishing the impugned publications in 2017. PK's corrections to his posts and previously drawn witness statement may have reflected no more than a greater understanding by him at the time of trial of the relevant facts and

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57 Reasons, [138]–[139].
58 Ibid [135].
59 *Lee v Lee* (2019) 266 CLR 129, 148 [55] (Bell, Gageler, Nettle and Edelman JJ) ('*Lee*').
60 Reasons, [136].
61 Ibid [17], [194]–[198].

circumstances. The mere fact that PK made corrections during the course of his evidence could not, without more, lead to some conclusion that his conduct was not reasonable some years earlier;

(c) when assessing reasonableness under s 30(1)(c), it is important to note that it is the conduct of the defendant (in this case, PK) in publishing the matter complained of that is required to be reasonable — not all of the conduct of the defendant before, at the time of, and after publication more generally; and

(d) the plaintiffs' submissions concerning the sale of the platinum warranty and the extension of the factory warranty are of no relevance to the reasonableness of PK's conduct, because the defamatory posts made no reference to the sale of the platinum warranty.[62]

69 The judge's analysis of the issue of reasonableness was thorough and detailed. There is no substance in the plaintiffs' contention that the judge overlooked any relevant evidence or matter in coming to his conclusion. Having reviewed the evidence for ourselves, we see no error in the conclusion that PK's conduct in publishing the impugned publications was reasonable. Indeed, we think that the judge was plainly correct.

70 Proposed ground 3 must be rejected.

Proposed ground 4: malice

71 At the risk of repetition, s 30(4) of the Act provides that a defence of qualified privilege under s 30(1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.

The judge's reasons

72 The judge commenced his analysis of the issue of malice by noting that malice is 'any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff'.[63] The judge then identified some of the relevant legal principles relating to malice. In the course of doing so, his Honour referred to *Roberts v Bass*,[64] *Szanto v Melville*,[65] *Barrow v Bolt*,[66] *KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden*[67] and *Yunghanns v Colquhoun-Denvers*.[68] His Honour observed that the plaintiffs bore the onus of proving that an improper purpose, actuating the publication of the impugned material, was the dominant reason for that publication; that there is a heavy onus to discharge in order to establish

62 The only use of the word 'warranty' in the relevant publications was the statement that the warranty department had treated PK with contempt.
63 Reasons, [156].
64 (2002) 212 CLR 1 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).
65 [2011] VSC 574 (Kaye J).
66 [2014] VSC 599 (T Forrest J).
67 (2020) 101 NSWLR 729 (Basten, Payne and White JJA) ('*KSMC Holdings*').
68 [2019] VSC 433 (Daly AsJ).

malice; and that a finding of malice is a serious matter which engages the principles in *Briginshaw v Briginshaw*.[69]

73 The judge noted that on various dates between 26 August 2016 and March 2018, PK was the author of 13 publications; and that the plaintiffs' claim was based upon four of these. The judge said that the nine posts made by PK which were not sued on may be relevant to the question of whether the four posts which were sued upon were actuated by malice. However, the question to be determined was whether the publications upon which the plaintiffs sued PK were actuated by malice.[70]

74 The judge concluded that the plaintiffs had failed to discharge the onus of establishing that the publication of the impugned publications was actuated by malice. His Honour said:

> 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.
>
> 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.[71]

75 In reaching these conclusions, the judge had regard to the evidence of two posts which PK made using false names: the first was a one star Google review of LLC under the name 'PKavo'; and the second was a Google review under the name 'Steve Smith'.[72] The judge said that if the plaintiffs' claim for defamation had been based on the PKavo and Steve Smith Google reviews, 'it would be strongly arguable that these publications were motivated by an improper purpose'.[73]

76 The judge also had regard to a post made by PK on a website known as 'Carsales'.[74] The judge noted that it was common ground that Carsales was an online platform for selling cars, not for posting comments about the experience of purchasing a vehicle.[75] The judge concluded that PK was not actuated by malice in making the Carsales post.[76] He said:

> It is true that PK misused the Carsales platform by posting an account

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69 (1938) 60 CLR 336 (Latham CJ, Rich, Starke, Dixon and McTiernan JJ).
70 Reasons, [159].
71 Ibid [162]–[163].
72 Ibid [163].
73 Ibid [165].
74 Ibid [166]–[170].
75 Ibid [167].
76 Ibid [168].

> 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.[77]

77 Next, the judge referred to a post made by PK on Porsche Forum, 'My first Porsche', which was in similar terms to the posts upon which the plaintiffs sued. The post was made under the name 'Petez'. After describing the circumstances of that post, the judge said:

> 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.[78]

78 After referring to other posts relied upon by the plaintiffs, the judge referred to *Mowlds v Fergusson*,[79] in which Jordan CJ said:

> 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 ill will towards him, evidence that on a later occasion the defendant manifested ill will towards the plaintiff may supply the necessary evidence unless it shows also that the ill will arose out of something occurring subsequently to the privileged occasion.[80]

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77 Ibid [170] (citation omitted).
78 Ibid [173].
79 (1939) 40 SR (NSW) 311 (Jordan CJ, Davidson and Halse Rogers JJ).
80 Ibid 327–8.

79 Ultimately, the judge concluded that none of the additional posts relied upon by the plaintiffs were actuated by malice. In relation to posts made after PK became aware that the plaintiffs had commenced defamation proceedings against him, the judge said that if these were actuated by PK's ill will towards the plaintiffs, this was explicable by his reaction to the plaintiffs having commenced proceedings against him. The judge said, however, that it did not follow that the impugned publications which preceded the commencement of the defamation proceeding were also actuated by ill will towards the plaintiffs.[81]

80 The judge concluded his reasoning on the issue of malice by saying:

> 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.
>
> 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.
>
> 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.[82]

Proposed ground 4: plaintiffs' submissions

81 In proposed ground 4, the plaintiffs contend:

> 4. (a) The judge erred in finding that the Applicants failed to establish that the impugned publications were actuated by malice (Reasons, [179]).

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81 Reasons, [176].
82 Ibid [177]–[179].

(b) His Honour should have found that the dominant, improper motive of the Respondent which actuated the publications was to injure the Applicants.

82 Under proposed ground 4, the plaintiffs submitted that the judge erred in finding that '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'.[83] The plaintiffs contended that such a finding was glaringly improbable or contrary to compelling inferences.

83 In support of their contention that the judge's finding on malice was glaringly improbable or contrary to compelling inferences, the plaintiffs relied upon the PKavo post, the Steve Smith post, PK's misuse of the Carsales platform, his post 'My first Porsche' and the other posts that they relied upon at trial and which were referred to by his Honour in the Reasons.

84 Next, the plaintiffs noted the judge's observation that a defendant's conduct which post-dates an impugned publication may constitute evidence that the impugned publication was actuated by malice, and then submitted that the trial judge's error in relation to proposed ground 4 was his Honour's failure to consider whether the conduct of PK 'constituted a campaign or vendetta to injure [the plaintiffs]'. The plaintiffs submitted that, by reason of his Honour's failure to consider whether the conduct of PK constituted a campaign or vendetta to injure the plaintiffs, his Honour erred in finding that the plaintiffs had failed to establish that the impugned publications were actuated by malice.

85 Finally, the plaintiffs submitted that the judge should have found that 'the dominant, improper motive of [PK] which actuated the publication of GR1 and GR3 was to injure [the plaintiffs]. It was not simply to publish his experience of dealing with LLC'. It was then submitted that PK 'published widely, including under false names, and he published GR1 and GR 3 with the predominant motive of harming [the plaintiffs]'.

Proposed ground 4: consideration

86 The plaintiffs take no issue with the judge's statement of the relevant legal principles governing the issue of malice. It was, as the judge observed, for the plaintiffs to prove that the publication of the impugned publications was actuated by an improper purpose. Moreover, the plaintiffs had a heavy onus to discharge to establish malice.[84]

87 The judge considered the context in which each of the impugned publications was made, the impugned publications themselves, and each of the other publications relied upon by the plaintiffs in support of their contention that publication of the impugned publications was actuated by malice. As with his consideration of the issue of reasonableness, his Honour's consideration of malice was both thorough and detailed.

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83 Ibid [162].

84 *KSMC Holdings* (2020) 101 NSWLR 729, 745 [61] (Payne JA, Basten and White JJA agreeing). See also s 140(2) of the *Evidence Act 2008*.

Again, having reviewed the evidence for ourselves, we see no error in his Honour's treatment of it.

88 The plaintiffs submitted that the issue of malice was largely (if not wholly) dependent upon a consideration of the documents tendered in evidence — specifically, PK's various publications (including those made under false names and those which were said to have been made on an occasion other than one of qualified privilege). We are not persuaded by this submission. While the judge did not expressly state that his findings on malice were in any way influenced by the evidence given by PK at trial, his factual findings on malice are likely to have been affected by impressions about the credibility and reliability of PK.[85] It is difficult to see how the judge could have come to a conclusion on the issue of malice favourable to PK if the judge had disbelieved PK's evidence of his motivation for publishing the impugned posts. In the circumstances, we would not overturn the judge's conclusion on malice unless we were satisfied that it was glaringly improbable or contrary to compelling inferences.

89 The plaintiffs' submission that the judge failed to consider whether the conduct of PK constituted a campaign or vendetta to injure them must be rejected. At Reasons [169], the judge specifically referred to the plaintiffs' submission that the Carsales post evidenced 'a campaign/vendetta conducted by PK against the plaintiffs', and the plaintiffs' submission that the four posts upon which they sued 'were similarly part of an ongoing campaign/vendetta on the part of PK to damage the reputation of the plaintiffs'.[86] Having referred to these submissions, the judge then rejected them at Reasons [170]–[171].

90 The question of malice in this case fell to be resolved by determining whether, on all of the evidence, the plaintiffs have established that PK's publication of the impugned publications was actuated by some improper purpose or motive. Describing PK's posts and conduct as a 'campaign' was of little assistance to the resolution of this issue. If PK's publications could be described as part of a campaign to inform LLC's customers and potential customers of his experience with LLC, that could hardly be said to be improper.

91 Moreover, the fact that a defamatory publication might injure the person defamed in it and that this might be foreseeable (if not known) to the publisher of it does not mean that the publication — actuated by a proper or legitimate purpose as required by s 30 of the Act — cannot be the subject of a defence under s 30 of the Act. As the judge observed, in considering the defence of statutory qualified privilege, it is the dominant reason for publication which must be considered.

92 As we have said above, the plaintiffs carried the onus of establishing that the publication of the impugned publications was actuated by an improper purpose. For the reasons given by the judge, and with which we agree, the plaintiffs failed on the issue of malice. The mere fact that there was some evidence which, if considered in isolation, was capable of supporting a finding of malice did not mean that malice had in fact been established.

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85 See *Lee* (2019) 266 CLR 129, 148 [55] (Bell, Gageler, Nettle and Edelman JJ)].

86 See also the judges' reference, at Reasons [171], to the plaintiffs' submissions that other posts made by PK evidenced a campaign/vendetta on PK's part to damage the reputations of the plaintiffs.

93 Proposed ground 4 must be rejected.

Proposed ground 5 and the notice of contention

94 It follows from what we have said above that the plaintiffs have failed in their attempt to overturn the judge's orders. Having arrived at that conclusion, it is not necessary for us to deal with proposed ground 5 (the plaintiffs' complaints that the judge's assessments of damages were inadequate) or PK's submission in the notice of contention that the judge erred in not upholding his defence of honest opinion. As the High Court said in *Boensch v Pascoe*,[87] this Court should confine itself to determining only those issues which it considers to be dispositive of the justiciable controversy raised by the appeal.[88] Accordingly, we do not propose to say anything about the judge's provisional assessments of the plaintiffs' damages or his Honour's rejection of PK's defence of honest opinion.

Conclusion

95 Leave to appeal will be refused.

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87 (2019) 268 CLR 593.

88 Ibid 600–601 [7]–[8] (Kiefel CJ, Gageler and Keane JJ), 629 [101] (Bell, Nettle, Gordon and Edelman JJ).

ANNEXURE A

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

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.

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Peter

ANNEXURE C

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

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, tyeares 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