IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-001925
[2017] NZHC 2846

BETWEEN	LOW VOLUME VEHICLE TECHNICAL ASSOCIATION INCORPORATED First Plaintiff
AND	ANTHONY PETER JOHNSON Second Plaintiff
AND	JOHN BERNARD BRETT Defendant

Hearing:	31 July and 1 August 2017 with supplementary submissions on 1, 6 and 20 November 2017
Appearances:	D P MacKenzie for the Plaintiffs J B Brett, the Defendant in person
Judgment:	20 November 2017

JUDGMENT OF PALMER J

This judgment is delivered by me on 20 November 2017 at 4 pm pursuant to r 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
MinterEllisonRuddWatts, Wellington

Party:
Defendant in person

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Summary

[1] The Low Volume Vehicle Technical Association Inc (LVVTA) has had a long and challenging relationship with Mr John Brett. Mr Brett used to certify low volume vehicles (LVVs) until his authority to do so was revoked by the New Zealand Transport Authority (NZTA) in 2012. He presents as an opinionated individual who has difficulty accepting he is wrong. Mr Brett continued to maintain a website containing a steady stream of criticism of the competence and integrity of the LVVTA and its Chief Executive, Mr Anthony Johnson. In 2014 the parties entered a Settlement Agreement (reproduced in Annex 1) over alleged defamation by Mr Brett that governed how Mr Brett would express his opinions in future. In 2015 the LVVTA and Mr Johnson issued these proceedings for defamation by Mr Brett in 35 statements and for breach of the Settlement Agreement. They seek a permanent injunction, damages of $250,000 each for defamation and their legal costs for breach of contract. Mr Brett defends the proceeding in person and, in return, seeks an apology and costs.

[2] The LVVTA is entitled to sue in defamation as a body corporate on the basis of the opportunity cost of its staff time in dealing with his statements, which can be reflected in financial accounts. Although it has not been quantified, that amounts to pecuniary loss as required by s 6 of the Defamation Act 1992 (the Act).

[3] Of the 35 statements complained of, as set out in Annex 2, I find 10 are defamatory of both the LVVTA and Mr Johnson, 11 are defamatory of the LVVTA but not Mr Johnson, five are defamatory of Mr Johnson but not the LVVTA, and nine are not defamatory at all because they do not bear the pleaded meanings or are mere insults (or both).

[4] Mr Brett does not succeed in any of his defences of truth and in only one defence of honest opinion. However, two of Mr Brett's statements are contained in an affidavit he made in this proceeding. By hyperlinking to the affidavit I do not consider Mr Brett effectively repeated the statements, so they are protected by absolute privilege under s 14 of the Act.

[5] I also consider the defence of qualified privilege is available as a defence to defamation about the LVVTA's performance of its public functions, performed in the public interest to ensure public safety. There is a legitimate interest in an entity performing a public function and bound by the New Zealand Bill of Rights Act 1990 (Bill of Rights) being subjected to generally-published public criticism which is properly of public concern. Qualified privilege prevents public scrutiny being unduly chilled by defamation proceedings. Mr Brett succeeds in this defence in relation to all his defamation of the LVVTA. Surprisingly, the LVVTA did not try to defeat qualified privilege by pleading Mr Brett was predominantly motivated by ill will towards it under s 19 of the Act. I do not consider such qualified privilege extends to defamatory statements about the staff of a private entity, even an entity performing a public function. Mr Brett's defence of qualified privilege does not succeed in relation to his defamation of Mr Johnson.

[6] The Settlement Agreement purports to require Mr Brett to remove, and refrain from making further, statements on his website that are incorrect. It also purports to require Mr Brett to allow an LVVTA response to be posted on his website about statements that are correct. In those respects, I consider it is inconsistent with Mr Brett's right to freedom of expression under s 19 of the Bill of Rights. Accordingly, I hold the LVVTA did not have capacity to enter into a contract containing those clauses, which I sever from the rest of the Agreement. But in defaming Mr Johnson Mr Brett breached the remaining provisions of the Agreement.

[7] I declare Mr Brett has defamed Mr Johnson in 12 statements. I order Mr Brett to pay Mr Johnson $100,000 in damages as well as costs. I make a permanent injunction that Mr Brett not repeat the defamatory statements for which he has been found liable. And I warn him that, if the LVVTA had pleaded and argued ill will, his defence of qualified privilege might not have succeeded.

What happened?

Low volume vehicles

[8] LVVs are vehicles that travel on public roads and are produced in low volumes, of 500 or less in any one year, where construction of the vehicle may affect

its compliance with vehicle standards or with safety performance requirements. They include road-going modified or customised cars or scratch-built cars.

[9] Section 152(a) of the Land Transport Act 1998 empowers the Minister of Transport and the Governor-General in Council to make rules for the purposes of safety and licensing for any form of transport. Under s 158 these may include provision for classification and inspection of vehicles, setting of standards and approval of persons to carry out inspections and provide other services under the Act. The Low Volume Vehicle Code (the Code) is incorporated by reference into law under the Land Transport Rule: Vehicle Standards Compliance 2002 (the Rule). The purpose of the Code is to ensure LVVs are designed and constructed in such a way that they are safe to be operated on public roads and comply as closely as practicable with safety requirements of other mainstream production vehicles.

[10] The LVVTA, established in 1992, is an incorporated society made up of nine member associations.[1] Its governing body is the Council, consisting of the President and one delegate from each member. The relationship between the NZTA and the LVVTA is set out in the Low Volume Vehicle Certification System Operating Agreement which provides the LVVTA was:[2]

> … formed for the purpose of enabling New Zealanders to safely modify and build one-off or small production run motor vehicles, and developing, in consultation with the New Zealand Transport Association, a Low Volume Vehicle Code for incorporation in the Land Transport Rule: Vehicle Standards Compliance 2002 the Rule, and all applicable individual Land Transport Rules.

[11] Under the Agreement the LVVTA is responsible for:[3]

> a. establishing Low Volume Vehicle Standards (the Standards) necessary for the safe modification, construction, and certification of low volume vehicles; and

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1 The member organisations are: Constructors Car Club Inc; Motorsport New Zealand Inc; New Zealand Four Wheel Drive Association Inc; New Zealand Hot Rod Association Inc; New Zealand Motor Caravan Association Inc; Sports Car Club of New Zealand Inc; the Vehicle Association of New Zealand for People with Disabilities Inc; Kiwi Trikers Social Club Inc; and the Vintage Car Club of New Zealand.

2 The Low Volume Vehicle Certification System Operating Agreement, Issue #4, 1 July 2012 [Operating Agreement] at B.

3 Operating Agreement at [2.2].

b. establishing operational and procedural requirements (the Operation Requirements Schedule) necessary for the efficient operation of the low volume vehicle certification system; and

c. communicating these requirements to the Low Volume Vehicle Certifiers (the Certifiers) authorised by the Agency, the motoring public, and participating organisations; and

d. providing to the Agency specialised technical and operational advice and support, in order to assist the Agency in fulfilling its responsibility relating to the application of the Code; and

e. issuing a low volume vehicle certification plate (the plate) for each certified vehicle.

[12] LVV certifiers are appointed by the NZTA to issue LVV certifications.[4] The NZTA assesses LVV certifiers' performance, with powers of suspension or revocation.[5] The NZTA requires certifiers to enter into a Deed of Appointment, which requires provision of services according to the Rule, the Code, Standards and Operating Requirements. Certifiers' paperwork are subjected to a "desk-top" audit by LVVTA before a certification plate is issued.

[13] Approximately 6,500 certification plates are issued each year. Almost 150,000 LVVs have been certified in total. There are currently 42 LVV certifiers in New Zealand. The evidence of Mr Anthony Johnson, Chief Executive of the LVVTA since 2003, is there have only been two cases where a person has been killed in an accident involved certified LVVs where the certified modifications were found to be unsafe. In both cases he says they were found by a coroner to have been certified as compliant with the Code when they were not.

Mr Brett as an LVV certifier

[14] Mr Brett was an authorised LVV certifier from April 1999 until 3 December 2012. Mr Johnson's evidence is the LVVTA became concerned about many aspects of Mr Brett's performance from the early 2000s. He considers Mr Brett was unwilling to apply the specified requirements. His evidence is that:[6]

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4 Operating Agreement at [2.2].
5 Operating Agreement at [2.2].
6 Brief of Evidence of Anthony Peter Johnson dated 19 May 2017 at [26].

(a) in the year ended June 2011, Mr Brett ranked as the worst certifier in New Zealand measured by technical, administrative and procedural errors recorded;

(b) in the year ended June 2012, Mr Brett ranked as the worst certifier in New Zealand in terms of technical errors and third worst in terms administrative and procedural errors; and

(c) Mr Brett made 32 times more safety-related technical errors than the average of all other LVV certifiers.

[15] Mr Johnson gave evidence about efforts of the LVVTA and NZTA to help Mr Brett but says Mr Brett "insisted, on every such occasion, that he was right and that we (LVVTA and NZTA staff) were all wrong, and that his knowledge was superior to that combined expertise which is embodied within the LVV certification system".[7]

[16] For his part, Mr Brett gave evidence that "[i]n some cases the new LVV Standards were actually dangerous, and could lead to unsafe outcomes".[8] He stated a group of Auckland certifiers wrote a formal proposal to the LVVTA and NZTA spelling out issues that needed to be addressed. He suggested almost all the issues raised were addressed in NZTA's review of the LVV system published in February 2017 and almost all LVV standards have been completely rewritten and were re-issued on 25 August 2016. However, only a few of the amendments in the 25 August 2016 re-issue related to the NZTA review and most were technical updates.

[17] On 3 December 2012, after determining Mr Brett was not a fit and proper person to be a LVV certifier, the NZTA revoked his authorisation as a certifier. Mr Brett appealed. The District Court dismissed the appeal on 27 December 2013.[9] Judge Wiltens stated:[10]

> [107] Given Mr Brett's benchmarked performance as the lowest performing certifier in terms of technical competence for 2011 and 2012, and the number and the nature of the complaints that have been raised regarding

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7 At [27].
8 Brief of Evidence of John Bernard Brett, undated at [24].
9 *Brett v New Zealand Transport Agency* DC Manukau CIV-2013-055-93, 27 December 2013.
10 At [107]–[110].

> his competence and compliance, I could not be satisfied that Mr Brett was a fit and proper person to remain as an LVV certifier.
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> [108] Mr Brett submitted that he was not required to be subjected to the desk-top review process by LVVTA.
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> [109] The evidence showed numerous examples of Mr Brett trying to find any excuse possible for not complying with LVV Regulatory Documents and the written instructions of the LVVTA. This was clearly not the conduct of a diligent and competent inspector complying with the applicable requirements – that being the overarching requirement provided for in s 2.1(2) of the Rule.
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> [110] Not only was that conduct a breach of the conditions of Mr Brett's conditions of appointment and the regulatory regime, but it ignored the fact that it was the desk-top review process that has detected errors on his part.

The Settlement Agreement

[18] Mr Brett runs a website using an address very similar to that of the LVVTA. The evidence of Mr Daniel Myers, Engineering Technical Officer of the LVVTA, is that Mr Brett's website is the third result of google searches on "low volume vehicle" or "lvvta". Mr Brett's evidence, under cross-examination, is the site gets about 100 visits per day. Mr Johnson's evidence is that, from September 2012, Mr Brett increased and heightened attacks on the LVVTA and Mr Johnson personally. Lawyers' letters ensued. Mr Brett agreed to remove statements to which Mr Johnson and the LVVTA objected and did so on 13 December 2012. From January 2014 Mr Brett published further statements on his website and on his Facebook page, alleging general and particularised incompetence on the part of the LVVTA leading to deaths and injuries. Further legal correspondence ensued.

[19] On 5 June 2014, the LVVTA and Mr Brett entered into a Settlement Agreement, which is reproduced in Annex 1 to this judgment. In its key terms, the LVVTA agreed not to sue Mr Brett for defamation in return for Mr Brett removing material from his website and not posting more. Mr Johnson's evidence is that Mr Brett did not remove all the offending posts as agreed and he published further statements from 28 July 2014 without complying with cl 5(d) by giving the LVVTA an opportunity to review the statements. Under cross-examination, Mr Brett's evidence is he did take down posts and he did comply with cl 5(d).

[20] The evidence of correspondence at the time shows the LVVTA's lawyers complained to Mr Brett on 14 July 2015 identifying under cl 8(a) eight defamatory statements on Mr Brett's website in alleged breach of the Settlement Agreement. In reply on 16 July 2015 Mr Brett stated the Settlement Agreement was "rendered null and void" by the LVVTA failing to honour their part of the agreement to remove from their website the District Court judgment on his appeal and to desist from making defamatory statements about him. He defended the truth of each of the identified statements.

[21] Mr Johnson gave evidence of being upset about the statements about him and the LVVTA, some of which alleged he had lied to, and committed perjury in, the District Court when giving evidence. Mr Myers also gave evidence about the stressful impact of Mr Brett's statements, on him and other staff and on the reputation of the LVVTA.

Commencement of proceedings

[22] This proceeding was commenced on 19 August 2015. It included an application for an interim injunction in relation to 25 statements the plaintiffs considered the most egregious. On 28 September 2015, the LVVTA's lawyers wrote to Mr Brett identifying 82 allegedly untrue and defamatory statements published by Mr Brett, 34 of which were the subject of the Statement of Claim. Mr Brett published on his website an apology to the LVVTA which stated he had taken down the statements identified by the LVVTA as of concern to it. But the LVVTA's lawyers responded on 14 October 2015 that three of the 34 statements still remained, one had been amended rather than removed and 29 of the other statements still remained. On 20 October 2015 Mr Brett's lawyers acknowledged some statements remained but stated Mr Brett had confirmed that all statements of concern had subsequently been removed. On 4 November 2015, the LVVTA's lawyers wrote again identifying 29 allegedly defamatory statements remaining on Mr Brett's website and wrote again on 10 November 2015 noting none of them had been removed.

Undertaking and interim injunction

[23] The interim injunction application was heard on 18 November 2015. With leave, the plaintiffs filed a memorandum dated 23 November 2015 seeking an interim order restraining publication by Mr Brett of 27 statements.[11] In a memorandum in response dated 26 November 2015, Mr Brett said none of the statements remained on his website and he undertook to the Court that:

> (a) All the statements contained in the Schedule attached to the memorandum of counsel for the plaintiffs dated 23 November 2015 ("the Schedule") are no longer on my website, and some of them have long been removed; and
>
> (b) No statements similar to those contained in the Schedule will be published by me or by my servants, agents or otherwise, either orally or in writing, until further order of the Court.

[24] On that basis, Woolford J considered an interim injunction was not necessary to protect the interests of the plaintiffs and declined the application in a judgment of 14 December 2015.[12]

[25] On 17 August 2016, the plaintiffs brought to the Court's attention four further statements by Mr Brett it considered breached the undertaking. On 1 September 2016 Associate Judge Christiansen issued a minute recording his impression that Mr Brett was willing to agree on certain publication restrictions.[13] Mr Brett took one of the statements down but, in email correspondence back and forth during September 2015, did not agree to take down the other three. In that correspondence Mr Brett denied there was any undertaking from him to take anything down.[14] Confronted by his undertaking of 26 November 2015 Mr Brett responded on 2 October 2016 saying he had voluntarily taken down or changed the additional three statements. Under cross-examination Mr Brett explained he had misinterpreted the plaintiffs' request.

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11 They were numbered 25 but one included three statements. For consistency with the numbering of other statements I count them as 27.

12 *Low Volume Vehicle Technical Association Incorporated v Brett* [2015] NZHC 3038.

13 *Low Volume Vehicle Technical Association Incorporated v Brett* HC Auckland CIV-2015-404-1925, 1 September 2016 (First Case Management Conference Minute of Associate Judge Christiansen) at [36].

14 Email of John Brett to Duncan MacKenzie at 2.04 pm Monday 19 September 2016 and at 3.14 pm Tuesday 27 September 2016.

[26] In his evidence, Mr Johnson identified two further statements still published at the date of the hearing that he considers breach the undertaking. Mr Brett stated under cross-examination he does not regard them as similar to the statements covered by the undertaking.

[27] Set out in Schedule A to the second Amended Statement of Claim are 35 statements about which the plaintiffs complain. These are statements to which Mr Brett's undertaking to the Court relates, as well as additional statements. The plaintiffs say the identified statements are untrue, have enormously upset Mr Johnson and others and have damaged the LVVTA's goodwill. They say they have suffered a prolonged defamatory attack by Mr Brett for nearly five years. They seek specific performance of the Settlement Agreement in the form of a permanent injunction, as well as declarations and damages. Mr Brett seeks an apology and costs in return.

The hearing

[28] Mr Johnson and Mr Myers gave evidence for the plaintiffs. Mr Brett objected to their evidence as irrelevant. Mr Brett gave evidence for himself. He agreed with objections that some of the material in his brief was not relevant and he did not give evidence about those matters. Other parts of the evidence he gave, that related to his removal as a certifier and allegations of Mr Johnson's role in that and allegations of Mr Johnson defaming Mr Brett, were also irrelevant to the issues here. Mr Robert Berger provided a brief of evidence for Mr Brett but could not give evidence at trial as he was hospitalised. Mr Johnson addressed his points in a reply brief. Mr MacKenzie, for the plaintiffs, objected to Mr Berger's brief as irrelevant and his point baseless. Mr Brett objected to Mr Johnson's reply brief, which was taken as read.

[29] I indicated at the hearing that the proceeding is not a platform for airing old grievances. I have had regard to the briefs of Mr Johnson, Mr Myers and the parts of the brief of Mr Brett that were read, as admissible evidence. The other paragraphs of Mr Brett's brief that are relevant I have considered as submissions.

Comment on pleadings and submissions

[30] The law of defamation is notoriously technical and difficult to navigate. Sections 37 to 42 of the Act illustrate some of the requirements of particularity in pleadings and the issuance of notices. There are technical inadequacies in the pleadings of both parties. Given that Mr Brett is unrepresented, I have addressed the substance of his submissions and position, rather than the adequacy of their legal form. So, for example, I have considered whether Mr Brett had a legal defence of absolute privilege in relation to two statements even though he did not raise it. And I have considered whether he had a defence of qualified privilege even when he thought he had no defence.

[31] The plaintiffs, by contrast, are represented by a national law firm. Yet, as noted below, they did not specify the meanings pleaded as defamatory with particularity. Rather they provided general meanings to groups of statements. This was not helpful to their case. Neither did plaintiffs' counsel provide accurate references to where in the common bundle eleven of the statements could be read in context.[15] Three of the statements are not contained in the common bundle at all, causing me to seek further explanation. Provision of that explanation revealed that two of those statements were contained in an affidavit by Mr Brett (to which he posted a hyperlink) which caused me to seek submissions on whether the defence of absolute privilege is available. And counsel's submissions about the substantive content and application of the defences were sweepingly dismissive. In particular, they did not engage with the legal issues involved in the application of the defence of qualified privilege. Surprisingly, the plaintiffs did not even try to defeat qualified privilege by pleading Mr Brett was predominantly motivated by ill will towards it under s 19 of the Act.

Preliminary issue

[32] As a preliminary issue, Mr Brett objected the LVVTA has not validly authorised the proceedings. This objection is based on a brief of evidence for Mr Brett by Mr Robert Berger, the past Chairperson of the Vehicle Association of New Zealand for People with Disabilities, about the LVVTA's decision-making processes.

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[15] Statements 5, 8, 10, 11, 13, 19, 20, 22, 32, 33, 34.

The brief stated the LVVTA has a Management Committee which was not validly appointed from 26 May 2015 to 23 November 2016. It also stated the Council of the LVVTA did not authorise legal proceedings.

[33] Mr Brett had previously made this point in an interlocutory application, in the form of a submission that counsel for the LVVTA did not have valid instructions. Associate Judge Christiansen dismissed that claim in a minute dated 1 September 2016.[16] In response to the latest form of the objection, the plaintiffs point to a letter in evidence from Mr Steve Keys, President of the LVVTA, confirming:

(a) Mr Johnson has kept the Management Committee informed of the proceedings;

(b) the Management Committee decided to take and continue with the proceeding against Mr Brett;

(c) the Management Committee has a mandate under the LVVTA constitution to manage the affairs of the LVVTA (which is consistent with Mr Berger's ; and

(d) Council members have been kept informed of the proceedings.

[34] On the basis of that evidence from the President of the LVVTA that the proceedings are properly brought, I dismiss Mr Brett's further objection.

The issues

[35] I determine the case in terms of six sets of issues. The first is a generic procedural point raised by Mr Brett. The next four issues relate to the defamation suit. The penultimate issue relates to the breach of contract suit. The final issue concerns remedies in relation to both suits.

(a) Issue 1: Can the LVVTA sue in defamation as a body corporate?

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16 First Case Management Minute of Associate Judge Christiansen, above n 13, at [30].

(b) Issue 2: Were Mr Brett's statements defamatory?

(c) Issue 3: Does Mr Brett have a defence of truth or honest opinion?

(d) Issue 4: Does Mr Brett have a defence of absolute privilege?

(e) Issue 5: Does Mr Brett have a defence of qualified privilege?

(f) Issue 6: Did Mr Brett breach the Settlement Agreement?

(g) Issue 7: What remedies should I order?

Issue 1: Can the LVVTA sue in defamation as a body corporate?

[36] The LVVTA, as an incorporated society, is a body corporate. Section 6 of the Defamation Act 1992 requires proceedings for defamation brought by a body corporate "shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings – (a) has caused pecuniary loss; or (b) is likely to cause pecuniary loss to that body corporate."

Submissions

[37] Mr MacKenzie, for the LVVTA, submits the publication of the statements has caused the LVVTA pecuniary loss in it committing resources, including the loss of goodwill and incurring significant legal costs, to counter Mr Brett's statements. Mr Myers gave evidence of the negative impact of Mr Brett's statements on the overall external perception of the LVVTA and the legal costs of dealing with Mr Brett. He stated:[17]

> As a small organisation, a lot of our time has been distracted by having to deal with Mr Brett, such as the time spent attempting to come to an agreement, dealing with public statements and answering questions from those who have read them and want to know more. We have also incurred considerable legal cost dealing with Mr Brett.

[38] Mr Brett submits the LVVTA has a monopoly position so the plaintiffs need to justify their claims of pecuniary loss.

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[17] Affidavit of Daniel Myers dated 19 May 2017 at [17].

Law of bodies corporate suing in defamation

[39] The Court of Appeal in *Midland Metals Overseas Pte Ltd v The Christchurch Press Ltd* had no doubt "the legislative intent was to limit compensatory relief for a corporate plaintiff to pecuniary loss" which includes "loss in the value of its goodwill".[18] Otherwise, there is some tension between High Court authorities:

(a) In *Ti Leaf Productions Ltd v Baikie,* Pankhurst J held expending resources to meet defamatory publications could constitute pecuniary loss.[19]

(b) In *Rural News Ltd v Communications Trumps Ltd,* Anderson J held whether a particular publication is likely to cause pecuniary loss will depend on the circumstances of the case, including the nature of the business, the relevance of the publication and the context in which it occurs.[20] He found some pecuniary loss was likely there, even if actual loss could not be proved.

(c) In *Tairawhiti District Health Board v Perks,* Paterson J considered s 6 referred to "injury to reputation in the way of the plaintiff's trade or business" not "money spent on initiating the defamation proceeding".[21] He considered there needs to be an evidential basis before pecuniary loss can be inferred.[22]

Decision on ability to sue as a body corporate

[40] The purpose of s 6 is important. The 1977 Committee on Defamation that recommended enactment of the provision that eventually became s 6 considered:[23]

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18 *Midland Metals Overseas Pte Ltd v The Christchurch Press Ltd* [2002] 2 NZLR 289 (CA) at [12].

19 *Ti Leaf Productions Ltd v Baikie* HC Christchurch CP9/97, 3 October 2000, at [154].

20 *Rural News Ltd v Communications Trumps Ltd* HC Auckland AP167-SW00, 4 April 2001, at [15].

21 *Tairawhiti District Health Board v Perks* [2002] NZAR 533 (HC) at [25].

22 Citing *Chinese Herald Ltd v New Times Media Ltd* [2004] 2 NZLR 749 (HC) at [53]–[57].

23 New Zealand Committee on Defamation *Recommendations on the Law of Defamation*: *Report of the Committee on Defamation* (Government Printer, Wellington, 1977) [McKay Report] at [359]–[363].

(a) The common law, that a trading corporation can only succeed where defamation has either caused or is likely to cause actual financial loss, should be preserved.

(b) Such actions should not be restricted to situations of proven actual loss because that is impracticable and difficult to assess and prove.

(c) The term "pecuniary loss" should be used rather than "special damages" because the latter "includes not only financial loss, but also loss of some temporal or material advantage estimable in money".

(d) Government authorities, local bodies and trade unions, as non-trading bodies, "cannot really suffer financial loss" and members usually sue in their own right: "If the words complained of do not reflect on individuals in such a way as to entitle them to sue and do not cause actual pecuniary loss to the body concerned then no action should lie." The Committee recommended the section refer to any "body corporate" as it does now.

[41] I consider this background demonstrates Parliament's purpose in enacting s 6 was to confine the availability of defamation suits brought by bodies corporate to the circumstances where they have suffered, or are likely to suffer, losses that are or can be reflected in the entity's financial accounts. That is because, in Lord Reid's words, "[a] company cannot be injured in its feelings, it can only be injured in its pocket".[24]

[42] No evidence was provided that Mr Brett's statements caused a loss to the LVVTA of "goodwill" as that concept is understood in financial accounting terms. I do not consider an asserted inchoate effect on reputation, unsupported by evidence, equates to a loss in value of an entity's goodwill or satisfies the requirement of s 6 that there be pecuniary loss.

[43] For a pecuniary loss to constitute costs spent in initiating and conducting defamation proceedings would be entirely circular. It would mean a body corporate

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[24] *Lewis v Daily Telegraph* [1964] AC 234, 262 quoted in the McKay Report at [359].

could always bring defamation proceedings, rendering s 6 otiose. There has to be some financial loss to the entity independent of the cost of its legal proceedings. But that can include the cost to an entity of having to deal with the effect of defamatory statements other than in initiating legal proceedings. That, in turn, can include the opportunity cost of the time of staff members in dealing with the effect of the statements. They represent a real cost that can diminish productivity and is likely to cause losses that can be reflected in the entity's financial accounts.

[44] Here, I agree the evidence of the opportunity cost of LVVTA staff time in dealing with Mr Brett's statements satisfies the requirement there be a pecuniary loss under s 6 that entitles the LVVTA to sue in defamation.

[45] Paterson J in *Tairawhiti District Health Board* noted there is a question about whether the House of Lords' decision in *Derbyshire County Council v Times Newspaper Ltd* applies in New Zealand.[25] The House of Lords decided elected councils could not sue for defamation in England because they should be open to uninhibited public criticism and the threat of civil actions for defamation would place an undesirable fetter on the freedom to express such criticism.[26] In New Zealand, I consider these issues are taken into account through the defence of qualified privilege, as discussed further below. On that basis, in my view, there is no reason why a body corporate performing a public function cannot sue in defamation if it suffers pecuniary loss. That includes the LVVTA.

Issue 2: Were Mr Brett's statements defamatory?

[46] I need to decide whether each of the statements alleged by the plaintiffs to have a defamatory meaning is capable of, and does, bear that meaning. The first column of the table in Annex 2 of the judgment identifies each of the statements the plaintiffs allege is defamatory. The plaintiffs have pleaded the same meanings for groups of statements, as noted in the second column of the table. The third column contains Mr Brett's response. The fourth column contains my summary as to whether the meaning of each statement is defamatory. The fifth contains my summary as to whether any defences apply.

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25 *Tairawhiti District Health Board v Perks,* above n 21, at [28].

26 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 547.

Law of defamatory meaning

[47] I apply the legal principles relating to defamatory meanings encapsulated by the Court of Appeal in *New Zealand Magazines Ltd v Hadlee (No 2)*:[27]

> … In determining whether words are capable of bearing an alleged defamatory meaning:
>
> (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
>
> (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
>
> (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
>
> (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
>
> (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
>
> (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard go the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them.

[48] I also apply the determination in the judgment I recently issued in *Sellman v Slater* that there is a threshold of seriousness in the harm to reputation so, generally, a statement is defamatory if it causes the reasonable person reading or hearing it to think worse of the person concerned in a more than minor way.[28] And, as I held there:[29]

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27 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 at 625 (citations omitted).
28 *Sellman v Slater* [2017] NZHC 2392 at [69] and [75].
29 At [83] (citations omitted).

> Second, I agree that the tendency of political debate on the internet often to be expressed in hyperbolic and sarcastic terms does not lower the legal threshold for what is capable of being defamatory. But, irrespective of the medium, statements which engage in robust political and policy debate need to be read in that context, in such a way as to uphold the right to freedom of expression. As s 5 of the Bill of Rights makes clear, that right is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The law of defamation, that protects peoples' reputations, is a reasonable limit as long as it is not applied so enthusiastically as to chill political and policy debate. Plaintiffs cannot expect courts to uphold thin-skinned reactions to attack on political or policy grounds. Those who engage in genuine public political and policy debate must expect robust public responses. But defendants cannot expect to make false, un-substantiated personal attacks, in a political and policy context, with legal impunity.

Submissions

[49] Mr MacKenzie, for the LVVTA, submits Mr Brett has engaged in sustained attack on the LVVTA and Mr Johnson since late 2012 and the 35 statements complained of are all blatantly defamatory. He submits they tend to impute a lack of skill and/or judgement by the plaintiffs in their professional capacities and are injurious to their reputations.

[50] The plaintiffs did not plead one specific meaning for each statement complained of. Paragraph [53] of the Amended Statement of Claim pleads:

> In their natural and ordinary meaning, the defendant's published statements (above) conveyed the following imputations, each of which is defamatory to the plaintiffs – namely, that:"
>
> (a) they are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk;
>
> (b) they carry on business in an illegal manner;
>
> (c) they conspired to bring about the NZTA's revocation of the defendant's certification authority for improper and/or retaliatory purposes;
>
> (d) they make erroneous certification decisions and they are unqualified to take any part in the regulatory regime for the certification of low volume vehicles in New Zealand;
>
> (e) they are dishonest, tell untruths and, in Mr Johnson's case specifically, that he perjured himself by lying when giving evidence on oath before the District Court; and

(f) they are dysfunctional and, in Mr Johnson's case, mentally ill.

[51] Some of those six imputations are somewhat different from the equivalent headings under which the specific statements are grouped in the Schedule to the Amended Statement of Claim:

(a) The first heading is the same as the first imputation pleaded in [53].

(b) The second heading adds that the plaintiffs "operate" or carry on business in an illegal manner.

(c) The third heading amplifies the third imputation, suggesting "Mr Brett's certification authority was revoked by (or at the behest of) the plaintiffs, in a retaliatory effort to suppress his views on the [LVV] certification system in New Zealand".

(d) The fourth heading is the same except it relates only to the LVVTA and is expressed in the past tense ("has made").

(e) The fifth heading is substantively the same as the fifth imputation pleaded in [53].

(f) The sixth heading is entirely different, saying "Statements containing personalised slurs on the plaintiffs".

[52] Mr Brett's various responses are contained in the table. In general, he seeks to justify and defend his statements.

Decision on defamatory meanings

[53] Section 37(2) requires, where a plaintiff alleges a matter is defamatory in its natural and ordinary meaning, "the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself". One of the purposes of requiring meanings to be specifically pleaded is to put the defendant on notice as to the exact meaning which is alleged to be

defamatory and which he or she has to address. But there are two versions of that in the Statement of Claim.

[54] With one exception, I have assessed the meanings of the statements against the meanings formally pleaded in paragraph [53] rather than those in the headings in the Schedule. I do not consider the differences between the two sets make any difference to the result, except in respect to the exception. The last heading in the Schedule, regarding "personalised slurs", does not constitute a pleading of a defamatory meaning but leaves open that "the meaning is evident from the matter itself" in the words of s 37. I have therefore assessed whether the statements in this last group are defamatory both in terms of the meaning pleaded in paragraph [53] and in terms of the meaning evidence from the matter itself.

[55] The pleaded meanings of allegedly defamatory statements are crucial in defamation proceedings. The plaintiffs' approach of grouping statements under common meanings is an inadequately particularised approach to pleading meanings. The result is that the pleaded meanings have not been calibrated to each statement and I have found a number of statements do not bear the pleaded meaning. The plaintiffs should have taken a more careful approach to the pleaded meanings.

[56] In *Broadcasting Corporation of New Zealand v Crush* in 1988, for a full court of the Court of Appeal, Cooke P considered "there is a good deal to be said for the view" that a plaintiff cannot, without notice, fall back at trial on some lesser defamatory meaning than those pleaded, unless the pleadings reserve that right: "if the plaintiff has nailed his colours to the mast as to the meaning of which he complains, it does not seem rational to suppose that the jury can legitimately give a verdict for him on finding some different and less serious meaning".[30] In *Television New Zealand v Haines*, the Court of Appeal confirmed the point to have survived the enactment of the Defamation Act 1992 and to apply to judge-alone trials.[31] The importance of the interest of fairness to the defendant is further reinforced when he is unrepresented. The consequence of a plaintiff failing to prove a statement bears the

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30 *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 at 239.
31 *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [56].

pleaded meaning is therefore that the statement is not defamatory as alleged. "If a plaintiff fails to do that, it will lose at that point."[32]

[57] Of the 35 statements complained of, as set out in Annex 2, I find 10 are defamatory of both the LVVTA and Mr Johnson, 11 are defamatory of the LVVTA but not Mr Johnson, five are defamatory of Mr Johnson but not the LVVTA, and nine are not defamatory at all because they do not bear the pleaded meanings or are mere insults (or both).

Issue 3: Does Mr Brett have a defence of truth or honest opinion?

The defences of truth and honest opinion

[58] If a defendant proves the defamatory meanings of statements complained of are true, or not materially different from the truth, that is a complete defence under the common law and s 8 of the Act.

[59] The defence of honest opinion can also defeat defamation claims under the common law reinforced and modified by ss 9 and 10 of the Defamation Act 1992. As Professor Cheer summarises it:[33]

> Any individual has the right to express an opinion on something. Provided this opinion is honestly held, and the speaker has got his or her facts right, it does not matter how unusual, or extreme, or damaging the opinion may be. The speaker is entitled to it and has a good defence to a defamation action.

[60] She goes on to say "[t]hus the defence is the very essence of freedom of speech: the right that citizens should be able openly to air their views and exchange criticisms on matters which concern them."[34] To sustain the defence of honest opinion, the defendant must prove:

(a) The statement, read in context, must be capable of being opinion: "[i]t must appear to a reasonable person reading or hearing the passage complained of that the author is merely presenting his or her

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32 At [56].

33 Ursula Cheer "Defamation" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) [Cheer in *Todd on Torts*] at 896.

34 At 897.

comment or *opinion* on the facts in question and is not purporting to put forward another *fact.*" [35]

(b) The opinion must be based on facts which must be identified explicitly or implicitly and which are true or not materially different from the truth. Under s 38 for the defences of truth and honest opinion the defendant must give particulars of what he or she alleges are facts and what he or she relies on to say they are true.[36]

(c) Under s 10, the opinion expressed must be the defendant's genuinely held opinion.[37]

(d) Under s 11 a defence of honest opinion shall not fail where material consists partly of statements of fact and partly of statements of honest opinion:

> … if the opinion is shown to be genuine opinion having regard to:
>
> (a) … those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or
>
> (b) any other facts that were generally known at the time of the publication and are proved to be true.

Submissions

[61] Mr Brett submits the defences of truth and honest opinion protect some of his statements. He also submits he is protected as a whistle-blower by the Protected Disclosures Act 2000. He clearly is not, under the terms of that Act. For one thing, he was not an employee of LVVTA.

[62] In his written submissions Mr MacKenzie sweepingly submitted Mr Brett has no defences available as "there is not a shred of truth or honest opinion about his

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35 At 900.
36 *Simunovich Fisheries v Television New Zealand* [2008] NZCA 350 at [126]–[127].
37 *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at 773.

statements" and "[n]or did he ever seek to justify his so called honest opinions".[38] The plaintiffs did not serve a notice of non-genuine opinion under s 39.

Decision on truth and honest opinion

[63] The appended table contains my assessment of whether the defence of honest opinion applies to each statement complained of. In summary, all of Mr Brett's defences of truth fail. Where he points to evidence it is not sufficient to discharge the burden on him of proving the defamatory meaning of each statement was true.

[64] Similarly, all but one of Mr Brett's defences of honest opinion fail. Most of his statements are expressed as statements of fact, not as statements of opinion. It would not appear to a reasonable person that, in those, Mr Brett is merely presenting his comment or opinion. And he has not proved his statements were based on facts that were true, or not materially different from the truth. In the one instance where the defence succeeds (statement 29), it is clear Mr Brett is commenting on, or expressing his opinion about, a statement by Mr Johnson, to which he provides a hyperlink so the reader can assess the comment for themselves.

Issue 4: Does Mr Brett have a defence of absolute privilege?

Facts

[65] Two of the statements complained of here (statements 18 and 25) were made in an affidavit by Mr Brett. In a post on his website on 26 August 2017 entitled "Gagging Order application dismissed by High Court Judge", Mr Brett gave his account of the proceeding. In the post he stated:

> I was served on Friday 21st, so had no time to arrange for representation. I therefore represented myself. My affidavit can be seen here: IN THE HIGH COURT – LVVTA VS JB Affidavit of John Brett

[66] The parties have proceeded on the basis the underlined words contained a hyperlink to Mr Brett's affidavit, dated 24 August 2015, which contained statements 18 and 25. The post also included a link to a copy of the Judge's Minute.

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[38] Plaintiffs' Synopsis of Closing Submissions dated 1 August 2017 at [23].

Law of absolute privilege

[67] Section 14 of the Act states that "anything said, written, or done" by a party in any court proceedings is protected by absolute privilege. Absolute privilege means the protection is absolute and there is no exception for ill will. That includes, relevantly, "what is done from the inception of proceedings including all pleadings and other documents brought into existence for the purpose of the proceedings".[39]

[68] Equivalent absolute privilege over parliamentary proceedings can be lost if a statement, originally said within the House of Representatives, is effectively repeated outside it. That is consistent with every repetition of a statement being a separate publication under defamation law. As Professor Cheer suggests, the distinction between what constitutes effective repetition is a question of fact and degree which can be "very fine".[40] Standing by a previous statement is a repetition but acknowledging it was said may not be. The Privy Council in *Buchanan v Jennings* held a member's statement outside the House, that he "did not resile" from what he had said within it, was effective repetition.[41] The Parliamentary Privilege Act 2014 may have altered the application of the doctrine of effective repetition in respect of parliamentary privilege, but not privilege in relation to judicial proceedings.

Submissions

[69] In response to my request for submissions on this issue Mr Brett submits the statements are protected by absolute privilege under s 14 of the Act. Mr MacKenzie submits they are not because absolute privilege only applies in relation to conduct in the course of the proceedings themselves, not to statements published outside the proceedings. Mr MacKenzie relies on a statement in the *Laws of New Zealand* that "a statement will not be protected if it is not uttered for the purpose of judicial proceedings…".[42] He submits by subsequently broadcasting the content of his affidavit to the world Mr Brett took himself beyond the bounds of protection of s 14.

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39 *Lincoln v Daniels* [1962] 1 QB 237, 256 (Devlin LJ), quoted in *Rawlinson v Oliver* [1995] 3 NZLR 62 at 68 (per Richardson J).

40 Cheer in *Todd on Torts*, above n 33, at 916.

41 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 (PC).

42 Laws of New Zealand *Defamation* (online ed) at [91].

Does absolute privilege apply here?

[70] Whether the two statements are absolutely privileged depend on whether Mr Brett's action of hyperlinking to the affidavit is an effective repetition of the statements that breaks the scope of the absolute privilege otherwise afforded them in the affidavit.

[71] There is some force in the argument that posting a hyperlink to an absolutely privileged document breaks privilege. Doing so makes the document available to the general public outside the courtroom in which the hearing was held and in the context of whatever comments are made about the hearing and the affidavit in the post. That may involve the affidavit being used for a purpose other than that for which it was made – in court proceedings.

[72] But I do not consider hyperlinking to a whole document, without more, is sufficient to break the privilege. A person making a statement in an affidavit has sworn it is true. If a statement in an affidavit is pulled out and quoted or used separately in the post then that could be effective repetition. But a link to the affidavit itself preserves the affidavit, in its original form, intact. And an affidavit used in a court proceeding is used in a public forum, unless there is some form of suppression involved, which there was not here. The Supreme Court stated in 2016:[43]

> The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges".

[73] The principle of open justice extends to the ability of litigants to publish a document from court proceedings, after a hearing is held and the issue determined, where it is not subject to confidentiality orders. I consider publishing the whole of such a document, without more, does not constitute effective repetition of

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[43] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2] (footnotes omitted).

defamatory statements in it, so as to entail the loss of absolute privilege. Otherwise, the public interest in those engaged in the administration of justice being "free from the fear of proceedings and 'the vexation of defending actions'",[44] that is upheld by absolute privilege, could be weakened. I consider the availability of defamation proceedings in respect of statements in affidavits used in court proceedings would not be a limitation on freedom of speech that is necessarily demonstrably justified in a free and democratic society under the Bill of Rights.

[74] In the circumstances here, I hold the two statements contained in Mr Brett's affidavits are protected by absolute privilege.

Issue 5: Does Mr Brett have a defence of qualified privilege?

Law of qualified privilege

[75] While the defences of truth and honest opinion require proof the relevant facts are true, the defence of qualified privilege can apply even if they are not. Schedule 1 of the Act recognises a variety of specified occasions to be subject to the defence of qualified privilege.

[76] The defence of qualified privilege recognises it is not always right to presume malice from the publication of false and defamatory words.[45] Qualified privilege can be defeated by the plaintiff proving "the defendant was predominantly motivated by ill will towards the plaintiff or otherwise took improper advantage of the occasion of publication", under s 19 of the Act. That includes recklessness as to truth. Surprisingly, this was not pleaded or argued by the plaintiffs here.

[77] The principle by which occasions of qualified privilege are identified is that "the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it".[46] Where subject matter of a

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44 *Lincoln v Daniels,* above n 39, quoting *Munster v Lamb* (1883) 11 QBD 588 (CA) at 607 (per Fry LJ).

45 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at [18].

46 At [18] quoting Lord Atkinson in *Adam v Ward* [1917] AC 309 at 334.

statement can be protected by qualified privilege, it is ordinarily likely to be, but will not necessarily be, made on an occasion of privilege.[47]

[78] The Court of Appeal in *Lange v Atkinson* in 1998 considered qualified privilege should be available in respect of political statements published generally in New Zealand. It concluded:[48]

> (1) The defence of qualified privilege may be available in respect of a statement which is published generally.
>
> (2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.
>
> (3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.
>
> (4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.
>
> (5) The width of the identified public concern justifies the extent of the publication.

[79] In 2000, the Court of Appeal further explained those five conclusions:[49]

> (a) The five conclusions are to be read as a whole.
>
> (b) The second conclusion, "based on the discussion of the New Zealand constitutional system, along with the discussion of freedom of expression in its wider context" is more focused than the first statement: "the wider public may have a proper interest, supporting the defence, in respect of generally-published statements which directly concern the functioning of representative and responsible government."

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47 At [21].
48 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at [10].
49 At [12]–[13].

(c) The phrase in the second conclusion, "the performance or possible future performance of specific individuals in elected public office", leads directly into the third conclusion: "The proper interest does exist and the defence is accordingly capable of applying to the statements identified in that conclusion so long as those statements directly concern the functioning of representative and responsible government."

(d) The fourth conclusion is a further essential element. "It is only those matters which are properly of public concern that are protected." That must be addressed in assessing whether the occasion established privilege, "along with the contextual elements indicated in the second conclusion".

(e) Ordinarily it can be expected statements within the parameters of the third conclusion will warrant protection "but it is still necessary to take into account the circumstances of publication", including the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information".

[80] Since *Lange v Atkinson,* the defence of qualified privilege defence has been found in exist in other circumstances. For example, in *Osmose v Wakeling* media reports of political statements, including by a Member of Parliament, about timber preservative products attracted qualified privilege.[50] In *Hagaman v Little* Clark J accepted there was a traditional duty/interest relationship giving rise to qualified privilege in respect of statements by the Leader of the Opposition.[51] But I can find no decisions, either way, about whether an entity performing public functions attracts qualified privilege.

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50 *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC).
51 *Hagaman v Little* [2017] NZHC 813, [2017] 3 NZLR 413.

Submissions

[81] Mr Brett submits New Zealand law favours freedom to criticise public bodies under the Bill of Rights. He submits he has the protection of the defence of qualified privilege in relation to all his statements. He relies on the Court of Appeal's judgments in *Lange v Atkinson.*

[82] Mr MacKenzie submits Mr Brett is completely misguided in relying on qualified privilege, the Bill of Rights and the other defences he raised. He submits no such defence is available but he offered no substantive analysis of the content of qualified privilege or why it is not available.

Decision on qualified privilege

[83] I do not consider qualified privilege of the exact sort discussed in *Lange v Atkinson* applies to Mr Brett's statements. The subject matter of his statements was not political contest or "the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office" in terms of the third of the Court of Appeal's conclusions.

[84] But I do consider there is an analogous qualified privilege, deriving from similar principles, that can cover the subject matter of the statements here:

(a) The defence of qualified privilege may be available in respect of a statement which is published generally.

(b) The nature of New Zealand's constitution and democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about institutions' performance of public functions, exercise of public powers and discharge of public duties.

(c) In particular, a proper interest does exist in respect of, and the defence is accordingly capable of applying to, statements made about the

actions and decisions of such institutions, so far as decisions directly affect or affected their public functions, powers or duties.

(d) The determination of the matters which bear on those functions, powers and duties will depend on a consideration of what is properly a matter of public concern rather than of private concern. It is only those matters which are properly of public concern that are protected.

(e) The width of the identified public concern justifies the extent of the publication.

(f) Ordinarily it can be expected statements within these parameters will warrant protection but it is still necessary to take into account the circumstances of publication, including the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information.

[85] The LVVTA is an incorporated society composed of nine other incorporated societies. It is not established by statute and no minister is responsible for its performance. But the LVVTA performs public functions and has public powers and duties under the Operating Agreement with the NZTA. These are public regulatory functions, as identified in Issue 6. It performs those functions in the public interest for the purpose of public safety. The LVVTA does not have a public function in appointing or assessing the performance of certifiers. That is the function of the NZTA.

[86] I find below that, in exercising its public functions in the public interest for the purpose of public safety, the LVVTA has a duty to comply with the Bill of Rights. I consider the scope of the defence of qualified privilege is likely to be similar to the scope of applicability of the Bill of Rights. An entity performing a public function such that it is bound by the Bill of Rights under s 3(b) is an entity which, ordinarily, must expect public scrutiny without the chilling effect of potential defamation proceedings. That extends to an entity performing a regulatory function for the purpose of the safety of New Zealand transport.

[87] Mr Brett publishes criticism of the LVVTA's performance of its public functions. His blogsite appears to be primarily devoted to the subject of LVVs, as indicated by its title. Its audience is likely to be people with a direct interest in LVVs and their safety. The New Zealand public, and in particular that portion of it with an interest in LVVs, has an interest in receiving generally-published such criticisms which are properly of public concern. So, in general, I conclude the defence of qualified privilege can extend to defamatory statements criticising the LVVTA's performance and exercise of its public functions, powers and duties. But the defence does not apply to LVVTA decisions that relate to anything other than its public functions, powers and duties.

[88] While the performance of the public functions of the LVVTA can attract qualified privilege, the LVVTA is not a public entity. Its office-holders are not elected by the public or accountable to the public other than by agreement with the NZTA. They are members of private incorporated societies who volunteer to govern a club of such societies which has agreed to take on public functions. It is not reasonable to expect such individual office-holders to give up the right to sue for untrue defamatory statements made about them personally. There is no public interest in attacking the person rather than the institution. I note the same logic does not necessarily apply to officials of public entities.

[89] So I consider the defence of qualified privilege does not extend to protect defamation of the office-holders of the LVVTA. The availability of qualified privilege as a defence against defamation of the LVVTA counters the potentially chilling effect of defamation suits on the legitimate public criticism and scrutiny of the LVVTA as an organisation. The non-availability of qualified privilege as a defence against defamation of individuals involved in the LVVTA counters the potentially chilling effect of defamation suits on the willingness of individuals to involve themselves in the LVVTA.

[90] The fifth column of the appended table contains my analysis of whether each of the statements complained of here were made on occasions of qualified privilege. In summary, I find all of the defamatory statements about the LVVTA are protected

by the defence of qualified privilege. But the defence is not available to protect Mr Brett against defamatory statements he made about Mr Johnson personally.

Issue 6: Did Mr Brett breach the Settlement Agreement?

Submissions

[91] Mr MacKenzie submits Mr Brett breached cls 5(a) and 5(d) of the Settlement Agreement because he never removed the statements the LVVTA had complained about and by publishing further statements in breach of cls 5(a) and 5(d). He also submits the LVVTA did not breach the Settlement Agreement, Mr Brett did not approach LVVTA about any such breach and, even if it had, cl 7 did not release Mr Brett from his obligation.

[92] Mr MacKenzie also makes supplementary submission that the LVVTA did not enter into the Settlement Agreement in the performance of any of its public functions, powers or duties so the Bill of Rights does not apply to it. Alternatively, he submits the Agreement was a justified limit in seeking to enforce the LVVTA's right not to be defamed. If the Agreement was entered into inconsistently with the Bill of Rights he submits it does not follow the contract is void and unenforceable. He submits discretionary relief under the Contract and Commercial Law Act 2017 (the 2017 Act) should be granted to bring the Agreement in line with the justified limits of the Bill of Rights.

[93] Mr Brett makes supplementary submissions that the LVVTA and its staff are covered by s 3(b) of the Bill of Rights. He submits the Settlement Agreement breached his right to freedom of expression under the Bill of Rights in seeking to prevent any expression of any kind concerning the LVVTA or its staff and in extending to statements that "may be considered defamatory". He submits he signed the Agreement without legal advice and under duress, when he was still a certifier. He submits it was impossible to keep, was entered into illegally by the LVVTA and is void for public policy reasons. He also submits it contained obligations which LVVTA failed to observe which is why Mr Brett advised LVVTA he regarded it as null and void. Mr Brett seeks relief under s 76 of the 2017 Act if it is available.

Was there a lack of consideration or repudiation?

[94] The law of contract provides, in general, that binding legal agreements must be honoured. Although he did not repeat it in closing, in his opening submissions Mr Brett submitted the Agreement was made without consideration. This refers to the requirement of contract law that something of value be given in return for a promise.[52] If he maintains it, that submission is not correct because both sides exchanged something of value, under cls 4 and 5 of the Agreement.

[95] Mr Brett is also wrong in arguing the LVVTA breached the Agreement or that the LVVTA's conduct entitled him to regard it as null and void. The evidence is that the LVVTA made its best endeavours to comply with cl 4 of the Agreement. When Mr Johnson became aware, during the interlocutory hearing, that Mr Brett claimed the LVVTA's summary statement about the District Court judgment could still be found by a specific Google search, Mr Johnson had all files from the server removed so that could not happen.[53] Mr Brett could not cancel or repudiate the Agreement on this basis.

Does the Bill of Rights apply to the LVVTA?

[96] Mr Brett has a better point in submitting the Agreement breached his right to freedom of expression. The Bill of Rights, under s 3(b), applies to acts done 'by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law". The Court of Appeal requires a "generous interpretation" be given to this section, as is appropriate for a human rights instrument.[54] Mr MacKenzie acknowledged the Bill of Rights may well apply to the LVVTA in general.

[97] As foreshadowed above, I agree the LVVTA is a body which performs public functions, powers and duties, in terms of the indicia identified by Randerson J in *Ransfield v The Radio Network Ltd.*[55] Like New Zealand Thoroughbred Racing in

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52 John Burrows, Jeremy Finn, Stephen Todd *Burrows, Finn and Todd Law of Contract in New Zealand* (5th ed, Wellington, LexisNexis Ltd 2016) [*Burrows, Finn and Todd*] at ch 4.
53 Brief of Evidence of Anthony Peter Johnson dated 19 May 2017 at [43].
54 *R v N* [1999] 1 NZLR 713 (CA) at 721.
55 *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) at [69].

Cropp v Judicial Committee,[56] it plainly performs regulatory functions exercised for the purpose of public safety in the public interest. The consequences of breach of the Code it administers include criminal offences.[57] The LVVTA acquires public functions and powers under its Operating Agreement with the NZTA, a Crown entity, as explained above. It performs public functions identified above.

[98] I do not accept Mr MacKenzie's submission that the LVVTA was not exercising a public power or performing a public function when it entered into the Settlement Agreement. The fact the LVVTA was purporting to enter a contract, governed by the (private) law of contract, does not negate it doing so for the purpose of performing its public functions. As I have held above in relation to qualified privilege, all of Mr Brett's statements complained of by the LVVTA in this proceeding related to its performance of its public functions. I consider the LVVTA entered into the Settlement Agreement primarily to impose sanctions on criticisms of its performance of its public functions. It was therefore exercising a public power conferred upon it pursuant to law, for the purposes of s 3(b) of the Bill of Rights.

[99] Entities which are purely public, and which derive their powers from statute, lack the legal power to make any decisions which are inconsistent with the Bill of Rights unless, perhaps, such a power is explicitly granted by statute. The LVVTA is a private body. But when it is performing its public functions, it does not have the legal power to make a decision that is inconsistent with the Bill of Rights.[58] That includes entering into an agreement that is inconsistent with the Bill of Rights.

Did the Settlement Agreement breach the Bill of Rights?

[100] Section 19 of the Bill of Rights guarantees the freedom to impart information and opinions of any kind in any form. That right is subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

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56 *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [5].

57 Clause 3 of the Land Transport (Offences and Penalties) Regulations 1999 provides that breaches of specified provisions of the Rule, including r 10.6 which relates to operation of a low volume vehicle without a vehicle plate or label issued under the Code, is an offence against the Land Transport Act 1998.

58 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68] and *Cropp v Judicial Committee,* above n 56, at [6].

society". The law of defamation is a reasonable limit on the right to freedom of expression, as I have already noted.

[101] So I accept Mr MacKenzie's submission that actions taken by the LVVTA to prevent defamation are not inconsistent with the Bill of Rights. To the extent that cl 5 of the Agreement prevents Mr Brett or the LVVTA making defamatory statements to which there are no defences, I consider it is consistent with the Bill of Rights and is not illegal. I understood Mr MacKenzie to agree in his closing submissions that if a statement was not defamatory it would not be caught by cl 5.

[102] However, there are other problematic aspects of cl 5 of the Agreement in terms of the Bill of Rights:

(a) Clause 5(a)(i) of the Agreement purports to require removal of, and desistance from making, statements that "are incorrect".

(b) Clauses 5(a)(ii) and (iii) purport to require removal of, and desistance from making, statements that are "perceived to be in any way defamatory" toward LVVTA or any persons employed by or associated with the LVVTA.

(c) Clause 5(b) purports to require removal of, and desistance from making, statements that are not accompanied by clear and relevant documented evidence that supports them.

(d) Clause 5(d)(i) purports to require Mr Brett to refrain from making a statement that an LVVTA staff member of his choice "can demonstrate" is incorrect.

(e) Clause 5(d)(ii) purports to require Mr Brett, if a statement on his website is correct, to allow the LVVTA staff member's written response to be provided immediately after the comment.

[103] Mr MacKenzie submits Mr Brett breached cl 5(d). He submitted in closing that cl 5(d) was a reasonable limit on Mr Brett's freedom of expression because Mr

Brett had made so many statements that were blatantly defamatory of an organisation charged with ensuring public safety and he has gone so far beyond the line of what is acceptable he needed help to exercise his freedom of speech.

[104] I do not agree clauses 5(a)(i), 5(d)(i) or 5(d)(ii) are, in a free and democratic society, demonstrably justified limits on Mr Brett's right to freedom of expression. Mr Brett's right to freedom of expression includes the freedom to be wrong – to express incorrect statements unless they are defamatory or otherwise unlawful. It also includes the freedom not to be compelled to express information. These clauses limit those freedoms without rational justification.

[105] The prohibitions of statements "perceived to be" defamatory statements in cls 5(a)(ii) and (iii) would be overly broad if any subjective perception by the LVVTA or its officers would be sufficient to trigger it. But, in light of cls 1 and 2, I interpret these perceptions as having to be objective – as if the clause said "reasonably perceived to be defamatory". I consider paragraph 5(b), in requiring statements to be accompanied by supporting evidence, effectively allows Mr Brett to make statements that would be protected by the defence of truth. So, in upholding defamation law, these clauses are justified limits on the right to freedom of expression.

[106] It could be argued, though it was not, that Mr Brett agreed to these restrictions so he was limiting his own rights. But he did so under the threat of legal action and without legal advice. There is European case law rejecting arguments that an employer could waive his right to freedom of expression through an employment contract.[59] If it were necessary to determine, I would consider the same applies in the circumstances here.

What is the effect of the Settlement Agreement breaching the Bill of Rights?

[107] A contract entered into by an entity which lacks the capacity to do so is ultra vires and void.[60] It is not enforceable by the body against the other party.[61] It

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[59] *Rommelfanger v Federal Republic of Germany* (Application No 12242/86) (unreported) 6 September 1989, EComHR cited by Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [13.25.17].

[60] Stephen Todd, *Burrows, Finn and Todd,* above n 52, at [14.2.2] and see Laws of New Zealand *Restitution* (online ed) at [54]–[56].

follows from my conclusion the LVVTA entered into the Settlement Agreement in the performance of its public functions, and inconsistently with the Bill of Rights, that it did not have the capacity to enter into the Agreement.

[108] Unlike most cases where a person or entity lacks capacity to enter a contract at all, the LVVTA only lacks capacity to enter into specific clauses of the Agreement, not the other clauses of the Agreement. In England and Wales, in *Re Staines Urban District Council's Agreement, Triggs v Staines Urban District Council,* a statutory entity entered an agreement containing certain clauses that were beyond its powers.[62] Cross J drew on English and Welsh Court of Appeal authority regarding the severability of covenants in maintenance agreements that were contrary to public policy. He held that if the void clauses form the whole, or substantially the whole consideration for the promise, the plaintiff would be unable to enforce it; but if the void clauses form only a subordinate part of the consideration, so that their elimination will leave the bargain a reasonable one, the plaintiff will be able to enforce it.[63] I agree and apply that here. Severing the offending cls 5(a)(i), 5(d)(i) or 5(d)(ii) leaves a reasonable contract which remains enforceable.

[109] Alternatively, if I am wrong about capacity, the Settlement Agreement would be an illegal contract. Section 71 of the 2017 Act, sub-pt 5 of pt 2 of which is the successor to the Illegal Contracts Act 1970, defines "illegal contract" as a contract "governed by New Zealand law that is illegal at law or in equity, whether the illegality arises from the creation or the performance of the contract". A straightforward application of the plain meaning of those words would result in a contract, entered into in breach of an entity's powers to do so, being illegal. The Settlement Agreement would be illegal for that reason. It may well also be illegal at common law as contrary to public policy regarding good government and the democratic process, for breaching the Bill of Rights.[64] Under ss 72 and 71(1)(b) a contract with an illegal provision is an illegal contract, and an illegal contract is, as a whole, of no effect. If the Agreement here were illegal I would grant relief under s

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61 *Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc* [1982] 1 NZLR 673 at 674–675.

62 *Re Staines Urban District Council's Agreement, Triggs v Staines Urban District Council* [1969] 1 Ch 10.

63 At 18, citing *Bennett v Bennett* [1952] 1 KB 249 and *Goodinson v Goodinson* [1954] QB 118.

64 By analogy with *Peters v Collinge* [1993] 2 NZLR 554 (HC). See *Burrows, Finn and Todd*, above n 52, at [13.4.4].

76 of the Act, as Mr MacKenzie requests, by severing the offending clauses and holding the remainder of the Agreement enforceable. That would have the same effect as my finding of a lack of capacity.

[110] Mr Brett breached the clauses of the Agreement that are not severed, in making the 12 defamatory statements about Mr Johnson I have found he made. When given notice of his breach of the Agreement on 14 July 2015 he was required to remove the statements. Instead, he maintained the Agreement was null and void due to the LVVTA's alleged breach of it, which he had not raised previously, and he defended the statements. This was resolved by his undertaking on 25 November 2015, under threat of an application for an interim injunction, to remove the statements then objected to by the LVVTA. But when the LVVTA raised concerns about this being breached in August 2016, Mr Brett denied even having given an undertaking. It is clear Mr Brett breached cl 5(a) of the Agreement by failing to take down defamatory statements and by posting further defamatory statements.

Issue 7: What remedies should I order?

The remedies sought

[111] The plaintiffs seek remedies:

(a) for breach of the Settlement Agreement:

(i) specific performance in the form of a permanent injunction restraining Mr Brett from making the identified statements; and

(ii) damages of $89,590.24, comprising the plaintiffs' legal costs incurred by the LVVTA because of the breach of contract was flagrant;

(b) for defamation:

(i) declarations under s 24 of the Act that Mr Brett is liable to the plaintiffs;

(ii) a permanent injunction restraining Mr Brett from making the statements complained of; and

(iii) damages of $500,000 in total ($250,000 to each of the LVVTA and Mr Johnson).

[112] Mr Brett submits Mr Johnson and the LVVTA already had a very poor reputation so he did not damage it further. On the basis of the evidence, I do not accept that. He submits these claims should be dismissed with an apology from Mr Johnson and the LVVTA and scale costs being awarded in his favour. On the basis of my conclusions about liability, I do not accept that either.

The remedies granted

[113] I do not award the LVVTA's litigation costs as damages for breach of contract. The general policy rule is that costs may not be claimed as damages, so as not to undermine the costs regime.[65] That is also consistent with litigation costs not counting for the purposes of pecuniary loss under s 6 of the Act as analysed in Issue 1 above.

[114] My understanding is the remedy most keenly desired by the plaintiffs is that Mr Brett stop defaming them. His behaviour to date, and attitude at trial, indicates that may be difficult for him. I hope this judgment, in spelling out what is and is not defamatory, and what defences apply when, will help him avoid future defamation. To reinforce that, I issue a declaration that Mr Brett is liable to Mr Johnson in respect of the statements he published that I have found to be defamatory and lacking any defence. I also note, for Mr Brett's benefit, that if the plaintiffs had pleaded and proved that he had ill will towards the LVVTA in making his defamatory statements about it, that would have defeated his defence of qualified privilege.

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[65] *Chick v Blackwell* [2013] NZHC 1525 citing Louise Merrett *"*Costs as Damages*"* (2009) 125 LQR 468.

[115] Given Mr Brett's proclivity to repeatedly defame the plaintiffs, in the face of threats of legal action and after signing the Settlement Agreement undertaking not to do so, I also consider a permanent injunction against Mr Brett making the statements I have found to be defamatory and not subject to defences is required.

[116] Finally, I hold a modest damages award is required to compensate Mr Johnson for the damage of Mr Brett's attacks on Mr Johnson's reputation. I have found Mr Johnson has been defamed 12 times by Mr Brett. The defamatory statements mean:

(a) Mr Johnson is incompetent, and that puts public safety and lives at risk (statements 1, 3, 8, 11, 12).

(b) Mr Johnson conspired to bring about the NZTA's revocation of Mr Brett's certification authority for improper and/or retaliatory purposes (statement 17).

(c) Mr Johnson is unqualified to take part in the regulatory regime for the certification of LVVs because he has no understanding of the issues involved (statement 22) and he has made erroneous certification decisions through the desk-top audit process (statement 23).

(d) Mr Johnson is dishonest and tells untruths (statement 24).

(e) Mr Johnson risks the personal safety of wheelchair users in the interests of hot rod owners (statement 33).

[117] These are a series of direct unfounded attacks on Mr Johnson from November 2012 to June 2015. They were made by someone with apparent credibility in relation to LVV matters. The statements damaged Mr Johnson's personal and professional reputation. They have caused him significant stress.

[118] I consider the effect of the defamation here is comparable to the defamation in *Kim v Cho,* where the successful plaintiff was said to have obtained funds illegally and was awarded $100,000, and in *Jones v Lee*, where the successful plaintiff was

said to have ripped off shareholders and was awarded $104,000 in compensatory damages.[66] The defamation here is less serious than those involving allegations of criminal complicity with the Mr Asia drugs syndicate and the Black Power gang for which $125,000 was awarded in compensatory damages.[67] I award compensatory damages of $100,000 against Mr Brett to Mr Johnson.

[119] I award costs against Mr Brett on a 2B basis.

Result

[120] I make the following orders:

(a) A declaration Mr Brett is liable to Mr Johnson for publishing 12 statements (1, 3, 8, 11, 12, 17, 22, 23, 24, 30, 33, 35) which are defamatory and to which he has no defence.

(b) I grant to Mr Johnson a permanent injunction prohibiting Mr Brett making those statements.

(c) Mr Brett must pay compensatory damages of $100,000 to Mr Johnson.

(d) Mr Brett must pay costs on a 2B basis.

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Palmer J

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66 *Kim v Cho* [2016] NZHC 1771, 2016] NZAR 1134; *Jones v Lee* HC Wellington CIV-2007-485-1510, 18 May 2010.

67 *Hallett v Williams* HC Auckland CIV-2010-404-7064, 26 July 2011.

Annex 1: The Settlement Agreement

DATED 5 June 2014

BETWEEN

THE LOW VOLUME VEHICLE TECHNICAL ASSOCIATION INCORPORATED

AND

JOHN BRETT

SETTLEMENT AGREEMENT

9800406

DATED the 5th JUNE day of ~~May~~ 2014

Parties

1. The Low Volume Vehicle Technical Association Incorporated (**LVVTA**); and
2. John Brett

(the **parties**).

Background

1. The parties have been engaged in correspondence and dispute concerning publications made by Mr Brett (including on his internet website www.lowvolumevehicle.co.nz [the **Website**]), which publications LVVTA contends are defamatory of it and/or its officers. For his part, Mr Brett denies any defamatory meaning to the publications.

2. The intention of this agreement is to record an understanding between LVVTA and Mr Brett which allows Mr Brett to exercise a right to express his opinion, about LVVTA and the low volume vehicle certification system in general, and to make public statements about same, in a collaborative and co-operative manner with LVVTA, based only on truthful and accurate information and evidence, such that Mr Brett's statements are not knowingly or unknowingly incorrect, defamatory, or a personal attack on any individual persons or the LVVTA.

3. This agreement is also intended to provide a cornerstone from which LVVTA and Mr Brett can avoid operating in an adversarial and confrontational manner and instead combine their knowledge and experience to work together in an effort to continuously improve the low volume vehicle certification system, and as a result, the safety of modified and individually-constructed motor vehicles.

Agreement

4. By signing this agreement, LVVTA agrees and undertakes that it will:

(a) not commence any formal legal action against Mr Brett for defamation, or make substantive claims for reputational damage; and

(b) not post information relating to complaints that have been made against or investigations into Mr Brett on its website; and

(c) not post photographs and/or descriptive information of motor vehicles that have been incorrectly certified by Mr Brett on its website; and

(d) immediately remove the summary of Mr Brett's revocation and appeal, and the District Court's judgment in relation to Mr Brett's appeal, from its website; and

(e) not make a formal complaint against Mr Brett to the Engineering Associates Registration Board (**EARB**) for any alleged breach of the EARB's Code of Ethics; and

(f) not otherwise publicise the outcome of Mr Brett's revocation, appeal, and the District Court's judgment throughout other certification industries and agencies; and

(g) continue to operate in a consultative and collaborative manner, incorporating the combined knowledge and experience of Mr Brett and other industry experts to continuously improve the low volume vehicle certification system, and as a result, the safety of modified and individually-constructed motor vehicles.

5. By signing this agreement, Mr Brett agrees and undertakes that he will:

(a) immediately remove, and desist from making any further such comments or statements in the future on the Website or within any other public medium, any comments or statements that:

(i) are incorrect; or

(ii) are, or may be perceived to be, in any way defamatory toward LVVTA; or

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(iii) are, or may be perceived to be, in any way defamatory toward any person(s) employed by and/or associated with LVVTA;

and

(b) immediately remove, and desist from making any further such comments or statements in the future on the Website, or within any other public medium, any comments or statements that are not accompanied by clear and relevant documented evidence that supports the comments or statements being made; and

(c) provide an LVVTA staff-member of Mr Brett's choice with on-going registration as an 'author' to the Website; and

(d) prior to publishing any comments or statements about LVVTA on the Website or within any other public medium, provide an LVVTA staff-member of Mr Brett's choice with the opportunity to review the intended comment(s) or statement(s), and he will either:

(i) refrain from making the comment or statement if the LVVTA staff member can demonstrate that the comment or statement is incorrect; or

(ii) in the case that the comment or statement is correct, allow the LVVTA staff member's written response to be provided immediately after the comment or statement without rejection, filtering, or editing;

and

(e) immediately remove all comments and/or statements from his website that state, imply, or may lead a person to believe that Mr Brett is a low volume vehicle certifier, and refrain from making any further such comments or statements in the future on his website or within any other public medium.

Joint responsibilities

6. In order to ensure that the objectives of this Agreement are met, LVVTA and Mr Brett both undertake to work together in a spirit of co-operation and willingness, in

a combined effort to continuously improve the safety of low volume vehicles and the quality of the low volume vehicle certification system.

7. The parties agree that in the event that Mr Brett fails to comply with his undertakings specified in 5(a) to (e) of this agreement, LVVTA will discontinue to abide by its undertakings specified in 4(a) to (g) of this agreement.

8. To the extent that either party has reason to believe that any provision of this agreement has been breached, the parties agree that they will act in good faith to:

   (a) bring the breach to the other party's attention as soon as reasonably practicable after the party becomes aware of the breach; and

   (b) first engage with the other party to seek to resolve the breach,

before resorting to any formal means of dispute resolution.

SIGNED for and on behalf of)
LOW VOLUME VEHICLE TECHNICAL ASSOCIATION INCORPORATED)
by)
in the presence of:)

Frances Bradley
[Witness Name]
Plate Production Officer
[Occupation]
21 Raiha Street, Porirua
[Address]

SIGNED for and on behalf of)
JOHN BRETT)
by)
in the presence of:)

M Wallace-Deane
[Witness Name]

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ENGINEER OFFICE MANAGER

[Occupation]

6 POURNOSSON PLACE

[Address] PRAHRAN 213

Annex 2: Table of Allegedly Defamatory Statements

	Statement and Context ("website" is Mr Brett's website)	Pleaded defamatory meanings	Defendant's Response	Is it defamatory?	Do defences of honest opinion, truth, qualified or absolute privilege apply?
1.	"LVVTA incompetence endangers lives" Post on Brett website entitled "LVVTA incompetence endangers lives", 8 November 2012.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk.	Mr Brett has given examples of what he says are many dangerous practices. In his honest opinion the practices are likely to cause injury and death. Safety is not achieved by waiting until someone is killed or injured before removing dangers. Orally: "In my honest opinion their practises are likely to cause injury and death"	The statement, read in context, means the LVVTA and Mr Johnson are incompetent and that puts public safety and lives at risk. That is **defamatory of the LVVTA and Mr Johnson** because it causes the reasonable person to think worse of them in a more than minor way.	The statement is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA but not that of Mr Johnson**. **Mr Brett is liable to Mr Johnson.**
2.	"LVVTA incompetence threatens lives" Post on Brett website entitled "LVVTA incompetence threatens lives", 19 February 2014.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk.	Mr Brett has given examples of what he says are many dangerous practices. In his honest opinion the practices are likely to cause injury and death. Safety is not achieved by waiting until someone is killed or injured before removing dangers. Orally: "In my honest opinion their practises are likely to	The statement, read in context, means the LVVTA is incompetent and that puts public safety and lives at risk. That is **defamatory of the LVVTA but not Mr Johnson** who is not the subject of the statement.	The statement is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA.**

			cause injury and death"		**Mr Brett is not liable.**
3.	"Lives are on the line, dangerous LVV Certified vehicles HAVE KILLED AND INJURED PEOPLE, more deaths and injuries are predicted unless changes are made" Post on Brett website entitled "LVVTA incompetence endangers lives", 8 November 2012	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk.	It is certain that LVV Certified vehicles have killed and injured people. Mr Brett has given examples of unsafe practices that he says have avoidable potential to kill and injure again, including inadequate responses to failures that have occurred.	The statement, read in context (which directly implicates Mr Johnson) means the LVVTA and Mr Johnson are incompetent and that puts public safety and lives at risk. That is **defamatory of the LVVTA and Mr Johnson**.	The statement is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA but not that of Mr Johnson.** **Mr Brett is liable to Mr Johnson.**
4.	"Modified vehicles are being LVV Certified and are allowed on the road with known safety issues, and resultant avoidable deaths and injuries occur and will continue to occur" Post on Brett website entitled "LVVTA incompetence threatens lives", 19 February 2014.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk.	An example of such a safety issue is that of rear-facing seats in taxi vans. Another is wheel adaptors made of unsuitable materials. Mr Brett says he has pointed this risk, and shown how it can be avoided. LVVTA ran the risk anyway.	The statement, read in context, means the LVVTA is incompetent and it, knowingly, puts public safety and lives at risk. That is **defamatory of the LVVTA but not Mr Johnson** who is not the subject of the statement.	The statement is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**
5.	"The big danger is the incompetence of the	The plaintiffs are incompetent, put their own interests	The statement was made by Roger Phillips concerning the LVVTA rejection of his	The statement, read in context, means the LVVTA is incompetent.	As a comment, in the context of a comments section on a blogpost, the reasonable person may consider this Mr Brett's opinion. But I do not

	LVVTA" Comment by Brett on comments section on a post on the Brett website entitled "Wheelchair-user cars pulled from roads", 19 February 2014.	ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk.	vehicles, which were subsequently justified.	That is **defamatory of the LVVTA but not Mr Johnson** who is not the subject of the statement.	accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. But the statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**
6.	"The whole system is under threat because of the LVVTA stupidity" Post by Brett on "NSRA NZ" Facebook page sharing an article on his website entitled "NZTA clearly does not have very high standards." Link accompanied by photograph of Mr Johnson, 30 April 2015.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk.	Many good modifiers and certifiers have given up/walked away from the system. The LVV system is, by Mr Johnson's own admission, poorly regarded by many vehicle enthusiasts.	The statement, read in context, **does not bear the pleaded meaning.** It alleges stupidity in the LVVTA, not incompetence. That is simply an insult and **not defamatory to either the LVVTA or Mr Johnson.** It does less than minor damage to their reputations.	If it were defamatory, it would appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. If it were defamatory, Mr Brett would not have shown the statement or its pleaded meaning is true or not materially different from the truth. The statement is a generic slur and does not directly concern the LVVTA's exercise of a public function. If it were defamatory, the defence of qualified privilege would not defeat the defamation of the LVVTA. **Mr Brett is not liable.**
7.	"NOTHING HAS BEEN DONE TO PREVENT THE NEXT LVV DISASTER!" Post on Brett website entitled "NZ Designed Wheelchair vehicles – a	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and	Since that statement a great deal has been done by NZTA in their ongoing review.	The statement, read in context, means the LVVTA is incompetent (because it is not doing anything to prevent its next disaster). That is **defamatory of the LVVTA but not Mr**	The statement is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth.

	needless mess - LVVTA and NZTA were warned in January 2011", October 2014.	lives at risk.		**Johnson** who is not the subject of the statement.	The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**
8.	"No-body at the LVVTA is competent to make any judgment about the safety of such Certifications" Post on Brett website entitled "LVVTA incompetence threatens lives", 19 February 2014.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk.	The remark was in the context of body-restructure certifications. There are no LVV standards, and no body of knowledge exists at LVVTA. Mr Brett has certified, for example, stretch limousines with no roof himself, and carried out tests if he felt they were needed. Nobody at LVVTA would have any knowledge on how to do jobs like that.	The statement, read in context, means the LVVTA, and everybody there, is incompetent and that puts public safety at risk. That is **defamatory of the LVVTA and Mr Johnson**.	The statement is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. **The defence of qualified privilege defeats the defamation of the LVVTA but not that of Mr Johnson.** **Mr Brett is liable to Mr Johnson.**
9.	"Instead of accepting the concerns in any constructive manner, Tony Johnson has responding by attacking the Certifiers who dared to criticise" Post on Brett website entitled "LVVTA incompetence endangers lives", 8 November 2012.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk	The Auckland Certifiers compiled a detailed, thought-out submission. Every one of those certifiers has since been hounded out of the system. Auckland is now short of certifiers.	The statement, read in context, **does not bear the pleaded meaning** that Mr Johnson is incompetent. **It is not defamatory for that reason of Mr Johnson or the LVVTA** which is not the subject of the statement.	The statement is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. If it were defamatory, the defence of qualified privilege would not defeat the defamation of Mr Johnson. **Mr Brett is not liable.**

10.	"[The] LVVTA, where Engineers are not welcome and amateur guesswork prevails" Comment in comments section of a post on Brett website entitled "LVVTA DANGERS: THE FACTS", 25 March 2014.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk	This statement was part of Roger Phillips contributions, about the debacle over his U-Drive Mobility Skoda Yeti Vehicles, which have subsequently been completely justified.	The statement, read in context, means the LVVTA is incompetent (by allowing amateur guesswork to prevail). That **is defamatory of the LVVTA but not Mr Johnson** who is not the subject of the statement.	Read in context, as a comment in a comments section of a blogpost, the statement would appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The context of the statement refers to LVV Certifiers. It directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**
11.	"ALL OF THIS HAS BEEN ADMITTED BY MR JOHNSON UNDER CROSS EXAMINATION DURING MY APPEAL HEARING. THEREFORE IT IS A TRUE STATEMENT THAT LARGE NUMBERS OF UNSAFE VEHICLES WERE KNOWINGLY ISSUED WITH LVV PLATES BY THE LVVTA"	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk	Mr Johnson has on many occasions, admitted that vehicles with unsafe seating were being made and Certified by the firm Van Extras. These practices were ended when I became the Certifier. I was unwise to say perjury.	The statement, read in context, means the LVVTA and Mr Johnson are incompetent and knowingly put public safety at risk. That is **defamatory of the LVVTA and Mr Johnson.**	The statement is expressed as a statement of fact (as a "true statement"). It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA but not that of Mr Johnson.** **Mr Brett is liable to Mr Johnson.**

	Post on Brett website entitled "LVVTA DANGERS: THE FACTS", 25 March 2014.				
12.	"[Mr Johnson] overlooks that the LVV System is responsible for deaths, and for putting lives at risk." Post on Brett website entitled "NZTA clearly does not have very high standards", 19 April 2015.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk	The two deaths that have occurred were avoidable, no adequate standards existed at the time, nor exists now to prevent such tragedies.	The statement, read in context, means the LVVTA and Mr Johnson are incompetent and put public safety and lives at risk. That is **defamatory of Mr Johnson and the LVVTA.**	The statement is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA but not that of Mr Johnson.** **Mr Brett is liable to Mr Johnson.**
13.	"The LVVTA do not want to hear any criticism, even constructive criticism." Comment by Brett in comments section of post on Brett website entitled "PUBLIC ANNOUNCEMENT", 11 March 2014.	The plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk	What has happened to me demonstrates the point. Why am I being sued for defamation for making constructive criticisms that should have led to possible improvements?"	The statement, read in context, **does not bear the pleaded meaning** that the LVVTA is incompetent or putting safety and lives at risk. For that reason, it is **not defamatory of the LVVTA nor of Mr Johnson** who is not the subject of the statement.	If it were defamatory, he statement is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. If the statement were defamatory, the defence of qualified privilege would defeat the defamation of the LVVTA.

					Mr Brett is not liable.
14.	"The LVVTA now (illegally) make all Certification decisions, and won't accept this." Comment by Brett in comments section of post on Brett website entitled "Aftermarket seats – the seatbelt buckle problem", 15 February 2013.	The plaintiffs carry on business in an illegal manner	Refers to comments about misuse of review process.	The statement, read in context, means the LVVTA operates in an illegal manner. That is **defamatory of the LVVTA but not of Mr Johnson** who is not the subject of the statement.	Reading it in context, as a comment in the context of a comments section on a blogpost, the reasonable person would consider this Mr Brett's honest opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**
15.	"The LVVTA appears to be being operated in an illegal and questionable manner" Post by Brett on LinkedIn entitled "Has the Low Volume Vehicle system failed?", 17 March 2015.	The plaintiffs carry on business in an illegal manner	This could refer to the misuse of the review process, or to the manner in which the CEO and the president of the LVVTA have taken over all power of the LVVTA from the General Counsel of the LVVTA.	The statement, read in context, bears the pleaded meaning. It is **defamatory of the LVVTA but not Mr Johnson**, who is not mentioned.	The statement is expressed as a statement of opinion. It would appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of developing LVV safety standards. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**

16.	"I trust that the review will notice that the LVVTA has failed in these roles, and has extended itself to actually illegally making Certification Decisions". Comment by Brett in comments section of Post entitled "Government Probe into LVVTA and LVV system", 9 June 2015.	The plaintiffs carry on business in an illegal manner	"I live in hope that the NZTA will in time notice this mis-use of the review process"	The statement, read in context, means the LVVTA operates in an illegal manner. That is **defamatory of the LVVTA but not of Mr Johnson** who is not the subject of the statement.	Reading the statement in context, it is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement directly concerns the LVVTA's exercise of its public function of certification of vehicles. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**
17.	"I'm John Brett, the LVV Certifier who disagreed with LVVTA and got struck off because of it." Post by John Brett on "Lifted Trucks NZ" Facebook page sharing an article on Brett website entitled "NZTA clearly does not have very high standards." Link accompanied by photograph of Mr Johnson, 6 May 2015.	The plaintiffs conspired to bring about the NZTA's revocation of Mr Brett's certification authority for improper and/or retaliatory purposes.	NZTA had at the time left the LVV system in the hands of Mr Johnson. Almost all the evidence produced for the revocation was produced by Mr Johnson (a list can be reduced if required – but is made clear by his correspondence to NZTA at the time)	The statement, read in context, bears the pleaded meaning by implication. It is **defamatory of the LVVTA and Mr Johnson** (who is pictured)	Even though this statement appears in a comments column, it is expressed as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement concerns the LVVTA's exercise of its public function of providing information and advice to the NZTA. The defence of qualified privilege **defeats the defamation of the LVVTA but not that of Mr Johnson.** **Mr Brett is liable to Mr Johnson**
18.	"I have long been a	The plaintiffs	NZTA had at the time left the	The statement, read in	Reading the statement in context, it is expressed

	whistle-blower, expressing the view that the LVV system is dangerously deficient. My authority was revoked at the behest of the LVVTA and Mr Johnson for this reason in December 2012." This statement was not at the place in the common bundle referred to by the plaintiffs. Further inquiry reveals it is in a statement made by Mr Brett in an affidavit dated 24 August 2015 filed in these proceedings in response to the plaintiffs' application for an interim injunction. Mr Brett included a link to the affidavit in a post on the Brett website entitled "Gagging Order application dismissed by High Court Judge", 31 August 2015.	conspired to bring about the NZTA's revocation of Mr Brett's certification authority for improper and/or retaliatory purposes.	LVV system in the hands of Mr Johnson. Almost all the evidence produced for the revocation was produced by Mr Johnson (a list can be reduced if required – but is made clear by his correspondence to NZTA at the time)	context, means Mr Brett's certification authority was revoked at the behest of the LVVTA and Mr Johnson for improper and/or retaliatory purposes. That **is defamatory of the LVVTA and Mr Johnson**.	as a statement of fact. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth, in the purposes of revocation being improper. The statement concerns the exercise of the LVVTA's public function of providing information to the NZTA. **The defence of qualified privilege defeats the defamation of the LVVTA.** The statement is also contained in an affidavit sworn by Mr Brett for the purposes of court proceedings. Under s 14 of the Act it is therefore subject to **absolute privilege, which defeats the defamation**. I do not consider Mr Brett has effectively repeated the statement by means of the hyperlink to the affidavit itself. **Mr Brett is not liable.**
19.	"Tony [Johnson] loves taking action against 'troublesome LVV Certifiers', especially against John Brett."	The plaintiffs conspired to bring about the NZTA's revocation of Mr Brett's certification	NZTA had at the time left the LVV system in the hands of Mr Johnson. Almost all the evidence produced for the revocation was produced by	The statement, read in context (which includes statement 9 above), **does not bear the pleaded meaning.** It does not	If it were defamatory, the statement is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion.

	Post on Brett website entitled "LVVTA incompetence endangers lives", 8 November 2012	authority for improper and/or retaliatory purposes.	Mr Johnson (a list can be reduced if required – but is made clear by his correspondence to NZTA at the time)	mention revocation of Mr Brett's certification authority or the purposes of that. **It is not defamatory for that reason.** If it were defamatory, it would not be defamatory of the LVVTA which is not mentioned.	Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The defence of qualified privilege would not defeat the defamation of Mr Johnson if it were defamatory. **Mr Brett is not liable.**
20.	"The LVVTA promoted themselves to Certifiers in Chief" Comment by Brett in comments section of post on Brett website entitled "PUBLIC ANNOUNCEMENT, 11 March 2014.	The plaintiffs make erroneous certification decisions and are unqualified to take any part in the regulatory regime for the certification of low volume vehicles in New Zealand	Mr Johnson set himself and the LVVTA as the gate-keeper, and took on the responsibility of second-guessing Certification decisions. Mr Johnson also makes clear the limitations of his personal knowledge, and the limitations of the knowledge of his team are evident to most certifiers and modifiers.	The statement, read in context, **does not bear the pleaded meaning.** It does not suggest the LVVTA made erroneous certification decisions or that it was unqualified to take any part in the regulatory regime. **It is not defamatory.**	If it were defamatory, the comment, in the context of a comments section of a blogpost, and in its language used, would appear to a reasonable person as Mr Brett's opinion. But I would not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement concerns the LVVTA's exercise of its public function of certification. If it were defamatory, the defence of qualified privilege would defeat the defamation of the LVVTA. **Mr Brett is not liable.**
21.	"Axle beams made of unsuitable materials have been approved by the LVVTA" Post on Brett website entitled "LVVTA incompetence endangers	The plaintiffs make erroneous certification decisions and are unqualified to take any part in the regulatory regime	Mr Johnson set himself and the LVVTA as the gate-keeper, and took on the responsibility of second-guessing Certification decisions. Mr Johnson also makes clear the limitations of his personal	The statement, read in context, means the LVVTA has made erroneous certification decisions (regarding axle beams). That is **defamatory of the**	The statement is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The example he provides in

	lives", 19 February 2014.	for the certification of low volume vehicles in New Zealand	knowledge, and the limitations of the knowledge of his team are evident to most certifiers and modifiers.	**LVVTA but not of Mr Johnson** who is not the subject of the statement.	submissions is not substantiated and does not clearly relate to this statement. The statement concerns the LVVTA's exercise of its public function of certification. The defence of qualified privilege **defeats the defamation of the LVVTA**. **Mr Brett is not liable.**
22.	"There is very evidently, no-one at the LVVTA with any understanding of the issues involved in such LVV Certifications. Despite this, the LVVTA have set themselves up as 'Judge and Jury' and have promoted themselves to the 'LOW VOLUME VEHICLE TECHNICAL AUTHORITY'" Post on Brett website entitled "LVVTA incompetence endangers lives", 19 February 2014.	The plaintiffs make erroneous certification decisions and are unqualified to take any part in the regulatory regime for the certification of low volume vehicles in New Zealand	Mr Johnson set himself and the LVVTA as the gate-keeper, and took on the responsibility of second-guessing Certification decisions. Mr Johnson also makes clear the limitations of his personal knowledge, and the limitations of the knowledge of his team are evident to most certifiers and modifiers.	The statement, read in context, means the LVVTA and Mr Johnson are unqualified to take part in the regulatory regime for the certification of low volume vehicles (because no one at the LVVTA, including Mr Johnson, has any understanding of the issues involved). That is **defamatory of the LVVTA and Mr Johnson.**	The statement is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement concerns the LVVTA's exercise of its public function of certification. If it were defamatory, the defence of qualified privilege **defeats the defamation of the LVVTA but not that of Mr Johnson**. **Mr Brett is liable to Mr Johnson.**
23.	"The LVVTA, (Tony Johnson and his staff) failed to spot the problem, or to raise the issue in the first place … The LVVTA has again failed in the role of 'gate-	The plaintiffs make erroneous certification decisions and are unqualified to take any part in the regulatory regime	Mr Johnson set himself and the LVVTA as the gate-keeper, and took on the responsibility of second-guessing Certification decisions. Mr Johnson also makes clear the limitations of his personal	The statement, read in context, means the LVVTA and Mr Johnson have made erroneous certification decisions (through the desk-top audit process). That is	The statement is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different

	keeper' to LVV Certifications" Comment by Brett in comments section of post on Brett website entitled "Wheelchair-user cars pulled from roads", 19 February 2014.	for the certification of low volume vehicles in New Zealand	knowledge, and the limitations of the knowledge of his team are evident to most certifiers and modifiers.	**defamatory of the LVVTA and Mr Johnson.**	from the truth. The statement concerns the LVVTA's exercise of its public function of certification. The defence of qualified privilege **defeats the defamation of the LVVTA, but not that of Mr Johnson.** **Mr Brett is liable to Mr Johnson.**
24.	"In the Appeal Hearing, under my cross-examination, Mr Johnson admitted many highly dangerous and life threatening errors and practices of the LVVTA that he had previously denied." Post on Brett website entitled "John Brett-Position Statement on Independent Enquiry", 14 June 2015.	The plaintiffs are dishonest, tell untruths, and in Mr Johnson's case specifically, he perjured himself by lying when giving evidence on oath before the District Court.	I did not understand how serious such remarks could be, and on legal advice quickly removed them. So I have no defence.	The statement, read in context, means Mr Johnson is dishonest and tells untruths but the statement does not say the previous denials were on oath so the meaning does not extend to perjury. This is **defamatory of Mr Johnson but not of the LVVTA.**	The statement is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The defence of qualified privilege **does not defeat the defamation of Mr Johnson.** **Mr Brett is liable to Mr Johnson.**
25.	"Mr Johnson also admitted under examination that certain statements he had made under oath were not actually true, and hence perjury." Said to be 31 August 2015.	The plaintiffs are dishonest, tell untruths, and in Mr Johnson's case specifically, he perjured himself by lying when giving evidence on oath before the District	I did not understand how serious such remarks could be, and on legal advice quickly removed them. So I have no defence.	The statement, read in context, would mean Mr Johnson perjured himself by lying under oath when giving evidence before the District Court. This would have been **defamatory of Mr Johnson but not the LVVTA** which is not the	Reading the statement in context, it is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The defence of qualified privilege would not

	This statement was not at the place in the common bundle referred to by the plaintiffs. Further inquiry reveals it is in a statement made by Mr Brett in an affidavit dated 24 August 2015 filed in these proceedings in response to the plaintiffs' application for an interim injunction. Mr Brett included a link to the affidavit in a post on the Brett website entitled "Gagging Order application dismissed by High Court Judge", 31 August 2015.	Court.		subject of the statement.	defeat the defamation of Mr Johnson. The statement is contained in an affidavit sworn by Mr Brett for the purposes of court proceedings. Under s 14 of the Act it is therefore subject to **absolute privilege, which defeats the defamation**. I do not consider Mr Brett has effectively repeated the statement by means of the hyperlink to the affidavit itself. **Mr Brett is not liable.**
26.	"Later examples used to justify my revocation included many wrong statements and lies." Post on Brett website entitled "John Brett-Position Statement on Independent Enquiry, 14 June 2015.	The plaintiffs are dishonest, tell untruths, and in Mr Johnson's case specifically, he perjured himself by lying when giving evidence on oath before the District Court.	I did not understand how serious such remarks could be, and on legal advice quickly removed them. So I have no defence.	The statement, read in context (which includes statement 27), means the LVVTA is dishonest and tells untruths. This is **defamatory of the LVVTA but not of Mr Johnson** who is not identified.	The statement is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement concerns the LVVTA's exercise of its public function of providing information to the NZTA. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**

27.	"Unfortunately the Judge chose to believe the litany of lies from LVVTA." Post on Brett website entitled "John Brett-Position Statement on Independent Enquiry, 14 June 2015.	The plaintiffs are dishonest, tell untruths, and in Mr Johnson's case specifically, he perjured himself by lying when giving evidence on oath before the District Court.	I did not understand how serious such remarks could be, and on legal advice quickly removed them. So I have no defence.	The statement, read in context (which includes statement 26), means the LVVTA is dishonest and tells untruths. This is **defamatory of the LVVTA but not of Mr Johnson** who is not implicated in the statement**.**	The statement is expressed as a statement of fact, not a statement of opinion. It would not appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement concerns the LVVTA's exercise of its public function of providing information to the NZTA, which was used in defending Mr Brett's appeal of NZTA's revocation of his certification. The defence of qualified privilege **defeats the defamation of the LVVTA.** **Mr Brett is not liable.**
28.	"We are greatly relieved at no longer having to deal with the ignorant bullies at the LVVTA." Post on Brett website entitled "PUBLIC ANNOUNCEMENT, 19 February 2014.	The plaintiffs are dysfunctional and, in Mr Johnson's case, mentally ill. Or this is a personal slur.	I think that my experiences of the plaintiff well justify such remarks, and make no apology.	The statement does not suggest either plaintiff is dysfunctional or mentally ill. It is simply an insult of unidentified people. **It is not defamatory.** It does less than minor damage to the LVVTA's or Mr Johnson's reputation.	If it were defamatory, the statement would appear to a reasonable person that Mr Brett is merely presenting his opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. If it were defamatory, the statement does not concern the LVVTA's exercise of its public function of providing information to the NZTA. The defence of qualified privilege would not defeat the defamation of the LVVTA or Mr Johnson. **Mr Brett is not liable.**

29.	"Tony Johnson justifies and glorifies his technical illiteracy" Post on Brett website entitled "NZTA clearly does not have very high standards", 19 April 2015.	The plaintiffs are dysfunctional and, in Mr Johnson's case, mentally ill. Or this is a personal slur.	I think that my experiences of the plaintiff well justify such remarks, and make no apology.	The statement does not suggest either plaintiff is dysfunctional or mentally ill. It does mean Mr Johnson is technically illiterate and is **defamatory of Mr Johnson** It is not defamatory of the LVVTA which it does not mention.	The statement is expressed as a statement of opinion. It would appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. It provides a link to an article by Mr Johnson, which is the basis of the comment and allows readers to decide for themselves. The defamation is **defeated by the defence of honest opinion.** Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The defence of qualified privilege would not defeat the defamation of Mr Johnson if it were defamatory as pleaded. **Mr Brett is not liable.**
30.	Photo of Mr Johnson bearing the caption: "Belligerent attitude, high handed approach." Post on Brett website entitled "NZTA clearly does not have very high standards.", 19 April 2015.	The plaintiffs are dysfunctional and, in Mr Johnson's case, mentally ill. Or this is a personal slur.	I think that my experiences of the plaintiff well justify such remarks, and make no apology.	The statement does not suggest either plaintiff is dysfunctional or mentally ill. It does mean Mr Johnson has a belligerent attitude and high handed approach. That is **defamatory of Mr Johnson and the LVVTA** (which is linked to the statement in the contextual text).	Read in context, he language of the statement suggests it would appear to a reasonable person that Mr Brett is merely presenting his opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement concerns the LVVTA's exercise of its public functions. The defence of qualified privilege would **defeat the defamation of the LVVTA, but not of Mr Johnson**. **Mr Brett is liable to Mr Johnson.**
31.	Picture of a train wreck	The plaintiffs are	I think that my experiences of	The statement does not	If it were defamatory, the statement is in a cartoon

	bearing the caption: "LVVTA?" Post on Brett website entitled "Today's Cartoons!", 9 June 2015.	dysfunctional and, in Mr Johnson's case, mentally ill. Or this is a personal slur.	the plaintiff well justify such remarks, and make no apology. I thought I'd be able to make such a comment.	suggest the plaintiffs are dysfunctional or mentally ill. It is simply an insult and **not defamatory.** It does less than minor damage to the Mr Johnson's reputation, or that of the LVVTA which is not mentioned.	and qualified by a question-mark. It would appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The statement concerns the LVVTA's exercise of its public functions. The defence of qualified privilege would defeat the defamation of the LVVTA, but not Mr Johnson, if it were defamatory. **Mr Brett is not liable.**
32.	Cartoon depicting Mr Johnson with knuckles dragging on the ground, accompanied by the caption: "MAD Tony the 'X'Spurt Engineer" Post on Brett website entitled "Today's Cartoons!", 16 June 2015.	The plaintiffs are dysfunctional and, in Mr Johnson's case, mentally ill. Or this is a personal slur.	Mr Brett removed the cartoons after a short time without prompting as he "did not like the tone of them".	The statement, read in context, would not be taken by a reasonable reader to mean Mr Johnson is mentally ill. It is simply an insult and **not defamatory**. It does less than minor damage to the LVVTA's or Mr Johnson's reputation.	If it were defamatory, the statement is in a cartoon. It would appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The defence of qualified privilege would not defeat the defamation of Mr Johnson, if it were defamatory. **Mr Brett is not liable.**
33.	Cartoon depicting Mr Johnson driving a vehicle with a wheelchair user	The plaintiffs are dysfunctional and, in Mr Johnson's	Mr Brett removed the cartoons after a short time without prompting as he "did not like	The statement, read in context, would not be taken by a reasonable	The statement is expressed in a cartoon referring to a fictional movie. It would appear to a reasonable person that Mr Brett is merely

	tied to the front, accompanied by the caption: "MAD Tony's 'Fury Road!' In a New Zealand Landscape where humanity is broken Tony, a man of many words, attempts to wreak destruction on wheelchair users to protect the rule of his Hot Rod Tribe" Post on Brett website entitled "Today's Cartoons!", 16 June 2015.	case, mentally ill. Or this is a personal slur.	the tone of them". This is an opinion I'm entitled to express.	reader to mean Mr Johnson is really mentally ill. But it does mean Mr Johnson risks the personal safety of wheelchair users in the interests of Hot Rod owners. That **is defamatory of Mr Johnson. It is not defamatory of the LVVTA** which is not implicated.	presenting his comment or opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The defence of qualified privilege would not defeat the defamation of Mr Johnson. **Mr Brett is liable to Mr Johnson.**
34.	Cartoon captioned: "MAD CARS 3 – Directed by Mad Tony – Screenplay by Mad Tony – Casting by Mad Tony – Based on Fiction." Post on Brett website entitled "Today's Cartoons!", 16 June 2015.	The plaintiffs are dysfunctional and, in Mr Johnson's case, mentally ill. Or this is a personal slur.	Mr Brett removed the cartoons after a short time without prompting as he "did not like the tone of them".	The statement, read in context, would not be taken by a reasonable reader to mean Mr Johnson is really mentally ill. It is simply an insult and **not defamatory.** It does less than minor damage to the LVVTA's or Mr Johnson's reputation.	If it were defamatory, the statement is expressed in a cartoon. It would appear to a reasonable person that Mr Brett is merely presenting his comment or opinion. But I do not accept Mr Brett has shown it is based on facts not materially different from the truth. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The defence of qualified privilege would not defeat the defamation of Mr Johnson, if it were defamatory. **Mr Brett is not liable.**
35.	"Time for [Mr Johnson] to be got off the potty to	The plaintiffs are dysfunctional and,	Mr Brett hoped NZTA would eventually realise that Mr	The statement, read in context, does not mean	The statement is presented as a statement of fact about Mr Johnson's competence. It would not

	make way for competent, practical people." Post on Brett website entitled "NZTA clearly does not have very high standards", 19 April 2015.	in Mr Johnson's case, mentally ill. Or this is a personal slur.	Johnson had to be moved on for the sake of the future of the LVV system.	Mr Johnson is mentally ill (or dysfunctional). It does mean he is not competent or practical. **That meaning is defamatory of Mr Johnson, but not the LVVTA.**	appear to a reasonable person that Mr Brett is merely presenting a comment or opinion. Mr Brett has not shown the statement or its pleaded meaning is true or not materially different from the truth. The defence of qualified privilege would not defeat the defamation of Mr Johnson, if it were defamatory. **Mr Brett is liable to Mr Johnson.**