IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-1925
[2017] NZHC 3281

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

Hearing:	On the papers
Appearances:	R J Gordon for the Plaintiffs J B Brett, the Defendant in person
Judgment:	21 December 2017

JUDGMENT OF PALMER J

This judgment is delivered by me on 21 December 2017 at 1.00 pm pursuant to r 11.5 of the High Court Rules

……
Registrar/Deputy Registrar

Solicitors:
MinterEllisonRuddWatts, Wellington

Party:
Defendant in person

Summary

[1] Self-represented litigants pose a challenge to judicial proceedings. Judges walk a difficult line between not disadvantaging or advantaging a self-represented litigant for their ignorance of legal process. Here the plaintiffs, represented by a national law firm, seek recall of the substantive judgment in this proceeding.[1] They submit it upheld the defence of qualified privilege when the self-represented defendant, Mr John Brett, did not plead that. The plaintiffs submit either the case should be determined on the basis pleaded or the Low Volume Vehicle Technical Association (LVVTA) should be afforded the opportunity to respond to a properly pleaded claim of qualified privilege.

[2] The label and substance of the defence of qualified privilege was explicit in Mr Brett's initial pleadings, in his affidavit filed before trial and in his written submissions at trial. The label of qualified privilege was omitted from Mr Brett's final statement of defence when he was directed to recast it, as a more detailed response to the statement of claim, in response to the plaintiffs' lawyers' complaints. Mr Brett's intention to argue qualified privilege was clear in substance before and during the trial. At the hearing the plaintiffs' counsel acknowledged Mr Brett relied on qualified privilege but dismissed it and did not engage with it. They did not take the point it was not pleaded, until they received judgment. I decline to recall the judgment to deprive the self-represented defendant of the defence of qualified privilege or to allow the plaintiffs to reopen the hearing to argue a pleadings point they did not take when the substance and label of the defence was squarely before them and the Court.

Relevant law

Law of recall of judgments

[3] Rule 11.9 of the High Court Rules 2016 provides a judge may recall a judgment "at any time before a formal record of it is drawn up and sealed". In *Horowhenua County v Nash* Wild CJ identified three categories of circumstance in which a judgment may be recalled:[2]

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1 *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 2846 [Substantive Judgment].
2 *Horowhenua Country v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled — first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[4] In *Unison Networks Ltd v Commerce Commission* the Court of Appeal cited with approval the following examples identified by the English Court of Appeal of cases where recall might be justified under the third of those categories:[3]

> [A] plain mistake on the part of the courts; a failure of the parties to draw to the court's attention a fact or point of law that was plainly relevant; or discovery of new facts subsequent to the judgment being given. Another good reason was if the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity consider.

[5] The Court of Appeal concluded as follows:[4]

> We conclude by observing that the Court's reasons and the issues it chooses to address are within the discretion of the Court. It will often be unnecessary to deal with all of the submissions presented because of the way in which a case is finally resolved. The Court plainly is able to address submissions in the manner it chooses. While a decision may be recalled where a material issue properly put before the Court is not addressed, excluding a slip or minor error, the cases in which justice will require a recall on this basis are likely to be rare.

[6] In *Sipka Holdings Ltd v Merj Holdings Ltd* Wylie J recalled a judgment under the third *Nash* category.[5] The parties did not have the opportunity to make submissions on whether a matter should be remitted to the District Court or not because that possibility was not raised by either party. Wylie J recalled two paragraphs of the judgment to allow them the opportunity to present submissions on that issue.[6]

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3 *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 at [32] citing *Re Blenheim Leisure (Restaurants) Ltd (No 3)* [2000] BCC 821 (EWCA).

4 At [34].

5 *Sipka Holdings Ltd v Merj Holdings Ltd* [2015] NZHC 3073.

6 At [13].

The law of pleadings

[7] Rule 5.48(4) of the High Court Rules 2016 requires an affirmative defence to be pleaded. *McGechan on Procedure* suggests the rule "recognises three long-established propositions as to the purpose of statements of defence":[7]

> (a) Answering specific allegations: One purpose is to answer specific allegations made in the statement of claim, such answer being by admission or denial.
>
> (b) "Affirmative defences": Another purpose is to state "affirmative defences", ie matters of defence which do not arise in themselves from admissions or denials of the plaintiff's allegations.
>
> (c) Clear and particular: A statement of defence, like a statement of claim, must be clear and particular as opposed to evasive and general.

[8] In *Price Waterhouse v Fortex Group Ltd,* the Court of Appeal considered pleadings should be read "as conveying what they would reasonably convey, in the context of the case, to a sensible legal mind".[8] The Court eschewed a pedantic approach to pleadings or advocacy of prolix pleadings. It stated:[9]

> In marginal cases, it is better to avoid generalities and rules of thumb, and to return to principle. The pleader and Court simply ask "in the circumstances of this claim, is that statement sufficiently detailed to state a clear issue and inform the opposite party of the case to be met?". This is not, under modern practice, simply some minimum which a Defendant needs so as to be able to plead. It is intended to supply an outline of the case advanced, sufficient to enable a reasonable degree of pre- trial briefing and preparation. Discovery and interrogatories are only an adjunct, not a substitute for pleading.
>
> …What is required is an assessment based on the principle that a pleading must, in the individual circumstances of the case, state the issue and inform the opposite party of the case to be met. As so often is the case in procedural matters, in the end a common-sense and balanced judgment based on experience as to how cases are prepared and trials work is required. It is not an area for mechanical approaches or pedantry.

[9] In *Manukau Golf Club v Shoye Venture Ltd,* in relation to affirmative defences, the Court of Appeal said:[10]

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7 Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) [*McGechan*] at [5.48.01].

8 *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 18.

9 At 19 (emphasis added).

10 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZCA 154, (2012) 21 PRNZ 235 at [21]–[22]. The substantive point was noted, without comment, by the Supreme Court in a decision overturning the Court of Appeal's decision not to award costs without giving reasons at *Manukau*

> A defence that relies on material outside the admission and denial of the facts alleged by a plaintiff in a statement of claim is known as an affirmative defence.[11] Under r 5.48(4) of the High Court Rules it must be pleaded. A duty is then placed on the plaintiff to file a reply.[12] The need to plead an affirmative defence was considered by this Court in *James v Wellington City*[13] where Buckley LJ's statement in *Re Robinson Settlement*[14] was quoted:
>
> > The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy.
>
> There are good reasons for the requirement of pleading an affirmative defence. The whole purpose of pleadings is fully and fairly to inform the opposite parties of the claims or defences they face. If an affirmative defence is not pleaded in the statement of defence, a plaintiff will have no notice of it and not be able to answer it. Further, if there is no pleading setting out the nature of the affirmative defence, there is nothing defining the issue so it can be properly understood and determined by the Court. The need for any affirmative defences to be pleaded applies no less to a defended summary judgment than to a trial. Only if such affirmative defences are pleaded can they be defined, answered and properly analysed. It is possible for an affirmative defence that has not been pleaded to arise and be considered in the course of a hearing, but only if leave is granted to amend and add that defence.

[10] The Court held it would be unfair, and a breach of natural justice, to enter judgment against the plaintiff without it having notice of a particular point and an opportunity to call evidence and make submissions.[15]

[11] In *Lee v New Korea Herald Ltd,* in a defamation context, Heath J noted "[p]leadings in defamation proceedings retain a more formal character than generally applies in other civil proceedings" and "a Statement of Defence must plead explicitly any affirmative defence".[16] The plaintiffs took the point in closing submissions that

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Golf Club Inc v Shoye Venture Ltd [2012] NZSC 109, [2013] 1 NZLR 305 at [11].

11 *McGechan,* above note 7, at [HR5.48.15(1)].

12 High Court Rules, rr 5.62–5.63.

13 *James v Wellington City* [1972] NZLR 978 at 982.

14 *Re Robinson's Settlement* [1912] 1 Ch 717 (CA) at 728.

15 *Manukau Golf Club Inc v Shoye Venture Ltd,* above n 10, at [28].

16 *Lee v The New Korea Herald Ltd* HC Auckland, CIV-2008-404-5072, 9 November 2010 at [36] and [39].

there was no positive pleading of the defences of truth or honest opinion and no issue of qualified privilege was raised.[17] Heath J stated:[18]

> While I might be entitled to put to one side issues of truth, honest opinion, and qualified privilege, given the absence of a proper pleading, I consider the preferable approach is to ascertain whether those defences are made out. That approach has the advantage of ensuring that any award of damages made in favour of Mr Lee is not based on allegations of defamatory statements to which Mr Yoo could properly have raised the defences of truth and honest opinion.

[12] The Court of Appeal ultimately remitted the claim to the High Court for rehearing on finding the defendant had not had the opportunity to put his defence. It did not mention this point.[19]

The "law" of self-represented litigants

[13] Speaking extra-judicially, the Hon Helen Winkelmann has said "the growing levels of unrepresented litigants are a challenge to the functioning of [our system of justice]."[20] She said "Judges regard themselves as under a duty to do what they can to ensure that the unrepresented party understands what is going on in court and has a good and fair opportunity to present their case."[21] She pointed to the risk that that will lead a judge to become an effective participant in the dispute.[22] Similarly, extra-judicially, Venning J, as Chief Judge of the High Court, has said:[23]

> While the overriding obligation of the Judge is to provide a fair trial, in doing so the Judge must maintain his or her impartiality. A Judge should not give the unrepresented litigant a positive advantage, nor should he or she give them legal advice or effectively conduct their case for them.[24]

[14] In *Fahey v R,* in a criminal context, the Court of Appeal has recently said of self-represented defendants:[25]

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17 At [41].
18 At [42].
19 *Kim v Lee* [2012] NZCA 600, (2012) 21 PRNZ 395.
20 Helen Winkelmann, Chief High Court Judge "Access to Justice – Who Needs Lawyers?" (Ethel Benjamin Address, Dunedin, 7 November 2014) at 7.
21 At 9-10.
22 At 10.
23 Geoffrey Venning, Chief High Court Judge "Access to Justice – A Constant Quest" (Address to New Zealand Bar Association Conference, Napier, 7 August 2015) at 5.
24 *Tomasevic v Travaglini* [2007] VSC 337, (2007) 17 VR 100; *Reisner v Bratt* [2004] NSWCA 22.
25 *Fahey v R* [2017] NZCA 596 at [50]–[51] (footnotes omitted, except for *R v Jaser).*

> [50] A trial court owes a number of obligations to a self-represented defendant. It must:
>
> (a) Explain the rights to legal representation and to legal aid, satisfy itself that the defendant fully understands them, and provide an opportunity to exercise those rights.
>
> (b) Explain the trial process and the rights that it affords the defendant.
>
> (c) Explain the rules of evidence as necessary.
>
> (d) Intervene as necessary to ensure overall fairness to each side. This may include offering the defendant a degree of guidance in, for example, articulating what the defence is or putting questions to witnesses.
>
> (e) Put to the jury in detail appropriate to the circumstances any defence available in law, whether or not the defendant has advanced it.
>
> [51] Of course the court's power to assist is limited, for it must always be and appear impartial. As it was put in *R v Jaser*:[26]
>
> > [32] The practical difficulty that emerges … is that the trial judge has a duty to assist the self-represented accused, in order to ensure a fair trial, but the trial judge must also remain neutral and cannot intervene in the active ways that defence counsel can intervene, such as by taking over cross-examinations and by providing strategic advice.

The procedural context

Commencement of proceedings

[15] This proceeding was commenced by the plaintiffs filing a statement of claim and an application for an interim injunction on 20 August 2015. The Statement of Claim included a reference to Mr Brett having asserted, when earlier plaintiffs asked him to cease and desist defamation on 14 November 2012, that the statements he had published "were true information"; or alternatively, were "protected by qualified privileged".[27]

[16] Mr Brett filed a Statement of Defence on 25 August 2015, saying (only):

> The alleged defamation comprises verifiable factual material, and justifiable opinion, and that it is strongly in the public interest for this material to remain

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26 *R v Jaser* 2014 ONSC 2277.

27 Statement of Claim dated 19 August 2015, at [21].

available. For this reason I contend that the Court should decline the Interlocutory Application by Plaintiffs on notice for an Interim Injunction.

An Affidavit setting out my reasons for this has also been filed.

[17] One of the 10 paragraphs in the affidavit filed the same day included, relevantly:[28]

> The Low Volume Vehicle Technical Association and its CEO Mr Anthony Peter Johnson have a privileged role in ensuring the safety of Low Volume Vehicles in New Zealand. As such they cannot be expected to be sheltered from public scrutiny and debate.
>
> a The LVVTA and Mr Johnson are in a position of power and can adversely affect the legitimate activities and livelihood of people in the Automotive Industry. There are a number of examples where that power has been unreasonably exercised and those who have suffered have no recourse other than to sue the Government.
>
> b Having such a powerful agency able to suppress comment, both good and bad because it does not like the comment is seen as a derogation of the basic right that all people should have available to hold oppressive bureaucracies to account for their actions.
>
> c Closing down or restricting the website removes the only avenue available for views to be expressed, and for people to show that they are not alone when fighting for fairness within the New Zealand Society.

Amendments to pleadings

[18] In a further affidavit, dated 26 November 2015, in response to the application for an interim injunction Mr Brett stated:[29]

> 3 The required test for the issue of the injunction is not whether the plaintiffs consider that the statements are defamatory of them, but whether the statements exceed the rights of the defendant under the New Zealand Bill of Rights Act 1990, clause 3(b) "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".
>
> …
>
> 7 I need to point out that as a Registered Engineering Associate I am required to abide by a Code of Ethics (see appendix 2) which requires me to, amongst other things, to,

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[28] Affidavit of John Brett dated 24 August 2015 at [7].

[29] Affidavit of John Brett dated 26 November 2015 at [3], [7] (emphasis in the original).

a. in Clause 3: "**Not be involved in illegal, dishonourable, improper and objectionable practices."**

b. And in Clause 6: **Uphold the public interest, especially in matters of health and safety and the protection of life and the well-being of the community.**

c. From this, I believe that I have a public duty to speak up about aspects of the Low Volume Vehicle Certification process, which I believe falls well below the standards expected of New Zealanders of such public bodies, and indeed endangers lives and negatively affects many New Zealand businesses.

[19] On 14 December 2015, Woolford J issued judgment declining the plaintiff's application for an interim injunction on the basis of an undertaking by Mr Brett.[30] He recorded Mr Brett's assurance to the plaintiffs and the Court "that none of the statements complained of will reappear at any future time and that any further postings will abide scrupulously to acceptable criticism permitted by the New Zealand Bill of Rights Act".[31]

[20] On 21 December 2015, the plaintiffs served a notice requiring further and better particulars of the Statement of Defence, including "for which of those statements does the defendant assert the defence of qualified privilege pursuant to section 16 of the Act?".[32] Mr Brett's response on 26 January 2016 included this statement (repeatedly):

> **QUALIFIED PRIVILEDGE** [sic]
>
> All the above statements are I believe defensible as Qualified Privilege, in that I cannot in conscience allow a dangerous system to continue without scrutiny.

[21] On 6 July 2016, the plaintiffs filed an Amended Statement of Claim which retained the reference to qualified privilege that was in the first Statement of Claim, as noted above. In response, on 12 August 2016, Mr Brett filed a more comprehensive Amended Statement of Defence dated 29 July 2016 stating, relevantly:

> **FREEDOM OF SPEECH – LVVTA AND MR JOHNSON**
>
> …

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30 *Low Volume Vehicle Technical Association v Johnson* [2015] NZHC 3039.

31 At [42].

32 Plaintiffs' Notice requiring further and better particulars of Statement of Defence, 17 December 2015, at [1](c), [2](c), [3](c), [4](c)

6 The LVVTA and Mr Johnson as an employee or contractor to the LVVTA are clearly included under clause 3(b) of the New Zealand Bill of Rights Act 1990 as- "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".

7 The required test for the issue of Defamation in this case is not whether the plaintiffs consider that the statements are defamatory of them, but whether the statements exceed the rights of the defendant under the New Zealand Bill of Rights Act 1990, clause 3(b) "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".

…

ALLEGED PUBLICATION OF UNTRUE AND DEFAMATORY STATEMENTS

16 In all cases I believe I am justified by defences of truth, honest opinion and qualified privilege.

…

STATEMENTS OF CLAIM- The Plaintiff claims:

…

21 My responses to the above:

…

c. QUALIFIED PRIVILEDGE [sic] **ITEMS**

All the above statements are I believe defensible as Qualified Privilege, in that I cannot in conscience allow a dangerous system to continue without scrutiny.

[this was repeated]

FREE SPEECH

34 I am proud to be a citizen of a country which espouses the right to free speech in the Bill of Rights, unlike other countries where any criticism of the Government or its agencies can result in intimidation, arrest, imprisonment or seizure of assets.

…

37 For the right to free speech to cost a citizen his solvency, his home, and his retirement are not really a right to free speech. Such a situation is a licence for malpractice of all kinds by Governmental agencies and employees to be concealed by threats of unaffordable Defamation action.

First case management conference

[22] Before the first case management conference, on 17 August 2016, the plaintiffs filed a memorandum complaining Mr Brett's Statement of Defence of 29 July 2016 was "highly defective" and "a wide-ranging amalgam of submission, supposition and claimed evidential matters", stating:[33]

> Recognising that the defendant is a lay litigant, counsel of perfection is not sought here. However, in order for this litigation to progress on even a relatively ordered basis, it is necessary to know which of the specific issues actually being taken by the plaintiffs are accepted, and which are denied – and, if the latter, on what basis. This is, of course, one of the fundamental purposes that a party's pleadings should serve.

[23] The plaintiffs requested Mr Brett be directed to amend his statement of defence. Mr Brett responded by memorandum on 24 August 2014 saying, in support of the proposition the proceeding should be "struck off" under r 15.1(a):[34]

> As a layman, it appears to me that the plaintiff's case has no chance of success, as it strikes at the freedom to comment under the Bill of Rights 1990:
>
> (a) Freedom of expression,
>
> (b) Freedom to criticise the legislative, executive, or judicial branches of the Government of New Zealand; and
>
> (c) Freedom to criticise any persons or body in the performance of any public function, power, or duty conferred or imposed on that persons or body by or pursuant to law.

[24] At the case management conference on 1 September 2016, Associate Judge Christiansen issued a minute stating:[35]

> [6] …The plaintiffs complain that in breach of Rule 5.48 Mr Brett does not by his statement of defence admit or deny each of the allegations made by the plaintiffs. Rather, they say his document is a wide-ranging amalgam of submission, supposition and claimed evidential matters.
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> …
>
> [22] In the course of discussion it was agreed Mr Brett would file an amended statement of defence. As was explained to him it is important that

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33 Plaintiffs' memorandum dated 17 August 2016 at [8].

34 Defendant's memorandum dated 25 August 2016 at [26].

35 *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").

> he addresses paragraph by paragraph each of those assertions contained in the statement of claim.
>
> [23] Mr Brett agreed to do this and to file an [amended] statement of defence by 16 September 2016.

Final Statement of Defence

[25] In his amended and ultimate Statement of Defence filed on 14 September 2016, Mr Brett repeated paragraphs 6 and 7 of his earlier Statement of Defence, quoted above, and expanded on paragraph 7 by adding:[36]

> a. There has been widespread concern about the manner in which the Low Volume Vehicle System is being operated
>
> b. This has resulted in a Ministerial directive to carry out an independent review, and Standards NZ were contracted to carry out Stage 1 which was a targeted questionnaire.
>
> c. The New Zealand Transport Agency is now involved in the Vehicle Certification activities of the LVVTA, and making substantial changes similar to what I and others have been advocating. **SCHEDULE C** is the latest update from the NZTA.
>
> The operation and management of the LVVTA, and Mr Johnson's role, must be seen as a legitimate subject for discussion and comment.

[26] The five paragraphs of the Statement of Defence that had previously made generic pleadings regarding all statements under the heading "Alleged Publication of Untrue and Defamatory Statements" were, as directed, replaced by a paragraph-by-paragraph response to the specific pleadings in the Statement of Claim. Consequently the explicit reference to qualified privilege was omitted.

[27] In addition, however, in response to each of the two causes of action in defamation, the Statement of Defence stated:[37]

> The statements pleaded above, that are allegedly untrue and defamatory of [each plaintiff] are not so because:
>
> a. Factual material can be supported with evidence.
>
> b. Honest Opinion is justifiable as genuine, and not even malicious.

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36 Statement of Defence dated 13 September 2016 (emphasis in the original).
37 At [53] and [58].

> c. The defendant is subject to Clause 3 of the New Zealand Bill of Rights Act as a 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.

[28] In addition, in relation to each cause of action in defamation, the Statement of Defence stated:[38]

> **The Defendant claims that:**
>
> …
>
> The [plaintiffs] cannot be protected by any injunction, any more than any other body carrying out a Public Function.

Further developments

[29] In his further memorandum of 9 November 2016, Mr Brett repeated his 24 August 2016 statement about the Bill of Rights and also said:

> 16 The plaintiff appears to be trying to stifle discussion on a matter of public interest and a matter of road safety, in order to protect his position. This action also casts a shadow over all the other people who are afraid to speak out publicly on this issue, for fear of reprisals from Mr Johnson.

[30] In a minute of 14 December 2016, Associate Judge Christiansen recorded Mr Brett as saying, in a memorandum of 9 December 2016, "the plaintiffs have failed to describe any legal basis on which Mr Brett's comments about the quality of the first plaintiff's certification system amounts to defamation" because the plaintiffs "overlook the reference in the judgment of Woolford J to 'the rights of freedom of expression'".[39]

[31] In a memorandum of 2 February 2017, in maintaining the proposition the proceeding should be struck out, Mr Brett stated: "As a layman, it appears to me that the plaintiff's case has no chance of success, as it strike as [sic] the freedom to comment under Clauses 3 and 14 of the Bill of Rights 1990 and appears to be a test case to the validity of the legislation."[40]

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38 After [55] and [59].

39 *Low Volume Vehicle Technical Association Incorporated v Brett* HC Auckland CIV-2015-404-1925, 14 December 2016 ("Case Manage Conference Minute of Associate Judge Christiansen) at [3].

40 Defendant's memorandum dated 2 February 2017, at [24].

[32] On 7 March 2017, the close of pleadings date was set as 5 May 2017. On 5 May 2017, the plaintiffs filed a further Amended Statement of Claim. The defendant did not plead in response to that and proceeded to trial on the basis of the Amended Statement of Defence dated 13 September 2016. The plaintiffs did not take any point in relation to that before or at the hearing or in its application for recall, though they noted it in the latter.[41]

Submissions and hearing

[33] Mr Brett's affidavit of 14 June 2017, filed on 23 June for the substantive hearing, provided evidence of the Engineering Associates Code of Conduct that his affidavit of 26 November 2015 had given as the basis for his public duty to criticism the LVV certification process.[42] The affidavit was a mixture of evidence, pleadings and submission. It included headings that suggested it was responding to the Amendment Statement of Claim. It included the following statements:

> **Part 2 OF THE SECOND AMENDED STATEMENT OF CLAIM: ALLEGED PUBLICATION OF UNTRUE AND DEFAMATORY STATEMENTS**
>
> …
>
> 77 In all cases, I claim that I have the protection of qualified privilege for all statements that I am alleged to have made.
>
> …
>
> **ALLEGED FURTHER PUBLICATION OF UNTRUE AND DEFAMATORY STATEMENTS**
>
> 94 Clause 51(b) of the Claimants Second Amended Statement of Claim includes a statement which I made about my intentions in pointing out dangers in the LVV System.
>
> …
>
> b In any case I also claim the defence of Qualified Privilege as I considered it to be my duty to point out dangers to the motoring public based on my knowledge.
>
> …
>
> **AUTHORITIES**

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41 Plaintiffs' memorandum of counsel dated 22 November 2017, at [5](f) and fn 2.

42 Affidavit of John Brett dated 14 June 2017, at [13].

110 I rely on the following:

a New Zealand Bill of Rights Act 1990

b Lange v Atkinson and Another Court of Appeal 1998 4BHRC 573

c Lange v Atkinson, Judicial Committee 1999 1 NZLR

d Lange v Atkinson Court of Appeal 21 June 2000, 3 NZLR

e APN New Zealand Limited v Simunovich Fisheries, and PETER JOHN SIMUNOVICH and VAUGHAN HILTON WILKINSON, Supreme Court of NZ, SC 69/2008, [2009] NZSC 93

[34] In the plaintiffs' synopsis of opening submissions of Thursday 27 July 2017, the extent of Mr MacKenzie's submissions for the plaintiffs about the defences of truth, honest opinion and qualified privilege were:[43]

> As to the defamation causes of action, it is submitted that Mr Brett has not seriously raised any defence to same. Mr Brett's statement of defence at various points refers to defences of truth, honest opinion and qualified privilege, but without giving any particulars of same. He also relies on the New Zealand Bill of Rights Act in which he appears to say he is protected by freedom of speech.
>
> It will be submitted that Mr Brett cannot simply baldly assert reliance upon these defences. Nor can he try to hide behind a protection of the New Zealand Bill of Rights Act. While that Act does give freedom of speech, it is not a licence to defame.

[35] In his written submissions dated 27 July 2017 Mr Brett stated:[44]

> 34. Defamation Act 1992 – the second available defence is "Honest Opinion". I have indicated those statements which I claim were my Honest Opinion I note that Clause 19.1 of the Defamation Act 1991 Clause 19.1 states that:
>
> > **"In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion publication."**
>
> 35. Mr Johnson appears to regard all criticism, as personal, and motivated by ill-will, regardless of how the criticism was intended. Certainly, Mr Johnson's responses were personal, and appeared to be motivated by ill-will, as have his actions and those of his staff towards me.

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43 At [40]–[41].

44 Emphasis in the original.

36. I maintain that my criticisms of the Low Volume Vehicle System and people in that system were always motivated by

(a) A genuine concern for public safety and creation of a healthy Low Volume Vehicle Certification system

(b) a genuine concern for clients whose businesses have been destroyed or harmed by Mr Johnson and the LVVTA

(c) that my technical criticisms are based on a lifetime of relevant mechanical engineering training and practice and in fact constitute EXPERT OPINION.

(d) I provide evidence of my lifetime of relevant mechanical engineering training and practice in my Affidavit, in Clauses 1 to 13, and associated exhibits JB 1 to JB9

37. I maintain that the occasions of publishing was appropriate to the content, being on a website targeting people with an interest in the subject of Low Volume Vehicles.

…

43. In the Court of Appeal of New Zealand CA52/97 between D R Lange appellant, and JB Atkinson First respondent and Australian Consolidated Press Second respondent, the Court came to this conclusion:

(a) *Political statements may be protected by qualified privilege* Our consideration of the development of the law leads us to the following conclusions about the defence of qualified privilege as it applies to political statements which are published generally;

(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.

44. My first comment- The law makes no distinction between political statements and any other statements. Only the NZ Bill of Rights Act 1990 states that "This Bill of Rights applies only to acts done-

(a) By the legislative, executive, or judicial branches of the Government of New Zealand, or

(b) By any person or body in the performance of any public function, power, or duty imposed on that person or body by or pursuant to law"

45. My second comment- The case before the Court of Appeal was about political statements. The ruling consequently related to political statements. In no way does the court suggest that political statements are in some way a special case, and subject to different treatment to other statements with regard to qualified privilege.

…

Summary

52. The law in New Zealand is clear in favour freedom to criticise by any person or body in the performance of any public function, power, or duty conferred on imposed on that person or body by or pursuant to law.

53. The defence of "Qualified Privilege" has been debated extensively in cases I have references:

(a) Lange vs Atkinson and Another, Court of Appeal 1998 4NBHRC573

(b) Lange v Atkinson, Judicial Committee 199 1 NZLR

(c) Lange v Atkinson Court of Appeal 21 June 2000, 3 NZLR

…

[36] At the hearing, at the outset of Mr Brett's evidence-in-chief, I clarified with him, and he agreed, that some paragraphs of his affidavit would not be part of his evidence and were now part of his submissions.[45] In the course of giving his evidence by going through his affidavit, Mr Brett got to his points about qualified privilege and asked me "[w]hen I'm stating my defence as a qualified privilege and so forth, am I veering from giving an affidavit? I am…well..".[46] I said that was stated in his submissions.

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45 Transcript at 21/lines 3-7.

46 At 23/lines 27-33.

[37] In his closing submissions of Monday 31 July 2017, Mr Brett stated:

> 14. The Law in New Zealand is clear in favouring freedom to criticise 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
>
> 15. The defence of "Qualified Privilege" has been debated extensively in cases I have references:
>
> (a) Lange vs Atkinson and Another, Court of Appeal 1998 FBHRC573
>
> (b) Lange v Atkinson, Judicial Committee 199 1 NZLR
>
> (c) Lange v Atkinson Court of Appeal 21 June 2000, 3 NZLR

[38] On Tuesday 1 August 2017, the second and last day of trial, in the plaintiffs' written closing submissions, the extent of the response to Mr Brett's defences was:

> It is submitted also that Mr Brett has not raised any defence to these defamatory statements. To the extent that he relies upon a mixture of truth, honest opinion, qualified privilege and/or reliance upon the New Zealand Bill of Rights Act, he is completely misguided. He has not raised any points that could form the basis for an affirmative defence on any of these grounds. He has not done so because he cannot.[47] There is not a shred of truth or honest opinion about these statements. Nor did he ever seek to justify his so called honest opinions. In short, his statements do not accord with reality.

[39] In closing, in response to my request for a response on the Bill of Rights points being made by Mr Brett, Mr MacKenzie said:[48]

> … And in my submission [the NZBORA] doesn't have any effect and the reason why is because Mr Brett is trying to rely on his freedom of expression under the Bill of Rights Act, which he is perfectly entitled and the LVVTA does not… the plaintiffs don't object to that in any way. What they do object to is that freedom of speech isn't a licence to defame, so you have to – you have freedom of speech but if you're going to say things, they have to be sure or your honest opinion or you've got a qualified privilege or absolute privilege to make those statements. So to the extent the Bill of Rights applies to the LVVTA; they're not trying to curb Mr Brett's freedom of expression in any way. They're simply just wanting to ensure that he does have the freedom of expression, but that he doesn't abuse that. And the Defamation Act is just an accepted limit on freedom of speech.
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> …

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47 Mr Brett accepted under cross-examination one of the more egregious statements he made, referring to Mr Johnson as a perjurer, was false (footnote in the original).

48 Transcript at 69–70 and 81.

> He just boldly asserted truth, honest opinion, qualified privilege, Bill of Rights Act and yesterday added in another one under the Protected Disclosures Act, which was new. So there's nothing behind any of that, Sir.

[40] In his closing submissions, Mr Brett said:[49]

> Okay. And in summary I've discussed the law and I've said, "The law in New Zealand is clear in favouring freedom to criticise by any person or body in the performance of any public function." That is under the Bill of Rights.

Judgment

[41] On 20 November 2017, I issued judgment in this proceeding.[50] I held Mr Brett was liable in defamation to Mr Tony Johnson, the second plaintiff, but Mr Brett succeeded in a defence of qualified privilege in respect of the LVVTA itself. I expressed surprise 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 Defamation Act 1992 (the Act).[51] I made the following comments about the hearing, submissions and pleadings:

> *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

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49 At 108.
50 Substantive judgment, above n 1.
51 At [5], [31] and [76].

> 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.[52] 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.

Application for recall

[42] On 22 November 2017, the plaintiffs applied for orders recalling those parts of the judgment which held the defamatory statements published by Mr Brett about the LVVTA were protected by the defence of qualified privilege.

Submissions

Plaintiffs' submissions

[43] Mr Gordon, for the plaintiffs, submits the defence of qualified privilege was not pleaded by Mr Brett and the LVVTA did not have the opportunity to respond properly to the defence. He submits the procedural history of the case showed qualified privilege was not a live issue because Mr Brett's initial pleading of qualified privilege on 26 January 2016 and 1 July 2016 was defective and it was removed from his second amended Statement of Defence of 12 September 2016. Consequently, he

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52 Statements 5, 8, 10, 11, 13, 19, 20, 22, 32, 33, 34.

submits, the plaintiffs prepared for trial on the basis that defence was no longer in issue.

[44] Mr Gordon respectfully submits it was therefore not "surprising" that the plaintiffs did not reply to a non-existent ground of defence and it was a little unfair to criticise counsel for "offering no substantive analysis of the content of qualified privilege or why it is not available".[53] He submits Mr Brett's subsequent invocation of the qualified privilege in his brief of evidence served on 9 June 2016 and his written opening submissions on the afternoon of the first day of trial on 31 July 2017, were bald and completely unparticularised and it can hardly be said there was adequate time to offer substantive analysis of it. He cites r 5.48 of the High Court Rules 2016, *McGechan on Procedure,* and case law to the effect that an affirmative defence must be pleaded with proper particularity.

[45] Mr Gordon accepts that Mr Brett was unrepresented and, as a lay litigant, it was appropriate that he be afforded some leeway by the Court. However, he submits the leeway allowed here caused the LVVTA to be doubly prejudiced, in preparing its case on the basis qualified privilege was no longer in issue and in losing the opportunity to rebut the defence, including under s 19 of the Act. Accordingly, the plaintiff applies for the judgment be recalled. Mr Gordon submits either the case should be determined on the basis pleaded or the LVVTA should be afforded the opportunity to respond to a properly pleaded claim of qualified privilege.

Defendant's submissions

[46] Due to being overseas, Mr Brett was unable to respond until 10 December 2017. He apologises to the Court for the many failings in his various documents, including pleadings. He states he did not claim to be a lawyer or to be otherwise familiar with the legal precedents and requirements quoted by the plaintiffs' counsel. He says he was representing himself out of financial necessity, as a retired pensioner. Mr Brett submits:

> I can point out that the claim for Qualified Privilege under section 3 of the Bill of Rights Act has continually been brought to the attention of the Court, and

[53] At [82].

> that of Counsel for the Plaintiff, at every opportunity. It should therefore have been apparent to Counsel that this was likely to be a defining issue.

[47] Mr Brett submits he would be able to present an effective defence to a claim by the plaintiff that his published statements were motivated by ill will, as his statements were, in all cases, motivated by professional concern about the LVV system. Mr Brett also takes issue with my finding that the defence of qualified privilege does not apply to Mr Johnson and, if the judgment is recalled, seeks to have the opportunity to argue that. He indicates he would be guided by the Court as to whether to make a separate application for recall in relation to that.

Should the judgment be recalled?

[48] I would be open to recalling the substantive judgment if I considered some very special reason for justice requires it. A mistake as to the basis on which the case was pleaded, about which the plaintiffs were criticised and subject to an adverse ruling on a material point, could constitute such a reason. However, I do not consider that has happened here.

[49] The key point in the judgment that bears on the substantive reasons for recall was this:[54]

> 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.

[50] I do not consider that approach to dealing with a self-represented litigant in the technically complex arena of defamation law is wrong or crosses the line of impartiality. I consider it is part of ensuring the self-represented litigant has a fair trial. It is consistent with the Court of Appeal's endorsement of the obligation of the Court to put to a jury in a criminal trial any defence available in law, whether or not the defendant has advanced it.[55] Although this was not a criminal matter, the interests of a defendant facing a claim of $500,000 damages are similarly engaged. In those

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54 Substantive judgment, above n 1, at [30]

55 *Fahey v R,* above note 25, at [50](e).

circumstances, dealing with substance rather than legal form is in the interests of justice.

[51] If, nevertheless, the plaintiffs had had no notice of the defence, no opportunity to respond to it and suffered as a result, they would have legitimate cause for complaint. My initial reaction to reading Mr Gordon's submissions was concern that may have occurred.

[52] However, on reviewing the procedural history outlined above, I consider the plaintiffs' lawyers were squarely on notice about Mr Brett's defence of qualified privilege. As explained in the substantive judgment, the substance of qualified privilege as a defence is that a defendant has a duty to make a communication.[56] That was extended in relation to political statements in the *Lange v Atkinson* litigation, with reference to the public interest in the functioning of government and performance of those elected to public office.[57] The label and the substance of the defence of qualified privilege were raised before proceedings commenced, in Mr Brett's initial pleadings, in his affidavits and in his opening and closing written submissions.

[53] The defence of qualified privilege was explicit in Mr Brett's statement of defence until he amended it, in response to the plaintiffs' complaints and at the direction of Associate Judge Christiansen, to address the statement of claim paragraph-by-paragraph. In doing so, the references to freedom of speech were retained but the generic explicit invocation of qualified privilege was replaced by paragraph-by-paragraph pleadings. Yet the final Statement of Defence included, in response to the two causes of action in defamation, pleadings which, it is tolerably clear, were intended to raise defences, as quoted above.

[54] If it was not sufficiently clear qualified privilege was one of them, Mr Brett's affidavit of 14 June 2017, filed some five weeks before the hearing, explicitly claimed the protection of qualified privilege and three of the five cases cited were the *Lange v Atkinson* cases. Mr MacKenzie, for the plaintiffs, appears to have understood Mr Brett to be relying on qualified privilege as his written submissions of 27 July 2017

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56 Substantive judgment, above n 1, at [77], citing *Lange v Atkinson* [2998] 3 NZLR 424 (CA).
57 At [78]–[79]

identified that but dismissed it. Most comprehensively, Mr Brett's written opening submissions of 27 July 2017 contained an explicit invocation of the defence of qualified privilege with a creditable attempt at analysis of case law and a submission about its extension. The submissions even explicitly anticipated, and rebutted, arguments of ill will in response to his claim of qualified privilege.[58] Mr Brett's closing submissions of 31 July 2017 further explicitly invoked the defence of qualified privilege. Mr MacKenzie's written submissions of 1 August 2017 submitted Mr Brett was misguided and had not raised any points that could form the basis for an affirmative defence on the ground of truth, honest opinion, qualified privilege and/or reliance upon the Bill of Rights.

[55] I do not consider a self-represented litigation can be expected to be able to plead defences to defamation suits in the legally correct forms. But Mr Brett is correct that the claim for qualified privilege had continually been brought to the attention of the Court and counsel for the plaintiffs. His intention to argue qualified privilege was clear in substance before the commencement of the proceeding, before the trial and was crystal clear during the trial.

[56] It was essentially a point of law that the plaintiffs had to meet. They did not meet it. On reviewing the procedural history in detail, I hold to the view expressed in the substantive judgment that the plaintiffs were dismissive of all Mr Brett's defences and did not engage with the legal issues involved in the application of the defence of qualified privilege.[59] In terms of the Court of Appeal's guidance in *Price Waterhouse,* in the circumstances of this claim the statements in the pleadings, read in the context of the rest of procedural history, stated a clear issue and informed the plaintiffs of the case to be met.

[57] The plaintiffs' lawyers did not take any point about the pleadings in this respect, before or during the hearing. They had taken other points about the pleadings, the response to one of which may have been responsible for the explicit invocation of qualified privilege dropping out of the final statement of defence. They submit, consequently, they prepared for trial on the basis that defence was no longer in issue.

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58 At [34]–[36].
59 Substantive judgment, above n 1, at [31].

Yet the plaintiffs' opening and closing submissions acknowledged Mr Brett was relying on qualified privileged, as he clearly was.

[58] I decline to recall the judgment to deprive the self-represented defendant of the defence of qualified privilege or to allow the plaintiffs to reopen the hearing to argue a pleadings point they did not take when the substance and label of the defence was squarely before them and the Court.

Result

[59] I decline the application for recall.

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Palmer J