

GOOGLE REVIEWS - QUALIFIED PRIVILEGE DEFENCE UPHELD IN DEFAMATION CLAIM

AUSTRALIA COMPLEX COMMERCIAL LITIGATION AND DISPUTES ALERT

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The Victorian Supreme Court (the Court) recently upheld a statutory qualified privilege defence in novel circumstances. The defence was applied in respect of what were otherwise found to be defamatory Google reviews. This was so despite courts historically being reluctant to apply the qualified privilege defence to publications made to the world at large, due to the inherent difficulties in establishing that all readers of mass publications have an interest in the matters the subject of the publication.

Srecko and David Lorbek v Peter King [2022] VSC 218 (Lorbek v King) demonstrates how disgruntled customers can potentially stand by a defamatory review by invoking the statutory qualified privilege defence.

However, the decision makes clear that a reviewer should ensure they have a genuine and reasonably held belief as to the truth of the matters published. In other words, reviewers still need to "do their homework" before publishing a review to ensure that their conduct was reasonable in the circumstances.

FACTS

Lorbek Luxury Cars (LLC) sells luxury second-hand motor vehicles. Srecko Lorbek is the owner and Chief Executive Officer of LLC. David Lorbek is a senior salesperson.

Peter King purchased a 2011 Porsche Panamera from LLC for AU\$159,726, but subsequently discovered the vehicle was not roadworthy at the time of purchase. This was so despite initially receiving a roadworthy certificate after purchasing the vehicle.

Mr. King subsequently published three critical Google reviews of LLC as well as a post on the website known as *Law Answers* in respect of his dispute with LLC. Srecko and David Lorbek sued Mr. King for defamation.

Despite failing to establish his other defences to the Lorbeks' defamation claim (those being, fair comment/honest opinion, justification and contextual truth), Mr. King successfully invoked the statutory qualified privilege defence under section 30 of the *Defamation Act 2005* (Vic).

STATUTORY QUALIFIED PRIVILEGE

Unless Mr. King's publications were found to be actuated by malice, he was entitled to rely upon the statutory qualified privilege defence provided he established that:

- the recipient(s) of the publication(s) had an interest or apparent interest in having information on LLC

- the defamatory aspect of the publications was made to the recipient(s) in the course of giving them information on LLC
- his conduct in publishing each of the reviews was reasonable in the circumstances.

Did the Readers of the Reviews Have an Interest in Having Information on LLC?

The Court found the recipients did have an interest or apparent interest in receiving the information on LLC in Mr. King's reviews.

The LLC employee responsible for responding to negative Google reviews alone satisfied this criterion in the Court's view, because it was their job to address them. Unsurprisingly, customers and potential customers of LLC were also found to have an interest in receiving the information on LLC in Mr. King's reviews.

The moderator of the *Law Answers* website was also found to have an interest in receiving information on Mr. King's dispute with LLC, given it was published in response to a pre-existing thread on LLC.

The Court also found that Mr. King had proved that any defamatory aspect of his publications was made in the course of giving readers information on LLC.

Was the Conduct of Mr. King in Publishing the Defamatory Reviews Reasonable in the Circumstances?

The conduct of Mr. King in publishing the defamatory reviews was considered reasonable in the circumstances, which was perhaps best reflected by the extensive investigations he undertook in seeking to understand how he had purchased a vehicle which was not roadworthy.

He made significant enquiries in that regard, including by seeking advice on the roadworthiness of the vehicle and obtaining documentary evidence establishing that the vehicle was not roadworthy at the time of purchase.

By reference to various, non-exhaustive reasonableness considerations set out in section 30(3) of the *Defamation Act 2005* (Vic), the Court favourably held that:

- The reviews published by Mr. King were of public importance and interest because they concerned the sale of a vehicle by LLC which was not roadworthy at the time of sale
- The reviews focussed on the Lorbeks' public activities, being their involvement in LLC's business as a retailer of used luxury cars
- The statements of fact made in Mr. King's reviews were underpinned by his genuine and reasonably held belief that the Lorbeks knew that his vehicle was not roadworthy when they sold it to him
- Mr. King acted reasonably by relying on quality sources of information and advice in publishing the reviews
- LLC could have given their side of the story by responding to Mr. King's publications, as it has done in response to other negative reviews.

Were Mr. King's Reviews Actuated by Malice, Such That he Cannot Invoke the Statutory Qualified Privilege Defence?

The Lorbeks failed to establish that the dominant purpose for each of Mr. King's reviews was improper and one of malice (that is, one which seeks to injure the reputations of the Lorbeks). To the contrary, the Court found the predominant purpose underpinning those reviews was to share Mr. King's adverse customer experience with LLC.

IMPLICATIONS

The statutory qualified privilege defence ventured into somewhat "uncharted waters" in *Lorbek v King*, in that it was upheld in respect of what were otherwise considered to be defamatory Google reviews (and a post on a *Law Answers* forum). The judgment confirms that customers, potential customers and persons tasked with addressing negative reviews (be they on Google or on a social media platform) may well satisfy the interest limb of the statutory qualified privilege defence, which somewhat refines the historic view that online publications are inherently made to the world at large (which was problematic for the purposes of this defence). The viability of the defence for reviewers will instead likely be determined by the reasonableness of their conduct in publishing their [defamatory] review.

The Court's judgment can be accessed [here](#).

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