CITATION:	*Step v Stokes* [2009] NTMC 010
PARTIES:	VA'CLAV STEP v VICKI STOKES
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court Act
FILE NO(s):	20618554
DELIVERED ON:	23 April 2009
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JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

TORT – Misfeasance in Public Office – Defamation

Education Act (NT) s4

Va'clav Step v Vicki B Stokes, NT(SC) unreported, 20 May 2008, Angel J
Va'clav Step v Vicki B Stokes, NT(CA), unreported, 3 November 2008
Small v Mahony [2006] NTSC 97
Northern Territory v Mengel (1995) 185 CLR 307
Cornwall and Others v Rowan [2004] 90 SASR 269
Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50
Farquhar v Bottom [1980] 2 NSWLR 380
Capital and Counties Back v Henty [1882] 7 at App Cas 741
Adam v Ward [1917] AC309
Toogood v Spyring (1834) 149 ER 1044
Lackersteen v NTA, (1988) 92 FLR 6
Wilkes v Wood (1763) 98 R 489
Rookes v Barnard [1964] AC 1129

Gillooly, "*The Law of Defamation in Australia and New Zealand*", The Federation Press, 1998

REPRESENTATION:

Counsel:

Plaintiff:	Self
Defendant:	Mr Morris

Solicitors:

Plaintiff:	Self
Defendant:	Solicitor for the NT

Judgment category classification:	B
Judgment ID number:	[2009] NTMC 010
Number of paragraphs:	98

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20618554

[2009] NTMC 010

BETWEEN:

VA'CLAV STEP
Plaintiff

AND:

VICKI STOKES
Defendant

REASONS FOR DECISION

(Delivered 23 April 2009)

JENNY BLOKLAND CM:

Introduction and Outline of the Primary Issues Raised

1. Mr Va'clav Step ("the plaintiff") claims Ms Vicki Stokes ("the defendant") committed the tort of misfeasance in public office with malicious intent causing him an intellectual injury and loss of opportunity. Further, he alleges she defamed him. He claims a total of $30,000 damages ($20,000 for the alleged misfeasance in public office and $10,000 damages in relation to the alleged defamation). He also seeks aggravated and exemplary damages.

2. In short, the defendant was the principal of the Northern Territory Open Education Centre ("NTOEC"). The plaintiff had been studying at NTOEC in 2001 and 2002 and applied for enrolment in NTOEC in the second semester of 2003. He claims he satisfied all of the entry requirements and was "entitled to be enrolled". He says the defendant refused to enrol him at that time and that she advised him no further enrolments would be available to

him. He alleges the defendant refused to enrol him with the NTOEC in the first semester of 2004, despite the fact he "satisfied all the entry requirements, and was entitled to be enrolled". He claims the defendant's reasons for refusing his enrolment were not in accordance with criteria specified in information supplied to students and the decision was not made in accordance with the principles of "good public administration, was not justified, was unfair and unreasonable". (Particulars of Claim, paragraph 4).

3. The plaintiff alleges the defendant's decision was based on her *personal bias* against him as a result of complaints he made concerning the morality and legality of the contents of the *"Development, Relationships and Sexuality"* information book for the *Health Unit* in 2001, a subject that his daughter was studying. Further, he suggests the defendant's *personal bias* arises from the fact that he made complaints about NTOEC, in particular, that NTOEC sent study materials to his daughter that were either late or not sent at all during 2002. He alleges the defendant's refusal to enrol him constitutes the tort of *misfeasance in public office with malicious intent*.

4. His case is that as a result of the defendant's decision, he was unable to study with the NTOEC for two years, (second semester 2003 – second semester 2005). As a result, he claims he was not admitted into a course of study at Charles Darwin University because the admission requirement for Charles Darwin University was the Northern Territory Certificate of Education. He claims to have suffered an intellectual and psychological injury; further, that his academic progress was *arrested* and consequentially he lost the opportunity to obtain the Northern Territory Certificate of Education. He alleges this resulted in lost opportunity to increase his future earning capacity.

5. The defendant denies the commission of the tort of *misfeasance in public office* and denies she caused an intellectual or psychological injury to the plaintiff. In particular, the defendant denies the plaintiff satisfied all the

entry requirements and denies that there is something known as "an entitlement to be enrolled". She denies she refused to enrol the plaintiff as alleged by him, but admits she advised the plaintiff there would be no further enrolments available to him. The defendant says that her reasons for refusing the plaintiff's further enrolment were *in part* consistent with criteria specified in materials for prospective students. She asserts that other reasons for refusing his enrolment were not based on criteria specified in materials for prospective students, but her reasons were nevertheless legitimate and valid considerations in relation to the application.

6. The allegations of *bias* are denied. The defendant denies that the conditions pleaded by the plaintiff amount to an injury that entitles him to an award of damages and denies the plaintiff lost opportunity to increase his future earning capacity by reason of his failure to obtain the Northern Territory Certificate of Education.

7. In relation to the claim for defamation, the plaintiff says the defendant made defamatory statements to NTOEC staff, Northern Territory Department of Education Chief Executive Mr Peter Plummer and to the investigating officer for the Northern Territory Ombudsman. The part of the claim sourced in material that relates to the Ombudsman's Office was struck out on 13 December 2007 (that is, paragraphs 10(k), (m), (n), (o)) of the Statement of Claim: (Transcript 13 December 2007). Most of the alleged defamatory statements are sourced in letters and memos where the defendant has described certain letter(s) written by the plaintiff. For example, the defendant wrote to the plaintiff stating that one of the plaintiff's letters "constitutes an attempt to harass Ms Miles [a teacher at NTOEC] in the appropriate performance of her duties"; that the plaintiff's letter "was discriminatory in that it was offensive, abusive and belittling to Ms Miles on the basis of her performance of her required duties"; that the plaintiff's letter was "extremely unpleasant and an attempt to intimidate Ms Miles from her legitimate duties"; that it is "hypocritical" for the plaintiff to blame Ms

Miles; that certain personal comments directed to Ms Miles were of an "abusive nature"; that the plaintiff's letter constitutes "an attack on their personal and professional integrity, and as such, amount to harassment" and that as a consequence, the defendant instructed all staff that they were not to accept written correspondence from the plaintiff.

8. The complaint of defamation also relates to written advice from the defendant that personal vilification of staff, insults or threats will be referred to the Education Department's "legal officer for advice on what further protection may be sought for NTOCE staff". It is also alleged the defendant described an English assignment submitted by the plaintiff as "an obvious attack against staff". The further allegations of defamation include statements by the defendant to the effect the plaintiff was unacceptably aggressive towards her and that a public display of aggression was witnessed by a number of staff members; that the plaintiff had become "threatening and abusive towards her"; and that the defendant had sought to explain her actions as "justified because of the foreseeable risks [the plaintiff poses] to the personal and emotional wellbeing of staff".

9. The plaintiff claims he suffered distress and injury to his feelings because of the defamatory statements made by the defendant and is "afraid that the defamatory statements made by the defendant may negatively affect his interactions with the NTOEC staff, the Department of Education staff and negatively affect his academic career".

10. In general terms, the defendant admits the words identified by the plaintiff are true in substance and in fact, but argues a number of those statements were published to the plaintiff alone or were published on occasions of qualified privilege and consistent with the defendant's obligation to properly administer the NTOEC. The defendant denies stating the plaintiff was "unacceptably aggressive towards Ms Stokes, a public display that was witnessed by a number of staff members who have expressed concern about

your connection with NTOEC", alternatively if words of that nature were used, the qualified privilege is claimed. The defendant denies the distress, injury and negative consequences asserted by the plaintiff and says that the stress asserted does not amount to an actionable injury.

Evidence Concerning the Plaintiff's Personal Circumstances and His Decision to Study at NTOEC

11. Mr Step gave brief autobiographical evidence as background to the events in question. Much of it is not strictly speaking directly relevant to his claims, but it does help to explain why he was in the position of studying at NTOEC at the same time as his daughter; and in part, assists to explain why he may react to circumstances and issues in a particular way and why he feels strongly, from his perspective, about some of the materials and other matters at NTOEC he felt compelled to take some action on.

12. He told the Court he was born in Czechoslovakia (as it then was) in 1951; that when he was three months old his father was arrested by the then Communist regime in Czechoslovakia and sentenced to fifteen years imprisonment. His mother committed suicide as a result of his father's lengthy imprisonment and he was brought up by an uncle and aunt. He said this caused him emotional problems; he didn't agree with his uncle's and aunt's political views. He said for financial and other reasons they had certain sympathies with, or were members of the Communist party. He considered the Communist regime to have caused the death of his parents. He said his father spent nine years in gaol, working in uranium mines during his incarceration. His father died three months after he was released from prison from diseases attributable to imprisonment. He developed a hatred for dictatorships and made reference to objectionable practices such as placing political opponents in gaol and to censorship. One can of course readily identify with why the Defendant feels strongly about this history. He said Western Governments and the United States were presented as evil at that time in Czechoslovakia.

13. He said he was a good student until he was sixteen years of age; he explained the impact of the Russian invasion in Czechoslovakia. He said as he matured, he realised how evil the regime was and he stopped studying. He said that to progress to higher study or to a better paid job at that time, a person needed to be a member of the Communist party. He worked as a labourer; he refused national service and spent about one week in a psychiatric hospital. He was a conscientious objector and was influenced by the Bible. He decided to follow the principles of *Godly love and unselfish love of other people*. He was imprisoned himself for five months for insulting members of the Communist Party. Eventually he left Czechoslovakia and was accepted for immigration to Australia in 1979. He became an Australian citizen in 1982. He settled in Darwin as the warm weather was good for a spine ailment he had suffered from.

14. After some travel, he told the Court he lived in Darwin on the beach with his then partner, a woman from Maningrida. They had a child, (Anthea Step – who gave evidence in these proceedings), but his partner returned to Maningrida when Anthea Step was a baby. He became a single parent. He told the Court that having Anthea gave him a purpose in life, as he believes children are a gift from God. He was happy to look after her as best he could.

15. After living and working at the YMCA camp across Darwin harbour, he and his daughter travelled. This included going to Czechoslovakia for a period. They then settled in Palmerston in rented accommodation and Anthea began school in Moulden Park School. Anthea began to get sick at school and after trying different schooling options, they moved into a camp Mr Step built at Middle Arm Peninsular. After some time, Anthea was enrolled in Katherine School of the Air and Mr Step educated her at home. They tried Woodroffe School for a time, but Anthea became sick again once she was in a class environment. He enrolled her at the NTOEC from about grade 7/8. He supervised her in her studies. She could effectively be schooled at their

camp-home when studying through NTOEC, avoiding the illnesses she frequently suffered whenever she was in a school class room environment.

The Commencement of Studies by the Plaintiff at NTOEC

16. The plaintiff enrolled himself as a student at the NTOEC in 2001. He said this helped him assist Anthea as the subjects she was studying became more difficult. I was referred to the document "*Enrolment and Fees*", (Exhibit P2, Doc 6, NTOC info sheet) under the heading "*Who Enrols*", "*Adults who wish to improve their education or to take courses along with their children*" (T16, 10/12/07). Although Anthea Step was in grade 9, Mr Step enrolled as a mature age student directly into year 11.

17. The plaintiff was given information concerning the need to complete stage 1 and stage 2 units to complete years 11 and 12. (Exhibit P2 – 72B). The plaintiff completed two stage 1 units in 2001, *Bridging Science 1* and *Legal Studies* (P2, 85). In relation to the subject *English: Part 2*, the 2001 Semester 2 Report noted:

> "Va'clav is continuing in this subject and is expected to complete by 21 June 2002" and "Va'clav hasn't commenced this subject yet as he has been completing English Part 1".

The report on English Part 1 notes:

> "Va'clav is continuing in this subject and is expected to complete by 14 December 2001. You continue to demonstrate a very thoughtful and conscientious approach to this subject so I am pleased that circumstances are allowing you to finish the course. The quality and presentation of your written work is commendable and I look forward to helping you further develop your writing skills and literary appreciation".

18. Mr Step told the Court that throughout this period he was studying different units to those studied by Anthea, but he gave preference in his study time to assisting Anthea rather than concentrating on his own studies. During this period when they were both studying, he said they were having difficulties

dealing with legal issues surrounding coronial proceedings associated with the death of Anthea's mother. Anthea Step gave evidence that her father was tutoring her and supervising her in her studies. She said "he was essential in my studies, without him I wouldn't be able to study" (T192).

19. It is not disputed the defendant, Ms Vicki Stokes is an experienced teacher and school principal. At the time of the hearing of this matter, the defendant was an educational consultant. By consent, her curriculum vitae was tendered (Exhibit D29). Ms Stokes was the principal of NTOEC at the relevant time. She explained NTOEC is the provider of distance secondary education in the Northern Territory, also offering vocational and training courses. At the time she was principal, Ms Stokes said there were about 1,000 students at NTOEC per year. NTOEC offered about 2,500 units each semester and there were 60 – 70 staff members. The delivery of the education was done by written text using mail delivery and individual telephone conversations between students and teachers. Multi-media delivery was still being developed.

20. The student body comprised students who wished to undertake broader studies than their school curriculum permits; students in isolated areas, including Indigenous students on communities and adult students, in particular, defence force students and prisoners. In terms of adult students studying the same subjects as their children, Ms Stokes indicated that there had been a previous arrangement at the school allowing for enrolments on this basis. Mr Step was the only person at the school on that particular basis during her time as principal of NTOC.

21. Ms Stokes said the object of obtaining year 11 and 12 at school in the Northern Territory is to obtain the Northern Territory Certificate of Education (NTCE) as the NTCE represents completion of school – (a graduation certificate) - and with the right mix of subjects, is effectively the entrance to university. She explained that for university entrance at the

relevant time, school age students needed to complete 12 units at stage 1 and 10 units at stage 2 (of which five must be double units). This was a requirement to obtain a Tertiary Entry Rank ("TER"). She explained mature students could be given status for stage 1 subjects so they did not need to follow the same pattern. She said students in that category were required to take one humanities subject and one science subject within their five double units. Ms Stokes said that any mature student looking to the NTCE as a path to university should go straight into stage 2, as that was the quickest way to progress.

22. I find the evidence overall, (some which is discussed further in these reasons), discloses a dual motivation on the part of the plaintiff when he first enrolled, he wanted to be enrolled to assist his daughter, but also wanted to advance on his own education, especially improving his English. It is also clear as the evidence unfolded, a significant part of his intention shifted to the fulfilment of a personal goal to enter university himself. In relation to the advancement of his own skills, the plaintiff referred from the outset to be able to, in time, achieve a Northern Territory Certificate of Education (eg T 10/12/2007 17). Although assisting his daughter with her study, throughout much of the period in question, he was not actually studying alongside her, but rather taking various stage 1 subjects.

Complaints raised by the plaintiff and responses by the defendant

23. The plaintiff apparently felt very strongly about a number of educational materials and processes of NTOEC relevant to his daughter Anthea and her studies. Much of the hearing was devoted to evidence about those complaints. The plaintiff's allegation (in part) is that the defendant responded to these complaints ultimately in misfeasance of public office by refusing the plaintiff further enrolment and by responding in certain ways alleged to be defamatory.

24. There is evidence the plaintiff went to see the defendant on or about term three in 2000 about a mistake in the year 8 *Social Education* booklet concerning an international boundary noted in the materials as the Volga River. The defendant said she acknowledged to the plaintiff this boundary should have been recorded as the Ural mountains. The defendant told the plaintiff the mistake would be corrected, however, the plaintiff said the booklets would have to be recalled, destroyed, reprinted and re-issued. According to the defendant, this led to Mr Step being verbally abusive to her, including in a raised voice calling her (and she is quite open about not recalling the precise terms), either a fascist, Communist or a Nazi. The defendant said she was somewhat taken aback by this. The plaintiff is also unsure about what he actually said. He denies using the term fascist or Communist, but agrees he may have been referring to Nazi attitudes such as the Nazis, who at Nuremberg, claimed they were following orders (T 153). In any event, the plaintiff appears to accept there was an altercation over the error in the workbook and appears to accept he can be verbally aggressive. He qualifies any apparent acceptance of this in that he means no more than he forcefully puts his views (T 148-150).

25. Mr Step made a number of comments on the *"Development, Relationships and Sexuality"* study materials that were part of the health unit that Anthea Step was enrolled in. He sent these comments to Ms Rudwick, a staff member at NTOEC who brought them to the defendant's attention. In those comments the plaintiff alleges certain errors, but also alleges immorality, illegality and expresses religious opinions in relation to some of the unit content. The relevant workbook and DVD are before the Court. The DVD was played before this Court in these proceedings. For comprehension of these reasons, I set out the plaintiff's written comments:

> COMMENT NO 1 YEAR 8 HEALTH
>
> INFORMATION BOOK says: "The physical changes that occur at puberty were covered in more detail in year 8" (page 15) and "the

actual anatomy of the male and female reproductive systems was covered in year 8 Health" (page 41).

Year 9 Health Course obviously assumes that students have studied REPRODUCTIVE SYSTEMS in year 8. For example QUESTION 17 OF UNIT TEST uses word "CERVIX" – but this word was not used nor explained anywhere in year 9 Health Unit One!

My daughter hasn't done year 8 Health about REPRODUCTIVE SYSTEM because it was not offered to her.

I WANT TO KNOW WHY ANTHEA WAS NOT OFFERED YEAR 8 COURSE ABOUT REPRODUCTIVE SYSTEM BEFORE SHE WAS ASKED TO DO YEAR 9 COURSE 'DEVELOPMENT, RELATIONSHIPS AND SEXUALITY'?

COMMENT NO 2 RISK TAKING

Both myself and my daughter were distressed by video "RISK TAKING". My daughter left before it was over.

Those crazy people say that they "yell in the face of life". But no, they don't! They yell in the face of DEATH.

Even more distressing were questions asked by Ms Kate Miles: "After viewing the video, write down, in the space provided, why do you think that these people RISK DEATH (and fairly OFTEN ACHIEVE IT!). In your response tell me if it is something that YOU WOULD LIKE TO TRY …" (RESPONSE BOOK 1, PAGE 16).

Ms Miles asks 13 and 14 years old students whether they would like <u>TO ACHIEVE DEATH</u>!

This is SICK, SICK, SICK!

COMMENT NO 3 SLUTS AND STUDS

Ms Miles writes: "The terms 'SLUTS and 'STUDS' still seem to be used today". (RESPONSE BOOK 1, PAGE 21).

It is one thing that some rude students use such derogatory terms. Quite another thing is that TEACHERS use them as well.

Teachers should be moral examples to students, they should discourage students to use foul language.

Teachers should not follow rude students into the gutter of bad language!

COMMENT NO 4 CONCEPTION

The Information book says: “Conception occurs when a special female cell, the ova or egg, meets the special male cell, the sperm” (page 40).

The Response book 2 says: “One sperm finally burrows its way through and genetic information from both parents fuse. Conception has occurred” (page 6).

Both the above statements are WRONG. They describe FERTILIZATION, not conception.

“CONCEPTION is the fertilisation of an ovum by a sperm in the fallopian tube FOLLOWED BY implantation in the WOMB”.

“FERTILIZATION is the union of male and female gametes during sexual reproduction, to form a ZYGOTE”. Woman is pregnant when she is “carrying a FETUS within her womb.

(Quotations from COLLINS ENGLISH DICTIONARY, 1991 EDITION)

When a woman carries a ZYGOT, she is NOT PREGANT, she has NOT CONCEIVED. Only when zygote “becomes embedded in the lining membrane of the uterus” the conception has occurred. From that moment, zygote is called EMBRYO. (Quotation from THE FAMILY MEDICAL REFERENCE BOOK @ 1987)

NOTE: Anthea answered QUESTION 13 OF UNIT TEST according to information given in the Information book. But her answer (a) is WRONG. Correct answer is (c).

COMMENT NO 5 READINESS FOR SEX

In lesson 13 Ms Kate Miles asks repeatedly 13 and 14 years old students: “… are you ready for sex?”

Ms Miles knows about the law against sexual intercourse of people under 16 years of age; she mentions it in Information Book, page 53.

Criminal Code Division 2 of Part V deals with OFFENCES AGAINST MORALITY. These offences include SEXUAL

INTERCOURSE and gross indecency between any male or female of ANY AGE and a female UNDER 16 YEARS OF AGE, whether in public or in private. Maximum penalty: SEVEN YEARS IMPRISONMENT (s 128).

Amazingly, Ms Miles refers to this law only as "Another factor worth remembering" when she lists many reasons for and against having sex and encouraging students to decide whether they are ready for sex. (INFORMATION BOOK, PAGE 53).

Kate Miles writes to 13 and 14 years old students: "Still the question remains, are you ready for sex? Part of becoming responsible for yourself is making healthy choices about your life. This includes making choices about your sexuality". (INFORMATION BOOK PAGE 51).

Kate Miles also asks students to decide whether 15 years old girl is ready for sex. (RESPONSE BOOK 2, PAGE 13).

Kate Miles is telling students that they and 15 years old girls are free to choose an activity for which they could be PUNISHED BY IMPRISONMENT FOR SEVEN YEARS!

Kate Miles writes that if a 15 years old girl decides to go ahead with sexual relationship, her FIRST consideration would be SAFE SEX. (INFORMATION BOOK, PAGE 53).

Shouldn't that 15 years old girl be concerned in the first place about NOT TO BE CAUGHT BY THE POLICE having sex and face potential seven years in jail?

Finally, Ms Miles asks students to put ten activities related to readiness for sex in order from the most to the least harmful. She lists several possible consequences of sexual intercourse like: "catching STD", "unwanted pregnancy", reputation damaged from sex". But she totally fails to mention possible LEGAL CONSEQUENCES of sexual activity for people under 16 years of age. (RESPONSE BOOK PAGE 17).

It is obvious that Ms Miles does not take THE LAW seriously. It seems that Ms Miles thinks that the police and the courts do not ENFORCE the law against sexual intercourse of people younger 16 years.

If Ms Miles thought that there was a possibility the police and the courts would enforce this law, she would explain to the students

under 16 years of age that according to NT LAW they have only ONE CHOICE: NO SEX.

I wonder whether Ms Miles is aware of another law: "It is an offence to ENCOURAGE a child under 16 years of age to have sexual intercourse or commit, perform or engage in an act of gross indecency". Penalty: 5 years imprisonment when offender is over 18 years of age (s 131).

I am afraid that Ms Miles has come awfully close to breaking that law. She ENCOURAGES 13 and 14 years old students to CHOOSE between HAVING SEX and not having sex! The NT LAW gives no such choice!

I also wonder whether NTOEC is aware that it is also an offence TO PUBLISH AN INDECENT ARTICLE (s 125C). An indecent article is one that promotes crime or incites or instructs on matters of crime. Maximum penalty is 2 years imprisonment.

COMMENT NO 6 SAFE SEX

Ms Miles writes: "Safe sex is using protection that will prevent the spread of Sexually Transmitted Diseases" (INFORMATION BOOK, PAGE 54) and " … condoms offer protection against pregnancy and STDs …" (PAGE 59).

There are similar statements like these also on pages 55, 56 and 57.

All these statements are very misleading. Statistically condoms function properly only 95% of the times they are used. That means ONCE IN TWENTY TIMES they are used, CONDOMS FAIL for one reason or another!

Would anyone feel safe flying with an airline which planes crashed once in every 20 flights? I think that such an airline would not operate for long.

The truth is CONDOMS ARE NOT RELIABLE and should not be recommended!

Ms Miles also writes: "THE ONLY WAY of avoiding of these diseases is by obtaining from sex or using condoms every time you have sex". (INFORMATION BOOK, PAGE 55). I wonder why Ms Miles omitted THE BEST WAY of avoiding STDs – while having the best sex: Have sex only with a person you are married to and whom you can trust!

NOTE: All eight answers offered to questions 20 and 21 in UNIT TEST are WRONG – and the only RIGHT ANSWER (sex with a faithful spouse) is not offered!

COMMENT NO 7 FIVE AREAS OF HEALTH

Ms Miles lists five areas of health (INFORMATION BOOK, PAGE 6): MENTAL, SPIRITUAL, EMOTIONAL, SOCIAL AND PHYSICAL. But when Ms Miles discusses possible negative consequences of sexual activities, she is mainly concerned about physical health.

Ms Miles is a little concerned about emotional and social health but she fails totally to discuss possible influences of sexual activities on MENTAL OR SPIRITUAL HEALTH.

Humans have only LIMITED EMOTIONAL CAPACITY. People who have had a multitude of sexual partners before marriage become emotionally EXHAUSTED and then they are not capable of full emotional involvement in a marriage – and they often end up in a DIVORCE. Extramarital sex is damaging emotional health.

Extramarital sex also destroys people SOCIALLY. It breaks up families and because a family is a basis of a stable society, extramarital sex destabilises the whole nation.

Extramarital sex can lead also to MENTAL disturbances, even illnesses, depression, anxiety, jealousy and consequent murders and suicides.

But most important of all areas of health is SPIRITUAL HEALTH. (Spiritual = of invisible power). Spiritual health involves things like LOVE, JOY, PEACE, PATIENCE, KINDNESS, GOODNESS, FAITHFULLNESS, GENTLENESS AND SELF-CONTROL.

People who are involved in extramarital sexual relationships are/become SPIRITUALLY SICK.

Instead of LOVE, there is LUST and SELFISHNESS.

Instead of PEACE, there is TURMOIL.

Instead of PATIENCE, there is “I WANT IT NOW!”

Instead of KINDNESS there is HURTFULNESS.

Instead of FAITHFULNESS there is BETRAYAL.

Instead of GENTLENESS there is CALOUSNESS.

Instead of GOODNESS there is EVIL.

God intended SEX to be a BOND of two married people who love and are faithful to each other.

Extramarital sexual relationships are destructive, they cause SPIRITUAL SICKNESS which affects negatively all other areas of health.

COMMENT NO 8 RIGHT OR WRONG?

Ms Miles repeatedly tells students that there is no RIGHT OR WRONG: "There are no real right or wrong ways to deal with love!". (INFORMATION BOOK P 27) and "It should be stressed that there can be no general right or wrong …" (regarding dealing with pregnancy (INFORMATION BOOK P 63)

Ms Miles also encourages students repeatedly to decide themselves what is right or wrong – for them. She encourages students to decide whether they want to risk death, whether they want to be heterosexual or homosexual (INFO BOOK PAGE 25), whether they are ready for sex (INFO BOOK PAGE 51), whether they want to murder unborn babies or not (INFO BOOK PAGE 63).

The Bible says that the decision to decide themselves what is right and wrong, good and evil was the first CRIMINAL ACT humans committed. (GENESIS CHAPTER 3). It is also the underlying reason for all crimes.

The decision what is right and wrong morally belongs to God only.

In the Bible are revealed the laws and judgements which are relevant to subjects discussed in year 9 Health Unit 1:

1. "YOU SHALL NOT MURDER" (Exodus 20:13). This law includes SELF-MURDER and also senseless risking of life as shown in RISK TAKING video.

2. "If a man SEDUCES A VIRGIN who is not pledged to be married and sleeps with her, he must pay the bride-price, and she shall be his wife". (EXODUS 22:16)

"If a man happens to meet a VIRGIN who is not pledged to be married and rapes her and they are discovered, he shall pay the girl's father 0.6kg of silver. He must marry the girl, for he has violated her. He can never divorce her as long as he lives". (DEUTERONOMY 22:28-29).

This judgement of God is very lenient, especially if compared to Northern Territory Law against sexual intercourse of people under 16 years of age, which carries penalty of SEVEN YEARS IMPRISONMENT.

Notice however that there is no room for MULTIPLE SEXUAL EXPERIENCES outside marriage, because the first sexual intercourse establishes the marriage. And sexual intercourse of married people with other people than their spouses is called ADULTERY and the punishment for adultery is severe: "If a man commits adultery with another man's wife – with the wife of his neighbour – both the adulterer and the adulteress must be put to DEATH". (LEVITICUS 20:10). The harshness of the punishment reflects the SERIOUSNESS of the offence in God's eyes.

3. "If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their heads". (LEUITICUS 20:13). Homosexuality is a very serious offence.

4. "If men who are fighting hit a pregnant woman and she gives birth prematurely … and there is a serious injury, you are to TAKE LIFE FOR LIFE …". (EXODUS 21:22-25).

   God indicates that the life of UNBORN CHILD has the same VALUE as the life of GROWN MAN! To kill the unborn child is a serious crime. "Termination of pregnancy" (INFO BOOK PAGE 63) is MURDER!

The purpose of the above laws and judgements is to discourage people from making WRONG MORAL CHOICES and to protect the society from people who decide to make wrong choices anyway.

Even Ms Miles acknowledges that the choices she encourages young people to make can result in death, imprisonment, contracting diseases, unwanted pregnancies and consequent "terminations of pregnancies, that is murders. What a sad, sad result of WRONG CHOICES!

However, God is almighty and also merciful. He is not willing that even criminals should perish without a chance for re-education and rehabilitation (SEE COMMENT NO 9).

COMMENT NO 9 STAGES OF HUMAN DEVELOPMENT

THE INFORMATION BOOK shows ten stages of human development and growth. But the Bible reveals that there are THREE MORE STAGES than that: (INFO BOOK PAGE 9).

11. RESURRECTION: "Multitudes who sleep in the dust of the earth will awake: some to everlasting life, others to shame and everlasting contempt". (DANIEL 12:2).

    God is merciful and almighty, he will make alive again all people who ever lived – regardless of what crimes they had committed.

12. LEARNING TO LIVE GOD'S WAY: "Many motions will come and say, "come let us go up to the mountain of YAHWEH, to the house of the God of Jacob. He will teach us his ways, so that we may walk in his paths". The law will go out from Lion, the word of YAHWEH from Jerusalem. He will judge between many peoples …". (MICAH 4:2-3).

    Resurrected people will be re-educated according to the law of God. God will make sure that all people understand properly what is right or wrong.

13. THE FINAL JUDGEMENT. God will judge whether people will have made the right choices and put them into practice. People will be still free to choose. People who choose to be still disobedient to God's laws "will go away to eternal punishment" (death). The obedient will receive "eternal life". (MATTHEW 25:46)

COMMENT NO 10 THE CONCLUSION

Year 9 Health Unit 1 Development, Relationships and Sexuality is a very confused piece of work.

It contains instructions how to live unhealthy, immoral and disastrous life.

It should be discarded and the task of writing of a new year 9 Health Unit 1 should be given to a person with MORAL ATTITUDES who would encourage THE RIGHT, LEGAL AND HEALTHY CHOICES.

26. Mr Step's evidence before the Court confirmed that these comments represented his views on the materials. The defendant gave evidence that in consultation with another staff member, she referred a number of the matters raised by the plaintiff to be reviewed by the appropriate school committees. The defendant also explained that NTOEC does not offer a religious curriculum. She told the Court she had been of the view that perhaps it would have been more appropriate for Anthea Step to be at a school offering a religious curriculum. She explained a number of the comments made by the plaintiff were considered in the context of whether the booklet should be changed.

27. Mr Step wrote a letter to the teacher concerned with this unit, (Ms Kate Miles) with a copy to another teacher, Ms Christensen. This letter was referred to the defendant who decided to take certain steps to protect Ms Miles from reading the letter if she chose not to. The intercepted letter, dated 29 May 2001 from the plaintiff to Ms Miles reads as follows:

> Ms Kate Miles,
>
> I have decided that you are not a fit and proper person to be a teacher of my daughter Anthea.
>
> I have studied in detail together with Anthea the unit "Development, Relationships and Sexuality", which was authored by yourself. I have found the contents of that unit disturbingly misleading, immoral, criminal and evil; and I think that it has been so because you are disturbingly mislead, immoral, criminal and evil! It is my duty as a parent to protect my daughter from influence of people like yourself.
>
> When Anthea was sending the unit "Development, Relationships and Sexuality" to NTOEC, I attached my questions and critical comments to it. Mrs Rudwick did not respond to them, nor did anyone else. I enclose a copy of those my questions and comments so that you can

try to understand my decision that you are not fit and proper person to teach Anthea. (I doubt that you will).

When Anthea started studying unit "Drug Education" authored again by yourself, I found many teachings in it incorrect and misleading; but I will not waste my time by writing about them, as my comments have been ignored in the past. I am just informing you that Anthea will not be studying unit "Drug Education" any more, nor will she be studying anything else authored by yourself in the future.

When on 25 May 01 Anthea told you that she was not going to continue to study units authored by yourself, you argued that she had to complete a certain number of subjects to pass the year 9 level. I am informing you that Anthea does not study just to pass levels – she studies to learn correct, scientific, moral, legal and good teachings. This is obviously impossible by studying your literature.

Ms Miles, I have given to my decision to reject you as Anthea's teacher plenty time to mature and I am convinced that it is correct – whatever the consequences there might be for Anthea or myself. We will not be influenced by perverted people like you. We don't want to read or hear anything from you any more. Get out of our lives.

28. The defendant said she had never read a letter like that before; she was concerned the plaintiff was vilifying Ms Miles who was a young teacher. In an attempt to limit contact between the plaintiff and certain of the teaching staff, the defendant wrote a memo to NTOEC staff on June 5, 2001 as follows:

People

Mr Step recently sent a challenging letter to a teacher here. As Principal, I consider that the correspondence was an attempt to harass and intimidate the teacher from completion of legitimate duties. I have written to Mr Step informing him that all future correspondence from him to staff here must be directed through me. Please do NOT accept written correspondence directly from Mr Step, rather send it to me – I will ensure that any items of correspondence do not accrue in my pigeon hole, they will be vetted for offensive material and handed on (or returned to Mr Step) forthwith. I will only act on personal abusive comments, and will not be involved in any intellectual interpretations or arguments.

(DISPATCH STAFF: Please note this instruction and direct correspondence from Mr Step through me in the first instance. Work received from Anthea Step should go directly to the Faculty concerned as normal procedure, unless there is an obvious letter from Mr Step attached.)

I appreciate that this is an extraordinary process but my judgment is that such actions are justified because of the foreseeable risk to the personal and emotional wellbeing of staff.

I have also advised Mr Step that he may contact staff by telephone, but that any complaints of harassment or intimidatory behaviour will be dealt with directly and may result in a review of his enrolment in NTOEC courses. I trust your judgement in this area and request that you pass any concerns promptly to a member of senior staff.

Mr Step may take my letter as an opportunity to review his approach to staff here and hence moderate his behaviour. If that occurs I will review this instruction to staff accordingly.

Please address any concerns to me.

29. Further, the defendant wrote to the plaintiff on the same date (June 5, 2001) as follows:

Dear Mr Step

I refer to your letter of 29 May 2001, addressed to Ms Kate Miles at this Centre. You sent a copy of the letter to Assistant Principal Ms Sherrill Christensen, who showed it to me before Ms Miles received her copy. I have discussed the letter with Ms Miles, and at this stage she has decided not to read it, based on my undertaking that I would convey to you the following points:

1. As Principal of the Northern Territory Open Education Centre I consider that your letter constitutes an attempt to harass Ms Miles in the appropriate performance of her duties. I believe that your letter was discriminatory in that it was offensive, abusive and belittling to Ms Miles on the basis of her performance of her required duties. Your behaviour is unwelcome to me in that I was obliged to read the letter in the course of my duties. I found it to be extremely unpleasant and an attempt to intimidate Ms Miles from her legitimate duties, writing materials designed to meet the Northern Territory Board of Studies Approved Health curriculum.

2. Your complaints about exposing your daughter Anthea to unwelcome material are unrealistic, because as supervisor you decide which NTOEC materials are made available to Anthea. I know that you have given comprehensive consideration to the contents of the Health units that Anthea has completed, so it is entirely hypocritical for you now to blame Ms Miles for exposing Anthea to challenging ideas and concepts. As is set out in the warning at the start of the Health materials, you were free to contact the teacher Ms Rudwick at any time to discuss your concerns and you were free to withdraw Anthea from the subject at any time, as you have now done.

3. In light of the abusive nature of your personal comments directed to Ms Miles, I will oversee all future correspondence from yourself to members of this Centre's staff. In future you should address all correspondence to staff members through me, and I will decide whether to pass them on, or return them to you instead. I will be issuing an instruction to staff that they are not to receive direct correspondence from you. Anthea may continue to deal directly with her teachers, and you may continue to make telephone contact with your teachers. However if I receive reports of an intimidatory comments from you in conversations with staff, I will review your continued enrolment in NTOEC courses.

4. Ms Rudwick will consider your various comments about the Health units as part of her materials review process at the end of the unit. Where there are mistakes in fact or continuity, these will be corrected in the revised version for the next print run. We will not be including your interpretations of religious issues in the revised materials.

30. On the memo to staff, Ms Stokes said it represented her honest view of the situation as an attack on Ms Miles' professional integrity, a personal attack on her and an attempt to intimidate her. On use of the word "harass" the defendant said she meant a personal attack or attempt to upset Ms Miles. The defendant said she thought the memo necessary to prevent stress that could be avoided. She said stress was a risk she needed to deal with as the principal of NTOEC with a duty of care to staff. The defendant said that if Mr Step had not been a student she would have responded along the lines of a trespass notice and refusal to respond to his correspondence. Because he was a student and a parent of a student, Ms Stokes said it was a complicated

process to try and avoid conflict between his role as a parent and his role as a student. She said his intimidating behaviour towards staff and concerns about staff could lead her to a review of his enrolment and she wanted to give him a clear warning of that. She said her views expressed in the letter were beliefs that were honestly held.

31. Ms Stokes gave evidence of another incident in April 2002 concerning the plaintiff and late dispatches of materials. Certain materials had been delayed. It was common ground that this was an ongoing problem at NTOEC. In relation to some of the units with late materials, Ms Stokes said the plaintiff had been advised that some of those materials would not be ready until the second semester. Arrangements had been made for the plaintiff to pick up the materials from NTOEC, as the plaintiff had indicated he did not want them posted. When he came to pick them up, a staff member reported the plaintiff shouting at her. The defendant heard him shouting. When the defendant came down to attend to the plaintiff, he started shouting again and Ms Stokes says she told the plaintiff he had the dispatch; that it was "all there". She said the plaintiff was sitting down at the interview table at the time. She said he started yelling about his complaint with the dispatch and she says she tried to explain the situation to him but he just yelled, waved his hands around, said he did not want to see her and didn't accept what she was saying.

32. Ms Stokes said she obtained some further information from the English teacher concerned with the materials and went back to the plaintiff to explain that to him. He continued shouting and being abusive. She said as well as waving his arms around, he was moving objects and waving books in the air. She said he was also thumping the table making it most uncomfortable. She believed he would be physically violent towards her. She said his shouting led a number of male teachers to attend the area. She said she asked Mr Step to leave about ten times and then asked her secretary to call police. He continued to yell and dialled triple O on his own mobile

phone to get police to come and obtain Anthea Step's dispatch. The police arrived and at about that point, Mr Step stopped shouting, got up and went to the police. Police asked Ms Stokes if she wanted to lay charges but she said she just wanted him off of the premises. She said she was concerned he was both a student and a parent and it was therefore complicated. After receiving advice, she took out a trespass notice against the plaintiff. (P2, Doc 92). She also prepared a report to Mr John Dove, the General Manager of Schools (P2, Doc 93-95).

33. In May 2002 the plaintiff sent letters to two teachers (Ms Christensen and Mr Sharma) at the NTOEC: (P2, Doc 102-109). The Defendant said those teachers became concerned about the content. Some of the letters complain about a maths text that smelt, giving Anthea Step headaches and an allegation by Mr Step that one of the Maths teachers had agreed to pay $30.00 to photocopy a text book. There was a detailed history given in evidence about the issue of whether there had been agreement for NTOEC to pay for photo copying of the text. Certain other allegations about being an "uncaring" teacher are made in those letters as well as statements along the lines of Anthea Step being "abused" because of not being sent work on time and because of her sensitivity to chemicals. The defendant wrote to the plaintiff on 17 May 2002 expressing concern about those letters and implemented a further procedure where all letters from the plaintiff would be given to her first. That letter also refers to a further incident where the plaintiff effectively resubmitted a copy of his letter to Ms Christensen as an English assignment. The letter from the defendant states: "If you submit any further unacceptable material I will withdraw your enrolment from NTOEC and refund your 2002 school fees."

34. It is clear and I accept the plaintiff made many complaints to NTOEC. These complaints are put forward in the plaintiff's case by him partly to show what he considers to be the real reason for the defendant's failure to enrol him in 2003. I accept the complaints were dealt with in the way the defendant has

described for the reasons she describes. The defendant's written responses to the plaintiff and to staff members concerned are before the court. The defendant appeared sincere and matter of fact before the Court in her descriptions of what had transpired and reconciling the difficulties of the needs of managing NTOEC with those of Mr Step and Anthea Step. She answered questions in both examination in chief and cross-examination with a significant degree of detail, bearing in mind many of the events are well in the past. The strongest action in my view taken by NTOEC throughout the above period was the trespass notice in April 2002 and limiting the contact between the plaintiff and staff of NTOEC. The defendant said the trespass notice, indeed all trespass notices were renewed on an annual basis.

Evidence Concerning the Defendant's Decision Not To Approve Further Enrolments

35. The defendant had been away from NTOEC during 2002 as she was principal at Darwin High School in semester 2 of 2002. She returned to NTOEC in 2003. On her return to NTOEC, as advised in the handover folder she was made aware Mr Step's enrolment as a full time student had been accepted. The defendant was approached by staff members about whether the courses could properly be provided for the plaintiff who, they believed, wanted to go to university. (T 21 Feb 2008, 12). The defendant said she thought a mistake had been made because mature aged entry to university was no longer via matriculation through year 12.

36. Her evidence on her initial impression about this was as follows:

> "In that folder there was advice that Mr McClane (sic) had accepted Mr Step's enrolment as a fulltime student. I was approached by a couple of the staff members, and I don't remember who, it's a long time ago, but there was questions of concern that Mr Step wasn't to be a fulltime student. There were concerns whether we would be able to or whether as a centre we'd be able to provide him with the courses that he wanted to go to university. I – my immediate response was there has been a mistake made that – because mature

> aged entry to the university was no longer via matriculation through a year 12 certificate. That had changed a good 20 years before. The reforms of the university system in the late 1980s and the reforms of the Australian Qualification System in the early 1990s had removed the need for mature aged people to go back to school in order to gain access to higher education. That was the – so I thought there had been a mistake made. I checked with the career counsellor and she had given that advice to Mr Step".

37. Ms Stokes said she checked on the career counsellor's advice given to the plaintiff, she was told that advice was that he didn't require the NTCE to go to university and that he should access the entry test for mature aged students, the ("STAT" test). If he did that test and obtained a score of 145 or above, he would have access directly into higher education courses. If his score was below that, he could access via the *Tertiary Enabling Programme*. This programme did not charge HECS and was a low cost access programme.

38. The defendant said that it was brought to her attention that the plaintiff had applied to complete the NTCE because he wanted to go to university. She thought his enrolment form indicated the same. She looked at his subjects and saw he was still taking *stage one* courses which she said, are not part of the tertiary entrance requirements for adults. She said even if adults wanted to complete the NTCE, all that was required was five double *stage two* units. She said given Mr Step wanted to go to university, it did not make sense for him to be doing *stage one* units. She said this also had resource implications for NTCE long-term as he would be at NTCE for an extended period. She told the Court *stage one* subjects do not contribute to the Tertiary Entrance Rank (TER). She also gave evidence that the scale process of *stage two* subjects meant that any results Mr Step did achieve would be scaled back and he would have difficulty obtaining the required 59 TER for university entrance.

39. Ms Stokes said she consulted the careers advisor who had taught Mr Step and she had presumed there was a reasonably positive relationship between

the plaintiff and the careers advisor. She wrote to the plaintiff advising him about her decision over his enrolment (P2, Doc 176). That letter is set out as follows:

> "Dear Mr Step
>
> I am responding to your letter of 3 February 2003 to our Senior Coordinator Mr Downey requesting enrolments in more subjects for Semester 1.
>
> I am not prepared to approve any extension of your current enrolment for 2003. I believe that your continued enrolment at NTOEC is unnecessary, because you completed your secondary education in Europe before you came to Australia. You have now established sufficient success in secondary education through NTOEC to move forward to further education or training.
>
> I believe that you are now suitably prepared to approach NTU for adult entry to their courses, in either higher education or technical and further education. There are two pathways that you can take for adult entry – via the STAT test (contact Susana Lu-Dizon on 8946 6878 for details) or the Tertiary Enabling Program which can be studied externally (contact person is Moya Deetlefs on 8946 7187). If you have general enquiries about studying at NTU, the Uni Info Shop would be able to assist (Freecall 1800 061 963).
>
> Your 2003 NTOEC enrolments in General Maths A, VET Maths and Bridging Science 2 have already been accepted, so you may finish off those courses. No further enrolments at NTOEC will be available for you once those courses are completed. If you do not wish to continue with your current enrolment, I shall arrange full refund of fees on return of all materials.
>
> Yours faithfully
>
> Vicki B Stokes
>
> Principal"

40. Further, in her evidence she explained, it was critical to university study that the plaintiff had completed the *stage one* English unit and could read and write English at a technical level. She said she understood that one of the plaintiff's intentions was to improve his English. She was satisfied he

had the appropriate skills. She said she knew he was "basically an intelligent person" and that doing Year 11 units was a waste of NTOEC resources, as he could go directly to university.

41. The defendant rejected all suggestions put to her that she had refused further enrolments because of any prejudicial view she had formed of the plaintiff. The Defendant was cross examined at length on her reasons for advising the plaintiff about not being able to enrol further; this included cross examination on various correspondence with Department of Education officials and other agencies that referred to the history of incidents concerning the plaintiff. The Defendant strongly denied that the history between the plaintiff and NTOEC was the reason for her decision.

42. A significant issue the plaintiff had with the defendant's decision appears to stem from the fact that he hoped to study law at university and he thought if he continued at NTOEC, he would achieve the marks in year 12 required to study law. He told the Court his results in 2001 and 2002 "were not too good". He said he had problems studying at that time as the Coronial Inquiry concerning Anthea's mother was progressing. He said he didn't like the way their lawyer was conducting the coronial, so he applied and was given leave to appear himself at the Coronial. He said he was frustrated about his level of knowledge of the law and started making inquiries about studying law. (Ex P2, Doc 129, 21 October 129). Under the university entry requirements (Ex P2, Doc 170) he noted the minimum requirements were successful completion of the NTCE (or equivalent) and a TER of 60 or higher; successful completion of TAFE award of Certificate Level 4 or higher; attainment of a STAT score of 145 or greater; successful completion of at least one year of full-time study (or equivalent) of an under-graduate degree/diploma course.

43. He said it wouldn't be any good if he passed the STAT test but wasn't fully prepared for study. He said he thought the safest way was to try to obtain

the NTOEC within two years and obtain a TER of 70 or more so that he would automatically be enrolled in law. He applied for admission into the law course in 2003 (Ex P2, doc 178).

44. The plaintiff said he also noted in the Bachelor of Laws information from NTU (Ex P2, doc 269) the statement: *"If English is not your first language, but you have studied the last two years of secondary school in Australia (years 11 and 12) in the English language or have successfully completed a TAFE of 12 months duration in Australia then you will not be required to provide further evidence of language proficiency."* He said he thought this would apply to him. In cross-examination he was asked about the fact that that section of the document was headed *"English Language Requirements for International Students"*. He agreed he was an Australian citizen and I take that by implication he agreed he was not an "*International Student"*. Still, he said, he thought that principle would apply to him. He also noted the statement *"Admission as a candidate for the degree of Bachelor of Law is subject to such quotas and selection requirements as may be set by the school from time to time"*. He said the law school could give priority to people who have the Certificate of Education and a higher TER. He thought *"the surest and fastest way to get to study law"* was through the NTOEC.

45. He said the other reason he wanted to study at NTOEC was that Anthea would be studying year 11 and he could study with her. He referred to his enrolment being accepted and the letter of 1 December 2002 advising of the non-availability of certain units (Ex P2 Doc 142). That letter gave a phone number for confirmation that Mr Step said he used. He also gave evidence of taping conversations between himself and NTOEC staff as he said he had previous problems, primarily over the late provision of materials: (Exhibit P2, doc 146-149 – transcript of phone recordings taken by the plaintiff). Overall, in relation to the initial acceptance of his enrolment, the plaintiff said he was happy to be able to finally study the same subjects as his daughter.

46. In cross-examination the plaintiff agreed his plan was that by 2006 he would be commencing to amass a score by way of year 12 study to go to university. He agreed he wanted to study *stage one* subjects in 2003, 2004 and 2005. He agreed he did the STAT test in 2003 that gave him a score of 166. He agreed it gave him admission to university. The plaintiff continued to qualify this acceptance of a path of admission to university because it was not to the course he wanted (the law course). He agreed he was enrolled in the Bachelor of Aboriginal and Torres Strait Islander Studies. He said he couldn't enrol in other courses at that stage because he and Anthea were living in their isolated bush camp and he could only study courses that were offered externally so he could be with her. He agreed the "number one" reason he wanted to be at the camp was to tutor Anthea. He appeared to accept the proposition that in 2003, even if he had been offered the law course or other courses, he wouldn't have done them because he was tutoring Anthea (transcript 12/12/07 at 124). He told the Court the law degree is now offered externally, but was not then. He said that was why he enrolled in the Bachelor of Aboriginal and Torres Strait Islander Studies – it was external.

47. The plaintiff was directed to comments noted on his enrolment for NTU (P2, doc 254), *"Application denied. Student advised that would be admitted to law if completed full year of another degree at credit average."* He agreed he then enrolled in and started the Bachelor of Aboriginal and Torres Strait Islander Studies for semester 2 of 2003. He agreed he did not do well in his first assignment. It was put to him that he had developed a similar pattern at NTOEC of commencing subjects and then if he didn't do well, withdrawing from the subject. He agreed for example that he enrolled in English six times. He said each year there was a different reason for withdrawing or extending the subject. He agreed he had to leave the Bachelor of Aboriginal and Islander Studies as he failed.

48. Although Mr Step eventually agreed he was offered a place in the law course if he obtained a credit average in a year of another course, he said he couldn't rely on that. (Ex P2, at 261). He said *"maybe I'm really paranoid, you know, but I was convinced that because I started this proceedings against police officers that those people didn't want me at all. You know."* The plaintiff was also directed to his cancellation of his enrolment in the *Tertiary Enabling Programme*. He said he also spoke to Professor Ned Aughterson about gaining entry to law at NTU and was advised the Tertiary Enabling Programme did not provide entrance.

49. He agreed he was told if he completed the *Tertiary Enabling Programme* with a distinction average, he would be offered a place in the Associate Degree of Legal Studies. He said he cancelled the Tertiary Enabling Programme because he stopped doing assignments. He thought he would not obtain the distinction average. He said he believed the lecturers were against him. Mr Step also agreed he cancelled a course, Certificate II in Information Technology.

50. Mr Step was asked if he recalled a letter from Bronwyn Langworthy of NTOEC in 2002 discussing problems with his "Bridging Science" unit. The last paragraph states: *"Please note the stage 1 results did not contribute to your tertiary entrance rank and therefore have no impact on any future ability to enter university. As previously explained to you, you already have a year 12 result for presentation plus it is most likely that you will be considered for mature age university entry without any study with the NTOEC"*. Mr Step commented that "most likely" wasn't good enough for the Bachelor of Laws.

51. The plaintiff's argument is given Ms Stokes had previously warned him that she may cancel his enrolment due to his conduct (in correspondence noted above); given she had inquired of the General Manager Mr Dove about terminating his enrolment after the incident in April 2002 and given she had

previously inquired about his possible expulsion but was advised it was not available in circumstances where the student was not presenting a danger to other students, (Transcript 21 February 2008 at 59); it follows on the plaintiff's argument the defendant acted unlawfully to punish the plaintiff by cancelling further enrolments. He argues this is particularly so given the Enrolment and Fees Information of NTOEC indicates the availability of enrolments for "Adults who wish to improve their education or to take course along with their children."

Discussion of the Misfeasance in Public Office Claim

52. In my view, the plaintiff has taken the most negative interpretation possible of the actions of the defendant in not permitting further enrolments and urges the Court to do the same. What is revealed throughout the evidence, including the documents, is that the plaintiff continuously views the actions of anyone in a decision making capacity in education with extreme suspicion. As noted, the plaintiff has said himself "*maybe I'm really paranoid*".

53. It is easy to envisage differing views on aspects of the Health Unit, (the subject of complaint by the plaintiff set out above). There may well be healthy discussion on whether a harm minimization approach or a strict legal approach should be adopted to the study of such subjects. There might be legitimate areas of debate on whether motivation for young people to make healthy choices should be imposed only externally by the law or intrinsically by promoting a greater understanding of the possible harms. The booklet makes it clear that certain sexual activities are against the law. The way the plaintiff has expressed his opposition to the course material, especially the letters, is readily capable of being viewed as personal and professional attacks on the teachers concerned. Some of the language comes across as extreme. As the plaintiff alludes to himself, there may indeed be difficult issues and life events that have led him to these conclusions. That doesn't

mean however, his own conclusions on the conduct of those around him always accords with reason. His perceptions about events that affect him are viewed by him with extreme suspicion. This attitude is revealed in his conduct such as taping telephone calls of employees of the NTEOC. A further example is his linking staff at NTU to complaints or legal actions that he has against certain police.

54. The plaintiff presents as a highly intelligent person. The extensive written material he has placed before the Court reveals a high level of literacy. Sadly, it also reveals this highly suspicious and negative outlook on people who make decisions. A further example was dealt with in evidence concerning an occasion when the plaintiff had said something like "Do you want to join the Coroner and police" to a Magistrate. Mr Step indicated he had apologised for this remark. Other examples illustrating his outlook were raised in the evidence. The evidence called by the plaintiff tends to reflect his particular suspicions and negative outlook on various subjects. This does not give me confidence that I should interpret the events or draw inferences readily from the plaintiff's perspective.

55. Anthea Step's evidence was particularly insightful in this regard. She gave evidence supporting the plaintiff's complaints about late materials from NTOEC. She also told the court she had a baby on 29 June 2007 and that she had been admitted into the law course at Charles Darwin University. She gave evidence that the plaintiff was assisting her with her torts course. In these proceedings, the plaintiff asked her *"I would like to ask her do you think that the suggestion of Ms Myles to choose sex whenever you like was any good advice."* Anthea Step answered *"No, it wasn't"*. Then he asked her *"Do [you] think that choosing to have pre-marital sex has made your life and studies very difficult?"* She answered *"Yes, Indeed"*. Then, *"Ms Myles' suggestions about extra marital sex should be deleted from the health year 9 books?"* Anthea Step stated: *"It should be discouraged, yes, it should be removed.*"

56. In cross-examination Anthea Step was asked whether she had drafted letters of complaint that she sent to Ms Christensen and Ms Stokes, she said "*Some of it, a bit of help from my father*". She said it was mostly her own work. She was asked whether the effect of her evidence about her pregnancy in 2006 was meant to convey that she became pregnant due to advice given by Ms Miles in the materials of 2001. She said *"Well it does have some unconscious influence that Ms Myles doesn't discourage it, however, she doesn't encourage it, but she doesn't object to it and I believe that's wrong and because of that that had I believe some conscious influence on what happened to me."* She was then asked *"If its unconscious influence, how do you know about it?"* She said *"Because it sort of dawned on me."* She also told the Court that her father showed her the list of questions he was going to ask her in Court and when asked *"Did he tell you what the answers were?"* She said *"Well (inaudible) a little – a little."* I do not accept this evidence as credible that the plaintiff's daughter was adversely affected in 2006 by the course materials of 2001 to the point that it influenced her becoming pregnant. This does not reflect well on the credibility of the plaintiff's case.

57. The elements of the tort of misfeasance in public office are set out in His Honour Justice Riley's judgment of *Small v Mahony* [2006] NTSC 97. The plaintiff there was an employee of the Red Dog Café in Alice Springs and the defendant was a police officer. The plaintiff believed he was obliged to remove rubbish from his employer's bin that was not sourced from the employer and place it in Alice Springs Council bins. He removed rubbish on one occasion that he believed should not have been placed in Red Dog Café's bin and threw it on the ground intending to place it in the Council bin. He was queried by two women who asked him what he was doing. There was an argument. He said the women concerned became aggressive and he said he would defend himself stating to them that he had "*knocked a woman out*" just the week before because she had attacked his fiancé. One of the

women called the police. The women described the incident in much more confronting terms with the plaintiff being markedly more aggressive. His Honour preferred their evidence.

58. The defendant police officer attended the café to investigate and in a series of conversations, the plaintiff alleged the defendant defamed him as she used words that indicated he assaulted someone and that her conduct in publishing the information regarding the incident to his employer amounted to misfeasance in public office. His Honour drew on a number of authorities, in particular *Northern Territory v Mengel* (1995) 185 CLR 307 standing for the principle that misfeasance in public office was a (at 345):

> "deliberate tort in the sense that there is no liability unless there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power."

59. Further, His Honour relied on the following passage (at 347):

> "The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability. And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach."

60. Further, the following was adopted from Brennan J's judgment (at 357):

> "I respectfully agree that the mental element is satisfied either by malice (in the sense stated) or by knowledge. That is to say, the mental element is satisfied when the public officer engages in the impugned conduct with the intention of inflicting injury or with the

> knowledge that there is no power to engage in that conduct and that that conduct is calculated to produce injury. These are states of mind which are inconsistent with an honest attempt by a public officer to perform the functions of the office. Another state of mind which is inconsistent with an honest attempt to perform the functions of a public office is reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce. The state of mind relates to the character of the conduct in which the public officer is engaged – whether it is within power and whether it is calculated (that is, naturally adapted in the circumstances) to produce injury."

61. To succeed, the plaintiff must prove on the balance of probabilities that the refusal to allow further enrolments was motivated with the intention of causing harm to the plaintiff or was done in the knowledge that it was in excess of power where the state of mind is inconsistent with an honest attempt to perform the defendant's functions as principal. Alternatively, it must be proven there is reckless indifference to the question of the exercise of the power and the harm or injury.

62. Despite the defendant's advice to the plaintiff about not being able to enrol in further subjects in 2003 (letter of 5 February 2003, Ex P2, 176), came after a warning and trespass notice in April 2002, and a further warning by the letter of May 2002, there had been no other specific incident since April and May of 2002 that might have been a trigger to cease future enrolments on the grounds of the plaintiff's conduct.

63. In my view, both the defendant and the staff at NTOEC had acted with restraint in the face of the plaintiff's challenging behaviours in the preceding years. The defendant appropriately set up procedures in 2002 to discharge her duty of care to staff so as to limit contact between the plaintiff, herself and other staff and at the same time, allow enough contact for both the plaintiff and his daughter to continue studying. Clearly both the defendant and other staff were mindful of the fact that the plaintiff's daughter was also a student and there was a need to consider her position as well. There is a wealth of material before the court indicating awareness and

concern on the part of the defendant and NTOEC for the position of Anthea Step.

64. In making the decision not to approve extension of the plaintiffs current enrolment and not to permit future enrolments, on the defendant's evidence that I accept, she took into account the advice of the career counsellor, the intention expressed apparently to other staff by the plaintiff that he wanted to go to university, the approach of universities to mature aged entrance, the slow track record of the plaintiff in relation to completing units at NTOEC and the resources of the NTOEC. It would be expected also that she made this decision with the knowledge of the background of problems between the plaintiff and NTOEC but the fact of that knowledge and her dealing with those problems some months before does not mean the Defendant's conduct nor any alleged bias as a result of it was the reason for her decision. The Defendant appeared motivated to consider what she believed the plaintiff's goal was. Granted her decision contrasted in part to that of the Acting Principal, but she appeared to genuinely believe the plaintiffs motivation for study and his goals had changed.

65. As it turned out, the defendant was offered entrance into a university course that he subsequently withdrew from. His complaint seems to be that he thought he was more assured of being admitted into the law course by completing year 12 at NTOEC and therefore, should have been allowed to continue re-enrolling. Even if that is correct and in my view the evidence points to the contrary conclusion, that decision by the defendant not to permit his enrolment can hardly be characterised as intentionally or recklessly beyond power and certainly not with intention to cause harm to the plaintiff. The plaintiff relies to a great degree on his history of conflict with the defendant and others at NTOEC to provide the proof of the motivation he wants to attribute to the defendant, but the defendant clearly went to some great lengths to manage around his behaviour over a period of time. The plaintiff kept asserting that he needed to be at NTOEC to

complete year 12 so he could obtain admission to law, but it was clear from the evidence there were other more suitable pathways for a mature-aged student.

66. The then Chief Executive of the Department of Employment Education and Training, Mr Peter Plummer endorsed the decision of the defendant not to approve any further enrolments. (Ex P2, doc 227) The defendant as principal clearly believes she has the power to approve or not approve enrolments – it is difficult to see how any educational facility would operate without a principal or manager to make those decisions. She conceives this as an incident of her duty of care and the management (resources etc that were referred to) of the NTOEC. Clearly the then Chief Executive believed the Defendant had the power to regulate enrolments in the manner that she did.

67. Even if there was a genuine doubt about her power to regulate enrolments, it is clear she exercised that power in the genuine belief that she was entitled to do so. The fact that in his letter Mr Plummer refers to an earlier incident of behaviour on the part of the plaintiff as part of the background to the defendant's action is hardly surprising given the history. It does not mean that the defendant made her decision on the basis of bias against the plaintiff. I note Mr Plummer also refers to the plaintiff's desire to study law and the steps he can take to achieve that. I note records of references in the Departmental correspondence before the Court the defendant's concerns over the plaintiff's previous conduct are mentioned, however that does not mean the Defendant acted on that on this occasion. Those incidents are part of the history of the relationship between the plaintiff and NTOEC.

68. The plaintiff argues there was specific criteria for the NTOEC that granted a legal entitlement to be enrolled. He relies on the course information noted above on who may enrol with NTOEC. It is clear he was partly motivated by wanting to study with his daughter and also wanted to improve his education. He was therefore a person who appeared to fit the criteria in the

course information and would readily expect an application for enrolment to receive proper consideration. I reject the argument that the NTOEC information amounts to criteria creating a legally enforceable entitlement to enrol. The evidence is that the principal has the overall authority on who may enrol, taking into account a range of factors including resources and the appropriateness of the enrolment. The *Education Act* defines "head teacher" as "the person to whom the administration and control of a school is committed". That would accord with how the defendant and the then Chief Executive of Education viewed her role and goes to the point that even if as a matter of legal entitlement the principal *must* enrol everyone who comes within a particular category, the defendant's genuine belief was that she had the power to regulate enrolments and in that case.

69. The plaintiff submitted Ms Stokes was not a truthful witness and alleged she had a selective memory. On a few occasions in cross-examination she admitted she needed to correct evidence or had wrongly recalled conversations or the sequence of events. Although her letters and memos concerning her dealings with the defendant are clear and available, it is understandable that the minutia of conversations about dispatches of materials and discussions with numerous NTOEC and departmental persons going back to between 2001 and 2003 when she was the principal, are not recalled with complete accuracy. It is to her credit as a witness that she was prepared to accept that she may be wrong over some details and recollections and in my view, that is understandable in these circumstances.

70. The plaintiff argues in relation to the misfeasance in public office claim that he was denied procedural fairness in the same sense as *Cornwall and Others v Rowan* [2004] 90 SASR 269. In that case the Court of Appeal (SA) confirmed that personal reputation is an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made. The affected person, Ms

Rowan's reputation was said to be under significant risk from serious allegations. In those circumstances, the Court held there was an obligation on both the particular board of inquiry and the Minister concerned, (Dr Cornwall), to afford procedural fairness to those such as Ms Rowan whose reputations may be severely affected by the inclusion of unsubstantiated serious allegations. The finding by the court of illegality and the inference of targeted malice came about due to the decision to include the unsubstantiated allegations at the same time as ceasing funding for the particular organisation for the Minister's own political advantage. It was the combination of those factors that led to a conclusion of misfeasance in public office on the part of the Minister: (*Cornwall and Others v Rowan* at 277-278).

71. The plaintiff argues he was not afforded procedural fairness and that forms a basis on which a finding of misfeasance in public office can be made in this case. It is clear from *Cornwall v Rowan* denial of procedural fairness alone does not evidence malice (at para 31). In this case, the defendant looked at the material on file and as is indicated in the letter of 5 February 2003, she was also responding to a letter of the plaintiffs to the senior co-ordinator requesting enrolments in more subjects. (Ex P1, doc 176, para 1). The defendant did not ask the plaintiff for his further views on the matter of further enrolment. In my view it would have been preferable for the plaintiff to be given an opportunity at that time to respond to the reasons why the defendant thought extension of enrolment was not appropriate, however, that falls far short of showing that the decision made constitutes misfeasance in public office. Failure to afford procedural fairness cannot by itself constitute misfeasance in public office.

72. The plaintiff was however advised he could finish the courses he had commenced. The decision related to extensions of the current enrolment and further enrolments.

73. The process adopted by the Defendant may be open to some criticism. For example, the plaintiff was not advised, that his expressed desire to go to university might affect the view taken of the appropriateness of his enrolment with NTOEC. Given that is not expressed in the NTOEC published information, he perhaps should have been advised that that was material that may be taken into account on the appropriateness of his further enrolment. Other factors where it would have been preferable to consult with the plaintiff are possibly matters concerning the appropriateness of taking stage 1 units in his circumstances and the view taken of his already completed secondary information; the status of the plaintiff's attempt to move to full time study and any ongoing matters relating to studying with his daughter.

74. Unlike more formal processes however, there is nothing to indicate the plaintiff would not at some point after receiving the letter from the defendant be able to renew his application or have the decision reviewed. Even if there were a requirement on the defendant to afford procedural fairness in these circumstances, and I lean to the view that there was, that is a long way from the situation in *Cornwall v Rowan.* There is no reason to impute malice or recklessness to the defendant. She obviously thought, having learned of his intentions that it was more appropriate for him to take the path she had envisaged would be preferable to the fulfilment of his ambitions, as far as she was aware. If her assessment of this state of affairs was an error, it does not amount to misfeasance in public office. The relevant incidents that the plaintiff alleges that constitutes bias were well over.

75. It is not the law that any failure to comply with the rules of natural justice leads to a finding of misfeasance in public office. In *Cornwall v Rowan* the Court there found there was ample evidence for reaching such a conclusion on those facts. Not every administrative error can be raised to the level of malice or recklessness required in proof of misfeasance in public office.

The Defendant appeared to me to have acted in good faith and what she thought was an appropriate option for the plaintiff. Just because the plaintiff took into account factors that were not public criteria in the course information does not mean it was inappropriate to have regard to it; it certainly doesn't mean she acted in malice or with reckless disregard for the consequences.

76. I agree the defendant also rejected the plaintiff's enrolment for 2004. The plaintiff was advised on 4 December 2003 by the defendant that his application would be considered. (Ex P2, 280). He was advised on 17 December 2003 that there were no "new circumstances" and his enrolment would not be accepted (Ex P2, 284). By that time, it is clear the Defendant believed her decision to be endorsed by the CEO of the Department of Education.

77. I do not see any merit in the plaintiff's claim that the defendant acted in misfeasance of public office and the claim is dismissed. If I am wrong and a contrary view were accepted, there is still a serious question on whether there has been *loss* as asserted by the plaintiff. The plaintiff sought leave from the Northern Territory Supreme Court to appeal certain rulings made by me during the course of the trial. After allowing the plaintiff to amend his application for leave to appeal, His Honour Angel J granted leave to appeal and made certain directions for the hearing of the matter once it was remitted to the Local Court for hearing before me. I was advised by the parties that the plaintiff sought leave for an extension of time to appeal to the Northern Territory Court of Appeal. Counsel for the defendant made application on the last day of the hearing before me to admit certain evidence for the narrow purpose of disproving the claim that the plaintiff suffered "arrested academic progress". That was evidence contained in an affidavit tendered by the plaintiff to the Northern Territory Court of Appeal. In my view, it satisfied the criteria for fresh evidence in these proceedings, and I admitted the plaintiff's statement in his affidavit to the Court of

Appeal, the relevant part is: "I am a first year law student at Charles Darwin University".

78. I find no "arrested academic progress" has been proven. There is also no evidence of intellectual and psychological injury. There was no evidence called of a recognisable psychological injury. Even if the misfeasance claim were made out, the loss and damage pleaded is not proven. The evidence also indicates the plaintiff was permitted and did enrol again at the NTOEC in 2005, under a new principal. There is no evidence before the Court that the plaintiff has lost the opportunity to increase his future earning capacity. The plaintiff has had very paid little work in the immediate to middle past and he did not give evidence concerning how this would change in the future or what work he could have done in the intervening years. I acknowledge his primary work has bee as a parent and carer for his daughter. He also gave evidence he did not go on and complete the available university study that was initially available to him for reasons unrelated to the alleged misfeasance. He has clearly been able to advance his academic career.

79. In these circumstances the plaintiff cannot bring himself within the parameters of *Gifford v Strang Patrick Stevedoring Pty Ltd* [2007] NSWCA 50, concerning delay in commencing study. The part *of Gifford v Strang Patrick Stevedoring Pty Ltd* [2007] NSWCA 50, (19 March 2007) that the plaintiff submits is relevant concerns one of a number of dependant children, (Kelly Gifford) of a deceased worker. During the course of the trial evidence was accepted that she had suffered an abnormal grief reaction manifested by her bulimia. As a result she was unable to function normally and her tertiary studies were delayed. After the bulimia ceased there was evidence given at trial, of personality changes, however the Court upheld a ruling that after the bulimia ceased she did not continue to suffer from a demonstrable psychiatric condition. She was compensated ultimately for five years that could be attributed to her fathers death but not for other years lost for other reasons. For instance, there was four years where she didn't

study for other reasons and the contingencies were numerous. Rather than losing time and future income as a result of delayed enrolment, the plaintiff here was able to move into tertiary studies in a timely way, on his path to the law degree but he did not continue with the various courses offered.

Discussion of the Defamation Claim

80. The first of the alleged defamatory statements is said to be contained in the letter of 5 June 2001 from the defendant to the plaintiff (set out above). In particular the statements that the plaintiff's letter to Ms Miles "constitutes an attempt to harass Ms Miles in the appropriate performance of her duties"; that it was "discriminatory in that it was offensive, abusive and belittling to Ms Miles on the basis of her performance of her required duties"; "I found it extremely unpleasant and an attempt to intimidate Ms Miles from her legitimate duties" and "it is entirely hypocritical for you now to blame Ms Miles."

81. The plaintiff's case is that he

> "..is afraid that the defamatory statements made by the defendant may negatively affect his interactions with the NTOEC staff, with DEET staff, with the NT Ombudsman and with the NT Ombudsman's office staff, because they portray the plaintiff as a person of a bad character and because the people who have access to his NTOEC, DEET or Ombudsman office files would accept them as true and treat the plaintiff as a person of bad character": (para 10.3 plaintiff's response to request for further particulars noting the reference to the Ombudsman's Office can now be disregarded).

82. I have taken the plaintiff's case to mean that he asserts these alleged statements are capable of carrying an imputation that he is of *bad character*. On whether the matters complained of give rise to the imputation alleged, I note the comments *Farquhar v Bottom* [1980] [2 NSWLR 380 at 385] Hunt J:

> "in deciding whether the matter complained of is capable of conveying to the ordinary reasonable reader the imputations relied on

> by the plaintiff, I must be guided and directed by the test of reasonableness, I must reject any strained, or forced, or utterly unreasonable interpretation: Jones v Skelton [1963] SR (NSW) 644. "I must proceed upon the basis that the ordinary reasonable reader is a person of fair, average intelligence": Slatyer v Daly Telegraph Newspaper Co Ltd (1908) 6 CLR 1 at 7: "who was neither perverse nor morbid nor suspicious of mind": Keogh v Incorporated Dental Hospital of Ireland ((1910) 2 Ir R 577 at 586): "nor avid for scandal": Lewis v Daly Telegraph Ltd [1964] AC 234 at 260.
>
> "The ordinary reasonable reader does not, we are told, live in an ivory tower. He can, and does, read between the lines, in the light of his general knowledge and experience of worldly affairs: Lewis v Daly Telegraph Ltd (supra at 258): James v Skelton (supra at 650): Lang v Australian Consolidated Press Ltd [1970] 2 NSWR 408 at 412. It is important to bear in mind that the ordinary reasonable reader is a layman, not a lawyer and that his capacity for implication is much greater than that of a lawyer: Lewis v Daly Telegraph Ltd (supra at 277): Morgan v Odhams Press Ltd [1971] 2 All ER 1156 at 1163: Lang v Australian Consolidated Press [1970] 2 NSWR 408 at 412: Middle East Airlines Airliban SAL v Sungravure Pty Ltd [1974] 1 NSWLR 323 at 340."

83. I note in Gillooly, "The Law of Defamation in Australia and New Zealand," at 36 it is stated that what the ordinary, reasonable reader, listener or viewer will glean from the matter complained of will depend on three major factors: the matter itself; the context; and any special knowledge possessed by the recipient. Gillooly also cites Lord Blackburn in *Capital and Counties Back v Henty* [1882] 7 at App Cas 741 at 771:

> "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances".

84. In my view it is stretching the ordinary understanding of "*bad character"* to suggest that pointing out complaints the defendant had with the plaintiff's letter carry an imputation of *"bad character"*. She is clearly describing how she sees the letter and what she perceives the impact of the letter is. She has used the word "harass", which the plaintiff correctly points out strictly

means "repeated" conduct and there was no evidence of repeated conduct of the plaintiff towards Ms Miles. In my view, in the context of explaining why it was thought that the particular letter would cause upset, using the term "harass" and other terms used fall short of indicating bad character.

85. The Collins Concise Dictionary entry for "harass" is "to trouble, torment or confuse by continual persistent attacks, questions, etc". On that definition it may be that given the number of comments by the plaintiff, even within the one document, the comments together may be said to "harass". In my view this would be an interpretation open to anyone who read the letter.

86. It must be remembered that all of this was raised in a letter from the defendant to the plaintiff. The plaintiff says the letter can still be regarded as "*published*" by "*being placed into the plaintiff's NTOEC file and consequentially any person who has an access to the file can read them, including the NTOEC staff and the Department of Employment, Education and Training (DEET) staff.*" ("Plaintiff's Response to the Defendant's Request for Further Particulars of the Plaintiff's Amended Statement of Claim of 25 October 2006", para 9 (a)"). The plaintiff submits the letter was published because there is evidence of it being placed in a confidential file where it could be accessed by principals in the future and any person who has access to the file. The plaintiff refers to the evidence of the defendant on 21 February 2008 (Transcript 55.4) as evidence that the letter was published. Ms Stokes states there was another copy printed and placed into a confidential file in her desk and stored on the hard disk of her computer. She said the computer was an individual stand alone computer; that the acting principal had access to the computer while she wasn't there, but the computer was handed in and all material was put on a disk and stored. She said when she had to provide copies to the general manager, she had to go and make a photocopy. There is no evidence that the letter was read by any other person prior to relevant legal proceedings. It is not clear whether the letter was read by him.

87. The Defendant's list of documents also refers to "*Document Nr 6: "Email V Stokes to all staff NTOEC re V Step enclose draft letter V Step 05/06/01 copy*". On one reading that would tend to indicate the letter was circulated with the memo, however, the face of the memo itself does not indicate an attachment. From the inclusion on the list in the way that it is, it is unclear and it is not alleged in the plaintiff's pleadings to be published in that way. The Defendant does not recall who compiled the list of documents: (Transcript, page 57, 21 February 2008). I cannot be satisfied there is publication of the letter. If I a wrong and there has been limited publication, to Mr Dove (the general manager) and to the staff who received the memo, given the limited number of persons who might potentially have seen the letter, those persons would have understood the context that this was a description of particular material on a particular occasion. I am not persuaded that knowing the context, any of those persons would draw from that letter that the plaintiff was of *bad character*. I note the imputation "bad character" was not contained in the statement of claim, but in my view, the plaintiff's further and better particulars make it clear that it is the imputation of *bad character* that is being asserted. In those circumstances of accepting that that is the imputation sought to be drawn, I would permit amendment of the defence to allow the defendant to assert that the particulars fall short of demonstrating the plaintiff is of bad character. In my view, *bad character* concerns a significant flaw in the character of a person, not the description of the impact of material such as this. I do not understand the concept of *bad character* as relating to these circumstances.

88. If there was publication, given the limited publication in the circumstances it was made, in my view, the publication would be protected by qualified privilege. The general test to determine whether a particular occasion is privileged can be traced to Lord Atkinson in *Adam v Ward* [1917] AC309:

> "…a privileged occasion is in reference to qualified privilege and an occasion where the person who makes the communication has an interest or 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. This reciprocity is essential".

89. His Honour Justice Riley applied this test in *Small v Mahony (supra)* where His Honour held the police officer was acting in accordance with her duty to inform the plaintiff of allegations made against him. His Honour held she was doing no more than reporting the complaints of others. His Honour went on to say that he would have held the discussion between the police officer and the plaintiff's employer to be covered by the privilege and the recording of the incident on the PROMIS system was similarly protected. His Honour noted the underlying justification is the *"common convenience and welfare of society"* (citing *Toogood v Spyring* (1834) 149 ER 1044). In my view, the circumstance of the publication of this letter corresponds with communications or is analogous with communications connected with employment that are well recognised: (See *Gillooly supra* at 177 and *Small v Mahony)* (supra). Although of course the plaintiff was not an employee, the persons alleged to have received a copy of the letter were employees or were superiors in the Department who would have a significant interest in the matter of the good management of NTOEC. It is true that the privilege may fail if it is motivated by malice, however, there is no evidence that this letter was published maliciously. I accept the defendant was acting in accordance with her duties as a manager when she wrote that letter.

90. Paragraph 10(f) – (i) of the statement of claim concerns the letter from the plaintiff to the defendant of 17 May 2002 "consequently I have instructed all staff they are not to accept written correspondence from you directly". "Your letters constitute an attack on their personal and professional integrity and as such, amount to harassment". "Any personal vilification of staff, insults or threats will be referred to our department's legal officer for advice on what further protection may be sought for NTOEC staff". "I am returning your last English assignment as unacceptable materials. It is an obvious attack against staff here". I have concluded, the same or similar

considerations apply to the contents of this letter as with the previous one, (save for the fact there is no evidence this letter was published to or circulated to staff or others). It was merely filed. If it has been read by others in the course of the management of NTOEC clearly it is protected by qualified privilege.

91. Paragraph (h) concerning personal vilification and potential threats may carry an imputation of bad character as it tends to convey a reputation for threatening violence, however, that is subject to appreciating the context of letters sent by the plaintiff. If it is found to carry such an imputation and is found to be published, it is also in my view protected by qualified privilege. This relates to procedures to deal with material of a certain type that may go to staff of the NTOEC.

92. A further alleged defamatory statement is contained in a letter of Peter Plummer : (Exhibit P2 Doc 227, *statement of claim 10(j)*) "when you visited NTOEC in April 2002 you were unacceptably aggressive towards Miss Stokes, a public display that was witnessed by a number of staff members who have expressed concern about your connection with NTOEC". That is not a letter that the defendant has published and cannot be attributable to the defendant. If I am wrong on that, then any statements she may have made along these lines to Mr Plummer in my view is clearly protected by qualified privilege. As the ten CEO of the Department of Education it is to be expected that this type of incident would be reported.

93. In relation to the memo to staff (Exhibit P2. Doc66) containing the words "my judgement is that such actions are justified because of the foreseeable risk to the personal and emotional wellbeing of staff": (*Statement of Claim Paragraph 10 (l)*). Although published to the staff of NTOEC, the memo is clearly written and sent with the motivation of protecting and informing staff of the reasons for the concerns about the plaintiff and in my understanding of the authorities would be protected by qualified privilege if

found to be defamatory. In any event I am not persuaded these words carry the imputation alleged.

94. If I am wrong concerning the conclusion that the various alleged defamatory statements do not carry the imputation of bad character, or if I am wrong in finding the plaintiff is bound by the imputation and indeed if it were to be found that any of the statements complained are held to bring the plaintiff's reputation into disrepute or a lowering of his reputation, I agree with the submission that truth is available as a defence. I do not come to this conclusion lightly. Clearly the plaintiff is someone who has struggled with early life deprivations, lived under an oppressive regime, migrated to a new country and despite that, has taken very seriously and conscientiously his duties as a father and a citizen. The plaintiff at this level exhibits significant strength of character. What he has said in this matter however, is that when he considers that he makes truthful comments to people, people can't consider it an attack on them. Even if people find what he says is offensive, if it is true, "*there's nothing wrong with it*."(T 177). He also said, if what he says is true and people are offended, "*its not my fault. No, its their fault*." and "*Maybe its good for them, I reckon. I'm even obliged to tell people so they – because see people don't see their own mistakes, other people see them better so I'm even obliged to tell them so they can change their ways*." (T 178). Further he was asked: "*So it doesn't matter to you that other people might feel upset about you because of what you say because you think that its your duty to point out their shortcoming? Yes. And that is a reputation that you would be content with? Yes. I'm proud of it because if I didn't do it, I would be a hypocrite, that's my main problem that's what I am trying to avoid. Tell the truth is a great asset*." The plaintiff is content with a reputation that he has a duty to point out the shortcomings of others even if it is upsetting or offensive. The plaintiff uses strong and challenging language in his letters to the various staff at NTOEC. The descriptions given by the Defendant in her letters and memos are substantially true in terms of

describing that language and its impacts, on any fair reading of the material. Although use of the word "harass" may not be correct from the dictionary meaning, other choices such as annoy, upset or attack might have all been appropriate choices to convey the same or similar message.

95. Whatever view is taken of this material, context has a significant bearing on the final result. The fact the Defendant has responsibility for staff and would be expected to take some action on the letters and material from the plaintiff, underlines the importance of the application of qualified privilege in these circumstances.

96. If I am wrong and it is found the plaintiff has been defamed, given the evidence the plaintiff gave in relation to his reputation that he accepts he points out the faults of others even if it offends, I do not see that his reputation has been damaged. He told the court he doesn't consider yelling at people or being aggressive (verbally) for a "just cause" to be wrong. (T 146-7). If people are fearful from the aggression, he says "that's their problem, not mine"…"because I don't intend to harm to anybody, not physical harm." In those circumstances, given the plaintiff is content to be known by this reputation, indeed to take some pride in it, I would not make an award for damages. I dismiss the claim for defamation.

97. In relation to both the misfeasance in public office claim and the defamation claim, the plaintiff seeks aggravated and exemplary damages. Aggravated damages are compensatory in nature and exemplary damages go beyond the question of compensation and are awarded "as a punishment to the guilty, to deter from any such proceeding for the future, and as to proof of the detestation of the jury to the action itself." :(*Lackersteen v NTA*, (1988) 92 FLR 6, Asche CJ citing *Wilkes v Wood* (1763) 98 R 489 at 498-99 per Pratt LCJ.). Generally an award for such damages is made to show the Defendant and others that "tort does not pay": *Rookes v Barnard* [1964] AC 1129, per

Lord Devlin at 1227. I do not see anything in the conduct of the Defendant requiring the necessity for an award of this kind.

98. As noted above, the plaintiff sought leave from the Honourable Supreme Court to appeal a ruling I made during the course of the hearing. After allowing amendment of the grounds for leave, His Honour Justice Angel made certain directions that the defendant be cross-examined on certain material in this Court. That further hearing did not occur until 1 December 2008. I note the plaintiff sought further leave to extend time to appeal the ruling of His Honour to the Court of Appeal on 3 November 2008 and the Court of Appeal dismissed that application on the same day. Both parties submitted the result required the further cross-examination of the Defendant as His Honour's order para 3 read "The matter is remitted back to the Local Court for further hearing, directing the Magistrate to recall the Defendant for further cross-examination by Mr Step as to her reasons for refusing his enrolment". I proceeded on the basis the intention was that the plaintiff be permitted to cross examine the Defendant in accordance with His Honour's Order interpreted in the light of the transcript of His Honour's reasons of 20 May 2008.

99. I will make orders dismissing the claims and will hear any application for costs.

Dated this 23rd day of April 2009.

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Jenny Blokland
CHIEF MAGISTRATE