SOUTH AFRICA'S MEDIA DEFAMATION LAW IN A CONSTITUTIONAL, DIGITAL AGE

by

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I dedicate this research to those South African journalists who fulfil their mandate legally and ethically.

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I am inspired by my colleagues at Caxton and CTP Publishers and Printers Limited.

The company enables passionate journalists from all over South Africa to serve their communities by delivering news in print and digital format 24 hours a day, seven days a week. In so doing, Caxton empowers South Africans. An informed citizen is empowered in that he/she is able to participate effectively in his or her community, as well as in our democracy. This contributes positively to one's sense of dignity.

#CaxtonCares – it really is true.

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Thank you all from the bottom of my heart.
Helene

DECLARATION OF ORIGINALITY

I, Helene Eloff, with student number 28033460, declare as follows:

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LIST OF ABBREVIATIONS

A	Appélafdeling
ABCA	Alberta Court of Appeal
AAPP	Association of Asian Parliaments for Peace
AC	Appeal Cases
ACHR	American Convention on Human Rights
AJ	Acting Judge
AJIL	American Journal of International Law
All ER	All England Law Reports
All SA	All South African Law Reports
Am. J. Comp. Law	American Journal of Comparative Law
APLA	Azanian People's Liberation Army
BGD	Bophuthatswana General Division
C	Cape Provincial Division
Campbell L. Review	Campbell Law Review
CANUSLJ	Canadian United States Law Journal
CC	Constitutional Court
CICSA	Comparative International Law Journal of Southern Africa
CILSA	The Comparative and International Law Journal of Southern Africa
Civ	Civil Division
DP	Deputy President of the Constitutional Court
Drexel L. Rev.	Drexel Law Review
EC	Electronic Commerce
ECHR	European Convention on Human Rights
EWCA	England and Wales Court of Appeal
Fordham L.Rev.	Fordham Law Review
GNP	North Gauteng High Court, Pretoria
GSJ	South Gauteng High Court, Johannesburg
HHA	Hoogste Hof van Appél
HNP	Herstigte Nasionale Party

HTML	Hypertext Markup Language
IAB	Interactive Advertising Bureau
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IJ	International Journal
IP	Internet Protocol
ISP	Internet Service Provider
I.CON	International Journal of Constitutional Law
J	Judge
JMME	Journal of Mass Media Ethics
JOL	Judgments OnLine
JILT	Journal of Information, Law and Technology
K.B.	King's Bench
MDDA	Media Development and Diversity Agency
NLJ	National Law Journal
Neb.L.Rev.	Nebraska Law Review
NIC	Network Information Centre
NSWLR	The New South Wales Law Reports
OAS	Organization of American States
OJ	Quicklaw's Ontario Judgments
OK	Oos Kaapse Afdeling
OTTL	Ottowa Law Review
Oxf J Leg Stud	Oxford Journal of Legal Studies
PELJ	Potchefstroom Electronic Law Journal
Q.B.	Queen's Bench
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SCC	Supreme Court of Canada
S.C.R.	Supreme Court Reports
SOCAN	Society of Composers, Authors and Music Producers of Canada

TCP	Transmission Control Protocol
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
U Miami Int'l Comp L	University of Miami International and Comparative Law Review
UN	United Nations
URL	Universal Resource Locator
WL	Westlaw
ENCA	eNews Channel Africa
ANC	African National Congress
AOL	America Online
CPS	Crown Prosecution Service
OAS	Organisation of American States
Para	Paragraph
PI	Private Investigator
SCA	Supreme Court of Appeal
SALJ	South African Law Journal
SANEF	South African National Editors Forum
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TRW	Tydskrif vir Regswetenskap
V	Versus
WWW	World Wide Web

SUMMARY

The rights to freedom of expression and dignity do not discriminate and apply equally to all South Africans. There was a time when the ability to impart information on a large scale belonged to a tiny percentage of society. Prior to the 1990s the media were South Africa's gatekeepers of information in the public interest.

Today, regular South Africans who are not affiliated with the media have information publication and distribution abilities that exceed that of traditional media sources such as newspapers and magazines.

The ability to damage reputations on a large scale was previously unique to the media. Today, any person can ruin another's reputation with the click of a button.

Although media members and regular persons are equally able to defame, the law still distinguishes between media defendants and non-media defendants in defamation cases based largely on the powerful position and exclusive abilities the media once held.

The differentiation affects liability in terms of the presumptions of wrongfulness and fault that arise where defamation occurred.

In order to disprove the presumption of wrongfulness where defamation occurred, media defendants may use the exclusive defence of 'reasonable publication.' By proving that they had acted reasonably in publishing the defamatory content, media members can evade liability.

In order to be held at fault for defaming, media members need only have been negligent, whereas intention is required on the part of non-media defendants.

The law of defamation balances the rights to freedom of expression and human dignity in a way that must be constitutionally justifiable.

Non-media defendants' right to freedom of expression is limited more than that of media defendants when the wrongfulness of defamation is considered. When dealing with fault, media defendants' right to freedom of expression is limited more than that of non-media defendants.

These limitations were found to be constitutionally justifiable prior to the digitisation of society and the rise of social media. Prior to these developments the media risked damaging reputations on a large scale. Regular South Africans typically did not bear the same risk. Today this risk is inherent to the communications of South Africans that are not media members.

In light of these changes, this dissertation aims to ascertain whether it is still constitutionally justifiable to distinguish between media and non-media defendants in defamation cases.

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CHAPTER 1: INTRODUCTION

1.1. INTRODUCTION AND BACKGROUND TO STUDY

Over the last two decades, two events have caused drastic changes in the South African legal and media landscapes.[1] The country's transformation from a state with parliamentary sovereignty to constitutional sovereignty and the arrival of the internet has reinvented the practices of publishing and distribution of information in South African society.[2]

The Constitution,[3] the *lex fundamentalis* of South African law,[4] containing the Bill of Rights, entrenches basic human rights as its foundation. Under the Constitution South Africans have the right to human dignity, which underlies a variety of other human rights,[5] such as the right to freedom of expression incorporating a right to receive and impart ideas.[6] The Constitution has an important role in maintaining South Africa's relatively young post-apartheid, democratic and open society.[7]

The Internet and World Wide Web have sparked change in the way information is published and distributed. Society has undergone a "page to screen" transformation[8] and information is increasingly published and distributed using information and communications technology rather than ink, paper and delivery by hand or postal

1 O Ampofo-Anti in J Meiring (2017) *South Africa's Constitution at Twenty-One* 62-64.

2 *Id.*

3 The Constitution of the Republic of South Africa of 1996 ('the Constitution'). S2 of the Constitution states that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

4 *National Media v Bogoshi* 1998 4 SA 1196 (SCA) (hereafter '*Bogoshi*'); *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC) (hereafter '*Khumalo*'.)

5 Preamble to the Constitution.

6 S16 of the Constitution.

7 I Currie & J De Waal (2013) *The Bill of Rights handbook* 343.

8 Kress G (2013) *Literacy in the new media age* 5.

service.[9]

Defamation is the wrongful, intentional (or, in the case of the media, negligent) publication of words or behaviour concerning another which has the tendency to undermine his status, good name and reputation.[10]

Defamation can be committed in a variety of mediums including newspapers and electronic publications on the World Wide Web.[11] Printed newspapers form part of so-called "traditional media,"[12] whereas electronic publications are categorised as "new media."[13]

The law of defamation seeks to find a balance between the two important rights to freedom of expression and dignity.[14] This entails the limitation of both rights through a proverbial constitutional prism.[15] The law through which basic human rights are limited must be reasonable in that it must not kerb any basic human rightmore than is necessary for the limitation to achieve its purpose.[16]

South African courts distinguish between media defamation defendants and non-media defamation defendants. Although a more detailed conceptualisation of "media defendant" and "non-media defendant" follow in paragraph 2.2.2.2, the difference is largely based on whether the defendant partakes in the newsgathering, production of distribution process or a media company.[17] Media defendants are generally affiliated

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9 *Id.*

10 J Neethling et al (2005) *Neethling on Personality Rights* 131; D Van der Merwe *et al* (2016) *Information and communications technology law* 491.

11 Snail S 'Cyber Crime in South Africa – hacking, cracking and other unlawful online Activities' (2009) *JILT* 2.

12 G Daniels (2017) 'State of the Newsroom South Africa – Fakers & Makers' 18.

13 *Id.* 10.

14 D Milo & P Stein (2013) *A Practical Guide to Media Law* 19.

15 *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others:* In *re: Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 1 SA 545 (CC). Also see D Van der Merwe (2016) 495.

16 Currie & De Waal (2013) 178.

17 *NM and others v Smith and others* (CCT 69/05) [2007] ZACC para 94. (Hereafter *NM and Others v Smith.)* Also see *Pakendorf & Others v De Flamingh* 1982 3 SA 146 (A) (hereafter *Pakendorf*. To the contrary the court in *Bogoshi* (1998) 1202 E-F held that printers were not media defendants.

with media companies whereas non-media defendants (also referred to as regular defendants) are not.[18]

The result of differentiating is that different rules of liability apply to non-media defendants and media defendants. This *status quo* was found constitutionally justifiable in 2002.[19] The digital revolution changed the international and South African societal context dramatically.[20] Society's news consumption habits and preferences have also changed. Whereas the traditional media was once the gate keeper of information in the public interest,[21] South Africans (and the international community) rely on both web-based information sources and the traditional media.[22] Taken into consideration these changes, this study questions whether the legal position approved in 2002 is still constitutionally justifiable.

Once a plaintiff proved that a defendant had published a defamatory statement concerning the plaintiff, the delictual elements of wrongfulness[23] and fault[24] are presumed on the part of the defendant. The latter bears the onus of averring and proving the defences against presumed wrongfulness and fault.[25]

An exclusive defence based on reasonableness is available to members of the media who seek to evade liability based on wrongfulness.[26] Concerning the fault element, non-media defendants are held to a lower standard of fault than media defendants.[27]

Since the distinction between media defendants and non-media defendants (and its effect on the availability of defences) was confirmed two decades ago, a change

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18 *Id*.

19 *Khumalo* (2002).

20 See Chapter 4 for a detailed discussion.

21 *Bogoshi* (1998) 1213.

22 Edelman '2019 Edelman Trust Barometer' (2019) http://www.edelman.com/site/g/files/aatuss 191/files/2019-02/2019_Edelman_Trust_Barometer_Global_Report_2.pdf. 50.

23 Unlawfulness is the objective element of the delict of defamation. To exclude unlawfulness, a defendant must rely on the *boni mores,* an objective criterion. See in this regard Y Burns (2015) *Communications Law* 222.

24 A person who commits a delict will be liable for damages if he had acted with intent or negligence. See Burns (2015) 222.

25 Van der Merwe (2016) *Information and communications technology law* 491.

26 JC Knobel 'Nalatige persoonlikheidskrenking' 2002 *THRHR 32.*

27 *Id.*

occurred in the context wherein the South African defamation law is applied.[28] It was brought about by the arrival of the internet, the World Wide Web and social media.[29] Globally, societal changes were caused by the internet and the rise of a network society.[30]

In 2018, South Africans use the internet, the World Wide Web and social media as key instruments through which the right to freedom of expression is exercised.[31]

This is done by publishing content in various mediums including written text, audio and video to audiences, and distributing the publications electronically[32] to audiences ranging from a handful to millions.[33] The question arises whether the distinction between media defendants and non-media defendants is still constitutionally justifiable in a digital age.

1.2. SCOPE AND PURPOSE OF STUDY

1.2.1. Overview

The transition from traditional media to news media is accelerating.[34] Traditional print media journalists publish information in, for example, newspapers and can also publish and distribute news reports on the World Wide Web.[35]

The ability to publish and distribute information online is also inherent to bloggers

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28 The societal change is discussed in detail in chapter 4 of this dissertation.

29 M Castells & G Cardoso (2005) *The Network Society: From Knowledge to Policy* 7. According to Castells and Cardoso, the network society describes the social structure resulting from the interaction between a paradigm of new technology and social organisation. The internet, an international digital communication network of computers, is the main medium for socialising for members of the network society.

30 *Id.*

31 Internetworldstats.com 'Internet Users Stastistics for Africa (Africa Internet usage, 2018 population statistics and Facebook subscribers)' 12 September 2018 https://internetworldstats.com//stats1.html (accessed 20 November, 2018).

32 S Nel in S Papadopoulos & S Snail (eds) *Cyberlaw @ SA III*: *The law of the Internet in South Africa* (2012) 251.

33 M Vries & N Moosa 'The laws around social media' (2015) *Without Prejudice* 39-40.

34 G Daniels (2017) 'State of the Newsroom South Africa – Fakers & Makers' 2.

35 Daniels (2017) 2.

and citizen journalists.[36]

Citizen journalists generally use technology to compile reports on a variety of current topics.[37] Other than traditional journalists, citizen journalists or bloggers are not necessarily affiliated with a media or publishing company.[38] These pseudo-publishers or journalists are not required to adhere to any editorial policies or codes of conduct.[39] Some may be compensated for their work, but some create and publish content without remuneration.[40]

In order to determine whether the distinction between media defendants and non-media defendants is still constitutionally justifiable in a digital age, this study will discuss the delict of South African defamation law and expound on its subset of media defamation law. Jurisdiction in the field will be studied to examine South African courts' reasons for differentiating between the two types of defendants. The study will indicate how the Constitution informs the law of defamation and guides its application, interpretation and the limitation of basic human rights that defamation law facilitates. Societal changes over the last two decades will be illustrated, and developments in international defamation law compared to that of South Africa.

In developing South Africa's defamation law, within the context of mainly print media, courts have provided reasons for differentiating between members of the public who defamed, and the media who defamed. These reasons include that the mass media has wide publication abilities and an ability to cover a defamatory statement extensively which often has far-reaching consequences for the defamed individual.[41]

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36 *R v National Post* SCC 16 2010 1. A 'blogger', according to wordpress.org, is someone who posts content such as articles, new information, up-to-date news, opinions and case studies onto a 'weblog', which is a term used to describe websites that maintain an ongoing chronicle of information. See further Wordpress.org 'Introduction to Blogging' 5 January 2005. https://codex.wordpress.org//Introduction_to_Blogging (accessed on 5 May 2017).

37 *Id.*

38 *Id*.

39 *Id.*

40 C Beugge 'Blogs that make the most money – and how to set up your own' 4 June 2014 *The Telegraph* http://www.telegraph.co.uk//finance//personalfinance//money-saving-tips//10865063//Blogs-that-make-the-most-money-and-how-to-set-up-your-own.html (accessed on 15 May 2017).

41 Burns (2015) 222.

Motivations for the differentiation between media defendants and non-media defendants were emphasised in jurisprudence dating as far back as 1903. In that year, the court in *Wilson v Halle and Others*[42] remarked that "…a company that makes it its business to publish newspapers, and which employs individuals to publish those newspapers, is liable for any libel that may appear therein."[43]

In 1982, in *Pakendorf,* the court endorsed differentiating between defamation by the media and defamation by individuals based on the high risks inherent to the media industry because "…by disseminating its products, the press undoubtedly pose one of the potentially greatest sources of damage to the individual's personality rights".[44]

In 2007, the court in *NM v Smith*[45] listed common characteristics of a media defendant.[46] It held that a media defendant has some form of professional standing, usually obtained through editorial policy and a subscription to a code of conduct which ensures accurate reporting and verification of allegations. A media defendant was described as having the ability to derive commercial gain by disseminating information and the court stated that media defendants are able to reach a wide audience through widespread publication.

As was indicated in paragraph 1.1 of this dissertation, the elements of wrongfulness and fault are affected by the different approach of South African courts in dealing with media defendants and non-media defendants.[47]

To rebut the presumption of wrongfulness, media defendants and non-media defendants may employ the defences of truth and public benefit, publication that amounts to fair comment and publications made on a privileged occasion.[48] Since 1998, a fourth defence of reasonableness was made available to media defendants, enabling them to rebut the wrongfulness presumption in defamation cases.[49]

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42 *Wilson v Halle and Others* 1903 TH 178 (hereafter '*Wilson'*).
43 *Wilson* (1903) 201.
44 *Pakendorf* (1982) 157-158.
45 *NM and others v Smith* (2007) paras 94, 149 and 176.
46 *NM and others v Smith* (n 13 above) paras 94, 181.
47 Knobel (2002) 27-36.
48 *Khumalo* (2002) 414 B.
49 *Bogoshi* (1998).

The presumption of fault is generally refuted by the non-media defendant proving that he lacked *animus iniuriandi* in defaming the plaintiff.[50] Media defendants may not rely simply on lack of intent as a defence but are held to a higher bar, that of non-negligence.[51] In comparing the position of media defendants and non-media defendants, a right to freedom of expression limitation transpires that applies to media members only.[52]

In comparing the resultant position of media defendants and non-media defendants, it becomes evident that the *status quo* limits the right to freedom of expression of non-media defendants.[53]

A quick overview of development in South Africa's law of defamation provides some crucial background.

Prior to 1998, media defendants (excluding news vendors) were held strictly liable for defamatory publications. Media defendants were presumed to have intended to defame, regardless of whether they were actually at fault.[54] This precedent originated from the *Pakendorf* case and the result was thus: A media defendant who defamed and could not rebut the presumption of wrongfulness was automatically considered as having defamed with intent.

Between 1998 and 2002, the law of defamation (specifically as it pertains to the media) was developed and found to be consistent with the constitution.[55]

In *National Media Limited v Bogoshi*[56] (*Bogoshi* case) strict liability for media defendants was rejected as it did not constitute a justifiable balancing of the rights to

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50 Burns (2015) 222.

51 Neethling *et al* (2005) 131.

52 Eloff, H 'SA defamation law: media defendants and Average Joes belong on equal footing' 11 October 2018 www.lowvelder.co.za//454515//sa-defamation-law-media-defamation-average-joe-belong-equal-footing (accessed on 25 February, 2019).

53 *Id.*

54 *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 3 SA 631 (A) 638 (hereafter '*O' Malley*'); *Trimble v Central News Agency* 1934 AD 43 (hereafter '*Trimble'*).

55 *Bogoshi* (1998) 1196; *Khumalo* (2002) 401; *Le Roux & Others v Dey* 2011 3 SA 274 (CC) (hereafter '*Le Roux*').

human dignity and freedom of expression.[57] This was the first case where a South African court acknowledged that a false defamatory statement could be lawful based on publication having been reasonable.[58]

The court in *Bogoshi* upheld the differentiation between media defendants and non-media defendants.[59] The latter benefitted from the additional defence of reasonableness in terms of which "the publication in the press of false defamatory statements of fact will not be regarded as unlawful if, upon considerations of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time."[60]

The court, having rejected strict liability,[61] considered the requirements of the rebuttal of intention in media defamation cases.[62] The rule for non-media defendants would not be applied to the media: Unlike non-media defendants, media defendants could not evade liability by proving that they had not intended to defame. Media defendants would have to prove that they were not negligent in defaming.[63]

The framework as developed in *Bogoshi* was approved by the Constitutional Court in *Khumalo and Others v Holomisa* (*Khumalo* case).[64]The court found that the reasonableness defence passed constitutional muster, in that it managed to "…strike an appropriate balance between the protection of freedom of expression on the one hand, and the value of human dignity on the other."[65]

Concerning the media defendant and the fault element, the court in *Khumalo* confirmed that the absence of *animus iniuriandi* would constitute a defence for

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56 *Bogoshi* (1998).

57 *Id.* 1210 A-G.

58 *Id.* 1212 G-H.

59 *Id.*

60 *Bogoshi* (1998) 1212 F-G. The court stated that, to determine reasonableness, a non-exhaustive list of factors was listed that must be considered when the reasonableness of a publication is considered. These included the nature, extent and tone of allegations made. The nature of the information on which the allegations were based, and the reliability of sources had to be considered, and the steps taken to verify the information.

61 *Id.* 1210 G-H.

62 *Id.* 1214 F-G.

63 *Id*.

64 *Khumalo* (2002) 401.

65 *Khumalo* (2002) 424 B.

media defendants only if the lack of intention was not the result of the defendant's negligence.[66]

1.2.2. Scholarly dissonance and limitations to study

The developments in *Bogoshi* and *Khumalo* were supported, but not without reservation.[67] For some, it appeared as if the court in *Bogoshi* had blurred the lines between the elements of wrongfulness and fault,[68] and between the fault requirements of intention and negligence.[69]

Authors differ on whether fault takes the form of negligence or intent as per the *Bogoshi* and *Khumalo* judgments.[70] According to Midgley, fault in the form of intention remains the basis of liability for all defendants.[71] Midgley states that media defendants seeking to evade liability must first prove that they had no intention to defame and secondly, prove that the defamation was not the result of their negligence.[72]

Neethling, on the other hand, argues that media liability is based on negligence and that it has replaced *animus iniuriandi* as the form of fault.[73] This study agrees with Neethling's position that the mass publication of a defamatory statement by a

66 *Khumalo* (2002) 415 F.

67 JR Midgley 'Media liability for defamation' (1999) *SALJ* 211.

68 Midgley (1999) 221-222*;* J Neethling *'*Die lasterreg, die Grondwet en National Media Limited v Bogoshi' (1999) *Tydskrif vir Regswetenskap* 117. See also JM Burchell 'Media freedom of expression scores as strict liability receives red card: National Media v Bogoshi' (1999) *SALJ* 6.

69 Midgley (1999) *222.*

70 Midgley (1999) 222; J Neethling 'Die lasterreg en die media: strikte aanspreeklikheid word ten gunste van nalatigheid verwerp en 'n verweer van mediaprivilegie gevestig' (1999) *THRHR* 443*.* Midgley states that 'fault in the form of intention remains the basis of liability for all defendants...if media defendants wish to rebut the presumption of intention by pleading ignorance or mistake, such ignorance or mistake must have been subjectively reasonable in the circumstances of the case: the defendant must not have been negligent in making the mistake.' Neethling, conversely, argues that media liability will no longer be based on *animus iniuriandi*, but on negligence.

71 Midgley (1999) 222.

72 Midgley (1999) 222.

73 Neethling (1999) 443.

member of the media raises the presumption of negligence.[74] Apart from clarifying its position on this subject, any further discussion of the reasons behind it fall outside of the parameters of the present study. South African courts have not set the standard of negligence for media defamation.[75] The parameters of this study do not extend to suggesting such a standard of negligence.

This dissertation focusses on the reasonable publication of false defamatory statements in general. No specific focus will be placed on the reasonable publication of false defamatory matter relating to politicians and public figures.

Another critique of the *Bogoshi* and *Khumalo* judgments states that courts blurred the edges between the requirements of fault and wrongfulness.[76] Attempting to solve this conundrum falls outside the boundaries of this study.

The present study will not include a discussion on the onuses resting on plaintiffs and defences in defamation cases, nor will it discuss the constitutionality of remedies available to the defamed, nor to the calculation of damages.

Private international law is excluded from this study, as is the choice of applicable law such as whether, how and in terms of which country's law a South African complainant can institute defamation action against a foreign social media user. It is noted that the network society offers borderless communication, enabling a South African to affect publication of content in the United States of America within minutes. Likewise, a computer user in England can publish in South Africa in the blink of an eye.

It is noted that the public's trust in traditional media institutions' credibility has diminished.[77] South Africans are sceptical of traditional media organizations and are

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[74] See J Neethling 'The protection of false defamatory publications by the mass media: recent developments in South Africa against the background of Australian, New Zealand and English law' (2007) *CICSA* 103-123.

[75] Midgley (1999) *222.*

[76] Midgley (1999) 222.

[77] J Rittenberry 'South Africa: As trust falls, businesses expected to lead' (2018) https://edelman .com/post/south-africa-trust-falls-business-expected-to-lead (acessed on 27 February 2019).

concerned about the 'fake news'[78] phenomenon.[79] A further investigation of the phenomenon or the public's lack of trust in the media falls outside of this study's parameters.

What this study seeks to establish is whether South Africa's common law of defamation is constitutionally justifiable in that it distinguishes between media defendants and non-media defendants. The justifiability of the resulting rights limitations will be investigated.

The possibility of treating non-media defendants and media defendants on equal footing in defamation cases was acknowledged by the courts in *Pakendorf,*[80] *Bogoshi*[81] and *Marais v Groenewald* (*Marais*).[82]

This study anticipates that, due to societal changes having transformed how non-media defendants communicate, such a future development of the South African defamation law will necessitate ceasing to distinguish between media and non-media defendants.

1.2.3. Problem statement and objectives of study

The attributes that previously set media defendants apart are no longer unique to members of the media.[83] News dissemination occurs in a context differing greatly from the *status quo* that prevailed at the time of the *Bogoshi* and *Khumalo* cases.[84]

The network society functions in a digital context. This enables regular residents

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78 Edelman, R 'Fake news; the neutron bomb explodes' (2017) https://edelman.com/insights/fake-news-neutron-bomb-explodes (acessed on 27 February 2019). Edelman defines 'fake news' as "sloppy or biased reporting by news organizations."

79 *Id.* Also see Edelman, R 'Fake news; the neutron bomb explodes' (2017) https://edelman.com/insights/fake-news-neutron-bomb-explodes (acessed on 27 February 2019).

80 *Pakendorf* (1982) 155 A.

81 *Bogoshi* (1998) 1214 J.

82 *Marais v Groenewald & Others* 2000 2 SA 578 (T). (Hereafter '*Marais'*).

83 The attributes that used to set media defendants apart include their ability to publish and distribute information on a large scale. See Eloff (2018).

84 *Id.*

to effect mass publishing, an ability previously reserved for mass media.[85] Whereas the ability to share information in the public interest was once limited to mass media, the public is now able to do so.[86] Previously, the media's ability to make money through publishing and distributing news was unique to mass media.[87] Today, regular citizens receive incomes from performing these actions.[88]

These changes necessitate a re-evaluation of South Africa's defamation law to ascertain whether it is constitutionally justifiable.[89]

In reaching each study objective and in answering the research question, it must be continuously noted that the law of defamation is a vehicle through which a balance must be reached between the protection of freedom of expression on the one hand, and human dignity on the other.[90] This balance necessarily entails competing constitutional rights to be balanced in a constitutionally justifiable way.[91]

Central to this enquiry is Section 36 of the Constitution, known as the limitation clause. It dictates that rights in the Bill of Rights may be limited in terms of law of general application to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. When considering the reasonableness of such a limitation, relevant factors are considered that include the nature of the right,[92] the importance and purpose of the limitation,[93] the extent and nature of the limitation,[94] the relation between the limitation and its

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85 Vries & Moosa (2015) 39-40.

86 J Thompson 'This is how much money food bloggers actually make' 28 April 2014 https://www.huffingtonpost.co.za/2017/ 04/ 29/ this-is-how-much-money-food-bloggers-can-actually-make_a_22060872/ (accessed 4 May 2018).

87 R Phillips 'Constitutional Protection for non-media defendants: Should there be a distinction between you and Larry King?' (2010) *Campbell L. Review* 185.

88 Phillips (2010) 185.

89 Eloff (2018).

90 *Khumalo* (2002) 424 B.

91 S 36 of the Constitution holds that the rights to dignity and freedom of expression may be limited by our common law of defamation, if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

92 S 36(a) of the Constitution.

93 S 36(b) *Id.*

94 S 36(c) *Id.*

purpose,[95] and less restrictive means to achieve the purpose.[96]

Section 39 of the Constitution, the interpretation clause, states that the law is to be interpreted taking into consideration numerous factors, including international law and societal changes.[97] This study investigates how Canada and England reconsidered differentiation between media and non-media defendants in reaction to the societal changes brought about by society's digitisation.

1.2.4. Reasons for choice of comparative jurisdictions

The issues raised in this study are not unique to South Africa. It will be instructive to see how it was resolved elsewhere, for example in Canada and England. These two countries also had to adapt to the transition from traditional media to new media.

In these countries, defences focussed on media publications were extended to or replaced by defences that apply to all defendants in defamation cases and not only members of the media.[98]

In England, defendants may evade liability by proving that the statement complained of was, or formed part of, a statement on a matter of public interest and that the defendant reasonably believed that publishing the statement complained of was in the public interest. This is in terms of Section 4 of England's Defamation Act of 2013. Prior to the Act's commencement, only media defendants could avoid liability by indicating that they had practised 'responsible journalism'. The test for 'responsible journalism'[99] required *inter alia* the defamatory statement, the context surrounding it and the conduct of the author to be examined to ascertain whether the statement was made reasonably.[100]

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95 S 36(d) *Id.*

96 S 36(e) *Id.*

97 *Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (BGD) (hereafter *Nyamakazi*).

98 Tench (2014) 'Defamation Act 2013, A Critical Evaluation Part 4 – the Public Interest defence' 29 July 2014 inforrm.wordpress.com (accessed on 19 May 2017).

99 *Reynolds v Times Newspapers Ltd* 2006 UKHL 44 (hereafter '*Reynolds*').

100 *Id.*

In discussing these developments, the conclusion is reached that the Defamation Act has widened the scope of application of England's qualified privilege defence in that the statutory version now applies to all defendants.[101]

In Canada, when a false statement is published, the defence of responsible communication on matters of public interest allows publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest.[102]

The defence of responsible communication on matters of public interest was applied in *Crookes v Newton*[103] (C*rookes* case) and extended to apply 'to anyone who publishes material of public interest in any medium' in *Grant v Torstar* (*Torstar* case).[104] Here, the defence is focused more on the conduct of the defendant than the content of the publication.[105]

1.2.5. Methodology

In Chapters 1 and 2 an introduction, problem statement and illustrative hypothetical scenario are followed by the background and development of South Africa's defamation law. The elements of the delict of defamation will be expounded on and the defences available to media defendants and non-media defendants will be discussed.

The concepts underpinning media defamation law will be focussed on, in particular the conceptualisation of 'publication,' 'mass media' and 'media defendants.' Media-exclusive defences of 'reasonableness' under wrongfulness and 'non-negligence' (also called 'reasonableness') under the fault element, will be discussed.

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101 See para 5.4 of this dissertation.

102 *Grant v Torstar Corporation* 2009 SCC 61 (hereafter '*Torstar*'). *Crookes v Newton* 2011 SCC 47 (hereafter '*Newton'*).

103 Tench (2014).

104 *Id.*

105 *Id.*

Chapter 3 elaborates on media defamation jurisprudence in South Africa. Jurisprudence will be divided into pre-1994 and post-1994 categories to reflect the transformative impact the Constitution had on defamation law jurisprudence featuring the media.

In Chapter 4 the rise of South Africa's 'network society'[106] and its effect on news dissemination is addressed. The traditional media's transformation to incorporate digital media[107] is expounded on and aspects of a different news reporting reality emphasised. The application of media defamation law within a 'new media' context will be illustrated by means of revisiting the hypothetical scenario introduced in Chapter 2. This is expected to challenge the constitutional justifiability of distinguishing between media defendants and non-media defendants and the effects thereof.

Chapter 5's comparative study will indicate how the law in England and Canada adapted to the transition from traditional media to new media. The elements of defamation (or libel[108] and slander[109]) will be expounded on and jurisprudence discussed.

In Chapter 6, the hypothetical scenario from Chapters 2 and 4 is revisited. A conclusion is reached on whether the South African defamation law is still constitutionally justifiable in that it distinguishes between media defendants and non-media defendants.

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106 Castells & Cardoso (2005) 7. According to Castells & Cardoso, a network society is a social structure built of networks that are operated by information and communication technologies.

107 G Daniels (2014) 'State of the Newsroom South Africa – Disruptions Accelerated' 28-30.

108 In some countries (such as England and Canada) defamation comes in two forms, either libel or slander. Slander is verbal defamation and libel is defamation in the written form. See Collins (2014) *Collins on Defamation* vii. Read more on libel and slander in paragraph 5.4.2 below.

109 *Id.*

CHAPTER 2: SOUTH AFRICA'S DELICT OF DEFAMATION

2.1. INTRODUCTION, PROBLEM STATEMENT AND HYPOTHETICAL SCENARIO

South African media defamation law treats media defendants and non-media defendants differently. In chapter 1.1 above, the present study explained that South African courts distinguish between media defendants and non-media defendants. The result of differentiating is that different rules of liability apply to non-media defendants and meda defendants.

In South Africa, defamation is the wrongful, intentional (or in the case of the media, negligent) publication of words or behaviour concerning another which has the tendency to undermine his status, good name and reputation.[110] Once it was proven that a defendant had published something defamatory about a plaintiff, two presumptions arise.[111] The first is that the defendant had acted wrongfully in defaming. To rebut this presumption, media defendants may use an exclusive reasonableness defence that is not available to non-media defendants. The second is that the defendant is at fault (intention as form of fault applies to non-media defendants whereas negligence applies to media defendants).[112]

The factors that motivated courts to differentiate between the two types of defendants no longer carry the same weight – in fact, some of these factors no longer exist. The present study will illustrate in chapter 4 below that non-media defendants have publication abilities that are equal to that of media defendants. Media defendants and non-media defendants now bear the same risk of prejudicing the dignity of others.

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110 Neethling et al (2005) *Neethling on Personality Rights* 131. (Defamation was accordingly defined in para 1.1 on page 3 above.)

111 Neethling *et al* (2015) *Deliktereg* 372.

112 *Id.*

Accordingly, the present study questions whether inconsistent right limitations resulting from differentiating between media defendants and non-media defendants is constitutionally justifiable.

The hypothetical scenario below illustrates that media defendants and non-media defendants are approached differently when the elements of wrongfulness and fault are considered.

Steve Hofmeyr is a South African Facebook user with 454 503 followers.[113] He is not a media member, but a South African singer and public figure,[114] well-known for his controversial statements[115] on social media platforms.[116] If Steve Hofmeyr defames someone through his Facebook post, he can evade liability by proving that he did not intend to defame.[117]

Charles Cilliers is a media member. Cilliers is a reporter and online editor employed by *The Citizen,* a daily newspaper and digital news service that reaches 138 000 online readers daily.[118] Its print edition has a reach of approximately 45 947.[119] When defamation appears in a *The Citizen* publication, neither the reporter, content creator, sub-editors, editor, owner, publisher or printer[120] can evade liability by proving that the intention to defame was not present.[121]

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113 Steve Hofmeyr's Facebook page www.facebook.com/Steve.Hofmeyr/ (accessed on 15 October 2018).

114 *Id.*

115 Du Plessis, E 'Should we tolerate Steve Hofmeyr?' 2 February 2018 https"//www.huffingtonpost.co.za //should-we-tolerate-steve-hofmeyr_a_23371918// (accessed on 18 October 2018).

116 Social media platforms allow the holders of smartphones, tablets and similar devices with internet access to communicate with a mass audience. See A Manno & K Shahrabi 'Web 2.0: How It Is Changing How Society Communicates' June 2010 http://www.asee.org/documents/sections/middle - Atlantic/fall-2009-01/Web-20-how-it-is-changing-how-society-communicates.pdf (accessed on 23 April 2018).

117 This is because Steve Hofmeyr is not a media defendant. He is a non-media defendant in a defamation case. See JC Knobel 'Nalatige persoonlikheidskrenking' 2002 *THRHR* 32 where the author explains that defamation defendants that are not members of the mass media need only disprove intent as form of fault to evade liability.

118 *Citizen News* Facebook page https://www.facebook.com//TheCitizenNewsSA// (accessed on 10 May 2018).

119 The Audit Bureau of Circulations of South Africa. Report: 'Newspaper Circulation Statistics for the period of July-September 2017.'

120 Paragraph 3.2.1.6 sheds light on the roles played by different contributors in a newsroom as Described by the court in *Long* (1993) 91-94. For the purposes of this chapter, it suffices to explain these roles in a print media context. A reporter is responsible for gathering news and conveying it to the newsroom. Content creators function mainly in a digital context and create contents depicting the news in an easily digestible form. Sub-editors are assigned by editors to scrutinise text provided by

Concerning defamation, the rules that apply to the media are different to the rules that apply to regular citizens.[122] Although discussed in detail throughout this study, the differentiation can be found in the standard of fault applied to establish liability for the media, and in determining the lawfulness of media members' defamatory publications.

For media members, this standard of fault is negligence, whereas intent applies to regular (non-media) defamation defendants.[123] A more detailed discussion follows in this chapter at paragraph 2.2.3.2. In addition hereto, media defendants may evade liability by proving that the reasonableness of their publication rendered it lawful.[124] This defence is not available to non-media defendants.[125]

In the above scenario featuring Steve Hofmeyr and Charles Cilliers, the latter has an additional, exclusive defence to rebut the presumption of wrongfulness that the former may not utilise.

South African courts have over the years distinguished between non-media defamation defendants and media defamation defendants setting precedents that predate the advent of social media.[126] The reasons for this differentiation include that the mass media has wide publication abilities[127] and an ability to convey a

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reporters and to edit it linguistically. Editors are responsible for approving the final product orior to printing. Owners of media companies have a self-explanatory title. Publishers and printers are responsible for effecting publication and printing of print products. Distributors ensure that print products are distributed. These roles were confirmed during a site visit to Lowveld Media's newsroom and printing press on February 25, 2019.

121 See Knobel (2002) where the author explains that media defendants cannot evade liability for defamation by proving lack of intent. Also see the cases of *Hill* (1844), *Wilson* (1903), *Craig* (1963), *Hassen* (1965), *O'Malley* (1977), *Pakendor* (1982), *Bogoshi* (1998), and *Khumalo* (2002).

122 Knobel (2002). Also see *Marais v Groenewald* [2002] All SA 578 (T) (hereafter '*Marais*'); (1999) 443.

123 Neethling (1999).

124 This was illustrated by the court in *Bogoshi* (1998); *Khumalo* (2002). Also see Milo & Stein (2013) *A Practical Guide to Media Law* 32-38.

Milo & Stein (2013) 32-38. (A more detailed discussion on the forms of fault for media defendants and non-media defendants follows in this chapter at para 2.2.3.2)

126 The first differentiation between media defendants and non-media defendants was made in *Hill* (1844). The precedents were confirmed by our courts in *Pakendorf* (1982); *Bogoshi* (1998) and *Khumalo* (2000). This was also confirmed by the court in *Herholdt v Wills* 2014 JOL 31479 (GSJ) 6 - 7. Landmark cases include *Bogoshi* (1998) and *Khumalo* (2002), which predate the arrival of social media in 2004. See Chapter 4 in this study for a discussion of the establishment of the internet, World Wide Web and social media.

127 *O'Malley* (1977) 640.

defamatory statement extensively, which often has far-reaching consequences for the defamed individual.[128] Another reason includes the fact that many members of the media belong to media institutions which prescribe to a code of conduct.[129]

Although the advent, nature and functioning of the internet, World Wide Web and social media will be discussed in detail in Chapter 4, this study notes that social media platforms enable non-media members to create, publish and distribute content to large audiences.[130]

What follows is a discussion on the background and development of South Africa's defamation law and specifically, its media defamation law. The elements of the delict and defences available to non-media and media defendants will be discussed below.

2.2. BACKGROUND AND DEVELOPMENT OF SOUTH AFRICAN MEDIA DEFAMATION LAW

2.2.1. Introductory remarks

South Africa's law of delict has developed over more than a century. It had its origins in Roman Law and has since been influenced by the Constitution and the Bill of Rights.[131] It offers a system for compensating those who were harmed by the conduct of others.[132]

The delict of defamation is part of South Africa's private law[133] and falls under the subcategory of the law of obligations.[134] Private law has as its goal the regulation of interactions between individuals in the community.[135] When people or their individual

128 Burns (2015) 222. Also see *Pakendorf* (1982) 157 H, where the court motivated the differentiation based on the media's ability to cause widespread prejudice in defamatory publications.

129 *NM and Others v Smith* (2007) 260.

130 A Manno & K Shahrabi 'Web 2.0: How It Is Changing How Society Communicates' June 2010 http://www.asee.org/documents/sections/middle-Atlantic/fall-2009-01/Web-20-how-it-is-changing-how-society-communicates.pdf (accessed on 23 April 2018).

131 Neethling *et al* (2015) 1-4.

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

interests clash, the law recognises each individual's interests and sets limits regarding those interests and reconciles the clashing interests.[136]

The law of delict stipulates which interests are legally recognised. It dictates in which circumstances the interests are protected against infringement and how the balance between these rights can be restored.[137] Whereas each person must generally bear the damage he suffers,[138] the law of delict acknowledges that the burden of damage sometimes moves from one person to another.[139] When a wrongdoer has caused another to suffer damages, that wrongdoer may carry the obligation of compensating the victim for the harm he had caused.[140]

The law of defamation was developed to protect the right to a good name which is a personality right.[141] In the South African law, a distinction is made between delicts that cause patrimonial damage (*damnum iniuria datum*) and those that cause personality injuries (*iniuria*).[142]

Where an injury to such a right has occurred, it is called *iniuria*.[143] An *iniuria* is the wrongful infringement of or contempt of a person's *corpus* (physical integrity), *fama* (good name) or *dignitas*.[144] *Dignitas* refers to the personality interest of dignity or honour.[145]

The delict of defamation allows a plaintiff to claim compensation from a wrongdoer who damaged his right to a good name.[146] Whereas patrimonial damage may be remunerated with the *Actio legis Aquiliae* (an action for the wrongful and culpable causing of patrimonial damage), the *actio iniuriarium* is an action for satisfaction

136 *Id.*
137 *Id.*
138 *Telematrix (Pty) Ltd//a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2005 ZASCA 73 para 12. Also see C Asser (1994) *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht: Verbintenissenrecht* 12.
139 Neethling *et al* (2015) 1-3.
140 *Id.*
141 *Id.* 13.
142 *Id.*
143 *Id.* 269.
144 *Id.* 349-353.
145 Neethling et al (2005) 49-51.
146 *Id.*

(*solatium* or sentimental damage) for the wrongful and intentional injury to personality.[147]

Because the law of defamation falls under the umbrella of delictual claims, he who seeks to claim delictually must prove all five of the elements of a delict. These elements are conduct, wrongfulness, fault, causation and damage. All five of these elements must be present before delictual liability will be established.[148] What follows is an overview of these elements.

2.2.1.1. The elements of delict

2.2.1.1.1. Conduct

For a delict to exist, the wrongdoer must have acted in a wrongful way, causing damage to someone else.[149] Such overt behaviour may be a positive act performed physically, the making of a statement, or the failure to say or do something.[150] Both commissions and omissions may qualify as conduct establishing a delict.[151]

2.2.1.1.2. Wrongfulness

Wrongfulness describes the way in which prejudice is caused.[152] When one person acts and causes harm to another, this will not necessarily give rise to legal liability. Liability will only follow if prejudice was caused in a wrongful way. An act will be wrongful if it is performed in a way legally reprehensible according to the *boni mores*.[153]

South African courts use a two-step test to ascertain whether conduct was wrongful. First, it is determined whether a legally recognised individual interest was

147 Neethling *et al* (2015) 8-13.
148 *Id.* 4.
149 *Id.* 27.
150 *Id.*
151 *Id.*
152 *Id.* 35.
153 *Id.* 35-38.

infringed.[154] If so, the courts ask whether this was done in a legally reprehensible way which is judged according to society's legal norms.[155]

The legal norm applicable in the case of defamation is: '…in the opinion of the reasonable person, [has] the subject's *dignitas* been negatively affected?'[156] In dealing with the delict of defamation, this question can be rephrased as follows. 'Would the reasonable person, upon reading the statement complained of, conclude that the plaintiff's right to *dignitas* was unjustifiably infringed upon?'[157]

The reasonable person is, in a media context, referred to as the 'reasonable reader.'[158]

2.2.1.1.3. Fault

When conduct leads to the infringement of an individual interest in a legally reprehensible way, the person who acted wrongfully will only be held liable if he is at fault.[159]

Individuals cannot be held accountable for their actions if they lacked the capacity to distinguish between acceptable and unacceptable behaviour to act accordingly at the time of the incident complained of.[160] Before a person can be held accountable for intentional or negligent conduct, it must be established that he or she had the capacity to differentiate between acceptable and unacceptable behaviour and to act accordingly.[161]

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154 Neethling *et al* (2015) 35.

155 *Id.*

156 The reasonable person is a concretisation of the *boni mores*. The reasonable person is a fictitious, normal, right-thinking person. He is not overly sensitive nor hypercritical. The reasonable person subjects himself to the norms and values of our Constitution. See Neethling *et al* (2015) 363. Also see *O'Malley* (1977); *SA Associated Newspapers Ltd v Schoeman* 1962 2 SA 613 (A) 616; *Argus Printing & Publishing Co Ltd v Inkata Freedom Party* 1992 3 SA 579 (A) 587-588.

157 *SA Associated Newspapers Ltd v Estate Pelser* 1975 4 SA 797 (A) 810-811; *Williams v Van der Merwe* 1994 2 SA 60 (OK) 64-65; *Isparta v Richter* 2013 6 SA 529 (GNP) 534-537.

158 *Independent Newspaper Holdings Limited v Suliman* [2004] 3 All SA 137 (SCA) para 24.

159 Neethling *et al* (2015) 135.

160 *Id.* 137; M Loubser & R Midgley (2012) *The Law of Delict in South Africa* 104; *Weber v Santam Versekerings Maatskappy Bpk* 1983 3 SA 381 (A) 389 403 410.

161 Loubser & Midgley (2012) 104.

There are two forms of fault generally recognised in the South African law of delict: intention and negligence.[162] These terms refer to the blameworthiness of the state of mind of the person who had acted.[163]

When individuals act with intention, they direct their will to establish a certain consequence.[164] When someone's act is the result of negligence, it means that he should have foreseen the negative consequences of his actions and acted to prevent it but had failed to do so.[165]

Traditionally, intent was the only acknowledged form of fault concerning infringements of personality and defamation.[166] In 1998, negligence was accepted as the required form of fault for members of the media.[167]

2.2.1.1.4. Causation

Someone cannot be held liable if he has not caused the damage complained of. To qualify as a delict, there must be a causal link between the wrongdoer's conduct and resultant damage.[168]

Whether there is such a causal link in any particular scenario is a question of fact,[169] which is asked and answered in light of available evidence and determined on a balance of probabilities.[170]

The *conditio sine qua non* theory is the starting point in determining whether there is a factual causal link between an act and its harmful consequences.[171] Differently

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162 Loubser & Midgley (2012) 104.

163 *Id.*

164 Neethling *et al* (2015) 138.

165 *Id.* 143.

166 *Id.* 360.

167 *Bogoshi* (1998). Also see Neethling (1999) 443; J Neethling & JM Potgieter 'Regsonsekerheid in die lasterreg in die lig van die Grondwet – die pad vorentoe?' (1996) *THRHR* 706; *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) (hereafter '*Holomisa'*).

168 Neethling *et al* (2015) 187; *First National Bank of SA Ltd v Duvenage* 2006 5 SA 319 (HHA) at 320.

169 Neethling *et al* (2015) 187-189; *Ocean Accident Guarantee Corporation Limited v Koch* 1963 4 SA 147 (A).

170 Neethling *et al* (2015) 187.

171 *Id. First National Bank of SA Ltd v Duvenage* 2006 5 SA 319 (HHA) at 320.

phrased, South African courts ask whether the complained of consequence would have existed had it not been for the conduct of the wrongdoer.[172]

2.2.1.1.5. Damage

As stated above, a delict is a wrongful, culpable act which has harmful consequence. The latter, a consequence that harms, is the element of damage.[173] The law of delict has a compensatory function and requires the loss of some legally recognised value to apply.[174]

Damage is a broad concept comprising patrimonial and non-patrimonial prejudice.[175] In other words, both patrimonial and non-patrimonial loss can be incurred.[176] Whereas patrimonial loss can be compensated in kind, the value of non-patrimonial loss is indirectly measured in money.[177] A further discussion on the objectives and nature of damages falls outside the perimeters of this study.

In conclusion, the elements of the law of delict can be summarised as follows: a delict was committed when an act or omission infringes upon an individual's recognised interest. The wrongdoer who infringed upon a person's right to a good name can be held at fault for either wilfully or negligently causing damage. As a result of the act, the victim has suffered damages which in turn places an obligation on the wrongdoer to compensate the victim for the losses caused.

2.2.2. The Law of Defamation

2.2.2.1. Definition

Defamation is the wrongful, intentional (or, in the case of the media, negligent) publication of words or behaviour concerning another person which has the effect of

172 Neethling *et al* (2015) 187, 227.
173 *Id.*
174 *Id.*
175 *Id.* 228.
176 Milo & Stein (2013) 49.
177 *Id.* 228-229.

injuring that person's status, good name or reputation.[178] The law of defamation seeks to find the balance between one person's right to a good name or unimpaired reputation, and another's right to freedom of expression.[179]

Defamation, as a delict, has as its elements the act of publication of a statement that infringes on a plaintiff's right to a good name, the wrongfulness of such a statement, the causality (in that it is the defamatory statement which causes the subject of the statement to suffer a loss), and the resultant damage caused to the subject's right to a good name.[180]

2.2.2.2. Non-media defendants and media defendants

Non-media defendants and media defendants can effect defamation. An understanding of 'mass media' is needed, from where 'media defendants' is defined.

The term 'mass media' includes the creation, publication and distribution of content in different forms of media, such as television, radio, newspapers, magazines and videos.[181] The media conveys information, entertainment, images, text and symbols to a large audience.[182]

The term 'mass media' is associated with media outlets and –institutions and members of the mass media operate according to rules such as professional codes and practices.[183] Various role players contribute to the creation of media. In a newspaper newsroom, for example, content is generated through the combined

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178 S Nel in S Papadopoulos & S Snail (eds) *Cyberlaw @ SA III*: *The law of the Internet in South Africa* (2012) 251-273; *Le Roux* (2011) 304; *Cele v Avusa Media Limited* [2013] 2 All SA 412 (GSJ); JM Burchell (1993) *Principles of Delict* 160–188; Van der Walt & Midgley (2005) *Principles of Delict* 117–120; Loubser & Midgley (2012) 339.

179 Nel in Papadopoulos & Snail (2012) 251; *Khumalo* (2002); *Mthembi-Mahanyele v Mail & Guardian* Ltd 2004 6 SA 329 (HHA).

180 Neethling et al (2005) 131; *Le Roux v Dey* (2011) 304; *Bogoshi* (1998) 1218; *Mohamed v Jassiem* 1996 1 SA 673 (A) 694; *Khumalo v Holomisa* (2002) 414; *Sayed v Editor, Cape Times* 2004 1 SA 58 (C) 61.

181 R Lorimer & P Scannell (1994) *Mass Communication* 157-184. Also see Van der Walt (2016) 493-495.

182 *Id.*

183 Nel in Papadopoulos & Snail (2012) 255; *NM and Others v Smith* (2007).

efforts of journalists, sub-editors, editors, publishers and printers[184] (these roles are futher discussed in paragraphs 3.2.1.6 and 4.3.2.1 below.)

The mass media is characterised by a form of editorial control.[185] It can therefore be indicated that print media and online news services should qualify as mass media for defamation law purposes.[186]

In defining 'media defendants,' the court in *NM & Others v Smith & Others*[187] (*NM v Smith*) listed common characteristics of media defendants.

Firstly, such a defendant has some form of professional standing obtained through editorial policy and a subscription to a code of conduct.[188] Secondly, a media defendant generally derives commercial gain from disseminating information.[189] Thirdly, members of the mass media can reach wide audiences through widespread publication.[190] Fourthly, members of the mass media tend to publish and distribute content routinely.[191]

This differentiation between non-media defendants and media defendants was developed within a print media context.[192]

Although the functioning of a newsroom will be discussed in detail in paragraph 4.3.2.1 below, it should be noted that journalists, editors, sub-editors, printers, publishers, distributors and media owners may be sued for defamation.[193]

With the dawn of electronic media, the internet, World Wide Web[194] and digital news reporting, traditional media members and regular citizens alike have taken to

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184 Lorimer & Scannell (1994); *Nasionale Pers v Long* 1930 AD 87 (hereafter '*Long'*); Neethling *et al* (2015) 370.

185 *Id.*

186 Nel (2012) 255. *NM and Others v Smith* (2007).

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.*

192 *Pakendorf* (1982) 154 and *Bogoshi* (1998) 1202 E-F.

193 Milo & Stein (2013) 21. Lorimer and Scannell (1994) 157-184. *Long* (1930) 87. Note that the functioning of a newsroom is discussed in more detail in paragraph 4.3.2.

publishing topical information online in the public interest using computers, tablets, cell phones and other mobile internet devices.[195] In *NM v Smith*, the court acknowledged that mass media activities can be performed in print and electronically.[196] News is often distributed online using, for example, social media platforms such as Twitter, Facebook and Instagram.[197]

News reports, which may contain defamatory content, can take various forms, for example that of speech, print and online publication.[198] The plaintiff who alleges having been defamed must prove that the defendant was responsible for the publication of defamatory content.[199]

In this online era, publication of the same report may happen repeatedly – each time a report is accessed, publication occurs.[200] Any person who repeats or draws attention to a defamatory publication is considered responsible for its publication.[201] This study focussed on the liability of media defendants as it pertains to the initial act of publication within the borders of South Africa.

The elements and defences of both non-media defendants and media defendants will now be discussed, and the consequences of the differentiation between media defendants and non-media defendants for liability will be emphasised.

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194 While the internet is the physical infrastructure of servers, computers, fibre-optic cables and routers through which data is shared, the World Wide Web is the layer of multimedia that is added onto the physical infrastructure, internet or, as it has also been called, 'network of networks' along which data travels. See S Papadopoulus et al (2012) *An introduction to Cyberlaw* 3 and D Van der Merwe (2000) *Computers and the Law* 1. Also see J Alejandro 'Journalism in the age of social media' 2010 https://www.reutersinstitute.politics.ox.ac.uk/sites/default/ files/research (accessed on 19 October 2018). See also *R v National Post* 2010 SCC 16 1.

195 G Daniels (2014) 'State of the Newsroom South Africa – Disruptions Accelerated' 28-30. These Platforms are discussed in chapter 4 at paragraph 4.2.2.

196 *NM and Others v Smith* (2007) paras 176 and 149.

197 Daniels (2014) 77.

198 *Id.*

199 Neethling *et al* (2015) 360-362; *Vermaak v Van der Merwe* 1981 3 SA 78 (N) 79–80; *Pretorius v Niehaus* 1960 3 SA 109 (O) 112.

200 Nel (2012) 251-253; Neethling *et al* (2015) 361-362.

201 *Id.*

2.2.2.3. Elements of defamation

A plaintiff who institutes action based of defamation will have to prove the presence of three elements in order to prove defamation occurred.[202] These elements are publication, the defamatory nature of the statement in question and the defamatory statement's reference to the plaintiff.[203] Each element is discussed below.

2.2.2.3.1. Publication

Publication occurs when defamatory words or behaviour comes to the attention of a third party.[204] The publication requirement will have been satisfied when words or behaviour becomes known to one other person than the defamed himself.[205]

Publication has two components. First, it comprises the act of creating material and making it known to others. Secondly, the recipient must understand what it conveys.[206] Only once the receiver of the act or material comprehends its meaning, will publication have taken place.[207] For instance, where a defamatory statement is verbally made to a deaf person, he will not be able to understand the meaning of what is said. Accordingly, no defamation could have possibly taken place. When a statement is made to someone in a foreign language, he will not be able to understand it and defamation will be absent. If, however, it is translated, and the significance grasped, the requirement of publication will have been met.[208]

Publication must in most cases be averred by the plaintiff.[209] It is considered to have occurred in certain circumstances, such as when defamatory allegations appear in a newspaper.[210] In such cases, the defendants may rebut the presumption of publication.[211]

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202 Neethling et al (2005) 131. D Van der Merwe *et al* (2016) 491-496.
203 *Id.*
204 *Id.*
205 *Id.*
206 Nel (2012) 253; *Vermaak v Van der Merwe* (1981) 83.
207 Neethling *et al* (2005) 131-134. D Van der Merwe *et al* (2016) 494.
208 Neethling *et al* (2015) 361-362. Also see *Vermaak v Van der Merwe* (1981) 79-80.
209 *Id.*
210 Nel (2012) 252; D Van der Merwe *et al* (2016) 493.
211 *NM and Others v Smith* (2007).

Once it was established that publication has taken place, the plaintiff will have to prove that the defendant was responsible for the publication.[212] In principle, publication is not only attributed to the person from whom a defamatory remark originated. [213] Any person who repeats, confirms or draws attention to the defamatory publication is considered responsible for its publication.[214]

In South Africa's defamation law, each individual publication provides rise to a separate cause of action.[215] Although this is taken cognisance of, a detailed discussion of this falls outside the ambit of this study.

2.2.2.3.2. Defamatory nature of statement

To violate someone's right to dignity, good name or reputation, a statement must be defamatory.[216] Examples of defamatory statements are those that injure someone's moral character. This injury occurs when he is painted for example, as a criminal, unethical, immoral, unprincipled or dishonest.[217]

Two steps are taken to determine whether a statement is defamatory in nature. First, the meaning of the material is ascertained.[218] Secondly, it is established whether the material - words, for example) actually convey something defamatory.[219]

Although defamation can be effected using words or conduct, this dissertation focusses on written defamation and the focus is therefore on words that defame. Words can have more than one meaning. First, words have their ordinary or natural meaning, which is the meaning a reasonable person who receives it would attach to

212 Neethling *et al* (2015) 362; *Pretorius v Niehaus* 1960 3 SA 109 (O) 112.
213 Nel (2012) 253; Neethling *et al* (2015) 362; Neethling *et al* (2005) 134.
214 *Id.*
215 *Id.*
216 Milo & Stein (2013) 28; Neethling *et al* (2015) 362.
217 *NM and Others v Smith* (2007).
218 Nel (2012) 253.
219 *Id.*

it.[220] After the ordinary meaning of words is established, it remains to be asked whether the meaning of the words is defamatory.

Words may also have a secondary meaning which is called an innuendo, or hidden meaning, attributed to the words through context.[221] If a plaintiff claims having been defamed by innuendo, will have to identify the persons who were aware of the hidden meaning of what had been published.[222] The court will then determine if the words would in fact have been understood in that context by a reasonable person (in the position of the receiver of the material) to have been defamatory.[223]

South African courts use the test of asking whether a statement tends to lower the plaintiff in the general estimation of right-thinking persons.[224] South African courts consider how the reasonable person, to whom non-discriminatory values and norms that underpin the Constitution are ascribed,[225] would interpret the text complained of.[226]

The reasonable person is the fictional, normal, well-balanced and right-thinking person who is neither hypercritical nor oversensitive.[227] It is a person with normal emotional reactions.[228] The reasonable person is considered to hold the norms and values of the South African Constitution.[229] This hypothetical person is an average member of society and not of a certain group or community in society.[230] The

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220 Neethling *et al* (2015) 364; *Le Roux* (2011); *Tsedu & Others v Lekota & Another* [2009] 3 All SA 46 (SCA) (hereafter '*Tsedu'*) para 5.

221 *Id.*

222 *Id.*

223 *Id.*

224 *Smith v Elmore* 1938 TPD 18 at 21; Neethling *et al* (2015) 362-365; *Williams v Van der Merwe* 1994 2 SA 60 (OK) 64; see also Loubser & Midgley (2012) 352-354.

225 *Smith v Elmore* (1938); Neethling *et al* (2015) 365; *Williams v Van der Merwe* (1994); see also Loubser & Midgley (2012) 352-354*;* In *Sokhulu v New Africa Publications Ltd & Others* [2002] 1 All SA 255 (W), the plaintiff instituted a defamation claim after alleging that an article about her was defamatory. The article stated that she had a child out of wedlock and lived with the child's father whilst not being married to him. The claim was dismissed, as the court attributed Constitutional values to the reasonable person and held that, accordingly, these facts would not lower the plaintiff's esteem in the view of the reasonable reader.

226 Milo & Stein (2013).

227 Neethling *et al* (2015) 362-365.

228 *Id.*

229 *Id.*

230 *Id.*

reasonableness standard embodied by the test is called the *boni mores*.[231] When the reasonable person test is applied, it is applied within the context and subject to the circumstances of each case.[232]

Concerning media defendants, an adapted form of the test called the 'reasonable reader' test is used to determine whether the content complained of is defamatory. In this objective test, courts ask how reasonable readers of ordinary intelligence would interpret content in the context within which it was published. The context in which words appear can cause the meaning of the words to change.[233]

Concerning context, the 'bane and antidote rule' holds that if one part of a publication states something disreputable about the plaintiff, which is countered in another part of the text such as the conclusion, the report should be read in its entirety, as the bane accompanies the antidote.[234]

In defining the reasonable reader, South African courts stated that it is a 'reasonable, right-thinking person,' 'of average education and normal intelligence,' and 'not of morbid or suspicious mind,' nor 'super-critical or abnormally sensitive,' and 'must be assumed to have read the articles as articles in newspapers are usually read.'[235]

In many media defamation cases, courts are called upon to determine the defamatory nature of a publication that forms part of a series. When this happens, the court is to conducts an assessment based on the publication's coverage as a whole, as the reasonable reader would have done.[236]

This principle was illustrated in *Independent Newspaper Holdings Ltd v Suliman*[237] where the Supreme Court of Appeal stated that a reasonable reader would not

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231 *Id.*

232 *Id.*

233 Milo & Stein (2013) 23-25; *Independent Newspaper Holdings Ltd v Suliman* [2004] 3 All SA 137 (SCA) (hereafter '*Suliman'*) para 24; *Modiri v Minister of Safety and Security & Others* 2011 6 SA 370 (SCA) (hereafter '*Modiri'*).

234 See the UK case of *Chalmers v Payne* 1835 2 Cr M&R 156.

235 *Id.*

236 *The Citizen 1987 (Pty) Ltd & Others v McBride (Johnston & Others as Amici Curiae)* 2011 8 BCLR 816 (CC) (hereafter '*Mc Bride*')para 94; Milo & Stein (2013) 26.

237 *Suliman* (2004) para 24.

understand ‘a person being suspected’ to mean that the suspect actually committed a crime. This was endorsed in the case of *Modiri v Minister of Safety and Security* (*Modiri*).[238]

In the latter case, the court noted that reasonable readers know that not all arrested and charged persons are convicted. The court stated that reasonable readers understood this and therefore, readers understood the difference between suspects and criminals.

Where plaintiffs hold that the meaning of a statement is defamatory, they should plead that. Should this defamatory meaning be the statement’s secondary meaning, the plaintiff must plead exceptional circumstances from which this secondary meaning is derived. Lastly, a plaintiff may paraphrase defamatory material to highlight the sting.[239]

2.2.2.3.3. Defamatory statement refers to the plaintiff

Someone who seeks to institute a defamation action can only successfully do so if the defamatory publication concerns or refers to him or her.[240] A causal link must exist between the publication, the defamatory statement and the plaintiff. The plaintiff must prove that the defamation pertains to his good name.[241] This is determined by using the reasonable person test to determine whether the defamatory publication can be linked to the plaintiff.[242] In media defamation cases South African courts ask whether the words, read by the ordinary reasonable reader, can be understood to convey that the defamation refers to the plaintiff.[243]

Only certain persons are eligible to sue for defamation. All natural persons and non-trading corporations may sue for impairment to their reputations.[244] The dead and

238 *Modiri* (2011) .
239 Milo & Stein (2013) 27.
240 Neethling *et al* (2015) 365.
241 *Id.*
242 *Id.*
243 *South Africa Associated Newspapers Ltd & Another v Estate Pelser* [1975] 4 All SA 683 (A); *Williams v Van der Merwe* (1994) 64–65; *Isparta v Richter* 2013 (6) SA 529 (GNP) 534–537.
244 *Modiri* (2011) 114; Neethling *et al* (2015) 365.

the government cannot, although individual cabinet ministers may sue if they were defamed in that they were accused of conducting themselves wrongly whilst managing state affairs.[245]

Concerning defamation, two presumptions arise once the plaintiff proved that defamatory content was published which refers to the plaintiff. These are the presumptions of wrongfulness and fault.[246] For non-media defendants, the presumption of fault arises in the form of intent,[247] whereas media defendants are presumed to have acted with negligence.[248]

2.2.3. Presumptions that arise once defamation has taken place

The presumption of wrongfulness is discussed in this section.

2.2.3.1. The presumption of wrongfulness

Once defamation was published, which refered to a plaintiff, it is presumed that the defendant had acted wrongfully in defaming.[249] This means that the plaintiff's right to a good name or reputation was injured in a legally reprehensible way. The norms, according to which legal reprehensibility is judged, are contained in the hypothetical opinion of the reasonable person, or a person who judges according to the *boni mores.*[250] This consideration is best illustrated by means of a hypothetical scenario. X walks into a room and kills Y in front of 100 people. If the statement is made that X killed Y, this statement will negatively impact X's right to a good name. The reasonable person should comprehend that this defamatory statement is justifiable and, therefore, not wrongful.

245 *Id.*
246 Neethling *et al* (2015) 365, 372-374.
247 Neethling (1999) 443*;* Neethling *et al* (2015) 373; *Bogoshi* (1998); *Khumalo* (2002).
248 *Id*.
249 Neethling *et al* (2015) 365.
250 *Id.* (2015) 47-49; *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) 770; *Bogoshi* (1998) 1215.

If X insults Y and leaves the room, the statement that X has killed Y would be untrue and defamatory according to the reasonable person. Such defamation will be unjustifiable, because a person who insults cannot lawfully be labelled a killer.

The defendant who seeks to rebut the presumption of wrongfulness must, on a balance of probabilities, prove that he had not acted wrongfully.[251] This can be proven based on defences, such as the publication being true and in public benefit, the publication being protected by surrounding context, it being a malice-free opinion based on true facts in the public interest, the subject having provided consent, provocation, self-defence and necessity. In addition hereto, media defendants benefit from the exclusive defence of reasonableness.

2.2.3.1.1. Defences rebutting the presumption of wrongfulness

2.2.3.1.1.1. Truth and public benefit

Defamatory statements that are true and published for the public benefit cannot give rise to a successful defamation claim.[252] For a statement to fall under the protection provided by this defence, it must be 'substantially true.' This means that the crux of the defamatory allegations must be true. This principle was illustrated in *Times Media Ltd & Others v Niselow.*[253]

In the case, *Sunday Times* reported that a group of children had fallen ill after eating food cooked at the All Africa Games. The article stated that the children had been served food and, after an hour, a large number of the children became ill. Some were taken to hospital. A doctor that had treated the children called the incident the biggest medical disaster of its sort he had ever seen.[254]

The publication was sued for defamation. The plaintiffs claimed it held that the food was poisonous and that they were negligent in that they continued serving the food

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251 Neethling *et al* (2015) 360-365.

252 Milo & Stein (2013) 30.

253 *Times Media Ltd & Others v Niselow* [2005] 1 All SA 567 (SCA).

254 *Id.* at 568.

knowing that it had caused the children to become sick. The plaintiffs claimed that the report accused them of having caused this massive medical disaster. The Supreme Court of Appeal found that the report was defamatory, but that it was not wrongly so. The element of wrongfulness was absent, as the newspaper had established, through the treating doctor, that this was 'one of the biggest medical disasters faced in the number of patients affected by the medical condition.' Various witnesses had attested to the food seeming off.[255]

The court found that the meaning reflected in the paper's story was therefore true. In this case, the court also found that the report was in the public interest. South African defamation law does not recognise truth in itself as a defence to a defamation claim. The published truth must also have been in the public interest if liability is to be evaded.[256]

There is no clear-cut definition of what would be in the public interest. South African courts have repeatedly stated that 'material in which the public has an interest' should not be confused with 'material which is interesting to the public.'[257] What is in the public interest or public benefit to become known will depend on the *boni mores*.[258]

Black's Law Dictionary[259] defines 'public interest' as 'the general welfare of the public that warrants recognition and protection.' It also defines 'public interest' as something in which the public as a whole has a stake. Interests that justify governmental regulations are expressly included in this definition.

The South African Press Council for Print and Online media's constitution states that 'public interest' is understood to describe information of legitimate interest or

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255 *Id.* at 578.

256 Neethling *et al* (2015) 368-369; Milo & Stein (2013) 29-31.

257 *Bogoshi* (1998) 13; *Patterson v Engelenburg & Wallach's Ltd* 1917 TPD 350-361; In *Modiri* (2011) 376 – 380, the court stated that whether a certain statement was in the public interest will always be determined considering the surrounding circumstances, which are variable. The court indicated that courts should not limit themselves to guidelines or rules in this respect.

258 Neethling *et al* (2015) 368-369.

259 Black's Law Dictionary is available online via https://thelawdictionary.org/ (accessed on 25 February 2019).

importance to citizens.[260] In light of the contents of the Bill of Rights in South Africa's Constitution, it can be indicated that the public has an interest in anything that affects the basic rights and responsibilities of South Africans, for example the responsibilities the government has in favour of its people or the responsibilities residents have towards each other.

When a defamatory statement is published about politicians, public servants and public figures, proving that reportage was in public interest is usually less complicated than when a private individual is the topic of reportage. [261] This is according to Milo and Stein.[262] The authors explain that when a defamatory statement relates to a private individual, the defendant may be required to prove that surrounding circumstances contributed to establishing public interest.[263] The time, manner and occasion of the publication may be indicative in this respect.[264]

2.2.3.1.1.2. Fair comment

The right to express one's opinion or criticism is fundamental to an open, democratic society.[265] Protected comment (also known as fair comment) is protected as long as it enunciates an honestly held opinion on facts that are true or substantially true and pertains to a matter of public interest.[266]

The elements of the defence of fair comment were set out in *Crawford v Albu.*[267] To raise this defence successfully, the defendant has to prove that the statement complained of amounts to a comment or opinion and was not presented as fact.[268] An objective test determines whether a statement presents itself as commentary or

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260 Preamble to The Code of Ethics and Conduct for South African Print and Online Media.

261 Milo & Stein (2013) 30-31.

262 *Id.*

263 *Id.*

264 *Id.*

265 *The Citizen 1987 (Pty) Ltd & Others v McBride (Johnston & Others as Amici Curiae*) (2011) para 141; Milo & Stein (2013) 3-5; O Ampofo-Anti in J Meiring (2017) *South Africa's Constitution at Twenty-One* 62-64.

266 *McBride* (2011) para 84; Neethling *et al* (2015) 370.

267 *Crawford v Albu* 1917 AD 102 at 115-117.

268 *Crawford* (1917). See also Neethling *et al* (2015) 370.

fact.[269] This means that the reasonable person (or, in the case of media defamation, the reasonable reader) should, upon reading it, be able to distinguish between fact and opinion on fact.[270] The context within which a statement appears is to be taken into account when implementing the objective test.[271]

The comment or opinion must be honestly held and a genuine expression relating to facts that are at least substantially true and in public interest must be honestly held. If not generally known, the facts in relation to which comment is made must be clearly stated.[272] Although exaggeration or prejudice is protected as well, comment will not be deemed protected if the author was malicious in commenting.[273]

2.2.3.1.1.3. Privileged occasion

On certain occasions, the public interest demands that the reporting is conducted without restriction. The defence of 'privileged occasion' applies.[274] There are two kinds of privilege, absolute privilege and qualified privilege.[275]

Absolute privilege is sometimes accorded to some persons by the state.[276] For example a member of parliament has absolute privilege when she addresses the house in a legislative proceeding.[277]

South African law recognises only one absolute privilege and that is that defamatory statements made during parliamentary proceedings are protected, regardless of whether the statement is made maliciously or not.[278]

Qualified privilege covers statements made on occasions, such as those in court, tribunal proceedings or proceedings similar thereto.[279] Reportage on such occasions

269 *Id.*
270 *Id.*
271 *Id.*
272 Milo & Stein (2013) 39; Neethling *et al* (2015) 368.
273 *Id*.
274 *Id.*
275 *Id.*
276 *May v Udwin* 1981 1 SA 1 (A) at 71.
277 Milo & Stein (2013) 39-42; Neethling *et al* (2015) 368.
278 *Id.*

is in the public interest as it serves the public to be informed of what happens during these occasions.[280]

He who seeks to make use of the privileged occasion defence must report accurately, fairly and balanced. This means that the defendant's report must cover the positions of all parties involved.[281] Only a report of the actual proceedings will be covered under the 'privileged occasion' defence.[282] When information is gathered and published relating to the proceedings but which do not come from what was placed on record, it is not protected.[283] For example: if X is accused of murder, reportage on the court proceedings will be covered by the defence, even if it is defamatory in nature. If Y comments out of court and says that X is an awful killer, reportage of Y's statement will not be protected under the privilege defence.

Another form of qualified privilege is a duty-based privilege. According to Neethling, Potgieter and Visser,[284] this category of privilege exists where someone has a legal, moral or social duty or an interest that justifies the making of a defamatory statement to the receiver, who has a corresponding duty or interest in receiving the information.[285] Whether such a social or moral duty exists will be determined objectively using the reasonable person test.[286] Once it was established that the abovementioned right and duty existed, the defendant will have to prove that he did not exceed the limits of this privilege.[287] This will entail proving that the remarks were relevant to or necessary to fulfil his duty.[288] If a defendant had acted maliciously and the plaintiff proves it, the defendant will not be able to use this defence.[289]

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279 *Id.*

280 *Id..*

281 Milo & Stein (2013) 43; *Pakendorf* (1982)*; De Flamingh v Lake* 1979 3 SA 676 (T) 682; *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 1 SA 72 (W) 74; Neethling *et al* (2015) 308.

282 Milo & Stein (2013) 42.

283 *Id*.

284 Neethling *et al* (2015) 367.

285 *Id.*

286 *De Waal v Ziervogel* 1938 AD 112 127. Also see *Ehmke v Grunewald* 1921 AD 575, 581 and *Yazbek v Tsatsi* 2006 6 SA 327 (HHA) 331.

287 Neethling *et al* (2015) 367.

288 Neethling et al (2005) 146-147.

289 *Id.*

2.2.3.1.1.4. Consent

If a person has provided consent for his right to a good name to be infringed upon, any consequent defamation will be justified in terms of the *volenti non fit iniuria* rule.[290] This rule dictates that someone who willingly places himself in a position where harm may follow as a result cannot subsequently claim compensation from another if that harm materialises.[291] It amounts to a voluntary assumption of risk. When judging whether the *volenti non-fit iniuria* rule applies, courts use a fact-based enquiry.[292]

2.2.3.1.1.5. Provocation

Defamatory statements can be lawfully made in reaction to provocative behaviour.[293] For this defence to apply, requirements must be met. The provocation must be of such a nature that a reasonable person in the defendant's shoes would have reacted as the defendant had done: with a defamatory remark.[294] Secondly, the reactive defamation must not have been disproportionate to the behaviour that provoked the defamation and it must have followed directly after the provocation.[295]

2.2.3.1.1.6. Self-defence

When a defendant makes a defamatory statement with the purpose of protecting a legitimate interest, the wrongfulness of his conduct is set aside.[296] An act of self-defence (also referred to as 'private defence') is present when the defendant defends either his own or someone else's legitimate interest against others' actual or imminently threatening wrongful act.[297]

290 *Id.*
291 Neethling et al (2005) 161.
292 *Id.*
293 *Id.*
294 *Id.*
295 *Id.*
296 Neethling et al (2005) 159-160.
297 *Id.*

As with defamation in reaction to provocation, the act of self-defence must remain within certain limits.[298] The defamation in self-defence (taken into consideration whom it is published to) must be relevant to the protection of the threatened or prejudiced interests and not exceed what is reasonably necessary to protect it.[299]

2.2.3.1.1.7. Necessity

Necessity arises when he who defames is placed in a position where he must protect the justified interests of himself or another. He has to defame to protect these interests.[300] It is different from the self-defence defence in that he who acts in self-defence does so in reaction to a wrongful attack from a human. He who reacts to necessity, reacts to an act not wrongfully caused by a human.[301]

Within the realm of the law of delict, necessity may serve as a defence to both the elements of wrongfulness and intent, depending on the surrounding circumstances.[302]

2.2.3.1.1.8. The defence of 'reasonableness'

This defence holds that a media defendant will not be held liable for publishing a defamatory (and false) statement if the publication was reasonable.[303] In assessing whether the media's publication had been reasonable, the court in *Bogoshi* considered the following, which did not amount to a *numerus clausus*.[304] The court stated that: [305]

> [I]n considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is

298 *Id.*
299 *Id.*
300 Neethling *et al* (2015) 98-100.
301 *Id.*
302 *Id*.
303 *Bogoshi* (1998) 1204 A-E.
304 *Modiri* (2011) 114.
305 *Bogoshi* (1998) 1204 A-E.

> usually allowed in respect of political discussion (*Pienaar and Another v Argus Printing and Publishing Co Ltd 1956 (4) SA 310 (W) at 318C-E*) and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, and the steps taken to verify the information.

From the requirements that the media must consider the nature of the information corroborating the allegations, the reliability of its sources and steps taken to verify the information, it is gathered that the media must take reasonable steps to confirm the veracity of content before publishing it. Although the untruth of a defamatory statement is not a requirement for defamation, media members have a duty of verifying their content.[306]

In considering the nature of a defamatory allegation, it is asked whether the allegations made are in the public interest. Greater leeway is granted concerning political discussion.[307] In gathering news, journalists are expected to consider the reliability of their sources. Information or tip-offs from a source that is not trusted and credible, must be corroborated by another independent source.[308] Journalists must consider the source's intentions and moral character.[309]

Where documents are relied on for information, journalists must test the veracity thereof and consider the status thereof. An affidavit, for example, should be considered more credible than an unsigned letter.[310] Subjects of reportage must as a general rule be provided a right of reply. The tone of and use of language used in reportage is also relevant to the reasonableness of a report. Allegations should not be presented as fact and reportage should be unbiased and balanced.[311]

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306 *Bogoshi* (1998) 1204.

307 Milo & Stein (2013) 34.

308 *Id.* This is according to investigative journalist and author Jessica Pitchford, who addressed Caxton local media journalists on 4 October 2018 in her presentation titled 'Investigative Journalism,' presented at Caxton House in Johannesburg. During the same presentation, amaBunghane journalist Susan Cromley reiterated that journalists must be responsible and thorough when verifying facts and allegations prior to publication.

309 *Id.*

310 *Id. Bogoshi* (1998) 1212 A-G.

311 *Id.*

The court continued that the press should not consider the addition of this defence as a justification for the publication of untruths or a licence to lower their standards of care.[312]

This study will now discuss two cases involving the reasonableness defence. In *Lady Agasim Pereira v Johnnic Publishing Eastern Cape (Pty) Ltd* (*Lady Agasim Pereira* case)*,*[313] the court held that the defendant could not avail itself of the defence. In *Sayed v Editor, Cape Times* (*Sayed* case)*,*[314] the court applauded the publication for its reasonableness.

In *Lady Agasim Pereira*, the plaintiff had become the focus of one journalist at *The Herald* newspaper. The plaintiff came to their attention after the paper had published a series of reports on her husband and his dubious dealings. In reaction to the reportage, she wrote a letter expressing her disdain with the paper. The letter circulated in the community where she lived, and a journalist uncovered a family feud.[315] *The Herald*'s reportage on the fued was titled 'High flying baroness disowned by bitter mom.'[316]

The journalist's source was the plaintiff's mother, who had been feuding with her daughter for years. The journalist described her source as 'a close family friend,' although it was the plaintiff's mother. The information provided by the source was not corroborated in any way. The journalist did not get hold of the plaintiff and she was not provided a right of reply prior to publication.[317]

The defendants attempted to raise the defence of reasonableness but failed.[318] The court held that it was unreasonable for the publication to rely on the plaintiff's mother as a source and that it was unjustifiable to refer to the source as a 'close family

312 *Bogoshi* (1998) 1212 A-G 1213 A.

313 *Lady Agasim Pereira v Johnnic Publishing Eastern Cape (Pty) Ltd* [2003] 2 All SA 416 (SE) (hereafter '*Lady Agasim Pereira'*).

314 *Sayed v Editor, Cape Times & Another* 2003 JOL 11471 (C) (hereafter '*Sayed*').

315 *Id*.

316 *Id.*

317 *Lady Agasim Pereira* (2013) 415.

318 *Lady Agasim Pereira* (2013) 425-426.

friend.' The court held that the journalist had failed to act reasonably[319] in that she did not establish contact with the plaintiff to provide her a right to reply. [320]

Even though some members of the public may have found the reportage interesting, the court indicated that the allegations were of a private nature and not in the public interest.[321]

In *Sayed v Editor, Cape Times,*[322] the court applauded a Cape Town journalist for the reasonableness with which she conducted herself in holding a bogus diplomat accountable for his actions.[323] The journalist received a pack of documents incriminating the plaintiff. It was alleged that the plaintiff was a crook and impersonator that masqueraded as Malawi's Honorary Council and was involved with a crime syndicate.[324] The authenticity of the documents was confirmed by both a senior police official and the Malawi High Commissioner for South Africa.[325] The journalist was present when the police tried to execute a warrant for his arrest. She offered the plaintiff the right to reply, which he chose not to do.[326]

The court indicated that the *Cape Times* story titled 'Strange story of dodgy diplomat' was in the public interest and that it was an example[327] of how the press is to conduct itself.[328] The court held that the holding accountable of a public official was conducted in a way that resonated with the principles in the *Bogoshi* case.

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319 *Id*.
320 *Id*.
321 *Id*. 415-416.
322 *Sayed* (2003).
323 *Sayed* (2003) 1.
324 *Id.* 8, 12.
325 *Id.* 12.
326 *Id.*
327 *Id.* 13.
328 *Id.* 14.

2.2.3.2. The presumption of fault

Traditionally, defamation defendants are presumed to have acted with intent (*animus iniuriandi*) in injuring the personality rights of those they defame.[329] *Animus iniuriandi* deals with the mental position of the wrongdoer in causing certain consequences, knowing that these consequences will be wrongful.[330]

Because *animus iniuriandi* (the intention to defame) is presumed once publication of a defamatory statement by a non-media defendant was proven,[331] the plaintiff does not have to prove the presence of intent (the plaintiff must, however, claim intention on the part of the defendant in his pleadings.)[332] The defendant is burdened with disproving it.[333] If a defendant did not cause consequences he had known would have been wrongful, he could not have had intent pertaining to defamation.[334]

In disproving intent, the defendant must produce evidence showing that intent was not present, i.e. that he did not cause the relevant consequences nor knew that indicated consequences could have been wrongful.[335] The grounds on which intent can be excluded include mistake, intoxication, insanity, jest and provocation. These defences will be discussed further below.

The presumption of fault for media defendants is negligence-based. Since 1998, this was an accepted form of fault concerning media defendants.[336] A more detailed discussion follows in paragraph 2.2.3.2.1.6 below.

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329 Knobel (2002) 24.

330 Neethling *et al* (2015) 371; Knobel (2002) 24.

331 *Id.*

332 *Id.*

333 Neethling *et al* (2015) 370-372. *O' Malley* (1977) 403, 409.

334 *Id.*

335 Neethling *et al* (2015) 372-373; *Maisel v Van Naeren* 1960 4 SA 836 (K); Neethling *et al* 164–165.

336 *Bogoshi* (1998). See also *Mthembi-Mayanyele v Mail & Guardian Ltd* (2004) and J Neethling 'Die locus standi van 'n kabinetsminister om vir laster te eis, en die verweer van redelike publikasie van onwaarheid op politieke terrein' (2005) *THRHR* 321.

2.2.3.2.1. Defences in rebuttal of fault

2.2.3.2.1.1. Mistake

Someone who *bona fide* believes that his act is lawful is unaware of the wrongfulness of his defamatory publication.[337] He therefore lacks consciousness of wrongfulness; a crucial element of intent.[338] When a person lacks consciousness of wrongfulness in acting, he necessarily acts without intent.[339] This defence is available to non-media defendants, but not to media defendants.[340]

2.2.3.2.1.2. Intoxication

A person who acts with intent necessarily has the cognitive ability to distinguish between right and wrong.[341] He is also able to act according to that realisation.[342] Someone acting under the influence of alcohol can be considered unaccountable for his deeds.[343] In some cases, the consumption of alcohol may be considered negligent in light of the acts that followed.[344]

2.2.3.2.1.3. Insanity

As long as a person cannot, as a result of some mental illness, distinguish between right and wrong or act accordingly, he will be considered unaccountable for his deeds.[345]

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337 Neethling *et al* (2015) 372.

338 *Id.*

339 *Id.*

340 *Id.*

341 *Id.* 373.

342 *Id.*

343 *Id.*

344 Neethling *et al* (2015) 138; Neethling, Potgieter and Visser uses this example as illustration: When a motorist drinks alcohol prior to driving, he may be considered to have been negligent in that he consumed alcohol prior to his taking a trip, during which he knew he would have had to drive. He will be held negligent if he had known that the alcohol would impair his ability to drive properly.

345 Neethling *et al* (2015) 138.

2.2.3.2.1.4. Jest

When someone publishes a joke that contains defamatory words, but does not direct his will towards injuring the prejudiced party's right to a good name, he lacks direction and will.[346] The direction of will is an essential element of intent.[347] By proving that he had not intended to defame, the defendant can rebut the presumption of *animus iniuriandi*.[348] South African courts require that, for jest to be a successful plea, the reasonable bystander should have regarded the words as a joke and, therefore, stripped it of a defamatory impact.[349]

2.2.3.2.1.5. Provocation

If a person is provoked to the point of losing his temper or composure and being driven by rage to react, he may be considered to lack the ability to distinguish between right and wrong and act accordingly.[350] This may render him free of fault.[351]

2.2.3.2.1.6. The defence of 'reasonableness' or 'non-negligence'

Prior to *National Media v Bogoshi*[352] media defendants were held strictly liable for defamation. The court in *Bogoshi* decided that strict liability for media defendants had to be rejected as it did not constitute a justifiable balancing of the rights to human dignity and freedom of expression.[353] This was the first case where South African courts acknowledged that a false defamatory statement could still be lawful. A more detailed discussion of the case can be found in paragraph 3.5.1.4 below.

The court in *Bogoshi*[354] considered whether media defendants should be able to rebut the presumption of intentional harm by proving that they had lacked knowledge

346 Neethling *et al* (2005) 166 .
347 *Id.*
348 *Id. Masch v Leask* 1916 TPD 114 116 117; *Le Roux v Dey* (2011) 308 314.
349 Neethling et al (2005) 165 - 166.
350 Neethling *et al* (2015) 138.
351 *Id.*
352 *Bogoshi* (1998).
353 *Id.* 1210 A-G.
354 *Id.*

of the wrongfulness of their action. The answer was negative.[355] The court stated that:

> "…the media should not be treated on the same footing as ordinary members of the public by allowing them to rely on the absence of *animus iniuriandi*, and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case.[356]

The media would have to prove that they were not negligent in publishing defamatory statements to negate the presumption of fault.[357]

Scholars disagree about the desired approach to determining the fault element in a defamation case.[358] As stated in paragraph 1.2.2, this study agrees with the view of Neethling, who argues that media liability will no longer be based on *animus iniuriandi*, but on negligence.[359] This same view was held by the court in *Mthembi-Mayanyele v Mail & Guardian Ltd* (*Mthembi-Mahanyele* case).[360]

Neethling's view seems to have had the court's support in *Khumalo v Holomisa.*[361] In interpreting the judgment in the *Bogoshi* case, the court held that 'media defendants could not escape liability merely by establishing an absence of knowledge of wrongfulness. They would in addition have to establish that they were not negligent.'[362]

Midgley rightly points out that South African courts never expressly stated the standard of negligence for media defamation.[363] The yardstick for determining what

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355 *Id.*

356 *Id.*

357 *Id.* Neethling (1999) 443.

358 See Midgley (1999) 222. See also Neethling *et al* (1999) 443. Midgley states that 'fault in the form of intention remains the basis of liability for all defendants...if media defendants wish to rebut the presumption of intention by pleading ignorance or mistake, such ignorance or mistake must have been subjectively reasonable in the circumstances of the case: the defendant must not have been negligent in making the mistake.' Neethling, conversely, argues that media liability will no longer be based on *animus iniuriandi*, but on negligence.

359 Neethling (1999) 443.

360 *Mthembi-Mayanyele v Mail & Guardian Ltd* (2004) as discussed in Neethling *et al* (2015) 371-374.

361 *Khumalo* (2002).

362 *Khumalo* (2002) 416 B.

363 Midgley (1999) 222.

negligence would mean in this context has not been confirmed in relation to media defendants. Establishing such a yardstick falls outside the limits of this study.

2.2.4. Remedies

Where publication has not yet taken place, an applicant may apply for an interdict that will prevent the publication of a defamatory statement.[364] Where defamation was already published, the prejudiced party may institute action for damages.[365]

Non-monetary remedies, such as an apology, have previously been awarded by South African courts where defamation had occurred.[366] This was done in cases with non-media defendants. No high court decision has yet sanctioned the apology-remedy against a media defendant.[367] Elaborating further on the awarding of court-ordered apologies to remedy media defamation falls outside the scope of this study.

The plaintiff who successfully proves defamation may ask the court to order that the defendant pay damages to the plaintiff for the impairment of the latter's reputation. Whereas this would qualify as 'general damages,' 'special damages' may also be sought.[368]

General damages reward the plaintiff for non-monetary loss. It has two purposes: firstly, the payment compensates the plaintiff for his injured feelings and impaired reputation.[369] Secondly, payment vindicates the plaintiff in the eyes of the public.[370] Special damages reward the plaintiff for monetary loss which he is able to prove came as a result of the defamation complained of.[371]

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364 Milo & Stein (2013) 43.
365 *Id.*
366 *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (2) at para 2.
367 Milo & Stein (2013) 43.
368 *Id.*
369 *Id.*
370 *Id.*
371 Milo & Stein (2013) 46.

Elaborating on whether damages should include alternative remedies to financial remuneration fall outside the scope of this study. A further discussion of the remedies available to defamation plaintiffs also fall outside the scope of this study.

2.2.5. Comments on problem statement

This chapter began with a hypothetical scenario: non-media defendant Steve Hofmeyr publishes to more than 400 000 people per day. Media defendant Charles Cilliers is a reporter with *The Citizen* who publishes to 138 000 online readers and about 46 000 print readers per day.

Both Hofmeyr and Cilliers publish information in the public interest from time to time. Both have the ability to publish content and distribute it to thousands of readers. Hofmeyr and Cilliers may use the web and social media sites to make money. Although Cilliers voluntarily prescribes to the Press Code for South African Print and Online Media, both have subjected themselves to the rules of the social media platforms, such as Facebook that they utilise to publish and distribute news.

Two hypothetical scenarios will now illustrate how differentiating between media defendants and regular defendants affect their liability in terms of lawfulness and fault.

2.2.5.1. The lawfulness hypothesis

Hofmeyr and Cilliers are both provided copies of a private investigator's docket. The Private Investigator is investigating John Snow, a businessperson who allegedly committed fraud. Both do a thorough job of investigating the private investigator's allegations. They interview three sources with first hand knowledge of the fraud and confirm the allegations.

Two days before Cilliers's deadline, he and Hofmeyr go to Snow's house. They see the police leaving his home and contact the police to confirm whether he was arrested. The police confirm this, and neither can reach the man for comment. Police ascribe this to Snow being in custody.

Cilliers compiles a social media post with a photo of John Snow. ‘John Snow has been arrested following a fraud investigation by private investigators. He is in custody and will appear in court tomorrow. Read *The Citizen’s* print edition for more.’ In the print edition, Cilliers states that *The Citizen* had spoken to three sources who corroborated the allegations and that he was on the scene when police arrested a man confirmed to be John Snow. He adds that John Snow is in custody and cannot be reached for comment, but that the publication will cover his court appearance.

Hofmeyr uploads a photo of John Snow onto Facebook with the following text: ‘Police arrested John Snow in connection with a fraud investigation today.’ He adds a comment from the three sources and that John Snow could not be reached for comment but promises his readers that he will take a livestream video of what happens in court.

Hours after their publications, they are both contacted by John Snow. He is on holiday in the Bahamas and was not arrested. The police mistakenly confirmed that he had been taken into custody. John Snow institutes defamation action against both Cilliers and Hofmeyr. He proves that both had made defamatory statements referring to him. The presumption of wrongfulness arises.

Steve Hofmeyr’s position:
To rebut the presumption that he had wrongfully defamed John Snow, Hofmeyr can raise the defences of truth and public interest, a context-based defence, such as that the information was part of a court record or that duty and interest justified the publication, the fact that he wrote a malice-free opinion based on true facts in the public interest, or that the subject had consented to publication, or that Hofmeyr had published in self-defence or necessity. Hofmeyr is unable to prove that any of these defences exist and his publication is considered unlawful.

Charles Cilliers’s position:
Cilliers may also rely on the defences of truth and public interest, reportage on court or quasi-judicial proceedings, which states that he published a malice-free opinion on true matters of public interest, that the subject had consented to the publication, or that duty and interest justified the publication or even that he had published in self-

defence or necessity. The media-exclusive defence of ‘reasonableness’ as it pertains to wrongfulness is also available to Cilliers. He pleads that the publication was reasonable in the circumstances.

The court finds that the information was in the public interest and that Cilliers had considered the reliability of his sources carefully. Information was obtained from multiple sources, including the police. Cilliers tried to reach the subject for comment but could not reach him. At the time of publication, police had indicated that this was because John Snow was in custody. In truth, it was because he was in another country. The court states that Cilliers had used language carefully. The court considers publication to have been reasonable in the circumstances and it is found lawful.

Comment on the hypothetical scenario:
When the non-media defendant (Steve Hofmeyr) is compared to the media defendant (Charles Cilliers) regarding the element of wrongfulness, the non-media defendant does not have the chance to prove the reasonableness of his publication. This limits the non-media defendant’s right to freedom of expression to a greater extent than that of the media defendant. Media defendants may evade liability by proving reasonableness of publication, whereas non-media defendants may not.

2.2.5.2. The fault hypothesis

Steve Hofmeyr and Charles Cilliers both queue at the grocery store and hear two security guards gossiping. ‘Massive secret. Don’t tell anyone. I arrested Coen Cash today,’ says the one security guard. He adds that ‘he had his ex-wife’s bank card and R4000 with him. Got him red-handed.’

Hofmeyr posts a photo of Coen Cash, a well-known South African businessman onto Facebook and states: ‘The irony! CoenCash arrested. I have it from a reliable source that he was caught red-handed with R4000 of his ex-wife’s money and her bank card. More to follow.’ Cilliers compiles a post on *The Citizen’s* Facebook page. ‘BREAKING NEWS: Businessman Coen Cash was arrested. He was allegedly

caught with R4000 of his wife's money and her bank card in his possession. *The Citizen* will investigate the story and keep readers updated.'

Minutes later, Cilliers gets a phone call from his editor. Coen Cash's wife called and was upset about the publication as her husband had done nothing wrong. It transpires that the security guard who made the comment has been feuding with Cash for years. Both Cilliers and Hofmeyr are sued for defamation. Coen Cash proves that defamatory statements were made referring to him by both men. Neither Cilliers nor Hofmeyr succeeds in refuting the presumption of wrongfulness.

The presumption arises that they had acted with fault in defaming Coen Cash. Neither can rely on the defences of intoxication, insanity, jest or provocation. Hofmeyr can rely on the defence of having made a mistake that resulted in a lack of *animus iniuriandi* to defame. Cilliers, as a member of the media, cannot do so. He must prove that he was not negligent in defaming Coen Cash. Cilliers cannot prove that he lacked negligence and is held liable.

2.2.6. Comments on Chapter 2

Chapter 2 details the delict of defamation and the differentiation between non-media defendants and media defendants in South Africa's defamation law is evident.

The hypothetical scenario of Charles Cilliers and Steve Hofmeyr illustrated that non-media defendants and media defendants face different fates when accused of defaming, even where the facts of their defamation (and the harm it has caused) are the same.

In Chapter 3, this study sheds light on media defamation jurisprudence in South Africa. The purpose is to illustrate South African courts' approaches in dealing with media defamation cases. The courts' approaches to media and non-media defendant differentiation and the elements of wrongfulness and fault will be investigated.

Jurisprudence will be divided into pre-1994 and post-1994 categories, as South Africa turned from a country with parliamentary sovereignty to one with constitutional sovereignty in 1994. The impact that this had on South African courts' interpretation and application of the common law of defamation will be illustrated.

CHAPTER 3: A GUIDE TO MEDIA DEFAMATION JURISPRUDENCE

3.1. INTRODUCTION

The distinction between non-media and media defamation defendants in South African courts was first recorded in 1844[372] and confirmed again in 2002.[373] The media's ability to disseminate information on a large scale was one of the factors that led South African courts to distinguish between media defendants and regular defendants in the past.[374] Other reasons for doing so included media defendants' commercial gain derived from publishing or printing of, for example, newspapers,[375] the risk for prejudice to the personality rights of others inherent to the media business[376] and the credibility society tends to associate with the media.[377]

The unique tools, abilities and required levels of responsibility expected from those in the media industry motivated courts to view them differently when judging their liability for media defamation.[378] In differentiating between non-media defendants and media defendants, South African courts have considered the elements of wrongfulness and fault many times over the years.[379]

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372 *Hill* (1844) 520.

373 *Khumalo* (2002) 401.

374 *O'Malley* (1977) 394.

375 *NM and Others v Smith* (2007) 260.

376 *Pakendorf* (1982) 157 H.

377 *Pakendorf* (1982). It must be noted that the credibility society once associated with the media has diminished since the *Pakendorf* judgment. See paragraph 6.1 of this dissertation and Young 'Reynolds v Times Newspapers' *Landmark Cases in Defamation book* (print edition forthcoming) 1 February 2018 https://ssrn.com//abstract=3128626 (accessed on 10 September 2018). Also see Edelman (2017), Rittenberry (2018) and Edelman (2019).

378 *Hill* (1844), *Wilson* (1903) 178, *Craig* (1963), *Hassen* (1965), *O'Malley* (1977), *Pakendorf* (1982) *Bogoshi* (1998), and *Khumalo* (2002).

379 *Id.*

This study will now explore South Africa's media defamation jurisprudence and focus on South African courts' views regarding the delictual elements of wrongfulness and fault as it pertains to the liability of media defendants in defamation cases. First, jurisprudence preceding 1994 will be discussed and insights gained into South African courts' approaches to these elements before the country's transformation from a state with parliamentary sovereignty to a constitutional sovereignty. This will be followed by a discussion of post-1994 jurisprudence to examine how South African courts amended their approach after South Africa adopted the Constitution.

3.2. MEDIA DEFAMATION JURISPRUDENCE

The cases discussed below will reflect jurisprudential developments in the law of media defamation in South African courts. Scholary opinions on these developments will subsequently be considered.

3.2.1. Pre-1994 jurisprudence

The cases discussed below will provide insight into why South African courts distinguished between media defendants and non-media defendants between 1844 and the country's constitutional transformation in 1994. The cases below indicate that our courts often emphasize the responsibility and care expected from those who were able to publish and distribute information on a large scale.

Although intent has traditionally been the required form of fault in cases where personality rights were infringed,[380] South African courts have repeatedly considered negligence-based fault in the 1900's. In 1982, the court in *Pakendorf*[381] decided that fault in the form of strict liability would be presumed on the part of media defamation defendants based on the risk of reputational damage inherent to their craft.

After discussing strategically selected jurisprudence prior to 1994, this study will consider scholarly comment on the developments up until the *Pakendorf* decision.

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380 Knobel (2002) 31.

381 *Pakendorf* (1982).

3.2.1.1. *Hill v Curlewis and Brand*[382]

The *Hill* case was the first recorded South African case in which the liability of a media defendant was considered, the defendant in this case being a newspaper editor.[383] The plaintiff was Captain Hill, Magistrate of Malmesbury.[384] The defendants were Curlewis, a writer, and Brand, the editor of the *Zuid-Afrikaan* newspaper.[385]

Curlewis wrote a letter which was published in the *Zuid-Afrikaan*. It averred that the plaintiff, who was on the Licencing Board, withheld a licence from the applicant, Curlewis, based on private motives.[386] The letter claimed that a licence had previously been granted to Curlewis whilst he was in treaty for the purchase of the house of the plaintiff. Once the sale was completed, the licence was refused and granted to friends of the plaintiff.[387]

In reaction to the plaintiff's claim that the letter published was libellous,[388] Curlewis argued that the contents of the letter were true,[389] but failed to prove it.[390] Brand denied having any malicious intent as averred and argued that the letter was published due to negligence as he did not peruse its contents properly.[391] Brand did not prove the cause or nature of his neglect.[392]

The court held that to sustain this defence, either to negate liability or in mitigation of damages, would constitute a principle that would destroy the responsibilities of editors of newspapers for libels they publish in their newspapers.[393] In 1907, the

382 *Hill* (1844).
383 *Hill* (1844).
384 *Id.* 521.
385 *Id.*
386 *Id.*
387 *Id.*
388 *Id.*
389 *Id.*
390 *Id.* 522.
391 *Id.*
392 *Id.* 523.
393 *Id.*

court in *Hartley v Palmer; Hartley v Central News Agency*[394] confirmed that when an editor of a newspaper is sued for defamation, the absence of *animus iniuriandi* cannot serve as a defence.

3.2.1.2. *Wilson v Halle and Others* [395]

In the *Wilson* case, the liability of the writer, owner and publishers of a newspaper containing defamation was considered.[396]

The plaintiff was a member of the Johannesburg Stock Exchange, a member of the Distinguished Service Order and Lieutenant Colonel commanding the 2nd Kitchener's Fighting Scouts.[397] The first defendant was Gustav Halle, the editor of the *Transvaal Critic* newspaper and other defendants were the proprietor and owner of the *Transvaal Critic*, Transvaal Critic Syndicate Limited, as well The Central News Agency (publishers).[398]

In a series of reports, the *Transvaal Critic* reported that cattle would have been sold and the proceeds given to members of the 2nd Kitchener's Fighting Scouts (2nd K.F.S.) regiment.[399] The members did not receive the full amounts due to them and it was reported that Wilson was responsible.[400] The reports incriminated Wilson and suggested that he had acted criminally in handling the money.[401]

Wilson instituted a case of libel against the defendants. Halle admitted publishing libellous material pertaining to the plaintiff and alleged that the parties agreed that the plaintiff would be satisfied with an apology made in court and published in the *Transvaal Critic,* or as the court directed, together with payment of the plaintiff's

394 *Hartley v Palmer; Hartley v Central News Agency*(1907) 24 S.C. 228. (hereafter '*Hartley'*).
395 *Wilson* (1903) 178.
396 *Id.* 200.
397 *Id.* 179.
398 *Id.*
399 *Id.*
400 *Id.*
401 *Id.* 180-181.

taxed costs.[402] The plaintiff denied having entered into a settlement agreement.[403] The court found in favour of the plaintiff, with costs.[404]

It was also argued by the defendant that the reportage amounted to true, fair and *bona fide* comment on matters of public interest.[405] The court did not accept this defence, as the factual nature and public interest of the matters commented on was not proven.[406] It was further argued that the plaintiff had not suffered any damages as a result of the reportage.[407]

Other defences stated that publishers' and proprietors' responsibility for the publication of the alleged libel was limited according to the scope of their duties as proprietors and publishers of the *Transvaal Critic* respectively.[408]

The court considered whether a distinction was to be drawn between the writer, owner and publishers of the paper.[409] The court stated that The News Agency was not a mere vendor of the newspaper, but its registered publisher and therefore the '…actual utterer of the libel.'[410] The court continued to state that '…if he puts the paper into the world, he puts it into circulation, and if he puts it into circulation he is liable for all the consequences equally with the editor and with the proprietors.'[411]

The owner, publisher and proprietor, the court stated, would be responsible for the libel appearing in its publications.[412] The court reiterated that any company that makes it its business to publish newspapers and which employs individuals to do so, would be responsible for the libel that those newspapers contained.[413]

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402 *Id.*
403 *Id.* 183.
404 *Id.* 190.
405 *Id.* 191-192.
406 *Id.* 192.
407 *Id.*
408 *Id.* 183.
409 *Id.* 260
410 *Id.*
411 *Id.* 261.
412 *Id.*
413 *Id.*

3.2.1.3. *Dunning v Cape Times Limited*[414]

In the *Dunning* case, the court considered the liability of printers.[415] The plaintiff, Sir Edward Harris Dunning, sued Cape Times Ltd for libel. The alleged libel was contained in a newspaper called *The Owl* of 31 March 1905.[416] The plaintiff alleged that the defendants printed and published the paper.[417]

The defendants admitted the libel and that they had printed *The Owl*, but denied that they were its publishers.[418] They pleaded not knowing about the libel contained in the publication upon printing and that they had no malice.[419] According to the defendants, they had published apologies in various publications upon becoming aware of the libel in *The Owl*.[420]

The court took into consideration that the publication of the relevant issue of *The Owl* had been interdicted prior thereto.[421] The court stated that this fact was revealed in the edition complained of under the title '*The Interdicted Pamphlet'*.[422] The court stated that a large firm whose business it is to print a newspaper on contract and deliver it to distributors had to be responsible for the contents thereof and that there could be no doubt as to the legal responsibility of the printers.[423] Judgment was given in favour of for the plaintiff.[424]

3.2.1.4. *Trimble v Central News Agency Limited*[425]

The *Trimble* case dealt with the liability of a news vendor where the publication it sells contains defamatory content. [426]

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414 *Dunning v Cape Times Ltd* 1905 TH 231.
415 *Id.*
416 *Id.*
417 *Id.*
418 *Id.* 231.
419 *Id.*
420 *Id.*
421 *Id.*
422 *Id.* 232.
423 *Id.*
424 *Id.*
425 *Trimble* (1934) 43 - 44.

The court ruled that a vendor would only be considered at fault for distributing defamatory content if it had been aware of the defamatory nature of the content and continued distributing it.[427] This, the court stated, would amount to fault in the form of negligence.[428]

This was an application for leave to appeal *in forma pauperis*.[429] The applicant in this case had been the plaintiff in the Transvaal Provincial Division, where he had sued the respondents for £2 000 in damages after defamatory content pertaining to the plaintiff had been printed in a magazine called *Tit Bits*.[430] The defendants' defence was that they had acted merely as vendors of the newspapers and not as either publishers or printers.[431]

The facts of the case included that the respondents were distributors and vendors throughout the Union of South Africa and Southern Rhodesia.[432] The paper reached Cape Town through English mail prior to its distribution. The issue containing the defamation complained of arrived in Johannesburg on 29 June 1933.[433] The respondents were unaware of its contents until a letter alerted them to it on 4 July.[434]

The court referred to the English cases of *Emmens v Pottle and Others* [435] and *Vizetelly v Mudies Select Library Limited*[436]. In the *Vizetelly* case, the court emphasised that the basis of a libel action was that the defendant had falsely and maliciously published defamatory matter concerning the plaintiff. Publication of defamation in itself was considered evidence of malice. The presumption of malice originated from the falsity of a published defamatory publication.[437]

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426 *Trimble* (1934). See also J Neethling 'Nalatigheid as aanspreeklikheidsvereiste vir die *animus iniuriandi* by laster. *Marais v Groenewald* 2001 1 SA 634 (T) 2002 *THRHR* 260.

427 *Trimble* (1934). See also Neethling (2002) 260.

428 *Id.*

429 *Id.* 44.

430 *Id.* 47.

431 *Id.*

432 *Id.* 48.

433 *Id.*

434 *Id.* 49.

435 *Emmens v Pottle & Others* 1885 16 QBD 354.

436 *Vizetelly v Mudies Select Library Limited* 1900 2 QBD 170.

437 *Trimble* (1934) 47.

Because a man 'must be taken to intend the natural consequences of his own act in publishing the libel,'[438] the presumption could not be rebutted merely by proving that the defendant lacked a spiteful state of mind whilst publishing.

It was acknowledged that a privileged occasion could rebut intention on the side of the defendant. In *Vizetelly*, the court, in interpreting the *Emmens* case, indicated that 'the innocent publication of defamatory matter, being its publication under such circumstances as to rebut the presumption of any malice, is not a publication within the meaning of the law of libel.'[439]

The court in *Trimble* stated that a vendor would be protected by proving that he had, at the time of selling the newspaper, not known that it contained libels on the plaintiff, that the vendor's lack of such knowledge was not due to negligence on his part and that the vendor did not know that the paper's character was of such a nature that it would likely contain libellous matter, nor ought the vendor have known that it would contain libellous matter.[440]

In the *Trimble* case, the court had to consider what the capacity of the vendors were, whether they had been merely vendors or could be considered publishers as well.[441] The court determined that the agency ought not to have known what the contents of *Tit Bits* was until it had been made aware thereof.[442] Accordingly, The Central News Agency was not considered liable for the period during which it acted purely as vendors and had not known that defamatory material had been contained in what they had published.[443] The court held that the agency would have been liable for distribution subsequent to its discovering that the publication had contained defamatory content.[444]

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438 *Id.*
439 *Trimble* (1934) 48.
440 *Id.*
441 *Id*.
442 *Id.* 44.
443 *Id.*
444 *Id.*

The portion of the claim that would have probably been successful was trivial and the applicant's *in forma pauperis* application was denied.[445]

3.2.1.5. *Robinson v Kingswell; Argus Printing & Publishing Co. Ltd. v. Kingswell*[446]

In the *Kingswell* case, the court considered the liability of a manager of a newspaper company for defamation.[447] The court considered the novelty of a rule that would absolve a proprietor for liability based on the fact that publication had occurred without his knowledge, connivance or negligence.[448] Although no such defence was adopted, the court stated that it would be a positive development of the law of defamation.[449]

This was an appeal in a defamation matter with an intricate set of events.

A reporter with the *Rand Daily Mail* reported that a Mr Stanley had been criminally charged, appeared before a magistrate and had been released on £100 in bail.[450] The reporter was reporting on happenings in court, but had not been to court himself.[451] His editor was aware of this fact.[452] Kingswell, manager of *Rand Daily Mail*, exercised no control over the editor's operations.[453]

The criminal prosecution against Stanley was, according to the report, based on a letter Stanley had written to a Dr Matthews.[454] The letter reportedly contained defamatory content.[455] A warrant was issued for Stanley's arrest and he was taken into custody.[456] When Stanley was charged, a copy of the letter was attached to the

445 *Id.*
446 *Robinson v Kingswell; Argus Printing and Publishing Co*. Limited *v*. *Kingswell* 1913 AD 513.
447 *Kingswell* (1913) 513.
448 *Id.* 536.
449 *Id.*
450 *Id.* 513.
451 *Id.* 515.
452 *Id.*
453 *Id.* 513-515.
454 *Id.*
455 *Id.*
456 *Id.*

summons that was delivered to him.[457] He applied for bail. The application was heard in the chambers. The letter was neither read nor referred to by the magistrate.[458]

The *Rand Daily Mail* reporter heard of the matter, called Stanley's attorneys and obtained a copy of the summons and attached letter.[459] The reporter took the documents to his acting editor Mr Neame, who ordered that it be published.[460]

Stanley's attorney, a Sir Robinson, protested against the article that had been published. He did so in a telegram and wanted his concerns to be published in the *Rand Daily Mail*.[461] He sent a second telegram which was not published.[462] The *Rand Daily Mail* did publish a notice referring to both telegrams.[463]

After not having either of his protests against the article published in the *Rand Daily Mail*, Robinson wrote another letter.[464] This one was sent to another publication, *The Star*. In his letter to *The Sta*r, Robinson labelled the *Rand Daily Mail'*s Kingswell and the editor as having behaved in ways disgraceful to journalism. [465] This publication was the basis of Kingswell's defamation claim against both Robinson and *The Star*.[466]

In the court *a quo*, the defendant justified his telegram to *The Star* stating that it was a reply to the publication of Stanley's letter in the *Rand Daily Mail* by the plaintiff.[467] He held that the telegram he had sent to *The Star* was sent *bona fide* to vindicate his character and to prevent further prejudice as a result of the contents published by the *Rand Daily Mail*.[468] The defendant further stated that it was done without

457 *Id.*
458 *Id.*
459 *Id.*
460 *Id.*
461 *Id.* 516.
462 *Id.*
463 *Id.*
464 *Id.*
465 *Id.*
466 *Id.*
467 *Id.*
468 *Id.*

malicious intent.[469] He also pleaded that the words contained in his telegram were true, that the words were expressions of opinion made in good faith upon facts which he argued were matters of public interest. Robinson also proceeded to claim damages in reconvention from the plaintiffs.[470]

The defendant company also pleaded that it had published Robinson's letter with the purpose of vindicating Robinson's character and argued that publication of their article was therefore privileged.[471] The company pleaded that, as far as the article contained allegations of fact, these allegations of fact were true in substance and in fact.[472] The company pleaded that, as far as the words in the article consisted of expressions of opinion, they were fair comments, made in good faith, and without malice upon facts that were matters in the public interest.[473]

The trial court considered four main questions in considering the case.[474] These were: whether the *Rand Daily Mail* was entitled to publish Stanley's letter in the manner that it had done so, whether the defendant was legally entitled to object to the publication, whether the defendant was entitled to protest against the publication of Stanley's letter as improper journalism (even if the occasion was privileged in law), and whether the defendant (even if he had been entitled to protest) had used language so vehemently that it would disentitle him from consideration.[475]

The court concluded that the privilege of a fair and accurate report of court proceedings could not extend beyond what had formed part of the judicial proceedings in open court.[476] The publication of documents or summons that had not been placed on record in open court would therefore not fall within the ambit of this privilege.[477] The court found that the *Rand Daily Mail's* publication of the letter was not justified and that the defendant had a right to object thereto. The court found that

469 *Id.*
470 *Id.*
471 *Kingswell* (1913) 517.
472 *Id.*
473 *Id.*
474 *Id.*
475 *Id.*
476 *Id.*
477 *Id.*

the article in *The Star* was excusable, although it contained 'immoderate language,' as it expressed the defendant's opinion under provocation.[478]

The court *a quo* considered that the plaintiff, Kingswell, was not responsible for the publication of the contents that were wrongly published by the *Rand Daily Mail*. Accordingly, the court held that it was unjustifiable for the defendant to defame Kingswell, who was the manager of the publication, in reaction thereto.[479] Judgment was delivered for the plaintiffs against Robinson and the Argus Company for £100, payment by one absolving the other.[480] The defendants appealed and the plaintiff cross-appealed.

On behalf of Argus Company (owners of *The Star*), it was argued that Kingswell should have been considered liable for what was published in the newspaper he managed.[481] In considering this, the court referred to Section 7 of Ordinance 49 of 1902.[482] In terms thereof, a managing director may be criminally liable for defamation published in his newspaper, despite the fact that he had not published the defamation in question. However, if the managing director can prove that the material complained of was published without his knowledge and without negligence on his part, he could evade liability. It was argued on behalf of the appellant that, if criminal proceedings could be instituted against a manager or managing director, so could civil proceedings.[483]

The Act did not, however, address civil liability. The court stated *obiter* that, in the absence of some clear indication of intention, a person's civil liability would remain unaffected by the section.[484] The court held that a principle absolving a proprietor from civil liability in cases where he could prove that libel was published without his

478 *Id.*
479 *Kingswell* (1913) 518.
480 *Id.*
481 *Id.*
482 *Id.*
483 *Id.* 519.
484 *Id.* 526.

knowledge, conscience or negligence, would have been novel.[485] The court indicated that such a principle would, however, have had to be embodied in clear language.[486]

The court dismissed both the appeal and cross-appeal and upheld the judgment of the court *a quo*, re-allotting the damages payable to the plaintiff.[487] In this case, the court's gravitation towards a negligence-based form of fault is noted.[488]

3.2.1.6. *Nasionale Pers v Long*[489]

The *Long* case offers insight into the practical operations of a print media newsroom and explains the duties of different contributors in the editorial process.[490] It also illustrates the liability of different role players.[491]

This was an appeal from the Cape Provincial Division. In the court *a quo*, judgment was given in favour of the respondent (also referred to herein as the plaintiff) in a defamation case of which the facts are stated as follows: on 21 April 1928, a report appeared in *Die Burger* of which Nasionale Pers was the publisher, that contained comment on a report in *Cape Times,* of which Long was the editor*.* The *Cape Times'* report was about a speech delivered by Prime Minister General Hertzog on 3 April.[492] It was titled *'n Onwaarheid* and the comment piece stated that *Cape Times* had reported an untruth.[493]

According to the comment in *Die Burger*, *Cape Times* wrongly reported that General Hertzog stated that the South African Party consisted of 'soulless Afrikaners and jingo-imperialists.'[494] The comment in *Die Burger* went on to state that Hertzog had in fact made a statement with the opposite effect and that his words had been twisted. The writer of the comment held that no reporter who comprehended a

485 *Id.*
486 *Id.*
487 *Id.* 527.
488 Neethling (2002) 260.
489 *Long* (1930) 87.
490 *Id.* 93-98.
491 *Id.*
492 *Id.* 90.
493 *Id.*
494 *Id.*

fraction of his job could have made such a mistake.[495] The question of how this happened was left open-ended, but the writer stated that the assumption could not be made that a reporter would supply a false report '…in a cold-blooded way.'[496]

The plaintiff held that he had been defamed. The defendant (also referred to herein as the appellant) denied that the published content referred to the plaintiff personally or as the editor of *Cape Times*.[497] The defendant plead that the text complained of contained allegations of fact that were true and in the public interest and that the comments therein were based on these facts.[498] Taking into consideration that the editor was not named, the court considered whether he had in fact been defamed.

The court stated that the articles in *Die Burger* suggested that one or more members of the editorial staff of *Cape Times* deliberately altered Hertzog's words.[499] It came to light that it was in fact the *Cape Times* reporter who wrote the story who had made the mistake and that the reporter's story was published in *Cape Times* exactly as he submitted it.[500]

The court elaborated on the process followed at *Cape Times'* news room. Reports were taken from journalists to chief sub-editors.[501] The chief sub-editor would then hand the report to a sub-editor or someone else to prepare it for the newspaper.[502] The court stated that 'the report is not inserted in the paper by the reporter but by someone who acts under the general direction of the editor and who is usually called a sub-editor.'[503] The court held that, if a reporter is not to be held to blame for a false report, the blame had to lie with the editor or his sub-editors.[504]

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495 *Id.*
496 *Id.*
497 *Id.* 91.
498 *Long* (1930) 91.
499 *Id.* 93.
500 *Id.* 94.
501 *Id.*
502 *Id.*
503 *Id.*
504 *Id.*

The court stated that *Die Burger* wanted to convey to the public that editorial staff at *Cape Times* had deliberately twisted Hertzog's words.[505] Whether the editor was defamed, the court stated, would depend on the circumstances of the case.[506]

The court expounded on the duties of an editor. The editor had to control the policy of the paper regarding its political views as a party organ. The editor would also write certain leading stories.[507] In these circumstances, *Die Burger* wrote that *Cape Times* had published an untruth to drive its political agenda. This charge, the court held, involved the policy of the paper for which the editor was responsible.[508] The court found that the editor could, therefore, institute action in his personal capacity.[509] The court then considered whether the plaintiff had to prove that the defendant had *animus iniuriandi* in defaming him.[510] The court stated that the onus was then placed on the defendant to rebut this presumption, but that simply showing that he lacked intent would not be enough.[511]

The court stated that '…if a man acts recklessly, not heeding whether he will or will not injure another, he cannot be heard to say that he did not intend to hurt.'[512] The court stated that if a writer performed libel recklessly and defamed not only his intended victim, but also others, he would be held liable for all the libel committed.[513] Where surrounding circumstances prove that a write never intended to injure a plaintiff and that he was not reckless, nor could he have known that what he wrote would apply to the plaintiff through a bad stroke of luck, accident or misfortune, the court held that the defendant would have a defence to a libel claim.[514]

The court applied this to the scenario at hand and stated that it was reckless of the editorial staff member who had written the *Die Burger* article not to consider the

505 *Id.* 95.
506 *Id.*
507 *Id.*
508 *Id.*
509 *Id.* 98.
510 *Id.*
511 *Id.* 99.
512 *Id.* 100.
513 *Id.*
514 *Id.*

possibility that the reporter (and not the editor) may have made a mistake.[515] The court also stated that it was reckless of *Die Burger*'s writer not to exclude the editor expressly if he had no intention of including him when contemplating who could have been at fault in publishing a misquoted version of what Hertzog had said.[516]

The appeal was dismissed with costs. In this case, the defendant's recklessness was aligned with the intention to hurt another.[517] The term 'recklessness' would again be referred to *inter alia* in the *Hassen* case in paragraph 3.2.1.7 below.

3.2.1.7. *Hassen v Post Newspapers (Pty) Limited and Others*[518]

In the *Hassen* case, the court examined the concepts of negligence and recklessness and considered whether it could be forms of fault in defamation cases. Although the court in the subsequent *O'Malley* case[519] interpreted the *Hassen* case in support of its view that negligence cannot be a form of fault,[520] some scholars held the opposite view.[521]

In the *Hassen* case, a newspaper called *Post* printed an image of two persons next to a report on a criminal case against two accused (Braun Laher and Lord Latib).[522] The caption indicated that the two persons on the image were the two accused in this case. The image did contain Braun Laher, but the person depicted as Lord Latib was in fact an innocent bystander.[523]

This innocent bystander was the plaintiff who instituted action holding that the image was defamatory in that it wrongly identified him as a suspect in a criminal matter.[524] The defendants were the owner, printer, publisher and distributer of the weekly

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515 *Id.*
516 *Id.*
517 *Id.*
518 *Hassen* (1965) 562.
519 *O'Malley* (1977) 407 D.
520 *Id.* Also see the discussion of the *O'Malley* case in para 3.2.1.8 below.
521 See paragraph 3.6 of this chapter.
522 *Hassen* (1965) 563 A-F.
523 *Id.*
524 *Id.* 563 F.

paper called *Post*.[525] The court considered whether the defendants could be held at fault for the defamatory publication they had made.[526]

The court considered itself bound by the *Long* case[527] and deduced the following rule therefrom:

> "A defamation is not actionable if it was published in the honest, though mistaken, belief in the existence of circumstances which would have justified or excused its publication, but that is so only if the mistake is not attributable to the recklessness or negligence of the defendant, or of those for whose acts or omissions he is responsible." [528]

The court stated that:

> "The law clearly does not sanction such a publication if it is made out of spite or ill-will. But nor, I think, does the law sanction a defamatory publication which, though not tainted with spite or ill-will, was made unreasonably, recklessly or negligently."[529]

The court considered whether the first defendant was negligent, and whether this negligence lead to the publication of a defamatory content. The court determined that a high degree of care was required of those who act for newspapers[530] when they were proposing to publish, or causing publication, of matter that could cause serious reputational harm.[531] The court added that 'those who follow a trade or craft, however worthy, in which reputations of others are imperilled, carry heavy responsibilities'[532] and found that the first defendant had fallen short of that standard.[533]

The court stated that the first defendant should have confirmed whether the persons in the photo were indeed the accused and that they had fallen short of the high

525 *Id.* 562 H.
526 *Id.*
527 *Id.* 575 D. *Long* (1930) 87.
528 *Hassen* (1965) 575 D-F.
529 *Id.* 574.
530 *Id.* 577 A.
531 *Id.*
532 *Id.*
533 *Id.*

degree of care expected of them in failing to do so.[534] The court stated that there was negligence on the part of the first defendant that founded liability for defamation and that 'if it were necessary to go so far I would say that the lack of care amounted to recklessness...in the sense of negligence in a high degree.'[535] The judgment was in favour of the plaintiff.

Neethling and Potgieter have described the *Hassen* case as a proper illustration of how meaningful and practical a negligence-based form of fault in defamation cases is.[536] They have indicated that negligence as form of fault in defamation cases makes sense and that this was illustrated in the *Hassen* case.[537] The court's considerations on viewing negligence as a founding form of fault in defamation cases was also received well by Burchell.[538] The court in the subsequent case of *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*[539] (*O'Malley* case) had a different interpretation, as discussed in paragraph 3.2.1.8 below.

To have intent, he who acts must aim for a certain consequence, knowing what that consequence will entail for the personality rights of another.[540] Knobel[541] argued that the court in *Hassen* had equated the question of intent with the question of ill-will or spite, recklessness, negligence or unreasonableness on the part of him who defames. In other words, Knobel's view holds that the court in *Hassen* equated the defendant's ill-will, spite or lack of care behind the act of publication with intent. Knobel's view will be expounded on in paragraph 3.6 of this chapter during a discussion of the effect of the court in *Hassen*'s reasoning on post 1994-jurisprudence.

534 *Id.* 577 C.
535 *Id.* 577 D.
536 J Neethling and JM Potgieter "Aspekte van die lasterreg in die lig van die Grondwet – *Gardener v Whitaker* 1995 2 SA 672 (OK) (1995) *THRHR* 709-715.
537 *Id.*
538 See *inter alia* Burchell (1985) 193.
539 *O'Malley* (1977) 394.
540 Neethling (2002) 265.
541 Knobel (2002) 34.

3.2.1.8. *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*[542]

The court in this decision considered prior case law on media defamation and provided commentary on the decisions discussed this far. Before the facts of this case are discussed, the court's commentary on previous decisions is emphasised.

The court in *O'Malley* confirmed principles raised in the *Hill,*[543]and *Hartley*[544] cases, confirming the liability of an editor for the defamation that appears in a newspaper.[545] The court confirmed that editors would not be able to raise lack of *animus iniuriandi* as a defence.[546] The liability of publishers for the content of publications they published was confirmed[547] and an excerpt of *Wilson v Halle and Others*[548] was referred to:

> "[I]f he puts the paper into the world, he puts it into circulation, and if he puts it into circulation, he is liable for all the consequences equally with the editor and with the proprietors." [549]

From *Wilson v Halle*,[550] the court in *O'Malley* also reiterated:

> "a company which makes it its business to publish newspapers, and which employs individuals to publish those papers, is responsible for any libel which may appear therein."[551]

The *Dunning v Cape Times*[552] principle was entrenched by the court in *O'Malley*[553] and printers of publications would be considered liable for the defamatory content

542 *O'Malley* (1977) 394.
543 *Hill* (1944) 520.
544 *Hartley* (1907) 228.
545 *O'Malley* (1977) 403; *Hartley* (1907) 228.
546 *Id*.
547 *Id.*
548 *Wilson* (1903). 178, 200 - 201.
549 *Wilson* (n 500 above).
550 *Wilson* (n 332 above) 178.
551 *O'Malley* (n 326 above) 404 B.
552 *Dunning* (n 368 above) 231.
553 *O'Malley* (n 326 above) 404 B-D.

thereof, regardless of whether they had known about it.[554] The court in *O'Malley* accepted that news vendors could be liable based on negligence,[555] accepting the exception in *Trimble v Central News Agency Ltd.*[556] Fault was also considered by the court in *O'Malley*. The court in *O'Malley*[557] criticised the court in *Hassen's*[558] interpretation of the *Long*[559] and *Craig v Voortrekkerpers Bpk*[560] decisions, stating that the inference of negligence as form of fault that the court in *Hassen* made from the *Long* judgment could not be justified.[561]

The court in *O'Malley*[562] quoted from the *Long* case, stressing that:

> "Before a person can be held liable for any *iniuria* in its widest sense of wrong, and in its narrower sense of *contumelia*, there must exist an intention to commit a wrong or, as it is usually expressed, there must be an *animus iniuriandi*."[563]

According to the court in *O'Malley's* interpretation,[564] the court in *Long* acknowledged intention to commit a wrong as a prerequisite for liability. According to the court in *O'Malley*,[565] the result of *Hassen* would have been correct had the media defendant been held strictly liable.[566]

The court in *O'Malley*[567] referred to Van der Walt's view that[568] the powerful mediums of press and radio could place defenceless citizens in a difficult position by causing grave reputational harm while publishing and broadcasting. The court in *O'Malley* stated that strict liability of the press could have been accepted into South

554 *Dunning* (n 368 above) 233.
555 *O'Malley* (n 328 above) 404 D-F.
556 *Trimble* (n 379 above) 43.
557 *O'Malley* (n 328 above) 406 H-407 B.
558 *Hassen* (n 472 above).
559 *Long* (n 443 above) 87
560 *Craig* (n 332 above). This case is not discussed in this study, as its intricacies fall outside the parameters of this study.
561 *O'Malley* (n 328 above) 407 B.
562 *O'Malley* (n 328 above) 406 F-H.
563 *Long* (1930) 99-100.
564 *O'Malley* (1977) 407.
565 *Id.* 407D.
566 *Id.*
567 *Id.* 407 F-H.
568 JC van der Walt 'Die Aanspreeklikheid van die Pers op Grond van Laster' (1976) *Gedenkbundel H. L. Swanepoel* 41.

African law as an exception to the general rule of *animus iniuriandi* as a required form of fault.[569] Although the court made room for doing so, it did not implement the acceptance of strict liability, as form of fault in this case where the defendant failed to disprove intent on his part. The facts of the case follow.

This case was an appeal against a decision made in favour of the plaintiff in the Witwatersrand Local Division. In the court *a quo*, the appellant was found liable for defaming the respondent.

The incident that gave rise to the judgment took place on 26 September 1976.[570] The respondent (also referred to as the plaintiff) was the editor of *The Daily News* and alleged that the appellant (also referred to as the defendant) broadcasted news reports stating that the respondent was arrested in terms of the Riotous Assemblies Act.[571] A later broadcast stated that the respondent was released on R50 bail and was due to appear in court.[572] According to the broadcasts complained of, the Minister of Justice had provided the information relayed.[573]

The respondent stated that the reportage was defamatory of him in that it meant and was understood to mean that he had attended an unlawful gathering and was arrested for doing so,[574] whereas he was in fact arrested at a wine tasting because of an advertisement that appeared in his publication.[575] The advertisement related to an illegal meeting. He alleged that the reportage was published with the intention to injure his reputation.[576]

The appellant in the court *a quo* denied that the reportage meant that the respondent attended a wrongful gathering or was arrested because of it.[577] The appellant also stated that its reportage was true, information in it was obtained from reliable sources, that it had no *animus iniuriandi* towards the respondent, and that the

569 *O'Malley* (1977) 407 F-H
570 *Id.* 400 A-B.
571 *Id.*
572 *O'Malley* (1977) 400 B-F.
573 *Id.*
574 *Id.*
575 *Id.* 394 G.
576 *Id.*
577 *Id.* 400 G.

reportage was broadcasted in the public interest.[578] In the court *a quo*, judgment was given in favour of the plaintiff.

In its broadcast, the defendant did not indicate where or why the plaintiff was arrested.[579] The announcement that he was arrested in terms of the Riotous Assemblies Act which was announced along with the arrest of 13 other people who had attended an illegal gathering.[580] The court stated that the average reasonable listener would have concluded that the respondent had attended an illegal gathering and was arrested for that reason.[581] In the court of appeal, the court reiterated that when defamatory words have been published, it is presumed that this was done wrongfully and with intent.[582] The court noted that the proverbial lines distinguishing the two elements had been blurred in the past.[583]

Pertaining to the element of wrongfulness, the court noted that in English law, lawfulness of defamation was accepted as a defence prior to the rise of the term called 'privilege.'[584] The court stated that the wrongfulness of defamation would be negated if that defamation could be justified.[585]

The court further noted that English terms, such as 'malice' and 'express malice' were used in relation to the element of intention and, in so doing, the meaning of intention became murky. The court reiterated that no ill-will or malice needs proving for intention to exist in South African defamation law.[586] The court defined intention by stating that it is a deliberate action that excludes negligence and that it may comprise *dolus directus* or *dolus eventualis*.[587]

578 *Id.*
579 *Id.* 408 E-G.
580 *Id.*
581 *Id.*
582 *O'Malley* (1977) 402 A.
583 *Id.*
584 *Id.*
585 *Id.* 402 E-F.
586 *Id.* 402 F-G.
587 *Id.*

The presumption of wrongfulness, the court stated, can be refuted by proving that a defamatory statement was published in circumstances that exclude wrongfulness.[588] When the question arises whether the publication thereof was wrongful or lawful, the court held that it would then be its task to ascertain whether, in terms of the common law, public policy would consider publication to be justified.[589] In referring back to the English term 'privilege,' the court stated that this word referred to the publication of defamatory words justified by the interest of public policy.[590] The court stated that the circumstances giving rise to privilege in English law were similar to those giving rise to the lawfulness of defamatory publication in South African law.[591]

Regarding the presumption of intent, the court stated that the presumption of intention to defame places a burden of rebuttal on a defendant to prove that he lacked intention in defaming.[592] Merely denying intention, the court held, would not be sufficient. The defendant would have to list facts upon which the statement that he had not intended to defame rested.[593] The court stated that the intention to defame would require the mental capacity to intend a specific consequence, and knowledge of the fact that the said consequence would be wrongful.[594]

The court proceeded to consider previous cases and found that the acceptance of strict liability for media defendants would be a justifiable exception to the general requirement of *animus iniuriandi* as form of fault in defamation cases.[595]

In *O'Malley,* the appellant made no attempt to refute the presumption of *animus iniuriandi,* save from denying that the reports complained of were published without *animus iniuriandi*.[596] The defamatory nature of the report was denied and an

588 *Id.* 402 F - 403 A.
589 *Id.* 403 A.
590 *Id.*
591 *Id.*
592 *O'Malley* (1977) 403 A-B.
593 *Id.* 403 B.
594 *Id.* 403 C. Also see the decision in *Craig* (1963).
595 *Id.*
596 *Id.* 408 B-G.

alternative plea of truth and public benefit was levelled.[597] In the court *a quo*, these defences were not successful.[598]

No evidence was presented to prove that *animus iniuriandi* was absent, save for the appellants' attempt to base their lack of *animus iniuriandi* upon the ambiguity of their written reports prior to broadcasting, which was rejected by the court.[599] The court confirmed the judgment of the court *a quo*.[600]

3.2.1.9. *Pakendorf and Others v De Flamingh*[601]

The court in *Pakendorf* accepted strict liability of the media for defamation and this precedent would be upheld for more than ten years. This was an appeal against a defamation judgment made in the Transvaal Supreme Court that held the appellants accountable for defaming the respondent.

Two publications, *Oggendblad* and *Hoofstad*, had printed reports featuring the respondent, who was a practising advocate.[602] The reports falsely held that the respondent bore the brunt of a judge following improper behaviour.[603] The advocate on the receiving side thereof as identified in the report, was not the same person who had in fact been chastised.[604] The respondent argued that the defamatory nature of the report lied therein that it painted the respondent as an unethical, unprofessional person that had not behaved according to the guidelines of his profession.[605]

The first and second appellants were the editor and the proprietor of *Oggendblad* and the third and fourth appellants were the editor and the proprietor of *Hoofstad*.[606] In the trial court, the defendants argued in rebuttal of the presumption that they had

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597 *Id.*
598 *Id.*
599 *Id.* 409 A.
600 *Id.* 410 B-C.
601 *Pakendorf* (1982) 157.
602 *Pakendorf* (1982) 146.
603 *Id.*
604 *Id.*
605 *Id.* 155 H – 156 A.
606 *Id.* 153 B.

acted with *animus iniuriandi*[607] in defaming the plaintiff. Their arguments (discussed below) were unsuccessful and the court *a quo* found in favour of the plaintiff, which the appellants sought to overturn on appeal.

In the trial court, reference was made to *Suid-Afrikaanse Uitsaaikorporasie v O'Malley.*[608] The trial court in *Pakendorf* stated *obiter* that an exception should be made concerning the requirement of *animus iniuriandi* as a prerequisite for liability in defamation cases. The trial court in *Pakendorf* stated that the court in *O'Malley* held that media defendants ahould be considered strictly liable for defamation.[609]

Nonetheless, the trial court in *Pakendorf* ruled that *animus iniuriandi* had been present on the part of the defendants.[610] The trial court in *Pakendorf* based liability on intention and not on strict liability.

In the *Pakendorf* cases, both the reporters of *Oggendblad* and *Hoofstad* acknowledged that they had known that the contents of their reports were defamatory.[611] However, they believed that the reports were accurate reflections of a written court judgment.[612] It was argued that they lacked malice in publishing the defamatory reports.[613] The defendants in the court *a quo* did not acknowledge that the plaintiff's professional image had been tarnished nor that he had suffered damages as a result.[614]

The reporters testified in an attempt to rebut the presumption of *animus iniuriandi.* It was argued that, because they made a *bona fide* mistake, the appellants were not liable.[615]

One appellant stated that once it came to their attention that the respondent was not the advocate referred to by the judge, *Oggendblad* published an apology in the

607 *Id.* 151 D.
608 *O'Malley* (1977) 394.
609 *Id.* 405 A.
610 *Id.* 154 F.
611 *Pakendorf* (1982) 154 G.
612 *Id.*
613 *Id.* 155 D.
614 *Id.*
615 *Id.* 156.

newspaper under the headline 'Apology to Advocate De Flamingh.'[616]' The court of Appeal in *Pakendorf* did not agree that the reporters lacked fault and stated that both reporters had acted unreasonably in thinking that their reports accurately reflected the judgment and that they were not aptly qualified court reporters.[617]

The court held this case as an example of the unfairness of allowing proprietors and editors whose papers published defamation to rely on the absence of *animus iniuriandi* and escape liability owing to its reporters making a mistake.[618] The court stated that it would result in a substantial injustice to the respondent.[619] The court expounded on the scenario where a defendant admits to having used defamatory words, but states that it happened because he had no knowledge of the wrongfulness thereof due to a mistake.[620]

The court indicated that a clear solution had to be found for scenarios where an absence of knowledge was caused by the defendant's negligence.[621] As the acceptance of such a notion was not placed before court, the court did not consider the circumstances under which it would be accepted.[622] The court then laid the foundation for the acceptance of strict liability in media defamation cases. First, the court stated that even if strict liability would be applied for members of the press, they would still be able to evade liability in media defamation cases by relying on defences, such as truth and public interest.[623]

The court then provided context on the proverbial strings from which South Africa's defamation law is woven. It contains strings of Roman-Dutch and English law.[624] The court stated that, whereas the notion of *animus iniuriandi* as fault requirement originated in Roman-Dutch law, strict liability of the press had its roots in English law.[625] It was also stated by the court that the thread of English law could be clearly

616 *Id.*
617 *Id.* 154 G-H.
618 *Id.*
619 *Id.*
620 *Pakendorf* (1982) 155 A-D.
621 *Id.*
622 *Id.*
623 *Id.*
624 *Id.*
625 *Id.*

discerned in cases dealing with defamation by the media.[626] The court mentioned that a plea of 'absence of malice' was inserted in defamation cases in South African courts and that the concept of negligence or vicarious liability was implied in certain cases.[627] The court held that South African courts never distanced themselves from the doctrine of strict liability.[628]

As an example, reference was made to the case of *Wilson v Halle and Others*[629] where the court reiterated a principle decided in English and South African courts, according to which those whose business it is to publish newspapers, are liable for the defamation it may contain.[630]

The court in *Pakendorf* stated that, by implication, the court in *Trimble v Central News Agency Ltd*[631] had accepted strict liability.[632] This, the court in *Pakendorf* stated, was implied when the court in *Trimble* confirmed that a newspaper vendor could rebut the presumption of 'malice' by proving that he was unaware that the paper he sold contained libels pertaining to the plaintiff, his lack of knowledge was not due to his negligence and that he did not know, nor ought he to have known, that the publication was likely to contain defamatory matter.[633]

Reference was then made to to *Robinson v Kingswell,*[634] where the court's *obiter* statement was in favour of introducing a principal for civil liability in terms of which a managing director of a company could be liable for a defamatory statement if he cannot prove that he had no knowledge, consent, negligence, nor had colluded or been in agreement pertaining to its publication.[635] The court in *Pakendorf* interpreted this *obiter* statement to be an indication of the court's attitude towards the liability of the press.[636]

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626 *Id.*
627 *Id.*
628 *Id.*
629 *Wilson* (1902) 178.
630 *Pakendorf* (1982) 156 G-H.
631 *Trimble* (1934) 43.
632 *Pakendorf* (1982) 156 H.
633 *Id.* 157 A. See also *Trimble* (1934) 43.
634 *Kingswell* (1913) 513.
635 *Id.*
636 *Pakendorf* (1982) 156.

The court in *Pakendorf* referred to the *actio de effusis vel deiectis* referred to in *O'Malley*.[637] In Roman Law, this action would be granted to him who is injured by something poured or thrown out of a building. The occupant of the building would be held liable for the action of those who reside there. This, the court stated, offered due protection to those unable to prove who committed the deed that caused them injury. The court stated that managers of the press business typically pose such a high risk of prejudice to the personality rights of others, and that risk could therefore be elevated to a basis for liability.[638] It was also stated that, after the court had been presented with the case at hand, there was no doubt that strict liability for members of the press should be retained.[639] The appeal in *Pakendorf* was dismissed.[640]

3.3. CONCLUSION: PRE-1994 JURISPRUDENCE

The cases discussed in paragraph 3.2 revealed the changes in South African courts' approach to the elements of wrongfulness and fault and the views of South African courts on the media's responsibilities.

In *Hill,*[641] reference was made to the duty upon editors to act responsibly when publishing. The court stated that allowing a defendant to evade liability by indicating that he lacked intent (although he was negligent in defaming) would destroy the responsibilities of editors.[642]

In *Wilson*,[643] the court considered the liability of newspaper writers, owners and publishers. The fact that they made the act of publishing into a business established the foundation for their liability.[644] In *Dunning*,[645] the principle in *Wilson* was

637 *O'Malley* (1977) 405 A.
638 *Pakendorf* (1982) 157 H.
639 *Id.* 157 D.
640 *Id.*
641 *Hill* (1844) 520.
642 *Id.*
643 *Wilson* (1903) 178.
644 *Id.*
645 *Dunning* (1905) 231.

reiterated and the court considered those in the publishing business liable for the defamatory content printed.[646]

In *Trimble*,[647] the court decided that newspaper vendors would not be liable for defamation unless they had been aware of it and distributed nonetheless. In other words, liability for newspaper vendors was found on the defendant having foreseen prejudice and failing to prevent it.[648]

In *Kingswell*,[649] the liability of a manager of a newspaper company was considered. The court in this case noted *obiter* that a defence absolving a defendant who had no knowledge, connivance or negligence of the defamatory nature of the publication's content, would be novel.[650]

In the *Long*[651] case, the court stated that a media defendant would evade liability if he acted without both intent and recklessness. Recklessness, in this case, was defined as 'acting recklessly, not heeding whether he will or will not injure another.'[652] Where the lack of intent was the result of a mistake, the court held that this mistake should not have been caused by recklessness or negligence on the part of the defendant.[653]

In *Hassen*,[654] the court stated that those who follow a trade or craft in which the reputations of others are imperilled carry heavy responsibilities. Those whose work carried a high risk of defaming others were, according to the court, bound to a high degree of care.[655] The court compared a lack of care to recklessness in the sense of negligence to a high degree.[656] The court in *Hassen* equated the defendant's ill-will, spite, unreasonableness, negligence or recklessness with intent under the fault

646 *Id.*
647 *Trimble* (1930) 43.
648 *Id.* 44.
649 *Kingswell* (1913) 513.
650 *Id.* 518.
651 *Long* (1930) 87.
652 *Id.* 100.
653 *Id.*
654 *Hassen* (1965) 562.
655 *Id.* 577 A.
656 *Id.* 577 D.

element of defamation.[657] The effects hereof on post-1994 jurisprudence will be discussed in paragraph 3.6 of this chapter.

In *O'Malley*,[658] the court considered the presumption of wrongfulness and stated that it could be refuted by proving that a defamatory statement was published in circumstances that exclude wrongfulness.[659] Whether this was the case would depend on public policy.[660] Regarding intent, the court considered the nature of the medium utilised by media defendants.[661] The nature of print media, the court stated, made it difficult to prove intent on the part of he who uses the medium to defame.[662] Therefore, the court stated that media defendants should not be able to evade liability merely by denying the intention to defame.[663] The court in *O'Malley* also concluded that negligence could not be the appropriate form of fault in a defamation claim.[664]

In *Pakendorf*,[665] the court accepted strict liability in media defamation cases. The court reiterated the principle in *Wilson* that those who make publishing newspapers their business are liable for its contents.[666] The court found that the press business posed such a high risk of prejudice to the personality rights of others that this risk should be the basis of faultless liability.[667]

The *Pakendorf* judgment was widely criticised by academics, journalists and media lawyers.[668] This judgment had modified the general principles of the delict of media defamation and rendered media defendants with only one rebuttable presumption instead of two.[669] Whereas media defendants could previously rebut the presumptions of wrongfulness and intent, they were now presumed to have acted

657 Knobel (2002) 27-30.
658 *O'Malley* (1977) 394.
659 *Id.* 402.
660 *Id.*
661 *Id.* 405 A-C.
662 *Id.*
663 *Id.* 403 B-D.
664 *Id.* 407 C-E.
665 *Pakendorf* (1982) 157 H.
666 *Id.* 156 G-H.
667 *Id.* 157 G-H.
668 JR Midgley 'The attenuated form of intention: A Constitutionally acceptable alternative to strict liability for the media' (1996) *THRHR* 635-638.
669 *Id.*

with intent when publishing defamatory content and could only evade liability by disproving that they had acted wrongfully.[670]

Burchell[671] and Visser[672] indicated that the decision in *Pakendorf*, the *locus classicus* for strict liability in defamation cases, placed unjustifiable limitations on freedom of expression of media defendants. At the time of the *Pakendorf* decision, personality rights were acknowledged by the common law, such as that of defamation. This would be changed dramatically by the acceptance of the Constitution in the early 1990's.

3.4. FROM A PARLIAMENTARY SOVEREIGNTY TO THE CONSTITUTION AS *LEX FUNDAMENTALIS*

Prior to 1994, South Africa was a parliamentary sovereignty and an apartheid state. Apartheid was an institutionalised racially discriminatory practice, labelling people with white skins as supreme in comparison with others, denying others certain basic human rights.[673]

The interim Constitution[674] that was implemented in 1994 was followed by the Final Constitution (hereafter 'the Constitution') in 1996.[675] The Constitution completed the country's evolution into a democracy[676] and is the supreme law of the Republic of South Africa. The Constitution binds all organs of state, all levels of government and all citizens, entrenching fundamental rights and freedoms.[677] This transformative document[678] is the *lex fundamentalis* of South Africa's post-1994 legal order that sets out the new order for both government and the country's residents.

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670 *Id.*

671 JM Burchell 'Strict liability for defamation by the media and freedom of the press' (1980) *SALJ* 212.

672 PJ Visser 'Nalatige krenking van die reg op fama' (1982) *THRHR* 174.

673 D Quaid 'How bad was Apartheid in South Africa? What are its lasting effects on the black population in South Africa?' 13 May 2016 https://www.quora.com//How-bad-was-Apartheid-in-South-Africa-What-are-its-lasting-effects-on-the-black-population-in-South-Africa (accessed on 27 April 2017).

674 The Constitution of the Republic of South Africa Act 200 of 1993 ('the Interim Constitution').

675 The Constitution 1996 ('the Constitution').

676 Currie, De Waal & Law Society of South Africa (2013) *The Bill of Rights Handbook* 6.

677 *In re: Certification of the constitution of the Republic of South Africa* 1994 4 SA 744 (CC).

678 K Klare 'Legal Culture and Transformative Constitutionalism' (1998) *SAJHR* 146.

The preamble to the Constitution recognises the injustices of South Africa's past, affirms its status as the supreme law of the country and establishes a society based on democratic values, social justice and fundamental human rights.

The foundation of the Constitution is the Bill of Rights. It entrenches 27 basic human rights in Sections 9 to 25 including the rights to equality (Section 9), human dignity (Section 10), life (Section 11), freedom and security of the person (Section 12), privacy (Section 14), freedom of religion, belief and opinion (Section 15) and freedom of expression (Section 16).

The Bill of Rights regulate both the vertical relationship between the state and the individual and the horizontal relationships between legal persons on all levels of society.[679] It acknowledges personality rights, entrenching it and elevating it to basic human rights.[680] The Constitution provides the legal foundation for the Republic of South Africa's existence, sets out the rights and duties of its citizens and defines the structures of government.[681]

3.4.1. Constitutional interpretation

The Constitution is the prism through which all law must be viewed.[682] It is in light of the Constitution that all other law must be considered.[683] There are various theories and canons of constitutional interpretation including historical,[684] grammatical,[685] contextual[686] and value-based interpretations.[687] In interpreting a text as

679 S Woolmans & H Botha *Constitutional Law of South Africa* (2013) ch 36-p7.

680 Knobel (n 334 above) 34.

681 Ch 9-14 of the Constitution, 1996.

682 *Investigating Directorate: Serious Economic Offences and others v Hyundai Motors Distributors (Pty) Ltd & Others; in re Hyundai Motor Distributors (Pty) Ltd & Others v Smith NO & Others* 2000 2 SACR 349 (CC) at 360C (hereafter '*Hyundai'*).

683 *Id*.

684 *S v Makwanyane & Another* 1995 6 BCLR 665 (CC) 769.

685 AJ Hofmeyr 'Constitutional Interpretation in the new South African order' (LLM Dissertation 1998 University of Witwatersrand.)

686 *Ferreira v Levin* 1996 2 SA 984 (CC) 1013A-C.

687 A Chaskalson 'From wickedness to equality: The moral transformation of South African Law.' (2003) *I.CON* 599.

multifaceted, vast, far-reaching and with such hierarchy as the Constitution, consistently[688] combining interpretational approaches is likely to best serve justice.[689]

In answer to the question whether any single doctrine of constitutional interpretation is preferable, this study abides by the court's statement in *Nortje v Attorney-General of the Cape:*[690]

> "There is no closed set of rules concerning the interpretation of our Constitution.' It is a process that allows for a changing society and changing circumstances. The interpretational engagement between presiding officers and the constitutional text was described by Sachs J in *Prince v Cape Law Society.*[691]
>
> What it requires is the maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by global experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values emphasised by our Constitution."

Similarly, the court in *Nyamakazi v President of Bophuthatswana*[692] (*Nyamakazi*) held that constitutional interpretation had to be conducted in the context, scene and setting existing at the time of examination to accommodate the growth of society the Constitution seeks to regulate.[693] The impact of an interpretation's outcome on future generations is also relevant, taking into account new developments in society.[694] The court in *Nyamakazi* agreed with scholar and legal philosopher Ronald Dworkin's view that the moral criteria of a community should be considered during interpretation.[695]

This study sheds light on the constitutional interpretation of two competing fundamental rights involved in the law of defamation. These are the right to human dignity and the right to freedom of expression.

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688 *Id.*

689 SO Dzinga 'The desirability of consistency in Constitutional interpretation.' (LLD dissertation 2011 Unisa) 507.

690 *Nortje v Attorney-General of the Cape* 1995 2 SA 469 (C) 472F-G.

691 *Prince v Cape Law Society* 2002 2 SA 794 (CC) para 155.

692 *Nyamakazi* (1992) 848-849.

693 *Id*.

694 *Id*.

695 *Id.* 842.

3.4.2. Human dignity and freedom of expression

Human dignity is a fundamental value and ground norm[696] of South Africa's Constitution, and it is a basic human right.[697] The status of dignity as a basic human right was confirmed in 1993 in Section 10 of the interim Constitution.[698] In the final Constitution of 1996, human dignity was also confirmed to be a ground value of the Constitution.[699]

The right to freedom of expression received the status of a basic human right in Section 15 of the interim Constitution.[700] In the Final Constitution, Section 16 states:

> 16 Freedom of expression:
> (1) Everyone has the right to freedom of expression, which includes –
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.
> (2) The right in subsection (1) does not extend to–
> (a) propaganda for war;
> (b) incitement of imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The acceptance of the Constitution caused a revival of the criticism of the *Pakendorf* case.[701] Academics and members of the media doubted whether strict liability for media defendants would be found constitutionally justifiable when challenged.[702]

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696 *S v Williams* 1995 3 SA 632 (CC) para 77.

697 *Makwanyane* (1995) para 39.

698 Sec 10 states that: "Every person shall have the right to respect for and protection of his or her dignity."

699 Sec 1(a) of the final Constitution states that South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

700 Sec 15 states that: "(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research. (2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion."

701 J Neethling & JM Potgieter (1995) 713.

702 *Id.*

This was considered in various post-1994 defamation cases. This study will shortly discuss the cases of *Du Plessis and Others v De Klerk and Another* (*Du Plessis*),[703] *Gardener v Whitaker* (*Whitaker*),[704] *Holomisa v Argus Newspapers*[705] (*Holomisa*) and the seminal cases of *National Media Limited & Others v Bogoshi*[706] *(Bogoshi)* and *Khumalo & Others v Holomisa*[707] *(Khumalo).* Lastly, the case of *Marais v Groenewald*[708] (*Marais*) will be discussed and the justifiability of differentiating between media defendants and regular defendants will be questioned.

3.5. CONSTITUTIONAL JURISPRUDENCE

3.5.1. Post-1994 jurisprudence

3.5.1.1. *Du Plessis and others v De Klerk and Another*[709]

In this case, the appellants were *Pretoria News*, its editor, its owner and publisher, its distributor and a journalist.[710] During February and March 1993, the newspaper published a series of articles dealing with the supply of firearms and other material to UNITA.[711] The articles alleged that South Africans were engaged in these operations and that it breached the country's air control regulations.[712]

Two of the reports mentioned respondents Mr Gert de Klerk and his company, Wonder Air Pty Ltd.[713] The appellants claimed damages based on allegedly unlawful defamation.[714] The respondents (hereinafter referred to as defendants) filed a joint plea admitting to publication and denying meaning that the plaintiffs were involved in illegal activities.[715] The defendants also denied that the articles were defamatory.[716]

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703 *Du Plessis and Others v De Klerk and Another* 1996 5 BCLR 658 CC (hereafter *Du Plessis*).
704 *Gardener v Whitaker* 1996 4 SA 337 (hereafter '*Gardener')*.
705 *Holomisa v Argus Newspapers* [1996] 1 All SA 478 (W) (hereafter '*Holomisa')*.
706 *Bogoshi* (1998) 1196.
707 *Khumalo* (2002) 401.
708 *Marais v Groenewald & Others* [2000] 2 All SA 578 (T) (hereafter 'Marais').
709 *Du Plessis* (1996).
710 *Id.* 658-659.
711 *Id.*
712 *Id.*
713 *Du Plessis* (1996) 664.
714 *Id.* 658-659.
715 *Id.*

In the alternative, they alleged that the general subject-matter was a matter of public interest and also pleaded the defence of fair comment.[717] The defendants also stated that they published the articles in good faith whilst pursuing their duty to inform the public on facts, opinions and allegations on the Angola civil war and that their readers had a right to be so informed.[718] This, they argued, rendered publication lawful.[719]

The interim Constitution came into force between the publication of the articles complained of and the matter going to trial. The defendants gave notice of their intention to amend their plea.[720] The defendants pleaded that publication was not unlawful based on the protection afforded to the defendants by Section 15 of the interim Constitution.[721] The plaintiffs objected, stating that the Constitution was not in force when the defendants committed the defamation.[722] They also argued that the Constitution did not apply directly and horizontally to common law disputes.[723] The plaintiffs further stated that Chapter 3 of the interim Constitution protected the plaintiff's right to reputation and that this right took precedence over the right claimed by the defendants.[724]

The court *a quo* denied the application. The court concluded that the Constitution does not apply retroactively.[725] The decision of the Constitutional Court was dominated by opinion differences regarding the horizontal application of Chapter 3 of the interim Constitution.[726]

The majority judgment of the court was delivered by Kentridge AJ[727] and found that Chapter 3 could not be applied directly to the common law in actions between private

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716 *Id.*
717 *Id.*
718 *Id.*
719 *Id.*
720 *Id.*
721 *Id.*
722 *Id.*
723 *Id.*
724 *Id.*
725 *Du Plessis* (1996) 658-659.
726 JWG Van der Walt 'Perspectives on horizontal application: Du Plessis v De Klerk revisited' (1997) *South African Public Law* 1.
727 *Du Plessis* (1996) 660-662.

parties.[728] A separate concurring judgment was delivered by Mahomed DP.[729] Section 15, the court found, was not a provision that could apply directly to horizontal common law action between parties.[730] A minority judgment articulated by Kriegler J however, was in favour of direct horizontal application of the Bill of Rights.[731] Van der Walt stated that the differences of opinion articulated by Kriegler and Kentridge was soon of historical importance only, provided the impact that Section 8 of the final Constitution would have on the matter at hand (see paragraph 3.5.1.5 for a discussion of the Khumalo case which addresses Section 8 of the Constitution).[732]

3.5.1.2. *Gardener v Whitaker*[733]

The plaintiff in this case was a city council clerk who launched a defamation action against a member of the council, alleging that the latter had labelled a statement in the plaintiff's report (presented at a committee meeting) as a lie.[734] The defendant denied that the statement was defamatory, that it referred to the plaintiff or that the defendant had intention to defame the plaintiff.[735] In the alternative, the defendant used the defences of truth and public interest and privilege.[736] In the court *a quo*, it was ruled that the words complained of were indeed defamatory and referred to the plaintiff.[737] The court considered the defamatory statement to be on a matter of public interest and the occasion during which it was made as an occasion where open and frank discussion was called for.[738]

The court found that the defendant had a duty to speak and that those present had a right to receive his statement. The case of *De Waal v Ziervogel*[739] was referred to in

728 *Id.*
729 *Id*.
730 *Id.*
731 *Id.* 662-663.
732 Van der Walt (1997) 1.
733 *Gardener* (1996) 337.
734 Neethling & Potgieter (1995) 709-715.
735 *Id.*
736 *Id.*
737 *Id.*
738 *Gardener* (1996) 337.
739 *De Waal v Ziervogel* 1938 AD 112 121-3.

support of his finding that the scenario at hand was one of qualified privilege. In the court *a quo*, four main issues were considered.[740]

> (1) whether the provisions of the Constitution are to be applied in litigation that was pending at the time of the commencement of the Constitution;
> (2) whether the provisions of Chapter 3 of the Constitution dealing with fundamental rights apply to litigation between private individuals or entities;
> (3) if so, whether and to what extent those provisions affect the present common law of defamation; and
> (4) the effect of the conclusions reached in respect of the first three issues on the present matter. [741]

First, the court interpreted Section 241(8) of the interim Constitution to conclude that Chapter 3 of the Constitution applied to disputes still pending at the time of the Constitution coming into force.[742] Secondly, the court found that Chapter 3 would apply to vertical and horizontal litigation matters.[743]

The court in *Gardener* stated that the basic concern of the Constitution was to transform the South African legal system into one concerned with openness, accountability, principles, human rights and reconciliation, and reconstruction which would at times call for the explicit application of the provisions of Chapter 3 between individuals.[744] The court then considered to what extent the provisions of the law in Chapter 3 would influence the common law of defamation.[745] The court noted that the right to freedom of expression was acknowledged only indirectly by means of the defences of truth and public benefit, privilege and fair comment.[746] Because the defendant's conduct was lawful in terms of qualified privilege, absolution from the instance was granted with costs.[747]

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740 *Gardener* (1996) 675 F-H.
741 *Id.* G-H.
742 *Id.* 678-680.
743 *Id.* 680-686. See also *Mandela v Falati* 1995 1 SA 251 (W) 257-258; *Jurgens v Editor, Sunday Times Newspaper* 1995 2 SA 52 (W) 58; The decision in *Du Plessis v De Klerk* (1996) held the opposite.
744 *Gardener* (1996) 685B-686 B.
745 *Id.* 686 E-F.
746 *Holomisa* (1996) 478.
747 *Id.*

The decision was taken on appeal to the Constitutional Court,[748] based on the plaintiff's arguments that Chapter 3 of the Constitution was not intended to apply to litigation upon civil wrongs between private persons or, alternatively, that if the Constitution was intended to apply to such litigation, it was not intended to operate in respect of matters pending at the date upon which the Constitution came into force.[749] The defendant stated that the court *a quo* had erred in creating an onus upon the plaintiff to show that his interest in his good name enjoyed precedence over the defendant's right to freedom of expression.[750]

The court *a quo*'s reconsideration of the plaintiff's onus (to show that his interest in his good name enjoyed precedence over the defendant's right to freedom of expression the right to freedom of expression) was labelled by Neethling and Potgieter as an overemphasis.[751] The Constitutional Court held that the court *a quo* was correct in finding that the right of freedom of speech under Section 15 cannot be invoked as a defence to a defamation action that originated before the Constitution came into force.[752]

The Constitutional Court pointed out that the court *a quo* did not apply Section 15 directly, but purported to develop the common law, having regard *inter alia* to the values embodied in Section 15 and applying same.[753] The court dismissed the application for leave to appeal.

748 *Id*.
749 *Holomisa* (1996) 338 F-G.
750 *Id.*
751 Neethling & Potgieter (1995) 712-714.
752 *Holomisa* (1996) 338 F-G.
753 *Id.* 337 J.

3.5.1.3. *Holomisa v Argus Newspapers*[754]

In this case (*Holomisa*), the doctrine of strict liability was questioned and found not to be consistent with the right to freedom of speech and political expression guaranteed by the Constitution.

An article in *Argus* reported that the plaintiff was involved in activities of the Azanian People's Liberation Army (APLA).[755] It alleged that he was involved in activities targeting white people and that he was involved in an assassination plot.[756]

In April 1994, the new Constitution came into effect. Holomisa instituted an action against the defendant for defamation.[757] Holomisa alleged that the report had falsely and defamatorily linked him to racial killings, which tarnished his reputation.[758] The defendant excipiated by arguing that, because the plaintiff is a public official, he would have to prove that the defendant had known that the content it published was false or that the defendant had acted recklessly in publishing.[759]

The defendant further invoked the right to freedom of speech and expression in Chapter 3 of the interim Constitution.[760] To establish whether the defendant could invoke the Constitution, the court asked three questions: whether the plaintiff was an organ of state, whether Chapter 3 applied to private parties, and whether it could apply retroactively.[761] The court held that the plaintiff was acting in his private capacity and that Chapter 3 was intended to apply 'in some way' to all horizontal and vertical litigation disputes.[762]

Section 35(3) of the interim Constitution obliged courts to have due regard to the spirit, purport and objects of Chapter 3 during the interpretation of the law, and

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754 *Holomisa* (1996) 478.
755 *Id.*
756 *Id.*
757 *Id.*
758 *Id.* 479.
759 *Id.*
760 *Id.*
761 *Id.*
762 *Id.*

applying and developing common law.[763] Therefore, the court had to take the rights of freedom of expression and dignity into account when considering the defences available to the media defendant who allegedly defamed.[764] The court in *Holomisa* confirmed that the absence of *animus iniuriandi* was not a defence that the press could employ and that the press was subject to strict liability for defamation following the decision in *Pakendorf*.[765]

Decisions predating the Constitution were considered and the court stated that these judgments had narrowed the ambit of the right to freedom of expression.[766] The court found that the Constitution necessitated the reconsideration of any common law encroaching upon a fundamental right in light of the Constitution.[767]

The court stated that a defamatory statement relating to 'free and fair political activity' would be constitutionally protected, unless a plaintiff could prove that the statement was unreasonably made considering all the relevant circumstances.[768] Accordingly, the court found the plaintiff's claim to be defective in that it failed to state that the defendant was unreasonable in publishing an untrue defamatory statement.[769] The exception was upheld.

The defence of reasonable publication of information relating to political activity was described as political privilege by Neethling, Potgieter and Visser.[770] Since the 2004 decision of *Mthembi-Mahanyele v Mail & Guardian Ltd*,[771] the reasonable person test was used to ascertain whether reportage was *prima facie* wrongful regardless of whether the plaintiff was a political figure or not. Neethling questions whether the defence of political privilege is necessary, as the wrongfulness test developed in

763 *Id.*
764 *Holomisa* (1996) 479.
765 *Id*.
766 *Id*.
767 *Id.* 480.
768 *Id*.
769 *Id*.
770 Neethling *et al* (2015) *Deliktereg* 370.
771 *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 6 SA 329.

National Media Ltd v Bogoshi[772] (explained below in paragraph 3.5.1.4) was constructed to allow for greater latitude where reportage deals with politicians.[773]

Because this study focusses on the defence of media privilege and the general approach courts employ for all media defendants, a further examination of political privilege cases falls outside the ambit of this study.

Before the present study expounds on the seminal case of *National Media Limited v Bogoshi*, mention is shortly made of *Neethling v Du Preez and Others* (*Du Preez* case)*.*[774] In this case, the constitutionality of South Africa's media defamation law was questioned. First, the court rejected previous appellate statements suggesting that a defendant in a defamation action might bear only an evidential burden in trying to prove that a defamatory statement was true, whereas the plaintiff would bear the overall onus.[775] Secondly, the court found that public policy in itself would not justify the media in publishing defamation.[776]

The *Du Preez* case is not discussed in further detail, because this study does not extend to a discussion of onus in defamation cases. It is also noted that the courts in *National Media Limited v Bogoshi* and *Khumalo v Holomisa*[777] provided clear confirmation of the fact that the public interest of a report would not suffice to rebut its presumed unlawfulness in the absence of either its truth or reasonableness having been proven. The cases of *Bogoshi* and *Khumalo* are emphasised because of the profound impact they had on developing the law of media defamation in line with the Constitution.

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772 *Bogoshi* (1998) 1196.

773 Neethling 'Die locus standi van 'n kabinetsminister om vir laster te eis, en die verweer van redelike publikasie van onwaarheid op politieke terrein: *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (HHA)' (2005) *THRHR* 321.

774 *Neethling v Du Preez & Others* 1994 1 SA 708 (A).

775 *Id.* 777 D-G.

776 *Id*.

777 *Khumalo* (2002) 401.

3.5.1.4. *National Media Ltd and Others v Bogoshi*[778]

This case was decided on while the interim Constitution was in force. In this case, the Supreme Court of Appeal weighed the rights to freedom of expression and human dignity as was required by the interim Constitution.[779] In considering the wrongfulness element, the court considered the constitutional right to freedom of expression and the media's role in the nationwide effecting of this right. This right was entrenched in that the defences available to media defendants were extended to include 'reasonableness.'[780]

The court in *Bogoshi* found that the precedent of strict liability in South Africa's defamation law prohibited it from being a vehicle through which the rights to freedom of expression and human dignity could be balanced through justifiable limitations.[781] Strict liability on the part of media defendants was replaced with negligence-based liability.[782] This study now discusses the *Bogoshi* case in detail.

The *Bogoshi* case was an appeal against the court *a quo*'s refusal of the appellant's (also referred to as the defendant) application to amend its plea in a media defamation case. The first defendant was the owner and publisher of the *City Press* newspaper,[783] the second defendant was the editor, the third defendant was the distributor and the fourth, the printer of the newspaper.[784] The plaintiff held that he had been defamed in the publication's reportage between 17 November 1991 and 29 May 1994.[785]

The defendants' original plea stated that the articles complained of were substantially true and published for the public benefit. In the defendants' application for the amendment of their plea, they wanted to add three additional defences.[786]

778 *Bogoshi* (1998) 1196.
779 *Id.* 1207.
780 *Id.* 1211.
781 *Bogoshi* (1998) 1196.
782 *Id.* 1214
783 *Id.* 1201 G.
784 *Id.*
785 *Id.*
786 *Id.* 1201 G-H.

These defences would cater for the event that they would be unable to prove the truth of the articles' contents.[787]

The first defence the defendants sought to add was that the third defendant (the distributor) did not intend to defame the plaintiff, it was not aware of the allegedly defamatory reports in the issues of the publication at hand, and it did not know that articles of that kind would likely appear in *City Press*.[788] The proposed defence also held that the third defendant was not negligent.[789] The second defence that the defendants wanted to add mirrored the contents of the first, but related to the fourth defendant (the printer).[790]

The third defence that the defendants proposed held that 'the publication of the articles was lawful and protected under the freedom of speech and expression clause in the interim Constitution."[791]

The court *a quo* dismissed the application. The court of Appeal stated that the application for the amendment of the defendants' plea would be dismissed if it would be excipiable in its amended form.[792]

The court set out the position of different media defendants as it pertains to their liability. The court stated that distributors may escape liability based on the absence of negligence,[793] but held that printers, newspaper owners, publishers and editors were strictly liable for defamation as per the precedent set in *Pakendorf.*[794]

It was submitted by the counsel for the defendants that modern day printers used technology that made it unlikely that those printing would know about defamatory material in what they printed. Accordingly, it was argued that the position of printers

787 *Id.*
788 *Bogoshi* (1998) 1201 I.
789 *Id.*
790 *Id.*
791 *Id.* 1201 J – 1202 A.
792 *Id.* 1202 C-D.
793 *Id.*
794 *Pakendorf* (1982).

should be brought in line with that of distributors.[795] The court stated that the validity of the proposed third defence would have to be evaluated and the question of strict liability considered before the defendants' argument on the liability of printers could be considered.[796]

Prior to considering the validity of the defence that 'the publication of the articles was lawful and protected under the freedom of speech and expression clause in the Constitution of the Republic of South Africa Act 200 of 1993 (the 'interim Constitution'),'[797] the court expounded on South Africa's defamation law. The court stated that liability for defamation assumed an objective element of wrongfulness and a subjective element of fault in the form of *animus iniuriandi*.[798] Both elements were alleged by the defendant and presumed as soon as defamatory material was published.[799] The court stressed that a bare denial would not be enough to refute either presumption and that the defendant would have to plead facts which justified his denial of either wrongfulness or *animus iniuriandi* to evade liability.[800]

In the court *a quo*, the defendants denied wrongfulness and pleaded truth and public benefit.[801] The defendants pleaded that the articles had not been published wrongfully and alleged that it had been published 'in good faith' and without the intention to defame the plaintiff. The defendants submitted that they were unaware of the falsity of the material they published, they did not publish it recklessly, the publication thereof was reasonable in the circumstances, and the defendants were not negligent.[802]

The third proposed defence is quoted below: [803]

> "Stripped of presently irrelevant detail the third proposed defence now reads as follows:

795 *Bogoshi* (1998) 1202 E.
796 *Id.* 1202 E-F.
797 *Bogoshi* (1998) 1201 J – 1202 A.
798 *Id.* 1202 G.
799 *Id.* 1202 G-H.
800 *Id.* 1202 H.
801 *Id.*
802 *Id.* 1202 H – 1203 A.
803 *Id.* 1203 F – 1204 A. (The court omitted supporting facts alleged in paragraph 7.3.1 B and C, which relate mainly to the qualifications of the reporters who wrote the articles and their pre-publication investigations.)

7.2 ... the defendants plead that the publication of the articles was not unlawful by reason of the protection afforded to the defendants:

7.2.1 by Section 15 to the constitution of the Republic of South Africa Act 200 of 1993...

7.2.2 alternatively to subparagraph 7.2.1 above, by Section 15 of the constitution read with Section 35(3) of the constitution....

7.3 More particularly:

7.3.1A the defendants were unaware of the falsity of any averment in any of the articles;

7.3.1B the defendants did not publish any of the articles recklessly, i.e. not caring whether their contents were true of false; the facts upon the defendants will rely in this context are...

7.3.1C the defendants were not negligent in publishing any of the articles; the facts upon which the defendants will rely in this context are...

7.3.1D in view of the facts alleged in paragraphs 7.3.1A to 7.3.1C, the publications were objectively reasonable;

7.3.1E the articles were published without animus injuriandi. Alternatively, to paragraph 7.3.1 above

7.3.2 the appellants repeat mutatis mutandis the contents of paragraphs 7.3.1A to 7.3.1E above;

7.3.3 the articles concern matters of public interest,

7.4 in the circumstances the publication of the articles was not unlawful and is furthermore protected by Section 15, alternatively Section 15 read with Section 35(3) of the constitution**.**

The court stated that paragraph 7.4 was the nub of the defence. It held that the publication of the articles was lawful and constitutionally protected by the circumstances alleged in the paragraphs preceding 7.4.[804] The court indicated that defamation defences in South Africa do not form a *numerus clausus*.[805]

With reference to the *O'Malley* case, the court reiterated its task to determine whether public and legal policy would require a publication to be regarded as lawful.[806] This lawfulness of an act or omission, the court stated, is determined by 'the application of the general criteria of reasonableness based on considerations of fairness, morality, policy and the court's perception of the legal convictions of the community.'[807]

804 *Bogoshi* (1998) 1203 F – 1204 A.

805 *Id.* 1204 D.

806 *Id.* 1204 D-G.

807 *Id.*

The court stated that the third proposed defence was novel. Defendants in previous cases focussed on a lack of *animus iniuriandi*[808] to escape liability for lack of knowledge of the falsity of the defamatory contents of their publications. The defendants in this case, however, sought to plea that publication, even if it had contained falsities, had been lawful as plead in paragraph 7 of their proposed plea amendment. The court also stated that the third defence raised the issue of fault within a framework of lawfulness, whilst the proposed first and second defences raised the issue of fault squarely.[809]

The court referred to the cases of *Craig v Voortrekkerpers Bpk*[810] and *O'Malley*,[811] where the court reaffirmed the requirement of *animus iniuriandi* to found liability for defamation.[812] The court in *O'Malley* confirmed that negligence could not ground liability for defamation, but that news distributors could escape liability for defamation of which they were not aware.[813] The court in *O'Malley* confirmed that owners, editors, publishers and printers of newspapers would be liable for media defamation as it were in terms of English law. This meant that the publication of defamatory material, and not any particular intention held while defamation was published, formed the basis of liability. Members of the press would be accountable for defamation whether they were aware of it or not.[814]

In *Pakendorf*, media defendants were held strictly liable for defamation.[815] The court in *Bogoshi* stated that accordingly, newspaper owners, publishers, editors and printers were liable for defamation without fault. These defendants were not entitled to rely on their lack of knowledge of defamatory material or their mistaken belief in the lawfulness thereof to evade liability in defamation cases.[816] It was this precedent

808 *Id.*
809 *Bogoshi* (1998) 1204 G.
810 *Craig* (1963). In this case, the court stated that to refute the presumption of animus iniuriandi, the defendant should be able to prove that he had published with another intent than to defame, as long as that other intent was not unlawful.
811 *O'Malley* (1977).
812 *Bogoshi* (1998) 1205 B – F.
813 *Id.*
814 *Id.*
815 *Pakendorf* 157.
816 *Id.*

that motivated the court *a quo's* decision to deny denying the appellants leave to amend their pleadings.[817]

The argument on behalf of the defendants in *Bogoshi* was presented on two alternative bases during the appeal.[818] First, it was argued that strict liability for members of the press was unconstitutional, because it impinged upon the freedom of speech and expression, which includes freedom of the press and media, conferred by Section 15(1) of the Constitution. Strict liability for members of the press was also not in accordance with the spirit, purport and object of Chapter 3 as required by Section 35(3) of the interim Constitution.[819]

The second alternative basis was that the *Pakendorf* case was wrongly decided and that the proposed third defence was valid under common law.[820] The court addressed the second alternative first.

The court made remarks on how the decision in *Pakendorf* was reached.[821] The court in *Bogoshi* held that the court in *Pakendorf* had made a policy decision in adopting strict liability, and 'set no great store by any of the previous decisions.'[822] According to the court in *Bogoshi*, the court in *Pakendorf* had overlooked inconsistent reasoning in *O'Malley* in taking the policy decision to adopt strict liability.[823] In *O'Malley*, the statement was made that liability for defamation can never be founded on negligence.[824] In the same case, the court acknowledged that a distributor's negligence is recognised as founding liability for defamation.[825]

The court in *Bogoshi* states that neither the court in *O'Malley* nor *Pakendorf* explained why members of the press were treated differently.[826] The court in *Bogoshi*

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817 *Id.*
818 *Id.* 1206 B.
819 *Bogoshi* (1998) 1206 B-C
820 *Id*.
821 *Id.* 1206 C.
822 *Id.* 1206 D.
823 *Id.*
824 *O'Malley* (1877) 407.
825 *O'Malley* (1977) 404.
826 *Bogoshi* (1998) 1206 G.

referred to Burchell's[827] statement that the appellate division had in previous decisions chosen between two extremes, *animus iniuriandi* or strict liability, whilst negligence had much to recommend it.[828] The court in *Bogoshi* also noted that strict liability had been tried and found wanting in England, its country of birth.[829]

The balance that must be struck between the right to reputation and freedom of expression in defamation cases was acknowledged as trite law by the court in *Bogoshi*.[830] The court stated that a weighing of these interests was not reflected in *Pakendorf*.[831] The court in *Bogoshi* proceeded to undertake that exercise.

In the *Bogoshi* case, it was stressed that neither of the two clashing rights was more important than the other.[832] The court acknowledged reputation, worded by the Supreme Court of Canada[833] as '…the fundamental foundation on which people are able to interact with each other in social environments... [and] that the good reputation of the individual represents and reflects the innate dignity of the individual…' and acknowledged that the protection of an individual's good reputation was fundamentally important to a democratic society.[834]

Freedom of expression, the court stated, was equally important.[835] The court echoed the European Court of Human Rights in *Handyside v United Kingdom*[836] (*Handyside* case) where it was indicated that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man.[837]

827 *Id.* Also see Burchell (1985) 193.
828 *Bogoshi* (1998) 1206-1207.
829 *Id.* 1207 E.
830 *Bogoshi* (1998) 1207 D.
831 *Id.*
832 *Id.* 1207 E.
833 *Hill* (1844) 162.
834 *Bogoshi* (1998) 1207 G.
835 *Id.* 1207 K.
836 *Handyside v United Kingdom* 1976 1 EHRR 737 754 (hereafter '*Handyside*').
837 '*Handyside*' (1976) as referred to in *Bogoshi* (1998) 1208 B.

Reference was also made to *Government of the Republic of South Africa v Sunday Times Newspaper and Another,*[838] where the court emphasised the role of the press in a democratic society. The function of the press was defined to include ferreting out and exposing corruption, dishonesty and graft and those responsible. The press was defined as being responsible for revealing dishonesty, ineptness and maladministration and was tasked with advancing communication between the governing and the governed.[839]

The court in *Bogoshi* proceeded to examine how the two interests (human dignity and freedom of expression) were weighed in the past. In *Argus Printing & Publishing Co Ltd & Others v Esselen's Estate* (the *Argus Printing* case),[840] the court acknowledged freedom of expression and the press as 'potent and indispensable instruments for the creation and maintenance for a democratic society.'[841] The court in *Argus Printing* added that the law did not, however, allow for the unjustified lambasting of someone's reputation. The court stated that the right to freedom of expression must yield to the individual's right not to be wrongfully defamed.[842] The court again considered strict liability and the possible grounds for its justification.[843]

Pakendorf was then discussed. In *Pakendorf,* the inequity of allowing the owner and editor of a newspaper to evade liability, based on the absence of *animus iniuriandi* due to a mistake made by a reporter, was pointed out. The court in *Bogoshi* stated that no further reasons were advanced for holding the defendants strictly liable.[844]

The court referred to *O'Malley*, where the court expounded on how difficult it could be to bring *animus iniuriandi* home to any particular person.[845] This was suggested

838 *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another* 1995 2 SA 221 (T) 227H - 228A.

839 *Bogoshi* (1998) 1208 E-F. Also see *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another* 1995 2 SA 221 (T) at 227H-- 228A.

840 *Argus Printing & Publishing Co Ltd & Others v Esselen's Estate* 1994 2 SA 1 (A) 23 B-E (hereafter '*Argus Printing*').

841 *Argus Printing* (1994). As referred to in *Bogoshi* (1998) 1208 G.

842 *Argus Printing* (1994) 25 B – E as referred to in *Bogoshi* (1998) 1208 G.

843 *Bogoshi* (1998) 1209 A.

844 *Id.* 1209 B-D.

845 *Id.*

as a possible justification for strict liability.[846] The court in *Bogoshi* described such a justification as unjustifiable after considering the implication as a form of collective or substituted liability of persons who may be blameless, based on the fact that he who carries the blame cannot be found.[847]

Another possible justification for strict liability was considered by the court in *Bogoshi*: the social utility of the doctrine in that it can inhibit the spreading of harmful lies.[848] The court stated that such statements are, however, inevitable in free debate.[849] The court added that it is both the right and a vital function of the press to make information and criticism available concerning every aspect of public, political, social and economic activity.[850] In doing so, the court stated, the press contributes to the formation of public opinion.[851]

The court also considered the fact that South Africa had, at the time, only recently acquired the status of a democracy.[852] Although freedom of expression did exist during the *Pakendorf* judgment, the role and importance of the press may not have been acknowledged at the time.[853] Taking into consideration the democratic imperative that the good of all requires a free flow of information and the media's task in this process, the court found that strict liability could not be defended.[854] The court stated that strict liability had been rejected in the United States, Germany, the European Court of Human Rights, the Netherlands, England, Australia and New Zealand.[855]

Then, the court in *Bogoshi* turned to the question of when the publication of a false defamatory statement may be justified and consulted other jurisdictions for guidance.[856] The court referred to the Australian cases of *Theophanous v Herald and*

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846 *Id.*
847 *Id.* 1209 E.
848 *Id.*
849 *Bogoshi* (1998) 1209 H. Also see *Gertz v Robert Welch Inc* 418 US 323 (1974) at 339-40.
850 *Bogoshi* (1998) 1209 H-I.
851 *Id*.
852 *Id.* 1210 A.
853 *Id.* 1210 A-G.
854 *Id.* 1210 H.
855 *Id.* 1210 I-1211 B.
856 *Id.* 1211 D.

Weekly Times Ltd and Another,[857] *Stephens and Others v West Australian Newspapers Ltd*[858] and *Lange v Australian Broadcasting Corporation* (*Lange* case)*.*[859]

In this regard, the court stated that the High Court of Australia had extended qualified privilege to include 'the publication to the general public of untrue defamatory material in the field of political discussion.'[860] The court referred to the judgment in *Lange v Australian Broadcasting Corporation,*[861] where the requirement for protection was indicated to be 'reasonableness of conduct', explained as follows:[862]

> "Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable, or it was unnecessary to provide the plaintiff an opportunity to respond." [863]

The court in *Bogoshi* also referred to the English case of *Reynolds v Times Newspapers Ltd and Others* (*Reynolds*)*.*[864] In that case, three steps were followed to determine whether a situation was privileged. The court in *Bogoshi* set out these three steps.[865]

First, the duty test ascertained whether the publisher was under any legal, moral or social duty to those to whom he published the material to do so.[866] Secondly, the interest test posed the question whether those to whom the material was published

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857 *Theophanous v Herald and Weekly Times Ltd and Another* 1994-1995 182 CLR 104.
858 *Stephens & Others v West Australian Newspapers Ltd* 1994--1995 182 CLR 211.
859 *Lange v Australian Broadcasting Corporation* 1997 189 CLR 520 (hereafter '*Lange*').
860 *Bogoshi* (1998) 1211 D-E.
861 *Lange* (1997) 574.
862 *Bogoshi* (1998) 1211 F-G.
863 As referred to in *Bogoshi* (1998) 1211 F-J.
864 *Reynolds v Times Newspapers Ltd & Others* 2001 2 AC 127 (HL).
865 *Bogoshi* (1998) 1211 H
866 *Id.*

had an interest to receive it.[867] Thirdly, the circumstantial test asked whether the nature, status and source of the material, and the circumstances of the publication, were of such a nature that the publication should be protected in the public interest in the absence of proof of express malice.[868] The court in *Bogoshi* explained that 'status' was used to indicate to which degree the information may command respect based in its character and known provenance.[869]

The court in *Bogoshi* found the English test to be similar to, but more concise than the 'reasonableness of conduct' test used in Australia.[870] The court also referred to the approach followed in the Netherlands. In that country, the circumstances surrounding publication would be taken into account to ascertain whether publication was lawful or wrongful.[871] The court stated that the approaches in England, Australia and the Netherlands seemed to pose suitable solutions to South Africa's problem.[872] The court in *Bogoshi* stated that:

> "…we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as wrongful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time." [873]

The court then offered guidance on what is to be taken into account in considering the reasonableness of publication.[874] This included the nature, extent and tone of the allegations made.[875] Greater latitude, the court stated, is usually allowed in respect of political discussion.[876] The nature of the information on which the allegations were based and the reliability of its source, and the steps taken to verify the information were also listed as factors to be taken into account in considering the reasonableness of publication.[877] The opportunity provided to those concerned in

867 *Id.* 1211 H-I
868 *Id.* 1211J
869 *Id.* 1212A
870 *Id.*
871 *Bogoshi* (1998) 1212 A-G.
872 *Id.* F-G.
873 *Id.* 1212 F-G.
874 *Id.* 1212 H.
875 *Id.*
876 *Id.*
877 *Id.* 1212 H-J.

publications to respond was also listed, as was the need to publish before establishing the truth in a positive manner.[878] The court stated that these considerations did not form a closed list.[879]

The court stressed that a high degree of care was still to be exercised by editors and their editorial staff.[880] This was on account of the nature of their occupation and in light of the powerful position of the press and the credibility it enjoyed among large parts of society.[881]

These factors, the court stated, would be relevant in considering the liability of an owner, publisher or editor.[882] Examinations in determining the liability of a printer would concentrate mainly on whether he could become aware of and prevent mistakes and the unwitting publication of defamatory material.[883]

The court concluded that the defendants' proposed amendment was not excipiable to the extent that it relied on the lawfulness of the publications.[884] The court then reverted to the issue of fault raised in the proposed defences.

The court's conclusion on the *Pakendorf* judgment meant that the liability of members of the press had to be considered on another basis than that of strict liability.[885] The court identified vicarious liability as a possibility, stating that the owner of a newspaper could be vicariously liable for his employees' acts and omissions where they had acted within the course and scope of their employment.[886]

Vicarious liability, the court held, was not the answer, as it enabled the owner to escape liability whenever his employee could rebut the presumption of *animus*

878 *Id.* 1213 B-C.
879 *Id.*
880 *Id.* A.
881 *Id.* It must be noted that the credibility society once associated with the media has diminished since the *Pakendorf* judgment. See paragraph 6.1 of this dissertation and Young (2018), Edelman (2017), Rittenberry (2018) and Edelman (2019).
882 *Bogoshi* (1998) 1213 E.
883 *Id.*
884 *Id.* 1213 F.
885 *Id*.
886 *Id.* 1213 F-G.

iniuriandi.[887] The court also rejected the notion that liability could be based on *dolus eventualis.*[888] Consideration was given to both risk liability and negligence liability.[889] The court stated that the latter had been rejected in *O'Malley*, but that *O'Malley* did not overrule the principle that distributors can escape liability if they were not negligent.[890]

The court referred to the open-ended question in *Pakendorf*,[891] which is whether absence of knowledge of wrongfulness can be relied upon as a defence if the lack of knowledge was due to the negligence of the defendant. The court referred to its approach regarding the lawfulness of the publication of defamatory untruths[892] and stated that permitting defendants to rely on absence of knowledge as a defence, if the lack of knowledge was due to the defendant's negligence, would negate the novelty of that approach to lawfulness.[893] Defendants would therefore not be able to evade liability in defamation cases by proving that they had no knowledge of the wrongfulness of their actions and therefore lacked intent, where that lack of knowledge had been caused by their own negligence.[894]

The court stated that *animus iniuriandi* in a media defamation context is concerned with the defendant's ignorance or mistake regarding an element of the delict.[895] The court continued that, where a defendant was ignorant or mistaken regarding the lawfulness of publishing a defamatory statement, the absence of *animus iniuriandi* could not be available as a defence.[896]

The court referred again to the position in England, Australia and the Netherlands. In those countries, the media was liable unless it was not negligent.[897] Considering the

887 *Id.*
888 *Id.*
889 *Id.* 1213 J.
890 *Id.* 1214 A.
891 *Bogoshi* (1998) 1214 A in reference to *Pakendorf* (1982) 155A.
892 *Id.* 1212
893 *Bogoshi* (1998) 1214 C.
894 *Id.*
895 *Id.* 1214 D.
896 *Id.* 1214 E.
897 *Id.* 1214 H.

media's credibility among large sections of the community,[898] the court found this additional burden reasonable.[899] (The society's trust in the media has since diminished. This is addressed in paragraph 6.1 of this dissertation.)

In *Bogoshi*, the court stated that the resultant position of media defendants may not be so different from that of non-media defendants, as *Pakendorf* had left open the question to whether any defendant could rely on a defence of absence of knowledge of wrongfulness due to negligence.[900] The court did not consider this question in relation to members of the public as it had not been called upon to do so.[901]

The court granted the appellants leave to amend their plea insofar as the first and second defences signified that the third and fourth defendants were not negligent. The defendants were ordered to pay the costs of the appeal.[902] The court then dealt with the onus of proof. This study does not extend to a discussion of the onus of proof in defamation cases. The court confirmed that the onus to rebut the presumptions of wrongfulness and fault rested on the defendant.[903]

3.5.1.5. *Khumalo and Others v Holomisa*[904]

When *Khumalo v Holomisa* was decided, the 1996 Constitution had replaced the interim Constitution and recognised dignity as both a right and a value. Section 8 [905]

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898 The credibility society once associated with the media has diminished since the *Pakendorf* judgment. Alse see N Tolsi 'Journalism suffers crisis of quality and credibility' lecture delivered during the 15th Annual Ruth First Memorial Lecture at the University of the Witwatersrand on 18 October 2018. See also Edelman (2017), Rittenberry (2018) and Edelman (2019).

899 *Id.* 1214 I.

900 *Id.* 1214J.

901 *Id.*

902 *Bogoshi* (1998) 1219 C.

903 *Id.* 1218 A 1218 D.

904 *Khumalo* (2002) 401.

905 Sec 8:
"(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of Subsection (2), a court–
(a) to provide effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not provide effect to that right; and

provides guidance on the application of the Bill of Rights. Section 36 [906] is the limitation clause and dictates when the limitation of a Bill of Rights through law will be constitutionally justifiable. Section 39[907] of the Constitution guides the interpretation of the Bill of Rights.

The court in *Khumalo,* the case discussed below, implemented these constitutional requirements when considering whether the common law as developed in *Bogoshi* was constitutionally justifiable. The court considered the position in *Bogoshi* and found that, in terms of both the interim Constitution and the final Constitution, the adaptation of the reasonableness defence and the fault standard of negligence for media defendants rendered media defamation law constitutionally justifiable. It struck an appropriate balance between the right to freedom of expression and the value of human dignity.[908] What follows is a discussion of the case.

This was an application for leave to appeal the dismissal of an exception by the High Court.[909] The applicants were the publishers of a newspaper called *Sunday World*.[910]

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

906 Sec 36:
"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in Subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the Bill of Rights."

907 Sec 39:
"(1) When interpreting the Bill of Rights, a court, tribunal or forum–
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider global law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

908 *Khumalo* (2002) 423 A-D.

909 *Id.* 408 A.

910 *Id.*

The respondent was a politician who alleged that he had been defamed by an article in the newspaper.[911] The article stated that the respondent was involved in a gang of bank robbers and that the police was investigating him.[912] The respondent's particulars of claim did not allege that the statement complained of was false.[913] The appellants sought to excipiate the respondent's particulars of claim based on this.

The appellants based their exception on two grounds. The first was the direct application of Section 16 of the Constitution that protects freedom of expression, and alternatively the common law, which the appellants argued should be developed to protect the spirit, purport and objects of the Bill of Rights as contemplated in Section 39(2) of the Constitution.[914] The second ground for exception stated that the obligation imposed on a plaintiff to establish the falsity of a defamatory statement ought to have applied to the plaintiff in this matter.[915]

The appellants argued that permitting a plaintiff (or, alternatively, a politician or public official) [916] to recover damages based on publication that related to a matter of public interest, matters of political importance, to the fitness of a public official for public office, or to the fitness of a politician for public office, where the plaintiff does not allege and prove the falsity of the statement in question, was inconsistent with Section 16 of the Constitution.[917]

The exception had the effect of questioning whether the law of defamation, as it had been developed by our courts, was inconsistent with the Constitution.[918] In particular, it questioned whether the law of defamation was inconsistent with the Constitution (and more specifically, Section 16) in that it does not require a plaintiff in a defamation case to plead that the defamatory statement is false.[919]

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911 *Id.*
912 *Id.*
913 *Id.* 408 B-C.
914 *Khumalo* (n 327 above) 408 B-D.
915 *Khumalo* (2002) 408 E.
916 *Id.* 408 G-H.
917 *Id.* 408 G.
918 *Id.* 409 A.
919 *Id.* 409 A-B.

The court pointed out the applicants' assertion that the right to freedom of expression was directly applicable, although the litigation did not involve the state nor a state organ.[920] The exception had been dismissed in the court *a quo*.

The Constitutional Court was first tasked with determining whether the dismissal of an exception was appealable[921] and found that it was.[922]

The common law of defamation in South Africa was expounded on and thecourt stated that it is based on the *actio iniuriarum*.[923] The court stated that it was not an element of the delict of defamation in common law for the statement to be false.[924] The presumptions of wrongfulness and *animus iniuriandi* that arise once it stands that a defendant published a defamatory statement concerning a plaintiff, was confirmed.[925] The court confirmed that the defendant who sought to evade liability had to rebut these presumptions.[926]

In *Khumalo*, the court listed the most commonly raised defences to rebut wrongfulness being that the publication was true and in public benefit, that it constituted fair comment and that it was made on a privileged occasion.[927] The court reiterated that a fourth defence rebutting wrongfulness was adopted in *National Media Ltd and Others v Bogoshi*.[928]

The court stated that this fourth defence allowed media defendants to establish that the publication of a defamatory statement was lawful in that it was reasonable in all the circumstances, even if it was false.[929] The rebuttal of intention as a required fault element by media defendants was also considered in *Bogoshi*.[930]

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920 *Id.* 409 C.
921 *Id.* 409 F.
922 *Id.* 413 B.
923 *Khumalo* (2002) 413 E.
924 *Id*.
925 *Id.*
926 *Id.* 414 B.
927 *Id.*
928 *Id.*
929 *Id.* 415 B-C.
930 *Id.* 415 C.

The court in *Khumalo* chronicled the court in *Bogoshi's* rejection of strict liability and the court's consideration of whether media defendants should be permitted to rebut the presumption of intentional harm through establishing a lack of knowledge of wrongfulness, even in cases where that lack of knowledge of wrongfulness was as a result of the negligence of the defendant.[931] The court in *Bogoshi* concluded that they could not and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case.[932] The court in *Khumalo* phrased it as follows: 'media defendants could not escape liability merely by establishing an absence of knowledge of wrongfulness. They would in addition have to establish that they were not negligent.'[933]

The court then considered Section 16 of the Constitution upon which the applicants relied on in asserting that the existing common law was inconsistent with the Constitution.[934] The court recorded the contents of Section 16, as seen below: [935]

> (1) Everyone has the right to freedom of expression, which includes:
> (a) Freedom of the press and other media;
> (b) Freedom to receive or impart information or ideas;
> (c) Freedom of artistic creativity; and
> (d) Academic freedom and freedom of scientific research.
> (2) The right in subsection (1) does not extend to:
> (a) Propaganda for war;
> (b) Incitement of imminent violence;
> (c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The importance of freedom of expression in a democracy was acknowledged.[936]

The court stated that exerisng the right to freedom of expression assisted in constituting the dignity and autonomy of human beings and that without it, citizens' ability to make responsible political decisions and their ability to participate effectively

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931 *Id.* 415 F.
932 *Id.* 416 B.
933 *Khumalo* (2002) 416 B.
934 *Id.* 416 C.
935 *Id.* 416 D.
936 *Id.* 416 F.

in public life would be stifled.[937] The court also indicated that the ability of citizens to be responsible and effective members of society depended on the manner in which the media carried out its constitutional mandate embodied in Section 16.[938]

The media's important role in the protection of freedom of expression in society was acknowledged, as was the right South Africans have to a free press and the right to receive information and ideas. The media's role in protecting citizens' rights in this respect was acknowledged.[939] With reference to *Government of the Republic of South Africa v Sunday Times Newspaper & Another*[940], the court also described the media as important agents in ensuring that government is open, responsive and accountable to the people, a requirement stipulated in the founding values of the South African Constitution.[941]

In *Khumalo,* the court indicated that freedom of expression must be construed in the context of the values enshrined in the Constitution, in particular human dignity, freedom and equality.[942] The court elaborated on human dignity as a constitutional value[943] and stressed that the protection thereof was foundational under South Africa's new constitutional order.[944] Human dignity informs constitutional adjudication and interpretation.[945] The court indicated that the term 'human dignity' encompassed not only an individual's self-worth, but also the esteem that others have of him.[946]

The court stated that the law of defamation 'lies at the intersection of the freedom of speech and the protection of reputation or good name.'[947] Reference was made to *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate*[948] where the court stated that freedom of expression could and should not be permitted to be

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937 *Id.* 416 F.
938 *Id.* 417 A.
939 *Khumalo* (2002) 416 G.
940 *Government of the Republic of South Africa v Sunday Times Newspaper and Another* 1995 2 SA 221 (T).
941 *Id.* 417 A-D.
942 *Id.* 417 G-H.
943 *Id.* 418 A.
944 *Id.* 418 D.
945 *Id.*
946 *Id.* 418 H.
947 *Id.*
948 *Argus Printing* (1994) 23 B-E.

totally unrestrained as it had to be justifiably limited at times to accommodate individuals' right to human dignity.

In considering the constitutionality of the law of defamation, the court stated that an appropriate balance had to be struck between the protection of freedom of expression on the one hand and the value of human dignity on the other.[949]

The court then turned to the applicant's exception in that it relied directly on Section 16 of the Constitution, despite the fact that none of the parties to the case were an organ of the state. The appellants' argument was that the common law of defamation was inconsistent with Section 16 of the Constitution in that it does not require a plaintiff to allege and prove the falsity of a defamatory statement.[950]

The court considered Section 8 of the Constitution to determine whether Section 16 could apply directly to the matter at hand and found that it could not,[951] clarifying that Section 16 applied horizontally. Thereafter, the court proceeded to enquire whether the common law of defamation unjustifiably limits the right in Section 16.[952] If it had done so, the common law would have had to be developed in accordance with Section 8(3) of the Constitution.[953]

Truth, the court stated, was not disregarded by the common law. The court stated that it remained relevant in establishing the defence of truth in public benefit against the presumption of wrongfulness.[954] The burden of proving truth thus falls on the defendant.[955]

The court stated that, at the heart of the constitutional dispute lay the difficulty of establishing the truth or falsehood of defamatory statements. The court continued that burdening either the plaintiffs or defendants with the onus of proving the truth or falsity of a statement would not be possible as it would result in 'a zero-sum game'

949 *Khumalo* (n 327 above) 419 D.
950 *Id.* 421 B.
951 *Khumalo* (2002) 419 H.
952 *Id.* 420 F.
953 *Id.* 420 H.
954 *Id.* 421 E.
955 *Id.* 421 G.

and no balance would be struck between the right to freedom of expression and human dignity.[956]

The court took into account that determining the truth or falsity of a statement is often either difficult or impossible.[957] In terms of South Africa's common law of defamation, the risk of failure to establish truth lies on the defendant.[958] The court took into consideration that risk comes into existence only once it was proved that a defamatory statement pertaining to the plaintiff was published by the defendant. By definition, it is the plaintiff who had published and caused harm to the defendant.[959] The court acknowledged that the difficulty of establishing truth would have caused a 'chilling effect' on the publication of information of which the truth cannot be confirmed, had the defence of reasonable publication not existed.[960] The court held that the defence of reasonableness developed in the *Bogoshi* case strikes a balance between the constitutional interests of plaintiffs and defendants.[961]

In *Khumalo*, the court stated that the defence of reasonable publication will encourage editors and journalists to act with due care[962] and respect for the individual interest in human dignity prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to do so.[963] The court ruled that the applicants' appeal failed as the common law, as currently developed, was consistent with the provisions of the Constitution.[964]

3.5.1.6. *Marais v Groenewald and Another*[965]

A book was published containing allegations against Groenewald and certain right-wing political leaders.[966] The first defendant wrote an article in response to the book.

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956 *Id.* 423 H-424 A.
957 *Id.* 421 H-I.
958 *Id.* 422 B.
959 *Khumalo* (2002) 422 B.
960 *Id.*
961 *Id.* 424 B.
962 *Id.* 424 E.
963 *Id.* 424 F.
964 *Id.* 425 B.
965 *Marais* (2002) 578.
966 *Id.*

In the article, Groenewald alleged that Marais (the plaintiff) had been a source of the book.[967] The article was distributed to the provincial offices of the Freedom Front, the political party to which Groenewald belonged.

The plaintiff instituted an action for defamation,[968] indicating that the defendant's article portrayed him as being dishonest and not worthy of trust.[969] The plaintiff alleged that the first defendant had circulated his defamatory article that came to the attention of the general public and that the first defendant also defamed him verbally.[970]

The first defendant admitted that he was the author of the article.[971] Other than that, all the allegations made by the plaintiff were denied.[972] The first defendant held *inter alia* that he did not intend to defame the plaintiff,[973] arguing that the article was intended to reach provincial offices of government only and not the public.[974] The defendant denied that the publication was unlawful.[975]

The court identified the following questions for determination: whether the article related to the book, whether the article was defamatory, whether *animus iniuriandi* was present on the side of the defendants, the nature and scope of the publication and whether damages were suffered by the plaintiff.[976] The court found that the article related to the book, that it was defamatory, and the court found that intent was present on the part of the first defendant. The plaintiff's good name had been damaged in the court's view and the defendants had to pay the plaintiff R20 000 in damages.[977]

967 *Id.*
968 *Id.*
969 *Id.*
970 *Id.*
971 *Marais* (2002) 579.
972 *Id.*
973 *Id.*
974 *Id.*
975 *Id.*
976 *Id.*
977 *Id.*

For purposes of this study, this case is significant, because of the court's consideration of the *Bogoshi* case. The court in *Marais* acknowledged that the court in *Bogoshi* had expounded the law of defamation in as far as it pertains to media defendants.[978] The court in *Marais* also pointed out that the Supreme Court of Appeal had, at two instances, left the question open as to whether all defendants should be able to rely on a defence of lack of *animus iniuriandi* where they were negligent in determining whether the defamatory statement was true or not.[979]

The court in *Marais* referred to the decisions in *Pakendorf v De Flamingh* and *National Media Ltd and Others v Bogoshi*.[980] The court also referred to the decision in *Hassen v Post Newspapers (Pty) Ltd and Others*, holding that the absence of knowledge of wrongfulness could not be raised as a defence where the defendant had been negligent.[981]

The court in *Marais* stated that the court in *Bogoshi* considered the potentially destructive results of publication of falsities by the media in particular, and that this motivated the court to treat media defendants and non-media defendants differently.[982] The court noted, however, that any written defamation could be distributed widely.[983] Such wide distribution, the court stated, was not exclusive to media defendants. The court acknowledged that non-media defendants could also effect wide distribution.[984] Therefore, the court stated that there is in principle no difference between a media defendant and a non-media defendant mass publishing defamation.[985]

The court in *Marais* considered the right to dignity in Section 10 of the Constitution and stated that the amendment of defamation law for media defendants should be extended to non-media defendants as well.[986] Such a development of the common law, the court stated, would promote the spirit and purport of the Constitution and the

978 *Id.* 588.
979 *Id.* 589.
980 *Id.*
981 *Marais* (2002) 589.
982 *Id.* 590.
983 *Id*.
984 *Id.*
985 *Id.*
986 *Id.* 590.

Bill of Rights (as Section 39(2) requires). The court also found that it would not unjustifiably limit the right to freedom of expression in Section 16(1).[987]

3.6. COMMENTS ON CHAPTER 3

The decisions of the courts in *Bogoshi* and *Holomisa* were welcomed by scholars and media practitioners alike.[988] The developments in *Bogoshi* and *Holomisa* were, however, not supported without reservation.[989] It appeared as if the court in *Bogoshi* blurred the line distinguishing between the elements of wrongfulness and negligence, [990] and between the fault requirements of intention and negligence.[991]

The aim of this study is only to ascertain whether it is still justifiable to differentiate between media defendants and non-media defendants in defamation cases within a digital, constitutional South Africa. Seeking clarity on the distinction between the elements of wrongfulness and negligence in media defamation law is not the purpose of this study, nor is determining where the line between intent and negligence as a form of fault lies. Although this study does not seek to clarify these issues, scholarly opinions were studied, and comment is to be provided below.

Milo's[992] view is that no distinction should be made between wrongfulness and negligence in media defamation law and holds that courts should simply apply the reasonableness test across the board for the sake of greater ease of application and clarity. He argues that once publication is reasonable, it would exclude both wrongfulness and negligence. Neethling states that such action would undermine

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987 *Id.*

988 Burchell (1985) 212; Neethling & Potgieter (1995) 706-715; Knobel (2002) 34; Neethling, J and Potgieter, PJ "Laster: die bewyslas, mediaprivilegie en die invloed van die nuwe Grondwet" 1994 *THRHR* 513; H Botha 'Privatism, authoritarianism and the constitution: The case of Neethling and Potgieter.' (1995) *THRHR.* 496-499; PJ Visser 'A successful Constitutional intrusion of Private Law *Gardener v Whitaker* 1995 2 SA 672 (E) (1995) *THRHR* 745-750.' See for a contrary view Midgley (1996) 635-638.

989 JR Midgley 'Media liability for defamation' (1999) *SALJ* 211.

990 Neethling 'Die lasterreg, die Grondwet en National Media Limited v Bogoshi' 1999 *TRW* 117. See also Midgley (1996) 221-222. See also Burchell 'Media freedom of expression scores as strict liability receives red card: National Media v Bogoshi' (1999) *SALJ* 6.

991 Midgley (n 919 above) 222.

992 D Milo 'The cabinet minister, the Mail & Guardian, and the report card: the Supreme Court of Appeal's decision in the Mthembi-Mahanyele case' (2005) *SALJ* 122.

the well-established foundations upon which South Africa's law of delict rests.[993] This study agrees that the existing structure and elements of delict should be maintained if it is at all capable of meeting practical needs, which Neethling believes it is.[994]

Although Neethling and Potgieter[995] refer to the defence of reasonableness publication as media privilege, South African courts have not classified it as a form of qualified privilege.[996] Qualified privilege, for clarification purposes, relates to a situation where a duty must be discharged and there is interest in doing so, which Neethling explains cannot be appropriated to the publication of an untruth.[997]

Neethling emphasises that South African courts are not limited to a *numerus clausus* of defences that set aside the presumption of wrongfulness, and that the law may be developed according to the *boni mores* of South Africans.[998] He states that the term 'reasonable publication', used by the court in *Bogoshi* to describe a defence that may refute the presumption of wrongfulness of defamation, is 'merely indicative of any publication of a defamatory statement which, because of the presence of a ground of justification, is considered to be lawful.'[999] The defence of reasonable publication may, according to Neethling, render the publication of an untruth lawful.[1000]

Although the defence of reasonable publication is only available to media defendants,[1001] Van der Walt and Midgley are of the view that it should be available to all defendants.[1002]

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993 J Neethling 'The protection of false defamatory publications by the mass media: recent developments in South Africa against the background of Australian, New Zealand and English law' (2007) *CILSA* 103.

994 Neethling (2007) 113-123.

995 Neethling & Potgieter (1994) 513.

996 Neethling (2007) 115.

997 Neethling (2007) 103.

998 *Id.* 116.

999 *Id.*

1000 *Id.* 117.

1001 *Id.*

1002 Van der Walt & Midgley (2016) *Principles of Delict* 154.

These authors reiterate trite law stating that it is the occasion, not the person who acts, that gives rise to privilege and that, therefore, not only media defendants should qualify to benefit from the defence.[1003] According to Van der Walt and Midgeley, the requirements of the privileged occasion defence should be adapted to accommodate the factors the court in *Bogoshi* listed in consideration of reasonableness. They believe that this adapted privilege defence should be available to any defendant who published material in the public interest *bona fide* and without malice in circumstances rendering publication reasonable.[1004]

Regarding the fault element, authors differ on whether fault takes the form of negligence or intent as per the *Bogoshi* and *Holomisa* judgments.[1005] According to Midgley, fault in the form of intention remains the basis of liability for all defendants.[1006] Midgley writes that media defendants who seek to evade liability must first prove that they had no intention to defame and secondly, prove that the defamation was not the result of their negligence.[1007] Midgley was also in favour of an attenuated form of intention that does not require consciousness of wrongfulness, but requires only that he who acts has the intention to achieve a certain result.[1008] This study agrees with Neethling,[1009] Burchell,[1010] Visser's[1011] and Knobel's[1012] (discussed below) views in disagreement with Midgley.[1013]

1003 *Id.*

1004 *Id.*

1005 *Id.* See also Neethling *'*Die lasterreg en die media: strikte aanspreeklikheid word ten gunste van nalatigheid verwerp en 'n verweer van mediaprivilegie gevestig' 1999 *THRHR* 443. Midgley states that 'fault in the form of intention remains the basis of liability for all defendants...if media defendants wish to rebut the presumption of intention by pleading ignorance or mistake, such ignorance or mistake must have been subjectively reasonable in the circumstances of the case: the defendant must not have been negligent in making the mistake.' Neethling, conversely, argues that media liability will no longer be based on *animus iniuriandi*, but on negligence.

1006 Midgley (1999) 222.

1007 *Id.*

1008 Midgley (1996) 635-638.

1009 Neethling (1999) 443.

1010 Burchell (1985) 155-158, 189, 193-194.

1011 Visser (1982) 174. This article argues in favour of negligence as required form of fault in defamation cases.

1012 Knobel (2002) 34.

1013 Midgley (1999) 222; Midgley (1996) 635-638.

According to Knobel, the confusion between *animus iniuriandi* and negligence could have originated from the *Hassen* case, where the court had equated ill-will, spite, recklessness, negligence or unreasonableness with intention.[1014] Knobel explains why this was not correct by elaborating on what negligence means. He states that someone who is mistaken about the wrongfulness of his act cannot have intention, because intention requires subjective knowledge of wrongfulness.[1015] Where a reasonable person in the shoes of he who acts would have realised wrongfulness or even the possible wrongfulness of his act and where he who acts does not have that realisation, he acts with negligence and not intent.[1016]

Knobel points out that negligence relates not only to a mistake, but to the damage it causes as well. If a reasonable person in the shoes of he who acts could have foreseen and prevented damage, he who acted should have done the same. Where he who acts fails to foresee or prevent such damage, he is negligent.[1017] Neethling also argues that media liability is based on negligence and that it has replaced *animus iniuriandi* as form of fault.[1018]

This study agrees with Neethling's position that the mass publication of a defamatory statement by a member of the media raises the presumption of negligence, although a further discussion of what negligence would entail falls outside the parameters of this study.

Lastly, this study enquires, in light of the view of the court in *Marais* and that of Knobel,[1019] whether it is still constitutionally justifiable to distinguish between media defendants and non-media defendants in South African defamation cases. This question is asked against the backdrop of societal and technological developments that have armed non-media members with vast publication abilities.

1014 Knobel (2002) 34.
1015 *Id.* 35.
1016 *Id.*
1017 *Id.*
1018 Neethling (1999) 443. Also see Neethling (2007) 103-123.
1019 Knobel (2002) 34.

The nature and effects of South Africa's digitisation into a network society will be discussed in Chapter 4. It will transpire that non-media defendants now have the ability to publish and distribute information that could cause far-reaching reputational harm.

CHAPTER 4: SOUTH AFRICA'S NETWORK SOCIETY AND NEWS REPORTAGE

4.1. INTRODUCTION

In 2000, Judge Van Dijkhorst presided over a defamation case between *Herstigte Nasionale Party (HNP)* leader Jaap Marais, the plaintiff, and defendant Major-General Tienie Groenewald of the Freedom Front (*Marais*). Neither Marais nor Groenewald were members of the mass media. Judge Van Dijkhorst stated:

> *"Mag met die standpunt die rubicon oorgesteek word in die lig van die feit dat Bogoshi juis die media uitsonder vir spesiale behandeling (op 1214F) op grond van die vernietigende invloed wat hul vals beriggewing op 'n persoon se goeie naam kan hê, vergeleke met die beperkte invloed van laster deur gewone burgers? Dit is egter 'n kwessie van graad. Skriftelike laster kan anders as deur die media – soos hier deur partystrukture – tog ook wyd versprei word en 'n goeie naam skaad. Publikasie kan so veel wyer wees as in 'n plaaslike koerantjie. Daar is geen beginselverskil nie. Die remedie is doelmatigheidshalwe aangepas na gelang van die veronderstelde omvang van die kwaad*." [1020]

The medium used for defaming was not a newspaper or any other form of mass media, but an article that Groenewald had written in reaction to a book implicating Marais. The defendant held that the article was not intended for mass publication to the public.[1021] This case was discussed in more detail in paragraph 3.5.1.6 below.

In his judgment, Van Dijkhorst considered the developments in the *Bogoshi* case. The fault of media members in defamation cases could be negligence-based,

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[1020] *Marais* (2002) 578.
Translated into English, this reads as follows:
"May the rubicon be crossed in view of the fact that *Bogoshi* had set apart the media for special treatment (1214 F) based on the devastating influence the media's false reportage can have on a person's good name, compared to the limited influence of defamation by ordinary citizens? However, we are dealing here with a matter of degree. Written defamation caused by non-media members – for example by by (political) party structures, as in this case – can be widely disseminated and cause reputational damage. Publication (by non-media members) can be much wider than publication in a local newspaper. There is no difference in principle. For the sake of effectivity, the remedy has been adapted according to the supposed extent of the damage caused" – as translated by Helene Eloff, author of this dissertation and mother tongue Afrikaans speaker.

[1021] *Marais* (2002); *Bogoshi* (1998) 1196.

whereas non-media defendants would have had to act with intent to be at fault.[1022] The court confirmed that the media could potentially destroy a person's reputation, based on the media's ability to publish and distribute information on a large scale and, in so doing, influencing the public opinion.[1023] The court stated that this grounded the acceptance of negligence as a form of fault for media defendants.[1024]

Although media defendants typically had widespread influence compared to that of non-media defendants, the court indicated that non-media defendants could also have widespread reach and influence in certain cases.

The issue at hand, the court stated, was the degree of harm caused by widespread publication,[1025] regardless of whether it was published by a media defendant or a non-media defendant.[1026] The court stated that publication of written defamation by a non-media member may be distributed wider than a publication made by a media defendant working for a newspaper with limited reach or small circulation.[1027] The court stated that in principle, there would then be no difference in harm done and the differentiation between media defendants and non-media defendants was questioned.[1028]

Further development of the law of defamation, through the extension of negligence as a form of fault for all defamation defendants, was suggested.[1029] This, the court mentioned, would promote the spirit and purpose of the Constitution without unjustifiably limiting the right to freedom of expression.[1030]

The *Marais* decision in 2000 was followed by the case of *Khumalo v Holomisa,*[1031] where the Constitutional Court confirmed the expansion of the law of defamation

1022 *Marais* (2002) 590.
1023 *Id.*
1024 *Id.*
1025 *Id.*
1026 *Id.*
1027 *Id.*
1028 *Id.*
1029 *Id.* See also Knobel (2002) *THRHR* 32, 34.
1030 *Khumalo* (2002) 401.
1031 *Id.*

regarding media defendants in the *Bogoshi* case.[1032] The question whether any defendant could rely on a negligence-based defence was acknowledged, but not considered in *Bogoshi* or *Khumalo,* as the courts had not been called upon to do so.[1033]

It is now 19 years after Judge Van Dijkhorst's words stated at the beginning of this chapter. In these 19 years, South African society underwent dramatic changes.[1034] For one, regular citizens without any mass media affiliation have the ability to publish defamatory information and distribute it to vast audiences.[1035]

In this chapter, the rise of the network society will be discussed, its effect on the communication and information dissemination abilities of regular persons, and on news reportage and members of the media. At the end of this chapter, it will be clarified whether the factual position of media and non-media defendants are similar in that both are able to disseminate information in the public interest to vast audiences and risk causing grave reputational harm in the process.

4.2. THE RISE OF THE NETWORK SOCIETY

We live in a world that has become digital.[1036] Between the arrival of the internet and today, the Internet sparked a revolution that was compared in significance to the industrial revolution that transformed the world three centuries ago.[1037]

Human development can be split into three stages.[1038] The first was the agricultural stage, the second the industrial age and the third, the post-industrial age.[1039] Alternatively, these stages were called the first, second and third waves of human

1032 *Bogoshi* (1998) 1214 J.

1033 Manno & Shahrabi (2010). See also M Castells & G Cardoso (2010) *The Information Age – Economy, Society and Culture. Volume 1: The Rise of the Network Society* 28-29.

1034 Manno & Shahrabi (2010).

1035 Castells & Cardoso (2010) 28-29.

1036 *Id.*

1037 D Van der Merwe 'Knowledge is the key to riches. Is the law (or anything else) protecting it adequately?' (2008) *PELJ* 3.

1038 *Id.*

1039 *Id.*

development.[1040] In the agricultural stage, land was a form of compensation provided by kings to loyal subjects.[1041] The industrial stage was 'industrial and based on mass production, mass entertainment and weapons of mass destruction.'[1042] Since the 1950's, human society had been moving towards the post-industrial or information age, a so-called third wave society where actionable knowledge had become the primary resource as opposed to physical labour or the products of mass production.[1043]

The information age is a period in human history characterised by the shift from an economy based on industrialisation to one based on information computerisation.[1044] The information technology revolution induced a new form of society, called the network society.[1045] In its simplest terms, the network society can be defined as a social structure based on networks.[1046] It has also been described as the social structure resulting from the interaction between a paradigm of new technology and social organisation.[1047] The Internet, a global digital communication network of computers,[1048] is a frequently used medium for communicating, exchanging information and socialising and has been described as backbone of the network society.[1049]

4.2.1. The Internet: background and conceptualisation of terms

The internet has its origins in research conducted by the United States military and the Network Information Centre (NIC) of the Stanford Research Institute in the 1960s.[1050] In the 1970s and 1980s, it grew through the activities of various academic

1040 *Id.*
1041 *Id.* 8-9.
1042 *Id.*
1043 Castells & Cardoso (2010) 148-162.
1044 *Id.*
1045 *Id.* 7.
1046 *Id.* 1-16.
1047 Castells & Cardoso (n 977 above). See also Papadopoulos & Snail (2012) *Cyberlaw @ SA III: The law of the Internet in South Africa* 1-3.
1048 *Id.* 1-16.
1049 Papadopoulos & Snail (2012) 1.
1050 *Id.*

institutions[1051] and its value was appreciated worldwide in the mid-1990s, when the internet's usage increased. It has since been growing exponentially.[1052]

To gain a better understanding of the internet's working and how it has transformed sociability, this study will contextualise certain main terms.

4.2.1.1. Internet

The internet is a collective term for the physical infrastructure that connects computers around the world.[1053] This infrastructure comprises servers, computers, fibre-optic cables and routers,[1054] connected through a software protocol known as Transmission Control Protocol (TCP) and Internet Protocol (IP).[1055]

4.2.1.2. World Wide Web

The World Wide Web is data, comprising a vast collection of text, documents, images, audio and video shared via the Internet.[1056]

4.2.1.3. Packet Switching (how data is communicated from one computer to another)

This process was described in the case of *In re DoubleClick Privacy Litigation.*[1057] The computer from where data is sent (for example a document), fragments the document into many small information 'packets.' The IP address of the website to where it is destined, is contained in each packet, as is a small portion of the document, and an indication of where the data pack is placed in the original document. From the originating computer, the packets are sent through a local

1051 *Id.*
1052 *Id.*
1053 Papadopoulos & Snail (2012) 3.
1054 *Id.*
1055 *Id.*
1056 *In re DoubleClick Privacy Litigation* DCPL 154F Supp 2d 497 S.N.D.Y. 2001 http://www.justia.com//cases//federal//district-courts//Fsupp2//154//497//2429654// (accessed on 30 April 2018).
1057 *Id.* Also see Papadopoulos & Snail (2012) 1.

network to an external router. Routers are devices that contain up-to-date directories of internet addresses. The data packets are sent from the one router to the next until it reaches the destination website. Different data packets travel along different routers according to availability and may reach their destination in a scrambled order. Because each data packet contains an indication of its position in the fully assembled document, they are reordered, and the document is displayed once the receiving computer was connected to the Internet.[1058]

4.2.1.4. Internet Service Provider (ISP)

An ISP is a service provider through which computers connect to the Internet.[1059] Service providers operate servers that act as storage for material uploaded to the Internet.[1060] ISP's are called the gateway to the Internet.[1061]

4.2.1.5. Servers

A server stores the data shared on the Internet. Servers make this data available through the TCP or IP protocol in that each document, image or clip has a Universal Resource Locator (URL).[1062] The data is requested from a server using a unique URL.[1063] The server then prepares the requested document, for example, and transmits the information to the user who requested it.[1064]

4.2.1.6. Universal Resource Locator (URL)

A URL is a reference that identifies a specific document, image or clip's physical location in the internet's infrastructure.[1065] By entering a specific URL, users can

1058 *Id.*
1059 Papadopoulos & Snail (2012) 1-3.
1060 *Id.*
1061 *Id.* 3.
1062 *Id.*
1063 *Id.*
1064 *Id.*
1065 *Id.*

access a specific document from the server storing it.[1066] The server then transmits the requested information to the user.[1067]

4.2.1.7. Web Browser

A web browser is a computer program through which a user communicates on the World Wide Web.[1068]

4.2.1.8. Web Page

A document or digital content that can be displayed in a web browser is a web page.[1069] A web page may contain text, images, audio clips and video elements.[1070]

4.2.1.9. Website

A website is a collection of web pages grouped together.[1071]

4.2.1.10 Search egine

A search engine is a service by means of which Internet users search for content on the World Wide Web. Key words or key phrases are entered into a search engine (Google,[1072] for example). The search engine receives a list of web content related to the key words or key phrases entered by the Internet user. This list is known as a 'search engine result page.'[1073]

1066 *Id.*

1067 *In re DoubleClick Privacy Litigation* (2001) 497.

1068 CD Mills et al 'What is the difference between webpage, website, web server, and search engine?' 8 April 2018 https://developer.mozilla.org//en-US//docs//Glossary//browser (accessed on 20 April 2018).

1069 According to Robert Visser, digital editorial support manager at Caxton CTP Publishers and Printers. Statement made during Caxton's Digiday presentation on 1 March 2018.

1070 Mills et al (2018).

1071 P Grabowicz 'Tutorial: The transition to digital journalism.' 17 September 2014 https://multimedia.journalism.berkeley.edu//tutorials//digital-transform// (accessed on 20 April 2018).

1072 Google https://www.google.com (acessed on 27 February 2019).

1073 Techopedia.com 'What does *search engine* mean?' https://www.techopedia.com/definition/12

4.2.2. The internet: development towards Web 2.0

4.2.2.1. Conceptualisation of Web 2.0

The term 'Web 2.0' describes a shift in the usage of the Internet and World Wide Web. Previously, content was published on the World Wide Web for a passive audience, whereas the web is now a platform for public participation and the re-mixing of data and information.[1074] Although social networking sites did exist prior to Web 2.0, these sites were not as interactive as they are today.[1075]

One of the first social networking sites launched on the Internet in 1994 was called Geocities.[1076] It allowed users to create their own websites and divided the sites into online 'cities' based on content. TheGlobe.com followed in 1995 and allowed users to interact based on shared interests.[1077] Users could also publish content.[1078] The first instant messaging service that enabled real-time transmission of text on the World Wide Web was launched by AOL in 1997.[1079] Online communication consisted of subsequent one-way communications.[1080]

'Web 2.0' describes the World Wide Web in its latest state. The current World Wide Web is interactive and involves people from across the globe who communicate through text, image and video messages to a much wider audience and with increased feedback in real-time.[1081]

708/search-engine-world-wide-web (acessed on 27 February 2019).

1074 M Walker 'The history of social networking.' 3 June 2013. http://www.webmasterview.com http://www.webmasterview.com//2011//08//social-networking-history// (accessed on 20 April 2018).

1075 Walker (2013).

1076 *Id.*

1077 *Id.*

1078 *Id.*

1079 Manno & Shahrabi (2010).

1080 *Id.*

1081 According to the Oxford English Dictionary, a smartphone is a mobile phone that performs many of the functions of a computer, typically having a touchscreen interface, Internet access, and an operating system capable of running downloaded apps. https://en.oxforddictionaries.com//definition//tablet (accessed on 20 April 2018).

4.2.2.2. Social media: a new way of communicating

A variety of social media platforms allow those with computers, smartphones,[1082] tablets[1083] or similar devices with Internet access to communicate with a mass audience.[1084] This study shortly describes a few of these platforms.

Facebook is a social networking website.[1085] It allows users to create profiles where they publish status updates, comments, share photographs, links to news or interesting content on the World Wide Web, play games, chat live or stream live video.[1086] Content can be shared publicly or to a select audience.[1087] The word 'posting' has become the social media colloquial term to describe publishing.

Twitter is a real-time social network that connects the subscriber to the latest stories, ideas, opinions and news about topics the user finds interesting.[1088] Interests and topics of conversation are indicated by adding a hashtag before typing a specific word.[1089] A Twitter post is known as a 'tweet' and users are limited to 280 characters per tweet. Registered users can re-post tweets, whereas other web users can only access tweets.[1090]

Instagram is a photo sharing application available on various mobile devices, including Apple iPone Operating System, Android and Windows Phones. People can upload photos or videos to Instagram which can be visually enhanced with Instagram's photo filters. Users can like and comment on the photos of other users viewed on the platform.[1091]

1082 According to the Oxford English dictionary, a tablet is a small portable computer that accepts input directly on to its screen rather than through a keyboard or mouse. Accessed online via https://en.oxforddictionaries.com//definition//tablet (accessed on 20 April 2018).

1083 Manno & Shahrabi (2010).

1084 D Nations 'What is Facebook and what does it do?' 2 February 2018 https://www.lifewire.com//what-is-facebook-3486391 (accessed on 20 April 2018).

1085 *Id.*

1086 *Id.*

1087 *Id.*

1088 Twitter's 'About' section www.twitter.com//about (accessed on 7 April 2016). Also see Twitter Help Centre 'How to use hashtags' www.twitter.com//help (accessed on 20 April 2018).

1089 Twitter's 'About' section www.twitter.com//about (accessed on 7 April 2016).

1090 *Id.*

1091 Instagram Help section https://help.instagram.com//424737657584573 (accessed on 7 April 2016.

WhatsApp Messenger is a mobile messaging application that allows users to exchange encrypted text messages, images, sound clips and videos.[1092] One-on-one and group communication is possible on WhatsApp.[1093]

Snapchat is a social media application that allows users to take photos and add various effects and text to it, which are then shared with friends.[1094] Snapchat creations delete themselves within ten seconds after being posted.[1095]

YouTube is a free video-hosting website that allows users to upload, store, share, comment on and view video content.[1096] YouTube videos can be shared onto other social media platforms by using a link or embedding the relevant HTML code.[1097]

1092 WhatsApp website www.whatsapp.com (accessed on 30 April 2018).

1093 *Id.*

1094 'What is snapchat?' section on the Snapchat Android application https://owhatis.snapchat.com// (accessed on 20 April 2018).

1095 *Id.*

1096 M Rouse 'Definition YouTube' Techtarget website https://searchio.techtarget.com//definition/You Tube (accessed on 29 April 2018).

1097 *Id.*

4.3. SOUTH AFRICA'S NETWORK SOCIETY

4.3.1 South Africans and transformed sociability

The network society manifests in a transformed sociability where internet users enhance their social activities with digital tools and platforms.[1098] Statistics are consulted to ascertain to what extent South Africans are doing this.

By November 2018, South Africa had a population of 57 million of which 30 million were internet users.[1099] This figure has grown by 1 184% since the year 2000[1100] and social media penetration is increasing.[1101] There are 16 million Facebook users in the country, of which 14 million access the platform using mobile devices.[1102] Eight million South Africans are subscribed to Twitter[1103] and 3.8 million to Instagram.[1104] Expressed in percentages of penetration, 49% of South Africa's population uses WhatsApp,[1105] 46% uses Facebook,[1106] 45% uses YouTube,[1107] 27% uses Instagram[1108] and 22% uses Twitter.[1109]

Statistics indicate that the logic of the network society has embodied itself in South African social practices.[1110] Technology and the Internet have enabled individuals to be more socially active. Means of communication have increased to include forms of

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1098 Castells & Cardoso (2005) *The Network Society: From Knowledge to Policy* 1-16. Also see Internetworldstats.com 'Internet Users Statistics for Africa (Africa Internet Usage, 2018 population statistics and Facebook Subscribers)' 12 September 2018 https://www.internetworldstats.com//stats.html (accessed on 20 November 2018).

1099 *Id.*

1100 Ornico.co.za 'The South African Social Media Landscape 2018'. Ornico website http://website.ornico.co.za//wp-content//uploads//2017//10//SML2018_Executive-Summary.pdf (accessed on 20 November 2018)

1101 *Id*.

1102 *Id.*

1103 *Id.*

1104 Statistica.com 'Penetration of leading social networks in South Africa 3rd Quarter 2017.' Statistica statistica.com (accessed on 30 November 2018).

1105 *Id.*

1106 *Id.*

1107 *Id.*

1108 *Id.*

1109 According to a statement made by Robert Visser, digital editorial support manager at Caxton CTP Publishers and Printers during Caxton's annual Digiday presentation on 1 March 2018.

1110 *Id.*

wireless communication, the use of mobile phones and social media platforms[1111] and the country's network society is experiencing a transformed sociability.[1112]

4.3.2 The effects of transformed sociability on South African print media

A central feature of the network society is the transformation of the realm of communication, which includes communication between persons and groups and communication between the media and people at large.[1113] The transformation of print media reportage will be discussed by comparing a traditional newsroom with reporters' current reality.

4.3.2.1. The traditional newsrooms

Newsrooms are the areas where the main steps in the preparation of newspapers are taken.[1114] It is the place where reporters, sub-editors, division editors, processing teams and editors meet to plan, submit, scrutinise and place their content on the publication's pages prior to printing.[1115]

Prior to the rise of the network society, newsrooms operated in a standardised fashion.[1116] Newspapers have for decades had newsgathering teams, processing teams and senior groups of editors supervising the work.[1117]

In *Nasionale Pers v Long,*[1118] the court stated that newsrooms generally consisted of reporters who submitted news, sub-editors who edited the content, and the editor. In that case, the court referred to the newsroom practices of the *Cape Times*.[1119]

1111 Castells & Cardoso (2005) 11.

1112 *Id.* 12.

1113 According to Capital Media Group Editor Sunette Visser and Highway Mail editor Michelle Dennis through electronic real-time communication on 30 April 2018.

1114 *Id.*

1115 S Saxena 'How a traditional newsroom is staffed' 11 October 2014 http://www.easymedia.in//traditional-newsroom-staffed// (accessed on 24 April 2018).

1116 *Id.*

1117 *Long* (1930) 87.

1118 *Id.* 93-95.

1119 *Id.*

At the *Cape Times*, reporters gathered news and submitted reports which were taken from journalists to chief sub-editors.[1120] The chief sub-editor would then hand the report to a sub-editor to prepare it for the newspaper before the newspaper was handed to the editor for approval of its content prior to printing.[1121] In that case, the court stated that editors and sub-editors would be held liable where a reporter had submitted a defamatory report that was published.[1122]

In producing printed newspapers, newsrooms still function in a similar manner.[1123] A report is submitted by a journalist, perused and scrutinised for errors by sub-editors and finally perused by editors.[1124] Newspapers often have specialist editors for different types of news. A news editor, for example, is in charge of ensuring that reporters continuously submit up-to-date news.[1125] Once a news report was sub-edited, the news editor approves it prior to publication, as does the publication's editor.[1126]

4.3.2.2. The digitisation of print media

The majority of traditional media organisations, both worldwide and in South Africa, have created websites where news is published electronically. This includes print publications, of which electronic versions are created.[1127] Due to the rapid nature of electronic publishing, reports regularly appear on these websites before it appears in the printed versions of publications.[1128] These news websites experience steep and continuing increases in website readership.[1129]

1120 *Long* (1930) 93-95.

1121 *Id.*

1122 S Naveed 'News room structure – sub editing and page designing.' 1 February 2013 https://www.slideshare.net//xxaqib?utm_campaign=profiletracking&utm_medium=sssite&utmsource=ssslideview (accessed on 28 April 2018).

1123 *Id.*

1124 *Id.*

1125 Saxena (2018).

1126 D Banisar (2007) *Silencing Sources* 31. See also G Daniels (2014) 'State of the Newsroom South Africa – Disruptions Accelerated' 1-3.

1127 *Id.*

1128 Daniels (2014) 33.

1129 *Id.* 1-3.

Meanwhile, South African print newspapers are experiencing a steady decrease in newspaper circulation and dwindling print advertising, a decline of about 5% every year.[1130] Since 2012, newsrooms have increasingly been adopting a digital-first strategy.[1131] This entails that news that is digitally delivered takes precedence over print media.[1132] The strategy is rooted in the realisation that readers are members of the network society and therefore no longer passive news recipients, but active engagers and content generators.[1133]

The digital-first strategy goes hand-in-hand with the incorporation of social media into the day-to-day functioning of newsrooms.[1134] Reporters use websites, Facebook, Twitter and other social media platforms and tools to reach audiences anywhere and at all times.[1135]

A reporter covering an event, crime scene or any other incident is required to take video footage, photographs and audio clips and practice direct reportage through social media platforms, often making use of live streaming video.[1136] Breaking news is typically condensed into one or two text sentences accompanied by a photo or video and published onto social media. Thereafter, multimedia elements and text with a more elaborate account of events is uploaded onto the publication's news website as soon as possible.[1137] This condensed report and follow-up reports are shared onto social media.[1138] Once this was done, a reporter submits a report for the publication's print edition in the newsroom.[1139]

In a print media context, the processes of news gathering, report writing and editing is conducted methodically and by multiple individuals, and steps are taken prior to

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1130 Daniels (2014) 28.

1131 *Id.*

1132 *Id.*

1133 *Id.* 35.

1134 *Id.*

1135 According to a statement made by Robert Visser, digital editorial support manager at Caxton CTP Publishers and Printers during Caxton's annual Digiday presentation on 1 March 2018.

1136 *Id.*

1137 *Id.*

1138 *Id.*

1139 *Id.* Also see Bezanson, RP *The Developing Law of Editorial Judgment*, 78 Neb. L. Rev. (1999) Retrieved from https://digitalcommons.unl.edu//nlr//vol78//iss4//6 on April 15, 2018.

publication to verify that the report is accurate.[1140] In a digital media context, a reporter publishes text and multimedia directly from the scene and consequently without the support and structure inherent to the traditional print media process.

Once news has been posted onto social media, readers can engage with the creator of the content and each other. This is done by, for example, commenting, sharing, re-tweeting or liking the social media post. This is called reader engagement and is a goal of modern media houses in this network society.[1141]

4.3.3. The effects of transformed sociability on non-media members

4.3.3.1. Mass publication by regular citizens

Society is no longer dependant on the mass media for receiving important information[1142] and has moved from a mass media system to a customised and fragmented multimedia system, inclusive of every message sent in the network society.[1143] Communication initiated by individuals or groups is diffused throughout the internet and can potentially reach the whole planet without the use of traditional mass media.[1144]

Citizens of the network society have increased publishing abilities.[1145] Any South African with internet access can self-publish a book using the World Wide Web.[1146] Bloggers are regular persons who publish text and other media onto their own personalised blogging websites.[1147] Cape Town resident Meg Sproat is an

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1140 According to a statement made by Robert Visser, digital editorial support manager at Caxton CTP Publishers and Printers during Caxton's annual Digiday presentation on 1 March 2018.

1141 *Id.* Also see Daniels (2017) 44.

1142 *Id.*

1143 *Id.*

1144 *Id.*

1145 C Bolt 'How to self-publish a book in 2018' https://self-publishingschool.com//how-to-publish-a-book// (accessed on 29 April 2018).

1146 A 'blogger,' according to Wordpress, is someone who posts content such as articles, new information, up-to-date news, opinions and case studies onto a 'weblog,' which is a term used to describe websites that maintain an ongoing chronicle of information. See further Wordpress.org 'Introduction to Blogging.' https://codex.wordpress.org//Introduction_to_Blogging (accessed on 5 May 2018).

1147 Boring Cape Town Chick Statistics Page. http://www.boringcapetownchic.com//statistics (accessed on 29 April 2018).

example.[1148] Her blog is titled 'Boring Cape Town chick' and was accessed by readers 87 037 times in 2017.[1149] Her Facebook page is followed by 4 487 people.[1150] She has posted more than 23 000 tweets[1151] to her 6 800 followers.[1152] Sproat posted 1 444 photos onto Instagram, whereupon she has 1 758 followers.[1153]

For some, blogging is a source of income.[1154] Allowing advertising on your blog, featuring sponsored content and being paid for product reviews are examples.[1155]

Social media users can also derive an income from what they publish onto these platforms.[1156] This can be achieved by selling intellectual property such as written reports, stories or photographs through social media, and by acting as an online brand ambassador or affiliate for a company.[1157] Advertising through online reviews is another way of making money using social media platforms.[1158]

Not all social media users subscribe to social media sites for the purpose of disseminating content on a large scale.[1159] Most social media users do so for the purpose of meeting new people, keeping in touch with friends, or general socialising.[1160] This does not mean that such a user's social media posts will not

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1148 *Id.*

1149 Boring Cape Town Chick Facebook page www.facebook.com//BoringCapeTownChick (accessed on 29 April 2018).

1150 Boring Cape Town Chick Twitter page https://twitter.com//boringctchick (accessed on 29 April 2018).

1151 I*d.*

1152 Boring Cape Town Chick Instagram page www.instagram.com//boringcapetownchick (accessed on 29 April 2018).

1153 J Thompson 'This is how much money food bloggers actually make.' 28 April 2014 https://www.huffingtonpost.co.za//2017//04//29//this-is-how-much-money-food-bloggers-can-actually-make_a_22060872// (accessed on 4 May 2018).

1154 N Crampton 'How to make money blogging.' 1 August 2015 www.entrepreneurmag.co.za//advice//marketing//online-marketing//how-to-make-money-blogging// (accessed on 4 May 2018).

1155 S Barker 'How to make money on social media (Even with fewer than 1000 followers)' 5 December 2015 https://www.forbes.com//sites//forbescoachescouncil//2017//12//05//how-to-make-money-on-social-media-even-with-fewer-than-1000-followers//#532656045549 (accessed on 4 May 2018).

1156 *Id.*

1157 *Id.*

1158 P Brandtzaeg & J Heim 'Why People Use Social Networking Sites.' July 2009 https://www.researchgate.net//publication//221095501_Why_People_Use_Social_Networking_Sites (accessed on 29 April 2018).

1159 M Bock 'The role of the "Citizen Journalist" in Today's World is changing' 29 October 2016 https://news.utexas.edu//2016//10//10//role-of-the-citizen-journalist-is-changing (accessed on 30 April 2018).

1160 *Id.*

reach thousands of people.[1161]

Some of these users end up compiling posts that are shared hundreds or even thousands of times. The #blackface social media scandal from 2014 serves as an example.[1162] In 2014, a photo was captured of two students at the University of Pretoria, dressed as domestic workers for a 21st birthday party. Their faces were painted brown. One of the students uploaded the photo onto her Facebook profile, from where an aggrieved Facebook user shared it onto other social media networks along with the caption #blackface and the allegation of racism. The photo, the hashtag #blackface, and users' outrage circulated on social media platforms before it made news headlines. The students apologised.[1163]

In 2017, two female students videoed themselves making racist statements, referring to the k-word.[1164] The video was uploaded onto their class' WhatsApp group, from where a group member distributed it through social media.[1165] The video was viewed more than 1 500 times.[1166] This scenario also proves how rapidly a message on the World Wide Web can be distributed to a large audience.[1167]

4.3.3.2. Citizen journalism

Not only can regular citizens' publications reach thousands of readers, but citizens are playing the roles of journalists with increasing regularity.[1168] Citizen journalism entails that ordinary members of the public take on the role of journalists by covering

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1161 ENCA website 'SAHRC to probe #blackface students' 7 August 2014 http://www.enca.com//sahrc-probe-blackface-students (accessed on 29 April 2018).

1162 *Id.*

1163 ENCA website 'WATCH: Tuks rocked by racist viral video' 28 October 2017 https://www.enca.com//south-africa//tuks-rocked-by-racist-viral-video (accessed on 29 April 2018).

1164 *Id.*

1165 *Id.*

1166 K Bulkley 'The rise of citizen journalism.' 11 June 2012 https://www.theguardian.com//media//2012//jun//11//rise-of-citizen-journalism (accessed on 30 April 2018).

1167 When content on social media platforms is rapidly mass distributed, the mass distribution is colloquially described as "going viral." This was explained by Benno Stander, digital manager of Lowveld Media, during a formal discussion in Lowveld Media's newsroom on September 8, 2016. Also see Eloff (2018).

1168 B Riskowitz 'Citizen journalism flexes it muscles' 13 January 2007 www.iol.co.za//news//-south-africa//citizen-journalism-flexes-its-muscles-310837 (accessed on 29 April 2018).

and uncovering news stories themselves.[1169] Smartphones and tablets allow these citizens to take videos, audio clips and photos of events as they unfold.[1170]

The amateur efforts of citizen journalists often have a vast reach. This will be illustrated using three examples.

South African citizen Ivan Leon uploaded a video titled 'Road Rage Incident in Durban: 22 Jan 2016' onto YouTube on 22 January 2016. This is an example of citizen journalism exposing road rage.[1171] It was viewed 2, 969 409 times to date.[1172]

In March 2018, a citizen passing through the Beit Bridge border post between South Africa and Zimbabwe videoed a home affairs official who was browsing on Facebook and checking her WhatsApp messages whilst at work.[1173] The video portrayed that this distracted her attention from her work. The video was uploaded onto social media and redistributed onto various news websites.[1174] In reaction hereto, the department issued a press release stating that it would investigate the matter and that her conduct violated its policies.[1175]

On 25 July 2017, a motorist stumbled upon a cash-in-transit heist whilst driving on the N4 in Mpumalanga.[1176] He videoed the entire heist and shared it onto social media. The video was re-shared through the local newspaper *Lowvelder's* YouTube channel and was viewed more than 500 000 times.[1177]

1169 C Measures 'The Rise of Citizen Journalism' 1 May 2013 www.socialmediatoday.com//content//rise-citizen-journalism (accessed on 30 April 2018).

1170 *Id.*

1171 *Id.*

1172 Timeslive website 'WATCH: Busted! Video of home affairs official entertaining herself at work goes viral' 14 March 2018 https://www.timeslive.co.za//news//south-africa//2018-03-14-watch--busted-video-of-home-affairs-official-entertaining-herself-at-work-goes-viral// (accessed on 25 February 2019).

1173 *Id.*

1174 Department of Home Affairs South Africa's website 'Media statement on action against home affairs official' 14 March 2018 www.dha.gov.za (accessed on 30 April 2018).

1175 J Hen-Boisen 'WATCH: CIT bombing caught on video' 26 July 2017 www.lowvelder.co.za//398353// watch-cit-bombing-n4-caught-video// (accessed on 30 April 2018).

1176 Lowveld Media Youtube channel 'Cash-in-transit vehicle bombed on N4, Crocodile Gorge, Mpumalanga' 26 July 2017 https://www.youtube.com//watch?v=96NIPUYMkHA (accessed on 30 April 2018).

1177 Bock (2016).

Prior to the rise of the network society and social media, the media was seen as the gatekeeper of news and information[1178] that assisted in forming people's consciousness, opinion and political decision-making.[1179] The structure and dynamic of socialised digital communication has changed this position.[1180] Mass publication by regular citizens and citizen journalism plays a large role in the formation of people's consciousness, opinion and political decision-making.[1181]

Banisar argues that bloggers, podcasters, citizen journalists and electronic magazine publishers are classified as 'more informal types of journalism.'[1182] Bock states that social media users, and not the mass media, are now the gatekeepers of news.[1183] The right to freedom of expression applies equally to members of the media, bloggers, tweeters and all others who choose to exercise their right to freedom of expression on matters of public interest.[1184]

There is much contemporary debate in the fields of law and media ethics about who qualifies as a journalist.[1185] Without expounding on the requirements of being classified as a journalist, this study takes note of the factual reality to ascertain whether South Africa's media defamation law justifiably distinguishes between non-media and media defendants in a Constitutional, digital age. The factual reality is that the distinction between members of the media and regular persons is not as clear as it was in 2002,[1186] when South Africa's common law of defamation was found to be consistent with the Constitution.[1187]

In the network society, parallels can be drawn between a social media user who decides what content to share and a newspaper editor.[1188] Someone who posts

1178 Castells & Cardoso (2005) 12-13.
1179 *Id.*
1180 *Id.*
1181 Banisar (2007) 31.
1182 Bock (2016).
1183 *Torstar* (2009) 61.
1184 E Ugland & J Henderson 'Who is a journalist and why does it matter? Disentangling legal and ethical arguments' (2007) *JMME* 241-261.
1185 *Khumalo* (2002) 425B.
1186 Eloff (2018).
1187 *Id.*
1188 *Id.*

news he witnesses can be compared to a reporter and those who comment on situations using social media as contributors to the news.[1189]

4.4. CONCLUDING REMARKS ON SOCIETAL CHANGE IN A DIGITAL SOUTH AFRICA

From the above, it is gathered that information dissemination occurs in a context that differs greatly from the *status quo* in 2002. The effect of this shift is illustrated by revisiting the hypothesis from Chapter 2.

Steve Hofmeyr is not a member of the media. He regularly publishes content to more than 400 000 people. Charles Cilliers, a journalist, publishes to 138 000 online readers and about 46 000 print readers per day. Defamation committed by Hofmeyr may be distributed wider than a publication made by Cilliers. The result of differentiating between media defendants and non-media defendants is that Cilliers is held to a higher fault standard than Hofmeyr,[1190] although both are able to do damage on a large scale. Another result is that Hofmeyr cannot use the reasonableness defence to prove that his defamation was lawful, whereas Cilliers can.[1191] In principle, this merits the questioning of the differentiation between non-media defendants and media defendants.[1192]

As a result of the digitisation of society, the factors that previously motivated South African courts to distinguish between media defendants and non-media defendants are no longer unique to the media.[1193] In practice, the media and regular citizens were placed on equal footing in that they can both publish and distribute content on a large scale and make money doing so.[1194]

In Chapter 5, the responses of Canadian and English law is discussed in reaction to the rise of the network society. In both these countries, the differentiation between

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1189 Eloff (2018).
1190 Neethling (1999) 443.
1191 Eloff (2018).
1192 Knobel (2002) 31.
1193 See Banisar (2007), Bock (2016) and Eloff (2018).
1194 *Id.*

media defendants and non-media defendants was revisited in light of the publishing and distributing abilities that regular citizens now enjoy.[1195]

The approaches implemented in Canadian and English law and jurisprudence may provide guidance in revisiting the South African position.

[1195] See discussion throughout Chapter 5 below.

CHAPTER 5: COMPARATIVE STUDY: DEFAMATION LAW IN ENGLAND AND CANADA

5.1. INTRODUCTION

South Africa's media defamation law has not been constitutionally tested to consider the societal transformation initiated by the World Wide Web and Web 2.0. As illustrated in Chapter 4, the digitisation of society has placed members of the media and regular citizens on equal footing.[1196] Any South African with Internet access and a social media profile can effect mass publication and distribution of information.[1197]

This change was observed not only in South Africa, but all over the world. The world's transition into a network society has affected existing defamation law in various countries across the globe.[1198]

This chapter explores the law of defamation in England and Canada. The importance of basic human rights such as the rights to human dignity and freedom of expression are acknowledged in South Africa, England and Canada alike.[1199] These countries' media law will be discussed to determine best practices that can be considerated in a South African context.

What follows in para 5.2 below is a short illustration of the internationally recognised fundamental rights values that are entrenched in South Africa, England and Canada. A more thorough discussion of the law of defamation in England and Canada follows in paragraphs 5.4 and 5.5.

1196 See paragraphs 4.3.3.2 and 4.4 above.

1197 Ugland & Henderson 'Who is a journalist and why does it matter? Disentangling legal and ethical arguments' (2007) *Journal of Mass Media Ethics* 241-261; Bock 'The role of the "Citizen Journalist" in Today's World is changing' 29 October 2016 https://news.utexas.edu//2016//10//10//role-of-the-citizen-journalist-is-changing (accessed on 30 April 2018).

1198 The International Press Institute Report: 'Out of balance – Defamation law in the European Union: A Comparative Overview for Journalists, Civil Society and Policy Makers' (2015).

1199 Gilbert & Tobin Centre of Public Law Website "Other Charters of Human Rights around the World" www.gtcentre.unsw.edu.au/node/147 (accessed on 24 February 2019).

5.2. DEFAMATION LAW IN THE GLOBAL ARENA

5.2.1. International fundamental human rights

This dissertation previously indicated (in paragraph 1.2.3) that the law of defamation is a vehicle through which a balance must be reached between the protection of freedom of expression on the one hand, and human dignity on the other.[1200]

The rights to dignity and freedom of expression are entrenched by the Universal Declaration of Human Rights (UDHR), a document that sets out the basic human rights that must be universally protected.[1201]

The UDHR informs international conventions and declarations that entrench the rights to, *inter alia,* freedom of expression, dignity and privacy.[1202] South Africa, England and Canada have been informed by the UDHR in acknowledging and entrenching fundamental human rights.

Although the UDHR is not a legally binding treaty,[1203] it expresses the fundamental values that are shared by the international community. The declaration has had a profound influence on the development of international human rights law.[1204]

International conventions and treaties that effect its provisions include the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights and the The Human Rights Charter of Asian Nationals.[1205]

1200 *Khumalo* (2002) 424 B.

1201 D Mabaya 'SA's Constitution embodies the Universal Declaration of Human Rights' 10 December, 2018 https://www.news24.com/Columnists/GuestColumn/sas-constitution-embodies-the-universal-declaration-of-human-rights-20181210 (accessed on 23 February 2019).

1202 Articles 19, 17, 18 and 25 of the Universal Declaration of Human Rights (hereinafter 'UDHR').

1203 Mabaya (2018).

1204 *Id.* Also see the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights and the The Human Rights Charter of Asian Nationals.

1205 *Id.*

South Africa is party to human rights treaties that were informed by the UDHR, including the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR, ICESCR and ICCPR have collectively become known as the UN Bill of Rights.[1206]

South Africa's Constitution is founded on the UN Bill of Rights and it guarantees the rights that are enshrined in the ICESCR and the ICCPR.[1207] This specifically includes the rights to human dignity[1208] and freedom of expression.[1209]

The two countries featured in this comparative study, England and Canada, share the fundamental values expressed in the UDHR and are parties to both the ICESCR and ICCPR.[1210]

What follows in paragraphs 5.2.1.1 and 5.2.1.2 below is a short illustration of these values being entrenched in both England and Canada. This is followed by discussions on the law of defamation in both countries in order to determine best practices that can be considered in a South African context.

1206 *Id.*

1207 *Id.*

1208 See the preambles to ICESCR and CCPR as well as article 10(1) of CCPR, which states:
"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Also see the preamble and articles 1, 19(3), 22 and 23 of the UDHR. S 10 of the South African Constitution guarantees the right to dignity.

1209 See the preambles to ICESCR and CCPR as well as article 19 of CCPR. Also see the preamble and article 19 of the UDHR, which states:
"1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order, or of public health or morals."
Also note that S 16 of the South African Constitution guarantees the right to freedom of expression.

1210 Gilbert & Tobin Centre of Public Law Website "Other Charters of Human Rights around the World" www.gtcentre.unsw.edu.au/node/147 (accessed on 24 February 2019).

5.2.1.1. Introduction: England's recognition of international fundamental human rights

England forms part of the United Kingdom, one of 47 Council of Europe member states that have signed the European Convention on Human Rights (ECHR). The ECHR is a convention that protects the human rights of those who live in member states of the Council of Europe.[1211] The Council of Europe is different from the European Union, which the United Kingdom seeks to withdraw from in October, 2019.[1212]

The bulk of the rights and freedoms enshrined in the ECHR were incorporated into England's Human Rights Act of 1998.[1213] This is discussed in more detail in paragraph 5.4.1 below.

5.2.1.2. Introduction: Canada's recognition of international fundamental human rights

Canada is considered to be a world-wide champion of human rights.[1214] The UDHR informs Canada's human rights laws. This includes the Canadian Charter of Rights and Freedoms,[1215] which is part of Canada's Constitution[1216] as well as the Canadian Human Rights Act of 1977.[1217]

1211 Equality and Human Rights Commission website. "What is the European Convention on Human Rights?"https://www.equalityhumanrights.com/en/what-european-convention-human-rights. (accessed on 23 February 2019).

1212 See paragraph 5.3.1 below for a discussion on the United Kingdom's impending withdrawal from the European Union. Also see J Doward 'Brexit bill leaves a hole in UK Human Rights' 13 January 2018 https://www.theguardian.com//law//2018//jan//13//brexit-eu-human-rights-act-european-charter. (Accessed on 1 September 2018). Also see L Kuenssburg 'Brexit: UK and EU agree delay to 31 October' 11 Paril 2019 https://www.bbc.com/news/uk-politics-47889404. (Accessed on August 10, 2019.)

1213 *Id.*

1214 Duhaime, B 'Canada and the Americas: Making a difference?' (2012) *IJ* 639 at 655.

1215 *Canadian Charter of Rights and Freedoms,* s 15, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, (QL).

1216 See Canada's *Constitution Act*, 1982.

1217 "Human Rights in Canada" Canadian Human Rights Commission website. www.crc-ccdpa.cc.ca/eng/ conntent/human-rights-in-canada. Accessed on 23 February, 2019.

Canada has been part of the Organization of American States (OAS) since 1990, but has not yet ratified the American Convention on Human Rights.[1218] When Canada became an OAS member, it recognized its international obligation to respect human rights as provided for in the OAS charter[1219] and the American Declaration of the Rights and Duties of Man.[1220]

Although Canada has not ratified the American Declaration on Human Rights, it has recognised the function of the inter-American commission on human rights (including the commission's competence to make recommendations to member states.)[1221] Due to Canada not ratifying the commission, it is subjected only to the commission's jurisdiction on petitions that allege violations of provisions of the American declaration that mirror the OAS charter's provisions.[1222] The American declaration is therefore, at least in part, binding on Canada.[1223]

This dissertation does not extend to a discussion on Canada's ratification of the ACHR and whether this will be ideal or not.

5.3. COMPARATIVE STUDY – DEFAMATION LAW IN ENGLAND AND CANADA

In both England and Canada, defences previously available only to members of the

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1218 "Enhancing Canada's role in the OAS: Canadian adherence to the American Convention on Human Rights " Report of the Standing Senate Committee on Human Rights. Published May, 2003 https://sencanada.ca/content/sen/committee/372/huma/rep/rep04may03-e.htm (accessed on 23 February 2019)

1219 Charter of the Organization of American States. http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-41_charter_OAS.pdf (accessed on February 23 2019). See specifically aticles 53, 106 and 145.

1220 American Declaration of the Rights & Duties of Man https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf (accessed on 23 February 2019). Note that articles 4 and 5 protect the rights to dignity and freedom of expression. Article 4 states: "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." Article 5 states: "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life."

1221 Duhaime, B 'Canada and the Americas: Making a difference?' (2012) *IJ* 639-642.

1222 *Id.*

1223 Duhaime (2012).

media have been extended to apply to non-media defendants as well.[1224] This study will examine how English and Canadian law of defamation was expanded to accommodate the digitisation of society described in Chapter 4 in order to determine best practices that can be considered within a South African context.

5.3.1. Background and motivation of selected jurisdictions

In this study, it is questioned whether South Africa's current common law of defamation is constitutionally justifiable in that it differentiates between media defendants and non-media defendants. South Africa's media defamation law forms part of the law of delict and, as explained in Chapter 2, requires the presence of five delictual elements to constitute a delict.[1225] These elements are: an act, its unlawfulness, fault on the part of the one who defames, damage caused by the defamation, and causality between the act of defamation and the damage.[1226]

The differentiation between media defendants and non-media defendants, as explained in paragraph 2.2.2.2 of this dissertation, can be found in the standard of fault applied to found liability for the media, and in the determination of the lawfulness of media members' defamatory publications.[1227] When South African courts previously expounded the country's law of media defamation, consideration was given to the laws of other countries, including England and Canada.[1228]

These two countries were selected for a comparative study for various reasons. Both countries have experienced the digitisation of society, which motivates this study's questioning whether South Africa's defamation law is justifiable in that it distinguishes between media and non-media defendants.[1229] England was chosen

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1224 R Dearden & W Wagner 'Canadian libel law enters the 21st century: The public interest and responsible communication defence' (2009-2010) *OTTL* 355; L Scaife (2014) *Handbook of Social Media and the Law.* 85-87.

1225 Neethling *et al* (2015) *Deliktereg* 4-5, 27, 35-38, 51 and 365.

1226 *Id.*

1227 J Neethling 'Die lasterreg en die media: strikte aanspreeklikheid word ten gunste van nalatigheid verwerp en 'n verweer van mediaprivilegie gevestig' (1999) *THRHR* 443.

1228 *Bogoshi* (1998) 1196.

1229 Internet World Stats website 'Top 20 countries with the highest number of internet users' 31 December 2017 https://www.internetworldstats.com//top20.html (accessed on 1 September 2018).

as South Africa's common law of defamation has English roots.[1230]

Defamation is not a delict in either Canada or England, but a tort.[1231] In England, a defendant is held strictly liable for defamation if no affirmative defence was established.[1232] Defamatory statements are presumed to be false and the defendant will be liable regardless of whether he had acted recklessly, negligently or without 'respect to truth or falsity.'[1233] The court in *Reynolds v Times Newspapers*[1234] brought fault in the form of reasonableness into the law, but limited it to media defendants.[1235] The so-called *Reynolds* privilege defence allowed journalists to evade liability for defamation where they could prove that their reportage was in the public interest and the product of responsible journalism.[1236]

The *Bogoshi* case derived its reasonableness defence in part from the *Reynolds* case. Subsequently, the English law of Defamation was amended by the Defamation Act of 2013. The Act was intended to correct the imbalance that existed between the protection of reputation and that of freedom of speech, which had been further complicated by online defamation.[1237] The Act aimed to remove complexities with online defamation by making its online enforcement easier, without unjustifiably infringing upon the right to freedom of speech.[1238] It replaced the defence accepted in *Reynolds* and made a similar defence available to both media and non-media defendants.

The United Kingdom's impending withdrawal from the European Union is noted after a referendum on 23 June 2016.[1239] The United Kingdom is due to leave the EU on

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1230 *Pakendorf* (1982) 155 A-D.

1231、 H Young 'Reynolds V Times Newspapers' *Landmark Cases in Defamation book* (print edition forthcoming) 1 February 2018 https://ssrn.com//abstract=3128626 (accessed on 10 September 2018).

1232 *Reynolds v Times Newspapers Ltd* [2001] AC 127 (HC) 192 (hereafter '*Reynolds HC')*.

1233 *Id.*

1234 *Id.*

1235 *Id.*

1236 M Hanna & M Dodd (2009) *McNae's Essential Law for Journalists* 278.

1237 J Afia & P Hartley 'Tipping the Balance' (2011) *NLJ* 161 376.

1238 Scaife (2014) 85-87. See also the English Defamation Act of 2013 21 February 2016 www.justice.gov.uk//consultations//draft-defamation-bill (accessed on 21 August 2018).

1239 Kuenssburg, L (2019).

31 October 2019.[1240] This Act is colloquially known as 'Brexit.'[1241] At the time of writing this study, Brexit has not occurred yet. The United Kingdom government has stated that, although the ECHR will cease to be part of UK law, basic human rights will not be weakened.[1242] The bulk of the rights and freedoms enshrined in the ECHR were incorporated into the Human Rights Act of 1998. Speculation on the possible future consequences of Brexit falls outside the scope of this study and will not fulfil an explicatory purpose as envisioned in this chapter.

Canada was also chosen for the purposes of this comparative analysis, as its Charter (Canadian Charter of Rights and Freedoms) is remarkably similar to South Africa's Bill of Rights.[1243] Canada's defamation law also originates from English common law. As in South Africa, Canadians have the right to freedom of expression. Part 1 of the Constitution Act 1982 contains the Canadian Charter of Rights and Freedoms. Section 2 of the Charter protects the rights to freedom of conscience and religion, freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, freedom of peaceful assembly and freedom of association. The value of dignity is crucial to the interpretation of the Canadian Charter,[1244] and the law of defamation in Canada serves to facilitate a balance between 'free expression and its effect on equality, dignity, and civility.'[1245]

As in South Africa and England, a defence was accepted under Canadian defamation law that centred on responsibility or reasonability on the part of the defendant. The Canadian defence is responsible communication on matters of public interest.[1246] This defence was extended to be available to non-media defendants.[1247]

The English law defence in Section 4 of the Defamation Act focusses on the public interest of publication (this is discussed in paragraph 5.4.2.7 below); the defence of responsible communication in Canada also requires that the defendant must have

1240 *Id.*
1241 *Id.*
1242 *Id.*
1243 LH Woolsey 'A Comparative Study of the South African Constitution' (2016) *AJIL* 27.
1244 JM Boland 'Is free speech compatible with human dignity, equality and democratic government: America, a free speech island in a sea of censorship?' (2013) *Drexel L. Rev.* 1-2.
1245 *Id.*
1246 *Id.*
1247 *Torstar* (2009) 61.

acted with diligence in trying to verify the allegations reported on (see paragraph 5.5.2.1.6 for a more detailed discussion).[1248] South Africa's law of defamation enquires about both the public interest and the defendant's reasonableness. Therefore, this study considers both these enquiries as featured in English and Canadian law respectively.

This chapter envisions guidance in answering whether it is still justifiable for South African defamation law to differentiate between media defendants and non-media defendants. The comparative analysis will also highlight both a public interest focussed reasonableness-inquiry as is used in England, and an inquiry that focusses on the reasonableness of the person defaming, which is used in Canada.

This dissertation notes that cases can be heard by judges and juries in England and Canada. England's Defamation Act of 2013 stipulates in Section 11 that trials are without juries unless the court directs otherwise. In Canada, judges decide on questions of law, whereas juries decide on questions of fact and then apply the law to the facts.[1249] Further elaboration on the civil procedure in either country or the intricacies of its jury systems fall outside the parameters of this study.

5.4. THE LAW OF DEFAMATION IN ENGLAND

The English law on defamation was expounded to cater for the unique challenges of the network society.[1250] These developments are discussed below

5.4.1. Background

The following statement was made by England's Court of Appeal in 2012. [1251]

> [A]s a consequence of modern technology and communications systems... stories will have the capacity to 'go viral' more widely and more quickly than ever before. Indeed, it is obvious that today, with the ready availability of the World Wide Web and of social networking sites,

1248 *Torstar* (2009) 61.
1249 *Torstar* (2009) paras 127-128.
1250 Scaife (2014) 85-87.
1251 *Cairns v Modi* [2012] EWCA Civ 1382 (hereafter *Modi*) 27.

> the scale of this problem has been immeasurably enhanced, especially for libel claimants who are already, for whatever reason, in the public eye.

Society's rapid digitisation happened in less than 20 years and broadened the scope of communications and the ways in which defamatory content can be conveyed.[1252]

In England, there is no written constitution.[1253] Freedom of expression in England exists in as far as it has not been statutorily, or by means of common law, limited.[1254] Article 10 of the ECHR protects freedom of expression,[1255] subject to the exercise of this freedom taking into account the protection of another's reputation.[1256] The inherent dignity of all human beings is also acknowledged in the ECHR, yet it is not a codified right.[1257]

England's Human Rights Act of 1998 aimed to incorporate this and other regulations into its body of laws. Section 3 placed courts under an obligation to interpret legislation in a manner compatible with Section 10 of the ECHR and courts should develop the common law to conform to Convention rights.[1258] This posed challenges to the country's defamation laws which comprise jurisprudence, The Defamation Act of 1953 and The Defamation Act of 1996.[1259] The EC Directive on electronic commerce (2000/31/EC) is provided for in the UK by the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013).[1260] Because of the challenges modern

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1252 Scaife (2014) 85-87.

1253 Harpwood (2005) *Modern Tort Law* 369.

1254 *Id.*

1255 Sec 10 of the ECHR states that:
"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

1256 *Id.*

1257 Protocol 13 of the ECHR.

1258 E Barendt 'Freedom of expression in the United Kingdom under the Human Rights Act, 1998' (2009) *Indiana Law Journal* 852.

1259 Scaife (2014) 86.

1260 *Id.*

technology posed and keeps posing through regular fast-paced development, the country's defamation law was no longer able to effectively regulate defamation.[1261]

The Defamation Act 2013 came into force in England and Wales on 1 January 2014. It has updated the law for the information age.[1262] One of the Act's purposes was to consider the challenge of balancing freedom of expression against the protection of reputation, as the internet had posed significant challenges when it came to policing the so-called 'Wild West' of the Internet, where users were able to create, publish and distribute defamatory content on a large scale.[1263]

This study will provide a short background to the English law of defamation and the amendments that the 2013 Act had introduced. Specifically, the focus will be placed on England's public interest defence,[1264] which replaced the *Reynolds* defence referred to earlier in this chapter. The courts' considerations in implementing the public interest defence will also be emphasised.

5.4.2. The tort of defamation in England

In England, the law of defamation falls under the law of tort.[1265] Tort law deals with civil wrongs.[1266] Private law distinguishes between property law and the law of obligations.[1267] The latter comprises tort, contract and restitution.[1268]

The law of tort protects interests, such as a person's interest in land and other property, one's interest in his or her bodily integrity, or one's interest in his or her reputation.[1269] The tort of defamation protects the latter.[1270] Defamation is one of a

1261 *Id.*
1262 *Id.*
1263 *Id.* Report: Joint Committee on the Draft Defamation Bill: HL Paper 203, HC 930-I, 19 October 2013.
1264 See S 4 of the Defamation Act of 2013.
1265 Harpwood (2005) 1.
1266 JCP Goldberg & BCZ Zipursky 'The strict liability in fault and the fault in strict liability' (2016) *Fordham L. Rev.* 744-757.
1267 A Dyson & J Goudkamp (2015) *Defences in Tort* 1.
1268 Harpwood (2005) 369.
1269 Dyson & Goudkamp (2015) 1.
1270 Harpwood (2005) 369. See also Goldberg & Zipursky (2016) 744-757.

few English torts that were described as 'strict liability' torts.[1271] Harpwood explains that defamation is a tort to which a degree of strictness does apply when liability is dealt with. The tort of defamation, Harpwood states, has 'a measure of strict liability.'[1272] The landmark defamation case of *Reynolds*, discussed later in this chapter, brought fault in the form of reasonableness into the English defamation law.[1273]

In English law, defamation can be defined as a statement that tends to lower the claimant in the estimation of right-thinking members of society in general.[1274] The claimant who institutes a defamation action must prove that publication occurred of a defamatory allegation which referred to the claimant.[1275] The untrue statement will not be defamatory if it merely causes anger or upset.[1276] For a statement to be defamatory, it has to contain material of untrue fact causing harm to the plaintiff,[1277] and must be considered defamatory in the esteem of 'right-thinking people.'[1278]

An innuendo[1279] would be sufficient to sustain a defamation claim if that defamatory statement referred to the claimant.[1280] A defendant would be liable for defaming a plaintiff, even where the defendant was not aware of who he was defaming. If *de facto* defamation had occurred, the defendant would be held liable regardless of his intention.[1281]. In *Newstead v London Express Ltd*,[1282] the court held that defamation resulting from a case of mistaken identity would still hold the defendant liable.[1283]

Under English law, defamation comes in one of two forms, either libel or slander.[1284] Slander is verbal defamation and libel is defamation in the written form.[1285] The

1271 Woolsey (2016) 98 192-193.
1272 Harpwood (2005) 369.
1273 *Id.*
1274 *Id.*
1275 *Id.* 376.
1276 *Berkoff v Burchill & Another* [1996] 4 All ER 1008.
1277 *Byrne v Deane* [1937] 1 KB 818.
1278 Deakin, Johnston & Markesinis (2012) *Tort Law* 636.
1279 *Tolley v Fry & Sons Ltd* [1931] AC 333.
1280 *Id.*
1281 *E Hulton & Co v Jones* [1910] AC 20.
1282 *Newstead v London Express Ltd* [1940] 1 KB 377.
1283 *Id.*
1284 Collins (2014) *Collins on Defamation* vii.
1285 *Id.*

plaintiff in a libel case does not have to provide proof of damages suffered to establish that libel had occurred.[1286] Claimants who seek to claim based on slander must provide proof of damages suffered, but exceptions apply, such as when it was stated that the claimant was a convict, has a disease or is unfit for his profession.[1287] In relation to statements made on the Internet, it is generally accepted that defamatory statements online are to be regarded as libel.[1288] Throughout this study, the focus was placed on libel in its written form. Therefore, the focus will remain on libel and not on slander.

5.4.2.1. Defences

There are various defences available to defendants accused of defaming. With the exception of the public interest defence which relates to this dissertation's research question, defences are not expounded on in detail, nor are scholarly comments on or judicial interpretation of these defences discussed.

5.4.2.2. Truth

Section 2 of England's Defamation Act of 2013 reads as follows:

> (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
> (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
> (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
> (4) The common law defence of justification is abolished and, accordingly, Section 5 of the Defamation Act 1952 (justification) is repealed.

1286 *Id.*

1287 Collins (2014) *Collins on Defamation* vii.

1288 Scaife (2014) 59-60. It is noted that the court in *Nigel Smith v ADVFN plc & Others* [2008] EWHC 1797 (QB) (hereafter *Nigel Smith*) classified 'chat' on an internet bulletin board as more similar to slander than libel. Since then, the court in *Jacqueline Thompson v Mark James, Carmarthenshire County Council* [2013] EWHC 515 (QB), 2013 WL 617648 270 stated that the *Nigel Smith* ruling could be important in determining context within which a defamatory statement was made and that this context could assist in classifying the defamation as either libel or slander.

This defence had replaced the common law defence of justification with a statutory defence of truth.[1289]

5.4.2.3. Honest opinion

Section 3 states that:

> (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
> (2) The first condition is that the statement complained of was a statement of opinion.
> (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
> (4) The third condition is that an honest person could have held the opinion on the basis of–
> (a) any fact which existed at the time the statement complained of was published,
> (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
> (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

The common law defence of fair comment was the predecessor for this new statutory defence in terms of the Defamation Act of 2013. This defence protected a publication if it was of an objectively fair opinion without malice.[1290] The opinion would have had to be on a matter of public interest and based on facts that were either true or protected by privilege.[1291]

The new statutory defence does not cover the latter.[1292] The new defence can be applied to opinion statements on any subject which includes private matters.[1293]

1289 U Smartt (2011) *Media & Entertainment Law* 121; JR Johnson 'Comparative Defamation law: England and the United States' (2017) *U Miami Int'l Comp L* 27.

1290 Collins (2014) 12.

1291 *Id.*

1292 *Id.*

1293 *Id.*

Where an opinion is based on fact, the defendant previously had to prove that the fact upon which the opinion rested was true.[1294]

To benefit from the new statutory defence, a publication must meet three requirements.[1295] In the first place, the statement must be an opinion.[1296] This is determined according to the common law measure of the reasonable person's perspective.[1297] Secondly, it is also required that a statement indicated the factual basis thereof.[1298] Thirdly, the opinion must be one that could have been held by an honest person based on any fact existing at the time of publication.[1299]

5.4.2.4. Privilege

The common law defence of privilege defence protects individuals in certain roles from being liable for defamation in two forms: absolute privilege and qualified privilege.[1300] The former is enjoyed by, for example, members of parliament or of the judiciary.[1301] The latter privilege applies to situations where an individual is morally or statutorily obliged to make information known.[1302] Statements made maliciously will not be protected under the privilege defence.[1303]

The Defamation Act of 2013 did not affect the common law defence of absolute privilege. It did, however, abolish a previously accepted construction of qualified privilege known as the *Reynolds* defence. This defence was developed to permit journalists to report stories in the public interest if their reportage was the product of responsible journalism.[1304] The *Reynolds* case is discussed in more detail below.

1294 *Id.*
1295 Mullins & Scott (2014) 92.
1296 Collins (2014) 12.
1297 *Id.*
1298 *Id.*
1299 *Id.*
1300 *Id.* 6.
1301 *Id.* 6-10.
1302 *Id.*
1303 *Id.*
1304 Hanna & Dodd (2009) 278.

The defence of privilege is contained in Section 7 of the Act. Section 6 extended the scope of the common law defence to include a defence for the publication of peer reviewed statements, including assessments of the merits thereof in scientific or academic journals.[1305]

5.4.2.5. Website operators defence

Website operators can defend themselves from defamation claims by indicating that they did not make the statement complained of and that the statement was, in fact, made by a user.[1306] This defence will not apply if the original author of the statement cannot be identified.[1307]

5.4.2.6. Public interest

With regard to matters which include public interest, Section 4 states that:

> (1) It is a defence to an action for defamation for the defendant to show that–
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest, and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

This statutory version of what was previously known as the *Reynolds* defence does not include the requirement that the plaintiff should prove that the defamatory

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1305 Smartt (2011) 134.

1306 S 5 of the Defamation Act of 2013 regulates how website operators should handle defamatory content and states the following:
"(1) This Section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
(3) The defence is defeated if the claimant shows that–
(a) it was not possible for the claimant to identify the person who posted the statement,
(b) the claimant gave the operator a notice of complaint in relation to the statement, and
(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations."

1307 *Id.*

publication complained of was responsible.[1308] The publisher must now prove that he or she reasonably believed that publication was in the public interest. The publisher must also demonstrate that the statement was or formed part of a statement on a matter of public interest.[1309]

Prior to the Defamation Act having transformed this defence, the court in *Reynolds v Times Newspapers*[1310] listed factors which served as a guideline to indicate whether a statement was made in the public interest. These factors were: seriousness of the allegation, the subject-matter, source, verification, status, urgency and comment from the claimant, balance, tone and circumstances.[1311] The transformation of the public interest devence is expounded on below.

5.4.2.7. Development of the public interest defence in England

Prior to the enactment of the Defamation Act of 2013, the defence of 'qualified privilege' sought to protect those who published false defamatory allegations who argued that they had the right to do so. This defence originated from the *Reynolds*[1312] case and was called the *Reynolds* defence.

5.4.2.7.1. *Reynolds v Times Newspapers*

The *Reynolds* defence could be raised where it was clear that a journalist had a duty to publish an allegation even if it turned out to be untrue.[1313] Prior to this judgment, all defendants had to prove a defamatory statement true to evade liability.[1314] The *Reynolds* case is a landmark defamation case because it brought fault into the law in the form of reasonableness for media defendants.[1315]

1308 Mullins & Scott (2014) 92.
1309 *Id.*
1310 *Reynolds HC* (2001) 192.
1311 *Id.*
1312 *Id.*
1313 *Id.* paras 83, 128, 178 and 181.
1314 Johnson (2017) 23.
1315 Young (2018).

The claimant was Albert Reynolds, who was the prime minister of Ireland until a political crisis in 1994.[1316] The defendant was Times Newspapers Limited, publishers of *The Times*. *The Times* did not feature the explanation Reynolds offered for a set of circumstances that had implicated him when reporting on these circumstances.[1317]

The defendant requested the court to consider the defence of qualified privilege, which had been denied in the court of Appeal.[1318] The House of Lords then had to determine whether the qualified privilege defence could be extended to cater for media defendants.[1319]

In the House of Lords, the defence of qualified privilege was approached in a unique way.[1320] The court confirmed that the media held no special duty to publish the contents complained of.[1321] The court explained that, in the absence of such a duty, the media would be limited to the defence of justification.[1322]

In order to determine whether the scenario at hand constituted a form of qualified privilege (which was not demarcated or named by the court),[1323] the court utilised a three part test. Firstly a 'legal, moral or social duty to publish' was required for privilege to exist, also referred to as the duty test.[1324] Secondly, the recipients were required to have an interest in receiving the publication (interest test).[1325] The court in *Reynolds* considered the democratic necessity of the free flow of information and public discussion of matters in the public interest and held that the media had the duty to inform the public on matters of public interest.[1326] Thirdly, the publication

1316 *Reynolds HC* (2001) paras 1-3.
1317 *Id.* paras 3-6.
1318 *Id.*
1319 *Id.* para 58.
1320 Young (2018).
1321 *Id.* See also *Braddock v Bevins* 1948 1 KB 580 (CA); J Bosland 'Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales' (2011) *Oxf J Leg Stud.*
1322 Young (2018).
1323 *Id.*
1324 *Id.*
1325 *Id.*
1326 *Reynolds HC* (2001) paras 16, 41-43.

must have been in the public interest the publisher must have acted reasonably in publishing.[1327]

The court cited a list of ten criteria according to which it should be determined whether the defendant qualifies to make use of the qualified privilege defence.[1328] These were: the seriousness of the allegation, the nature of the information, the public interest in the subject-matter, the source of the information, steps taken to verify the information, the status of the information, the urgency of the matter, whether comment was sought from the plaintiff, the tone of the article and the circumstances surrounding publication. The court stated that this was not an exhaustive list.[1329]

5.4.2.7.2. Developments following the *Reynolds* decision

The importance of the *Reynolds* decision was widely recognised.[1330] It allowed journalists to publish on matters of public interest without having to prove the truth of their publications.[1331] Instead, journalists had to prove that they were diligent in reporting. *Reynolds* constituted a fault-based defence.[1332]

5.4.2.7.2. (i) Jurisprudence preceding the Defamation Act of 2013

Courts in cases like *Abdul Latif Jameel Company Limited v The Wall Street Journal Europe,*[1333] *Galloway MP v Telegraph Group Limited* [1334] and *Flood v Times*

1327 *Id.* para 133.

1328 *Reynolds HC* (2001) paras 58 83 128 178 181.

1329 *Id.*

1330 Young (2018).

1331 *Id.*

1332 *Id.*

1333 *Abdul Latif Jameel Company Limited v The Wall Street Journal Europe* SPRL [2004] EWHC 37 (QB) (hereafter '*Jameel QB*').

1334 *Galloway MP v Telegraph Group Limited* [2004] EWHC 2786 (QB) as discussed in Young (n 1129 above). In the *Galloway* case, the Daily Telegraph had published articles about a member of parliament. The series of articles accused him of being paid by Saddam Hussein's regime and of taking cuts from the Oil for Food program. The sources were documents from the Iraqi embassy that became available after the fall of Baghdad. The contents were previously published in another print publication. The court implemented the *Reynolds* criteria and found that the source was not reliable and that attempts were not made to verify the contents. The court stated that the matter was not urgent as it would have been of interest at any time. The court criticised the defendants for not

Newspapers[1335] tended to apply the second phase of the Reynolds test restrictively.[1336] In the *Jameel* case, a story in the *Wall Street Journal Europe* alleged that the claimant's bank account was being moderated by the Saudi Arabian central bank as per request from the United States government, following allegations of possible terrorism funding. The *Wall Street Journal* interviewed several sources and tried to get comments from the plaintiff.[1337]

The court asked whether it was in the public interest for the publication to identify the plaintiff as a company that was under investigation at the time it had done so.[1338] The court found that it was not and that no urgency necessitated publication. The sources used were considered unreliable by the court after the jury found that the sources did not confirm the allegations made in the article. Qualified privilege was found not to apply.[1339]

Two issues were placed on appeal to the House of Lords.[1340] Issues on appeal were whether the *Reynolds* privilege should have been applied to the scenario, and whether profit earning companies were required to prove special damages to succeed in defamation claims. The House of Lords criticised the court *a quo* for its narrow interpretation of the *Reynolds* criteria, stating that it should serve as pointers and guidelines, rather than hard and fast 'series of hurdles' the defendant must

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holding the allegations to Galloway prior to publishing and the tone of the reportage, concluding that the defendant did not qualify to rely on the *Reynolds* defence.

1335 Another example of a court having applied the *Reynolds* defence narrowly was *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804, according to the court in *Flood v Times Newspapers Limited* (SC) 2012 UKSC 11) and Young (2018). In the *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804 case, the Times published a story about a police officer who was being investigated for allegedly receiving bribery from an anonymous informant. Police investigations revealed nothing, but the publication did not amend or remove their online reportage. The trial judge found that the *Reynolds* defence protected the print publication, but the court of Appeal came to a different conclusion which was then challenged in the Supreme Court (see *Flood v Times Newspapers Limited* (SC) 2012 UKSC 11). In the highest court, it was pointed out that the *Reynolds* defence is considered contextually as at the time of publication. At the time, the journalists had grounds to believe that the claimant had been guilty and the fact that his innocence later transpired, did not deduct from the public interest justifying publication at the time.

1336 Young (2018).

1337 *Jameel QB* (2003) 37.

1338 *Id.* para 40.

1339 *Id.*

1340 *Jameel & Another v Wall Street Journal Europe* (No.2) (HL) [2006] UKHL 44 (hereafter *Jameel HL*).

negotiate to benefit from the defence.[1341] The court indicated that the Reynolds defence was a speech-friendly defence and should not be interpreted too narrowly.[1342]

According to Young, the House of Lords laid the groundwork for future extensions of the *Reynolds* defence in England and abroad by acknowledging that such a defence should be made available to non-media defendants.[1343] The statutory replacement of the *Reynolds* defence appears below. It applies to non-media defendants as well.

5.4.2.7.2. (ii) Section 4 of the Defamation Act of 2013

Section 4 of the Defamation Act of 2013 introduced the defence of responsible publication on a matter of public interest.[1344] Section 4[1345] requires the defendant to prove that he 'reasonably believed that publishing the statement complained of was in the public interest.'[1346]

This provision is different from the common law defence it replaces. The word 'responsible' does not appear in the statutory defence.[1347] According to Young, the question of objective reasonableness was absorbed by a question asking whether the publisher subjectively thought it was reasonable to publish.[1348] Although the statutory defence is different from the *Reynolds* defence, paragraph 29 of the Explanatory Notes on Section 4 of the Act states:

1341 *Id.* para 33.

1342 Young (2018).

1343 Young (2018).

1344 The Defamation Act of 2013 sec 4.

1345 The section states:
"(1) It is a defence to an action for defamation for the defendant to show that–
(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
(2) Subject to Subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in Subsection (1), the court must have regard to all the circumstances of the case.…(6) The common law defence known as the *Reynolds* defence is abolished."

1346 *Id.*

1347 Young (2018).

1348 *Id.*

> "This section creates a new defence to an action for defamation of publication on a matter of public interest. It is based on the existing common law defence established in *Reynolds v Times Newspapers* and is intended to reflect the principles established in that case and in subsequent case law."

This study briefly refers to jurisprudence where the guidance from the principles in *Reynolds* were considered during the interpretation of Section 4.

5.4.2.7.2. (iii) *Economou v de Freitas*

The defence of publication on a matter of public interest was used in *Economou v de Freitas* (*Economou* case). Some facts of this case will now be emphasised.

Eleanor de Freitas and Alexander Economou had been in a relationship.[1349] De Freitas accused Economou of rape in 2013; he was arrested but not charged.[1350] He instituted private prosecution against de Freitas for perverting the course of justice and alleged that the Crown Prosecution Service continued the perversion. De Freitas committed suicide in 2014, days before the trial.[1351]

Her father, David de Freitas, was the defendant in the 2016 case.[1352] He wanted the inquest into her death to include the role of the Crown Prosecution Service (CPS) and stated the same in media interviews.[1353] Economou accused de Freitas of accusing him of falsely prosecuting de Freitas and having raped her, which he held was defamation in the form of libel.[1354]

The court determined that the publications referring to Economou had defamatory meaning and that it had caused serious harm to his reputation.[1355] De Freitas relied on the defence in Section 4 of the Defamation Act of 2013. The court found that

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1349 *Economou v de Freitas* 2016 EWHC [1853] (QB) para 1-7 (hereafter '*Economou*').
1350 *Id.*
1351 *Id.*
1352 *Id.*
1353 *Id.*
1354 *Id.*
1355 *Id.*

there was a strong public interest in the question he had raised regarding the CPS's actions and allowed de Freitas to rely on the defence.[1356] The court considered the balance between the right to freedom of expression and dignity and found that a judgment in favour of Economou would have unreasonably infringed de Freitas's right to freedom of speech.

When faced with whether the *Reynolds v Times Newspapers* checklist should assist a court in determining whether publication in the public interest was reasonable for the purposes of Section 4, the court in *Economou v de Freitas* did not provide a clear outcome except for acknowledging that the *Reynolds* defence was partially carried through to Section 4.[1357]

The court did, however, stress that Section 4 was flexible and adaptable, depending on the circumstances of cases. In as far as journalism is concerned, the court referred to the allowance for editorial judgment prescribed in Section 4(4).[1358] The court expounded on the meaning of reasonableness for the purposes of Section 4:

> "I would consider a belief to be reasonable for the purposes of Section 4 only if it is one arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case. Among the circumstances relevant to the question of what enquiries and checks are needed, the subject-matter needs consideration, as do the particular words used, the range of meanings the defendant ought reasonably to have considered they might convey, and the particular role of the defendant in question." [1359]

After the *Economou* case, the court in *Barron MP & Another v Vines*[1360] shortly acknowledged that the Act's explanatory notes suggest that Section 4 was intended to reflect the principles of the *Reynolds* defence, but indicated that there is room for argument about its exact scope and application.[1361]

1356 *Id.* 61.

1357 *Economou* (2016) para 37.

1358 *Id.*

1359 *Id.* para 241.

1360 *Barron MP & Anor v Vines* (Rev 1) [2015] EWHC 1161 (QB) (hereafter '*Barron*').

1361 *Economou* (2016) para 64.

In the same year, the court in *Yeo v Times Newspapers Ltd* (*Yeo*) indicated that the approach to the new statutory 'public interest defence' would likely follow the *Reynolds* approach.[1362] The court also referred to the explanatory notes to the Defamation Act that indicated that the new defence was a mere codification of the common law.[1363]

The court in *Yeo* confirmed that the statutory defence of 'public interest,' interpreted in light of the *Reynolds* defence, provided adequate guidelines for determining whether the publication of a defamatory statement would be protected.[1364] Such an inquiry will focus on whether the publication was in public interest and whether he who published had acted responsibly.[1365] The court indicated that the flexibility of Section 4 and the *Reynolds* defence guidelines provides for a just application of the law in the cases of both journalist defendants and non-journalist defendants.[1366]

5.4.3. Comments

Bernal considered Section 4 and the availability of its defence to both media and non-media defendants. Taken into consideration the nature of the 'new media' and the fact that communication has transformed, Bernal suggested that a defence for social media should be derived from the *Reynolds* defence and Section 4.[1367] The essence of this defence, Bernal suggested, would be that responsible tweeting should be protected, whereas irresponsible tweeting should render the author liable for defamation.[1368] According to Bernal, the *Reynolds* defence can be a defence of responsible tweeting.[1369]

Young agrees and states that the *Reynolds* defence has laid the groundwork for similar defences, such as the defence of responsible blogging, responsible

1362 *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 (QB) paras 140 148 (hereafter '*Yeo*').
1363 *Id.*
1364 *Yeo* (2015) paras 140, 163 and 170.
1365 *Id.*
1366 *Id.* para 140.
1367 *Id.*
1368 *Id.*
1369 P Bernal 'A defence of Responsible Tweeting' (2014) *Communications Law* 19.

Facebooking and even responsible investigative journalism.[1370] Investigating the novelty of such defences falls outside the parameters of this study. These scholarly suggestions indicate that the defamation law in England is able to cater for defamation scenarios originating from the network society where all residents are equally able to publish and distribute information on a large scale.

[1370] Young (2018).

5.5 DEFAMATION LAW IN CANADA

As in England, the law of defamation in Canada was developed to accommodate the characteristics of the network society. A discussion of the developments in Canadian defamation law follows.

5.5.1. Background

Canada, a former British colony, inherited British common law.[1371] Defamation is an unusual common law tort in Canada.[1372] It was traditionally considered a 'strict liability' tort, which means that the defendant will be liable for unlawful defamation regardless of whether it was intentional or negligent.[1373]

In 1982, the Canadian Charter of Rights and Freedoms was adopted and took full effect in 1985.[1374] In terms of Section 2 of the Charter, all persons have the following fundamental freedoms:

> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

In *Hill v. Church of Scientology of Toronto* (*Church of Scientology of Toronto*),[1375] it was established that, if a court finds that an element of the common law is inconsistent with Charter values, it would necessitate the court's reformation of the common law by judicial decree.[1376]

1371 RJ Daniels, MJ Trebilsock & LD Carson 'The legacy of empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies' (2011) *Am. J. Comp. Law*.

1372 L Duhaime 'Canadian Defamation Law' 20 October 2006 and updated on 25 February 2018 www.duhaime.org (accessed on 27 October 2018).

1373 *Id.*

1374 *Canadian Charter of Rights and Freedoms,* s 15, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, (QL).

1375 *Hill v Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 (hereafter '*Church of Scientology of Toronto'*).

1376 *Id*.

As with the law of defamation in England, Canada's law of defamation required expansion to accommodate the network society, where publication and distribution of information can easily be affected by non-media members.[1377]

The Canadian law of defamation was further expanded by Canadian courts[1378] for it to strike a balance between the individual's reputational interest and the freedom of expression, whilst not establishing a 'hierarchy' of rights.[1379] Canada's defamation law as it applies to all its jurisdictions except Quebec will now be discussed.

5.5.2. The tort of defamation in Canada

In Canada, a defamatory statement is defined as one with a tendency to injure the reputation of the person to whom it refers; the defamatory statement tends to lower his reputation in the estimation of right-thinking members of society.[1380]

As in England, Canadian courts distinguish between libel and slander.[1381] Libel is written defamation, whereas slander is spoken.[1382]

A plaintiff who proves that he was defamed may recover general and special damages for his loss of reputation.[1383] A plaintiff who sues for slander generally has to prove that he suffered damages, but exceptions exist, for example: when the defamed is accused of committing a crime by someone who is not a member of the police,[1384] accused of having a contagious disease, making negative remarks about the plaintiff in his professional capacity or accuses the plaintiff of adultery.[1385] As this study focusses on defamation in the written form, a more elaborate discussion of slander falls outside the scope of this study.

1377 *Torstar* (2009) para 19.

1378 See *WIC Radio v Simpson* [2008] 2 S.C.R. 420 (hereafter *WIC Radio*) para 2; *Torstar* (2009) 61.

1379 *Id*.

1380 J Blois 'Defamation: Libel and Slander' February 2018 www.cbabc.org (accessed on 10 September 2018.)

1381 *Id*.

1382 *Id*.

1383 *Id*.

1384 *Id*.

1385 *Id*.

A plaintiff in a defamation action must prove that the words (libel) complained of were defamatory,[1386] that it referred to the plaintiff and that publication occurred.[1387] Once the plaintiff has proven this, *prima facie* liability for defamation is established.[1388] The onus to raise an available defence then moves to the plaintiff.[1389]

Once defamation is determined to be present, intent is presumed on the part of the defendant,[1390] as is the defendant's liability for general damages.[1391] The defendant, therefore, bears the onus of establishing a common law prescribed defence. These defences are truth (known as justification), absolute privilege, qualified privilege, fair comment, innocent dissemination and responsible communication on matters of public interest.[1392]

5.5.2.1. Defences to a defamation claim in Canada

5.5.2.1.1. Truth

Truth (also referred to as 'justification') is a complete defence to a defamation claim.[1393] The defendant carries the burden of disproving the presumption that the statement complained of is untrue.[1394] This is achieved by means of providing evidence indicating that the statement is more likely true than untrue.[1395]

1386 *Torstar* (2009) para 28.
1387 *Id.*
1388 *Id.*
1389 *Id.*
1390 *Id*.
1391 *Id.*
1392 *Id.* para 28-37.
1393 CA Bayer (2001) 'Re-thinking the common law of defamation: striking a new balance between Freedom of Expression and the protection of an individual's reputation' LLM Thesis (unpublished), University of British Columbia 46.
1394 Blois (2018).
1395 Bayer (2001) 46.

5.5.2.1.2. Absolute privilege

The defence of absolute privilege allows people to make defamatory and false statements in certain systems, such as the judicial and quasi-judicial systems.[1396] Absolute privilege applies to statements made in criminal, civil, quasi-judicial and judicial proceedings and in parliament.[1397]

5.5.2.1.3. Qualified privilege

This defence may be utilised by a person who makes a defamatory statement about another person whilst performing a private or public duty.[1398] The statement, to receive protection, must be made to someone or people with an interest in receiving it that corresponds with the maker of the statement's duty.[1399] This duty can be a legal, social or moral one.[1400] To determine whether such a duty was present, courts ask whether a person of ordinary intelligence would determine that the duty to communicate the statement to those on the receiving side existed.[1401]

5.5.2.1.4. Fair comment

Fair comment will not render the person who makes it liable if it is about an issue of public interest, expressed as opinion and not fact,[1402] and would be judged accordingly in the eyes of an ordinary person.[1403] The opinion must be based on facts the defendant can prove, whilst those facts are either known to readers or

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1396 RE Brown (1994) *The law of Defamation in Canada* 1-17. See also *Deschant v Stevens et al* 2001 ABCA 39 paras 19-62.

1397 *Id.*

1398 Dearden & Wagner (2009-2010) 355.

1399 *Teskey v Toronto Transit Commission* 2003 OJ 5314 para 16 (hereafter '*Teskey*').

1400 *Id*.

1401 *Id.*

1402 *Radio2UE Sydney v Parker* (1992) 29 NSWLR 448.

1403 *Clarke v Norton* 1910 [VLR] 500. See also *Kemsley v Foot* [1952] AC 357.

otherwise stated.[1404] The comment must not be made maliciously.[1405]

5.5.2.1.5. Innocent dissemination

Generally, Canadian law considers a person who partakes in publishing a defamatory statement responsible.[1406] A person who merely distributes such information can evade liability by proving that they did not know that they were in fact distributing defamatory content; and that their lack of knowledge was not a result of their own negligence.[1407] He who seeks to utilise this defence must also prove that he put a stop to the distribution as soon as he became aware that the statement was defamatory.[1408]

5.5.2.1.6. Responsible communication on matters of public interest

This defence was established by the Supreme Court of Canada in 2009.[1409] It was found that defamation would not lead to liability where a journalist published information that was of public importance, serious and urgent, and where the journalist used reliable sources and tried to report on both sides of the story.[1410]

5.5.2.1.7. Development of the 'responsible communication on a matter of public interest' defence in Canada

5.5.2.1.7 (i) *Grant v Torstar*

The defendant was the Torstar Corporation, publisher of the Canadian newspaper *Toronto Star*.[1411] Peter Grant, the plaintiff, was a Canadian businessman.[1412] The *Toronto Star* published a report containing residents' comments on a proposed golf

1404 Dinden, AM (2015) *Canadian Tort Law* 676-716.
1405 *Id.*
1406 *Crookes v. Newton* 211 SCC 46 [2011] 3 S.C.R. 269 (hereafter '*Newton*') para 61.
1407 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* [2004] 2 S.C.R. 427 (Hereafter '*SOCAN*') para. 89.
1408 *Id.*
1409 *Torstar* (2009) para 19.
1410 *Id.* para 126.
1411 *Id.* para 4-17.
1412 *Id.*

course development on one of Grant's properties.[1413] These comments stated that Grant had allegedly used his political connections to obtain permission for the development.[1414] the *Star* gave Grant the opportunity to comment on the allegations, but he chose not to do so.[1415]

In the court *a quo*, the *Toronto Star* was not permitted to use the defence of 'responsible journalism' and Grant was awarded damages.[1416] Torstar appealed, after which Grant appealed to the Supreme Court.[1417]

The Supreme Court considered the balance of interests effected by the law of defamation, the balance being between the right to freedom of expression and the protection offered to reputation.[1418] The tort of defamation, the court acknowledged, limits this right.[1419] The court stated that this limitation should not amount to 'chilling' the expression of those who hold that right.[1420]

For a defendant's communication to be responsible, the court held that the publication complained of must have related to a matter of public interest and that the publication must have been responsible 'in that he or she was diligent in trying to verify the allegation(s), having regard to all the circumstances.'[1421] 'Relevant circumstances,' the court stated, would include: the seriousness of the allegation, the public importance of the matter, the urgency of the matter, the status and reliability of their source, whether the plaintiff's side of the story was sought and accurately reported, whether the inclusion of the defamatory statement was justifiable, and whether the defamatory statement's public interest lay "in the fact that it was made rather than its truth."[1422]

1413 *Id.*
1414 *Id.*
1415 *Id.*
1416 *Torstar* (2009) para 18-25
1417 *Id.*
1418 *Id.* para 2-3.
1419 *Id.*
1420 *Id.*
1421 *Id.* para 62.
1422 *Id.*

The court found that this defence could be applied by all defamation defendants and not just the media.[1423] The Supreme Court confirmed that the new defence would be 'available to anyone who publishes material of public interest in any medium.'[1424] It extends to bloggers and other online media, even though such internet-based communications are potentially much broader, more permanent, and may be more harmful than traditional print media.[1425] The court also defined 'public interest:' [1426]

> "Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a 'public figure', as in the American jurisprudence since *Sullivan.* Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence."[1427]

5.5.2.1.7. (ii) *Crookes v Newton*

In the subsequent case of *Crookes v Newton*[1428] (*Newton*), the court referred to the post-Charter development in *Grant v Torstar*. The court in *Newton* remarked that the *Torstar* case recognised the importance of achieving a proper balance between protecting an individual's reputation and the foundational role of freedom of expression in the development of democratic institutions and values.[1429]

The court in *Newton* was burdened with determining whether the act of hyperlinking online qualified as 'publication' for the purposes of defamation.[1430] The court found that a hyperlink by itself would not constitute publication of the contents to which it refers and that it was merely a reference. When he who hyperlinks presents contents from the material hyperlinked to in a way that repeats the defamatory content, the

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1423 *Id.* para 73, para 96.
1424 *Id.*
1425 *Torstar* (2009) para 99-109.
1426 *Id*.
1427 *Id.* para 106.
1428 *Newton* (2011) para 61.
1429 M Drucker 'Canadian v American defamation law: What can we learn from hyperlinks?' (2013) *CANUSLJ* 156-159.
1430 *Newton* (2011) paras 3-8.

court held that the hyperlinker's action would constitute publication.[1431]

5.6. Comments

The defence of responsible communication on a matter of public interest is twofold. In addition to the defendant having to indicate that the publication was on a matter of public interest, this defence also enquires whether the defendant acted responsibly. The defendant must prove to the jury that he had acted fairly and responsibly; that he had met a standard of responsible journalism. This standard is confirmed by, and responsive to, Charter values. If this is done, negligence on the part of the defendant is disproved.[1432]

Canadian procedure entails that the judge decides on questions of law, whereas the jury decides on questions of fact and then applies the law to the facts.[1433] In the case of deciding on reasonable communication on a matter of public interest, the judge decides whether the matter reported on is in the public interest. If so, the jury decides whether the defendant's act of publication was responsible, giving consideration to the facts of the case.[1434]

When doing so, the jury must assess the responsibility of the communication 'in light of the range of meanings the words are reasonably capable of bearing, including evidence as to the defendant's intended meaning.'[1435]

The final chapter of this dissertation reaches a conclusion in answer to the research question and considers the insights from this comparative study in a South African context.

1431 *Id.*

1432 J Cameron 'Does Section 2(b) really make a difference? Part 1: Freedom of Expression, Defamation Law and the Journalist-Source Privilege' (2010) *The Supreme Court Law Review: Osgoode's Annual Constitutional Law Conference* 151.

1433 *Torstar* (2009) paras 127-128.

1434 *Id.*

1435 *Id.* para 130.

CHAPTER 6: CONCLUSION

6.1. RESEARCH QUESTION REVISITED

This study set out to determine whether, in 2019's digital societal context, it is constitutionally justifiable to distinguish between media defendants and non-media defendants in defamation cases. After discussing the law of delict and the delict of defamation in Chapter 2, this study consulted jurisprudence to establish why South African courts differentiated between media defendants and non-media defendants.

Prior to the rise of the network society, only members of the media were able to disseminate content on a large scale.[1436] Print media institutions derived profit from the acts of printing and disseminating news.[1437] The media, as primary agents of the dissemination of information, were acknowledged as being 'extremely powerful'[1438] and bore the duty of acting responsibly whilst gathering and publishing information.[1439] As the gatekeepers of information in a pre-internet society,[1440] the way in which the media carried out its mandate to inform determined the ability of citizens to be effective members of society.[1441]

Chapter 4 emphasised the drastic changes brought about by the digitisation of society. It transpired that the digitisation of society removed the factors that once distinguished media defendants in defamation cases from non-media defendants.[1442] The technological tools and abilities of the network society allow individuals that are

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1436 *O'Malley* (1977) 640.

1437 *NM and Others v Smith* (2007) 260.

1438 *Khumalo* (2002) 401.

1439 *Hill* (1844), *Wilson* (1903), *Craig* (1963), *Hassen* (1965), *O'Malley* (1977), *Pakendor* (1982), *Bogoshi* (1998), and *Khumalo* (2002).

1440 Bock 'The role of the "Citizen Journalist" in Today's World is changing' 29 October 2018vhttps://news.utexas.edu//2016//10//10//role-of-the-citizen-journalist-is-changing (accessed on 30 April 2018.

1441 *Bogoshi* (1998) 1207-1210.

1442 Eloff 'SA defamation law: media defendants and Average Joe's belong on equal footing' 11 October 2018 https://lowvelder.co.za//454515//sa-defamation-law-media-defendants-average-joes-belong-equal-footing (accessed on 11 October 2018).

non-media members to receive and impart information on a large scale.[1443]

Print media institutions derive profit from the acts of printing and disseminating news.[1444] Likewise, regular persons derive an income from online mass publication and distribution of information.[1445]

When the media were society's primary agents of the dissemination of information, it was acknowledged as being 'extremely powerful'[1446] and bore the duty of acting responsibly whilst gathering and publishing information.[1447] Today, publication on a large scale is no longer exclusive to an educated, trained group of professionals with codes of conduct.[1448] Media and publishing companies in South Africa no longer employ only qualified journalists[1449] and are not obliged to adhere to a nationally enforced code of conduct.[1450] Traditional media publications no longer hold the credibility it once did.[1451] This dissertation does not seek to determine why the media has lost society's trust, but agrees with the view that both media defendants and non-media defendants should act responsibly in disemminating information, a view held by Bernal[1452] and Young.[1453]

1443 Young 'Reynolds V Times Newspapers' *Landmark Cases in Defamation book* (Forthcoming) 1 February 2018 https://ssrn.com//abstract=3128626. (accessed on 10 September 2018).

1444 *NM v Smith and Others* (2007) para 94, 181.

1445 Barker 'How to make money on social media (Even with fewer than 1000 followers)' 5 December 2017 https://www.forbes.com//sites//forbescoachescouncil//2017//12//05//how-to-make-money-on-social-media-even-with-fewer-than-1000-followers//#532656045549 (accessed on 4 May 2018).

1446 *Khumalo* (2002) 401.

1447 *Hill* (1844); *Wilson* (1903); *Craig* (1963); *Hassen* (1965); *O'Malley* (1977), *Pakendorf* (1982); *Bogoshi* (1998); *Khumalo* (2002).

1448 N Tolsi 'Journalism suffers crisis of quality and credibility' lecture delivered during the 15th Annual Ruth First Memorial Lecture at the University of the Witwatersrand on 18 October 2018.
Also see Young (2018).

1449 Confirmed during visits to the newsrooms of community publications *Lowvelder* (November 20, 2018)*, Polokwane Review* (4 May, 2018)*, Die Pos* (6 December, 2017), *Roodepoort Record* (17 November, 2017) and an interview with acting editor of *Letaba Herald,* Bertus du Bruyn (26 November, 2018).

1450 Members of the South African press, for example, may voluntarily elect to subscribe to the South African Code of Conduct for Print and Online Media. Independent Media, for example, ceased to subscribe to the code in 2016. See 'Independent Media Quits South Africa's Press Ombudsman' 21 October 2016 www.mybroadband.co.za (accessed on 27 October 2018).

1451 Young (2018), Tolsi (2018), Edelman (2017), Rittenberry (2018) and Edelman (2019).

1452 Bernal (2014) 19.

1453 Young (2018)

6.2. REVISITING THE DIFFERENTIATION BETWEEN MEDIA AND NON-MEDIA DEFENDANTS

The relationship between the media, citizens and the rights and duties in Section 16 of the Constitution has changed. At the time of the *Bogoshi* and *Holomisa* judgments, the right to freedom of expression was bestowed upon all South Africans in equal measure.[1454] The Constitutional protection of press freedom was motivated by the important contribution made by the press to a central goal of this freedom, which is establishing and maintaining a democratic, open society.[1455] The courts acknowledged this and protected the media's right to freedom of expression by introducing the reasonable publication defence.

Although the media's ability to make this contribution caused courts in defamation judgments preceding the arrival of social media to single the media out, it did not establish or endorse press exceptionalism.[1456] Press exceptionalism is the notion that media defendants or journalists have superior status in terms of the Constitution. The right to freedom of expression is valued as a guarantor of democracy, because it recognises that individuals in society need to be able to hear, form and express opinions and view freely on a wide range of matters.[1457] This applies to all South Africans equally, regardless of whether they are members of the media or not.[1458]

The reasonable publication defence is, however, exclusive to media defendants. The right to freedom of expression of the non-media defendant, when compared to that of the media defendant, is limited to a greater extent.[1459] With reference to the fault element of the delict of defamation, non-media defendants who prove that they did not intend to defame will evade liability based on their lack of fault.[1460] In the case of media defendants, this is not sufficient. Media members must also prove that they

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1454 Currie, De Waal & Law Society of South Africa (2013) 337-348.

1455 *Id.*

1456 *Holomisa (*1996) 498-499. See also A Lewis (1991) *Make No Law – The* Sullivan *Case and the First Amendment* 210. See also R Dworkin (1985) *A Matter of Principle* 386-387.

1457 *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) para 7, and Currie, De Waal & Law Society of South Africa (2013) 337-345.

1458 *Id.*

1459 *Bogoshi* (1998) 1196.

1460 *Id.*

had not been negligent in publishing to escape liability in defamation cases.[1461] Here, the media defendant's right to freedom of expression is limited more so than that of the non-media defendant.

6.3. REASONABLENESS AND RIGHTS LIMITATIONS

Although media defendants and non-media defendants have the same publishing and dissemination abilities and equal right to freedom of expression, South Africa's media law differentiates between the two types of defendants with the abovementioned rights limitations in paragraph 6.2 as a result.[1462]

When considering the constitutional justifiability of a Bill of Rights limitation by means of common law, South African courts assess the applicability of the basic human rights involved as per Section 8 of the Constitution. The limitation clause (Section 36) and interpretation clause (Section 39) are also used.[1463]

The rights to freedom of expression and human dignity both apply to the plaintiffs and defendants in defamation cases.[1464] In the event that the common law of defamation unjustifiably limits either right, it must be developed.[1465]

The court in *Khumalo* considered the position of media defendants and considered whether the law of media defamation facilitated the striking of an appropriate balance between the rights to freedom of expression and human dignity, which functions as both a right and a value.[1466] The court found that the defence of reasonable publication in the *Bogoshi* case struck a balance between the constitutional interests of plaintiffs and defendants.[1467] The negligence form of fault in defamation actions against the media was also found to achieve this balance.[1468]

1461 *Id.* 1214 B-I.

1462 *Bogoshi* (1998) 1214 B-I.

1463 These sections were also discussed in paragraph 3.4 below.

1464 *Khumalo* (2002) 401.

1465 See S 8(3) of the Constitution.

1466 *Khumalo* (2002) 423 H-424 A.

1467 *Id.* 425 B.

1468 *Khumalo* as discussed in Currie, De Waal & Law Society of South Africa (2013) 44-48 and 341-344.

In considering the law of defamation as it pertains to non-media defendants, this study asks whether the latter's inability to employ the reasonable publication defence unjustifiably limits their right to freedom of expression. The justification analysis is conducted by weighing up harm caused against benefits obtained.[1469] In other words, the existence and extent of a limitation must be justified by the purpose it serves constitutional South Africa guided by the values of openness, democracy, freedom and equality.

The inability of non-media defendants to employ the defence of reasonable publication effects press exceptionalism (an idea that was rejected by the South African Constitutional Court), which effects the media defendant's right to freedom of expression more so than the non-media defendant's, based on considerations that no longer apply in the network society.[1470] In paragraph 6.5 below, this dissertation finds that the harm done to non-media defendants can therefore not be justified by factors that no longer play a role.[1471]

In establishing negligence as a form of fault for media defendants, South African courts limited the right to freedom of expression in favour of the right to human dignity. This protected the right to human dignity of South Africans against those who are empowered to cause reputational damage on a large scale.[1472] Today, thousands of regular citizens have the same abilities.[1473] Extending the media defendant fault requirement to non-media defendants was suggested as an alternative to the law of defamation for non-media defendants, in that it was anticipated to better promote the values, spirit and purport of the constitution and affect a balance between the rights to freedom of expression and human dignity.[1474]

1469 *Id*.

1470 Eloff (2018).

1471 *Id.*

1472 *Khumalo* (2002) 417 A.

1473 Ornico.co.za 'The South African Social Media Landscape 2018'. Ornico website http://website.ornico.co.za//wp-content//uploads//2017//10//SML2018_Executive-Summary.pdf (accessed 20 November 2018).

1474 *Marais* (2002) 578.

6.4. GLOBAL PERSPECTIVES AND A SOUTH AFRICAN CONTEXT

In Chapter 4, the developments of the law of defamation in England and Canada were discussed. In both countries, the equivalents of South Africa's reasonableness defence were extended to apply to non-media defendants as well.[1475] The extensions were necessitated by the publishing and distributing abilities conferred upon non-media defendants by the digitisation of society.[1476]

Chapter 5[1477] indicates that England and Canada's defamation law caters for the Network Society, where all persons (media members and non-media members) are equally able to publish and distribute information on a large scale. Media members and non-media members are treated equally when liability for defamation is considered.[1478]

The focus of liability enquiries in English and Canadian defamation cases does not centre on whether the defendant is a media member or not.[1479] Rather, liability is incurred where the defendant had acted irresponsibly in publishing defamation, or when the defamation published is not in the public interest.[1480]

The global perspectives gained in Chapter 5 resonate with the views of Knobel,[1481] van der Walt and Midgley,[1482] and Neethling[1483] discussed in the paragraph below.[1484]

Knobel argues that the differentiation between media-defendants and non-media defendants should be done away with.[1485] This dissertation agrees.

1475 See *Grant v Torstar Corp* 2009 SCC 61; *Crookes v. Newton* [2011] 3 S.C.R. 269 and sec 4 of The Defamation Act of 2013.

1476 See *Torstar* (2009); *Newton* (2011). See also Bernal 'A defence of Responsible Tweeting' (2014) *Communications Law* 19 and Young (2018).

1477 See paragraphs 5.4.3 and 5.6 above as well as *Torstar* (2009); *Newton* (2011); *Reynolds* (2001) and S 4 of England's Defamation Acts, 2013.

1478 *Id.*

1479 *Id.*

1480 *Id.*

1481 Knobel (2002) 34.

1482 Van der Walt & Midgley (2016) *Principles of Delict* 154.

1483 Neethling (1999) 443. Also see Neethling (2007) 103-123.

1484 Also see the discussion in paragraph 3.6 above.

This dissertation also agrees with Van der Walt and Midgley's view that the defence of reasonable publication should be available to all defendants.[1486]

Regarding the fault element of the delict of defamation, this dissertation is in agreement with Neethling,[1487] who argues that mass publication of a defamatory statement by a member of the media raises the presumption of negligence rather than intent.[1488]

Lastly, this dissertation agrees with Knobel's approach[1489] to negligence as form of fault in defamation cases. He states that someone who is mistaken about the wrongfulness of his act cannot have intention, because intention requires subjective knowledge of wrongfulness.[1490] Where a reasonable person in the shoes of he who acts would have realised wrongfulness or even the possible wrongfulness of his act and where he who acts does not have that realisation, he acts with negligence and not intent.[1491] If a reasonable person in the shoes of he who acts could have foreseen and prevented damage, he who acted should have done the same. Where he who acts fails to foresee or prevent such damage, he is negligent.[1492]

6.5. CONCLUSION: PRATICAL APPLICATION OF DEFENCES IN A HYPOTHETICAL SCENARIO

To illustrate the effect the extension of the reasonableness publication defence and fault requirement of negligence towards all defamation defendants would have, this study revisits the hypothesis featured in Chapters 2 and 4.

1485 *Id.*
1486 Van der Walt & Midgley (2016) *Principles of Delict* 154.
1487 Neethling (1999) 443. Also see Neethling (2007) 103-123.
1488 *Id.*
1489 Knobel (2002) 34.
1490 Knobel (2002) 34.
1491 *Id.*
1492 *Id.*

Non-media defendant Steve Hofmeyr publishes to more than 400 000 people per day. Charles Cilliers is a reporter with *The Citizen* who publishes to 138 000 online readers and about 46 000 print readers per day.

6.5.1. Hypothetical scenario: wrongfulness

Hofmeyr and Cilliers are both provided copies of a private investigator's (PI) docket. The PI is investigating John Snow, a businessman who allegedly committed fraud. Both do a thorough job of investigating the private investigator's allegations. They meet the requirements of the *Bogoshi* defence of reasonable publication. If the law remains as it is and the availability of the reasonable publication defence is not extended to non-media defendants, Cilliers will be entitled to a defence that Hofmeyr will not be able to use to rebut the presumption of wrongfulness. Chapter 4 of this dissertation has illustrated that the factors that motivated differentiating between media defendants and non-media defendants in defamation cases are no longer as relevant or material as it once was. If the availability of the reasonable publication defence is not extended to non-media defendants, Hofmeyr's right to freedom of expression being limited more so than Cilliers's. If the reasonable publication is extended to non-media defendants, the current reality will be reflected in South African law and both defendants will be treated equally.

6.5.2. Hypothetical scenario: fault

Hofmeyr and Cilliers both publish defamatory allegations based on rumours from a single source. The source alleges that Coen Cash had stolen money. Neither Hofmeyr nor Cilliers corroborate the information and both are negligent in publishing the uncorroborated information as fact. In so doing, they affect reputational harm to the subject of their publications.

As a result, Coen Cash sues both Hofmeyr and Cilliers. If the law of media defamation is extended to include non-media defendants, both Cilliers and Hofmeyr will be considered to have been at fault, based on their negligence. If the law continues to differentiate between non-media and media defendants, Hofmeyr will evade liability by proving his lack of intention to defame, whereas Cilliers will be held

at fault.

Both Hofmeyr and Cilliers have exercised their rights to freedom of expression in ways that infringed on Coen Cash's right to dignity and caused extensive harm. What follows is a discussion of Charles Cilliers, Coen Cash and Steve Hofmeyr's positions under South Africa's current defamation law that differentiates between media defendants and non-media defendants.

6.5.3. Comments on hypothetical scenarios

In dealing with the wrongfulness element, Steve Hofmeyr's right to freedom of expression enjoys less protection than Charles Cilliers' right to freedom of expression. In other words, the law of defamation as it pertains to the wrongfulness element limits Coen Cash's right to dignity to a greater exntent where the defendant is a media defendant (Charles Cilliers) than where the defendant is a non-media defendant (Steve Hofmeyr).

The law of defamation as it pertains to the fault element limits Charles Cilliers' right to freedom of expression more than that of Steve Hofmeyr. When Steve Hofmeyr is the defendant, Coen Cash's right to human dignity is thus limited to a greater extent than when Charles Cilliers is the defendant.

6.6. Conclusion: reasearch question answered

This dissertation had set out to determine whether the above rights limitations are justifiable in a digital South Africa with the Constitution as it's *lex fundamentalis*.

In order for the above rights limitations to be justifiable, it must adhere to Section 36 of the Constitution. As was explained in paragraphs 1.2.3 and 3.5.1.5, rights in the Bill of Rights may be limited in terms of law of general application to the extent that is reasonable and justifiable in an open and democratic society based on human

dignity, equality and freedom. Factors relevant to this reasonableness consideration include the relation between the limitation and its purpose.[1493]

The purpose of distinguishing between media defendants and non-media defendants was discussed in chapter 3. The differentiation sought to protect South Africans against the traditional media's inherent high risk of defaming others.[1494] Because if the media's extensive publishing abilities, a high risk for dignity violations existed and media defendants were expected not to behave negligently.[1495]

Chapter 4 has illustrated that non-media defendants have publication abilities that are equal to that of media defendants. Media defendants and non-media defendants now bear the same risk of prejudicing the dignity of others.

The inconsistent right limitations applicable to media defendants and non-media defendants do not serve the purpose it had served prior to the digitisation of South African society. Accordingly, this dissertation finds that South Africa's media law is unfair in that it differentiates between media defendants and non-media defendants. The effects of doing so cannot be justified in terms of Section 36 of the Constitution.

This dissertation concludes that South Africa's defamation law requires the extension of the reasonable publication defence and negligence requirement as form of fault to all defendants. This will render the South African defamation law capable of effectively balancing the rights to freedom of expression and human dignity.

1493 S 36(d) *Id.*

1494 *Hassen* (1965) 562. *Bogoshi* (1998) 1213 A.

1495 *Id.*

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