

## *Impairment of Reputation, Dignity and Privacy*

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### I. INTRODUCTION

A right to freedom of expression is an essential element in any democratic society. It not only gives substance to the individual rights of freedom of conscience and individual autonomy, but also fosters an unencumbered press as a necessary watchdog of the activities of the state,<sup>1</sup> which, in a free society, must always be denied unfettered power.<sup>2</sup> This freedom of expression cannot be absolute, however, for words, signs and pictures may be as harmful to other people's legitimate interests as fists, knives and bullets. So the law has long played a role in balancing free expression with a variety of other rights and interests, such as dignity, reputation and due legal process.<sup>3</sup>

The rights to be weighed against each other have recently been constitutionalized<sup>4</sup> and, in the process, the focal point of the balance has inevitably shifted from that underlying the common law.<sup>5</sup> Lord Steyn has suggested that, as a result of the new landscape of human rights in the United Kingdom (and the same comment could equally be made of the new constitutional landscape in South Africa) 'freedom of expression is the rule and regulation of speech is the exception requiring justification'.<sup>6</sup>

The justifications for regulating speech in the interests of due legal process (primarily, the rules of contempt of court) form no part of this chapter, which is, rather, concerned with the limitations to free speech made necessary by the law's role in

protecting the personality rights of individuals such as their right to reputation, dignity and privacy. This chapter is divided into two sections. It deals first with defamation (the unlawful infringement of the right to reputation, sometimes itself seen as a species of dignity) and then with other attacks on personality. There is a necessary overlap between these two sections since defamation can itself be seen (and, perhaps, ought so to be seen) as the paradigmatic attack on personality. The unifying theme is, therefore, that of personality protection.

## II. DEFAMATION<sup>7</sup>

### 1. The interests protected by defamation

The first step in understanding defamation is to identify the interest that the law is seeking to protect and, as is usual but not inevitable in that endeavour, it is to the Roman law that both the Scottish and South African lawyer must turn. The Romans recognized two quite distinct but closely related interests as worthy of protection — reputation, that is to say, the esteem in which we are held by others, and self-worth, that is to say the esteem in which we hold ourselves. These two interests were recognized for different reasons and protected in different ways. Reputation was seen as a valuable commodity and its impairment could lead both to sentimental loss, where the *actio injuriarum* based on *animus injuriandi* (intention) was available, and to patrimonial loss. Self-worth, on the other hand, was seen as a part of an individual's human dignity and its infringement could also be redressed under the *actio injuriarum*, which provided a remedy for an affront brought about by a deliberate attack on a person's dignity.<sup>8</sup>

The distinction between the *actio injuriarum* and the Aquilian action in South Africa reflects the Roman law differentiation between sentimental (i.e. non-patrimonial) interests in physical integrity, reputation and dignity (including privacy), on the one hand, and economic interests, on the other hand. In an action for defamation, there was, furthermore, a resistance to describing verbal attacks on dignity as defamation.<sup>9</sup> However, the absence of any specific reference in the constitutional protection of rights in South Africa to 'reputation' *eo nomine*, has led the courts there to recognize that the concept of dignity (protected in s 10 of the South African Constitution)<sup>10</sup> is broad enough to include the protection of 'reputation' as well.<sup>11</sup>

Scots law, on the other hand, has vacillated between emphasizing one interest or the other<sup>12</sup> and, in practice, modern Scots law recognizes defamation as a single action protecting both reputation and dignity.<sup>13</sup>

The coalescence of the two doctrinally separate rights of 'reputation' and 'dignity' is revealed in the Scottish approach to cases of 'private' defamation in which communication is to the pursuer alone. The affront felt by the pursuer may found an action for damages as an infringement of the legally-protected interest of self-esteem or dignity. Scots law clearly regards such an action as being located within the parameters of 'defamation' even in the absence of economic loss<sup>14</sup> and there is no indication today that private defamation is subject to any different test for actionability from publicly announced defamatory statements. So *Mackay v. McCankie*,<sup>15</sup> the classic private defamation case, was argued and decided explicitly as a case of 'slander' and not, as T.B.

Smith has it,<sup>16</sup> of ‘insult’. Insult was treated as merely the form of loss suffered through the wrong rather than, as in Roman law, the wrong itself.

South African law, on the other hand, denies that private communication is defamation (for there, as in English law, publication is perceived as the essence of defamation). However, it has no difficulty in awarding damages: the delict being that of an innominate impairment of dignity. But, of course, what we *call* the action is next to irrelevant — the important issue is the basis of liability. And if the matter continues to be seen as falling under the *actio injuriarum* then (at least on a doctrinal level) only intention to injure would suffice to found the action. However, although a theoretical distinction is drawn in South Africa between the Aquilian action and the *actio injuriarum*, in practice the position is closer to the Scottish approach for it is not necessary to bring a separate Aquilian action where economic loss results from defamation. This is evident in cases involving corporate (juristic) plaintiffs in South Africa. Artificial legal persons can suffer no hurt feelings or affront (being emotional reactions of the mind) but they can, of course, suffer in their patrimony from a loss of reputation.<sup>17</sup> That loss is recoverable in damages and, though economic loss suggests an Aquilian remedy,<sup>18</sup> rather than one founded on the *actio injuriarum*, in South Africa it has been held that it is unnecessary to locate the remedy within one or the other, even for the purpose of identifying the appropriate form of fault required:<sup>19</sup> the action is one for defamation and any damages to be awarded are, as always,<sup>20</sup> restricted to damage that is actually suffered.

The coalescence of the protected interests into one action in Scotland and, at the very least, the blurring of the lines between them in South Africa reflects the element of artificiality involved in separating out two interests that substantially overlap. For it is clear that one’s own self-esteem is likely to be affected by the reputation one knows one holds.<sup>21</sup> The result is that an attack on reputation may well have, as a direct and inevitable consequence, a lowering of self-esteem. As Cory J put it in the Supreme Court of Canada: ‘Good reputation is closely related to the innate worthiness and dignity of the individual.’<sup>22</sup> And in an insightful analysis of *why* the (English) law protects reputation, Gibbons<sup>23</sup> argues that a person’s wish to protect reputation derives from his or her broader interests in exerting control over personal information, which the law protects because the ability to control one’s own public image is actually an assertion of autonomy.<sup>24</sup> Therefore it is, perhaps, no surprise that the modern law does not (or cannot) distinguish as clearly as the Romans did between the two interests, though the law in South Africa appears to cling, at least doctrinally, to the distinction far more than does the law in Scotland.

Yet a failure to distinguish clearly between overlapping, but essentially distinct, interests does have a number of drawbacks. For one thing it becomes entirely unclear which basis of liability (*culpa* for the economic interest of reputation or *animus injuriandi* for the personality interest of dignity) becomes appropriate when both interests can be vindicated by the same action. In addition, it misses the pleasing symmetry that exists in granting different levels of protection, through the form of fault required, to the different interests - an approach that would allow the law to reflect society’s views of the relative political importance of the interests at issue. There is an irresistible logic in locating economic interests within a broader framework of economic protection granted by the law of negligence, and there is something inherently suspect in a legal system

granting redress for economic loss caused by false words under the law of negligence if the words are falsely favourable,<sup>25</sup> while granting redress under the law of intent-based defamation if the words are falsely unfavourable.

The better approach would be to maintain as far as possible a separation between economic and personality interests, allowing the former to be protected by the Aquilian action based on negligence (bringing in unreasonableness), while affront to reputation, dignity or privacy might revert to being regarded as a different action with, entirely sensibly, its own policy considerations and a different balance of presumptions and defences. This would leave defamation to develop in its own way as a remedy for attacks on personality. But, at the end of the day, we must recognize that the life of the law is not merely logic but rather experience and there may be merit in the middle ground of negligence-based liability for defamation, especially in the context of distributors of published matter (already accepted in both systems)<sup>26</sup> and also of the media, as the Supreme Court of Appeal in the South African case of *Bogoshi*<sup>27</sup> realized and the Constitutional Court in *Holomisa v. Khumalo v. Holomisa*<sup>28</sup> endorsed.

## 2. The elements of the action for defamation

Defamation is a civil wrong attracting damages to compensate for losses suffered when one person conveys an idea, by whatever means, of and concerning another person which is derogatory or demeaning of the latter and which does not attract one of the various defences which might exclude liability.

In Scots law, once the pursuer has established the defamatory nature of the words complained of he or she acquires the benefit of two presumptions: that the words are false and that they were communicated with the appropriate degree of fault to found liability.<sup>29</sup>

In South African law, once the plaintiff has established the publication of matter referring to him or her that is defamatory in nature, he or she also acquires the benefit of two presumptions: that the publication was unlawful<sup>30</sup> and that the publication was accompanied by the appropriate degree of fault to found liability.<sup>31</sup> Falsity is not an element that the South African plaintiff must prove.<sup>32</sup> As in Scots law, it is for the defendant to prove truthfulness or the existence of any other defence excluding unlawfulness.<sup>33</sup> The three elements, common to both systems (though not necessarily applied in the same way), that require some detailed consideration are, therefore, defamatoriness, falsity and fault.

### (a) Defamatoriness

The most important element, from which much follows, is the defamatory nature of the idea conveyed by the defender or defendant. An action for defamation does not lie unless the ideas communicated are ‘defamatory’, that is to say are derogatory or demeaning, tested objectively. The objective nature of the test was authoritatively captured in the (not original) words of Lord Atkin in the House of Lords in the English case of *Sim v. Stretch*,<sup>34</sup> that is to say whether the words complained of ‘tend to lower the plaintiff in the estimation of right-thinking members of society generally’.<sup>35</sup> It is for the court to

determine how ‘right-thinking’ members of society would react to particular words. Where the *per se* meaning of words<sup>36</sup> is relied upon, the issue is neither how members of society do react nor how the pursuer or plaintiff did react, but how this judicial anthropomorphization of a legal standard would react. An example may make this clear (one chosen indeed to illustrate the further point that, in assessing the defamatory quality of particular words both times and attitudes change). There is little doubt that in days (happily) gone by, an allegation of homosexuality would result in even rational and reasonable people being less willing to associate with the person so ‘tainted’.<sup>37</sup> Nowadays the matter is far less clear, and a court could hold that an accusation of homosexuality is defamatory only if one were willing to say that it is an ordinary decent thing to estimate the inherent worth of gay and lesbian people to be less than that of non-gay people.<sup>38</sup> On a strict application of *Sim*, it ought not to be sufficient to allege that some people, bigots and the like, would have a lower opinion of a pursuer subject to such an allegation.

The Constitutional Court in South Africa has signalled that constitutionally-entrenched norms and values will affect broader decisions in the law of delict, for instance, on the scope of unlawfulness.<sup>39</sup> The decision of Goldstein J in *Sokhulu v. New Africa Publications Ltd*<sup>40</sup> has affirmed that constitutional values will also have an effect on determining the views of the right-thinking person in the test for assessing the defamatory content of matter. His judgment highlights the fact that the defamatory content of matter will vary with the temper of the times and, of course, that the effect of the Constitution must now be considered, especially those cases involving the determination of how a ‘right-thinking’ or ‘reasonable person’ would react. The ‘right-thinking’ person is, according to Goldstein J, ‘someone who subscribes to the norms and values of the Constitution’. It is likely that the same comment could now be made in Scotland in respect of the norms and values embodied in the European Convention on Human Rights.<sup>41</sup>

The question of what is meant by ‘society generally’ is less important in small, fairly homogenous societies (such as Scotland), than in large heterogenous countries (like South Africa). In both, however, there is authority for the proposition that the right-thinking member of society is defined according to the section of society to which the pursuer or plaintiff belongs.<sup>42</sup> In Scotland, Guthrie Smith said that an injury to character may be caused ‘by the false imputation of such acts as may lower him in the estimation of the public, or make his society shunned by those with whom he is accustomed to associate’,<sup>43</sup> and Lord McLaren talked of the standards of propriety accepted ‘amongst the class of persons to which the individual aggrieved belongs’.<sup>44</sup> In South Africa the Supreme Court of Appeal in *Mahomed v. Jassiem*<sup>45</sup> held that the *Sim v. Stretch* formulation embodies a segmental approach, which includes reference to the views of a substantial and respectable section of the community. So in determining whether a right-thinking person *would in fact* regard an allegation as defamatory, the view (albeit conservative, or even prejudiced) of a section of the community in which the plaintiff lives or works may become relevant, either by applying the sectional test laid down in *Mahomed* or by relying on a secondary meaning (or innuendo) in order to elicit a defamatory meaning. Thus, it would be defamatory to allege that a person had had an extra-marital affair within a morally very conservative community or where the allegation was made against a person who was known to be a priest who had taken a vow

of celibacy (on the sectional test in the first case and on an innuendo of breaking vows in the second).

However, it would be inconsistent with constitutional norms in South Africa if the sectional test allowed the court to endorse anti-constitutional sentiments, even if held by a large number of people, as ‘right-thinking’.<sup>46</sup> A better analysis of the sectional test might be to see it as an elaboration of, rather than as a qualification to, the objectivity rule, amounting to a recognition that the ‘right-thinking’ person must be placed in the circumstances of the pursuer or plaintiff, just as the ‘reasonable person’ in negligence cases will be modified according to the circumstances facing the defender or defendant. This approach accepts that the right thinking person expects more of some people than others and reacts to the same words differently depending upon the context in which, and about whom, they are made. But it also carries the necessary limitation that the circumstances into which the right-thinking person must be projected in order to assess whether the pursuer or plaintiff is entitled to feel affronted are confined to external circumstances (such as age, physical capacities and professional qualifications) rather than internal circumstances (such as personal beliefs or attitudes).<sup>47</sup>

*(b) Truthfulness*

Once it has been established that the words used by the defender are ‘defamatory’ in the sense described above, Scots law presumes that they are false, because it presumes everyone to be free from derogatory characteristics. The practical effect of this is that the onus is shifted onto the defender to show, as a defence, that the words are not false. It is important to note that this is merely a presumption, which shifts the onus of proof, and it can, therefore, be rebutted by the defender establishing the truth of the allegation. Nevertheless the end result is odd. In most other delictual actions the pursuer is obliged to prove each of the definitional elements of his or her case before the onus shifts to the defender to prove, if he or she can, an appropriate defence. Yet with defamation, though, falsity is one of the definitional elements, once the defamatory quality of the statement is proved by the pursuer the element of falsity (together with fault, which is considered below) is presumed to exist, thus throwing the onus of disproving falsity onto the defender.

The South African law resembles the Scots law on onus. There, truth for the public benefit is one of the defences excluding unlawfulness<sup>48</sup> and the burden is on the defendant to prove the existence of a defence excluding unlawfulness.<sup>49</sup> However, under both the common law and the constitutional constraints of free speech in South Africa, falsity is not an element to be proved by the plaintiff.<sup>50</sup> It is a factor affecting unlawfulness and the defendant must prove truthfulness, where that issue is relevant.

In Scots law the appropriate defence is that of *veritas* or, simply, truth. The truth of the allegation justifies in legal terms its communication. This was, however, not always the case: until the early 19<sup>th</sup> century there was some doubt as to whether truth provided an absolute defence.<sup>51</sup> This doubt probably arose as a result of a confusion of the legal responses to defamation. While defamation was a criminal as well as a civil wrong<sup>52</sup> (and therefore an act harmful to the public peace as well as to private self-esteem) it was by no means self-evident that only falsehoods would require a legal

reaction. Yet the civil law alone could not in logic accommodate actions (at least for defamation) based on truth. For one thing the original civil remedy of *palinode* (or recantation, often at the church door) required falsity, since a defender could not be ordained by a church court<sup>53</sup> to recant from what could be shown to be the truth.<sup>54</sup> And in addition, as the protection of reputation came to be at least as important as protection of dignity, truth became an absolute defence on the ground that the law had no role in protecting a reputation that was not deserved.<sup>55</sup>

In South Africa the equivalent defence is not truth *simpliciter* but ‘truth for the public benefit or interest’, allowing the law to respond appropriately to circumstances in which it is not in the public interest to allow the truth to be published.<sup>56</sup> Since the watershed judgment of the Supreme Court of Appeal in *Bogoshi*,<sup>57</sup> it is clear that in South Africa, as in the United States after *New York Times v. Sullivan*,<sup>58</sup> the public interest may, in very special circumstances, justify publication of inaccurate material to a greater extent than the normal rule in defamation,<sup>59</sup> namely that a defender or defendant can get away with minor inaccuracies so long as the major part of the communication is true. Hefer JA in *Bogoshi* recognized that in some cases, where the disclosure is on a matter of burning public concern, the need to publish before establishing the truth in a positive manner can be a factor in determining the overall lawfulness of the publication.<sup>60</sup> However, he emphasized the high degree of circumspection placed on editors and editorial staff and that there was no ‘licence to lower the standards of care’.<sup>61</sup>

The result is that truth alone is not an absolute defence to an action for defamation in South Africa (as it is in Scotland), nor is falsity alone sufficient (in either country) for liability.<sup>62</sup> This limitation on the publication of the truth has not, in practice, imposed an excessive fetter on freedom of expression in South Africa but has, rather, placed a restriction (which we regard as justifiable) on some truthful disclosures about the past actions of private individuals, which the courts have held he or she is entitled to ‘live down’.<sup>63</sup> The recognition of a policy-based, public benefit restriction on the publication of truthful matter about a person also provides South African law with a better basis for developing pragmatic limits for the protection of privacy than Scots law. This is a matter to which we will return.

### (c) *Fault*

One of the most curious features of defamation is the difficulty that the modern law has had in establishing a wholly satisfactory criterion for fault. A strict application of the Roman law would have made this relatively straight-forward – the affront element, based as it is on the *actio injuriarum*, would attract damages on a showing of *animus injuriandi* ([wrongful](#) intent to injure); while the reputational element of the action involves a matter of economic worth, would be based on the *lex Aquilia* and would require *culpa* (or fault in the wider sense of including culpable but unintentional acts, that is to say negligence). However, as we have already seen, the modern law does not make this distinction quite as neatly as the Romans did and in both Scotland and South Africa the law is content to award damages for the infringement of both interests on the basis of only one or other of the different forms of fault. Furthermore, the *Bogoshi* judgment<sup>64</sup> in South Africa has tended to blur the neat lines between the Aquilian action and the *actio injuriarum*.

There are a number of options for fault, ranging from proven intention<sup>65</sup> through presumed intention to negligence. Depending upon the circumstances, the law in both jurisdictions has for long contained examples of all three. So in a case of qualified privilege the pursuer or plaintiff must show that the defender or defendant intended to injure him. In a case that does not concern privilege, that intention is presumed (in Scots law irrebuttably, in South African law rebuttably). And in a case of communication by dissemination of material over which the defender or defendant has no control, negligence is the foundation of liability.<sup>66</sup> But how the various options are spread throughout the law is one of the major differences of approach between Scots and South African law.

In Scots law liability in cases that do not concern situations of privilege is theoretically based on [wrongful](#) intent, but that theory wilts under close scrutiny since not only is the fault element of the claim, called intent or (sometimes) malice,<sup>67</sup> presumed in favour of the pursuer (because bad intent is seen as an inescapable inference from the act itself)<sup>68</sup> but that presumption is irrebuttable with the result that it helps the defender not one whit to plead that he or she did not, or even could not, intend to injure the pursuer.

This rule, which we may call the rule of strict liability, is often traced to the English House of Lords decision of *Hulton v. Jones*,<sup>69</sup> but in fact in Scotland is far older. There is a series of cases, all involving newspapers as defenders, in which names had been published referring to one person but which could be taken to refer to other persons with identical or similar names, and in which the honesty of the newspaper publishers (in the sense of lack of any positive intention to injure the pursuer) was held to provide no defence.

Blackie suggests<sup>70</sup> that it was the very development of newspapers in the 18<sup>th</sup> century that moved the law from *animus* (which newspapers and their corporate owners cannot have) to strict liability. In other words it was an accidental rather than deliberate development whereby ‘the law slipped into strict liability’.<sup>71</sup> The earliest example is typical. *Finlay v. Ruddiman*<sup>72</sup> concerned a newspaper report that one John Finlay, shoemaker, had been charged with rape. The pursuer was a shoemaker of that name, but a different person altogether, and it was held that the newspaper had no defence to the effect that it had not intended to defame the pursuer (of whom it knew nothing) but only to report a fact concerning the other man.<sup>73</sup> However, Lord Kames is reported by Guthrie Smith<sup>74</sup> as saying in this case that ‘damages may be founded on culpa without an *animus injuriandi*’. This suggests that while actual intent was not necessary, a lesser form of fault would be sufficient — but still (and this is the point) necessary.<sup>75</sup> The case is not in itself authority for strict liability. Nor is *Craig v. Hunter & Co*,<sup>76</sup> where a similar mistake was immediately retracted by the newspaper and an apology offered. The court held that damages were not due unless either intent on the part of the newspaper could be shown by the pursuer or patrimonial loss could be shown to have been suffered as a result of ‘inadvertence or negligence’. In other words, *solatium* required *animus injuriandi* while the redress of patrimonial loss required *culpa* in a wider sense, including negligence. This was still thought to be the law half a century later<sup>77</sup> but, while it reflects fairly accurately the Roman law approach, it does not suggest strict liability (i.e. liability even in the absence of negligence) for either patrimonial or emotional loss. However, Hume<sup>78</sup> had earlier indicated an understanding of the law nearer to strict liability and the coalescence of the two interests protected by defamation led inexorably to a concomitant coalescence

of the different fault requirements into one apparently based on *animus injuriandi*, though presumed irrebuttably. Negligence as an alternative means of establishing liability (or at least lack of either intent or negligence as a means of establishing a defence) would seem to be no longer possible in Scotland after the Court of Session accepted *Hulton v. Jones* in *Wragg v. DC Thomson & Co Ltd*<sup>79</sup> (the ‘George Reeves Shoots Wife’ Case).

In South Africa the strict liability rule took far longer to be accepted and, when it was, that acceptance was subject to much narrower circumstances and, in the event, proved to be short-lived.

In *Maisel v. Van Naeren*<sup>80</sup> a genuine but mistaken belief in the existence of a privileged occasion was held to amount to a valid defence – and such subjectivity is clearly incompatible with strict liability. And in *Suid-Afrikaanse Uitsaaikorporasie v. O’Malley*,<sup>81</sup> the Appellate Division expressly accepted the principle that liability for defamation required consciousness of the wrongfulness of the publication: it was an intent-based delict that could not be committed through mere negligence (though lack of negligence would protect distributors of already published material, such as news vendors or book sellers). However, the Court went on to hold, *obiter*, that in cases involving the mass media, the defendant should be subject to strict liability (i.e. the presumption of intent could not be overturned). That suggestion was made the basis of the decision in *Pakendorf v. De Flamingh*<sup>82</sup> and from then (1982) until that case was overruled by *National Media Ltd v. Bogoshi*<sup>83</sup> in 1998, strict liability was a feature of South African law. However, it always was more limited than in Scots or English law, having been restricted to ‘media defendants’.

Now, the rule of strict liability is particularly problematic in relation to certain types of action where it is especially important that freedom of expression be given as high a regard as possible.<sup>84</sup> Representative democracies require, even demand, for their legitimacy that there be free speech, especially freedom to disseminate as widely as possible criticisms of those democratically elected to represent the people. A free press is the best way to ensure freedom of expression. But a media that can be held liable in damages for publishing false facts, when the publication was made in good faith furtherance of political debate, is a media at serious risk of illegitimate stifling. The obvious advantages of a familiar, flexible standard of the reasonableness of the publication (taking into account, *inter alia*, the ‘nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information ... and the opportunity given to the person concerned to respond’)<sup>85</sup> are manifold. Emphasis on such a supple criterion would set more realistic bounds for journalistic responsibility and free expression<sup>86</sup> than either a strict liability extreme or a free speech approach based on a necessarily artificial distinction between class of plaintiff (as, for example, in the United States of America).<sup>87</sup> It is this consideration, expressed in a variety of different ways, leading to a variety of approaches, that underpins the jurisprudence of all the legal systems that once embraced, but have since moved away from, strict liability.

In the United States of America, for example, a distinction has, since forty years, been made between ‘public officials or figures’ and private persons, and the former do not have the benefit of any presumption of malice or intent to injure, far less an irrebuttable presumption.<sup>88</sup> The category of person covered by this rule never was susceptible to ready delineation and the movement in the United States, since the decision

in *Sullivan*, has been one of inexorable expansion of the category.<sup>89</sup> This expansion, while scarcely principled, does indicate a growing distrust of the strict liability rule, which distrust has manifested itself in other ways too.<sup>90</sup> The courts in Australia and New Zealand have departed from the strict liability rule in matters of ‘political discussion’,<sup>91</sup> replacing it with a reasonableness test (the onus resting with the defendants to show that they acted reasonably);<sup>92</sup> and the Supreme Court of Appeal in South Africa abolished strict liability in the only cases to which it applied there, that is to say, with media defendants.<sup>93</sup> Yet media defendants continue to be treated differently from individual defendants in South Africa for, once strict liability goes, the problem remains of how to establish fault. Intention never is satisfactory when dealing with corporate rather than natural defendants, and it is not obvious how to strike the balance of fairness in cases in which plaintiffs are accidentally but actually harmed by media reports (such as where the plaintiff’s non-exclusive name is used to refer to someone else).

The solution of the Supreme Court of Appeal in South Africa in *Bogoshi* was to turn to the concepts of unreasonableness and negligence for media liability. If a media defendant fails to show that it exercised an appropriate degree of care (that is to say if it acted with *culpa*) in publishing the inaccuracy complained of, it will be held liable in damages for the loss of reputation (and impaired dignity or privacy) the plaintiff suffers as a result of the publication. The plaintiff need not show *animus injuriandi* and harm will be presumed to follow the making of the injurious statements. The onus is on the defendant to negative *culpa*, since the issues of neglect and unlawfulness are intertwined.<sup>94</sup> The Court, interestingly, emphasized that this decision was based on a development of the common law, which it found, in its new, developed, form, to be in conformity with the norms and values of the Constitution, and the Constitutional Court subsequently affirmed that the *Bogoshi* approach is compatible with constitutional values.<sup>95</sup>

The shift from strict liability to a reasonableness/negligence-based inquiry is much more than a shift in the onus of proof or even in the doctrinal basis of liability. It necessitates, in addition, a complete refocusing of the very purpose of the law of defamation, for the court’s inquiry is no longer into what the plaintiff is alleged to have done or omitted to do but also into what the defendant did or omitted to do. The outcome is not only a vindication or otherwise of the plaintiff’s reputation, nor a restoration in the eyes of himself or others of his dignity, but is a vindication (or otherwise) of the defendant’s professional standards and journalistic practices. For this reason alone, the South African Supreme Court of Appeal<sup>96</sup> and the Constitutional Court<sup>97</sup> have been wise to apply this subtle new approach only to media defendants.

It may be noted that, with its long history of strict liability, Scots law provides examples of its application only in relation to media defenders. It is tempting, but ultimately unpersuasive, to argue that, therefore, in Scotland as was the case in South Africa, the strict liability rule is limited to media defenders. But there is no hint of such a limitation to strict liability, even *obiter*, in any of the cases<sup>98</sup> and it is likely that Scots law will follow *Reynolds v. Times Newspapers*<sup>99</sup> so that strict liability for the media is likely to be with us for some time.

The approach urged on the court by the defendants in *Reynolds* was not to specify the types of defendants (either public figures or media defendants) who would not be subject to the risks of strict liability but, within the context of an extension of the defence

of qualified privilege, to specify the kinds of statements that would no longer attract liability in the absence of a showing of malice. Qualified privilege has the effect in English (and Scots) law of removing the irrebuttability of the presumption of malice (or intent to injure), leaving it to the pursuer to prove (if she can) that the defender intended to injure her. The defendants in *Reynolds* sought to persuade the English courts to extend this privilege to what was described as ‘political discussion’. This approach, attempting to introduce concepts of reasonableness into the ‘privilege’ enquiry, has noticeable similarities to the South African approach that was accepted in *Bogoshi*, but would not have been limited to media defendants.

The Court of Appeal in *Reynolds* accepted the defendants’ argument,<sup>100</sup> but the House of Lords did not. One of the major considerations influencing their Lordships was that, since newspapers (and other media publishers) in the United Kingdom cannot be forced to divulge their sources, it would be ‘unacceptably difficult for a victim of defamatory and false allegations of fact to prove reckless disregard of the truth’.<sup>101</sup> Lord Cooke of Thornton was (sensibly) dubious as to how the new category of privilege could be limited to ‘political discussion’.<sup>102</sup> He was worried both by the difficulties of defining the boundaries of the category and of the logic of doing so. The House of Lords did, however, accept<sup>103</sup> that politicians are expected to be robust in the face of strenuous criticism, more so indeed than private individuals.<sup>104</sup>

The House of Lords in *Reynolds* rejected the argument for what was there described as a ‘generic’ qualified privilege for political speech. Hefer JA in *Bogoshi* seemed to lean towards just such a generic privilege applying to the media in communicating information by emphasizing that it is the ‘right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion’.<sup>105</sup>

Nevertheless, the judgments of Lord Steyn and Lord Cooke in *Reynolds* demonstrate that the apparent divide, on the correct approach to media coverage of political speech, between *Bogoshi* in South Africa (and *Lange* in Australia and New Zealand), on the one hand, and *Reynolds* in England, on the other hand, is not as significant as might at first sight appear. Lord Steyn, in fact, acknowledged the similarity between the above approaches by redefining the duty/interest inquiry in cases of alleged privileged occasion as including broad issues of policy (such as failure to report the other side,<sup>106</sup> that the occasion must be one that can ‘fairly be said to be in the public interest’,<sup>107</sup> and the fact that the limits of free speech are wider in regard to criticism of politicians than private individuals).<sup>108</sup> Lord Cooke, although relying on the standard test of reciprocal interest, duty and common interest,<sup>109</sup> nevertheless underscored the flexible nature of this test in accommodating *all* circumstances and in meeting new situations, including those where the media might lay claim to a defence of qualified privilege.<sup>110</sup> Lord Cooke also observed<sup>111</sup> that this approach did not differ much from the Australian reasonableness test (or, one might add, the South African reasonableness test).

In the end, the differences between the English, Australian and South African approaches to the ambit of qualified privilege to political information communicated by the media is essentially one of emphasis, rather than substance.<sup>112</sup> Perhaps the only remaining difference between the *Reynolds* approach and that in the other jurisdictions is that it clearly endorses a judicially-controlled, incremental *ex post facto* development of

the list of categories of duty/interest rather than the Australian and South African stance that does not, *in advance*, foreclose on extending the scope of the defence of privileged occasion to political speech in the media.

### III. OTHER ATTACKS ON PERSONALITY

#### 1. Pushing the boundaries of defamation

The law of defamation dominates in Scotland, and consequently, accommodating as it is to personality interests, it has tended to preclude the possibility of actionability of other attacks on self-esteem and honour being actionable under different heads. Pursuers have (for perfectly understandable tactical reasons) sought to bring their cases within the recognized action for defamation rather than to seek to persuade the court to develop new actions (or, perhaps, to rediscover old ones), but the drawback of this is that both the cases and the action itself have had to be distorted in order to accommodate the interests which the Scottish courts appear perfectly willing, at heart, to recognize.

One can see both the willingness and the distortion very clearly in cases such as the well-known English decision of *Tolley v. Fry & Sons Ltd*,<sup>113</sup> where a professional golfer sued when his image was used without his consent to advertise chocolate. Since the ability to control one's own image is not explicitly a legally protected interest, the plaintiff was forced to squeeze his claim into one for defamation, arguing that the misuse of his image contained the innuendo that he had sold his amateur status (this at a time when sportsmen were either (amateur) gentlemen or (paid) players, but certainly not both). The artificiality of this approach is highlighted by a comparison of the case with a similar South African decision, *O'Keeffe v. Argus Printing and Publishing Co Ltd*<sup>114</sup> in which the plaintiff sued a publisher who had used a photograph of her without her consent in its advertisement for guns. Here, because South African law has a more developed law of personality rights, the court was able to be more candid and hold that a misappropriation of someone's image was in itself a wrong.<sup>115</sup> The English court, on the other hand (and the Scottish court would have done the same),<sup>116</sup> had to pretend that *Tolley's* claim was for defamation in order to provide redress for the quite separate wrong of misappropriation of image, an archetypical form of attack on a personality right.<sup>117</sup>

In a slightly different way, the same phenomenon can be seen in the manner in which the courts apply the very test for defamatoriness. As we have seen, the *Sim v. Stretch* test is designed to provide an objective criterion against which to test what is actionable. Yet increasingly damages have been awarded for statements which the plaintiff finds personally offensive but which rationally cannot satisfy the test of lowering the pursuer in the estimation of right-thinking members of society. A good example is the English decision of *Berkoff v. Burchill*<sup>118</sup> in which an allegation that the plaintiff (an actor) was 'hideously ugly' was allowed to go to a jury.<sup>119</sup> Such an allegation may, of course, be personally hurtful and cause serious affront but it is difficult to see how 'right-thinking' members of society could think less of the plaintiff, either as a person or as an actor, because someone else has publicly expressed what, almost by definition, is a personal opinion.<sup>120</sup> The court is, in our view, trying here to provide redress for the

plaintiff's affront, and the case is all the more remarkable for coming from a system which claims to be based entirely on protection of reputation.

While one might applaud these British attempts to extend the protection afforded to personality interests, the method adopted to do so is far from attractive. And the problem is not only, or even primarily, one of honesty. It is, in our view, right and proper that the courts should develop a protection for personality rights such as dignity, control of one's image, and privacy. The fundamental difficulty is that if they do so by squeezing such cases into the action for defamation they are forced to accept the limitations and peculiarities of that action, which might in their own context be justifiable, but which are likely to be inappropriate for other interests. In particular, treatment of truth and fault in defamation today is unlikely to produce satisfactory results when the action is seeking redress for, say, misuse of image. The balance that must always be struck with freedom of expression will take account of some interests in the context of defamation, and other interests in the context of misuse of image — and the balance is unlikely to be struck in the same place for both. The lessons from South Africa (where the shift from defamation to privacy as a potential remedy for certain types of disclosures is well under way) are particularly valuable. Persons injured by truthful disclosures are able to frame their remedy in terms of invasion of privacy rather than defamation. The court in *Sokhulu*<sup>121</sup> held, in regard to the alternative claim by the plaintiff that her dignity had been impaired by the allegations complained of, that 'dignity' is judged not only according to a subjective but also an objective concept of reasonableness.<sup>122</sup> For the same reasons as the court held that the words in *Sokhulu* were not capable of bearing a defamatory meaning, it also concluded that the statements in question were 'not reasonably capable of conveying a meaning that the plaintiff was insulted'.<sup>123</sup>

## 2. Types of personality interests

Burchell<sup>124</sup> lists a number of interests that South African law protects as specific examples of a more general personality right. He classifies attacks on self-esteem as either (i) impairments of dignity (including insult,<sup>125</sup> unlawful arrest or detention, malicious prosecution, adultery, interference with parental authority and breach of promise of marriage) or (ii) invasions of privacy (including unreasonable intrusions into the private sphere, public disclosure of private facts, appropriation of likenesses (right to identity) and false light in the public eye). This classification provides a useful structure for Scots law also.

### (a) *The right to dignity*

The concept of individual 'dignity' is granted explicit protection by the Constitution of South Africa<sup>126</sup> and many writers believe that this concept is the underlying principle within which concepts such as privacy, self-esteem and reputation are located.<sup>127</sup> Though Scots law lacks any explicit constitutional (or human rights) protection for dignity,<sup>128</sup> it is clear that this is, as in South Africa, the underlying interest that justifies an award of damages under both defamation, when there is no third party communication, and other

related actions, which do not require economic loss for actionability, such as verbal injury,<sup>129</sup> malicious falsehood or injurious falsehood. These are all clearly affront-based delicts and as such they demand proof of wrongful intent to injure. Freedom of the press was long ago given as the major reason why this should be so.<sup>130</sup> It needs, however, to be remembered that in an action for verbal injury, as with the action for defamation, Scots law no longer distinguishes between dignity and reputation for the purposes of fault, with the result that damages can be sought for the infringement of the economic right (if loss can be established) in the same action as redress is sought for the infringement of the personality right.<sup>131</sup>

There are other actions available to Scottish pursuers who feel that their right to dignity has been infringed, though usually these are by acts or omissions rather than by words (or, as it might be put, real injuries rather than verbal injuries)<sup>132</sup>. Indeed, most (but not all)<sup>133</sup> of the impairments of dignity listed by Burchell above have long been actionable in Scotland too. So, for example, wrongful imprisonment, wrongful arrest, wrongful prosecution and abuse of civil court process<sup>134</sup> will be dealt with in much the same way in both systems. Onus might, however, be different.<sup>135</sup>

Other than that issue, however, the two systems grant similar protection to personality, by providing redress for the affront inherent in being, for example, arrested or imprisoned etc. So while Scots law seeks 'reasonable cause' and might find it in lawful authority to act, South African law explores the 'unlawfulness' of the action, finding lawfulness in facts such as the public interest and the legal convictions of the community. The doctrinal (or at the very least structural) difference between the two systems seems to be that, while Scots law contains a number of disparate wrongs, each, of which can be explained (at least partly)<sup>136</sup> by the need to protect individuals from affront, South African law has a general principle that personality (including self-esteem and dignity) is a legally recognized interest, which can be attacked in a number of different ways.

### *(b) Privacy rights*

The personality right that conflicts most directly with the principle of freedom of expression is that of privacy. This concept, if it is to have meaning beyond existing rights, must be conceived broadly enough to include protection of both truthful and non-defamatory facts. In essence, it is the autonomy right of an individual to control access to, and use of, information concerning him or herself.

Though there was no sophisticated concept of privacy rights in Roman law, the *actio injuriarum* has been accepted in South Africa to include the concept of *dignitas*, embracing privacy, which is explicitly seen as a personality right.<sup>137</sup> From the 1950s onward in South Africa, the right to be free from public disclosure of private facts<sup>138</sup> and unreasonable intrusions into the private sphere<sup>139</sup> has been recognized by the courts. Section 14 of the South African Constitution also protects the right to privacy, which includes the right of an individual not to have their person or home searched, their property searched or seized and the privacy of their communications infringed. Jurisprudence from the Constitutional Court has emphasized a wide interpretation of 'privacy', which focuses on the exercise of individual autonomy.<sup>140</sup>

The situation is very different in Scotland where, in common with English law,<sup>141</sup> there has been a strong resistance to developing breach of privacy as an independent delict.<sup>142</sup> It has, however, long been possible to achieve a certain amount of privacy protection by relying on other actions, such as defamation and breach of confidence.

Defamation in Scotland can accommodate only false allegations. Breach of confidence is more useful as a tool to protect accurate but essentially private information and it has been recognized in both Scotland and England to be an actionable wrong.<sup>143</sup> Originally confidentiality was recognized in commercial relationships,<sup>144</sup> suggesting that the action was perceived to be one that protected economic interests. However, a relationship that demanded confidentiality that has been recognized at an early stage was that between doctor and patient,<sup>145</sup> and this relationship cannot easily be explained on the basis of (the patient's) economic interests. Perhaps even more clearly, the recognition that the relationship between spouses<sup>146</sup> and even other personal relationships<sup>147</sup> could import a duty of confidentiality<sup>148</sup> illustrates the extent to which confidentiality can protect privacy in some circumstances.

But the action for breach of confidentiality ~~did does~~ have one major limitation. It ~~was~~ is available only then the pursuer has passed information to the defender, who ~~has~~ then misused it, and it ~~was~~ is not available when the defender seeks out or acquires information independently of the pursuer. ~~R. More~~ recently, however, the courts have moved away from this requirement<sup>149</sup> and by doing so have been able to extend confidentiality to cover, effectively, privacy.<sup>150</sup> They do, however, continue to claim that it is the former rather than the latter that is being protected.<sup>151</sup> In light of the European Convention on Human Rights there may, however, be little difference in practice between an extended conception of confidentiality and privacy.

In *Douglas v. Hello!*<sup>152</sup> the Court of Appeal held that the time had come for the law to accept that existing torts such as breach of confidentiality and defamation were too limited to protect some of the interests that the European Convention on Human Rights required protecting, and that therefore privacy ought now to be recognized as a legally protected interest in itself. As Lord Justice Sedley put it: 'We have reached a point at which it can be said with confidence that the law recognizes and will appropriately protect a right of personal privacy.'<sup>153</sup> The law is not static but, in Lord Justice Sedley's words, the European Court of Human Rights is the 'final impetus' to the recognition of a right of privacy in English law.<sup>154</sup> The House of Lords, however, were quick to point out that this approach does not imply any recognition of a new cause of action, or even the development of a 'high-level principle of invasion of privacy' - rather it is no more than an extension, and possible renaming, of the established action for breach of confidence.<sup>155</sup> Interestingly, the notion of 'privacy', even in this restricted sense, being recognized contains exactly the same dichotomy of protected interests that we have seen in the case of defamation. *Douglas* was, in reality, a case raised to protect the plaintiffs' economic interests rather than their privacy in its dignity sense.<sup>155</sup><sup>156</sup>

Yet, in other circumstances, it is the personality infringement that the court is clearly concerned about. In *R v. Broadcasting Standards Commission, ex parte British Broadcasting Corporation*<sup>156</sup><sup>157</sup> Lord Mustill (in the context of a caution that a corporate body, which might be entitled to confidentiality as a protection of its economic interests, should not readily be seen as having a right to 'privacy') said the following:

‘An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate. The concept is hard indeed to define, but if this gives something of its flavour I do not see how it can apply to an impersonal corporate body, which has no sensitivities to wound, and no selfhood to protect’.<sup>158</sup>

Furthermore, in *Theakston v. MGN Ltd*<sup>159</sup> Ouseley J granted an injunction against the publication of photographs of the claimant, taken without his consent during a visit to a brothel, because it ‘would be particularly intrusive into the claimant’s own individual personality’,<sup>160</sup> but at the same time refused an injunction against the newspaper publishing the story. The claimant’s reputation was not protected by the law, but his personality interest was.

Still to be worked out by the Scottish (and indeed English) courts is the basis of liability for invasion of privacy (as an aspect of an extended concept of confidentiality), i.e. whether *animus* or *culpa*, intent or negligence, is the fault element; the House of Lords has indeed recognised that the European Convention on Human Rights does not require a remedy in face of any particular level of fault.<sup>161</sup> Defamation in Scotland provides an unhappy precedent for the muddle made with the basis of liability when the two protected interests are treated as one. Differentiating types of defender, as in South Africa, rather than the types of loss may well prove an attractive route out of the muddle.

United Kingdom judges are today faced with an important task — to construct an intellectually sustainable structure within which privacy can be afforded a sensible degree of legal protection without interfering disproportionately with competing rights. The earlier resistance to such protection is now, paradoxically, an advantage, for it provides the judges with a clean slate upon which to work, but they will have to be clear as to both policy and principle, harmonizing the various tensions adverted to in this chapter. The ultimate outcome remains still uncertain. Perhaps even more importantly, the United Kingdom courts have to work out the extent to which a public interest defence is applicable to actions for breach of privacy<sup>162</sup> and, again, the South African experience may provide useful lessons to draw upon.

#### IV. CONCLUSION

Whether there is enough content to the substantive right in Article 8 of the European Convention on Human Rights to allow the Scottish courts to develop protections for personality interests other than privacy remains to be seen, and commentators do need to resist the temptation to place more weight on the Convention than it can actually bear. However, the lessons from South Africa are clear: an expansive concept of personality protection, obviating the need to rely on the action for defamation, would not only allow the law to be more transparent and honest but would be better for society as a whole. The press would be in a better position clearly to see and acknowledge the boundaries beyond which the important, but never absolute, right of free speech will not provide protection. The ability to set these boundaries properly, taking account of the appropriate balance of free speech, reputation, dignity and privacy, is essential to any democratic legal system in the 21<sup>st</sup> century.



<sup>1</sup> A role described as 'vital' by the European Court of Human Rights in *Bladet Tromsø v. Norway* (2000) 29 EHRR 125, para. 59.

<sup>2</sup> It has long been recognized that freedom of expression rests on three central pillars: the attainment of truth; fostering the democratic process; and furthering individual autonomy. The last-mentioned justification for freedom of expression seems to be gaining recognition (see Burchell, *Personality Rights*, 13-19) and is explicitly recognized by O' Regan J in *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC) (Constitutional Court of South Africa, 14 July 2002 (case CCT 53/01)) para. [21].

<sup>3</sup> See E. Barendt, "Does anyone have any rights to free speech?" (1991) 44 *CLP* 63.

<sup>4</sup> In South Africa by the 1996 Constitution (*Constitution of the Republic of South Africa* Act 108 of 1996), s. 16; in Scotland by the Human Rights Act 1998, incorporating article 10 of the European Convention on Human Rights.

<sup>5</sup> In *Cox & Griffiths, Petitioners* 1998 SCCR 561 the Lord Justice General, Lord Rodger of Earlsferry, pointed out in a contempt of court case that although a boundary had always existed between freedom of expression and the requirements of the due course of justice, article 10 of the ECHR may well require that boundary to be redrawn in a place unfamiliar to the law. A part of the argument in *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA) was that not only the common law but also the new constitutional guarantee of the right to freedom of speech and expression removed the unlawfulness of inaccurate publications where the plaintiff had shown reasonable care.

<sup>6</sup> *Reynolds v. Times Newspapers Ltd & Ors* [2001] 2 AC 127 (HL) at 208A-B, [1999] 4 All ER 609 at 629. See also Lord Woolf CJ in *A v. B & C* March 11, 2002, para. 11(v).

<sup>7</sup> The present authors have contributed to the later 20<sup>th</sup> Century literature concerning the law of defamation in their respective jurisdictions: see Burchell, *Defamation and Personality Rights*; Norrie, *Defamation and 'Obligations Arising from a Wrongful Act'*, in *Stair Memorial Encyclopaedia*, vol. 15 (1996), §§ paras. 470-573.

<sup>8</sup> The remedy available under the *actio injuriarum* for the protection of human dignity is one of the most impressive legacies of the Roman law of delict. Human dignity ~~is~~ surely ~~also~~ at the heart of any human rights ideology. A concept of dignity, given a broad interpretation going beyond simply insult (or *contumelia*) embodied in the crystallized categories of impairment of dignity (see below) could, it might be argued, also provide an effective basis for a remedy for infringements of dignity manifesting themselves in unfairly discriminatory treatment of individuals, sexual harassment and abuse, unlawful dismissal from employment, interference with religious beliefs and so on: see Burchell, *Personality Rights, Personality Rights*, 330-4 (Cf. O' Regan J in *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC), para. 26, who acknowledges the foundational value of 'dignity' in the South African Constitution para [26]). The remedy for impairment of dignity was available via the common law even during South Africa's apartheid era, subject of course to the shackles imposed by the system of parliamentary sovereignty which dominated the jurisprudence of that time. The recognition, through the Human Rights Act 1998, of the unlawfulness of many of the above infringements of dignity provides Scots law with a basis (if it wishes to use it) for developing the common law delictual remedy along similar lines: see [the text](#) below, ~~text~~ at n. 131.

<sup>9</sup> See J.M. Burchell, 'The Criteria of Defamation' (1974) 91 *SALJ* 178.

<sup>10</sup> Act 108 of 1996.

<sup>11</sup> See *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), 1216I-J; *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC), para. [27] and [28]; and the High Court decisions cited in [Burchell, Personality Rights](#), n.2, 139.

<sup>12</sup> In the 17<sup>th</sup> century, Stair, I, 4, 4 limited his discussion to attacks on reputation. Bankton, I, 10, 21 and 24, in the 18<sup>th</sup> century, turned his attention to the general wrong of injury (the Roman *injuria*) which, including injury to the person, he described as 'an offence, maliciously committed' against the 'fame, dignity or reputation' of the pursuer. He goes on to explain that damages may be awarded without any direct proof of the quantum, 'that being hardly possible', pointing to 'injury' as more a wrong to personality than to patrimony. [Writing in the 19<sup>th</sup> century](#), -Guthrie Smith, *The Law of Reparation* (1<sup>st</sup> edn., 1864), 187 ~~writing in the 19<sup>th</sup> century~~, opens his chapter on defamation by referring to 'the right to one's honour and good name' (*The Law of Reparation* (1<sup>st</sup> edn., 1864, Edinburgh), 187), encapsulating thereby the interests described here as dignity and reputation into a unitary 'right'. Court practice followed this doctrinal approach, as can be seen, for example, in *Sheriff v. Wilson* (1855) 17 D 528 where a pursuer sued for

damages ‘by way of *solatium* for the loss and injury caused to him in means, character, credit, reputation, feelings and standing in society’. By the late 20<sup>th</sup> century, Professor [David M. Walker](#), [Delict \(2<sup>nd</sup> edn., 1981\), 729](#) was presenting the purpose of defamation primarily as the vindication of personality rights with only a secondary design to protect reputation [Delict \(2<sup>nd</sup> edn., 1981\), 729](#).

<sup>13</sup> Smith, *Short Commentary*, 726 despaired (as he so often did) that what he saw as the pure Roman distinction between ‘insult’ (requiring *animus*) and ‘defamation’ (requiring *culpa*) could no longer be said to represent Scots law.

<sup>14</sup> Norrie, *Defamation*, 28-9.

<sup>15</sup> (1883) 10 R 537.

<sup>16</sup> Smith, *Short Commentary*, 727.

<sup>17</sup> The same, inevitable, conclusion is reached in Scots law: *North of Scotland Banking Co v. Duncan* (1857) 19 D 881, 885 *per* Lord Ardmillan.

<sup>18</sup> From 1977 to 1989 the South African high courts flirted with the idea that the remedy for impairment of reputation available to a corporation was, in fact, exclusively aquilian in nature (see Burchell, *Defamation*, 42-4). However, in 1989 Rabie ACJ in *Dhlomo NO v. Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) reaffirmed the rule, stated by Innes CJ in 1916 in *G A Fichardt v. The Friend Newspapers Ltd* 1916 AD 1, that a trading corporation can sue for *defamation* without the need to establish special damage, provided it could demonstrate that the offending statement was ‘calculated’ (i.e. likely) to cause it financial prejudice. This rule was even extended to political parties in *Argus Printing and Publishing Co Ltd v. Inkatha* 1993 (3) SA 579 (A), although subject to the dictates of freedom of expression being considered, under the element of unlawfulness, in each particular case.

<sup>19</sup> *Caxton v. Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 560 *per* Corbett CJ.

<sup>20</sup> Scots law and South African law maintain an identity in strongly eschewing the Anglo-American notion of punitive or exemplary damages. In both systems damages are compensatory, even with general damages which are designed to reflect what can reasonably be assumed to have been lost.

<sup>21</sup> See R. Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’, (1986) 74 *California LR* 691.

<sup>22</sup> *Manning v. Hill* [1995] 126 DLR (4<sup>th</sup>) 129, 160. True it is, as Shakespeare reminds us, that reputation is ‘An idle and most false imposition; oft got without merit and lost without deserving. You have lost no reputation at all, unless you repute yourself such a loser’ (*Othello*, ii, iii, 261-65).

<sup>23</sup> T. Gibbons, ‘Defamation Reconsidered’, (1996) 16 *Oxford Journal of Legal Studies* 587 at 589.

<sup>24</sup> This approach is echoed in the interpretation of the Constitutional protection in South Africa of ‘dignity’, which is seen as part of an individual’s autonomy, to include ‘reputation’: see [n. 11](#) and n. 2.

<sup>25</sup> As in *Hedley Byrne v. Heller and Partners* [1964] AC (HL) 465 and its progeny.

<sup>26</sup> *Infra* [n. 66](#).

<sup>27</sup> *Supra* [n. 5](#). The constitutionality of the *Bogoshi* rule (which bases the media’s liability for defamation on proof of the absence of negligence or of the reasonableness of the publication) has been affirmed in *Holomisa* 2002 (8) BCLR 771 (CC), para. [43].

<sup>28</sup> *Supra* (n. 2).

<sup>29</sup> *Animus injuriandi*, often in the modern law rendered as ‘malice’ (though without the technical connotations that word has in English law) for most defenders, and negligence for innocent disseminators.

<sup>30</sup> The inquiry into unlawfulness (which is, in theory, distinguished from the inquiry into fault, whether in the form of intention or negligence) is one based on an *ex post facto*; public policy; investigation into the reasonableness or unreasonableness of the defendant’s conduct. Although the inquiry into unlawfulness has common ground with the inquiry into negligence in that both inquiries are dominated by assessment of the reasonableness or unreasonableness of the defendant’s conduct, the unlawfulness issue is broader than the negligence one. Supplement matters of policy, possibly going beyond the factual investigation into foreseeability of harm, which is the essence of the negligence inquiry, can be factored into the unlawfulness test. Thus, in a defamation case, broad issues of freedom of expression covering the instant and possible future cases, can become part of the unlawfulness equation. Similarly, fears of opening the floodgates and unduly interfering with the administration of justice can become part of the unlawfulness examination in cases of alleged negligent conduct causing pure economic loss. On the concept of unlawfulness in the context of infringements of personality rights, see Burchell, *Personality Rights*, ch. 16 and on unlawfulness in a wider context in delict, see the two chapters (by Francois Du Bois and Jonathan Burchell, respectively) in *Developing Delict—Essays in Honour of Robert Feenstra* (2001), [Juta Law](#) 1-48 and 99-132.

<sup>31</sup> *-Animus injuriandi*, or subjective intention to defame, with knowledge of unlawfulness for the individual; negligence for innocent disseminators and, more importantly, the media.

<sup>32</sup> It is clear that the common law does not require the plaintiff to prove the falsity of matter that was the subject of a defamation action (see *Mahomed v. Jassiem* 1996 (1) SA 673 (A), 694A-B and *National Media Ltd v. National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), 1218D-E and 1215C-I). As Hefer JA correctly stated in *Bogoshi*, 'Falsity of a defamatory statement is not an element of the delict, but... its truth may be an important factor in deciding the legality of its publication' (at 1218D-E). This has been the common law position for many years. See also *Selemela v. Independent Newspaper Group Ltd* 2001 (4) SA 987 (NC). The Constitutional Court in *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC), affirmed that the common law allocation of the onus on the defendant to prove a defence excluding unlawfulness in a defamation action placed a justifiable limit on the dictates of freedom of expression, when examined in the light of the defence of the 'reasonableness' of the publication ~~recogniserecognized~~ in the *Bogoshi* argument (see also Burchell, *Personality Rights*, 273).

<sup>33</sup> *Neethling v. Du Preez*; *Neethling v. The Weekly Mail* 1994 (1) SA 708 (A) and *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), 1215.

<sup>34</sup> [1936] 2 All ER 1237.

<sup>35</sup> *Guthrie-Guthrie Smith*, (n. 12), 188, gave this as the test in 1864, citing Grotius, ss. 306, as authority. For the development of the test in South African law, see Burchell, (1974) 91 SALJ 178n.9.

<sup>36</sup> As opposed to a secondary meaning or innuendo.

<sup>37</sup> See, for example, *Kerr v. Kennedy* [1942] 1 KB 409; *Vermaak v. Van der Merwe* -1981 (3) SA 78 (N) (allegations of lesbianism, the latter case focusing on the nature of publication to a third party and the understanding of the meaning of the words used in South African law); and *Richardson v. Walker* (1804) Hume 623; *AB v. XY* 1917 SC 15 (respectively, a direct allegation and an innuendo of sodomy). A more modern case is that of *Prophit v. BBC* 1997 SLT 745 in which the court did not question that an allegation of lesbianism was defamatory, though in that case the pursuer, being a nun, might be expected by right-thinking people to be chaste in both deed and thought. In *Quilty v. Windsor* 1999 SLT 346, 355F Lord Kingarth dismissed a claim based on an allegation of homosexuality on the ground that it 'would not now generally at least be regarded - if it ever was - as defamatory *per se*' (at 355F).

<sup>38</sup> In South Africa, since the Constitution protects rights to sexual orientation in s. 9(3), it is suggested that the matter is one of privacy rather than affront and that simple disclosures of sexual orientation, unaccompanied by derogatory epithets, should rather be actionable as invasions of privacy. It would seem that a *false* disclosure cannot found a privacy action nor (in Scotland) a truthful one a defamation action.

<sup>39</sup> *Carmichele v. Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

<sup>40</sup> 2001 (4) SA 1357 (W).

<sup>41</sup> Both the South African Constitution and the European Convention are primarily directed towards ensuring that states act in particular ways, but the underlying values of both (respect for others, tolerance etc) are clearly capable of being subscribed to by individuals - and it is in society's interests that legal doctrine encourages them to do so.

<sup>42</sup> Lord Atkin himself in *Sim v. Stretch* [1936] 2 All ER 1237, 1240 pointed out that the test he had just propounded 'is complicated by having to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used' (n.34, 1240).

<sup>43</sup> *Guthrie Smith*, (n.12), 188.

<sup>44</sup> *Macfarlane v. Black & Co* (1887) 14 R 870, 873.

<sup>45</sup> 1996 (1) SA 673 (A).

<sup>46</sup> *Quaere*: whether the Constitutional endorsement of tolerance can tolerate the sectional test sanctioning intolerance? Surely the answer is: only if the 'intolerance' is a view adhered to by a 'substantial and respectable section of the community', the court taking account of Constitutional norms in determining what is 'respectable'.

<sup>47</sup> See *Byrne v. Dean* [1937] 1 KB 818 where personal opinion (on the morality of reporting associates to the police) was held not to affect the test for defamatoriness.

<sup>48</sup> A distinction is drawn between defences excluding fault, such as mistake, and defences excluding unlawfulness, such as truth for the public benefit. Fault is seen as a subjective concept, while unlawfulness is objective. Fair comment, privileged occasion and consent are also defences excluding the unlawfulness of a publication although the South African courts have acknowledged that there is no closed list of

defences excluding unlawfulness: see *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), and *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC), para. 18. The Constitutional Court in *Holomisa*, para. 18 regards the *Bogoshi* formulation of the criterion of the 'reasonableness' of the publication as providing the defendant with a broader type of defence excluding unlawfulness and some commentators on *Bogoshi* consider that the judgment of the Supreme Court of Appeal opens up the possibility of recognising a general defence of 'media privilege' in certain circumstances, see below. A South African court has even held recently that the *amende honorable* has not been abrogated by disuse: it is 'a little treasure lost in a nook of our legal attic' (per Willis J in *Mineworkers Investment Company (Pty) Ltd v. Modibane* 2002 (6) SA 512 (W) 20012 JDR 0465 (T)-who held that the *amende honorable* was compatible with Constitutional norms and could require a defendant in a defamation action to be given an opportunity to make an appropriate public apology in lieu of paying damages (compare *Van Niekerk v. Radebe* case no 00/21813 where the freedom of expression implications are explored). The equivalent in Scotland, *palinode*, has probably been superseded by the statutory 'offer of amends' in ss. 2-4 of the Defamation Act 1996 (c. 31). As far as the defence of privileged occasion is concerned, both Scots and South African law draw fundamental distinctions between absolute and qualified privilege and recognise that it is the occasion that is privileged rather than the communication itself or the person making the communication.

<sup>49</sup> See the authorities cited *supra* n. 32.

<sup>50</sup> See the text accompanying See above n. 32000.

<sup>51</sup> See J. Blackie, 'Defamation', in Reid and Zimmermann, *History*, 666 ff. Before the 19<sup>th</sup> Century, we can find, for example, Bankton, I, 10, 31, with a distinctly Roman-Dutch flavour reflected in modern South African law, quoting Voet to the effect that '*veritas convitii non excusat a calumnia*' except where it is to the good of the commonwealth to have the crime known and the words were not said with a design to reproach.

<sup>52</sup> Though the distinction was not so clear before the early 19<sup>th</sup> century as it is today: see K. Norrie, 'The Intentional Delicts', in Reid and Zimmermann, *History*, 477-8; A. van Aswegen, 'Aquilian Liability I (Nineteenth Century)', in Zimmermann and Visser, *Southern Cross*, 567-8. The crime of defamation exists in South African law and, strictly speaking, only applies to serious defamation. Fortunately, the criminal sanction is very seldom utilized, as the use of the criminal law to curb free speech is a highly debateable incursion into free speech: see Burchell, *Defamation*, ch. 26.

<sup>53</sup> In whose jurisdiction actions against honour originally lay: see Blackie (n. 51), 668.

<sup>54</sup> *Chalmers v. Douglas* (1785) Mor 13939 (wrongly cited by Blackie (n. 51) as 13989).

<sup>55</sup> The matter was conclusively settled, as far as Scots law is concerned, by the time of the decision in *Mackellar v. Duke of Sutherland* (1859) 21 D 222, in which the judges expressed some surprise that counsel considered the matter open to dispute.

<sup>56</sup> In Scotland too it has been stated, *obiter*, that 'Truth is not always a justification of libel' (per Lord Deas in *Friend v. Skelton* (1855) 17D 548, 551) and that 'I am not disposed to doubt that there are some kinds of injurious publications, for which, according to our law, there may be a relevant claim of damages, although there is no slander. Examples of such a claim are afforded by cases in which some physical deformity or secret defect, such, for instance, as that peculiar defect in respect of which marriage may be annulled, is wantonly and offensively paraded before the public' (per Lord Deas in *Cunningham v. Phillips* (1868) 6 M 926, 928. He was delicately referring to impotency). Lord Deas is suggesting in both these cases that damages are claimable in circumstances in which there is no conceivable public interest served in broadcasting such true facts to the public. But this view did not catch, and there is no modern judicial statement to this effect.

<sup>57</sup> *Supra* n. 5, 1212B-C. The Constitutionality of the development of the common law in *Bogoshi* was subsequently affirmed in a unanimous judgment of the Constitutional Court in *Holomisa*.

<sup>58</sup> 376 US 254 (1964).

<sup>59</sup> See Norrie, *Defamation*, 130-1; Burchell, *Personality Rights*, 224.

<sup>60</sup> At 1209I-J and 1212-3. See also *Hamata v. Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2000 (4) SA 621 (C), at para. 30 where the Cape High Court was prepared to accept, without deciding, that 'untrue statements may be worthy of constitutional protection and that the mere fact that publication is false does not take it outside the purview of s. 16(1)' (the freedom of expression clause).

<sup>61</sup> At 1212-3.

<sup>62</sup> See Burchell, *Defamation*, 206-9, especially 207 n. 23 and *Delict* (1993), 174-175.

<sup>63</sup> See *Graham v. Kerr* (1892) 9 SC 185, 187 *per* De Villiers CJ: ‘Public interest would suffer rather than benefit from any unnecessary reviving of forgotten scandals’. Cf. Lord Deas in *Friend v. Skelton* (1855) 17D 548(1855) 17D 548, 551 where he said that if the words complained of concerned ‘some old and generally forgotten immoral act or act of impropriety’ then the truth of the words might act as a mitigation (though not exculpation).

<sup>64</sup> *Supra*, (n. 5).

<sup>65</sup> Including a type of ‘normative’ intention, approximating negligence (where the absence of knowledge of unlawfulness has to be reasonable, not merely *bona fide*) to excuse: see Van Dijkhorst J’s interpretation of *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), in *Marais v. Groenewald* 2001 (1) SA 634 (T). See J. R. Midgley, ‘Media liability for Defamation’, (1999) 116 *SALJ* 211 at 222. It would seem that the Constitutional Court in *Khumalo v. Holomisa* 2002 (2-8) BCLR 771 (CC), para. [20], has, by implication, rejected this approach to normative intention as a possible interpretation of *Bogoshi*, by clearly acknowledging a negligence-based liability for the media.

<sup>66</sup> Defamation Act 1996, s. 1 for Scotland; *Trimble v. Central News Agency Ltd* 1934 AD 43 for South Africa. One of the most significant forms of communication covered by s. 1 of the 1996 Act is electronic communication such as the internet. So network service operators and providers will be able to make use of this defence. The defence of absence of negligence would, in South Africa, be available to the media, in whatever shape or form: *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA).

<sup>67</sup> It is not the purpose of this chapter to explore the peculiar Anglo-American concept of malice in defamation. For present purposes it can be taken to be roughly analogous to intent to injure. For a more sophisticated account, see P. Mitchell, ‘Malice in Defamation’, (1998) 114 *LQR* 639. In *Adam v. Allan* (1841) 3 D 1058, 1073 Lord Jeffries defined malice as ‘animosity, ill-temper, love of scandal and gossip, or mere rash and thoughtless loquacity’.

<sup>68</sup> Erskine, IV, 4, 80.

<sup>69</sup> [1910] AC 20.

<sup>70</sup> *Blackie* (n. 51), 657.

<sup>71</sup> *Ibid.*, 662.

<sup>72</sup> (1763) Mor. 3436.

<sup>73</sup> See also *Outram v. Reid* (1852) 14D 577 to similar effect (the allegation there being one of bankruptcy).

<sup>74</sup> *Guthrie Smith* (n. 12-2), 202.

<sup>75</sup> This was certainly Erskine’s understanding of the law, writing ten years after *Finlay* (though he does not mention that case): Erskine, IV, 4, 80.

<sup>76</sup> 29 June 1809, FC.

<sup>77</sup> *Guthrie Smith*, (n. 12-2), 193.

<sup>78</sup> Hume, *Lectures*, III, 146.

<sup>79</sup> 1909 2 SLT 315, 409.

<sup>80</sup> 1960 (4) SA 836 (C) and *Minister van Veiligheid en Sekuriteit v. Kyriacou* 2000 (4) SA 337 (O).

<sup>81</sup> 1977 (3) SA 394 (A).

<sup>82</sup> 1982 (3) SA 146 (A). See Burchell, *Defamation*, 185 *ff. et seq.*

<sup>83</sup> 1998 (4) SA 1196 (SCA), confirmed by the Constitutional Court in *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC).

<sup>84</sup> This is, of course, the underpinning justification for the law of privilege.

<sup>85</sup> *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), 1211. The essence of what is sometimes colloquially referred to as the ‘right of reply’ can, therefore, be accommodated within the standard of the reasonableness of the publication: see Burchell, *Personality Rights*, 496-7. The standard of reasonableness also, in essence, underpins the approach of the European Court of Human Rights. The issue for that Court is ‘proportionality’ between restrictions on free speech and the aims sought to be achieved by the restrictions. The Court has held that what must be taken into account includes the extent to which reputation is damaged, the reasonableness of the defender’s efforts or lack of efforts to verify its facts, and its ‘vital role of “public watchdog”’: *Bladet Tromsø v. Norway* (2000) 29 EHRR 125.

<sup>86</sup> See Burchell, *Personality Rights*, 226.

<sup>87</sup> Considered immediately below and in Burchell, *Personality Rights*, 309-14.

<sup>88</sup> *New York Times v. Sullivan* 376 US 254 (1964).

<sup>89</sup> For a short exposition of the important cases, see Thomas Gibbons, 'Defamation Reconsidered', (1996) 16 *Oxford Journal of Legal Studies* 610-11.

<sup>90</sup> This is seen in *Telnikoff v. Matusevitch* [1992] 2 AC 343 the *Telnikoff saga*. Telnikoff and Matusevitch were Russians living in England and the one sued the other for defamation in the English courts as a result of a letter published in an English newspaper. The case went all the way to the House of Lords on a fairly obscure but important point relating to the defence of fair comment. The defendant lost and had substantial damages awarded against him. He then moved to the United States, whence the plaintiff followed him. When the plaintiff sought to have the English judgment ~~recognised~~ recognized and enforced against the defendant's assets (now also moved to the United States) the Maryland Court of Appeals refused to do so on the ground that it would be contrary to public policy to ~~recognise~~ recognize the English judgment (707 A 2d 230 (Md 1997)). Partly it was the level of damages that offended the Court of Appeals' notion of propriety but mostly it was the strict liability rule which was perceived as being utterly inconsistent with the United States of America's strong commitment to freedom of speech: see K. H. Youm, 'The Interaction Between American and Foreign Libel Law', (2000) 49 *ICLQ* 131.

<sup>91</sup> *Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96 (High Court of Australia); *Lange v. Atkinson* [1998] 3 NZLR 424 (New Zealand Court of Appeal). The Privy Council [2000] 1 NZLR 257 in an appeal in the latter case handed down a decision on the same day as the House of Lords (with the same judges) decided the English case of *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 (HL), and remitted *Lange* back to the New Zealand Court of Appeal to reconsider their decision in light of *Reynolds*. The Court of Appeal did so and confirmed their earlier decision: [2000] 3 NZLR 385.

<sup>92</sup> *Theophanus v. H & W Times* (1994) 124 ALR 1.

<sup>93</sup> *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), endorsed by the Constitutional Court in *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC).

<sup>94</sup> *Neethling v. The Weekly Mail* 1994 (1) SA 708 (A); *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), 1214E.

<sup>95</sup> *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC).

<sup>96</sup> In *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA).

<sup>97</sup> In *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC).

<sup>98</sup> The nearest one gets to a suggestion that newspapers should be treated differently from other defenders is in *Morrison v. Ritchie* (1902) 4F 645 and *McLean v. Bernstein & Ors* (1900) 8 SLT 42 but the issue in both was whether the negligence-based defence that is now known as 'innocent dissemination' (see [n.6](#), 66 above) applied to newspaper publishers as well as news vendors (and the answer given in both cases was no).

<sup>99</sup> [2001] 2 AC 127.

<sup>100</sup> In fact, it was the Court of Appeal decision in *Reynolds* ([n.6](#)), (i.e. that the common law can develop 'political information' as a generic category of information attracting qualified privilege, irrespective of the circumstances) that the Supreme Court of Appeal applied in *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA), 1210, 1211-2). The *Bogoshi* judgment opens up the possibility of a new category of qualified privilege—that applying to the media, who have a duty to communicate information to the public, who have a right to receive this information (at 1209I-J).

<sup>101</sup> *Per* Lord Steyn at 210H.

<sup>102</sup> At 220C.

<sup>103</sup> See especially the judgment of Lord Hope of Craighead at 234.

<sup>104</sup> This is also the position of the European Court of Human Rights: see *Oberschlick v. Austria* (1995) 19 EHRR 389, para. 59. Scots law allows an almost American breadth in determining the category of public figure about whom this expectation is held. In *Moffat v. West Highland Publishing Co Ltd* 2000 SLT 335 a pursuer was 'in a position of responsibility in the media industry' and was held, therefore, to be obliged to accept 'rough language and unmannerly jests'.

<sup>105</sup> At 1209I.

<sup>106</sup> At 213G.

<sup>107</sup> At 214B.

<sup>108</sup> At 215B-C.

<sup>109</sup> At 224C-D.

<sup>110</sup> Lord Hope dissented on this point (though not on the rejection of the plea that the Court should extend the ambit of qualified privilege). He held that policy matters and the reasonableness enquiry were relevant

only to determine whether, in a situation of qualified privilege, the plaintiff had established fault in the form of malice and not, as the majority held, to determine whether a situation of qualified privilege existed in the first place. The New Zealand Court of Appeal followed Lord Hope rather than the majority on this point when they reconsidered *Lange* at [2000] 3 NZLR 385, para. 5.

<sup>111</sup> At 225G.

<sup>112</sup> The Privy Council in *Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96 at 261-2, accepted that, the issue being one of judicial policy, different jurisdictions could rationally approach the issue in different ways (a sort of ‘margin of appreciation’ approach by this internationalist court).

<sup>113</sup> [1931] AC 333.

<sup>114</sup> 1954 (3) SA 244(C).

<sup>115</sup> See also *Boswell v. Union Club of South Africa (Durban)* 1985 (2) SA 162 (D) where it was held that there was an actionable but innominate injury when a club expelled a member because the expulsion suggested unbecoming conduct on the part of the member. Scots and English law would deal with this by identifying, through innuendo, a defamatory fact: see *Parlane v. Templeton* (1896) 4 SLT 153.

<sup>116</sup> A Scottish case illustrating this is *Adamson v. Martin* 1916 SC 319 where a person had been photographed and fingerprinted by the police without authority. The circumstances did not amount to wrongful arrest or detention and there is no delict of wrongful photography. So the pursuer raised the action in defamation, alleging an innuendo (less strained than in *Tolley v. Fry & Sons Ltd* [1931] AC 333 admittedly) that he was being accused of a crime.

<sup>117</sup> Burchell, *Personality Rights*, 411 n.111.

<sup>118</sup> [1997] EMLR 139.

<sup>119</sup> See also *Cornwell v. Myskow* [1987] 2 All ER 504 in which an actress obtained damages for an article alleging that she could not sing, was ugly, and that ‘her bum is too big’ (though on appeal a new trial was ordered as the judge had misdirected the jury).

<sup>120</sup> Apart from anything else, how could a plea of truth ever be established with such an allegation? The European Court of Human Rights has said that for a legal system to require defendants to establish the ‘truth’ of a judgmental opinion is an infringement of their right to free expression: *Oberschlick v. Austria* (1995) 19 EHRR 389, para. 63.

<sup>121</sup> *Supra* n.1140.

<sup>122</sup> This is the correct approach as set out in *De Lange v. Costa* 1989 (2) SA 857 (A) at 862B-G.

<sup>123</sup> At 1360I.

<sup>124</sup> Burchell, *Delict*, 198—211; Burchell, *Personality Rights*, 333-4 and [ch.apter 27](#).

<sup>125</sup> A person who is subjected to meaningless abuse is without a remedy for defamation as defamation involves words or ideas that have a meaning. However, a person who is subjected to abusive language, even though it may be meaningless, is not completely without a remedy in South African law. An action for injury to his or her dignity, objectively assessed, may be available: Burchell, *Personality Rights*, 197. Had Scots law not gone down the road (starting with *Sheriff v. Wilson* (1855) 17 D 528) of requiring falsity to be established in all cases of verbal injury (a rule which requires fact to test truth or falsity against) then this might be a good explanation for the public hatred and contempt cases (sometimes called the *convicium* cases) from the mid-19<sup>th</sup> century where facts could be extracted from the statements complained of only with some imagination. It is, at the end of the day, a policy decision for each legal system to make (rather than one referable to any underlying principle) whether damages should be given for the affront suffered through meaningless vulgarities such as ‘motherfucker’, ‘wanker’ or, in South Africa, ‘kaffir’. In South Africa, insulting words have been actionable as impairments of dignity and even as criminal *injuria* (both as a matter of principle and policy), even though the words are used in private (i.e. only to the insulted person) and where the word or words used are strictly speaking meaningless: see *Brenner v. Botha* 1956 (3) SA 257 (T); *S v. Jana* 1981 (1) SA 671 (T) and *Mbilini v. Minister of Police* 1981 (3) SA 493 (E).

<sup>126</sup> Section 10. The German *Grundgesetz* similarly, by art. 1(1), provides that the dignity of man shall be inviolable and from this the German courts have been able to fashion delictual remedies which provide redress for attacks on personality: see P. Handford, ‘Moral Damage in Germany’ (1978) 27 *ICLQ* 849.

<sup>127</sup> See R. Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 *California LR* 691; T. Gibbons, ‘Personality Rights: The Limits of Personal Accountability’ (1998) 3 *Yearbook of Media and Entertainment Law* 53 at 61-6; Burchell, *Personality Rights*, 329. See also *Dawood v. Minister of Home Affairs*; *Thomas v. Minister of Home Affairs* 2000 (3) SA 936 (CC), para. 34 and *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC) n. para. [26] and [27].

<sup>128</sup> Though the European Court of Human Rights has said that ‘the very essence of the [European] Convention is respect for human dignity’: *Goodwin v. United Kingdom*, 11 July 2002, para. 90.

<sup>129</sup> Classically, the phrase ‘verbal injury’ was used by the institutional writers to indicate a genus separate from real injury within which was contained a number of species including defamation; since the mid-19<sup>th</sup> century ‘verbal injury’ has commonly but misleadingly been used to refer to the species within the genus ‘*iniuria verbis*’ that is not defamation. See K. Norrie, ‘Hurts to Character, Honour and Reputation: A Reappraisal’ (1984) *JR* 163.

<sup>130</sup> ‘It is perilous enough to place such cases in which there is admittedly no slander in the sole arbitrament of a jury, even when an intent to injure is alleged; but there would be no safety at all for the public press if in cases where there is no slander an intent to injure were not held essential to liability for damages’: *per* Lord Deas in *Cunningham v. Phillips* (1868) 6 M 926, 928.

<sup>131</sup> For example, being held up to public hatred, contempt and ridicule (an archetypal form of verbal injury) might well lead a person to lose employment or contract for services. Damages would only be available if the defender could be shown to have intended to cause these losses. Blackie *n.(n. 51)*, 704-5 points out the fact (not apparent from the law reports themselves) that *Paterson v. Welch* (1893) 20 R 744, the classic ‘verbal injury’ case, was a claim for both patrimonial loss and *solatium*. (It follows that Lord Wheatley in *Steele v. Scottish Daily Record* 1970 SLT 53, 60 was wrong to state that the action in *Paterson* was restricted to *solatium*, though he came to that conclusion *because* the case was one of so-called verbal injury rather than defamation. Nevertheless in *Steele* itself the pursuer was seeking redress for both patrimonial and non-patrimonial loss).

<sup>132</sup> So Bankton, I, 10, 22 included within ‘injury’ assault, meaning to protect thereby not physical integrity but the dignity of the individual: ‘it tends much to the person’s disgrace’.

<sup>133</sup> Interference with parental authority has been held to be no delict (because the true nature of the parent-child relationship is one of responsibility to be shown by the parent rather than power of authority exercised by the parents: *McKeen v. Chief Constable, Lothian and Borders Police* 1994 SLT 93). Breach of promise to marry has never been a civil wrong in Scotland, and adultery no longer is (see Divorce (Scotland) Act 1976, s. 10(1) and Norrie, *n.(n. 52,2)*, 510-12).

<sup>134</sup> See K. Norrie *(n. 7)*, *Stair Memorial Encyclopaedia*, vol. 15 paras 435-69.

<sup>135</sup> In South Africa, once impairment of dignity has been established by the plaintiff it is presumed that this was both unlawful and perpetrated with fault and the onus shifts to the defendant to prove a defence excluding unlawfulness or lack of either negligence (by the media) or *animus* (by the individual). In Scotland the onus rests with the pursuer to prove fault.

<sup>136</sup> A more important reason for the development of wrongs such as wrongful imprisonment, wrongful prosecution and misuse of the civil process was the need to protect the administration of justice itself: see K. Norrie, *n.(n. 52,2)*, 500-506, 515.

<sup>137</sup> *Jansen van Vuuren NO v. Kruger* 1993 (4) SA 842(A) at 849E and *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC) *n.*, para. [27].

<sup>138</sup> *O’Keeffe v. Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C); *Mhlongo v. Bailey* 1958 (1) SA 370 (W); *Rhodesian Publishing and Printing Co Ltd v. Duggan* 1975 (1) SA 590 (R); *La Grange v. Schoeman* 1980 (1) SA 885 (E); *Jansen van Vuuren NO v. Kruger* 1993 (4) SA 842 (A); *National Media Ltd v. Jooste* 1996 (3) SA 262 (A).

<sup>139</sup> *S v. A and Another* 1971 (2) SA 293 (T) and the ‘peeping tom’ cases in criminal law, e.g. *R v. Holliday* 1927 CPD 395. Serious infringements of dignity can be prosecuted as *crimen* (or criminal) *injuria* in South Africa.

<sup>140</sup> For instance, *Bernstein v. Bester NO* 1996 (2) SA 751 (CC); *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice* 1999 (1) SA 6 (CC). The concept of dignity would also naturally embody such a broad interpretation: see *Khumalo v. Holomisa* 2002 (8) BCLR 771 (CC) *n.*, paras. [26] and [27].

<sup>141</sup> See *Francome v. Mirror Newspapers* [1984] 2 All ER 408; *Wainwright v. Home Office* December 21, 2001 (Court of Appeal), *especially* –Mummery LJ, paras. 57-60, and Buxton LJ, para. 102.

<sup>142</sup> Statute does, however, provide some redress, thereby providing some recognition by the law of the importance of privacy, (i) by setting up complaints mechanisms against, for example, broadcasters who unwarrantably infringe privacy (see Broadcasting Act 1996, s. 110), and (ii) by giving individuals various rights of access to personal information, a right to correct errors, and to limit access by others (see Data Protection Act 2000). This Act was required as a result of EC Directive 95/46 which was expressly

designed to protect, throughout the European Union, the ECHR right to privacy. Under the Act, damages may be obtained for distress and injury to feelings resulting from a breach of privacy: see *Campbell v. MGN* March 27, 2002.

<sup>143</sup> *Attorney General v. Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109; *Lord Advocate v. The Scotsman Publications Ltd* 1989 SLT 705.

<sup>144</sup> See *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461; *Brown's Trustees v. Hay* (1898) 25 R 1112. The action for invasion of privacy or confidentiality extends in South Africa to juristic persons: see *Financial Mail (Pty) Ltd v. Sage Holdings Ltd* 1993 (2) SA 451 (A) and *Investigation Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v. Smit* NO 2001 (1) SA 545 (CC), para. 17.

<sup>145</sup> *AB v. CD* (1851) 14 D 177; *AB v. CD* (1904) 7 F 72; *Furniss v. Fitchett* [1958] NZLR 396; *W v. Edgell* [1990] 1 All ER 835.

<sup>146</sup> *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302.

<sup>147</sup> *Stephens v. Avery* [1988] 2 All ER 477.

<sup>148</sup> When only private life rather than economic interests can be affected.

<sup>149</sup> See *Hellewell v. Chief Constable of Derbyshire* [1995] 1 WLR 804, per Laws J at 807. And in *Campbell v. Mirror Group Newspapers* March 27, 2002 the imparting to a newspaper by a third party of private information concerning the plaintiff, which it then published, was held to amount to a breach of the newspaper's duty of confidentiality to the plaintiff.

<sup>150</sup> See *A v. B & C* (n. 6), in which the (English) Court of Appeal held that the ECHR had given a 'new strength and breadth to the action [for breach of confidence]' (para. 4.) Lord Woolf, CJ, held that art. 8 'operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy. It requires a generous approach to the situations in which privacy is to be protected' (para. 6). Further, he held that the action for breach of confidence could accommodate 'the great majority of situations' in which the protection of privacy is justified (para. 11 (vi)).

<sup>151</sup> In *Wainwright v. Home Office* December 21, 2001 (Court of Appeal), the Court of Appeal made it plain that 'all of the previous cases that are seen as providing the germ of a tort of breach of privacy were decided on the basis of breach of confidence' (per Buxton LJ at 98). See also A. Mackenzie, 'Privacy - A New Right in UK Law?', 2002 SLT (News) 98.

<sup>152</sup> [2001] 2 All ER 289.

<sup>153</sup> Para. 110.

<sup>154</sup> Para. 111.

<sup>155</sup> They had signed a deal to give exclusive rights to their wedding photographs to one magazine and the defendants, a rival magazine, had surreptitiously taken photographs at the wedding to spoil their rivals' claim to exclusivity.

<sup>156</sup> [2000] 3 All ER 989.

<sup>157</sup> At 1002.

<sup>158</sup> February 14, 2002.

<sup>159</sup> Para. 78.

<sup>160</sup> This matter was adverted to but not discussed in *A v. B & C*, (n. 6) above.