

# The legal implications of defamatory statements on social media platforms in South Africa

**LH Homann**  
**21219222**

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Supervisor: Dr W Erlank

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## **Summary**

With the fast pace that technology is currently developing, technology forms a bigger part of our day to day lives. Technological advancement has an impact on all aspects of life, including how we communicate with one another. This has caused an increase in social media usage. South Africa is in no way an exception to this growing trend. The escalation of the use of social media platforms has brought with it the rise in the wrongful use of social media. The growth in wrongful use would lead to the proliferation of legal consequences for defamatory statements with regard to social media situations. The question arises if South Africa's current legislation is able to regulate the new phenomena of defamatory statements on social media platforms. The conclusion was reached that South Africa's current legislation is more than adequate to regulate this new form of defamation. With the qualification that that judges apply the current legal principles of the law of delict to this new form of defamation correctly. Educating and informing judges, as well as the public is vital in preventing this new form of defamation to become problematic.

## **Keywords**

Social media, Defamation, Delict, Defamatory statement, South Africa, Freedom of speech, Dignity, Reputation

## **Opsomming**

Met die geweldige tempo van tegnologiese ontwikkeling, vorm tegnologie 'n groter deel van ons alledaagse lewe. Tegnologiese ontwikkeling het 'n impak op alle aspekte van ons bestaan, insluitend hoe ons met mekaar kommunikeer. Om hierdie rede het die gebruik van sosiale media drasties verhoog. Suid Afrika is geensins 'n uitsondering op hierdie tendens nie. Die toename in die gebruik van sosiale media platforms, het ook die verhoging in die onregmatige gebruik daarvan teweeg gebring, as gevolg van menslike natuur. Die verhoging in die onregmatige gebruik van sosiale media platforms bring mee dat die toepassing van die reg ook verhoog aangaande lasterlike aantygings wat op sosiale media platforms gemaak word. Die vraag wat ontstaan is of Suid-Afrika se huidige wetgewing voldoende is om die nuwe sensasie van lasterlike aantygings op sosiale media platforms te reguleer. Die konklusie is bereik dat Suid-Afrika se huidige wetgewing meer as genoegsaam is om hierdie nuwe vorm van laster te reguleer. Met die voorvereiste dat die houe die huidige regs prinsiepe van die deliktereg, op die nuwe vorm van laster korrek toepas. Opleiding en kennisname aan houe, sowel as die publiek is kardinaal om te voorkom dat hierdie nuwe vorm van laster problematies van aard raak.

## **Trefwoorde**

Sosiale media, Laster, Delik, Lasterlike aantygings, Suid-Afrika , Vryheid van spraak, Integriteit, Reputasie

## 1 Introduction and problem statement

Moore<sup>1</sup> made a bold hypothesis in declaring that the number of transistors on integrated circuits doubles approximately every two years.<sup>2</sup> This hypothesis is commonly referred to as Moore's Law, and this trend concerning the specific growth pattern was described in Moore's 1965 paper, *Cramming more components onto integrated circuits*.<sup>3</sup> It basically stated that the trend would continue for the ten years after the invention of the integrated circuit in 1958.<sup>4</sup> His prediction has proven to be astoundingly accurate and remains fairly accurate to date, despite the critique and doubt fellow scientists had of the accuracy of the prediction.<sup>5</sup> Since integrated circuits are used in all facets of life, the effect of the doubling of the number of transistors on integrated circuits is that technology becomes faster, smaller and more efficient as time progresses.<sup>6</sup> Integrated circuits are used in almost all electronic equipment today. They have transformed the world of electronics and these electronics are used in all facets of day-to-day life.<sup>7</sup> For example the processing speed of central processing units (cpu's), memory capacity, sensors and pixels on digital cameras is strongly linked to Moore's law.<sup>8</sup> A combination of these components forms part of mobile phones, computers and other digital home appliances that are now inseparable parts of modern society.<sup>9</sup>

This technological advancement undoubtedly has a radical effect on how individuals communicate with one another. Another example of this growth can be seen in the

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1 Gordon Earle Moore, author of Moore's Law, American businessman and co-founder and Chairman Emeritus of Intel Corporation. See <http://www.intel.com/content/www/us/en/silicon-innovations/moores-law-technology.html>.

2 Oxlade *Gadgets and Games* 17.

3 Moore 1964 *Electronics Magazine* 1-4.

4 Moore 1964 *Electronics Magazine* 1-4.

5 Brock and Moore (eds) *Understanding Moore's Law* (Chemical Heritage Foundation Philadelphia 2006)

6 An integrated circuit is a small wafer that is normally made of silicone (or other semiconductors) and holds hundreds to millions of transistors, capacitors and resistors. These small chips can function as amplifiers, timers, microprocessors, and oscillators or computer memories. These very small electronica can perform calculations and store data using either digital or analogue technology. See <http://www.computerhope.com/jargon/i/ic.htm>. Today a USB memory stick is more powerful than the computers that put man on the moon, a prime example of the speed at which technology develops See Sarab 2012 <http://www.computerweekly.com/feature/Apollo-11-The-computers-that-put-man-on-the-moon>.

7 Nobel Prize 2003 [http://www.nobelprize.org/educational/physics/integrated\\_circuit/history/index.html](http://www.nobelprize.org/educational/physics/integrated_circuit/history/index.html).

8 For example, it is used in medical equipment, as well as in everyday home appliances. Li 2013 <http://dujs.dartmouth.edu/spring-2013-15th-anniversary-edition/keeping-up-with-moores-law#.UcH6-6saYs8>.

9 In a modern office, a combination of these components can be found in the immediate surroundings. Computers, computer screens, mobile phones, calculators, mp3 players, tablets and laptops are all examples of hardware that employs integrated circuits and is subject to Moore's law.

Internet. As with most other forms of technology, the amount of traffic communicated on the Internet is approximately doubling each year.<sup>10</sup> This rapid growth has caught most of the industries' experts off guard and was caused by the sudden change in focus occurring from the traditional voice communication towards modern data communication.<sup>11</sup> The demand for Internet access is derived from the demand for applications that utilize this access,<sup>12</sup> and these applications form part of the rapidly evolving technology front.<sup>13</sup>

In keeping with this spirit of ever increasing growth, the United Nation's Human Rights Commission<sup>14</sup> recently stated that it:

calls upon all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries.

This statement indirectly places a duty on all member states to facilitate Internet usage. The right to Internet access is already recognized by the laws of numerous states.<sup>15</sup> The reason for the existence of this right is to ensure that all people across the world are able to exercise and enjoy their rights to freedom of expression and opinion as well as other key fundamental human rights.<sup>16</sup> Statistically speaking, worldwide use of the Internet has increased by 566.4% from the year 2000 to the year 2012.<sup>17</sup> Developing regions (like the Middle East, Africa and Latin America) show the most growth over this time period.<sup>18</sup> These same statistics indicate a massive growth of 3606.7% in Internet usage in Africa from the year 2002 to the year 2012.<sup>19</sup> Therefore the most significant growth in Internet usage at the moment is taking place in Africa, including South Africa.

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10 Coffman and Odlyzko *AT & T Labs Research* 1.

11 Loomis and Taylor (eds) *Forecasting The Internet* 1.

12 Loomis and Taylor (eds) *Forecasting The Internet* 1.

13 The introduction of the tablet, for instance, has increased the demand for access to the Internet, because one of its main features is online connectivity.

14 Zeldin 2012 [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205403231\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403231_text).

15 Finland is one of the leading nations regarding technological development. The Ministry of Transport and Communications announced that every person in Finland was to have access to a one-megabit per second broadband connection, and a one hundred megabit per second broadband connection by 2015. See Reisinger 2009 [http://news.cnet.com/8301-17939\\_109-10374831-2.html](http://news.cnet.com/8301-17939_109-10374831-2.html).

16 Zeldin 2012 [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205403231\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403231_text).

17 Miniwatts Marketing Group 2012 <http://www.Internetworldstats.com/stats.htm>.

18 Miniwatts Marketing Group 2012 <http://www.Internetworldstats.com/stats.htm>.

19 Miniwatts Marketing Group 2012 <http://www.Internetworldstats.com/stats.htm>.

Advances in technology and communication have dramatically changed the way in which individuals create, share, and exchange information and ideas with one another. Information exchange via electronic systems is increasing in South Africa too.<sup>20</sup> Facebook<sup>21</sup>, Blackberry Messenger<sup>22</sup>, Twitter<sup>23</sup> and WhatsApp<sup>24</sup> are all examples of social platforms that are used to share information with someone across the globe with the mere a push of a button. These can all be seen as forms of social media. Social media is briefly defined as websites (eg Facebook) and applications (eg WhatsApp) which enable users to create and share content or to participate in social networking.<sup>25</sup>

The phenomenon of social media is not limited to the first world and the rich, but has become accessible to every business and private user worldwide. Even an individual in a third-world country can acquire access to the Internet (and thus social media platforms) via a mobile phone. According to the United Nations,<sup>26</sup> astoundingly more people have access to mobile phones than have access to toilets or latrines. Of the world's total population of 7 billion people, 6 billion people have mobile phones, whereas only 4.5 billion have access to proper sanitation.<sup>27</sup> Most modern phones have Internet access. A large portion of the world's population can therefore gain Internet access via mobile phones. The International Telecommunications Union reported in 2010 that given the current growth rate, web access by mobile phones is likely to exceed web access from desktop computers within the next five years.<sup>28</sup> The average world mobile-cellular penetration stands at 96.2%, while Africa stands at 63%.<sup>29</sup>

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- 20 Worldwideworx 2012 <http://www.worldwideworx.com/wp-content/uploads/2012/10/Exec-Summary-Social-Media-20121.pdf>.
- 21 Facebook is an online free-to-join website that allows people to capture, preserve and share their life stories with others. It is also a way to communicate with people across the globe. See Kelsey *Social Networking Spaces* 25.
- 22 BlackBerry Messenger is a mobile messaging app which allows the user to exchange messages, images, videos and audio via the Internet with other BlackBerry users. See <http://za.blackberry.com/bbm.html>.
- 23 Twitter is a real-time information network that connects the subscriber to the latest stories, ideas, opinions and news about a topic the user finds interesting. See <https://twitter.com/about>.
- 24 WhatsApp Messenger is a cross-platform mobile messaging app which allows the user to exchange messages, images, videos and audio via the Internet. See <http://www.whatsapp.com/>.
- 25 Poynter *The Handbook of Online And Social Media Research* 162.
- 26 United Nations 2013 <http://www.un.org/apps/news/story.asp?NewsID=44452#.Ub9pWasabQg>.
- 27 United Nations 2013 <http://www.un.org/apps/news/story.asp?NewsID=44452#.Ub9pWasabQg>.
- 28 International Telecommunication Union 2010 [http://www.itu.int/newsroom/press\\_releases/2010/06.html](http://www.itu.int/newsroom/press_releases/2010/06.html).
- 29 Miniwatts Marketing Group 2012 <http://www.Internetworldstats.com/stats.htm>.

The law is in no way left unaffected by these developments.<sup>30</sup> The law is not a rigid, uncompromising institution but a framework which must continually adapt and change in order to remain relevant in an ever-changing environment.<sup>31</sup> A relevant example of a changing environment as regards technology is mobile phone use. Due to the increase of mobile phone usage in all forms of crime (fraud etc) in South Africa, legislation had to be drafted to resolve problematic issues.<sup>32</sup> Thus, given the enormous strides being taken on the technological front, the law must similarly evolve in order to effectively serve its purpose. With the flourishing in technological advancement, electronic devices providing individuals with access to social media platforms have become cheaper and more available to all strata of society.<sup>33</sup> In addition, there has been rapid expansion of social media platforms across the globe and in South Africa. The Internet is a very powerful tool where information touching upon any subject can be published within seconds and for millions to see. Any person who has access to the Internet via mobile or web-based technologies has the ability to publish any information s/he wishes to share, and often with a certain amount of anonymity.<sup>34</sup>

There are, however, legal implications to the publishing of information on social media platforms. By making defamatory statements on any form of social media, the author subjects him/herself to legal scrutiny and action. In fact there is recent case law which testifies to the legal implications regarding defamatory statements made on social

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30 One of the most recent events that made international headline news (in connection with social media/technology and the law) was the Oscar Pistorius trial, where various individuals voiced their opinions on social media platforms after the sentencing of Pistorius. These individuals included the likes of Donald Trump, who labeled Masipa T a “moron”, which is clearly defamatory. See Alexander 2014 <http://www.independent.co.uk/news/people/donald-trump-vs-carl-pistorius-selfrighteous-trump-brands-judge-masipa-a-moron-over-pistorius-sentencing-9808850.html>. Another had to do with the violation of the right to privacy. This occurred with the recent hacking of the Apple iCloud server, which contains personal information (photos and videos amongst others) of millions of individuals. Amongst these individuals were celebrities, whose photos and videos (mostly of a sexual nature) were downloaded and released on the Internet for the world to see. See De Graaf 2014 <http://www.dailymail.co.uk/news/article-2781196/Will-end-iCloud-hacker-releases-fourth-wave-celebrity-nudes-including-male-victim.html>.

31 Hutchinson *Evolution and the Common Law* 268.

32 The *Regulation of Interception of Communications and Provision of Communication-related Information* Act 70 of 2002 was enacted to address the issues.

33 Research done by World Wide Worx and information analysts Fuseware has shown that social networking in South Africa has crossed the age barrier as well as the urban/rural divide. See <http://www.worldwideworx.com/wp-content/uploads/2012/10/Exec-Summary-Social-Media-20121.pdf>.

34 This anonymity is mostly falsely assumed. For example a caller using a blocked number on a mobile phone can be exposed with the use of the cellular operator’s records, making the anonymity void.

media platforms.<sup>35</sup> It has even recently been asked whether or not defamatory statements made by members of parliament on social media platforms would be protected by parliamentary privilege.<sup>36</sup> The legal implications touched upon above inevitably ensue on account of the conflicting rights enshrined in the *Constitution of the Republic of South Africa, 1996*.<sup>37</sup> All persons in South Africa have, in terms of section 10 of the Bill of Rights,<sup>38</sup> the right to human dignity, which includes the right to a good name and reputation and the right to have the said name and reputation protected and preserved. Similarly, however, all persons also have the right to freedom of expression and opinion as eluded to above, the said right being enshrined in section 16 of the *Constitution*. Neither of these rights is absolute, however, as all rights in the Bill of Rights can be limited in terms of the section 36, the limitation clause. Therefore it very often happens that, in exercising one's right to freedom of expression and opinion, one infringes upon another person's right to human dignity. A defamatory statement on a social media platform, for example, might in some instances be justifiable as such a person was simply exercising his right to freedom of expression. The contents of the statement, however, may often be of such a nature that it severely impinges upon another's right to dignity in that the latter's good name and reputation is unjustifiably injured. A delicate balance must be struck when weighing these rights up against each other.

Defamation in general is effectively regulated by the law of delict and the common law. Media law similarly regulates defamation in the context of media, like for example defamatory statements in newspapers and publications.<sup>39</sup> Regulation in terms of defamatory statements on social media platforms is more of a grey area, however, as no specific legislation in South Africa currently addresses this issue. The courts have touched upon the subject in more recent years but whether the common law is to be deemed sufficient in this regard remains to be seen. The situation is further complicated

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35 In a recent (2013) judgment, an interdict was awarded to the applicant by the South Gauteng High Court, which ordered the respondent to remove defamatory statements made on all social media platforms. See *Heroldt v Wills* 2013 2 SA 530 (GSJ).

36 Sapa 2013 <http://www.timeslive.co.za/politics/2013/03/24/politicians-tweet-at-own-peril>.

37 Hereafter: *Constitution*.

38 Chapter 2 of the *Constitution*.

39 Examples of legislation that govern traditional media forms are the: *Imprint Act* 43 of 1993, *Electronic Communications and Transactions Act* 25 of 2002 (hereafter the ECTA), *Independent Communications Authority of South Africa Act* 13 of 2000, *Broadcasting Act* 4 of 1999, *Media Development and Diversity Agency Act* 14 of 2002 and the *Films and Publications Act* 65 of 1996, *Copyright Amendment Act* 125 of 1992. See *Brand Media Law in South Africa* 25.

by the fact that the World Wide Web is accessible to any individual with Internet access. Thus anyone, anywhere across the globe, is in a position to access public websites and view their contents. This implies that different legal systems will find application in cases where more than one country is involved in a legal dispute arising from defamation on a certain social media platform. Which country's legal system is to be applied? To what extent can this system be applied? Who has jurisdiction and how is jurisdiction founded or established? All these questions arise with an amount of uncertainty.

The implications of the making of defamatory statements on social media platforms are widespread in the application of law. Defamatory statements made on social media platforms would be applicable in both the private and public sectors.<sup>40</sup> It is therefore imperative that the legal aspects as regarding defamatory statements on social media platforms be analysed so as to determine whether or not current regulation has become ineffective in addressing the issue. As with all forms of technology, social media platforms are constantly evolving, and no single permanent solution will ever exist. Yet the contemporary developments and progress attested to above as regards technology in general and social media platforms specifically compel an investigation of its links to defamation and other legal consequences which might stem from its various implementations.

The following assumptions can be made, and a hypothesis can be developed from them:

Assumptions:

- (a) Technology is growing at an exponential rate.
- (b) Due to this growth the usage of technology escalates and forms a bigger part of day-to-day life.
- (c) The increase of the involvement of technology in people's lives causes an increase in the use of social media.
- (d) The use of social media in South Africa is expanding.
- (e) The use of social media can have legal implications.

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40 Due to the scope of this dissertation, only the private sector will be discussed. Therefore only defamatory statements on social media platforms between two private individuals within the borders of South Africa will be investigated.

- (f) Due to the increasing use of social media, the wrongful use thereof would also increase.
- (g) The growth in wrongful use would lead to the proliferation of legal consequences for defamatory statements with regard to social media situations.

Hypothesis:

Due to the rapid development of social media the current legal framework is inadequate and needs to be developed further.

The main objective of this research is to determine to what extent defamatory statements on social media platforms are currently regulated by South African law.

To reach the main objective above, the following objectives must be reached:

- (a) Define social media on a national and international basis.
- (b) Investigate how the United States of America and England deal with legal issues regarding defamatory statements on social media platforms.
- (c) Identify the national legal principles that would find application to the making of defamatory statements on social media platforms.
- (d) Analyse and compare South African legislation with foreign legislation regarding defamatory statements and privilege on social media platforms.
- (e) Propose changes to the current legislative framework in order to promote legal certainty and effectiveness in the field.

The question remains, what are the legal implications of defamatory statements on social media platforms in South Africa?

The research methodology that will be used will consist mainly of a literature study of relevant textbooks, law journals, legislation, case law and Internet sources relating to the legal issues arising from the making of defamatory statements on social media platforms. Furthermore, a legal comparative study will also be undertaken to compare the position in South Africa with the position in England and the United States of America, where similar problems are experienced.

The research will contribute to the focus of the Research Unit of the Faculty of Law at North West University, namely *Development in the South African Constitutional State*, and will fall under the research project *New Thinking in Law* as well as the sub-project *Virtual Worlds, Internet and the Law*. The legal effects of the rapid growth in social media have not been academically analysed, and for that reason this study will contribute to the interpretation and application of, and errors in the legal framework regarding defamatory statements made in social media, within the broad context of South Africa as a constitutional state.

Thus this study aims to investigate the legal implications of defamatory statements on social media platforms in South Africa and will do so while also considering foreign approaches. The background and development of social media in general will firstly be touched upon with important concepts like Internet, Internet access and social media forming part of the discussion. Thereafter a distinction will be drawn between social media and other forms of media, whereafter the types of social media will briefly be elaborated upon. Chapter 3 will comprise of a comparative analysis wherein foreign positions as regards defamatory statements made on social media platforms will be investigated. In particular, legislation of England and the United States of America will be used for this purpose, followed by a relevant scenario and applicable case law. The law of delict in both these jurisdictions will be expounded upon in detail, focussing specifically on the elements of a delict and legislation currently governing defamation in these countries. Chapter 4 will attempt to provide the reader with a comprehensive overview of defamation in South Africa focussing on aspects like relevant definitions, delictual elements, the *Constitution*, and available remedies. A scenario and two relevant judgments will be provided so as to indicate whether or not defamation on a social media platform in South Africa is actionable in the light of the current legal framework. Finally Chapter 5 will provide a brief summary and recommendations to conclude the dissertation.

## **2 The background and development of social media**

### **2.1 *Introductory remarks***

Before delving into the legal questions regarding social media, a clear understanding of the inner workings of social media should be grasped. This chapter will serve as an introduction to the technical aspects regarding social media. This will ease the understanding of the legal aspects regarding all forms of social media. By looking at different definitions, the development and history, ways that social media can be accessed, the types of social media, the increase in the availability and use of social media and what this has to do with the topic of law, the objective can be reached.

### **2.2 *Key concepts***

Because social media require Internet access, a basic understanding of how the Internet works is required for the purposes of this dissertation. Basic definitions that have direct application to social media will therefore be investigated.

#### **2.2.1 *Internet***

One cannot imagine life today without the use of the Internet, irrespective of the fact that, in reality, few people have basic knowledge of how the Internet works, or how it originated.<sup>41</sup> The Internet represents the key factor of the growing information society or knowledge economy.<sup>42</sup> The reason for this can be ascribed to the fact that its basic communication infrastructure can be seen as “neutral”.<sup>43</sup> The simplest way to describe the Internet is that it is a global computer network, a network of networks.<sup>44</sup> These computer networks use a standard Internet protocol suite (TCP/IP) to communicate with

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41 The Internet has its origins in the United States of America (hereafter USA) military and the Network Information Centre in the 1960's. It was not until 1974 that the term “Internet” (network communications) was capped in the English language. The USA military and various universities set out to research the capabilities of this new medium, until 17 years later, in 1993, the Internet was born in its current form. See Craig *Internet* 9.

42 Papadopoulos “An introduction to Cyberlaw” 1-7.

43 Neutral communication can be seen in the sense of both sending and receiving information. See Papadopoulos “An introduction to Cyberlaw” 1-7.

44 A computer network consists of any number of computers that communicate with one another via different communication technologies (eg Wi-Fi). See Baroudi, Levine and Levine Young *The Internet for Dummies* 11.

one another on a global scale.<sup>45</sup> This communication through TCP/IP is done by packet switching.<sup>46</sup> The Internet furthermore provides a number of services that will be discussed shortly.

The first and most renowned is the World Wide Web (WWW). Many people mistakenly believe that the Internet and the World Wide Web are one and the same. This is not the case. The Internet, as already said, is the physical infrastructure.<sup>47</sup> The World Wide Web is a universal collection of texts, images, audio clips, documents and other resources.<sup>48</sup> All this data is stored on servers which make it available through TCP/IP software protocol.<sup>49</sup> The physical location of this data on the Internet's infrastructure is given a Universal Resource Locator (URL).<sup>50</sup> The specific data can then be accessed by sending request messages that contain the URL to the specific server/s where the data is stored.<sup>51</sup> When this request is received by the server, the desired data is prepared and transmitted to the user.<sup>52</sup> The main access protocol used on the World Wide Web is Hypertext Transfer Protocol (HTTP).<sup>53</sup> An Internet Web Browser is used to gain access to the World Wide Web.<sup>54</sup>

Data transfer is another common use for the Internet.<sup>55</sup> There are various ways in which data can be transferred from one individual to another. A more in-depth study of the

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45 A protocol can be seen as a set of rules governing the exchange or transmission of data between devices. See Papadopoulos "An introduction to Cyberlaw" 1-7.

46 This mode of data transmission can be described as a mode in which a message is broken into a number of various parts, which are then sent independently. The message is sent over whatever route is optimum for each packet. The parts are then reassembled at the destination. See <http://oxforddictionaries.com/definition/english/packet-switching?q=packet+switching>.

47 This physical infrastructure consists of numerous servers, computers, fibre optic cables and routers through which data is shared. See Papadopoulos "An introduction to Cyberlaw" 1-7.

48 Papadopoulos "An introduction to Cyberlaw" 1-7.

49 Papadopoulos "An introduction to Cyberlaw" 1-7.

50 Papadopoulos "An introduction to Cyberlaw" 1-7.

51 Papadopoulos "An introduction to Cyberlaw" 1-7.

52 Papadopoulos "An introduction to Cyberlaw" 1-7.

53 HTTP provides a standardized way for computers to communicate with one another, seeing that it specifies how clients request data, and the responses from servers on these requests. See Wong *HTTP Pocket Reference* 1.

54 Web Browser is a software application that makes it possible for the user to interact on the World Wide Web. See <http://dictionary.cambridge.org/dictionary/british/web-browser>.

55 "Sending and receiving data via cables (e.g., telephone lines or fibre optics) or wireless relay systems. Because ordinary telephone circuits pass signals that fall within the frequency range of voice communication (about 300–3,500 hertz), the high frequencies associated with data transmission suffer a loss of amplitude and transmission speed. Data signals must therefore be translated into a format compatible with the signals used in telephone lines. Digital computers use a modem to transform outgoing digital electronic data. A similar system at the receiving end translates the incoming signal back to the original electronic data. Specialized data-transmission links carry

workings and technicalities of this subject falls outside the scope of this dissertation, and it will therefore not be covered in any more detail.

The last and most vital aspect in this regard and for the purposes of this dissertation is communication. The way that individuals communicate with one another has been revolutionised by the Internet.<sup>56</sup> Email communication has supplanted traditional methods of communication in both the business and private sectors.<sup>57</sup> Not only can information be transferred in text format, but files containing images and music, for instance, can also be attached.<sup>58</sup> In addition, these emails can be sent to multiple recipients at once, making the speed and effectiveness that much more appealing for the user. Emails are also sent and received almost instantly, so that the receivers do not have to wait on postal services to physically deliver a document, since it can be accessed almost immediately with available Internet access. International borders do not hinder the flow of information either, as the Internet has completely globalised these forms of communication.<sup>59</sup> Internet telephony is also a popular method of online communication. Voice over-Internet Protocol (VoIP) is used to transport voice traffic as data messages over the Internet.<sup>60</sup> This can also usually be accomplished much more cost effectively than is the case with normal telephone calls, as international borders once again do not affect the costs.<sup>61</sup> With higher bandwidth, voice and video can be combined for realistic face-to-face conversations in real-time.<sup>62</sup>

Yet another important part of Internet communication is social networking. Social networking websites allow any individual with Internet access to connect with others and

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signals at frequencies higher than those used by the public telephone network". See <http://www.britannica.com/EBchecked/topic/152192/data-transmission>.

56 Internet Society 2013 <http://www.Internetsociety.org/Internet/what-Internet/history-Internet/brief-history-Internet>.

57 BBG Communications 2012 [www.bbgcommunicationunitedstates.com/advancements-in-Internet-communications/article/5.php](http://www.bbgcommunicationunitedstates.com/advancements-in-Internet-communications/article/5.php).

58 Data in different forms can be sent via email. See [www.bbgcommunicationunitedstates.com/advancements-in-Internet-communications/article/5.php](http://www.bbgcommunicationunitedstates.com/advancements-in-Internet-communications/article/5.php).

59 Beelman 1999 <http://www.nieman.harvard.edu/reports/article/102260/International-Journalists-Use-Internet-Technology-to-Breach-Borders.aspx>.

60 Wallingford *VoIP Hacks* xiii.

61 Wallingford *VoIP Hacks* xiii.

62 Programmes like Skype are an example of what can be achieved with higher bandwidth. Video calls, instant messaging and file sharing can be done with any other person, using Skype. This communication is in real-time. See <http://www.skype.com/en/what-is-skype/>.

to create as well as to share information in real-time.<sup>63</sup> Instant messaging is also provided through these services.<sup>64</sup> As this is the form of Internet communication related to the topic, it will be discussed in more detail later.

### 2.2.2 *Internet access*

Internet access is provided by Internet service providers (ISP's).<sup>65</sup> In modern times, Internet access is not limited to dial-up connections, as was the case in the past. There are several other ways in which an individual can acquire access to the Internet.<sup>66</sup> As with all technological advancements, the methods of Internet access have become faster, cheaper and more mobile. Broadband and wireless access form part of the newer technologies used to gain Internet access. Internet access is also no longer restricted to Personal Computers (PC's). Smartphones are the newest way of accessing social media platforms.<sup>67</sup> Smartphones have transformed the way people communicate with one another through mobile Internet access.<sup>68</sup> Internet access is now available mobile to any individual with a smartphone. Smartphones are also optimised for the use of social media through Internet access.<sup>69</sup> The costs of these smartphones are also

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63 It is important to take note that not all social media platforms are based on websites. WhatsApp, for instance, does not use any form of a website, whilst Facebook on the other hand can be accessed via a website or an application. See Chapter 1.

64 Jones 2013 <http://blog.brosix.com/combining-social-media-and-instant-messaging-for-effective-customer-service/>.

65 An ISP is a company that offers Internet access and other Internet-related services to its customers for a fee. See <http://www.techterms.com/definition/isp>. Examples of ISP's in South Africa are Vodacom, Mweb and Afrihost.

66 There are several ways to connect to the Internet in modern society. Each method has different speeds, capacity, costs and benefits. Broadband is one of the most popular methods. It requires a device (modem) and a fixed line. It also has high speeds. Wireless or Wi-Fi can be accessed by devices with built in Wi-Fi equipment. The speed is affected by various circumstances, including signal strength, amongst others. Satellite Internet is also an option. It is common in rural areas where no lines are available. Lastly there is dial-up Internet. One of the first methods, it has limited speeds. See Damien *Introduction to Computers and Application Software* 50.

67 The term smartphone was laid claim to by an unknown marketing strategist referring to a new class of mobile phone that could facilitate data access as well as processing with significant computing power. On the other hand there is the feature phone, or the so-called "dumb phone". This is a low-end mobile phone with limited capabilities. These phones usually provide basic calling and text messaging functionality and, more recently, basic multimedia and Internet capabilities. It must be kept in mind that all smartphones are mobile phones, but not all mobile phones are smartphones. See Zheng and Ni *Smart Phone Next Generation Mobile Computing* 4.

68 Garside 2011 <http://www.theguardian.com/technology/2011/dec/13/predictions-for-communications-world-2012>.

69 The most common example of this would be the BlackBerry smartphone devices. The preloaded applications for these phones include Facebook and Twitter. See <http://us.blackberry.com/software/smartphones/blackberry-7-os.html#tab-1>. With the launch of the new extension of Facebook, Facebook Home, HTC was the first smartphone company to preload the application to its HTC First. Facebook Home can be described as a new family of applications that

inexpensive compared with the costs of other devices used to gain Internet access.<sup>70</sup> As stated in Chapter 1, there are currently more mobile phones on earth than people. Chapter 1 also considers the question of whether or not Internet access should be a fundamental right. The answer would undoubtedly have an effect on the number of people who have and will have access to the Internet in future.<sup>71</sup>

Internet access is important in principle on account of the fact that without Internet access one cannot access any form of social media.

### 2.2.3 *Social media*

#### 2.2.3.1 Introduction

Social media can broadly be described as follows:

[A] group of Internet-based applications that build on the ideological and technological foundations of Web 2.0,<sup>72</sup> and that allow the creation and exchange of user-generated content.<sup>73</sup>

The social media we know today have their roots in the early nineties.<sup>74</sup> Geocities was one of the first social networking sites of its kind on the Internet.<sup>75</sup> After this TheGlobe.com made its appearance in 1995, allowing users to interact with other individuals who shared their interest, as well as to publish their own content. In 1997 AOL launched its Instant Messenger.<sup>76</sup> Up until the turn of the millennium these facilities

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works as a home and lock screen for Android smartphones. See <http://pctechmag.com/2013/04/htc-att-and-facebook-announce-the-htc-first-preloaded-with-facebook-home/>.

70 Vodacom has unveiled its newest budget smartphone, the Vodafone Smart Mini. This is a fully functional smartphone that will retail for approximately R800.00. This will make Internet access available to a larger part of the community, not limiting it to the wealthy. There will be smartphones that are even cheaper when this dissertation is examined. See Daniels 2013 <http://www.techsmart.co.za/news/Vodacom-unveils-Vodafone-Smart-Mini-low-cost-smartphone>.

71 Chapter 1.

72 “Web 2.0 represented a shift away from software companies that tried to lock people into using their products and media companies that published static content for a passive audience, toward a digital culture of public participation, re-mixing by individuals of data and information, harnessing the power of collective intelligence and providing services, rather than products”. Grabowicz 2013 <http://multimedia.journalism.berkeley.edu/tutorials/digital-transform/web-20/>.

73 Kaplan and Haenlein 2010 *Business Horizons* 60.

74 Walker 2011 <http://www.webmasterview.com/2011/08/social-networking-history/>.

75 Geocities allowed users to generate their own website and then divide them into “cities” based on their specific content. See Walker 2011 <http://www.webmasterview.com/2011/08/social-networking-history>.

76 AOL is a leading Web services company started in 1975. See <http://corp.aol.com/about-aol/overview>.

would not automatically connect the user to other users, because networked media were generally basic services that the user could join or actively use in groups.<sup>77</sup> The arrival of Web 2.0, shortly after the turn of the millennium, transformed the way individuals used the Internet with regard to social media.<sup>78</sup> Web 2.0 changed online services from being one-way communication to two-way interactive mechanisms for networked sociality.<sup>79</sup> This had a major impact on social media as a whole. It made it possible for our modern-day social media platforms to be created and developed.<sup>80</sup>

Social media platforms are dependent on mobile as well as web-based technologies to create vastly interactive platforms through which people share, co-create, confer and transform user-generated content. These mobile and web-based technologies in turn require Internet access to function.

Social media platforms are dynamic objects that are adapted in response to their users' requirements and their owners' purposes.<sup>81</sup> These platforms also react to opposing platforms and the larger technological and economic structure through which they develop.<sup>82</sup>

Over the past decade the use of social media has drastically increased, and it is continuing to do so.<sup>83</sup> As already stated, access to social media platforms is not limited to the rich and wealthy, but readily available to every person with Internet access.<sup>84</sup> Africa, including South Africa, is in no way behind as regards these developments,<sup>85</sup> and this increase in the use of social media undoubtedly has gone so far as to affect all facets of our day-to-day lives.<sup>86</sup>

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77 Van Dijk *The Culture of Connectivity* 4.

78 Grabowicz 2013 <http://multimedia.journalism.berkeley.edu/tutorials/digital-transform/web-20/>.

79 Van Dijk *The Culture of Connectivity* 4.

80 Dasgupta and Dasgupta 2009 <http://www.ibm.com/developerworks/webservices/library/ws-socialcollab/>.

81 Van Dijk *The Culture of Connectivity* 7.

82 Van Dijk *The Culture of Connectivity* 7.

83 Carranza 2013 <http://www.examiner.com/article/social-media-networking-stats-and-trends-2013>

84 Chapter 1

85 Essoungou 2010 <http://www.un.org/africarenewal/magazine/december-2010/social-media-boom-begins-africa>.

86 A very interesting and relevant example of the power of social media platforms is the Obama 2008 presidential campaign. President Obama was the first presidential candidate to effectively use social media as a major campaign strategy, sending out voting reminders on Twitter and interacting with people on Facebook. See Rutledge 2013 <http://mprcenter.org/blog/2013/01/25/how-obama-won-the-social-media-battle-in-the-2012-presidential-campaign/>.

### 2.2.3.2 Honeycomb framework of social media

According to Kietzmann *et al*, all social media are made up of seven functional building blocks which amount to something like a honeycomb framework.<sup>87</sup> These are identity, conversations, sharing, presence, relationships, reputation and groups. The authors use these building blocks to define social media.<sup>88</sup> Different social media activities are defined by the way each of these blocks is focussed on. Each of them will now be briefly described.

The first block is identity. The extent to which a user can reveal his identity in a social media setting is characterised by the identity functional block.<sup>89</sup> A user's name, age, gender, profession, location, and information depicting the user in a certain way can all be involved.<sup>90</sup> Numerous social media platforms constructed around identity entail the user generating a profile, which is the case in Facebook, for example.<sup>91</sup>

The conversations block signifies the degree to which users interconnect with each other in social media scenery.<sup>92</sup> The facilitation of conversations among individuals and groups is the main focus of many social media sites.<sup>93</sup>

Sharing is the third block, which has to do with the degree to which users exchange, allocate and obtain content.<sup>94</sup> The term "social" often suggests that interactions between users are vital.<sup>95</sup> The reason why users meet online and associate with each other is because sociality is about the objects that facilitate these ties between users.<sup>96</sup>

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87 Kietzmann *et al Business Horizons* 241-251.

88 Kietzmann *et al Business Horizons* 241-251.

89 Kietzmann *et al Business Horizons* 241-251.

90 Kietzmann *et al Business Horizons* 241-251.

91 Kietzmann *et al Business Horizons* 241-251.

92 Kietzmann *et al Business Horizons* 241-251.

93 There are a number of reasons for these types of conversations. Users of social media Tweet, blog, et cetera to meet people with the same mentality, to find true love, to develop confidence or to be on the cutting edge of new ideas or trending topics. Some users see social media as a way of expression and making a positive contribution to humanitarian causes, problems in the environment, economic matters, or politic arguments. See Kietzmann *et al Business Horizons* 241-251.

94 Kietzmann *et al Business Horizons* 241-251.

95 Kietzmann *et al Business Horizons* 241-251.

96 Kietzmann *et al Business Horizons* 241-251.

The degree to which users can see if other users are available is represented by the presence framework building block.<sup>97</sup> This may include where other users find themselves in the real world (for example in the Facebook location) or in the virtual world (an online application such as Skype).<sup>98</sup>

Relationships are the fifth block. This signifies the degree to which users can be associated with other users on the specific social media platform.<sup>99</sup> The association entails the form of relation two or more users have with one another that would lead them to interact, share objects of sociality, get together, or simply just site each other as a fan or friend.<sup>100</sup> The ways in which users of a specific social media platform are connected often determine the ways information is exchanged, as well as the nature of this information.<sup>101</sup>

Reputation signifies the extent to which users of a specific social media platform can classify the ranking of others and themselves in a social media context.<sup>102</sup> Generally the reputation block has a variable meaning depending on the specific social media platform applicable.<sup>103</sup>

The last block is groups. Groups are the final building blocks of social media platforms. This building block represents the extent to which a user of a specific social media platform can form communities and sub-communities.<sup>104</sup> Bigger groups of friends, followers and contacts are the result of an increase in the “sociability” of the social media platform.<sup>105</sup>

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97 Kietzmann *et al Business Horizons* 241-251.

98 In the virtual world the availability can be seen by using a status like “busy” or “available”. See Kietzmann *et al Business Horizons* 241-251.

99 Kietzmann *et al Business Horizons* 241-251.

100 Kietzmann *et al Business Horizons* 241-251.

101 These relationships can be informal or fairly formal, regulated and structured. LinkedIn, for example, allows other users to view how they are related to one another. See Kietzmann *et al Business Horizons* 241-251.

102 Kietzmann *et al Business Horizons* 241-251.

103 Reputation is based mostly on trust, and since information technologies are not adept at determining highly qualitative criteria, social media platforms rely on “mechanical Turks” (tools that combine user-generated content to determine trustworthiness). For example Jeremiah Owyang’s 70000 and Guy Kawasaki’s 292000 followers on Twitter confirm their reputations as social media gurus and emerging technology experts, respectively. See Kietzmann *et al Business Horizons* 241-251.

104 Kietzmann *et al Business Horizons* 241-251.

105 Kietzmann *et al Business Horizons* 241-251.

## 2.3 *Social media versus other forms of media*

Today several forms of information and data can be obtained from printed as well as forms of electronic media.<sup>106</sup> Social media differ from traditional forms of media as they are reasonably cheap and available to anyone who wishes to publish or access information.<sup>107</sup> Traditional media, on the other hand, normally require substantial resources to publish information.<sup>108</sup> Social and traditional media do, however, share one characteristic, namely their ability to reach small or large audiences.<sup>109</sup> A few similarities as well as differences between traditional and social media will now be elaborated upon.

### 2.3.1 *Reach*

Traditional as well as social media forms have the scale and capability to reach a global audience.<sup>110</sup> The difference lies in how they are run. Traditional media normally use a central framework for production, organisation and dissemination.<sup>111</sup> In contrast, social media are more decentralised and less organised, and are distinguished by numerous points of production utility.<sup>112</sup>

### 2.3.2 *Accessibility*

The production of traditional media is usually government and/or corporately owned, whereas social media are generally available to the public at little to no cost.<sup>113</sup> Consequently social media are much more accessible to all users in all facets of life.

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106	Social	Media	Guys	2013
	<a href="http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf">http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf</a>			
107	Social	Media	Guys	2013
	<a href="http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf">http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf</a>			
108	Social	Media	Guys	2013
	<a href="http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf">http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf</a>			
109	Social	Media	Guys	2013
	<a href="http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf">http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf</a>			
110	Social	Media	Guys	2013
	<a href="http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf">http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf</a>			
111	Social	Media	Guys	2013
	<a href="http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf">http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf</a>			
112	Social	Media	Guys	2013
	<a href="http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf">http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf</a>			
113	Social	Media	Guys	2013
	<a href="http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf">http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf</a>			

### 2.3.3 Usability

Traditional media production mostly necessitates specialised skills as well as training. Social media on the other hand require very little, if any, newly acquired skills.<sup>114</sup> All users are therefore able to manage social media for production purposes, something which increases the use thereof.

### 2.3.4 Imminence

The progress of time from an event's happening to its being published through a traditional form of media can be extensive.<sup>115</sup> Social media, however, are capable of and in fact renowned for almost immediate responses.<sup>116</sup>

### 2.3.5 Perpetuity

When information has been recorded in traditional media (for example printed or broadcast) it cannot be modified. Such information, disseminated via social media, on the other hand, can be altered by the addition of comments or by editing.<sup>117</sup> This does not stop the original text/post/comment from being saved on a search database.<sup>118</sup>

### 2.3.6 Quality

The information transmitted via traditional media is mostly mediated by some form of publisher. The range of the quality is considerably narrower than in niche, unmediated markets.<sup>119</sup> The quality of the content disseminated through social media, on the other

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114 Social Media Guys 2013  
<http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf>.

115 Newspaper articles for example have to be drafted, edited and then only printed. See Brand *Media Law in South Africa* 20.

116 Social Media Guys 2013  
<http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf>.

117 Social Media Guys 2013  
<http://citizenshipgate.com/en/wpcontent/uploads/2013/03/CompleteGuidetoSocialMedia.pdf>.

118 The term used for the storing of these posts/comments is "cached". See Erlank 2014 (1) *Juta Quarterly Review*.

119 Agichtein *et al* "Finding high-quality content in social media" 183-194.



host of diverse forms.<sup>127</sup> Twitter is a good example of a blog. It falls under the classification of a micro-blog.

#### 2.4.3 *Content communities*

Content communities' key objective is the sharing of media content between their users.<sup>128</sup> A wide range of different media types can be shared over these content communities.<sup>129</sup> The users of content communities are usually not obliged to create a personal profile page. In the occasional cases of its being a prerequisite, the page usually contains only the most basic user information. YouTube is probably the most popular example of a content community.

#### 2.4.4 *Social networking sites*

In all probability the most popular form of social media is social networking sites. The latter are applications that allow users to connect with one another by creating personal information profiles, inviting friends and colleagues to have access to these profiles, and sending instant messages between one another.<sup>130</sup> A personal information profile of a user can include a variety of information, including but not limited to photos, videos, audio files and blogs.<sup>131</sup> Facebook is a prime example of a social networking site.

#### 2.4.5 *Virtual game worlds*

Virtual game worlds are platforms that replicate a three-dimensional environment in which users can appear in the form of personalized avatars and interact with one another as they would in real life. One could basically describe a virtual world as an alternate, non-physical realm, in contrast to the real, physical world we live in.<sup>132</sup> Virtual game worlds' main function is entertainment.<sup>133</sup> According to Kaplan and Haenlein<sup>134</sup>,

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127 Kaplan and Haenlein 2010 *Business Horizons* 63.

128 Kaplan and Haenlein 2010 *Business Horizons* 63.

129 For example text (BookCrossing), photos (Flickr), videos (YouTube) and Powerpoint Presentations (Slideshare). See Kaplan and Haenlein 2010 *Business Horizons* 63.

130 Kaplan and Haenlein 2010 *Business Horizons* 63.

131 Kaplan and Haenlein 2010 *Business Horizons* 63.

132 Erlank *Property in Virtual Worlds* 46.

133 Erlank *Property in Virtual Worlds* 9.

134 Kaplan and Haenlein 2010 *Business Horizons* 64.

virtual worlds are probably the ultimate manifestation of social media. The reason for this claim can be ascribed to the fact that virtual worlds provide the highest level of social presence and media richness of all forms of social media. For interest's sake, World of Warcraft has been documented to be the most eminent of the virtual game worlds.<sup>135</sup>

#### 2.4.6 *Virtual social worlds*

Lastly we have virtual social worlds. These virtual worlds act more as an online virtual social interaction environment, as opposed to virtual game worlds.<sup>136</sup> Inhabitants of these virtual worlds are capable of choosing or indicating their actions more freely and therefore in essence of living a virtual life similar to real life.<sup>137</sup> Virtual social world users also take the form of avatars and interact in a three-dimensional virtual environment,<sup>138</sup> the difference being that there are no restrictions on the choice of thinkable interactions, apart from for elementary physical laws such as gravity.<sup>139</sup> One of the most prominent virtual social worlds would be Second Life.<sup>140</sup>

### 2.5 **Concluding remarks**

The following remarks are based on the above discussion, and the conclusions are drawn from it. Internet access on a national as well as an international scale is drastically increasing.<sup>141</sup> Numerous circumstances and factors are responsible for this, such as the advances made in technology and the announcement by the United Nations (UN) about elevating Internet access into a basic human right.<sup>142</sup> Logic dictates that as more people gain access to the Internet, more people will start to use it. This deduction

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135 World of Warcraft is an online game where players from around the world assume the roles of heroic fantasy character and explore a virtual world full of mystery, magic, and endless adventure. See <http://eu.battle.net/wow/en/game/guide/>.

136 Erlank *Property in Virtual Worlds* 16.

137 Kaplan and Haenlein 2010 *Business Horizons* 64.

138 Kaplan and Haenlein 2010 *Business Horizons* 64.

139 Kaplan and Haenlein 2010 *Business Horizons* 64.

140 Second Life is a virtual world launched on the 23rd of June, 2003. Second Life users interact with one another using avatars or residents. Residents can explore the world, meet other residents, socialize, participate in individual and group activities, and create and trade virtual property and services with one another. See <http://secondlife.com/whatis/?lang=en-US>.

141 Chapter 1.

142 Chapter 1.

can be verified by the statistics given above, and is especially evident in third-world countries, where the level of Internet usage has risen dramatically.<sup>143</sup>

With the increase in Internet usage across the globe, social media usage has boomed on national and international levels, as previously stated. However, the question now arises: does the increase in social media usage have any legal application? The answer is simple. The more social media are used, the more legal problems occur due to such usage, in line with basic human nature. This is apparent in both national and international spheres.<sup>144</sup> In some cases social media have even been adapted in the procedural processes of national courts.<sup>145</sup>

In the recent case of *Heroldt v Wills*, Willis J<sup>146</sup> rightfully stated that:

We have ancient, common law rights both to privacy and to freedom of expression. These rights have been enshrined in our Constitution. The social media, of which Facebook is a component, have created tensions for these rights in ways that could not have been foreseen by the Roman Emperor Justinian's legal team, the learned Dutch legal writers of the seventeenth century (the "old authorities") or the founders of our Constitution.

It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution. The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the courts, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication.

Thus it is clear why social media is a pressing legal issue. The following chapter will aim to shed light on how other countries are currently dealing with issues arising due to legal

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143 Chapter 1.

144 "Twitter has recently agreed to deliver information to French authorities of individuals who post racist and anti-Semitic comments anonymously on its micro blogging site. This followed after an extended legal battle between the US-based company and authorities in France" and "Recent developments in South Africa have proven that association regarding social media postings, will be deemed sufficient for legal liability. Scandalous postings by a woman and her husband about her husband's ex-wife led to a successful damage claim against the parties". See Homann 2013 *European Property Law Journal* 179-182.

145 "The development of social media has also forced changes in the procedural steps in courts. A South African case where such a scenario is clear is *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD). Steyn J had to improvise so that justice could be served. In this case, the applicant (CMC Woodworking) brought an *ex parte* application for substituted service. This substituted service was to be served using a Facebook message". See *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD); Homann 2013 *European Property Law Journal* 178-179.

146 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [7-8].

questions concerning social media. South Africa's present position as regards similar legal questions relating to social media will also be analysed.

### **3 Comparative analysis**

From the discussion in the previous chapter it is clear that the global use of social media is increasing dramatically. This increase is bound to have a significant effect on the legal application in social media situations. The aim of this chapter is to define the legal application of defamation on social media platforms in the USA and England. A hypothetical scenario regarding a statement made on a social media platform will be used to determine if this statement would qualify as defamation under the respective countries' laws regarding defamation.<sup>147</sup> In order to stay within the scope of the topic at hand, this chapter will deal only with the legal issues that may affect an individual as regards defamatory postings made on social media platforms.<sup>148</sup>

To illustrate and test if a defamatory posting on a social media platform would find any legal application, the following scenario will be used and hereafter evaluated against the backdrop of the three above-mentioned countries' legislation and stance on defamation. Fictitious person X posts the following as his Facebook / Twitter status update:

"Fictitious person Y likes his girls a tad young".

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147 Although statements on social media platforms regarding privileged statements are a very interesting topic, the focus of this dissertation will be on defamatory statements due to their greater relevance.

148 Due to this limited scope, a few other matters regarding defamatory statements on social media platforms will not be investigated in depth. One of these is the liability of the ISP. Liability for defamatory statements is not limited to the author of the material but applies to everyone in the publication process. The liability of the ISP is dependent on its function and role in the publication process. Other important questions that arise include: What is the liability of the social media platform regarding these defamatory statements? When would a court have jurisdiction to determine the legal consequences of defamatory statements published in other jurisdictions? Which law should apply to those legal consequences? Would it be possible to enforce the judgement? See Nel "Freedom of expression, anonymity and the internet" 251-273.

### 3.1 *The United States of America*

#### 3.1.1 *Introduction to defamation in the United States of America*

Defamation in the USA is defined much as it is in other countries. Pember and Cavert<sup>149</sup> define it as follows:

[A] communication which exposes a person to hatred, ridicule, or contempt, lowers him in the esteem of his fellows, causes him to be shunned, or injures him in his business or calling.

Defamation law recognises that one's society considers reputation to be one of a person's most valuable possessions and an individual therefore has the right to preserve his or her good name.<sup>150</sup> Defamation in the USA falls under the law of tort and can be subdivided into "libel" and "slander".<sup>151</sup> Libel is the publication or broadcast of any statement that injures someone's reputation or lowers that person's esteem in the community.<sup>152</sup> Spoken defamation on the other hand is considered to be slander.<sup>153</sup> Slander is usually heard by fewer people and is more short-lived in impact.<sup>154</sup> Libel typically has a wider audience and because it includes printed, published or broadcasted or publicised matter, it is usually more permanent.<sup>155</sup> Greater damages are thus awarded in libel cases, as libel can cause a potentially greater harm to the victim's reputation on account of its more extensive impact.<sup>156</sup>

Libel and slander used to be treated or approached separately by law, but with the introduction of broadcasting the distinction between the two has become somewhat

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149 Pember and Cavert *Mass Media Law* 154.

150 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

151 A tort can be defined as a civil wrong for which the victim receives relief in the form of damages. This includes intentional torts (assault), negligence (an act committed without intent, but in violation of the standards of a reasonable person), and strict liability (acts committed without any intention). See Edwards and Wells *Tort Law* 3; Creech *Electronic Media Law and Regulation* 201.

152 Libel includes defamatory material that is expressed in print, pictures, signs, broadcast by radio, television or cable communication technologies. See Creech *Electronic Media Law and Regulation* 201; Pember and Cavert *Mass Media Law* 148.

153 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

154 Creech *Electronic Media Law and Regulation* 202.

155 Creech *Electronic Media Law and Regulation* 202.

156 Creech *Electronic Media Law and Regulation* 202.

blurred and hence more difficult.<sup>157</sup> Any person who speaks, publishes (including material on the Internet) or broadcasts anything defamatory is a potential target for a defamation action.<sup>158</sup> For these reasons the focus of this chapter is mainly on libel.

The law of defamation in the USA is centuries old,<sup>159</sup> having its roots in the English common law.<sup>160</sup> All libel cases in the USA were previously governed by common law as applied by their respective states.<sup>161</sup> This approach, however, changed dramatically as a result of the hearing of *New York Times Co. v Sullivan*,<sup>162</sup> which dealt with the issue of libel in a constitutional context.<sup>163</sup> Courts in the USA now view libel as a First Amendment issue.<sup>164</sup> Rules and regulations regarding libel are now required to keep within the boundaries defined by the First Amendment,<sup>165</sup> which entails that a balance should be kept between the rights of free speech and the protection of an individual's or corporation's reputation.<sup>166</sup> Libel law in the USA has therefore experienced several interesting developments, such as the anti-SLAPP statutes and the so called "veggie" libel laws.<sup>167</sup>

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157 There are still jurisdictions in the USA where a distinction is upheld, with most states / jurisdictions considering defamation on the Internet to be libel. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

158 Pember and Cavert *Mass Media Law* 148.

159 Pember and Cavert *Mass Media Law* 147.

160 Slander was recognised as a cause of action as far back as the 13th century. Libel was originally seen as a criminal offense, and remained a common law crime. Defamation was punishable as a sin until the Protestant Reformation, it also formed part of England's ecclesiastical law. See Creech *Electronic Media Law and Regulation* 202.

161 Creech *Electronic Media Law and Regulation* 203.

162 Sullivan, the plaintiff in this ordeal sued the New York Times Co (the defendant) for printing as well as advertising about the civil rights movement in the south of the USA in such a way as allegedly to defame the plaintiff. See *New York Times Co. v Sullivan* 1964 376 US 254 (USSC).

163 Creech *Electronic Media Law and Regulation* 203.

164 First Amendment of the Bill of Rights of *The Constitution of the United States*, 1789.

165 Pember and Cavert *Mass Media Law* 147.

166 Pember and Cavert note the following: "Libel law is among the most tangled areas of American law. It is filled with many poorly defined amorphous concepts. Although it is based on traditional common law, it is infused with statutory and constitutional elements". See Pember and Cavert *Mass Media Law* 150; Creech *Electronic Media Law and Regulation* 203.

167 Kline describes Anti-SLAPP statutes as follows: "Strategic Lawsuits Against Public Participation (SLAPP) refer to suits brought in response to efforts by individuals or groups to participate in the democratic process by some person or entity that claims to have been wronged through that participation. A common type of SLAPP suit is a defamation action. Because of the effect these suits can have on citizens petitioning the government for redress of grievances, numerous states have enacted some form of anti-SLAPP legislation. California in particular has been the leader in litigation interpreting and applying SLAPP legislation". See <http://www.legal-project.org/149/anti-slapp-statutes-in-the-us-by-state>. Veggie libel laws on the other hand are briefly described by Steier as follows: "Veggie libel laws, also called food disparagement statutes, attempt to stop defamatory statements that could harm traditional food producers in various states: Louisiana, Idaho, Mississippi, South Dakota, Texas, Florida, Arizona, Oklahoma, North Dakota, Colorado, Alabama and Ohio. These laws prohibit statements that may reveal the ugly truth about foods sold in supermarkets as being unhealthy or even revolting. Such statements are, of course, harmful to the

No single definition of libel exists in the USA,<sup>168</sup> the reason being that each state and the District of Columbia defines libel for its own specific jurisdiction.<sup>169</sup> However, the definitions share numerous similarities, which permit for the overall characteristics of libel to be deduced.<sup>170</sup>

In a normal defamation suit (which includes libel) the injured party (the plaintiff) initiates the lawsuit to repair any damage to reputation and also to collect monetary compensation for the harm to reputation.<sup>171</sup> Your “character” is regarded as what you are and your “reputation” on the other hand is what people think you are.<sup>172</sup> A loss of self-esteem will not be deemed sufficient in proving damages in a libel suit as the law only protects reputation.<sup>173</sup> The words that were published / posted must also in fact damage the plaintiff’s reputation in order for the defendant’s conduct to be considered actionable defamation.<sup>174</sup> Lastly, at least a significant minority of the public must consider that the plaintiff’s reputation has been damaged.<sup>175</sup>

To reach any of the fore-mentioned aims, the plaintiff must win a settlement or a court case.<sup>176</sup> The burden of proof in a libel case is characteristically on the plaintiff.<sup>177</sup> To win a defamation suit, the plaintiff must prove certain claims or satisfy distinct “elements”.<sup>178</sup> These elements include: publication, identification, defamation, fault, falsity and injury or harm.<sup>179</sup>

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industry. Large beef and pork producers lobbied those laws into being to prevent the critical but free discourse about their products at the cost of consumers’ free speech. The idea that the large food corporations lobbied these laws into being in the very states that produce the staples of the fast food industry is suspicious. When free speech about fast food in those states is restricted, consumers are left questioning whether the companies are hiding something”. See Steier 2012 *Juris* 21.

168 Creech *Electronic Media Law and Regulation* 201.

169 Creech *Electronic Media Law and Regulation* 201.

170 Creech *Electronic Media Law and Regulation* 201.

171 Pember and Cavert *Mass Media Law* 151.

172 Pember and Cavert *Mass Media Law* 154.

173 Pember and Cavert *Mass Media Law* 154.

174 Pember and Cavert *Mass Media Law* 155.

175 The minority cannot be an unrepresentative minority. See Pember and Cavert *Mass Media Law* 156.

176 Pember and Cavert *Mass Media Law* 151.

177 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

178 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

179 There are various definitions of these elements. For the purposes of this dissertation, we will be using those as defined by Stewart, the reason being that he specifically focuses on *Social Media and the Law* in the USA. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

Plaintiffs usually have to satisfy all six of these elements for a defamation suit to be successful.<sup>180</sup> However, the mere fact that all the above elements are proven does not guarantee victory for the plaintiff,<sup>181</sup> as the defendant can still present a defence based on either common law grounds or the First Amendment.<sup>182</sup> The elements listed above will now be elaborated upon in more detail.

### 3.1.2 *Elements of libel in America*

#### 3.1.2.1 Publication

The *Copyright Act* of 1976 broadly defines publication as follows:<sup>183</sup>

[T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means –

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered, or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Publication regarding libel can more narrowly be described by Stewart's<sup>184</sup> definition:

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180 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

181 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

182 As previously mentioned, a defence based on the First Amendment would entail a defence regarding the constitutional right to freedom of speech. Common law defences include the following: truth, privilege and fair comment. See Creech *Electronic Media Law and Regulation* 208 -210. For the aims of this dissertation, the focus will fall on the elements of defamation rather than the defences therefore.

183 An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

184 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

Any article that appears in a printed medium or online or any story that is distributed via broadcast, cable, satellite, or the Internet is considered published. Libel can also be published in press releases, advertisements, letters and other personal communications. Information is also considered published when it appears in a blog, a personal website, a social media website (such as Facebook or Twitter) or an email.

Thus, before the law will recognise any statement or comment as a civil libel, the statement must be published.<sup>185</sup> Publication, in legal terms, involves at least three people:<sup>186</sup> the first person to communicate the defamatory statement, the second person being defamed and at least one other individual to hear, see, or read the defamatory statement.<sup>187</sup> The problem with this scenario is that even if the plaintiff is able to prove all the elements necessary to succeed with the lawsuit and successfully claim that the defence cannot defend the case, the plaintiff may win the case.<sup>188</sup> The real problem arises when the assessment of damages follows.<sup>189</sup> The plaintiff must show that the false statement that was published lowered his or her reputation among a large number of right-thinking people in the community.<sup>190</sup> In a situation where there is only one other party excluding the plaintiff and defendant, this is not possible. Thus, although the court may rule in favour of the plaintiff, the victory will be only a moral one, seeing as no damages will be awarded.<sup>191</sup> For this reason, when a statement is made directly to a person without anybody else knowing about it, it would not be deemed as a libel act of publication because there has been no reputational damage.<sup>192</sup>

The person publishing the statement must also have the intention to do so.<sup>193</sup> Some individuals also falsely believe that when attributing a libel to a third party, they are able to protect themselves from a libel lawsuit.<sup>194</sup> For example, typically a reporter is aware of the fact that one cannot label someone a murderer. A remarkably large number of individuals, however, believe that you can label someone a murderer as long as you

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185 Pember and Cavert *Mass Media Law* 157.

186 Pember and Cavert *Mass Media Law* 151.

187 Pember and Cavert *Mass Media Law* 151.

188 Pember and Cavert *Mass Media Law* 157.

189 Pember and Cavert *Mass Media Law* 151.

190 Pember and Cavert *Mass Media Law* 157.

191 Courts regard communication on the World Wide Web in the same way as they regard other published material. See Pember and Cavert *Mass Media Law* 157-159.

192 No other 3rd party can think less of a person if they did not receive the message. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

193 Creech *Electronic Media Law and Regulation* 206.

194 Pember and Cavert *Mass Media Law* 151.

attribute the statement to a third party. This is not the case.<sup>195</sup> Such conduct is still considered to be (re)publishing and will be discussed in more detail below.

An individual will be held liable for repeating (republishing) a defamatory statement if the information does not originate from a privileged source.<sup>196</sup> According to the common libel law of the USA, an individual that repeats a libel is just as accountable for the damages triggered as the original publisher.<sup>197</sup> This would be of particular importance in the realm of the social media. However, there are several limiting factors regarding republishing.<sup>198</sup>

The republication rule is usually limited to situations where the content is controlled by the publisher.<sup>199</sup> The reason why media companies are held responsible for the republication of libellous statements is that their staff writes, edits, selects or cuts the content that is intended to be used in any form of communication.<sup>200</sup> The fact that the content did not originate from the media company is not a factor taken into consideration.<sup>201</sup> Common carriers (telephone companies, libraries, book stores, newsstands) which provide content for distribution without editing the content are, however, not liable for the defamatory content.

In the USA every distributed (and also republished) libellous statement does not always constitute a separate publication.<sup>202</sup> According to the single publication rule, a libel plaintiff can sue only once the individual has excluded the possibility of numerous suits

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195 An example would be, for instance, "Peter killed his daughter," which could be attributed as follows: "Peter killed his daughter, according to his neighbour At Nel". See Pember and Cavert *Mass Media Law* 157.

196 Privilege can briefly be described as legal protection that a person or group has because of its position within a society. See <http://dictionary.cambridge.org/dictionary/business-english/privilege?q=privilege>; Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

197 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

198 This would include a journalist who accurately quotes a source, or media originations that publish or broadcast defamatory advertisements. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013) (Routledge New York 2013).

199 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

200 Creech *Electronic Media Law and Regulation* 207.

201 Common carriers (telephone companies, libraries, book stores, newsstands) that provide content for distribution without editing the content are not liable for the defamatory content. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

202 "Author and courtroom observer Dominick Dunne was sued when, during an appearance on a radio programme, he repeated allegations he said he had heard from a third party that implicated a U.S. congressman in the disappearance of a legislative intern name Chandra Levy. When Congressman Gary Condit sued, Dunne tried to defend himself by arguing that he was simply repeating what others had told him – he did not originate the libellous allegations. A federal district court rejected the argument, noting that the republication of false facts threatens the target's reputation as much as the original poster". See Pember and Cavert *Mass Media Law* 158.

across several jurisdictions for the same defamatory statement.<sup>203</sup> The single publication rule also finds application to text and videos on the Internet, and will therefore without a doubt include social media. A plaintiff in a libel case can thus sue in only one jurisdiction, even if a defamatory statement published on a social media platform (for example Facebook) was accessible to his friends in every one of the surrounding states.<sup>204</sup>

Lastly and according to federal statutory law, the operators of websites, blogs, online bulletin boards and discussion groups are not considered to be publishers and are not liable for any kinds of statements posted on their sites by third-party users.<sup>205</sup> One other area of unease which may arise with regards to publication and defamation on the social media platforms relates to the statutes of limitation.<sup>206</sup> All states have a statute of limitations on defamation claims, usually ranging from one to three years from the date of publication.<sup>207</sup> Thus far it seems that courts in the USA have nearly uniformly ruled that the continuous nature of online publications does not indefinitely extend the time limit for a libel action based on publication on the Internet.<sup>208</sup>

Libel tourism is also an on-going problem in the context of publication in libel suits, especially concerning online publication.<sup>209</sup> Libel tourism is where the plaintiff in the matter travels to a foreign venue to file a defamation claim that would not succeed in his own country.<sup>210</sup> Saudis, Russians, Ukrainians and even Hollywood celebrities have gone to London to seek amends concerning stories that were initially published in the USA but distributed globally via traditional and online media. The reason is that British courts have usually been friendlier to libel plaintiffs than courts in the USA, with London having

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203 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

204 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

205 As previously said, the focus of this study is the affect it has on the individual. As a matter of interest take section 230 of the *Communication Decency Act*, which makes a distinction between ISP's and so called Internet information content providers, which include social media platforms. Both of these entities are protected from libel action. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

206 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

207 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

208 "In 2002, for example, a New York court ruled that a defamatory statement that was posted to a website in 1996 was no longer actionable in 1998, one year after the state's statute of limitations had passed. Instead, the statute of limitations for Internet material begins when the information is first published. In addition, courts have ruled that updating a website does not constitute a new publication unless the defamatory statement itself is altered or updated". See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

209 Pember and Cavert *Mass Media Law* 161.

210 Pember and Cavert *Mass Media Law* 161.

gained the reputation as the libel capital of the world.<sup>211</sup> Numerous USA states have fortunately taken steps to address this problem.<sup>212</sup> New York and Illinois have for example passed legislation which forbids courts from those jurisdictions from imposing overseas judgments.<sup>213</sup> In the year 2010 the USA Congress approved legislation which forbids the domestic enforcement of foreign libel judgments against USA persons where the judgments are inconsistent with First Amendment defences built into American Law.<sup>214</sup> The *Securing the Protection of Our Enduring and Established Heritage Act* was signed by the USA president, Obama in August 2010.<sup>215</sup>

Unlike the other elements of libel, publication is usually not a contested issue in a libel case.<sup>216</sup>

### 3.1.2.2 Identification

The second element of the libel elements is identification. This entails that the plaintiff must establish that a published communication is indeed about the plaintiff.<sup>217</sup> If the plaintiff fails to do this, the plaintiff will surely lose the suit.<sup>218</sup> The latter will therefore have to prove that the defamatory statement was “of and concerning” him/herself.<sup>219</sup> What this requirement therefore basically comes down to is that the plaintiff must prove that an individual would be able to identify him/her as the subject of the defamatory statement.<sup>220</sup> Although not every reader or viewer needs to know to whom the libel refers, certainly more than one or two people should.<sup>221</sup> It must be borne in mind that to be afforded damages the plaintiff must show that his/her reputation has been lowered in the eyes of a significant minority of the members of the community.<sup>222</sup> Thus, the fewer people who are able to identify the plaintiff, the less chance there is for the plaintiff to

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211 Pember and Cavert *Mass Media Law* 161.

212 Pember and Cavert *Mass Media Law* 161.

213 A British court, for example, could still rule against a defendant from the USA, but the plaintiff would not be able to use American courts to enforce the judgment. See Pember and Cavert *Mass Media Law* 161.

214 Pember and Cavert *Mass Media Law* 161.

215 Hereafter: SPEECH Act. See Pember and Cavert *Mass Media Law* 161.

216 Creech *Electronic Media Law and Regulation* 206.

217 Pember and Cavert *Mass Media Law* 162.

218 Pember and Cavert *Mass Media Law* 162.

219 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

220 Creech *Electronic Media Law and Regulation* 205.

221 Pember and Cavert *Mass Media Law* 162.

222 Pember and Cavert *Mass Media Law* 162.

prove sufficient harm to win damages.<sup>223</sup> The identification does not have to refer to the plaintiff by name.<sup>224</sup> The plaintiff can be identified by any information about him/herself, such as a name, picture, description, nickname, caricature cartoon or even a set of circumstances.<sup>225</sup> Where a libellous statement does not make a clear identification, the plaintiff must prove that the defamatory words refer to him/her.<sup>226</sup>

The Internet has brought to the fore new challenges regarding identification. Some have argued that the ability of Internet publications (including social media publications) to reach enormous audiences reduces the possibility of a plaintiff being identified by “mere commonality of a name or other shared attribute”.<sup>227</sup>

Group identification: Identification of groups usually presents a degree of uncertainty. Group identification can be explained as follows:

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it, but only if (a) the group or class is so small that the matter can be reasonably understood to refer to the individual or (b) the circumstances of publication give rise to the conclusion that there is a particular reference to him.<sup>228</sup>

The first aspect which must be considered is the size of the group.<sup>229</sup> Usually persons who are part of a large group cannot prove identification.<sup>230</sup> Members of a smaller group would be able to prove that they have been identified by reference to the group as a whole, and therefore would be able to take action.<sup>231</sup> This would depend, however, on the size of the group, as well as the language that was used.<sup>232</sup> The likelihood that a statement identifies members of a group increases as the group becomes smaller.<sup>233</sup> However, there is no definitive size of a group that would qualify it as being large or small.

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223 Pember and Cavert *Mass Media Law* 162.

224 Creech *Electronic Media Law and Regulation* 205.

225 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

226 Pember and Cavert *Mass Media Law* 162.

227 An example would be that where people share the exact same first and second name it would be difficult to prove that the user's friends assumed that s/he was the particular individual in question. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

228 Pember and Cavert *Mass Media Law* 162.

229 Pember and Cavert *Mass Media Law* 162

230 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

231 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

232 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

233 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

### 3.1.2.3 Defamatory content

The third element of defamation which must be proven in a libel suit is the defamatory content of the statement. The definition of defamation in the USA has already been cited above. There is no conclusive list of words that are seen as “defamatory”.<sup>234</sup> Each case will be examined on its own merits in order to decide if the words, phrase or paragraph lowers the plaintiff’s reputation among a significant number of right-thinking people in the community.<sup>235</sup> The words in question should be considered in the light of their usual meanings unless the evidence persuades that the defendant meant something else when the statement was published.<sup>236</sup> A judge will decide, as a matter of law, if the words in question are capable of carrying a defamatory meaning.<sup>237</sup> The question to be asked would therefore be as follows: “Would the reasonable person regard this as a defamatory comment?”<sup>238</sup> In continuing, the two forms of libel will now be discussed briefly.

Libel *per se* refers to statements that are defamatory with the first view.<sup>239</sup> This form of libel can, in simple terms, be described as or referred to as direct libel.<sup>240</sup> Numerous statements can qualify as libel. As long as the average reader or listener is able to determine that the plaintiff was involved in an action that was damaging to his/her reputation it will be seen as libel.<sup>241</sup> These types of actions include the following: allegations of criminal behaviour or activity, allegations that a plaintiff has an infectious or loathsome disease, accusations that tend to injure a person in his business, trade,

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234 Pember and Cavert *Mass Media Law* 167.

235 A right thinking individual can be described as someone who usually obeys the rules and laws that is prescribed by society and who further agrees with the majority of society with regards to what is to be perceived as right and wrong. See Pember and Cavert *Mass Media Law* 167; Ingram and Henshall 2008 [http://www.thenewsmanual.net/Manuals%20Volume%203/volume3\\_69.htm](http://www.thenewsmanual.net/Manuals%20Volume%203/volume3_69.htm).

236 It should be noted that in different jurisdictions varying forms of the so-called reasonable person-test is used and applied. However, for the purposes of this study the terminology of the jurisdiction is followed, but in most cases reasonable person, reasonable man, right thinking person and ordinary person can be used interchangeably. See Pember and Cavert *Mass Media Law* 167.

237 Pember and Cavert *Mass Media Law* 167.

238 “A reasonable person is someone who uses ordinary prudence under the circumstances to avoid injury or other loss. A reasonable person is someone who is not careless”. The reasonable person does not specifically avoid injuring others, the reasonable person is by no means a perfect person. See Statsky *Essentials of Torts*; Pember and Cavert *Mass Media Law* 167.

239 This would be words that state directly, for example “thief”, “cheat” and “traitor”. See Pember and Cavert *Mass Media Law* 166.

240 For example, calling someone a murderer directly. See Creech *Electronic Media Law and Regulation* 202.

241 Creech *Electronic Media Law and Regulation* 203.

profession, office or calling, and attacks on one's character traits or lifestyle, including claims of sexual promiscuity, sexual behaviours that diverge from accepted norms, and adultery.<sup>242</sup>

The inclusion of statements concerning immoral behaviour or unusual sexual behaviour may seem antiquated, especially seeing as different communities' values as regards sexual conduct may differ radically.<sup>243</sup> These statements may nevertheless be the subject of a libel lawsuit, predominantly when published on the Internet, which effectively distributes such statements worldwide.

Libel *per quod* refers to statements where the defamatory impact of a statement results from the possession of extrinsic knowledge.<sup>244</sup> It is also known as indirect libel.<sup>245</sup> Libel *per quod* is similar to libel by suggestion or insinuation.<sup>246</sup> The libel is not evident from the words themselves, but is implied.<sup>247</sup> If a defamatory meaning is not apparent, the burden rests on the plaintiff to prove that a defamatory meaning was intended.<sup>248</sup> Libel *per quod* is, in reality, seldom easy to identify and similarly more difficult for the plaintiff to prove.<sup>249</sup> The reason for this is that an individual cannot be held liable for statements that are defamatory because of information the individual had no reason to know about.<sup>250</sup> Thus libel *per quod* hides in the interpretation of apparently innocent words.<sup>251</sup> In many jurisdictions in the USA a plaintiff alleging *libel per quod* must prove actual monetary loss, also known as special damages.<sup>252</sup>

Certain jurisdictions in the USA regard libel *per se* as proof of defamation in itself, which immediately establishes the existence of damages.<sup>253</sup> The distinction between these two

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242 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

243 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

244 Pember and Cavert *Mass Media Law* 167.

245 Creech *Electronic Media Law and Regulation* 205.

246 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

247 Creech *Electronic Media Law and Regulation* 205.

248 Creech *Electronic Media Law and Regulation* 205.

249 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

250 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

251 Creech *Electronic Media Law and Regulation* 205.

252 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

253 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

forms of libel has become less meaningful over the years,<sup>254</sup> with some jurisdictions having totally abandoned the distinction.<sup>255</sup>

#### 3.1.2.4 Fault

On account of the dramatic change this element of defamation has undergone, Stewart<sup>256</sup> is of the opinion that it can be viewed as one of the most complicated areas of defamation. For the first time in 1964 the USA Supreme Court ruled that a libel plaintiff was required to show that a defendant had been at fault when the defamatory material was published.<sup>257</sup> The level of fault of a plaintiff depends on a variety of factors,<sup>258</sup> which includes the identity of the plaintiff, the subject matter of the defamatory statement, and the type of damages or monetary awards the defendant is pursuing.<sup>259</sup>

Public officials and public figures have to prove a greater level of fault than private individuals.<sup>260</sup> The former can also not recover damages for a defamatory falsehood concerning their official conduct unless the defendant acted with “actual malice”.<sup>261</sup> The term “actual malice” can be defined as “knowledge of falsity or reckless disregard of whether the material was false or not”.<sup>262</sup> The two parts of the definition should be deliberated separately. Knowledge of falsity is a complicated way of describing a lie.<sup>263</sup> It is more difficult to define the term reckless disregard for the truth.<sup>264</sup> It can be seen as strong awareness of the likely falsity of the defamatory material when it was published,

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254 Pember and Cavert *Mass Media Law* 167.

255 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

256 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

257 Before this ruling civil libel law had been governed by what is known as the doctrine of strict liability, which requires that the libel defendant was responsible for harming a plaintiff regardless of how careful s/he had been in formulating and publishing or broadcasting the story. See Pember and Cavert *Mass Media Law* 179.

258 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

259 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

260 Pember and Cavert *Mass Media Law* 183.

261 Actual malice can be seen as present when a defendant acted with knowledge that the statement was false, or when s/he recklessly disregarded the truth. A public official can be seen as “those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs”. See Pember and Cavert *Mass Media Law* 183 and Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

262 Pember and Cavert *Mass Media Law* 203.

263 Pember and Cavert *Mass Media Law* 204.

264 Pember and Cavert *Mass Media Law* 205.

or adequate evidence to allow the conclusion to be drawn that the defendant in fact had doubts as to the truth of the publication.<sup>265</sup>

The proving of actual malice can be troublesome for the plaintiff as well as for the judges who have ultimately to decide these types of cases.<sup>266</sup> A plaintiff must prove actual malice with clear and convincing evidence.<sup>267</sup> Thus, whilst most civil cases only require proof by a preponderance of the evidence, the burden of proof is much heavier in actual malice matters.<sup>268</sup>

Private individuals, on the other hand, have to prove some degree of fault, even if it is only negligence.<sup>269</sup> Negligence is the fault norm most states have accepted for defamation relating to a private individual in a matter of public concern.<sup>270</sup> Negligence is widely used in the law of tort and can be described as the failure to act in accordance with the way a reasonable person would have done in similar circumstances. In libel cases courts sometimes have to use so-called “professional standards”.<sup>271</sup> This is when a professional in a certain field is compared with another, average professional in the same field with the purpose of establishing the truth or falsity of a deleterious statement made about the plaintiff’s professional capacity.<sup>272</sup>

The reason for the distinction between the fault levels required from a public figure and a private figure is the fact that public figures have resources and media access with which to contest defamatory content.<sup>273</sup> There is furthermore a difference between winning a defamation suit and the ability to recover presumed and punitive damages.<sup>274</sup> All plaintiffs (public and private) must prove that actual malice occurred in order to be

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265 Pember and Cavert *Mass Media Law* 205.

266 Pember and Cavert *Mass Media Law* 183 and Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

267 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

268 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

269 “In contrast to public officials and public figures, a private individual is an average person who has not voluntarily injected themselves into a public controversy. Many individuals who allege a defamatory statement was made about them on a social media site would probably fall into this category”. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

270 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

271 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

272 For example, what should the average professional journalist know before publishing material? A journalist cannot be compared to the average person on the street. Another measuring staff should be used. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

273 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

274 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

able to collect punitive damages, if the subject of the report is indeed a matter of public concern.<sup>275</sup>

### 3.1.2.5 Falsity

A defamatory communication must be injurious to someone's reputation as well as being false.<sup>276</sup> For the defendant to be protected from a libel suit, however, not every aspect of a defamatory statement has to be accurate.<sup>277</sup> The statement must be substantially true and hence minor errors will not be actionable. The USA dictates that public officials, public figures as well as private persons *involved in matters of public concern* must prove falsity. It is therefore clear that not all plaintiffs have to meet the requirement of falsity.<sup>278</sup> For example, a private person (and plaintiff) does not have to prove the falsity when the matter is not one of public concern.<sup>279</sup>

Both fault and falsity deal with defining what a matter of public concern is.<sup>280</sup> One could argue that it should be based on what is published in the media.<sup>281</sup> Defamation that occurs on the Internet in the USA will raise difficult questions regarding the subject matter of defamatory speech.<sup>282</sup> As stated in Chapter 2, online communication which includes social media has become more abundant today, steadily replacing conventional means of communication.<sup>283</sup> The communication that occurs on social media platforms, however, may interest only a small number of people, making it difficult to determine whether it is a matter of public or private concern.<sup>284</sup> The main complication arises from the fact that concluding that a statement is merely a matter of private concern may result in deciding the outcome of a defamation suit.<sup>285</sup> It is also unclear whether or not the public nature of social media publications may cause problems.<sup>286</sup> The reason therefore is that unless an individual has protected his/her

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275 Pember and Cavert *Mass Media Law* 212.

276 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

277 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

278 Pember and Cavert *Mass Media Law* 174.

279 Pember and Cavert *Mass Media Law* 174.

280 Pember and Cavert *Mass Media Law* 174.

281 Pember and Cavert *Mass Media Law* 174.

282 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

283 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

284 Pember and Cavert *Mass Media Law* 174.

285 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

286 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

account (privacy settings), the individual can publish for the whole world to see.<sup>287</sup> Some argue that this may elevate private speech into public speech. Numerous courts have ruled that expression is private even when widely distributed.<sup>288</sup>

The USA Supreme court has also never defined the term “matters of public concern,” a fact which further complicates the situation.<sup>289</sup> One factor that does have an influence on the term is the size of the audience receiving the message.<sup>290</sup> This factor is problematic in the sense that in today’s Internet environment it would appear to require courts to take into account how large an audience or how many followers a speaker might have on a social media platform.<sup>291</sup> When a social media platform’s (such as Twitter’s) privacy settings have not been effectively set, anyone in the world would be able to view the content, making the audience global.<sup>292</sup> As usual, the burden to prove falsity rests on the plaintiff.<sup>293</sup>

#### 3.1.2.6 Injury or harm

Finally, the last requirement for succeeding in respect of a libel suit is to prove injury or harm. The plaintiff in a libel matter sues for damages as compensation for the alleged wrongdoing.<sup>294</sup> The plaintiff must prove damages that go beyond embarrassment or plainly being upset.<sup>295</sup> The harm must be done to the individual’s reputation.<sup>296</sup> On the other hand, not all defamatory statements cause harm. With certain statements the harm to one’s reputation is presumed.<sup>297</sup> Damage may be presumed in cases of libel *per se* but not in cases of libel *per quod*.<sup>298</sup> Libel plaintiffs may sue for presumed damages or harm which loss of reputation is assumed to cause.<sup>299</sup> A plaintiff can also sue for

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287 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

288 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

289 Pember and Cavert *Mass Media Law* 174.

290 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

291 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

292 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

293 Pember and Cavert *Mass Media Law* 174.

294 Pember and Cavert *Mass Media Law* 245.

295 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

296 Harm does not necessarily have to be tangible. It can also be intangible, as in instances such as loss of reputation, loss of standing in a community, mental harm, or emotional distress. See Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

297 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

298 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

299 These damages can be obtained by the plaintiff without proof of injury or harm. See Pember and Cavert *Mass Media Law* 245.

damages of a compensatory nature or awards intended to compensate for proven loss of a good name or reputation.<sup>300</sup> Loss of revenue or other monetary loss can also be sued for.<sup>301</sup> Lastly, a plaintiff can sue for punitive damages which tend to punish the defendant, rather than to compensate the plaintiff.<sup>302</sup>

Calculating damage awards is a very complex procedure without adding the additional constraint of Internet communications.<sup>303</sup> Actual malice has to be proven before public official and public figures may be awarded damages.<sup>304</sup> For a private figure in a matter of public concern, the plaintiff must prove actual malice to claim presumed or punitive damages and has to prove negligence for compensatory damages.<sup>305</sup>

States' approaches regarding defamation and private individuals who are not involved in matters of public concern vary greatly.<sup>306</sup> Certain states allow plaintiffs to collect presumed and punitive damages without their proving actual malice.<sup>307</sup> These states also allow the plaintiff to collect compensatory damages without showing negligence.

### 3.1.3 Scenario

#### 3.1.3.1 Introduction

To determine if a defamatory statement on a social media platform in the USA will be considered libellous, each of the above mentioned elements must be satisfied. Only if all of the elements are satisfied can a libel claim be lodged.

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300 These types of damages are named actual damages or damages for actual injury in libel law. In these cases plaintiffs must bring evidence to the court to show that because of the defamatory publication in question s/he has suffered harm, which might include impairment of reputation or standing in the community, monetary loss, personal humiliation, or mental suffering and anguish. See Pember and Cavert *Mass Media Law* 245.

301 These types of damages are called special damages in libel law. They are specific items of pecuniary loss caused by the publishing of defamatory statements. Special damages represent a specific monetary loss as the result of the libel in question. See Pember and Cavert *Mass Media Law* 245.

302 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

303 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

304 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

305 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

306 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

307 Stewart (ed) *Social Media and the Law* (Routledge New York 2013).

The scenario described above will be used, where the following takes place: fictitious person X posts the following as his Facebook/Twitter status update:

“Fictitious person Y likes his girls a tad young...”

### 3.1.3.2 Publication

The first formal requirement is publication. Will a defamatory statement made on a social media platform satisfy the publication requirement? Publication requires at least three people. In this social media scenario the three people will be the following: 1) the person communicating the defamatory statement (fictitious person X, the person making the statement/poster), 2) the person being defamed (fictitious person Y), and 3) a third person to hear, see, or read the defamatory statement (a friend/follower of fictitious person X).

From the above it is clear that a defamatory statement made on a social media platform will indeed fit the sub-qualification of the three people. The third person is required to hear, see or read the defamatory statement. When posting on a social media platform, a third person will read the defamatory statement. Because the focus of this dissertation is on the individual making the defamatory statement, republishing (repeating the defamatory statement, for example re-Tweeting the statement) will not be investigated. Thus making a defamatory statement on a social media platform clearly satisfies the requirement of publication for a libel action. A posting on a social media platform can be deemed a publication.

### 3.1.3.3 Identification

Fictitious person Y would also have to prove that the defamatory statement that was published was of and concerning him. If any person is able to identify him as the subject of the defamatory statement, this requirement will be met. In this scenario identification will easily take place, seeing that the person’s name was used. However, because the statement was made on a social media platform it brings other challenges to the table. Because social media platforms have the ability to reach a very large audience, fictitious person Y will have to prove that he is *the* fictitious person Y mentioned in the statement.

The identification of fictitious person Y will be entirely possible, depending upon the circumstances. In the case of a social media platform, things to consider will include how many friends the parties share and their mutual connections amongst others. Another important issue to consider would be how famous the person is. A prominent celebrity would be easier to identify than an everyday citizen.

#### 3.1.3.4 Defamatory content

Fictitious person Y would also have to prove that the statement made on the social media platform is indeed a statement with defamatory content. In this scenario the statement would qualify as libel *per se* as well as libel *per quod*, depending upon the circumstances of the situation. The specific statement implies that fictitious person Y like's underage girls. It can even refer to him as being a paedophile or having similar tendencies, depending on the context as a whole. This is *contra bonos mores* and would therefore certainly be seen as defamatory. This requirement could therefore also be easily met, depending of the context and circumstances of the individual's situation.

#### 3.1.3.5 Fault

The requirement of fault may be the most complicated to prove by fictitious person Y. The level of fault that would have to be proven by fictitious person Y depends on the identity of the plaintiff, the subject matter of the defamatory statement, the type of damages and the monetary awards the plaintiff is seeking. In the context of this scenario we can assume that fictitious person Y is a private individual. Fictitious person Y will have to prove actual malice of the publication with clear and convincing evidence. In a social media setting, this requirement can also be satisfied, depending on the specific facts of the particular case.

#### 3.1.3.6 Falsity

For a successful libel suit fictitious person Y will have to prove that the defamatory posting on a social media platform is false in nature. This is the case only where fictitious person Y was involved in a matter of public concern. In this scenario, this matter would indeed be one of public concern. Therefore fictitious person Y must prove

that the statement is substantially false. How he goes about doing this, would depend on the surrounding circumstances.

#### 3.1.3.7 Injury or harm

Fictitious person Y will have to prove harm to his/her reputation. As stated above, there are various forms of harm. In this scenario, any of the forms of harm may be applicable, depending on the circumstances. For instance, fictitious person Y will be able to claim special damages if he was a ballet teacher with a lot of underage female students in his clientele, as the comment may result in his losing income if parents stop sending their daughters to his ballet school on account of the defamatory statement. Injury or harm to fictitious person Y's reputation can therefore be proven in a social media setting.

#### 3.1.3.8 Concluding remarks

It is clear that a defamatory statement made on a social media platform can without doubt satisfy the requirements for a libel suit. As previously said, whether or not the plaintiff will be successful in satisfying each individual requirement will ultimately depend on the surrounding circumstances of the specific case.

In an attempt to confirm the above, a case analysis regarding defamatory statements on social media platforms will briefly be examined.

#### 3.1.4 Case analysis

##### *Gordon & Holmes et al v Courtney Michelle Love*

Before delving directly into the case, it is necessary to give a short background about the defendant's (Courtney Love's) social media activities. Courtney Love's first incident regarding a libellous posting on social media platforms occurred in March 2009 when Dawn Simorangkir filed a libel case against Love.<sup>308</sup> The reason for the filing of the case

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308 Falkenberg 2011 <http://www.forbes.com/sites/kaifalkenberg/2011/01/05/courtney-loves-defense-to-libel-by-twitter-suit-im-an-addict/>.

was that Love had accused Simorangkir of theft on several occasions by Tweeting on Twitter.<sup>309</sup> Love went further as to imply that Simorangkir had a criminal background.<sup>310</sup> This would have been the first ground-breaking case where a jury would have to elect if Twitter posts could be considered as libel.<sup>311</sup> However, the case was settled pre-trial for the amount of \$430 000.<sup>312</sup>

Love returned to the challenge of initiating ground-breaking suits when she was the defendant in the first Twitter libel case that went to trial, in *Gordon & Holmes et al v Courtney Michelle Love*.<sup>313</sup> Love was sued for libel by her former attorney, Rhoda Holmes.<sup>314</sup> Holmes had been hired to deal with a case of fraud against the administrators of Kurt Cobain's (Love's late husband) estate.<sup>315</sup> In her Tweet, Love made allegations that Holmes had been "bought off".<sup>316</sup> Because of Holmes's association with Love, she was seen as a limited purpose public figure.<sup>317</sup> Holmes would therefore have to prove that Love acted with actual malice.<sup>318</sup>

Love attested that she did not mean to Tweet the message to the public, that it was intended as a private message, and that she Tweeted it by accident.<sup>319</sup> She also testified that she had removed the Tweet as soon as she realised that it had been made public.<sup>320</sup> Furthermore she claimed that she had honestly believed her statement to be

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309 Falkenberg 2011 <http://www.forbes.com/sites/kaifalkenberg/2011/01/05/courtney-loves-defense-to-libel-by-twitter-suit-im-an-addict/>.

310 McCartney 2011 [http://www.huffingtonpost.com/2011/03/04/courtney-love-settles-430\\_n\\_831302.html](http://www.huffingtonpost.com/2011/03/04/courtney-love-settles-430_n_831302.html).

311 McCartney 2011 [http://www.huffingtonpost.com/2011/03/04/courtney-love-settles-430\\_n\\_831302.html](http://www.huffingtonpost.com/2011/03/04/courtney-love-settles-430_n_831302.html).

312 McCartney 2011 [http://www.huffingtonpost.com/2011/03/04/courtney-love-settles-430\\_n\\_831302.html](http://www.huffingtonpost.com/2011/03/04/courtney-love-settles-430_n_831302.html).

313 *Gordon & Holmes et al v Courtney Michelle Love* 2013 USA BC462438.

314 Robinson 2014 <http://www.dmlp.org/blog/2014/lawyers-vortex-when-attorneys-become-public-figures>.

315 Robinson 2014 <http://www.dmlp.org/blog/2014/lawyers-vortex-when-attorneys-become-public-figures>.

316 Robinson 2014 <http://www.dmlp.org/blog/2014/lawyers-vortex-when-attorneys-become-public-figures>.

317 Robinson 2014 <http://www.dmlp.org/blog/2014/lawyers-vortex-when-attorneys-become-public-figures>.

318 Robinson 2014 <http://www.dmlp.org/blog/2014/lawyers-vortex-when-attorneys-become-public-figures>.

319 Orzeck 2014 <http://www.law360.com/articles/504056/courtney-love-cleared-of-defamation-in-twibel-suit>.

320 Orzeck 2014 <http://www.law360.com/articles/504056/courtney-love-cleared-of-defamation-in-twibel-suit>.

true at the time that it was made.<sup>321</sup> The jury decided that Holmes had not provided clear and convincing evidence that Love knew her statement to be false or doubted the truth of it, therefore failing to prove actual malice.<sup>322</sup> The requirement of actual malice, seeing that Holmes was a limited purpose public figure, had not been adhered to, according to the jury.

Although the plaintiff in this matter did not succeed with her libel claim, the fact that the case went to trial proves that defamatory statements on social media platforms in the USA can indeed have legal implications. Love's luck may have run out in her most recent libel suit, where Stern M L denied her anti-SLAPP motion to strike a new libel lawsuit filed against her (once again) by Dawn Simorangkir.<sup>323</sup> Stern M L was of the opinion that the allegations on The Howard Stern Show and Pinterest (a social media platform) could very well be found to be malicious by a trier of fact or a jury.<sup>324</sup> If this lawsuit succeeds, it will be the first in USA history (and yet another first for Love), and will give an indication of how damages may be awarded.

## **3.2 Defamation in England**

### **3.2.1 Background and introduction**

Defamation falls under the law of tort in England.<sup>325</sup> The law of tort has been developed to compensate for damage, including damage to reputations.<sup>326</sup> The need for injunctions to prevent damage to reputations also falls within the law of defamation.<sup>327</sup> Defamation

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321 Orzeck 2014 <http://www.law360.com/articles/504056/courtney-love-cleared-of-defamation-in-twibel-suit>.

322 Fernandez 2014 <http://www.today.com/popculture/courtney-love-wins-first-twitter-libel-trial-2D11988969>.

323 Chelin 2014 <http://www.spin.com/articles/courtney-love-dawn-simorangkir-libel-lawsuit-howard-stern/>.

324 Chelin 2014 <http://www.spin.com/articles/courtney-love-dawn-simorangkir-libel-lawsuit-howard-stern/>.

325 The word "tort" is derived from the Latin word *tortus* meaning "twisted". It developed into the meaning of "wrong". In English law it has a technical meaning, a legal wrong for which the law provides a remedy. Academics have long struggled with the formulation of a definition, but the most common one used is that of Windfield: "Tortious liability arises from the breach of a duty primarily fixed by law, this duty is towards persons generally and its breach is redressable by an action for liquidated damages". See Harpwood *Modern Tort Law* 1.

326 Harpwood *Modern Tort Law* 369.

327 Harpwood *Modern Tort Law* 369.

law is there to ensure that freedom of speech does not outweigh the interests of the individual, and vice versa.<sup>328</sup>

There is no complete definition for the word “defamatory”.<sup>329</sup> A working description can be reached, however, by combining the words “defamatory” and “statement”.<sup>330</sup> A defamatory statement can therefor broadly be defined as follows:

A statement which tends to lower the claimant in the estimation of right thinking members of society generally, and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem.<sup>331</sup>

In the law of defamation the defendant is not required to have established beforehand the likely effect of his words as long as his speech or writing was voluntary.<sup>332</sup> The relevance lies in the fact that others understood the words in a defamatory sense.<sup>333</sup>

Russel<sup>334</sup> states that:

Liability for libel does not depend on the intention of the defamer, but on the fact of defamation.

Courts in England treat the meaning of the words as a matter of construction rather than evidence that should be interpreted objectively in the context, with reference to the opinion of right-thinking members of society.<sup>335</sup> Many claim that this test is vague and unsatisfactory.<sup>336</sup>

English defamation law has been occasionally amended by legislation.<sup>337</sup> These amendments were made in the 1840's,<sup>338</sup> the 1880's,<sup>339</sup> 1952<sup>340</sup> and 1996.<sup>341</sup> The

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328 Harpwood *Modern Tort Law* 369.

329 Deakin, Johnston and Markesinis *Tort Law* 633.

330 Deakin, Johnston and Markesinis *Tort Law* 633.

331 Harpwood *Modern Tort Law* 376.

332 Deakin, Johnston and Markesinis *Tort Law* 633.

333 Deakin, Johnston and Markesinis *Tort Law* 633.

334 Deakin, Johnston and Markesinis *Tort Law* 633.

335 Deakin, Johnston and Markesinis *Tort Law* 636.

336 With regards to “right-thinking members of society”. many have tried finding better terms to describe such people. Street suggested that the phrase be replaced by a “substantial and respectable proportion of society”. Although this definition still has flaws, it is at least practical, because the law depends on what the majority of people actually think, rather than on what they should think. See Deakin, Johnston and Markesinis *Tort Law* 633.

337 Collins *Collins on Defamation* 5.

amendments made in these pieces of legislation are, however, minor in comparison with those made in the *Defamation Act 2013*.<sup>342</sup>

With regard to defamation in England, Eady rightly indicates that the Internet is unique and that the common law has been left undeveloped. He states that:

Those who provide Internet facilities, and those who avail themselves of their services, must continue to hack their respective paths through a thicket of domestic laws and international conventions often in conflict with one another – but to which they find themselves vulnerable at any moment. Those who communicate news and opinions, or indeed any information, need to be able to make at least an informed assessment of the risks to which they are subjecting themselves, if necessary with the assistance of legal advice. At present they can do little more than take a leap in the dark.<sup>343</sup>

This situation arose because of the inability of the common law to balance the rights of people regarding protection of a good reputation, the right to access to justice, and the right to freedom of expression.<sup>344</sup> As with most other common law nations, the law of defamation in England has been formed and moulded by the courts rather than by parliament.<sup>345</sup> In this connection the English parliament recently amended their defamation Act by enacting the *Defamation Act 2013*, which came in to operation on the first of January 2014.<sup>346</sup> This amendment should have a critical influence on how defamatory statements on social media platforms will be regulated.

Libel law in England was used by the rich and powerful against those alleging misconduct, confident in the fact that the burden of proof lies with the defendant.<sup>347</sup> This

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338 *Libel Act 1843 and Libel Act 1845*. See Collins *Collins on Defamation* 5.

339 *Newspaper Libel and Registration Act 1881; Law of Libel Amendment Act 1888*; Collins *Collins on Defamation* 5.

340 *Defamation Act 1952*; Collins *Collins on Defamation* 5.

341 *Defamation Act 1996*; Collins *Collins on Defamation* 5.

342 Collins *Collins on Defamation* 5.

343 Collins *Collins on Defamation* vii.

344 Collins *Collins on Defamation* vii.

345 Collins *Collins on Defamation* vii.

346 The intention of this Act is to allow scientists, online communicators (which would include those who publish in the social media), non-governmental organisations, and others to introduce fact or criticism as well as any comment and condemnation into public discussions without the fear that their contributions will end in legal battles. See Mullis and Scott *The Modern Law Review* 87.

347 The claimant has the burden to prove only that the statement was made by the defendant and that it was of a defamatory nature. The claimant does not have to prove that the statement was false. The defendant, however, has to prove as a defence that the statement is indeed true. Proving truth or falsity may be very difficult. It is said that the burden of proof in defamation law in England falls upon the defendant. See Collins *Collins on Defamation* vii.

gave rise to the increase of libel tourism in England.<sup>348</sup> Furthermore, the rule against repetition as well as the presumption of trial by jury made it difficult to settle litigation.<sup>349</sup> The USA congress legislated to bar English libel judgements from being given effect in regards to the First Amendment because defamation law in England unfairly infringed against free speech. This gave rise to free speech groups campaigning for reform in England, due to the law's failure to keep pace with rapidly changing technology, which includes social media.<sup>350</sup>

The reason for the popularity of libel tourism was that the claimant has the burden of proving only that the statement was made by the defendant and that it was defamatory, in the common law of libel.<sup>351</sup> English defamation law assumes publications that harmfully affect a claimant's reputation to be false, and in most cases, to have caused damage.<sup>352</sup> Proving that the libellous statement was made by the defendant and that the statement was defamatory is relatively easy. The claimant is not obliged to show that the statement is false in any way.<sup>353</sup> Therefore the burden of proof in English defamation law falls upon the defendant, as proving truth or falsity is often complicated.<sup>354</sup>

The main remedy provided by English law is an award of damages.<sup>355</sup> This is not the ideal solution, as claimants generally want to prevent publication in the first place, the prompt correction of the record, or to prevent future distribution of the offending statement. The reforms to the defamation law both pre and post 2013 have been

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348 The practice of libel tourism occurred when foreign claimants sued for defamation in England for allegations made in publications with little connection with England. See Collins *Collins on Defamation* vii.

349 Before the enactment of the *Defamation Act* 2013, the multiple publication rule was applicable as well as a trial by jury. These two aspects will be described in further detail later. Collins *Collins on Defamation* vii.

350 Collins *Collins on Defamation* vii.

351 Collins *Collins on Defamation* 6.

352 Collins *Collins on Defamation* 6.

353 Collins *Collins on Defamation* 6.

354 The most common form of defence that a defendant will have is the various forms of freedom of expression. Freedom of expression is weighed in the balance mostly through a mixture of defences that seem to overlap with one another. Secondary publishers also enjoy additional defences for the republication of defamatory statements, such as distributors and operators of website. See Collins *Collins on Defamation* 6. The defences available to the defendant before the *Defamation Act* 2013 consisted of unintentional defamation, consent, justification or truth, honest comment (public interest, true facts, honesty, absence of malice) and privilege (absolute privilege and qualified privilege). Due to the limited scope of this dissertation we will not focus on the defences, seeing that our primary focus is on whether an action can be brought due to a defamatory statement on a social media platform. See Deakin, Johnston and Markesinis *Tort Law* xviii.

355 Collins *Collins on Defamation* 7.

directed towards the resolution of defamation disputes without resorting to litigation.<sup>356</sup> Taking this route would grant claimants faster, cheaper and better targeted remedies.<sup>357</sup>

### 3.2.2 *Libel and slander*

England, like many other countries, differentiates between libel and slander.<sup>358</sup> Libel evolved out of statements which were considered in Tudor times to be prejudicial to the state.<sup>359</sup> Libel was therefore criminally punishable by the Court of Star Chamber.<sup>360</sup> As this was a prerogative court it gave favour to the interests of the state, Governmental suspicion of the press required that any injurious publications be inhibited by any means. In 1670 a division had been made in the common law courts between “general words spoken once, without writing” and the same words “being writ and published”.<sup>361</sup> The action of being written and published was actionable because it contained “more malice” than if the words had been spoken once.<sup>362</sup> This logic was flawed, however, as an assertion made in a public place such as the Royal Exchange concerning a merchant in London may be more widely dispersed than a few circulated printed papers or a private letter. Slander, the remedy for spoken words, has been evolving in the common law courts from an earlier time and represented the development from the older ecclesiastical jurisdiction.<sup>363</sup>

The differences between libel and slander have been abolished in some commonwealth jurisdictions and in 1975 the Faulks Committee recommended that the distinction should be put to an end.<sup>364</sup> However, this was never done.<sup>365</sup>

The modern distinction between libel and slander is that libel is most commonly committed to writing and is actionable *per se*.<sup>366</sup> The defamatory statement or

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356 Collins *Collins on Defamation* 7.

357 Collins *Collins on Defamation* 7.

358 Collins *Collins on Defamation* vii.

359 Deakin, Johnston and Markesinis *Tort Law* 636.

360 Deakin, Johnston and Markesinis *Tort Law* 636.

361 Collins *Collins on Defamation* vii.

362 Deakin, Johnston and Markesinis *Tort Law* 636.

363 Deakin, Johnston and Markesinis *Tort Law* 636.

364 Harpwood *Modern Tort Law* 337.

365 Harpwood *Modern Tort Law* 337.

366 Collins *Collins on Defamation* 5.

representation must also be in “permanent form” as well as visible.<sup>367</sup> A libellous defamatory publication is usually in words, but pictures, gestures and other acts, such as a Tweet, a blog or even a cartoon, can be defamatory.<sup>368</sup> Social media will most definitely have the potential to be libellous for the purposes of this dissertation.

A defamatory statement that is temporary and audible would therefore qualify only as slander.<sup>369</sup> Slander involves the spoken word and is actionable, with limited exceptions, only on proof of special damage.<sup>370</sup> Except for the obligation to prove special damages in case of most slanders, these torts are identical.<sup>371</sup> As in the USA, this dissertation will be focusing on libel rather than slander, as a defamatory statement on a social media platform clearly falls within the definition of libel.

For a claimant to succeed with an action for slander, the person must prove some sort of damage (for example economic loss) to succeed, whereas in libel the claimant does not have to prove that s/he suffered loss or damage as a result of the publication.<sup>372</sup>

### 3.2.3 *Elements of libel in England*

Contrasting with the elements for defamation in the USA, England broadly requires only three elements for the cause of action.<sup>373</sup> This was a contributing factor in regards to the libel tourism to England experienced before the *Defamation Act* 2013. The elements are as follows:

- a) The allegation must be defamatory.
- b) The defamatory statement must refer to the claimant.
- c) Publication of the defamatory statement should have occurred (in libel).

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367 Deakin, Johnston and Markesinis *Tort Law* 636.

368 Smartt *Media & Entertainment Law* 115.

369 Deakin, Johnston and Markesinis *Tort Law* 636.

370 Collins *Collins on Defamation* 5.

371 Collins *Collins on Defamation* 5.

372 Smartt *Media & Entertainment Law* 112.

373 Harpwood *Modern Tort Law* 376.

### 3.2.3.1 The allegation must be defamatory

As already stated, a publication will be deemed defamatory if:

it conveys a sufficiently serious accusation that, applying the standard tests, tends to lower the reputation of the claimant in the estimation of right-thinking participants of society generally, or to cause others to reject and void the claimant, or to expose the complainant to hatred, contempt or ridicule.<sup>374</sup>

If the statement affects only a limited group but not society in general, then this statement would not qualify as defamatory.<sup>375</sup>

Spoken words which are merely abusive, understood as condemnation or uttered in a fit of rage are not defamatory.<sup>376</sup> It is very doubtful if written words can ever be dismissed as abuse, meaning libel.<sup>377</sup> Other statements which are intended only as humour or a form of satire could indeed be actionable.<sup>378</sup> Political opinions frequently find expression in satire, which ridicules prominent people.<sup>379</sup> This finding can be avoided, however, by using one of the defences available.

Deciding if words are defamatory is usually easy where a straightforward allegation of dishonesty or immorality or other dishonourable behaviour is made.<sup>380</sup> However, complications can arise where an allegation might affect the reputation in a prejudicial manner.<sup>381</sup> Pearson<sup>382</sup> states that:

Words may be defamatory of a trader or businessman or professional man, though they do not impute any moral fault or defect of personal character. They can be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgement or efficiency in the conduct of his trade or business or professional activity.

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374 Harpwood *Modern Tort Law* 376.

375 Smartt *Media & Entertainment Law* 112.

376 The term "abuse" is used when a person gives vent to personal feeling rather than when a person aims to injure the claimant. The plaintiff's concern in cases of defamation is usually the esteem in which others hold him/her. The way in which the abusive words are spoken as well as the surrounding circumstances are very important, and the speaker takes the risk that the audience may see his words as defamatory. See Deakin, Johnston and Markesinis *Tort Law* 639.

377 Deakin, Johnston and Markesinis *Tort Law* 639.

378 Harpwood *Modern Tort Law* 376.

379 Harpwood *Modern Tort Law* 376.

380 Deakin, Johnston and Markesinis *Tort Law* 639.

381 Deakin, Johnston and Markesinis *Tort Law* 639.

382 Deakin, Johnston and Markesinis *Tort Law* 639.

What this suggests is that a statement can in one sense not be defamatory to a person as such, but could damage his professional standing, for example.<sup>383</sup> It could therefore be defamatory as it has a component of a subjective test.<sup>384</sup> A statement which reflects on a person's moral character, professional competence or A statement making adverse comments about a person's physical appearance will usually be deemed to be defamatory.<sup>385</sup>

The words used by the defendants may be harmless in themselves, but that is irrelevant, as the general picture they portray of the claimant may damage his reputation, which is the core issue in defamation.<sup>386</sup> The key element is what those words would mean to the reasonable person (an objective test).<sup>387</sup> This will be determined by the judge and (previously) jury.<sup>388</sup>

The claimant may also partly select a libellous statement, which is taken from a text, but the text as a whole may prove that there is no form of defamation.<sup>389</sup> This can have troublesome consequences, although it adheres to the prevailing tendency not to inhibit free expression.<sup>390</sup> Tabloids have the opportunity to exploit this through sensational

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383 If Tim says Jack is unqualified, there is no defamation if Jack is a pool cleaner. However, if Tim makes the same allegation and Jack is the head of an engineering firm, it would constitute a defamatory statement. All the circumstances should therefore be kept in mind.

384 A subjective test considers what the defendant was thinking at the time of the event. It includes surrounding events that would influence how the defendant reacted. This test does not consider what the reasonable person thinks, the focus is placed on the defendants mindset. See O'Riordan *Law for OCR* 19.

385 Harpwood *Modern Tort Law* 376.

386 Deakin, Johnston and Markesinis *Tort Law* 639.

387 An objective test considers what a reasonable person was or should have been thinking at the time of the event. The test does not consider subjective feelings or the mind-set of the specific defendant. In this case it would be a person that can and does read between the lines in the light of his or her general knowledge and experience of worldly affairs, which includes a certain amount of free thinking. See Harpwood *Modern Tort Law* 376; O'Riordan *Law for OCR* 19.

388 Harpwood *Modern Tort Law* 376.

389 "Thus, in *Charleston v. News Group Newspapers Ltd.* the two plaintiffs, who played a "respectable" married couple in a well-known Australian soap opera, sued the News of the World for a photomontage which consisted of their faces superimposed on naked bodies performing sex. Though the photograph was accompanied by an eye-catching title, the supporting text made it clear that the picture had been reproduced from a computer game in which the image of the plaintiffs had been used without their knowledge and consent. The plaintiffs complained that the picture and headline title were defamatory in so far that they implied that they had posed for the pictures. The action failed on the ground that the title and the picture could not be seen in isolation and that the final decision whether the tort of defamation had been committed depended on the words being seen in the total context". See Deakin, Johnston and Markesinis *Tort Law* 640.

390 Deakin, Johnston and Markesinis *Tort Law* 640.

reporting which then can be “neutralised” or “corrected” by an accompanying text, invariably in smaller print.<sup>391</sup>

Insinuation or innuendo further complicates matters.<sup>392</sup> This is where the claimant argues that the statement made bears an inner meaning which makes it defamatory.<sup>393</sup> In other words, the statement is not defamatory on the surface, but bears an underlying meaning which is of a defamatory nature.<sup>394</sup> The concealed meaning must be one that could be understood from the words themselves by individuals who knew the claimant, and this special mysterious hidden meaning must be pleaded by bringing supplementary information before the court to explain the meaning.<sup>395</sup> This will depend on factors known to the recipient of the statement at the time of publication.<sup>396</sup> If, however, the words of which the claimant complains are capable of any meaning or suggestion outside the dictionary meaning, the particulars of such a meaning should be explained in the statement of the case to give the defendant the chance to identify what has to be answered.<sup>397</sup> The claimant must plead and prove the innuendo. If s/he fails to do so, his pleadings will be struck.<sup>398</sup>

Another important aspect is the presence or absence of malice.<sup>399</sup> It is important to consider if the statement was published maliciously, seeing that it would allow the claimant to recover a higher award of damages.<sup>400</sup> It is also necessary in the law itself.<sup>401</sup> The term malice in the sense of defamation means that the publication was made spitefully or with ill will, or recklessness as to whether it was true or false.<sup>402</sup> The so called “bad feeling” must have led to the words being published and must specifically been directed towards the claimant.<sup>403</sup> The presence of malice will also automatically

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391 Deakin, Johnston and Markesinis *Tort Law* 640.

392 Deakin, Johnston and Markesinis *Tort Law* 639.

393 See Harpwood *Modern Tort Law* 378.

394 Deakin, Johnston and Markesinis *Tort Law* 639.

395 Harpwood *Modern Tort Law* 378.

396 Deakin, Johnston and Markesinis *Tort Law* 639.

397 Harpwood *Modern Tort Law* 378.

398 Deakin, Johnston and Markesinis *Tort Law* 639.

399 Harpwood *Modern Tort Law* 380.

400 Harpwood *Modern Tort Law* 380.

401 Harpwood *Modern Tort Law* 380.

402 Harpwood *Modern Tort Law* 380.

403 Harpwood *Modern Tort Law* 380.

obliterate certain defences of justification relating to “spent” convictions, unintentional defamation, fair comment on a matter of public interest, and qualified privilege.<sup>404</sup>

### 3.2.3.2 The defamatory statement must refer to the claimant

A publication would be seen as concerning the plaintiff if the person is named or identified in some other way, either generally or to persons with whom the individual is familiar.<sup>405</sup> The words therefore have to be defamatory of the claimant and not of another person, real or imaginary.<sup>406</sup> It may be taken into account if a statement does not refer to the claimant but a subsequent statement sheds light on the first, thereby making the identification clearer.<sup>407</sup> This is one of the easier requirements to prove under normal circumstances, and the claimant has to prove this element.<sup>408</sup>

If the claimant is not identified by name, then the person would have to prove that that the words complained of are understood by some readers to be referring to the person.<sup>409</sup> The identification of the claimant would depend upon whether or not reasonable people would believe that the statement complained of actually referred to the person.<sup>410</sup>

### 3.2.3.3 Publication of the defamatory statement

This is the most important requirement for the purposes of this dissertation, seeing that it forms the core of a defamatory statement on a social media platform. If a defamatory statement on a social media platform does not qualify under this requirement, no action would be able to commence. The definition of publication in England is similar to those of other nations, and can be seen as follows:

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404 Harpwood *Modern Tort Law* 380.

405 Collins *Collins on Defamation* 6.

406 Deakin, Johnston and Markesinis *Tort Law* 645.

407 Deakin, Johnston and Markesinis *Tort Law* 645.

408 Smartt *Media & Entertainment Law* 112.

409 Smartt *Media & Entertainment Law* 112.

410 Deakin, Johnston and Markesinis *Tort Law* 645.

A communication to at least one person other than the claimant in any form capable of signifying meaning, including the written and spoken word, symbols, pictures, visual images and gestures.<sup>411</sup>

The Internet has dramatically increased the potential for multi-jurisdictional defamation.<sup>412</sup> As stated above, defamatory matter published on the Internet may have a worldwide audience of indeterminate size, and a shocking impact on the reputation of its target.<sup>413</sup>

As with other jurisdictions, the burden of proving publication rests on the claimant.<sup>414</sup> This burden is eased in many instances, however, by certain rebuttable assumptions of fact.<sup>415</sup> With defamatory innuendoes the claimant will have to prove that the statement complained about was published to a specific person or persons possessing the special facts that enable them to understand the innuendo.<sup>416</sup> There is no presumption, however, that placing material on the Internet automatically amounts to substantial publication.<sup>417</sup> The claimant would have to prove that the material had received widespread publication as a result.<sup>418</sup> In the case of a defamatory statement on a social media platform, the claimant would have to prove these requirements.

Internet service providers can be held liable for the “publication” of defamatory material, if the material in question is stored on their servers and is accessible to their customers.<sup>419</sup>

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411 Examples of publication include: words written on a postcard or open message, defamatory statements placed in an envelope and addressed to the wrong person, speaking in a loud voice about the claimant so that people nearby can overhear, sending a letter to the claimant in circumstances when it is likely to be opened by a third party, allowing unauthorised defamatory statements to remain on one’s premises, making a statement which carries the natural consequence of being repeated by someone else, making the statement to the claimant’s spouse, and publication on the Internet. See Harpwood *Modern Tort Law* 375; Collins *Collins on Defamation* 6.

412 Collins *The Law of Defamation and the Internet* 4.

413 Collins *The Law of Defamation and the Internet* 4.

414 Deakin, Johnston and Markesinis *Tort Law* 652.

415 For example an open postcard or telemesssage is deemed to have been published to the people who would normally see it in the course of transmission. Spoken words, on the other hand, are presumed to be published to all persons within earshot. If it can be proved that a letter has been properly addressed, the publication to the addressee is presumed. See Deakin, Johnston and Markesinis *Tort Law* 652.

416 Deakin, Johnston and Markesinis *Tort Law* 652.

417 Deakin, Johnston and Markesinis *Tort Law* 652.

418 Deakin, Johnston and Markesinis *Tort Law* 652.

419 Deakin, Johnston and Markesinis *Tort Law* 652.

The aspect of publication has been drastically reformed by section 5 of the *Defamation Act 2013*, which will be inspected later.<sup>420</sup>

One of the very out-dated principles of the English defamation law was the so-called multiple publication rule. The multiple publication rule in essence was that each republication of a defamatory statement or broadcast would give rise to a separate cause of action, which was therefore subject to its own limitation period.<sup>421</sup> In social media the implications are obvious. For example, every time a person re-Tweets a defamatory statement, that would give rise to a separate cause of action. A prime example thereof is *The Lord McAlpine of West Green Claimant v Sally Bercow 2013* case, which will be examined later.<sup>422</sup> Each separate publication was subject to the one-year limitation period which ran from the time at which the material was accessed.<sup>423</sup> A defendant was further liable if s/he was a secondary publisher and could not use any of the defences contained in s 1 of the *Defamation Act 1996*.<sup>424</sup>

### 3.2.4 *The aspect of damages*

Before the *Defamation Act 2013*, damages were awarded by juries. This approach was riddled with problems. The first and most frequent was the fact that many juries granted very large awards for damages.<sup>425</sup> This aspect, combined with the high costs of litigation, caused many individuals and entities, especially in the newspaper industry, to complain about the current state of the law.<sup>426</sup> The reason for the substantial rewards is not entirely certain.<sup>427</sup> It is possible to suspect that the juries were not given any real guidance as to what amount should be awarded.

The second reason for the growing concern regarding defamation awards was that these awards were far overtaking awards for serious physical injuries.<sup>428</sup> Again this

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420 Smartt *Media & Entertainment Law* 112.

421 Smartt *Media & Entertainment Law* 117.

422 *The Lord McAlpine of West Green Claimant v Sally Bercow 2013* EWHC 1342 (QB).

423 Smartt *Media & Entertainment Law* 118.

424 Smartt *Media & Entertainment Law* 118.

425 Deakin, Johnston and Markesinis *Tort Law* 690.

426 Deakin, Johnston and Markesinis *Tort Law* 690.

427 Deakin, Johnston and Markesinis *Tort Law* 690.

428 Deakin, Johnston and Markesinis *Tort Law* 690.

could be linked to the fact that there was no guidance as to the amount of money that should be awarded for a defamatory statement.<sup>429</sup>

### 3.2.5 *Defamation Act 2013*

#### 3.2.5.1 Background

*Blackstone's Guide to the Defamation Act* gives a compact and accurate submission as to the reason why the *Defamation Act 2013* came into existence. It states as follows:<sup>430</sup>

The impetus for the present parliamentary process, which led to the Defamation Act 2013, can probably be traced to the enactment by various US legislatures of statutes preventing enforcement of foreign, particular English, libel judgement within their jurisdictions. This started with the State of New York, which in 2008 passed the Libel Terrorism Prevention Act, and culminated with the enactment by the US congress of the Securing the Protection of our Enduring and Established Constitutional Heritage Act 2010, known for the short as the SPEECH Act. What motivated these statutes, or indeed their remarkable names, is beyond the scope of *Blackstone's Guide to a new Act*, but was explained by Hoffmann in his Dame Ann Ebsworth Memorial Lecture delivered on 2 February 2010. The principal concern of American legislatures was so-called libel tourism, which involves – so it is said - foreign, particularly American, defendants being sued in England by foreign claimants, based on modest distribution of defamation publications in this jurisdiction, in print form or on the Internet. The American reaction to libel tourism struck a chord with some media in the UK and fuelled a campaign to reform English libel laws and, in particular, to introduce a rule modelled on the US Supreme Court case of *New York Times v Sullivan*, which in the case of a public figure – a concept upon which there is much jurisprudence – requires the claimant should prove, to a strict standard, malice on the part of the defendant as a condition of establishing a cause of action for defamation.

After the general elections of 6 May 2010 in England, the Conservative Party and the Liberal Democrats entered into a Coalition Agreement.<sup>431</sup> One of the priorities regarding this agreement was the review of the current libel laws “to protect freedom of speech”.<sup>432</sup> Prior to the Coalition Agreement, a series of reviews was already launched regarding aspects of defamation law in 2009 and early 2010.<sup>433</sup>

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429 Deakin, Johnston and Markesinis *Tort Law* 690.

430 It must also be noted that damage can be mitigated. Firstly damage would be mitigated if the defendant apologised. Secondly, if the claimant has a bad reputation, it will also be considered as a mitigating factor, for example if s/he has prior convictions relating to the defamatory statement. See Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

431 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

432 Collins *Collins on Defamation* 10.

433 Collins *Collins on Defamation* 10.

Lester,<sup>434</sup> a Liberal Democrat peer, presented the *Defamation Bill* 2010 as a private member's Bill to the House of Lords on 26 May 2010.<sup>435</sup> This Bill was read a second time on 9 July 2010, but was not pursued due to the fact that the Minister of Justice released a draft of the *Defamation Bill* in March 2011, which was very similar to Lester's Bill.<sup>436</sup>

An extensive consultation on its draft *Defamation Bill* was undertaken by the Ministry of Justice between March and June 2011.<sup>437</sup> A summary of responses was released in November 2011.<sup>438</sup> A report on the Bill was released in October 2011 after a joint committee of the House of Commons and the House of Lords conducted public hearings and private consultations in relation to the draft Bill.<sup>439</sup> The report advised the Government to take a strategic view as to how the law of defamation interacts with privacy as well as the costs of civil litigation generally.<sup>440</sup> Another area of concern was the striking of a balance between the protection of reputation and freedom of speech, and the difficulties of enforcing the law in the global online sphere.<sup>441</sup> The four core principles that influenced the report are as follows:<sup>442</sup>

1. The need for striking a balance between freedom of expression and the protection of reputation.
2. Reducing costs.
3. Accessibility.
4. Adapting to the new online environment with its challenges of jurisdiction, anonymity, and wide dissemination of content.

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434 As with the style conventions and for the sake of consistency, titles (even for Lords) are removed from the main text.

435 Collins *Collins on Defamation* 10.

436 Collins *Collins on Defamation* 10.

437 Collins *Collins on Defamation* 10.

438 Collins *Collins on Defamation* 10.

439 Collins *Collins on Defamation* 10.

440 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

441 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

442 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

The fourth principle would find application on social media platforms. Following the release of the report, the government published a response in February 2012.<sup>443</sup> The Ministry of Justice and Joint Committee's consultations and deliberations informed the Bill, which became the 2013 Act.<sup>444</sup> On 10 May 2012 it was read for the first time in the House of Commons.<sup>445</sup> The Bill received the Royal Assent on 25 April 2013, after a prolonged period of debate, including amendments.<sup>446</sup> The stated aims of the Bill at introduction were:<sup>447</sup>

1. Rebalancing the law, so that whilst people who have been defamed are able to protect their reputations, free speech is not unjustifiably impeded by libel actions, whether actual or threatened.
2. Ensuring scientific and academic debate is not impeded by threat of libel action, and encouraging responsible journalism.
3. Reducing the potential for libel tourism so that the law of England and Wales is internationally respected.

### 3.2.5.2 Amendments regarding the cause of action

Section 1 of the *Defamation Act 2013* states that:

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
- (2) For the purposes of this Section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

One of the biggest criticisms of the previous Act was that somewhat trivial claims were allowed to progress to trial.<sup>448</sup> It was suggested that the threshold test for the cause of action be changed to "serious and substantial harm".<sup>449</sup> This would result in a dual test,

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443 Collins *Collins on Defamation* 10.

444 Collins *Collins on Defamation* 10.

445 Collins *Collins on Defamation* 10.

446 Collins *Collins on Defamation* 10.

447 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

448 Mullis and Scott *The Modern Law Review* 104.

449 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

testing for serious as well as substantial harm. This was accepted only in part.<sup>450</sup> The Government agreed that the test should be strengthened and therefore proposed “serious harm” as the threshold.<sup>451</sup> The dual test was rejected because of the fact that it might cause confusion and increase costs through parties arguing over whether a claimant had overcome one, both or none of the “serious” and “substantial” harm thresholds.<sup>452</sup> It is anticipated that most claimants will not be affected by the “serious harm” threshold because most defamatory statements are likely to cause serious damage to a person’s reputation.<sup>453</sup> The most prominent effect of section 1 will be to place a more onerous burden on the claimant at the preliminary stage.<sup>454</sup>

A statement will not be deemed defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.<sup>455</sup> Careful investigation of the facts of the case will be necessary to establish that this has taken place.<sup>456</sup> The court would have to investigate the inherent gravity of the allegation, the nature and status of the defendant as well as of the claimant, the claimant’s financial position, and lastly if similar allegations have been published before.<sup>457</sup>

Serious financial loss is the requirement for a finding in favour of a body that trades for profit. The putatively libellous statement therefore has to cause the body serious financial loss, or it will not be seen as a defamatory statement.<sup>458</sup> These changes raise the threshold for the actionability of defamatory statements. Section 14 of the *Defamation Act 2013* also effects changes to the categories of slander that are actionable without proof of special damage.<sup>459</sup> A defamatory statement on a social media platform would therefore have to cause serious harm to be actionable.

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450 Price and McMahon (eds) *Blackstone’s Guide to the Defamation Act* (Oxford University Press Oxford 2013).

451 Price and McMahon (eds) *Blackstone’s Guide to the Defamation Act* (Oxford University Press Oxford 2013).

452 Price and McMahon (eds) *Blackstone’s Guide to the Defamation Act* (Oxford University Press Oxford 2013).

453 Smartt *Media & Entertainment Law* 136.

454 Mullis and Scott *The Modern Law Review* 106.

455 Collins *Collins on Defamation* 11.

456 Mullis and Scott *The Modern Law Review* 106.

457 Mullis and Scott *The Modern Law Review* 106.

458 Collins *Collins on Defamation* 11.

459 “For causes of action accruing after 1 January 2014, the only slanders that are actionable *per se* are words imputing that a claimant has committed certain criminal offences, and words imputing against the claimant in the way of his or her office, profession, or trade, or calculated to disparage the claimant in any office, profession, calling, trade, or business”. See Collins *Collins on Defamation* 11.

### 3.2.5.3 Amendments regarding defences

There are various changes that have been brought about by the *Defamation Act 2013*. Some defences have been abolished,<sup>460</sup> others amended,<sup>461</sup> and some new defences have been added.<sup>462</sup> The three main common law defences have been eliminated and replaced with a relabelled statutory variant.<sup>463</sup>

Most of these changes are in favour of defendants and the freedom of expression.<sup>464</sup> This is important with regards to defamatory statements on social media platforms, but it is not the main focus of this dissertation and will therefore only be briefly discussed.

#### 3.2.5.3.1 Truth

Section 2 reads as follows:

- (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
- (2) SubSection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
- (3) If one or more of the imputations is not shown to be substantially true, the defence under this Section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
- (4) The common law defence of justification is abolished and, accordingly, Section 5 of the Defamation Act 1952 (justification) is repealed.

This would be a common law defence in the instance where the publisher establishes on the balance of probabilities that the imputation conveyed by a defamatory statement was a matter of substantial truth.<sup>465</sup> Common law was combined with a statutory defence of contextual justification that would potentially apply when a defamatory statement contained two or more different imputations, not all of which were substantially true.<sup>466</sup>

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460 Such as the defence of truth. The 2013 Act abolishes the supplementary statutory defence of contextual justifications and replaces them with statutory formulations that are similar to the previous in substance. See Collins *Collins on Defamation* 11.

461 For example Privilege. See Collins *Collins on Defamation* 12.

462 For example, operators of websites. See Collins *Collins on Defamation* 11.

463 Mullis and Scott *The Modern Law Review* 87.

464 Collins *Collins on Defamation* 11.

465 Smartt *Media & Entertainment Law* 121.

466 Mullis and Scott *The Modern Law Review* 106.

The *Defamation Act 2013* has replaced these defences with a statutory formulation replicates, for the most part, the previous position.<sup>467</sup>

### 3.2.5.3.2 Honest opinion

Section 3 states that:

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—
  - (a) any fact which existed at the time the statement complained of was published,
  - (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

The common law defence of fair comment protected the publication, if it was without malice, of an objectively fair opinion.<sup>468</sup> The opinion of the matter must, however, have been of public interest, and have been based on facts that were true or protected by privilege expressly or tacitly implied.<sup>469</sup> This defence has been scrapped and replaced with a statutory defence of honest opinion.<sup>470</sup> It is in a significant respect more liberal than the common law defence of fair comment. The new defence can be applied to expressions of opinion on any subject matter, including purely private matters.<sup>471</sup> This is of particular importance to defamatory statements made on social media platforms, as most of them would be regarding private matters between individuals.

In instances where an opinion is based on fact, the defendant no longer has to prove that every underlying fact is true.<sup>472</sup> This defence is therefore applicable to opinions that are based on matters stated as facts on a broad range of occasions that are privileged

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467 Collins *Collins on Defamation* 11.

468 Collins *Collins on Defamation* 12.

469 Collins *Collins on Defamation* 12.

470 Collins *Collins on Defamation* 12.

471 Collins *Collins on Defamation* 12.

472 Collins *Collins on Defamation* 12.

by virtue of a statute.<sup>473</sup> The new defence is not applicable, however, on occasions that are privileged at common law.<sup>474</sup>

For a defendant to benefit from this new statutory defence, a publication must satisfy three requirements.<sup>475</sup> Firstly the statement being complained about must have been a statement of opinion.<sup>476</sup> The common law principle of the perspective of the reasonable reader is used to test if this is seen as an opinion.<sup>477</sup> Secondly it is required that the statement complained of indicated, generally or specially, the basis of the opinion.<sup>478</sup> Thirdly it is a requirement that such an opinion could have been held by an honest person on the basis of any fact which existed at the time of the statement complained of or anything asserted to be a fact in a privileged statement published.<sup>479</sup>

### 3.2.5.3.3 Privilege

The *Defamation Act* 2013 does not affect the common law defence of absolute privilege, and also some forms of common law qualified privilege, for the publication of false, defamatory material on certain occasions if it is of importance to the common convenience and welfare of society.<sup>480</sup> This is captured in section 7 of the Act. It does, however, abolish the Reynolds defence.<sup>481</sup> It further introduces a defence for the publication of peer-reviewed statements, including assessments of the merit of such statements, in scientific or academic journals.<sup>482</sup>

Section 6 governs privilege regarding scientific or academic journals and states that:

(1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.

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473 Collins *Collins on Defamation* 12.

474 Collins *Collins on Defamation* 12.

475 Mullis and Scott *The Modern Law Review* 92.

476 Mullis and Scott *The Modern Law Review* 92.

477 Mullis and Scott *The Modern Law Review* 92.

478 Mullis and Scott *The Modern Law Review* 92.

479 Mullis and Scott *The Modern Law Review* 92.

480 Collins *Collins on Defamation* 12.

481 “The Reynolds defence was developed to allow journalists to fulfil their duty to report stories in the public interest, even if they included defamatory material, if the publication was the product of responsible journalism. Attempts to use the defence have led to the courts closely examining whether a story was truly in the public interest, and how it was researched and written”. See Hanna and Dodd *McNae’s Essential Law for Journalists* 278.

482 Smartt *Media & Entertainment Law* 134.

- (2) The first condition is that the statement relates to a scientific or academic matter.
- (3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—
  - (a) the editor of the journal, and
  - (b) one or more persons with expertise in the scientific or academic matter concerned.

Peer-reviewed statements include fair and accurate copies of, extracts from, or summaries of such statements as well as assessments.<sup>483</sup>

Improving the protection afforded to scientific speech has been one of the primary goals of the libel reforms.<sup>484</sup> The *Defamation Act 2013* has a more liberal approach to a number of issues regarding statutory defences of absolute and qualified privilege.<sup>485</sup> The most prominent is that it extends absolute privilege to contemporaneously published fair and accurate reports of proceedings in public before courts established by law anywhere in the world.<sup>486</sup>

#### 3.2.5.3.4 Website operators

Section 5 regulates how website operators should handle defamatory content and states the following:

- (1) This Section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
  - (a) it was not possible for the claimant to identify the person who posted the statement,
  - (b) the claimant gave the operator a notice of complaint in relation to the statement, and
  - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

The issue regarding online publications is a growing area of concern.<sup>487</sup> A new defence is introduced by the *Defamation Act 2013* for operators of websites who assist the

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483 Collins *Collins on Defamation* 12.

484 Mullis and Scott *The Modern Law Review* 98.

485 Collins *Collins on Defamation* 12.

486 This includes international courts and tribunals established by the Security Council of the United Nations or an international agreement. See Collins *Collins on Defamation* 12.

487 This is of particular importance where publication is not done by the traditional actors in the field. An example of this would be an anonymous blogger or social media user whose location is unknown.

publication of defamatory statements which they themselves did not create.<sup>488</sup> This defence can be used even where the operators have put on notices that their services are being used for the communication of such statements.<sup>489</sup> Operators can forfeit this defence when they fail to respond to a notice of complaint in accordance with the cumbersome procedures set out in the *Defamation (Operators of Websites) Regulations 2013*.<sup>490</sup> This defence can also be lost if it is shown that the operators have acted with malice in relation to the posting of the concerned statement.<sup>491</sup> A framework is also introduced for a take-down procedure, where a claimant does not know the identity of a person that posted the defamatory statement online anonymously.<sup>492</sup> This piece of the legislation is vital in regard to how defamatory statements on social media platforms will be regulated.

The term “website operator” is not defined within the Act, due to the fast-changing nature of Internet platforms.<sup>493</sup> The number of different platforms in existence makes it impossible to have a single accepted definition of “website operator”. The meaning will have to be litigated in the courts.<sup>494</sup> Retail websites such as Amazon and other business sites would fall into the category, as visitors are able to post comments on their sites.<sup>495</sup> Social media platforms are troublesome, however. The problem lies in the fact that it is not necessarily clear who the operator is, by definition: the owner of the business (the social media platform), the person who created the account, or both? Section 5(2) states that the operator has a defence where it shows that it did not post the statement.<sup>496</sup> Where the website operator acts as a moderator, with the ability to edit posts, section 5(12) states that the defence is not defeated by reason only of that fact.<sup>497</sup>

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See Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

488 Smartt *Media & Entertainment Law* 134.

489 Collins *Collins on Defamation* 13.

490 *Defamation Act (Operators of Website) Regulations 2013*. See Mullis and Scott *The Modern Law Review* 100.

491 Collins *Collins on Defamation* 13.

492 A notice of complaint according to the *Defamation (Operators of Website) Regulations 2013* must include (a) the complainant's name, (b) set out the statement concerned as well as explaining why it is defamatory of the complainant, (c) specify where on the website the statement was posted and (d) any other information specified in regulations. See *Defamation (Operators of Website) Regulations 2013*.

493 Mullis and Scott *The Modern Law Review* 100.

494 Mullis and Scott *The Modern Law Review* 100.

495 Mullis and Scott *The Modern Law Review* 100.

496 Mullis and Scott *The Modern Law Review* 100.

497 Mullis and Scott *The Modern Law Review* 100.

Section 5, read in conjunction with section 10, significantly extends the current protection available to website operators in respect of posts by identifiable posters.<sup>498</sup> Where the posters of these defamatory statements are not identifiable, the Act encourages website operators to voluntarily disclose their identity and contact details.<sup>499</sup>

#### 3.2.5.3.5 Publication on a matter of public interest

In regard to matters which include public interest, section 4 states that:

- (1) It is a defence to an action for defamation for the defendant to show that—
  - (a) the statement complained of was, or formed part of, a statement on a matter of public interest, and
  - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

The requirement to demonstrate that the defamatory publication referred to was “responsible” has been abandoned.<sup>500</sup> The publisher must now prove that s/he “reasonably believed” that the publishing of the statement complained of was in the public interest.<sup>501</sup> It must also be demonstrated that this statement was or formed part of a statement on a matter of public interest.<sup>502</sup>

#### 3.2.5.3.6 Other important changes

There have been a number of other important changes that will have a significant impact on the use of social media in England. These will briefly be described below.

##### 3.2.5.3.6.1 Jurisdiction against secondary publishers

Courts in England and Wales will no longer have jurisdiction to determine defamation actions brought against most secondary publishers of defamatory statements.<sup>503</sup> Actions will be allowable only if it is not reasonably practical for the claimant to bring a

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498 Mullis and Scott *The Modern Law Review* 100.

499 Mullis and Scott *The Modern Law Review* 100.

500 Mullis and Scott *The Modern Law Review* 90.

501 Mullis and Scott *The Modern Law Review* 90.

502 Mullis and Scott *The Modern Law Review* 90.

503 Collins *Collins on Defamation* 13.

defamation action against the editor, author or commercial publisher of the statement.<sup>504</sup> In general this amendment will prevent a claimant from pursuing defamation actions against numerous establishments, including social media platforms.<sup>505</sup> Section 10 states that:

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

(2) In this Section “author”, “editor” and “publisher” have the same meaning as in Section 1 of the Defamation Act 1996.

Section 10 therefore limits the circumstances in which an action for defamation can be brought against an individual who is not the primary publisher of an allegedly defamatory statement.<sup>506</sup> The courts do not have the jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained, unless it is not reasonably practicable for such an action to take place.<sup>507</sup>

Section 10 indirectly makes it more difficult to proceed against online intermediaries regarding anonymous or pseudonymous posts.<sup>508</sup> Further, what circumstance a court would consider in determining whether it was reasonably practicable to bring a claim against the primary publisher is not clear.<sup>509</sup> There is no reason for a claimant to pursue a claim that, even when successful, would not be of any practical value to him/herself.<sup>510</sup> It is therefore doubtful that a court should have jurisdiction to hear a claim against the secondary publisher in such a scenario.<sup>511</sup>

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504 Collins *Collins on Defamation* 13.

505 These include libraries, commercial printers, wholesale and retail distributors of audio-visual matter, cinemas, the operators of online services that make others’ film and sound recordings available, many Internet content hosts, broadcasters of live programmes in respect of statements made by persons over whom the broadcaster has no effective control, mere conduit Internet service providers, telecommunications carriers, as well as postal and courier services. See Collins *Collins on Defamation* 13.

506 Smartt *Media & Entertainment Law* 136.

507 Mullis and Scott *The Modern Law Review* 100.

508 Mullis and Scott *The Modern Law Review* 101.

509 If the primary author and publisher were in the United States, so that any judgment obtained against them in this jurisdiction would be unenforceable due to the SPEECH Act, does this mean that it was not reasonably practicable to bring a claim against them? See Mullis and Scott *The Modern Law Review* 101.

510 Mullis and Scott *The Modern Law Review* 101.

511 Mullis and Scott *The Modern Law Review* 101.

### 3.2.5.3.6.2 Single publication rule

One of the most important amendments made is the partial replacement of the common law principle that each publication of the same defamatory statement gives rise to a separate cause of action.<sup>512</sup> This obviously has a major impact on social media usage. The previous, multiple publication rule could create injustice and social detriment by creating hypothetically everlasting liability.<sup>513</sup> This is especially problematic in the context of online publications, and therefore includes defamatory postings on social media platforms.<sup>514</sup> The major concern was that in an extreme scenario, online publishers may cavil at the continuous risk of suit, and so default altogether on maintaining Internet archives of past publications.<sup>515</sup> Section 8 of the *Defamation Act 2013* states that:

- (1) This Section applies if a person—
  - (a) publishes a statement to the public (“the first publication”), and
  - (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

It therefore makes provision that if a person has published a statement to the public or a section of the public, and the same person subsequently publishes the same statement or a statement that is substantially the same as the original statement, the time for prescription runs from the date of the initial publication.<sup>516</sup> This will be the case only if the manner of the following publication is not materially different from the manner of the first publication.<sup>517</sup> In assessing this issue the court would have to include the level of prominence that a statement is given as well as the extent of the subsequent publication.<sup>518</sup> Online publishers will benefit mainly from the single publication rule, which therefore includes any type of publication made on a social media platform.<sup>519</sup> It will drastically reduce the possibility for a claimant to sue in respect of defamatory statements first published at an earlier period that are stored in and remain accessible

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512 Smartt *Media & Entertainment Law* 118.

513 Mullis and Scott *The Modern Law Review* 101.

514 Mullis and Scott *The Modern Law Review* 101.

515 The legal risk was more likely to affect the integrity of archives that were maintained by prompting publishers to withdraw articles against which a complaint was made. See Mullis and Scott *The Modern Law Review* 101.

516 Smartt *Media & Entertainment Law* 118.

517 Collins *Collins on Defamation* 13.

518 Mullis and Scott *The Modern Law Review* 101.

519 Collins *Collins on Defamation* 14.

from online archives.<sup>520</sup> The measure underpins the freedom of speech by providing far greater protection to publishers.<sup>521</sup>

The new single publication rule is in no way flawless. It could be argued that the Act has been drafted too narrowly.<sup>522</sup> It protects the individual who originally published the material once prescription has been reached, but does not protect any other individual who republishes the same material in a similar manner.<sup>523</sup> For example, an online archive that publishes material written by another individual could successfully be sued, even though the original author could no longer be pursued for continuing to republish the original statement.<sup>524</sup>

### 3.2.5.3.6.3 Libel tourism

Section 9 states that:

- (1) This Section applies to an action for defamation against a person who is not domiciled—
  - (a) in the England,
  - (b) in another Member State, or
  - (c) in a state which is for the time being a contracting party to the Lugano Convention.

As already stated previously, England is infamous for its libel tourism claims. There have even been cases where both the claimant and the defendant have come from outside the European Union.<sup>525</sup> This gave London the title of the “libel capital of the world”.<sup>526</sup> It could be seen that foreign citizens brought defamation claims before the courts of England or Wales because they were perceived to be claimant friendly.<sup>527</sup> This

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520 For example, if John posted a defamatory statement about Peter 4 years ago as a Facebook status, the statement is still on John’s Facebook profile and can be seen by delving into the history of his account. Peter would now not be able to sue John if he republishes this statement, because the original cause of action has prescribed. Collins *Collins on Defamation* 14.

521 Smartt *Media & Entertainment Law* 118.

522 Smartt *Media & Entertainment Law* 120.

523 Smartt *Media & Entertainment Law* 120.

524 Smartt *Media & Entertainment Law* 120.

525 Smartt *Media & Entertainment Law* 128.

526 There are great concerns that Belfast in Northern Ireland could now become the capital for libel tourism, as the *Defamation Act* 2013 is not implemented there, and the previous legislation still applies. See O’Carroll <http://www.theguardian.com/media/2013/sep/16/irish-authors-warn-libel-threat-northern-ireland>.

527 Collins *Collins on Defamation* 14.

was one of the reasons why the USA introduced the *Securing the Protection of Our Enduring and Established Heritage Act* 2010.<sup>528</sup>

In any defamation action brought after the commencement of the Act, courts in neither England nor Wales will have any jurisdiction against defendants domiciled outside England, a member state of the European Union, Iceland, Switzerland and Norway.<sup>529</sup> The exception would be where England and Wales is the most appropriate place in which to bring the action.<sup>530</sup> Section 9 lastly limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statement.<sup>531</sup> This is important in relation to defamatory statements on social media platforms, as it would definitely be applicable to such statements, and would halter the abuse thereof.

The reform of the rule is in no way perfect, but it was necessary to prevent litigation from exercising an enormous effect on the maintaining of online archives.<sup>532</sup> The error in the thinking lies in the fact that it ignores the harms caused by ongoing publication.<sup>533</sup>

#### 3.2.5.3.6.4 Trial without a jury

Section 11 removes the presumption in favour of jury trial in defamation cases.<sup>534</sup> Defamation cases are now tried without a jury unless a court orders otherwise.<sup>535</sup>

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528 Smartt *Media & Entertainment Law* 135.

529 Smartt *Media & Entertainment Law* 135.

530 This would be the case where all the places in which the statement complained of, and any statement which conveys the same or substantially the same imputation as the statement that was complained of, has been published, England and Wales would be the most appropriate place to bring the action. See Collins *Collins on Defamation* 14.

531 Smartt *Media & Entertainment Law* 136.

532 Mullis and Scott *The Modern Law Review* 103.

533 The reputational harm is caused not by the publication of the statement but by the physical reading of the particular statement. It therefore does not matter when the publication occurs. Each time it is read it has the potential to harm the reputation of the person defamed. Therefore the problems caused by the perpetual availability of defamatory publications online are a matter of increasing concern. See Mullis and Scott *The Modern Law Review* 103.

534 Smartt *Media & Entertainment Law* 136.

535 Smartt *Media & Entertainment Law* 136.

### 3.2.5.3.6.5 The power of the court to order a summary of its judgement to be published

Section 12 makes provision for the court to order a summary of its judgement to be published, stating that:

(1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.

In the scenario of a defamatory publication on a social media platform, the judge would be able to publish a summary judgement on the claimant's page. This would be an attempt to "restore" the damage done to the claimant's reputation.

### 3.2.5.3.6.6 Removal of statements

Section 13 states the following:

(1) Where a court gives judgment for the claimant in an action for defamation the court may order—

(a) the operator of a website on which the defamatory statement is posted to remove the statement, or

(b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.

(2) In this Section "author", "editor" and "publisher" have the same meaning as in Section 1 of the Defamation Act 1996.

(3) Subsection (1) does not affect the power of the court apart from that subsection.

This section relates to circumstances where an author may not always be in a position to remove or avoid further distribution of material which has been found to be defamatory.<sup>536</sup> Where a court gives judgement in favour of the claimant in an action for defamation, it is now able to order the operator of the website on which the defamatory statement is posted to remove the statement.<sup>537</sup> It can also require a person who was not the author, editor or publisher of the statement but is distributing, selling or exhibiting the material to cease disseminating it.<sup>538</sup> This would be applicable to defamatory statements on social media platforms.<sup>539</sup>

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536 *Smartt Media & Entertainment Law* 136.

537 *Smartt Media & Entertainment Law* 136.

538 *Smartt Media & Entertainment Law* 136.

539 *Smartt Media & Entertainment Law* 136.

### 3.2.5.3.6.7 General provisions

Section 15 states the following:

In this Act—

“publish” and “publication”, in relation to a statement, have the meaning they have for the purposes of the law of defamation generally, “statement” means words, pictures, visual images, gestures or any other method of signifying meaning.

Section 15 sets out broad definitions for “statement” as well as “publication” for the purposes of the *Defamation Act* 2013.<sup>540</sup> The reason for the breadth of the definition is to ensure that the provisions of the Act cover an extensive variety of publications in any form, reflecting the current law.<sup>541</sup>

### 3.2.5.4 Conclusion

The main goal of the *Defamation Act* 2013 is to simplify and increase the approachability of the law of defamation.<sup>542</sup> Some authors argue that the reforms in the Act will change the landscape of free speech in England, while other authors have been more circumspect.<sup>543</sup> McNally, the Minister in charge of implementing the law, has emphasized that it should be understood that the Act forms only part of a wider range of measures concerned with improving the functioning of the public spheres.<sup>544</sup> It must also be noted that a lot will depend on the judicial reception of the Act.<sup>545</sup> In this respect it might be expected that there will be uncertainty and a burden for litigants in the short to medium term.<sup>546</sup> The Act does present an opportunity to rethink the nature of the interplay between the public sphere and the legal regime as well as the proper function of law in the resolution of public sphere disputes.<sup>547</sup>

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540 Smartt *Media & Entertainment Law* 138.

541 Smartt *Media & Entertainment Law* 136.

542 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

543 Mullis and Scott *The Modern Law Review* 87.

544 Mullis and Scott *The Modern Law Review* 87.

545 Mullis and Scott *The Modern Law Review* 108.

546 Mullis and Scott *The Modern Law Review* 108.

547 Mullis and Scott *The Modern Law Review* 108.

It has introduced fundamental changes which include sections 5, 8, 9 and 10, which are aimed at providing a framework for addressing defamation on the Internet. This includes defamatory statements on social media platforms.<sup>548</sup> A defamatory statement which is in the public's interest is of particular interest, seeing that the courts will now have to use the existing case law in interpreting the provisions of the Act.<sup>549</sup> The codification of defamation law in England is not a complete one, the reason being that other statutory provisions and areas of common law still remain. The codification of the defences does, however, increase accessibility, which will contribute to legal certainty.<sup>550</sup> With regard to the clarity of legislation the position is uncertain, as the eradication of common law defences raises serious and difficult questions as to which rules of law belong to the common law defence and which rightly form part of some other areas of the law which have not been abolished and remain binding in courts.<sup>551</sup>

### 3.2.6 Scenario

#### 3.2.6.1 Introduction

As with the scenario in the USA, to determine if a defamatory statement on a social media platform in England would be regarded as libel, each of the elements listed above must be satisfied. As previously pointed out, English law requires only three elements, which therefore requires a broader interpretation. For a libel claim to be lodged, all these elements must be satisfied.

The previous scenario will be used again: fictitious person X posts the following as his Facebook/Twitter status update:

“Fictitious person Y likes his girls a tad young...”

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548 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

549 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

550 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

551 Price and McMahon (eds) *Blackstone's Guide to the Defamation Act* (Oxford University Press Oxford 2013).

### 3.2.6.2 *The allegation must be defamatory*

This element is similar to that in the USA regarding “defamatory content”. The burden rests on fictitious person Y to prove that the statement made on the social media platform is indeed defamatory. The statement would therefore have to lower his reputation in the estimation of right-thinking individuals of society generally, or to cause others to reject and avoid the claimant, or to expose him to hatred, contempt or ridicule. This would indeed be the case, as the statement suggests or implies that fictitious person Y has sexual desires for younger or underage girls, which is *contra bonos mores*, and would therefore cause damage to his reputation.

It is further required that the statement should affect society in general, not only a limited group. This requirement will depend on the circumstances of the situation. If the statement was made on Twitter, anybody with a Twitter account would be able to view the content. It would therefore have a greater chance of affecting society in general, especially if the person has a large number of followers.

As usual, all the surrounding circumstances must be taken into account. This would include the profession and age of fictitious person Y, for instance. This would be of particular value in regards to the award of damages. For onstance, if fictitious person Y was a famous modern dancing coach and his clientele consisted mostly of young underage girls, it would cause him serious financial harm. This statement, with or without the surrounding circumstances, would definitely meet the *Defamation Act 2013* “serious harm” standard, as his reputation would receive serious harm. It is important to note what the words would mean to the reasonable person. These words clearly imply paedophilic behaviour in the fictitious person Y.

It is doubtful that insinuation or innuendo would have any effect on the statement in this scenario, as an reasonable person without any special prior knowledge would be able to understand that the statement related to paedophilia. If that were not obvious, fictitious person Y would have to plead and prove the innuendo.

To allow fictitious person Y to receive a higher award of damages he would have to prove that the statement was published with malice. The finding of malice would depend

on the surrounding circumstances. If fictitious person X is also a modern dancing teacher in the same area, malice would probably be present, as he would be spreading the gossip purposefully, to damage his rival's business, and with ill will. The requirement for a defamatory allegation is therefore met.

#### 3.2.6.3 *The defamatory statement must refer to the claimant*

This requirement is similar to the requirement of "identification" in the USA. Fictitious person Y would have to prove that the particular statement was indeed about him. If the person's name and surname was in the post, identification would be straightforward. If fictitious person Y was not identified by name, he would have to prove that the words complained of were understood by some readers to refer to him. This again is done by using the reasonable person test.

As stated previously the context of the use of social media complicates matters as social media platforms are able to reach very large audiences. Fictitious person Y would again have to prove that he is *the* particular fictitious person Y who is the subject of the statement.

Identification would be able to take place, depending on the surrounding circumstances. As previously said in connection with social media platforms, further circumstances like the possession of mutual friends or connections and the status of the parties must be considered.

In this specific scenario it is clear that the requirement is fulfilled.

#### 3.2.6.4 *Publication of the defamatory statement*

With regards to publication, the statement would have to adhere to the requirements set out in section 15 of the *Defamation Act* 2013. A defamatory statement on a social media platform could very well adhere to the requirements of section 15, as it could fall under both the definition of "statement" as well as that of "publish", depending on the surrounding circumstances. In the current scenario the statement adheres to both requirements, and for the purposes of the Act publication of a defamatory statement has

taken place, as it would be read by a third person. This would have to be proven by fictitious person Y, which would be easy to do in this scenario. Fictitious person Y would further have to prove that the defamatory statement had received widespread publication, as there is no presumption that placing material on the Internet automatically amounts to substantial publication.

The Act also provides that a defamatory statement requires at least three participants. As stated previously, in this social media scenario the three people would be the following: 1) the person communicating the defamatory statement (fictitious person X, the person making the statement/poster), 2) the person being defamed (fictitious person Y), and 3) a third person to hear, see, or read the defamatory statement (a friend/follower of fictitious person X).

From all of the above it is clear that a defamatory statement made on a social media platform can indeed fit all the requirements. As already said, republishing will not be examined.

#### 3.2.6.5 Concluding remarks

From the above scenario it is obvious that a defamatory statement on a social media platform would expose the person making the statement to a defamation case. The success or failure of the case will be dependent on the particular surrounding circumstances of the case.

The English law regarding defamation is still more lenient than that of the USA, as the requirements for instituting a libel action are much less onerous, and are more broadly formulated. This is still true despite the enactment of the *Defamation Act 2013*, which has brought about major reforms.

The reforms that will have the most impact on social media are those of section 5 (operators of websites), 8 (the single publication rule), 9 (action against a person not domiciled in the UK or a Member State) and 10 (action against a person who was not the author, editor etc). As previously stated, how the new Act will work will depend on the courts that have to implement it.

As in the case of the USA, an attempt to confirm the above analysis of the situation in the English jurisdiction of the impact of the law on defamatory statements made on social media platforms will be briefly analysed below.

### 3.2.7 Case analysis

#### *McAlpine v Bercow*

The most prominent and recent case relating to defamatory postings made on social media platforms in England would be that of *The Lord McAlpine of West Green v Sally Bercow*.<sup>552</sup> Although *Cairns v Modi* also had to do with a defamatory statement made on Twitter, the McAlpine case is more recent, and will therefore be discussed.<sup>553</sup>

On 2 November 2012 a report on BBC Two's Newsnight was aired, which falsely associated an unspecified "senior Conservative" politician with paedophilic acts with a young boy who had been living in care in the 1970's and 1980's.<sup>554</sup> This programme had attracted extensive attention as well as speculation as to who the unnamed person might be.<sup>555</sup>

McAlpine's name began to surface and his name was repeated on Twitter to the extent that it began to trend.<sup>556</sup> On 4 November 2012 Sally Bercow (a prominent figure in society) Tweeted the following to her 56 000 followers: "Why is Lord McAlpine trending? \*innocent face\*?".<sup>557</sup> Bercow apologised soon afterwards, but refused to admit that her

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552 *The Lord McAlpine of West Green v Sally Bercow* 2013 EWHC 1342 (QB). Take note that at the time of writing of this chapter no verdicts have been reached post the enactment of the *Defamation Act* 2013. A case preceding the enactment of the new legislation has therefore been selected for discussion.

553 *Cairns v Modi* 2012 EWCA Civ 1382.

554 BBC News UK 2013 <http://www.bbc.com/news/world-22652083>.

555 *Smartt Media & Entertainment Law* 13.

556 The BBC agreed to pay McAlpine the amount of £185 000 for damages, as well as legal costs. See Agata 2013 <http://www.farrer.co.uk/Global/Briefings/-06%20Private%20Client/McAlpine%20the%20Attorney%20General%20and%20the%20Defamation%20Act%20-%20social%20media%20accountability%20in%202013.pdf>.

557 The \*innocent face\* is an emoticon. An emoticon is described by the Oxford dictionary as follows: "A representation of a facial expression such as a smile or frown formed by various combinations of keyboard characters and used in electronic communications to convey the writer's feelings or intended tone". See <http://www.oxforddictionaries.com/definition/english/emoticon>.

Tweet was of a defamatory nature.<sup>558</sup> Proceedings were initiated by McAlpine, who applied for a preliminary ruling on meaning, claiming the Tweet signified that he was a paedophile who was guilty of sexually abusing boys living in care.<sup>559</sup> The \*innocent face\* was to be read as irony.<sup>560</sup> Bercow denied that the words were capable of any defamatory connotation, upholding that the Tweet consisted of a neutral question, with no hidden or secondary meaning.<sup>561</sup>

The court held that Bercow's Twitter followers most likely consisted of people who shared her specific interest in politics and current affairs.<sup>562</sup> This conclusion was used to determine the meaning of the statement.<sup>563</sup> Furthermore, the court held that by the date that she had made the Tweet (4 November), these followers would also be aware of the Newsnight programme that had aired just days before.<sup>564</sup> These followers would also probably have prior knowledge that McAlpine was a senior Conservative politician from the relevant time period.<sup>565</sup> The Judge also decided that as the claimant had been identified by name, Bercow's followers did not have to be aware of his former role as senior Conservative politician.<sup>566</sup> The court was of the opinion that it was common knowledge that today's peers are generally people who have held prominent positions in life, which often include positions in politics.<sup>567</sup>

The Judge held that the Tweet asked why McAlpine was trending in circumstances where firstly he was not otherwise under public scrutiny, and secondly there was speculation as to the identity of the unknown former senior politician.<sup>568</sup> From the background of these facts, any reasonable reader would understand the words

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558 BBC News UK 2013 <http://www.bbc.com/news/world-22652083>.

559 *Smartt Media & Entertainment Law* 13.

560 BBC News UK 2013 <http://www.bbc.com/news/world-22652083>.

561 *Smartt Media & Entertainment Law* 13.

562 Halliday 2013 <http://www.theguardian.com/politics/2013/may/24/sally-bercow-tweet-libelled-lord-mcalpine>.

563 Agata 2013 <http://www.farrer.co.uk/Global/Briefings/-06%20Private%20Client/McAlpine%20the%20Attorney%20General%20and%20the%20Defamation%20Act%20-%20social%20media%20accountability%20in%202013.pdf>.

564 Agata 2013 <http://www.farrer.co.uk/Global/Briefings/-06%20Private%20Client/McAlpine%20the%20Attorney%20General%20and%20the%20Defamation%20Act%20-%20social%20media%20accountability%20in%202013.pdf>.

565 *Smartt Media & Entertainment Law* 13.

566 *Smartt Media & Entertainment Law* 13.

567 Agata 2013 <http://www.farrer.co.uk/Global/Briefings/-06%20Private%20Client/McAlpine%20the%20Attorney%20General%20and%20the%20Defamation%20Act%20-%20social%20media%20accountability%20in%202013.pdf>.

568 *Smartt Media & Entertainment Law* 13.

\*innocent face\* to be devious and ironical. Bercow did not have to include the \*innocent face\* if she wanted the answer to a factual question. Any reasonable reader would therefore be able to conclude that McApline's name was trending, as he would fit the description of the unnamed user.<sup>569</sup>

The severity of the allegation that McAlpine fitted the description of the unnamed abuser was next to be investigated.<sup>570</sup> The Tweet supported the Newsnight programme, which alleged that the sexual abuse of minor boys had taken place. The court could not find scope for a lesser meaning. In other words the Tweet could only mean that McAlpine was a paedophile who sexually abused boys, and nothing else.<sup>571</sup> An alternative innuendo was also present to the small number of readers who were aware of the fact that McApline was a prominent Conservative from the years in question.<sup>572</sup>

The case was settled directly after the decision, the terms of the settlement being confidential.<sup>573</sup> This case proves that defamatory statements on social media platforms are actionable in England. In this specific case, the *Defamation Act* 2013 would not have made a significant difference to the determination of the verdict.

## **4 Defamation in South Africa**

### **4.1 Introduction**

This is the final and most important chapter of this dissertation, as it will focus on defamation on social media platforms in the context of South Africa. Investigations will be undertaken in more depth than in previous chapters, while still focussing on the problem at hand.

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569 BBC News UK 2013 <http://www.bbc.com/news/world-22652083>.

570 Agata 2013 <http://www.farrer.co.uk/Global/Briefings/-06%20Private%20Client/McAlpine%20the%20Attorney%20General%20and%20the%20Defamation%20Act%20-%20social%20media%20accountability%20in%202013.pdf>.

571 BBC News UK 2013 <http://www.bbc.com/news/world-22652083>.

572 Smartt *Media & Entertainment Law* 14.

573 Smartt *Media & Entertainment Law* 14.

A brief explanation will firstly be given regarding the background and development of the law of delict as a whole, followed by a definition.<sup>574</sup> Unlike the previous chapters, this chapter requires background knowledge of the *Constitution*. This is necessary because all legislation, including common law, must at all times adhere to it.

As with the other chapters, this introductory section will be followed by a discussion of the elements that are required for a defamation action. After this discussion the elements will be tested against the hypothetical scenario used previously, which will then be followed by case discussions.

## **4.2 Background**

### **4.2.1 South African case law**

It is important to inquire as to how and to what extent South African case law has built on the common law basis in regard to the identification and recognition of personality interests.<sup>575</sup> South African law regarding the common law delict *iniuria* has undergone almost no change except for the English law influences regarding *iniuriae*.<sup>576</sup> According to Neethling, Potgieter and Visser, courts in South Africa, almost without exception, start with Voet's<sup>577</sup> definition of *iniuria*, which in short is:

*A iniuria is the wrongful intentional infringement of or contempt of a person's corpus, fama or dignitas.*

*Corpus* (physical integrity) and *fama* (good name) are identified, recognised and protected by the present position.<sup>578</sup> The meaning of *dignitas* is still fairly uncertain.<sup>579</sup>

The first view limits *dignitas* to the personality interest of dignity or honour, and therefore requires an "element of degradation, insult or *contumelia*" for an *iniuria* to have been

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574 Due to space constraints the history of the law of delict in South Africa will not be discussed. For further information. See Neethling, Potgieter and Visser *Deliktereg*.

575 Neethling, Potgieter and Visser *Deliktereg* 14.

576 Neethling, Potgieter and Visser *Deliktereg* 14.

577 Neethling, Potgieter and Visser *Deliktereg* 14.

578 Neethling, Potgieter and Visser *Deliktereg* 14.

579 Neethling, Potgieter and Visser *Deliktereg* 14.

committed against the *dignitas*.<sup>580</sup> *Contumelia* is required for every *iniuria*, according to certain decisions.<sup>581</sup> However, there is no support for this view in common law foundations, as *contumelia* in the sense of an insult was at no point a general requirement for the delict *iniuria*.<sup>582</sup> Adding to this, the concept of *dignitas* was at no time limited to the personality interest of “dignity”.<sup>583</sup>

#### 4.2.2 Overview and definitions

The South African law of delict is a fusion of various legislative developments over hundreds of years.<sup>584</sup> The law of delict is a subcategory of South African Private Law. It has its origins in the days of the Twelve Tables in Roman Law and is today influenced by the Bill of Rights in our *Constitution*.<sup>585</sup> Throughout the history and development of the law of delict in South Africa, various other legal systems have influenced its principles, but not all of these influences have been compatible with its core principles.<sup>586</sup> The result thereof is that there are some contradictions to be recognised and certain rules that are not always clear and specific.<sup>587</sup> The law of delict offers a system for compensating those who have been harmed by the conduct of others.<sup>588</sup> A very important aspect of the law of delict is society’s legal convictions (the *boni mores*), which indicates that the principles that would be applied must express the views of society on what is considered acceptable behaviour, and what would not be seen as such.<sup>589</sup> It is accepted in this view that society is not stagnant, and continues to develop over time.<sup>590</sup> Expressions of public policy are therefore not necessarily expressions of contemporary, acceptable behaviour in South Africa.<sup>591</sup>

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580 Neethling, Potgieter and Visser *Deliktereg* 14.

581 Neethling, Potgieter and Visser *Deliktereg* 14.

582 Neethling, Potgieter and Visser *Deliktereg* 14.

583 Neethling, Potgieter and Visser *Deliktereg* 14.

584 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

585 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

586 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

587 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

588 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

589 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

590 A simple example of how the views of the society have changed in the past few decades would be the attitude towards having children before marriage. Thirty years ago this was seen as a great

The goal of private law as a whole (including the law of delict, which includes the law of defamation) is to organise interactions between individuals in the community.<sup>592</sup> The reason for wanting to do this is that unfortunately, due to human nature, people's individual interests sometime clash, as do the people themselves.<sup>593</sup> Private law's function is to recognise each individual's interests, set the limits regarding those interests, and reconcile clashing interests.<sup>594</sup> The role of the law of delict is specifically to indicate which interests are legally recognised, in which circumstances these legally recognised interests would be protected against infringement, and describe how the balance between these interests can be restored.<sup>595</sup>

The central principle in law is that each individual must bear the damage s/he suffers (*res perit domini*). In other words, damage or harm rests where it falls.<sup>596</sup> But there are exclusions to this rule. There are certain legally recognised instances where the burden of damage is shifted from one individual to another.<sup>597</sup> These legally recognised instances will result in the latter incurring an obligation to bear the former's damage or to provide compensation for it.<sup>598</sup> Thus it regulates the circumstances in which a third party would be held liable for damages that the claimant has suffered.<sup>599</sup>

The wrongdoer has an obligation towards the person who has suffered the damages, and this person has a corresponding right to claim compensation.<sup>600</sup> This result is a sort of obligation that is formed between these two parties.<sup>601</sup> As stated above, it can now be

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social scandal. Couples who were not married, where the woman was only pregnant and had not yet even given birth, would struggle to find a religious official to marry them. Today, having children before marriage is seen as the norm. People don't bat an eyelid if they hear about such a story. This is a simple example of how society's views change over time. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

591 The death penalty is a good example of this. Although most South Africans (therefore most members of "society" in this formulation) are of the opinion that the death penalty should be served in South Africa, the Bill of Rights contradicts this. Therefore the death penalty is not in affect because it is seen as unconstitutional, in spite of the fact that society is in favour thereof. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

592 Neethling, Potgieter and Visser *Deliktereg* 3.

593 Neethling, Potgieter and Visser *Deliktereg* 3.

594 Neethling, Potgieter and Visser *Deliktereg* 3.

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601 Neethling, Potgieter and Visser *Deliktereg* 3.

clearly seen that the law of delict belongs to the part of private law that is known as the law of obligations.<sup>602</sup>

Loubser and Midgley<sup>603</sup> give a short broad summary of the purpose of the law of delict, which reads as follows:

The law of delict, like all other law, forms part of a regulatory framework for society. Its purpose is also to set standards of behaviour for human conduct. So, underlying the overt compensatory regime of delict is a “hidden agenda”: it also serves a normative purpose and it prescribes a set of ethical rules and principles for social interaction.

The law of delict can shortly be described as the law of “civil wrong”. A more lengthy definition would define a delict as “the act of a person that in a wrongful and culpable way causes harm to another”.<sup>604</sup>

Van der Merwe and Olivier’s<sup>605</sup> definition of a delict is:

A delict is understood to be a wrongful and culpable act that causes harm or infringes another’s personality interest. Within this realm of the law of delict belong all the rules that determine the private-law liability of a person who has caused harm or a personality infringement to another in a wrongful and culpable way.

From the above it is clear that for any person to be successful with a delictual claim, the person would have to prove all five of the relevant elements,<sup>606</sup> namely conduct, wrongfulness, fault, causation and damage. These five elements must be present before delictual liability will be established.<sup>607</sup> From these elements, the question arises if delictual liability is governed by a generalising approach.<sup>608</sup> In other words if delictual liability is regulated by general principles or requirements (the elements).<sup>609</sup> The principles usually apply, regardless of which individual interest is impaired and

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602 Neethling, Potgieter and Visser *Deliktereg* 3.

603 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

604 Neethling, Potgieter and Visser *Deliktereg* 3.

605 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

606 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

607 Etsebeth 2008 *Without Prejudice* 43.

608 Neethling, Potgieter and Visser *Deliktereg* 4.

609 Neethling, Potgieter and Visser *Deliktereg* 4.

regardless of the way impairment is caused.<sup>610</sup> The casuistic approach of the English and Roman law of delict differs.<sup>611</sup> This is that the law of delict consists of a group or set of separate delicts (torts or *delicta*) with its own set of rules, as used in England.<sup>612</sup> The court would be able to find the defendant liable only if the conduct satisfies all the requirements of a specific delict.<sup>613</sup>

The good thing about a legal system that uses general principles of delictual liability is that it is able to accommodate changing circumstances and new situations more easily than the casuistic approach can.<sup>614</sup> This factor is of cardinal importance for the aims of this dissertation, as social media platforms are a changing circumstance in the legal sphere. The casuistic approach, on the contrary, requires the constant creation of new delicts.<sup>615</sup>

General principles, on the other hand, have only to be adapted or applied in a new way because of their flexibility and pliancy.<sup>616</sup> Unlike the English law of torts, the South African law of delict was able to recognise and protect individual interests which have made their appearance only recently.<sup>617</sup> Would this be the same with defamatory statements on social media platforms?

The generalising approach is subject to a significant qualification.<sup>618</sup> As already said, a distinction is made between delicts that cause patrimonial damage (*damnum iniuria datum*) and those that cause injury to personality (*iniuria*).<sup>619</sup> The two vital actions that stem from these forms of damage are the *actio legis Aquiliae* and the *actio iniuriarum*. The *actio legis Aquiliae* is an action for damages for the wrongful and culpable

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610 Individual interest includes a thing, the human body, honour, privacy, earning capacity, a trade secret, a trademark, or the goodwill of a corporation. See Neethling, Potgieter and Visser *Deliktereg* 4.

611 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

612 Neethling, Potgieter and Visser *Deliktereg* 4.

613 The casuistic approach is used by England, as seen in Chapter 3. See Neethling, Potgieter and Visser *Deliktereg* 4.

614 Neethling, Potgieter and Visser *Deliktereg* 4.

615 Neethling, Potgieter and Visser *Deliktereg* 4.

616 The end result is a combination of the “general” and “specific” approaches, which gives us the hybrid character of our law of delict. See Neethling, Potgieter and Visser *Deliktereg* 4.

617 For example, privacy and the goodwill of a corporation. See Neethling, Potgieter and Visser *Deliktereg* 4.

618 Neethling, Potgieter and Visser *Deliktereg* 5.

619 Neethling, Potgieter and Visser *Deliktereg* 5.

(intentional or negligent) causing of patrimonial damage.<sup>620</sup> The *actio iniuriarum* is an action for satisfaction (*solatium* or sentimental damages) for the wrongful and intentional injury to personality.<sup>621</sup> These two actions are applicable to almost the whole area of delictual liability, with a few exceptions.<sup>622</sup> The last important action is the action for pain and suffering by which compensation for injury to personality as a consequence of the wrongful and negligent (or intentional) impairment of bodily or physical-mental integrity is claimed.<sup>623</sup> From the above it is clear that a defamatory statement on a social media platform will warrant an *actio iniurium* in most circumstances, as defamation is one of the specific forms of *iniuria*.<sup>624</sup> The *actio legis Aquiliae* may also be applicable in certain circumstances. The action for pain and suffering will not fall within the scope of this dissertation, and will therefore not be discussed. The primary focus will thus fall on *iniuria*.

The law of delict has several important functions in the legal system of South Africa. It is important, however, to keep in mind the fact that these functions are not set in stone, as ideas may fluctuate over time.<sup>625</sup> Currently there are seven broadly defined functions<sup>626</sup> of the law of delict. First it has a compensatory function for harm that has been suffered or an interest that has been infringed.<sup>627</sup> The second is to protect certain interests of an individual.<sup>628</sup> Third, it serves to promote social order and cohesion.<sup>629</sup> It also aims to educate and reinforce values within the community.<sup>630</sup> The fifth function is to provide socially acceptable compromises between individuals' conflicting moral views.<sup>631</sup> The law of delict also aims to deter the injurer from behaving similarly in future and to warn

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620 Neethling, Potgieter and Visser *Deliktereg* 5.

621 Neethling, Potgieter and Visser *Deliktereg* 5.

622 Neethling, Potgieter and Visser *Deliktereg* 5.

623 Neethling, Potgieter and Visser *Deliktereg* 5.

624 Neethling, Potgieter and Visser *Deliktereg* 5.

625 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

626 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

627 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

628 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

629 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

630 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

631 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

against as well as to deter others from behaving in a similar fashion.<sup>632</sup> Finally, the law of delict relocates and spreads losses.<sup>633</sup>

With regard to defamation, especially defamatory statements on social media platforms, it can be seen that functions 1-6 would most likely find application in any case arising from a defamatory statement made on a social media platform.

It must always be kept in mind that specific forms of a delict must not be seen in isolation of the law of delict as a whole.<sup>634</sup> There is no series of separate delicts with their own sets of principles.<sup>635</sup> Because defamation falls under the umbrella of delictual claims, these elements would therefore also have to be proven in a defamation action. Some of these elements may prove to be problematic when applied to social media platforms.<sup>636</sup> It is therefore necessary to give a quick overview regarding each of them.

### **4.3 Delictual elements**

#### **4.3.1 Conduct**

The term “unlawful act”, which is one of the ways in which a delict can be described, indicates that one person causes damage or disadvantage to another through conduct or an action. An action can be seen as the cause of the delictual claim. Conduct can therefore be described as a general prerequisite for delictual liability.<sup>637</sup> The damage has to be caused by something, and with delictual liability this is caused by the conduct.<sup>638</sup> In other words, the conduct constitutes the damage-causing event in the case of a delict.<sup>639</sup> Conduct requires that some form of overt behaviour has to take place.<sup>640</sup> Thoughts that are not manifested in one way or another will therefore not create delictual

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632 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

633 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

634 Neethling, Potgieter and Visser *Deliktereg* 5.

635 The specific forms of delict may be seen as being species of the genus delict, in scientific terms. See Neethling, Potgieter and Visser *Deliktereg* 5.

636 Etsebeth 2008 *Without Prejudice* 43.

637 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

638 Neethling, Potgieter and Visser *Deliktereg* 3.

639 Neethling, Potgieter and Visser *Deliktereg* 3.

640 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

consequences.<sup>641</sup> The following are examples of what may satisfy the conduct element as overt behaviour:<sup>642</sup>

1. A positive physical act.<sup>643</sup>
2. A positive statement or comment.<sup>644</sup>
3. A failure to do or say something.<sup>645</sup>

The law itself determines what will be seen as “conduct”. A normative approach is therefore followed. In the case of social media, the posting of the defamatory statement would qualify as the conduct. With regards to online conduct, it will rarely be difficult to prove and will usually be assumed to be obvious.<sup>646</sup>

#### 4.3.2 Wrongfulness

The element of wrongfulness is narrowly connected to the fundamental idea of the law of delict, which is that liability is imposed when a person unreasonably causes harm to another.<sup>647</sup> In itself, the act which causes harm to another is insufficient to give rise to delictual liability.<sup>648</sup> Prejudice must be caused in a wrongful manner for delictual liability to follow.<sup>649</sup> This action would be wrongful if it is performed in a legally reprehensible or unreasonable manner.<sup>650</sup>

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641 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

642 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

643 An “act” is also known as a “commission”. For example, a person crashing a vehicle into the vehicle of his neighbour, or persuading a competing company’s staff member to join the specific person’s company. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

644 This would be, for example, the writing of a letter, or making a statement or a comment (also known as a commission). It is clear that posting a defamatory statement on a social media platform would fall into this category. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

645 This is an omission. An example would be to watch someone drown without trying to rescue the person. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

646 Etsebeth 2008 *Without Prejudice* 43.

647 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

648 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

649 Neethling, Potgieter and Visser *Deliktereg* 3.

650 If there is no wrongfulness, the defendant cannot be held liable. See Neethling, Potgieter and Visser *Deliktereg* 3.

To determine if an act is wrongful, a dual test is applied. The first step would be to determine if a legally recognised individual interest has indeed been infringed upon. This will entail ascertaining if an individual's interest has in fact been encroached upon.<sup>651</sup> The specific act therefore will have had to cause a harmful result.<sup>652</sup>

After it has been established that an individual's interest has been prejudiced, legal norms will be used to determine whether this prejudice occurred in a legally reprehensible or unreasonable manner.<sup>653</sup> A harmful consequence on its own is not sufficient to constitute wrongfulness; the violation of a legal norm must be present.<sup>654</sup> To answer the question whether or not the factual infringement of a legally recognised interest occurred in a legally reprehensible manner, an investigation into the element of wrongfulness would be necessary.<sup>655</sup>

#### 4.3.3 Fault

Fault (*culpa* in a wide sense) is accepted as a general requirement for delictual liability.<sup>656</sup> There are various views on the true nature of fault.<sup>657</sup> Two forms of fault are recognised in practice: intention (*dolus*) and negligence (*culpa* in the narrow sense).<sup>658</sup> These two terms refer to the legal blameworthiness or the reprehensible state of mind or conduct of someone who has acted wrongfully.<sup>659</sup> Fault can be seen as a subjective element of a delict because it is concerned to a large extent with the person's attitude or

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651 Neethling, Potgieter and Visser *Deliktereg* 3.

652 Neethling, Potgieter and Visser *Deliktereg* 3.

653 Neethling, Potgieter and Visser *Deliktereg* 33.

654 Neethling, Potgieter and Visser *Deliktereg* 33.

655 It is important to note that the legal convictions of the community (the *boni mores*) are used as the basic test for wrongfulness. The *boni mores* are used as a juridical yardstick. The term gives expression to the prevailing convictions of the community regarding what is right and what is wrong. This criterion enables the court to continuously adapt the law to reflect the changing values and needs of the community. The test would therefore be able to adapt to technological advancements, such as social media platforms. See Neethling, Potgieter and Visser *Deliktereg* 37; Marx 2014 <http://www.litnet.co.za/Article/die-skending-van-die-reg-op-die-goeie-naam-en-die-reg-op-privaatheid-met-verwysing-na-sosi>.

656 Neethling, Potgieter and Visser *Deliktereg* 117.

657 Neethling, Potgieter and Visser *Deliktereg* 117.

658 There are several defences regarding intention. These are mistake, jest, intoxication, provocation and emotional distress. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

659 Neethling, Potgieter and Visser *Deliktereg* 117.

disposition at the time of the act.<sup>660</sup> In contrast, the test for negligence is objective in nature.<sup>661</sup>

It is obvious that fault can be present only if a person has acted wrongfully.<sup>662</sup> Someone cannot be blamed if the person has not acted unlawfully for the purpose of the law of delict, or has acted lawfully.

The presence of intent or negligence on the part of the defendant is enough to blame the person; that is, to conclude that there was a reprehensible attitude or reprehensible conduct on the part of the defendant.<sup>663</sup> For the *action legis Auliliae* and the action for pain and suffering, intention or negligence would be sufficient for liability.<sup>664</sup> For the *actio iniuriarum* based on the infringement of personality (*iniuria*), intent is generally required and negligence would not be sufficient.<sup>665</sup> For the purposes of defamatory statements on social media platforms, the current position is that intention would be required.<sup>666</sup>

Before determining whether the defendant's wrongful conduct is blameworthy or not, it must first be established if s/he has the capacity to be held accountable.<sup>667</sup> In other words, the person's mental ability must be such that intent or negligence may be imputed to him.<sup>668</sup>

Fault therefore has two components. Firstly, the person must have been accountable at the time of causing the harm, meaning that the person must have had the capacity to be at fault.<sup>669</sup> Secondly, the person must have been culpable or blameworthy. The person must have acted intentionally or negligently.<sup>670</sup>

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660 Neethling, Potgieter and Visser *Deliktereg* 117.

661 Neethling, Potgieter and Visser *Deliktereg* 117.

662 Neethling, Potgieter and Visser *Deliktereg* 117.

663 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

664 The *action legis Auliliae* and the action for pain and suffering will later be briefly discussed. See Neethling, Potgieter and Visser *Deliktereg* 118.

665 The *actio iniuriarum* will be discussed later. See Neethling, Potgieter and Visser *Deliktereg* 118.

666 Marx 2014 <http://www.litnet.co.za/Article/die-skending-van-die-reg-op-die-goeie-naam-en-die-reg-op-privaatheid-met-verwysing-na-sosi>.

667 Neethling, Potgieter and Visser *Deliktereg* 118.

668 Neethling, Potgieter and Visser *Deliktereg* 118.

669 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

670 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

#### 4.3.4 Causation

A causal nexus between the conduct and damage is required for it to qualify as a delict.<sup>671</sup> A person cannot be held liable if s/he has not caused the damage or loss in question.<sup>672</sup> Whether or not there is a causal nexus in a particular case is a question of fact, which must be answered in the light of the available evidence and relevant probabilities.<sup>673</sup> A causal nexus either exists or it does not exist.<sup>674</sup> A number of theories regarding causation have been formulated, most importantly the *conditio sine qua non* theory, the adequacy theory, the direct consequences theory, the foreseeability theory, and lastly the “flexible approach”.<sup>675</sup>

All of these theories use the *conditio sine qua non* theory as their starting point in order to determine initially whether a factual causal nexus between the act and the harmful consequence exists.<sup>676</sup> If it does exist, so-called factual causation is present.<sup>677</sup> This factual causal nexus has the ability to extend infinitely, seeing that a single act may in principle give rise to an endless chain of harmful events.<sup>678</sup>

No legal system can, in regard to fairness, allow unlimited liability based solely on causation.<sup>679</sup> For which of the harmful events flowing from the person’s conduct should the defendant be held liable?<sup>680</sup> All of the previously mentioned theories attempt to answer this question, except for the *conditio sine qua non* theory.<sup>681</sup> Causation in this sense is known as legal causation.<sup>682</sup> Causation regarding defamatory statements made

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671 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

672 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

673 Neethling, Potgieter and Visser *Deliktereg* 165.

674 Neethling, Potgieter and Visser *Deliktereg* 165.

675 As they fall only broadly into the scope of this dissertation, these theories will not be discussed in further detail. See Neethling, Potgieter and Visser *Deliktereg* 165.

676 Neethling, Potgieter and Visser *Deliktereg* 165.

677 Neethling, Potgieter and Visser *Deliktereg* 165.

678 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

679 Neethling, Potgieter and Visser *Deliktereg* 165.

680 Neethling, Potgieter and Visser *Deliktereg* 165.

681 Neethling, Potgieter and Visser *Deliktereg* 165.

682 Neethling, Potgieter and Visser *Deliktereg* 165.

on social media platforms may be problematic in certain circumstances<sup>683</sup> as the concept of cyberspace is often not grasped.<sup>684</sup>

#### 4.3.5 Damage

A delict can be seen as a wrongful, culpable act which has a harmful consequence.<sup>685</sup> The harmful consequence is the element of damage. This element is fundamental for a delictual action for damages.<sup>686</sup> For the law of delict to be applicable, there must be some actual or potential harm.<sup>687</sup> The law of delict has a general compensatory function. Thus, for it to be applicable there must be some loss or damage for which the law makes compensation available.<sup>688</sup>

The function of compensation has two specific forms.<sup>689</sup>

The first form is compensation for damages. In this context compensation is a monetary equivalent of damage awarded to a person with the purpose of removing as wholly as possible his past as well as future patrimonial,<sup>690</sup> and, where applicable, non-patrimonial<sup>691</sup> damage.<sup>692</sup> Money is therefore intended as an equivalent of damage.

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683 Etsebeth 2008 *Without Prejudice* 43.

684 Etsebeth 2008 *Without Prejudice* 43.

685 Neethling, Potgieter and Visser *Deliktereg* 204.

686 Neethling, Potgieter and Visser *Deliktereg* 204.

687 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

688 Neethling, Potgieter and Visser *Deliktereg* 204.

689 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

690 Patrimonial loss can be directly or naturally expressed in monetary value. The extent of patrimonial loss can be ascertained with greater precision as it is determined by using objective criteria. Damages of patrimonial loss are of the same nature as the impaired patrimonial interest are therefore a genuine equivalent for such damage. Lastly, patrimonial loss implies that the utility of a patrimonial interest is reduced. See Neethling, Potgieter and Visser *Deliktereg* 204.

691 Non patrimonial loss is at most indirectly measurable in money. The loss cannot be ascertained with such great precision, as it is related to subjective feelings and can be assessed only by means of an equitable estimate. There is no true relationship between money and injury to personality. See Neethling, Potgieter and Visser *Deliktereg* 204.

692 Damage is a very broad concept which consists of patrimonial as well as non-patrimonial loss. Patrimonial and non-patrimonial loss are two mutually exclusive components. Many authors are of the opinion that in a primary sense damage is defined only as patrimonial loss. These include Van der Walt, Reinecke, Bober, Van der Merwe and Olivier. This approach is based on the assumption that patrimonial damage and injury to personality do not share any meaningful common denominator. On the other hand authors such as McKerron, Pauw and Pont accept a wider concept of damage, which therefore includes non-patrimonial loss. There are compelling arguments which prove beyond doubt that damage is a broad concept which consists of patrimonial as well as non-patrimonial loss. For the objectives of this dissertation, we do not have to go into any further detail

The second form is satisfaction. This is the case where money cannot be a true equivalent of the damages or loss to the impaired interest or interests.<sup>693</sup> Satisfaction implies the reparation of damage in the form of injury to personality *inter alia* by effecting retribution for the wrong suffered by the plaintiff and by satisfying the plaintiff's and/or the community's sense of justice.<sup>694</sup>

Damage or *damnum* can therefore broadly be defined as:

the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by law.<sup>695</sup>

With regards to defamatory statements on social media platforms it is clear that compensation for damages as well as satisfaction may be applicable. Furthermore, patrimonial as well as non-patrimonial loss can be applicable. All of the forms of damages would possibly be applicable, depending on the circumstances.<sup>696</sup> With regard to damage that occurs in cyberspace, Etsebeth<sup>697</sup> states the following:

The damage element may, however, prove to be more problematic. The central problem lies in quantifying the harm suffered in monetary terms. Courts will have to consider the extent of damages which have already occurred as well as future loss. The issue of pure economic loss will also have to be considered.

#### **4.4            *The Constitution of the Republic of South Africa***

It is common knowledge that South Africa's 1996 *Constitution* is the highest law of the country and that any and all conduct or law which is inconsistent with it would be

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regarding this subject, but it is necessary to mention that these are presumed to be two mutually exclusive components. See Neethling, Potgieter and Visser *Deliktereg* 204.

693 Neethling, Potgieter and Visser *Deliktereg* 204.

694 Neethling, Potgieter and Visser *Deliktereg* 204.

695 Neethling, Potgieter and Visser *Deliktereg* 204.

696 In the case where a defamatory statement has actually caused a person loss of business or clientele, it is clear that the person has suffered patrimonial damage and can therefore claim for it.

697 Etsebeth 2008 *Without Prejudice* 43.

deemed invalid.<sup>698</sup> With regard to defamation, the two main rights that clash are the right to dignity and the right to freedom of expression.<sup>699</sup>

The right to dignity is enshrined in a number of sections of the *Constitution*, such as sections 1, 2, 7, 8, 10 and 16, all of which make reference to dignity in a direct or indirect manner.<sup>700</sup> A good name and reputation fall within the bounds of the description of dignity in section 10 of the *Constitution*.<sup>701</sup>

The right to dignity must be weighed against the right to freedom of expression, which is enshrined in section 16 of the *Constitution*. Both of these rights can, however, be limited by law of general application, such as non-discriminatory law, which is enshrined in sections 10, 16 and 36.<sup>702</sup> The balance between these two constitutional values was dealt with by the Appellate Division in *National Media Limited v Bogoshi*.<sup>703</sup>

For the purposes of this dissertation, the fundamental rights enshrined in the Bill of Rights (Chapter 2) will be the prime focus of this discussion. The reason therefor is that it is applicable to all law including the law of delict, and therefore to the law of defamation.<sup>704</sup> The Bill of Rights vertically binds the state (the executive, the judiciary, the legislature and all organs of the state) and also binds all natural and juristic persons on a horizontal level. The limitation of a fundamental right by law of general application may surface only to the extent that the limitation is both reasonable and justifiable in an open, democratic society based on human dignity, equality and freedom.<sup>705</sup>

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698 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

699 Adams and Adams 2013 <http://www.lexology.com/library/detail.aspx?g=cc4533fe-dc7f-427b-ba1f-03b6bb17e576>.

700 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

701 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

702 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

703 *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA); 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

704 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

705 Neethling, Potgieter and Visser *Deliktereg* 17.

It is clear that fundamental rights are not absolute rights, as they can be limited in some way or another.<sup>706</sup> When determining the lawfulness of a limitation, all relevant factors must be taken into account at all times.<sup>707</sup> These relevant factors include the nature and extent of the fundamental right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and lastly if there are any less restrictive means of achieving this purpose.

When interpreting the Bill of Rights the courts must always promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>708</sup> Whilst interpreting the Bill of Rights the courts should take into account international law applicable to the specific circumstances.<sup>709</sup> In the interpretation of any legislation and when developing the common law and customary law, courts must promote the spirit, purport and objects of the Bill of Rights.<sup>710</sup> It can be said that where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have a general duty to develop the common law to eliminate the said deviation.<sup>711</sup>

The vertical and horizontal application of the *Constitution* can take place in a direct as well as an indirect manner.<sup>712</sup> A clear distinction can, however, not be made because of the unavoidable overlap between these two applications.<sup>713</sup>

As seen from Chapters 1 and 2, the Internet has not only become a vital instrument for communication between parties, but also for exercising each individual's right to freedom of expression in the whichever form, whether written, audio or video.<sup>714</sup> This right to freedom of expression, as well as the right to receive information is entrenched in section 16 of the *Constitution*.<sup>715</sup> Although freedom of opinion and expression is widely recognised as a basic human right, as it plays an important role in a fair and

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706 Erlank 2014 (1) *Juta Quarterly Review*.

707 Neethling, Potgieter and Visser *Deliktereg* 17.

708 Neethling, Potgieter and Visser *Deliktereg* 17.

709 Neethling, Potgieter and Visser *Deliktereg* 17.

710 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

711 Neethling, Potgieter and Visser *Deliktereg* 17.

712 Neethling, Potgieter and Visser *Deliktereg* 17.

713 Neethling, Potgieter and Visser *Deliktereg* 17.

714 Nel "Freedom of expression, anonymity and the internet" 251-273.

715 Nel "Freedom of expression, anonymity and the internet" 251-273.

open society, it is also recognised that this freedom comes with certain restrictions and responsibilities.<sup>716</sup>

#### 4.4.1 *Direct application*

Direct vertical application can be explained as situations where the state must respect the fundamental rights of an individual against the abuse of governmental power,<sup>717</sup> the exception being where such an infringement is reasonable and justifiable in line with the limitation clause (section 36 of the *Constitution*).<sup>718</sup>

Direct horizontal application, on the other hand, requires the courts to give effect to an applicable fundamental right by applying and where necessary developing the common law insofar as legislation does not give effect to that right.<sup>719</sup> Once again the exception lies where it is reasonable and justifiable to develop the common law to limit the right in accordance with the limitation clause.<sup>720</sup> The fundamental rights that find application in the law of delict must find application in this manner.<sup>721</sup>

In many instances situations will occur where two or more of these fundamental rights are in conflict with one another.<sup>722</sup> As already mentioned, in a situation regarding a defamatory statement on a social media platform, one will have to weigh up the fundamental right of freedom of expression on the one hand against the right to human dignity on the other.<sup>723</sup> A careful and correct balancing or weighing up of opposing rights would be necessary in such a situation to ensure that justice prevails.<sup>724</sup>

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716 Nel "Freedom of expression, anonymity and the internet" 251-273.

717 Basically this means that the state may therefore not infringe on these rights See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

718 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

719 Neethling, Potgieter and Visser *Deliktereg* 17.

720 Neethling, Potgieter and Visser *Deliktereg* 17.

721 These fundamental rights would include: the right to property, the right to life, the right to freedom and security of person (this includes the right to bodily and psychological integrity), the right to privacy, the right to human dignity, the right to equality, the right to freedom of expression, the right to freedom of religion, belief and opinion, the right to assembly, demonstration, picket and petition, the right to freedom of association and the right to freedom of trade, occupation and profession. See Neethling, Potgieter and Visser *Deliktereg* 17.

722 Neethling, Potgieter and Visser *Deliktereg* 17.

723 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

724 Neethling, Potgieter and Visser *Deliktereg* 19.

The inclusion of fundamental rights in the Bill of Rights increases their protection and gives them a higher status in that all law, state actions (executive or administrative), court decisions and even the conduct of natural and juristic persons may be tested against them.<sup>725</sup> It must always be kept in mind, however, that any limitation of a fundamental right must be in accordance with the limitation clause of the *Constitution*.<sup>726</sup> In the exercising of the limitation clause regarding this value judgement (including the weighing up of opposing fundamental rights), the general principles which have already been established in South African law with regards to the *boni mores* criterion for delictual wrongfulness may aid as a *prima facie* indication of the reasonableness of a limitation in terms of the Bill of Rights.<sup>727</sup>

When a fundamental right is infringed or threatened to be infringed, the prejudiced or threatened person is entitled to approach a competent court to grant the appropriate relief.<sup>728</sup> With regard to the above mentioned, it should be noted that the possibility exists for the development of a supposed “constitutional delict”, meaning that the infringement of a fundamental right *per se* constitutes a “delict”.<sup>729</sup> A clear distinction should be made between such a constitutional wrong and a delict, even though they may overlap.<sup>730</sup> The requirement for a delict opposed to a constitutional wrong differs substantially.<sup>731</sup>

Not every delict is necessarily also a constitutional wrong, just as every constitutional wrong is not necessarily a delict.<sup>732</sup> Another major difference is that a delictual remedy aims to compensate, whilst a constitutional remedy (even in the form of damages) is directed at affirming, enforcing, protecting and vindicating fundamental rights, and at preventing or deterring future violations of the Bill of Rights.<sup>733</sup> A constitutional wrong

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725 Neethling, Potgieter and Visser *Deliktereg* 19.

726 Neethling, Potgieter and Visser *Deliktereg* 19.

727 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

728 Neethling, Potgieter and Visser *Deliktereg* 19.

729 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

730 Neethling, Potgieter and Visser *Deliktereg* 19.

731 Neethling, Potgieter and Visser *Deliktereg* 19.

732 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

733 Neethling, Potgieter and Visser *Deliktereg* 19.

and a delict (or their remedies) should not be treated in the same way.<sup>734</sup> Terms like constitutional “delict” or “tort” should be avoided for the sake of clarity.<sup>735</sup>

#### 4.4.2 *Indirect application*

The indirect application of the Bill of Rights basically construes that all private law rules, principles or norms (therefore including those regulating the law of delict) must be read in the light of the basic values of the Bill of Rights.<sup>736</sup> The same results will probably be obtained as with the direct application when promoting the spirit, purport and objects of the Bill of Rights.<sup>737</sup> The indirect application would specifically apply to the more open-ended or flexible delictual principles, which include the *boni mores* for wrongfulness, the imputability test for legal causation, and the reasonable person test for negligence, and lastly in instances where policy considerations and factors such as reasonableness, fairness and justice may play an important role.<sup>738</sup>

The values underlying the Bill or Rights could therefore be implemented with good results as important policy considerations in determining wrongfulness, legal causation and negligence, as is apparent from case law.<sup>739</sup>

#### 4.4.3 *Constitutional values and norms*

From past judgements as well as the *Constitution* itself, broad categories of norms can be identified.<sup>740</sup> For the focus of this dissertation only two of these subtopics will be briefly examined. These are the two values that will be weighed up against one another in a case of a defamatory posting on a social media platform.

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734 Neethling, Potgieter and Visser *Deliktereg* 19.

735 Neethling, Potgieter and Visser *Deliktereg* 19.

736 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

737 Neethling, Potgieter and Visser *Deliktereg* 19.

738 Neethling, Potgieter and Visser *Deliktereg* 19.

739 Neethling, Potgieter and Visser *Deliktereg* 19.

740 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

#### 4.4.3.1 Dignity and equality

The right to a good name and reputation falls under the definition of dignity, so elaboration is necessary. Section 1 of the *Constitution* sets out the foundational values for the country and lists, among others, human dignity.<sup>741</sup> These values reinforce and support a number of sections in the *Constitution* and have enlightened various judgements.<sup>742</sup>

#### 4.4.3.2 Freedom of expression

Freedom of expression in South Africa has its origins in section 1 of the *Constitution*.<sup>743</sup> It is further also recognised by the common law of South Africa.<sup>744</sup> It is unique, however, in the sense that it differs from other foundational values, and also because of its prominence as a value that supports defences against claims under the *actio iniuriarum*.<sup>745</sup> The “special” status does not mean that this right is more important than any other foundational value. No hierarchy of rights exist.<sup>746</sup> Freedom of expression must be interpreted as informing the other values enshrined in the *Constitution*, especially human dignity, equality and freedom.<sup>747</sup>

### 4.5 Defamation in South Africa

The right to *fama* is recognised and protected as an independent personality right in South African law.<sup>748</sup> *Fama* can be viewed as a person’s good name with regards to the respect and status the person enjoys in society.<sup>749</sup> A person’s reputation therefore

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741 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

742 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

743 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

744 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

745 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

746 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

747 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

748 Neethling, Potgieter and Visser *Deliktereg* 325.

749 Neethling, Potgieter and Visser *Deliktereg* 325.

relates to the good name that the person enjoys in the assessment of others.<sup>750</sup> When any action has the effect of decreasing a person's status in the community (being defamatory to that person), consequently it infringes on that person's *fama* and is in principle *iniuria*.<sup>751</sup> There is a clear distinction between defamation in general as *iniuria* and the specific forms of infringement of good name which have in practice crystallised into specific form of *iniuria* under different names.<sup>752</sup> It must further be noted that there is a vital difference between what others think of a person (reputation) and what a person thinks about him/herself.<sup>753</sup>

The definition of defamation in South Africa is as follows:

The wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring that person's status, good name or reputation.<sup>754</sup>

Four elements can clearly be identified in the above, the first being wrongfulness, followed by intent, then publication, and lastly defamatory content.

The law of defamation attempts to find the balance between a person's right to a good name or an unimpaired reputation and another person's right to freedom of expression.<sup>755</sup> As from Chapter 1, it can be seen that the Internet has foregrounded several challenging scenarios regarding defamation.<sup>756</sup> Traditional rules and applications of the law need to be re-evaluated to grant solutions applicable to the phenomenon of

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750 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

751 Neethling, Potgieter and Visser *Deliktereg* 325.

752 These include malicious prosecution and wrongful and malicious attachment of property. For the aims of this dissertation we will not be discussing these forms. See Neethling, Potgieter and Visser *Deliktereg* 325.

753 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

754 Nel "Freedom of expression, anonymity and the internet" 251-273.

755 The *Constitution* does not specifically protect the right to reputation by name as it does with dignity and privacy. This does not exclude one's constitutional right to one's reputation. The right to reputation is protected via the right to dignity. Courts have indicated that the right to dignity includes one's right to reputation. It is clear that respecting another person's dignity underpins the right to reputation. The idea that the right to reputation is included in the right to dignity creates something of theoretical anomaly. The reason for this is that in common law *dignitas* and *fama* are distinct concepts. However, in constitutional jurisprudence they are however viewed as one and the same. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

756 Nel "Freedom of expression, anonymity and the internet" 251-273.

social media.<sup>757</sup> As already suggested, the risk of defamation resulting in damages is greater due to the range of applications and the extent of coverage the material may receive, as well as the ease with which it can be published.<sup>758</sup>

It is important to note that there is no requirement of an element of falsity. Truth, when defamatory, can also be actionable.<sup>759</sup> Each of these elements will be briefly discussed.

#### 4.5.1 *Publication*

As in both America and England, it is required that the defamatory statement or behaviour must be published or disclosed to at least a third person.<sup>760</sup> This is necessary as the good name, respect or status which a person enjoys in society relates to the opinion of others regarding that specific person, and defamation consists in the infringement of his good name.<sup>761</sup> Therefore, if no publication occurs the opinion of others concerning the person involved cannot be lowered.<sup>762</sup> It follows that publication is a necessary prerequisite for defamation to occur.<sup>763</sup> The publication must further refer to the plaintiff.<sup>764</sup> Publication has two components, the act of making the material known to another person, and the understanding and appreciation on the part of the recipient of the material's meaning and importance.<sup>765</sup>

As in America and England, publication can take various forms. It can occur in speech, print or innuendo.<sup>766</sup> The deduction can be made that posting a defamatory statement in the discussion forum of a website, sending an e-mail message, files transferred by file transfer protocol or video conferencing would constitute publication.<sup>767</sup>

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757 Nel "Freedom of expression, anonymity and the internet" 251-273.

758 Nel "Freedom of expression, anonymity and the internet" 251-273.

759 Neethling, Potgieter and Visser *Deliktereg* 326.

760 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

761 Neethling, Potgieter and Visser *Deliktereg* 326.

762 Neethling, Potgieter and Visser *Deliktereg* 326.

763 Neethling, Potgieter and Visser *Deliktereg* 326.

764 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

765 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

766 Nel "Freedom of expression, anonymity and the internet" 251-273.

767 The form of the content is not a determining factor. It can be formulated in text, graphics, audio or video. See Nel "Freedom of expression, anonymity and the internet" 251-273.

The requirement that the defamatory words or conduct have to be made to a third person is subject to two vital qualifications.<sup>768</sup> The first is that courts do not regard as publication the disclosure of defamatory words or behaviour to an outsider who is unaware of the defamatory character or meaning thereof in relation to the plaintiff.<sup>769</sup> The recipient of the publication in question must understand and appreciate the material's meaning and significance.<sup>770</sup> There would be no publication where a person makes a defamatory statement to another person who is deaf, for instance.<sup>771</sup> The same conclusion would apply where the statement is made in a language the third person cannot understand.<sup>772</sup> The person reading or hearing the material does not have to understand the meaning right away.<sup>773</sup> The requirements of publication will be met the moment the meaning or significance is grasped.<sup>774</sup> The lapse of time between the reading or hearing of the material and actually grasping what it means is irrelevant.<sup>775</sup>

The second qualification is that the communication of defamatory words concerning a third party by one spouse to the other does not constitute publication.<sup>776</sup> This second qualification will not be applicable to defamatory statements on social media platforms, as the audience would never be one spouse exclusively.

After it has been established that publication has indeed taken place, the plaintiff would have to prove that the defendant was responsible for the publication in question.<sup>777</sup> As a general rule the publication is attributed to the defendant if s/he was aware of the likelihood or could have reasonably expected that an outsider would take notice of the

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768 Neethling, Potgieter and Visser *Deliktereg* 326.

769 Neethling, Potgieter and Visser *Deliktereg* 326.

770 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

771 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

772 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

773 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

774 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

775 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

776 The reason for this is that communications between husband and wife are *stante matrimonio*. See Neethling, Potgieter and Visser *Deliktereg* 326.

777 Neethling, Potgieter and Visser *Deliktereg* 326.

defamation.<sup>778</sup> The main question is if the result objected to was foreseen or was reasonably foreseeable.<sup>779</sup>

It must further be noted that not only the person from whom the defamatory remark originated (the original poster), but also any person who repeats, confirms, or even draws attention to the defamatory statement is in principle responsible for its publication.<sup>780</sup> One of the principles of defamation law in South Africa is that each individual publication gives rise to a separate cause of action.<sup>781</sup> As seen in Chapter 3, this principle was inherited from English law.<sup>782</sup> The problem regarding this principle and the Internet is that every time a statement/article/posting with defamatory content is accessed, publication will take place.<sup>783</sup> This principle is known as the multiple publication rule and implies that there can be multiple actions in different jurisdictions.<sup>784</sup> This approach differs from the single publication rule (in which only one cause of action emanates from a publication, irrespective of how many copies were produced, downloaded or where they were distributed, as in Chapter 3 above).<sup>785</sup> The single publication rule is followed by the USA and more recently England. The fact that England has changed from the multiple publication rule to the single publication rule should be heeded as a warning that the multiple publication rule can cause unnecessary complications. How South Africa will respond to this caveat is currently unknown. The courts would have to develop the principle to accommodate changing circumstances, which include the social media.

This is of cardinal importance to defamatory statements on social media platforms, as users can repeat (for example re-Tweet), confirm and draw attention to an original

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778 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

779 Neethling, Potgieter and Visser *Deliktereg* 326.

780 An example would be an online magazine. Not only the author would be held liable, but also the editor, printer, publisher and owner of that magazine. See Nel "Freedom of expression, anonymity and the internet" 251-273; Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

781 Nel "Freedom of expression, anonymity and the internet" 251-273.

782 This principle has, however, now been amended (also see Chapter 3); Nel "Freedom of expression, anonymity and the internet" 251-273.

783 Nel sketches the scenario where a newspaper publishes a defamatory article on its website, and every copy of the online newspaper is archived on the Internet. Would subsequent occasions of accessing the website give rise to a separate cause of action? See Nel "Freedom of expression, anonymity and the internet" 251-273.

784 Nel "Freedom of expression, anonymity and the internet" 251-273.

785 Nel "Freedom of expression, anonymity and the internet" 251-273.

defamatory statement by commenting on the statement. One can even go so far as to ask the question if simply “liking” or being “tagged” in a defamatory post qualifies the person as someone who associated him/herself with this post, and is therefore indirectly responsible for its publication. Does such action draw attention to the post, or confirm it? Marx<sup>786</sup> is of the opinion that this will indeed be the case. This is confirmed by the decision of *Isparta v Richter and Another*, which will be discussed later in further detail.<sup>787</sup>

Defamatory comments on a non-defamatory statement will obviously also be included as defamatory statements, as well as all the defamatory comments following the original statement. People are currently not aware of the complications comments or replies to posts can cause them.<sup>788</sup>

Another important issue regarding publication is that publication is presumed to have taken place in certain circumstances.<sup>789</sup> Publication will be presumed where it is probable that other people will read or hear the words.<sup>790</sup> The onus will then be placed on the defendant to disprove this presumption.<sup>791</sup> An example of this would be postings on websites, news groups and bulletin boards.<sup>792</sup> A person would expect others to see a posting posted on a social media platform, as that is the purpose of posting the statement in question. Would publication be presumed regarding defamatory postings made on social media platforms? The deduction can be made that publication may be presumed, seeing that it adheres to the requirements.

Publication may now also take place through the use of technologies such as email and Internet websites.<sup>793</sup> This would therefore include social media platforms. The combination of the new technology and flawed human nature can lead to several

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786 Marx 2014 <http://www.litnet.co.za/Article/die-skending-van-die-reg-op-die-goeie-naam-en-die-reg-op-privaatheid-met-verwysing-na-sosi>.

787 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [7].

788 Erlank 2014 (1) *Juta Quarterly Review*.

789 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

790 Nel “Freedom of expression, anonymity and the internet” 251-273.

791 Nel “Freedom of expression, anonymity and the internet” 251-273.

792 Nel “Freedom of expression, anonymity and the internet” 251-273.

793 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

complicated scenarios. The most obvious is that of mistaken publication.<sup>794</sup> In the context of social media, the example can be imagined of a person who wanted to reply to a Facebook wall post with a private message, but accidentally replied on that person's wall, which included the defamatory comment of a third party. This third person sees the posting. What would happen? Would a *bona fide* mistake be excusable by the court?<sup>795</sup> This will depend on the surrounding circumstances, as the court has recognised mistake as a defence which negates wrongfulness if it can be proven that the mistake was a reasonable one.<sup>796</sup> The defendant would have to explain why the error occurred. For example, he may be an elderly person who is not very technically proficient.

With regards to defamatory statements made on social media platforms, the publication of defamatory material takes place at the place where and at the time when the material is observed (published) by the person observing the material.<sup>797</sup> The implication hereof is that publication does not take place where the server is located, except in instances where individuals have access to the material where the server is located.<sup>798</sup> It does not occur where the message is submitted either.<sup>799</sup> This was confirmed in *Tsichlas and Another v Touch Line Media* as well as in *Burchell v Anglin*.<sup>800</sup>

#### 4.5.2 Defamatory content

Defamatory content is the second component of the factual violation of a person's *fama*. The content of the published material must be defamatory.<sup>801</sup> This can be seen as the harm aspect of the personality interest.<sup>802</sup> The meaning of the material must first be

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794 Nel "Freedom of expression, anonymity and the internet" 251-273.

795 Nel "Freedom of expression, anonymity and the internet" 251-273.

796 Nel "Freedom of expression, anonymity and the internet" 251-273.

797 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

798 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

799 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

800 *Tsichlas and Another v Touch Line Media* 2004 (2) SA 112 (W); *Burchell v Anglin* 2010 (3) SA 48 (ECG).

801 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

802 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

established.<sup>803</sup> After the meaning has been established, it must then be established if the words, as they were meant, conveyed a defamatory imputation.<sup>804</sup>

As seen in the above chapter, words or conduct can have an ordinary (primary) meaning or a hidden (secondary) meaning.<sup>805</sup> The ordinary meaning of words or conduct is the natural meaning of the words, on face value.<sup>806</sup> This includes both expressed and implied meanings that the ordinary or reasonable reader, listener or viewer (the reasonable person) would understand in the context in which the publication has taken place.<sup>807</sup> The second or hidden meaning (innuendo) occurs when there are special circumstances known to both the communicator and the communicatee.<sup>808</sup> This has to do with the knowledge of special facts not known to others. In some instances the plaintiff will have to identify the persons that were aware of this hidden meaning.<sup>809</sup> However, the plaintiff does not have to prove that they understood the defamatory material, but only that they had the knowledge to potentially understand the defamatory material.<sup>810</sup> The court will determine if the words would in fact have been understood in the context of the background knowledge by the reasonable person.<sup>811</sup>

After the primary or secondary meaning/s of the material has been determined by the court, the court has to decide if this specific meaning is indeed of a defamatory nature.<sup>812</sup> The question that has to be asked to determine if this is the case is: would the

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803 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

804 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

805 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

806 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

807 These words do not always mean what they mean in a dictionary. For example, “bitch” may mean a female dog in one context, but when someone refers to a woman as a “bitch”, it has a derogatory meaning. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

808 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

809 South African law of delict also recognizes quasi-innuendo. This is not a proper innuendo in the sense that there is a second hidden meaning. Quasi-innuendo has to do with whether the meaning that the words bear has a more defamatory meaning in a particular context. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

810 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

811 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

812 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

words tend to lower the plaintiff in the estimation of right-thinking members of society generally?<sup>813</sup> It must be borne in mind that one has to consider the reaction of the person or class of persons who would receive the material in question.<sup>814</sup>

It is clear that the objective reasonable person test is of the utmost importance with regard to the question of defamatory content in cases of defamation.<sup>815</sup> This test should be viewed as a particular embodiment of the *boni mores*, or reasonableness standard.<sup>816</sup> The *boni mores* can be viewed as the standard used for comparison for wrongfulness.<sup>817</sup> According to Neethling, Potgieter and Visser,<sup>818</sup> principles have crystallised regarding the reasonable person test, as follows:

1. The reasonable person is the fictional, normal, well-balanced and right thinking person who is neither hypercritical nor oversensitive, but someone with normal emotional reactions.
2. The reasonable person is someone who subscribes to the norms and values of the Constitution that must inform all law. The constitutional principles must therefore be the basis upon which the values and views of reasonable members of the community must be determined.
3. The reasonable person is a member of society in general and not only of a certain group. The alleged defamation must thus have the effect of harming the plaintiff's good name in the eyes of all reasonable persons in society.
4. The reaction of the reasonable person is dependent on the circumstances of the particular case. The alleged defamation must therefore be interpreted in the context in which it is published.
5. Verbal abuse is in most cases not defamatory because it normally does not have the effect of injuring a person's good name.
6. Words (or behaviour) are *prima facie* or according to their primary meaning defamatory or non-defamatory. Words may, however, also have secondary meaning, which is an extraordinary meaning attached to them by a person with knowledge of special circumstances.<sup>819</sup>
7. If words have an ambiguous meaning - the one defamatory and the other not - then the meaning most favourable to the defendant must be followed.

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813 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

814 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

815 Neethling, Potgieter and Visser *Deliktereg* 327.

816 Neethling, Potgieter and Visser *Deliktereg* 328.

817 Neethling, Potgieter and Visser *Deliktereg* 328.

818 Neethling, Potgieter and Visser *Deliktereg* 328.

819 In this situation the plaintiff would have to prove that words which are on their face value not defamatory have a underlying defamatory meaning. The defendant on the other hand would seek to prove that *prima facie* defamatory words are actually non-defamatory. In both scenarios the party concerned must allege and further prove the circumstances on which the claim of innuendo is based. Both the *prima facie* meaning and the underlying meaning are ascertained objectively by means of the reasonable person test. See Neethling, Potgieter and Visser *Deliktereg* 328.

Once the plaintiff proves that the words or behaviour are indeed defamatory of nature according to the judgement of a reasonable person, this does not automatically prove that a wrongful act has been committed against the plaintiff specifically.<sup>820</sup> The plaintiff can initiate a defamation action only if the defamatory publication concerns the person, or refers to the person.<sup>821</sup> This would establish the causal link between the publication and the defamatory statement.<sup>822</sup> The reference to the plaintiff can be direct or by implication (indirect).<sup>823</sup> The plaintiff must explicitly state and prove that the defamation pertains to the claimant's good name specifically.<sup>824</sup> To determine this connection, the reasonable person test is used, meaning whether or not the defamatory publication can be linked to the plaintiff according to the judgement of a reasonable person.<sup>825</sup>

#### 4.5.3 Presumptions

With regards to defamation, there are two presumptions which occur regarding the publication of defamatory matter.<sup>826</sup> When the publication of defamatory matter takes place, it involves a violation of the plaintiff's reputational personality interest.<sup>827</sup> The onus rests on the plaintiff to prove that such a violation has occurred.<sup>828</sup> The plaintiff would usually also have to prove that wrongfulness and intention is present. This is not the

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820 Neethling, Potgieter and Visser *Deliktereg* 328.

821 Neethling, Potgieter and Visser *Deliktereg* 328.

822 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

823 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

824 Neethling, Potgieter and Visser *Deliktereg* 328.

825 It is important to consider the grounds of justification that exist regarding the element of wrongfulness. They will briefly be described here. The first is privilege or privileged occasion. This would be the situation where someone has a right, duty or interest to make specific defamatory assertions and the person or people to whom the assertions are published have a corresponding right, duty or interest to learn of such assertions. Privilege permits a person the legal right to injure another's good name and therefore sets aside the *prima facie* wrongfulness of his conduct. The second defence would be truth and public interest. The *prima facie* wrongfulness of the defendant's conduct will be void if the person can prove that his/her defamatory remarks were true as well as in the public's interest. The third defence is media privilege. This ground of justification concerns the reasonable publication of false or untrue statements by the media. Political privilege is the fourth defence. This defence is very similar to media privilege and involves the reasonable publication of (false or untrue) defamatory allegations on the political terrain. Lastly, the defence of fair comment can be used. Fair comment would be applicable when the *prima facie* wrongfulness of a defamatory publication forms part of a fair comment on facts that are true and in the public interest. See Neethling, Potgieter and Visser *Deliktereg* 329.

826 De Vos 2013 <http://constitutionallyspeaking.co.za/defamation-and-social-media-we-have-moved-on-from-jane-austen/>.

827 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

828 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

case with defamation, however.<sup>829</sup> When a plaintiff proves that there has been a violation of his or her *fama*, two rebuttable presumptions are made:<sup>830</sup> firstly, that the defendant's conduct is wrongful, and secondly, that the defendant acted intentionally.<sup>831</sup>

#### 4.5.4 Wrongfulness

If according to the reasonable person test the reputation of the person has been injured, the words or behaviour are defamatory to that person concerned and would therefore in principle (*prima facie*) be wrongful.<sup>832</sup> This is also applicable to defamatory postings on social media platforms.<sup>833</sup> This would be the case unless the defendant could prove otherwise.<sup>834</sup> In defamation, wrongfulness occurs when a person's right to his or her good name has been infringed.<sup>835</sup> It is irrelevant if the good name of the person involved has in fact (factually) been infringed.<sup>836</sup> The only pertinent question is if the reputation of the person concerned has been injured, according to the *boni mores*.<sup>837</sup> From the above it is clear that an objective approach is used to test if the reputation of the person concerned has been injured.<sup>838</sup> Courts would have to balance two conflicting rights, the plaintiff's right to reputation and the defendant's right to freedom of expression.<sup>839</sup> The facts regarding each case will determine the result of the normative enquiry into wrongfulness.<sup>840</sup>

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829 De Vos 2013 <http://constitutionallyspeaking.co.za/defamation-and-social-media-we-have-moved-on-from-jane-austen/>.

830 De Vos 2013 <http://constitutionallyspeaking.co.za/defamation-and-social-media-we-have-moved-on-from-jane-austen/>.

831 To rebut these presumptions, the defendant would have to prove on a balance of probabilities that the conduct was not wrongful. This can be done by showing that social policy favours the right to free expression, or that a recognized defence or ground of justification is present. Secondly, the defendant would have to prove that s/he had not been at fault, either because there was no direction of the will towards defaming the plaintiff, or because the plaintiff was not conscious of the wrongfulness of his or her conduct. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

832 Neethling, Potgieter and Visser *Deliktereg* 327.

833 Neethling 2014 *LitNet Akademies* 41.

834 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

835 Neethling, Potgieter and Visser *Deliktereg* 327.

836 Neethling, Potgieter and Visser *Deliktereg* 327.

837 Neethling 2014 *LitNet Akademies* 41.

838 Neethling, Potgieter and Visser *Deliktereg* 327.

839 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

840 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

#### 4.5.5 Fault

Fault describes the “intent” requirement. Fault can be subdivided into two categories, *Animus iniuriandi* and negligence. These two forms will now briefly be discussed.

##### 4.5.5.1 Animus iniuriandi

*Animus iniuriandi* is accepted as an essential requirement for defamation, with a few exceptions which will be investigated later.<sup>841</sup> It must be the intention to injure.<sup>842</sup> Negligence as a rule would be insufficient to render a wrongdoer liable.<sup>843</sup> As with wrongfulness, courts presume intention to be present once publication of defamatory matter (that refers to the plaintiff) has been proven.<sup>844</sup>

*Animus iniuriandi* can be seen as the intent to defame.<sup>845</sup> It has to do with the mental disposition of the wrongdoer to cause the relevant consequences, while also knowing that the consequences will be wrongful.<sup>846</sup> Without all of the elements present (to cause the relevant consequences and to know these consequences will be wrongful) there can be no intent with regards to defamation.<sup>847</sup> While it is required that the plaintiff expressly claim the existence of the intent to defame in the pleadings, there is no need to prove intent on the part of the defendant.<sup>848</sup> The reason is that when it is certain that the publication is indeed of a defamatory nature and that it also relates to the plaintiff, a presumption of wrongfulness is present as well as a presumption that the defamation was committed intentionally.<sup>849</sup> The burden of disproving this presumption is placed on the defendant.<sup>850</sup> Disproving the presumption will be done by producing evidence which shows that one or both of the essential elements of intent (to cause the relevant consequences and to know these consequences would be wrongful) are not present.<sup>851</sup>

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841 Neethling, Potgieter and Visser *Deliktereg* 334.

842 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

843 Neethling, Potgieter and Visser *Deliktereg* 335.

844 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

845 Neethling, Potgieter and Visser *Deliktereg* 335.

846 Neethling, Potgieter and Visser *Deliktereg* 335.

847 Neethling, Potgieter and Visser *Deliktereg* 335.

848 Neethling, Potgieter and Visser *Deliktereg* 335.

849 Neethling, Potgieter and Visser *Deliktereg* 335.

850 Neethling, Potgieter and Visser *Deliktereg* 335.

851 Neethling, Potgieter and Visser *Deliktereg* 335.

A ground excluding intent has to be present. The action can be either a mistake, or a jest.<sup>852</sup>

#### 4.5.5.2 Negligence

*Animus iniuriandi* is not a requirement where publication takes place by the mass media.<sup>853</sup> The development of the law of defamation over the years has now extended the fault requirement to that of negligence in certain circumstances.<sup>854</sup> Liability based upon negligence has been recognised for distributors and sellers of printed matter (for example newspapers and magazines) containing defamatory material.<sup>855</sup> In the second instance there are judgements relating to the liability of the press for defamation that recognise non-intentional but negligent mistakes as a ground for liability.<sup>856</sup>

In *National Media Ltd v Bogoshi* a third general principle was introduced.<sup>857</sup> From this decision it was determined that negligence is sufficient for defamation to be proved against the mass media.<sup>858</sup> This was confirmed by the court in the *Marais v Groenewald* case.<sup>859</sup> It was further held that the publication of defamatory content by the mass media raises the presumption of negligence.<sup>860</sup>

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852 With regard to a mistake, if the person is not aware of the wrongfulness of the defamatory publication in question because the person *bona fide* thinks or believes that his actions are lawful, consciousness of wrongfulness as well as intent are absent as result of the mistake. The person's mistake refutes the presumption of *animus iniuriandi* and therefore excludes intent. A jest, on the other hand, is where a defendant can prove that s/he published the defamatory words in the form of a jest. With a jest s/he has no intention to infringe the prejudiced person's right to a good name. This intention or will is an essential requirement of intent, and therefore intent would be absent, rebutting the presumption of *animus iniuriandi*. See Neethling, Potgieter and Visser *Deliktereg* 336.

853 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

854 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

855 The reason for this could be that most forms of printed media would first have to be read and edited before being printed, meaning that the writing has to go through an "approval" phase, making the persons in charge of this negligent. See Neethling, Potgieter and Visser *Deliktereg* 336.

856 Neethling, Potgieter and Visser *Deliktereg* 336.

857 There is a fair amount of controversy over which form of liability was introduced by *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA). Some commentators and courts suggest that the case introduced negligence liability, while others believe that liability is still based on intention, but the presumption of intention can be rebutted to escape liability, if it can be shown that the conduct was not negligent. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

858 Neethling, Potgieter and Visser *Deliktereg* 336.

859 *Marais v Groenewald* 2000 2 All SA 578 (T); Nel "Freedom of expression, anonymity and the internet" 251-273.

860 Nel "Freedom of expression, anonymity and the internet" 251-273.

This is a very important decision for the purposes of this dissertation. If social media platforms are regarded as mass media, this principle would also be applicable to defamatory statement made on social media platforms. It would first have to be ascertained if social media indeed fall under the definition of mass media. Mass media:

1. are a distinct set of activities (creating media content).
2. involve particular technological configurations (television, radio, vedetex, newspapers books).
3. are associated with formally constituted institutions or media outlets (systems stations, publications and so on).
4. operate according to certain laws, rules and understandings (professional codes and practices, audience and societal expectations and habits).
5. are produced by persons occupying certain roles (owners, regulators, producers, distributors, advertisers, audience members).
6. convey information, entertainment, images and symbols to a mass audience.<sup>861</sup>

From the above it can be seen that a defamatory statement made on a social media platform would not meet the requirements 3-5. Also the definition cannot be applied to all forms of content on the Internet, a fact which suggests that mass media seem to involve a certain forum of publication and continuity.<sup>862</sup> It is clear that online newspapers and magazines and other online news services would qualify as mass media for defamation purposes.<sup>863</sup> Nel<sup>864</sup> is of the opinion that:

Whether bulletin boards and newsgroups would be regarded as “mass media” would depend on the extent of editorial control over their content. Where no editorial control is exercised, the postings would probably not be regarded as “mass media”.

This was confirmed by Willis J. Although only in connection with an interdict, Willis J found that social media differ in class from the news media (which therefore includes mass media).<sup>865</sup> Consequently *animus iniuriandi* would currently be a requirement for defamatory statements made on social media platforms.

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861 Lorimer and Scannell *Mass Communications* 25.

862 Nel “Freedom of expression, anonymity and the internet” 251-273.

863 Nel “Freedom of expression, anonymity and the internet” 251-273.

864 Nel “Freedom of expression, anonymity and the internet” 251-273.

865 Marx 2014 <http://www.litnet.co.za/Article/die-skending-van-die-reg-op-die-goeie-naam-en-die-reg-op-privaatheid-met-verwysing-na-sosi>.

In the last case regarding negligence there is case law supporting the view that negligence should be a requirement in all instances of actionable defamation and not only in respect of the mass media.<sup>866</sup>

#### 4.5.6 Remedies available

It is important to take note of the remedies that are available to a person who has been a victim of a defamatory statement on a social media platform. It must also be noted that one act may in principle result in numerous (different or alternative) remedies.<sup>867</sup> Further, it is possible to be criminally charged for defamation, the requirements for proving which are much more arduous than in civil defamation.<sup>868</sup> This was confirmed in the *S v Hoho* case.<sup>869</sup> If an act gives rise to various claims, a situation which places a distinctive action at the plaintiff's disposal for each individual claim, different remedies would be applicable.<sup>870</sup> These remedies may be related (for example, only delictual actions) or unrelated (for example, delictual as well as contractual actions).<sup>871</sup> Alternative remedies could also be applicable where an act from which a claim arises offers a choice between different remedies (for example a choice between an action for pain and suffering and a contractual action).<sup>872</sup>

There are three remedies available to a plaintiff in regard to a defamatory posting on a social media platform, and they will now be discussed briefly.

##### 4.5.6.1 The interdict

The aim of the interdict is to prevent an impending wrongful act or prevent the continuation of a wrongful act that has already commenced.<sup>873</sup> This remedy is in contrast with most other delictual remedies, which are directed at compensation for

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866 Neethling, Potgieter and Visser *Deliktereg* 337.

867 These criminal activities include hate speech, incitement to violence, cyber bullying and defeating the ends of justice. See Erlank 2014 (1) *Juta Quarterly Review*.

868 Erlank 2014 (1) *Juta Quarterly Review*.

869 There is a possibility that both civil action and criminal prosecution can be initiated by a defamation claim. For the criminal prosecution, *crimen iniuria* will be used. However, this does not fall within the scope of this dissertation and is mentioned merely for interest's sake. See *S v Hoho* 2008 5 SA 493 (SCA).

870 Neethling, Potgieter and Visser *Deliktereg* 249.

871 Neethling, Potgieter and Visser *Deliktereg* 249.

872 Neethling, Potgieter and Visser *Deliktereg* 249.

873 Neethling, Potgieter and Visser *Deliktereg* 248.

patrimonial damage or the impairment of personality.<sup>874</sup> There are two forms of an interdict.

The first is called a prohibitory interdict, and as the name states, firstly prohibits the wrongdoer from committing a wrongful act, or secondly terminates the continuing the wrongful act that has already been commenced.<sup>875</sup> The second is called a mandatory interdict and requires positive conduct on the part of the wrongdoer to end the on-going wrongfulness of an act that has already been commenced.<sup>876</sup>

In a strict sense, an interdict does not qualify as a remedy in terms of any of the available actions, as when an interdict is sought, the main aim is to prevent loss, not to seek compensation.<sup>877</sup> All the elements of a delict need to be present, except for the loss requirement.<sup>878</sup> In more recent years some courts have also explored retraction and apology as a delictual remedy.<sup>879</sup> These “remedies” would be totally applicable regarding defamatory statements on social media platforms.

Consequently, the main goal of both interdicts is preventing a person from acting wrongfully.<sup>880</sup> Because an interdict does not have any relevance in respect of retribution for a wrong already committed, fault (according to common law and case law) is not a requirement for the granting of an interdict.<sup>881</sup> There are three requirements that must be adhered to, however:<sup>882</sup>

1. There must be an act by the respondent.
2. The act must be wrongful.
3. No other remedy must be available to the applicant.

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874 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

875 Neethling, Potgieter and Visser *Deliktereg* 248.

876 Neethling, Potgieter and Visser *Deliktereg* 248.

877 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

878 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

879 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

880 Neethling, Potgieter and Visser *Deliktereg* 248.

881 Neethling, Potgieter and Visser *Deliktereg* 248.

882 Neethling, Potgieter and Visser *Deliktereg* 248.

It is clear from this that both forms of an interdict would find application for a defamatory statement posted on a social media platform. If a posting cannot be justified, an interdict is a remedy to remove postings made on social media platforms to prevent the continuing wrongful conduct.<sup>883</sup>

Firstly, a prohibitory interdict could be granted to prohibit the further continuation of posting defamatory statements on social media platforms, as in *Heroldt v Wills*, which will be discussed later.<sup>884</sup> Secondly, a mandatory interdict could be granted to terminate the continuing of posting defamatory statements on social media platforms, and/or to remove the postings already made on these platforms. This was also the case in *Heroldt v Wills*.<sup>885</sup>

#### 4.5.6.2 Delictual actions

As seen from the history regarding the development of the law of delict in South Africa, in Roman law there were a variety of separate civil wrongs.<sup>886</sup> Each of these civil wrongs had its own rules.<sup>887</sup> Over time, most of these became subsumed under the *actio legis Aquiliae* and the *actio iniuriarum*.<sup>888</sup> This is why McKeron makes the following statement regarding these two actions:<sup>889</sup>

The result is that today the Aquilian action and the *actio iniuriarum* are the foundation-stones of the law of delict – the former having become the general remedy for wrongs to interests of sustenance, the latter, as in the old law, affording a general remedy for wrongs to interests of personality.

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883 Neethling 2014 *LitNet Akademies* 41.

884 *Heroldt v Wills* 2013 2 SA 530 (GSJ); O'Reilly *De Rebus* 14.

885 *Heroldt v Wills* 2013 2 SA 530 (GSJ); O'Reilly *De Rebus* 14.

886 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

887 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

888 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

889 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

The statement fails to make mention of the third pillar supporting delictual claims, the action for pain and suffering.<sup>890</sup> Some authors further argue that the *Constitution* should be regarded as a fourth pillar for the law of delict.<sup>891</sup>

It is possible that all the delictual actions described above can concur in certain circumstances.<sup>892</sup> For the purposes of this dissertation we will not be focusing on the action for pain and suffering, seeing that it would not find application with regards to defamatory statements posted on social media platforms.

The remaining two actions applicable, the *actio iniuriarum* and the *actio legis Aquiliae*, do concur in certain circumstances.<sup>893</sup> This would be the case where an *iniuria* also causes patrimonial damages.<sup>894</sup> An example would be of a professional person losing patients or clients due to defamation.<sup>895</sup> The scenario of the ballet teacher would be sufficient illustration, seeing that it is possible for the person to suffer patrimonial damages. For this reason, a defamatory statement on a social media platform could result in both an *actio iniuriarum* and/or an *actio legis Aquiliae*. In such a case the plaintiff would instate the *actio iniuriarum* for satisfaction and the Aquilian action for patrimonial damages.<sup>896</sup> In this instance the plaintiff must clearly set out the facts in his pleadings that are required for each action.<sup>897</sup>

To summarise, the general requirements for liability for the *actio legis Aquiliae* and the *actio iniuriarum* are the following:<sup>898</sup>

*Actio legis Aquiliae:*

1. Harm or loss in the form of patrimonial loss, which includes physical damage to person or property and also includes purely economic loss.

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890 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

891 Due to the technical detail that encumbers this subject it will not be discussed any further, as it does not fall within the scope of this study. See Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

892 Neethling, Potgieter and Visser *Deliktereg* 248.

893 Neethling 2014 *LitNet Akademies* 41.

894 Neethling, Potgieter and Visser *Deliktereg* 248.

895 Neethling, Potgieter and Visser *Deliktereg* 249.

896 Neethling, Potgieter and Visser *Deliktereg* 249.

897 Neethling, Potgieter and Visser *Deliktereg* 249.

898 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

2. Conduct could be either in the form of a positive act, an omission or a statement.
3. There must be factual causation in the sense that the conduct must have been a *conditio sine qua non* of the loss, and with regards to legal causation the link must not be too tenuous.
4. Blameworthiness in the form of *dolus* (intention) or *culpa* (negligence) would be a requisite for the requirement of fault.
5. Wrongfulness in the form of conduct that is objectively unreasonable or without reasonable justification.

The *actio iniuriarum*:

1. Harm or loss in the form of a violation of a personality interest that is usually classified under the headings of *corpus* (bodily integrity), *dignitas* (dignity) and *fama* (reputation).
2. Mostly statements or positive conduct, rarely an omission.
3. Causation is usually not a problematic aspect, except in certain circumstances, such as deprivation of liberty cases.
4. Wrongfulness in the form of conduct that is objectively unreasonable or without reasonable justification.
5. Fault in the form of intention

Ordinary delictual principles can successfully be applied to protect against actionable infringements of the personality on social media platforms.<sup>899</sup>

#### 4.5.7 *Miscellaneous aspects*

There are various aspects that are not directly applicable to defamation on social media platforms, but which are important to take note of. A few of these aspects will shortly be discussed.

##### 4.5.7.1 Jurisdiction

Since the focus of this study is primarily relationships between individuals in South Africa, international jurisdiction (which can be problematic, as already said) will not be

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<sup>899</sup> Neethling 2014 *LitNet Akademies* 41.

investigated.<sup>900</sup> It is still important, however, to determine when a court would have jurisdiction to determine the legal consequences of defamatory material published in other jurisdictions within South Africa.<sup>901</sup> To determine where the “act” of defamation took place, one would have to investigate where publication took place, seeing as this is the “act” element of defamation.

The general rule is that publication takes place where the defamatory statement in question is seen, read or heard, (by a third person) and completed when the receiver hereof understands the meaning of the statement.<sup>902</sup> As already stated, publication in an online situation would occur at the place where and at the time where the material is observed (published) by the person observing the material.<sup>903</sup> The implication hereof is that publication does not take place where the server is located, except in instances where individuals have access to the material where the server is located.<sup>904</sup> It does not occur where the message is submitted either. Where publication takes place, the specified court would have jurisdiction.

In an instance where the parties are situated within different divisions of the High Court, the *Tsichlas v Touch Line Media (Pty) Ltd* decision can be used as a guideline regarding jurisdiction.<sup>905</sup> The issue of jurisdiction was decided firstly on the publication of the defamatory material (when a third party downloaded it), which took place in the court’s jurisdiction.<sup>906</sup> The second issue was that the plaintiff had a place of business within that particular court’s jurisdiction.<sup>907</sup> On these grounds the court had jurisdiction to decide the matter.<sup>908</sup>

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900 Roos 2012 *The South African Law Journal* 382.

901 Nel “Freedom of expression, anonymity and the internet” 251-273.

902 Nel “Freedom of expression, anonymity and the internet” 251-273.

903 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

904 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

905 *Tsichlas v Touch Line Media (Pty) Ltd* 2004 (2) SA 112 (W); Nel “Freedom of expression, anonymity and the internet” 251-273.

906 Nel “Freedom of expression, anonymity and the internet” 251-273.

907 Nel “Freedom of expression, anonymity and the internet” 251-273.

908 The single publication rule of the USA (and now England) provides protection against liability arising from the publication of a defamatory statement in different locations. This rule does not allow multiple defamation suits to arise from a single defamatory statement that is published several times. The plaintiff would, however, be able to recover all the damages that s/he incurs as a result of the multiple publications, although the publication occurred only once. See Nel “Freedom of expression, anonymity and the internet” 251-273.

#### 4.5.7.2 Vicarious liability

Authors of defamatory statements, posts or messages are not the only individuals that can be held liable for the defamatory affects thereof.<sup>909</sup> Employers of employees can be held vicariously liable for delicts committed by their employees in the course and scope of their employment.<sup>910</sup> There are three aspects that have to be proved, however, namely:

1. The employee is in fact liable for the delict,
2. An employer-employee relationship existed at the time that the delict was committed, or
3. The delict was committed by the employee in the course and scope of his employment.<sup>911</sup>

The liability of the employer is therefore totally dependent on the surrounding circumstances.<sup>912</sup> One of the most important factors to keep in mind is whether the defamatory message, comment or post was sufficiently connected to the employer's business or whether the employee was on a romp of his own accord.<sup>913</sup>

Although no case law regarding this situation has surfaced to date, there has been one prominent case in England regarding vicarious liability. In the case of *Otomewo v Carphone Warehouse Ltd* two employees of Carphone Warehouse posted a status update on the plaintiff (without his permission or knowledge).<sup>914</sup> The specific status update read as follows: "Finally came out of the closet. I am gay and proud of it". This

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909 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

910 Loubser and Midgley (eds) *The Law of Delict In South Africa* (Oxford University Press Cape Town 2012).

911 Nel "Freedom of expression, anonymity and the internet" 251-273.

912 Nel "Freedom of expression, anonymity and the internet" 251-273.

913 It must be noted that defamatory postings on social media platforms can have devastating effects on labour law matters. This is already apparent in the numerous cases that have appeared before the CCMA in the past few years. Mostly these cases revolve around employees that make defamatory statements on social media platforms regarding their employers, as in *Media Workers Association of SA on behalf of Mvemve and Kathorus Community Radio* 2010 31ILJ 2217 (CCMA). These plaintiffs then go to the CCMA and claim that they have been unfairly dismissed by the employer. The CCMA tends to rule in favour of the defendants on the grounds that the employee has tarnished the image of the employer, and therefore no employee/employer relationship can further exist. This is a very interesting field, but unfortunately it does not fall within the scope of this study. See Nel "Freedom of expression, anonymity and the internet" 251-273.

914 *Otomewo v The Carphone Warehouse Ltd* (2012) 724 (EqLR); McGoldrick 2013 *Human Rights Law Review* 139.

was posted in the course of employment.<sup>915</sup> The actions also took place during working hours and involved dealings between staff and a manager.<sup>916</sup> In this case the employer was found vicariously liable for the conduct of its employees, which amounted to harassment on the grounds of sexual orientation.<sup>917</sup> The likelihood of South Africa following the same approach is great.

#### 4.5.7.3 Internet service providers

There are two important issues to take note of regarding Internet service providers in South Africa. They are briefly discussed below.

As already established, not only the author of defamatory material is liable but all participants in the publication process.<sup>918</sup> The ISP's liability is dependent on the function and role it plays in the publication process.<sup>919</sup> A distinction can be made between three categories, based on their respective functions.<sup>920</sup> These are:

1. Information controllers<sup>921</sup>
2. Information distributors<sup>922</sup>
3. Information carriers<sup>923</sup>

The *Electronic Communications and Transactions Act 25 of 2002* is the primary piece of legislation that regulates the liability of ISP's regarding defamation in South Africa.<sup>924</sup> This Act was greatly influenced by similar directives in the European Union.<sup>925</sup> The provisions in the ECTA protect ISP's in the sense that they limit their liability in certain

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915 McGoldrick 2013 *Human Rights Law Review* 139.

916 McGoldrick 2013 *Human Rights Law Review* 139.

917 McGoldrick 2013 *Human Rights Law Review* 139.

918 Nel "Freedom of expression, anonymity and the internet" 251-273.

919 Nel "Freedom of expression, anonymity and the internet" 251-273.

920 Nel "Freedom of expression, anonymity and the internet" 251-273.

921 In cases where a form of editorial control is normally exercised. Examples would be authors, editors and publishers. See Nel "Freedom of expression, anonymity and the internet" 251-273.

922 These can be seen as distributors that are linked to the distribution process of information. Examples would be hosts, and network and service providers. See Nel "Freedom of expression, anonymity and the internet" 251-273.

923 These are general carriers that merely serve as conduits in the transmission and routing process. Examples would be access providers and even hosts in certain circumstances. See Nel "Freedom of expression, anonymity and the internet" 251-273.

924 ECTA.

925 Nel "Freedom of expression, anonymity and the internet" 251-273.

circumstances.<sup>926</sup> This protection is granted only to ISP's that are members of the industry representative body, which adheres to a code of conduct and furthermore is capable of monitoring and enforcing such a code effectively.<sup>927</sup> ISP's which adhere to all the requirements will be granted immunity.<sup>928</sup> A competent court may, however, order an ISP to stop or prevent unlawful activity in terms of any other law.<sup>929</sup> This includes the granting of an interdict against the said service provider.<sup>930</sup>

As defamatory statements on social media platforms can easily be made with a certain amount of anonymity, this is an important matter for discussion. As stated in Chapter 1, this anonymity is mostly falsely assumed. ISP's are able to confirm the true identity of a person using his or her IP. The question is, is there an obligation on these ISP's to divulge this information?

As should be clear by now, freedom of speech is a constitutionally protected right.<sup>931</sup> Anonymous speech also enjoys coverage from this protection.<sup>932</sup> False and or defamatory speech, however, is not protected by this right, even if it is uttered anonymously.<sup>933</sup> To institute an action for online defamation it is necessary to determine the identity of the anonymous poster of the alleged defamatory statements.<sup>934</sup> There are two options available when seeking the disclosure of the anonymous poster.<sup>935</sup>

Firstly, the identity of the anonymous poster may be disclosed voluntarily by the ISP.<sup>936</sup> This is not a viable option seeing that the right to privacy is a fundamental human right that is protected by the *Constitution*.<sup>937</sup> An ISP cannot disclose the true identity of an individual who uses an alias only because another person alleges that the person has

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926 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

927 Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

928 The following categories will be granted immunity according the ECTA: mere conduct, caching, hosting and linking. See Nel "Freedom of expression, anonymity and the internet" 251-273; Moorcroft 2011 <http://www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-Internet>.

929 Nel "Freedom of expression, anonymity and the internet" 251-273.

930 Nel "Freedom of expression, anonymity and the internet" 251-273.

931 Nel "Freedom of expression, anonymity and the internet" 251-273.

932 Nel "Freedom of expression, anonymity and the internet" 251-273.

933 Nel "Freedom of expression, anonymity and the internet" 251-273.

933 Nel "Freedom of expression, anonymity and the internet" 251-273.

934 Nel "Freedom of expression, anonymity and the internet" 251-273.

935 Nel "Freedom of expression, anonymity and the internet" 251-273.

936 Nel "Freedom of expression, anonymity and the internet" 251-273.

937 Nel "Freedom of expression, anonymity and the internet" 251-273.

made defamatory comments and therefore requires the person's true identity.<sup>938</sup> Most ISP's privacy policies clearly state that the privacy of a subscriber is protected, except where the ISP is faced with legal proceedings or a court order or a subpoena.<sup>939</sup>

The second option would be to compel an ISP to disclose the identity of the anonymous poster.<sup>940</sup> This is currently not a practical option, as Chapter XI of the ECTA grants immunity to ISP's provided that all conditions are adhered to.<sup>941</sup> The ideal solution would be to pursue the anonymous poster, and not the ISP.<sup>942</sup> The problem in this instance is how this person's identity would be established.<sup>943</sup> Litigation to obtain the identity of an anonymous poster of an alleged defamatory post or message on the Internet is a relatively new field of law, on a global scale.<sup>944</sup> Pre-trial discovery procedures seem to be the only solution to the problem at hand.<sup>945</sup>

## **4.6 Scenario**

### **4.6.1 Introduction**

As with both previous chapters, a scenario will now be used to see if a defamatory statement on a social media platform will adhere to the requirements set out by the law of defamation. For a defamation action to be instituted, all five requirements must be met. The basic requirements of a delict must always be kept in mind (for example, causation) as this is still indirectly a requirement of defamation, and defamation still falls under the principles of a delict. It must further be noted that different authors list different elements of defamation. For example, Neethling, Potgieter and Visser do not expressly require identification (that the defamatory statement is shown to refer to the

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938 Nel "Freedom of expression, anonymity and the internet" 251-273.

939 Nel "Freedom of expression, anonymity and the internet" 251-273.

940 Nel "Freedom of expression, anonymity and the internet" 251-273.

941 Nel "Freedom of expression, anonymity and the internet" 251-273.

942 Nel "Freedom of expression, anonymity and the internet" 251-273.

943 Nel "Freedom of expression, anonymity and the internet" 251-273.

944 Nel "Freedom of expression, anonymity and the internet" 251-273.

945 Pre-trial discovery in South Africa is currently problematic, at best. Rule 35 of the Uniform Rules of Court does not allow discovery before an action has been commenced. According to Nel there is a need for a procedure to obtain information before the commencement of an action. The *Promotion of Access to Information Act 2 of 2000* would possibly be able to assist in obtaining information before the commencement of an action. See Nel "Freedom of expression, anonymity and the internet" 251-273.

specific person) as an element on its own. Instead, it is included in the requirement of publication.

The previous scenario will be used yet again: fictitious person X posts the following as his Facebook/Twitter status update:

“Fictitious person Y likes his girls a tad young...”

#### 4.6.2 *Publication*

Publication (as in England and the USA) to at least a third party has to take place to adhere to this requirement. In this scenario the three people involved will be the following: 1) the person communicating the defamatory statement (fictitious person X, the person making the statement/poster), 2) the person being defamed (fictitious person Y), and 3) a third person to hear, see, or read the defamatory statement (a friend/follower of fictitious person X).

From the above it is clear that a defamatory statement made on a social media platform will indeed satisfy the sub-qualification of the three people. The third person is required to hear, see or read the defamatory statement. When a statement is posted on a social media platform, a third person will read the defamatory statement. Because the focus of this dissertation is on the individual making the defamatory statement, republishing (repeating the defamatory statement, for example re-Tweeting the statement) will not be examined.

The third person/s must also understand and appreciate the meaning of the statement, before publication is deemed to be complete. In this scenario one would expect a reasonable person to understand the underlying meaning of the words, implying that fictitious person Y has relations with underage girls. Fictitious person Y would further have to prove that fictitious person X is indeed responsible for the publication. In the scenario fictitious person X should have been aware that a third party would see the defamatory statement. The result should also have been reasonably foreseeable by fictitious person X.

The plaintiff must also prove that the defamatory posting on a social media platform indeed refers to him - that he is the person being defamed. This would establish the causal link between the publication and the defamatory statement. Fictitious person Y would also have to prove that the defamatory statement that was published was of and concerning him. If any person is able to identify him as the subject of the defamatory statement, this requirement will be met. In this scenario identification will easily take place, as the person's name was used. However, because the statement was made on a social media platform it brings other challenges to the table. Because social media platforms have the ability to reach a very large audience, fictitious person Y will have to prove that he is *the* particular fictitious person Y referred to in the statement. Identification of fictitious person Y will be entirely possible, depending upon the circumstances. In the case of a social media platform, things to consider will include how many friends the parties share and how many mutual connections, the number of followers the parties have and how famous they are, amongst other things.

Therefore making a defamatory statement on a social media platform clearly satisfies the requirement of publication for a defamation action. One can go further and presume publication, as fictitious person Y should have been aware that it would be probable that other people would read the statement. A posting on a social media platform can be deemed a publication.

#### 4.6.3 *Defamatory content*

The second requirement, defamatory content, is also shared by the USA and England. The burden rests on fictitious person Y to prove that the statement made on the social media platform is indeed defamatory. The meaning of the material must first be established. Thereafter it must be established if the words, as they were meant, conveyed a defamatory imputation.

The specific statement implies that fictitious person Y likes underage girls. It could even characterise him as a paedophile or as having paedophilic tendencies, depending on the context as a whole. A reasonable person would easily be able to deduce the implied meaning. This is in conflict with the *boni mores*, and would therefore certainly be seen

as defamatory. This requirement can therefore also be easily met, depending of the context and circumstances of the individual's situation.

Depending on the circumstances, the defamatory content could also cause monetary loss, in addition to the infringement of personality. Once again, fictitious person Y would be able to claim damages with the *Actio iniuriarum* if he was for example a ballet teacher with a lot of underage female students in his clientele, as the comment might result in his losing income if parents stopped sending their daughters to his ballet school on account of the defamatory statement.

Defamatory content is certainly present in this scenario.

#### 4.6.4 *Wrongfulness*

Wrongfulness is one of the presumptions that are present when the publication of defamatory content regarding the plaintiff has been proven. The onus will therefore rest on fictitious person X to prove that the posting is not wrongful. Fictitious person X would have to prove that the violation of fictitious person Y's reputational interest did not occur. If according to the reasonable person test the reputation of the person has been injured, the words or behaviour are defamatory to the person concerned and would therefore in principle (*prima facie*) be wrongful. In defamation, wrongfulness occurs when a person's right to his or her good name has been infringed. This would be calculated by using the *boni mores*.

In the scenario it is clear that the fictitious person X's statement would indeed be against the *boni mores*, and therefore be wrongful. Fictitious person X would further not be able to rebut the wrongfulness of this statement. The wrongfulness requirement is therefore met.

#### 4.6.5 *Fault*

Fault has to do with the requirement of "intent". Fault can be subdivided into two categories, *Animus iniuriandi* and negligence. As previously stated, the current position

in South Africa is that social media do not qualify as mass media, so only intent (*animus iniuriandi*) would currently be applicable.

The requirement of intent is one of the two presumptions that are present when the publication of defamatory content regarding the plaintiff has been proven. Fictitious person X would have to prove that he had no intention to injure/defame with regards to the defamatory statement. Fictitious person X would have further to prove that he did not have the mental disposition to cause the relevant wrongful consequences. This is highly dubious.

In this scenario it would seem that the requirement of fault has indeed been met. As with all of the above, the finding it will be dependent on the surrounding circumstances.

#### 4.6.6 *Concluding remarks*

It is clear that a defamatory statement made on a social media platform could most definitely satisfy the requirements for a defamation claim. As previously stated, whether or not the plaintiff will be successful in satisfying each individual requirement will ultimately depend on the surrounding circumstances of the specific case.

To substantiate the above analysis, two cases will now be briefly discussed.

### 4.7 *Case study*

#### 4.7.1 *Introduction*

These cases will demonstrate the relevance and importance of defamatory statements on social media platforms and also serve to indicate the versatility of the delictual remedies available, as one case will pertain to an interdict and the other to damages.

#### 4.7.2 *Heroldt v Wills*

One of the most prominent cases regarding defamatory statements on social media platforms is that of *Heroldt v Wills*, which was decided in the South Gauteng High

Court.<sup>946</sup> This decision's fundamentals were laid in the *Dutch Reformed Church v Rayan Sooknunan* case, which was decided in 2012.<sup>947</sup>

The applicant in this matter (Heroldt) pleaded for an order against the respondent (Wills) to restrain the respondent from posting any information pertaining to the applicant on any form of social media. If the respondent failed to do so, she was to be placed under arrest for non-compliance for a period of 30 day or a period as determined by the court. The respondent was to remove the postings so posted by her for all social media sites. If the respondent alternatively neglected or refused to remove such postings from any form of social media site upon which it might have been posted, the Sheriff of Randburg was to be ordered and authorised to remove the postings so listed by the respondent. Lastly, costs were to be awarded for the application.<sup>948</sup>

The respondent was the writer of the posting that was made on Facebook that led to the litigation. This posting was titled "Letter to WH – for public consumption", and was posted on the respondent's "wall". It read as follows:

I wonder too what happened to the person who I counted as a best friend for 15 years, and how this behaviour is justified. Remember I see the broken hearted faces of your girls every day. Should we blame the alcohol, the drugs, the church, or are they more reasons to not have to take responsibility for the consequences of your own behaviour? But mostly I wonder whether, when you look in the mirror in your drunken testosterone haze, do you still see a man?<sup>949</sup>

Although it was common knowledge that the applicant did indeed enjoy social gatherings which included the consumption of alcohol, this posting contained numerous defamatory allegations.<sup>950</sup> The crux therein lay in that the statement portrayed Heroldt as a father that did not financially support his family, a father that would rather go out drinking than care for his family.<sup>951</sup> It further insinuated that Heroldt had a problem with drug and alcohol abuse.<sup>952</sup>

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946 *Heroldt v Wills* 2013 2 SA 530 (GSJ).

947 *Dutch Reformed Church v Rayan Sooknunan* 2012 6 SA 201 (GSJ).

948 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [1]; Jacobson 2013 <http://webtechlaw.com/posts/johannesburg-high-court-rules-on-facebook-defamation.html>.

949 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [2].

950 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [2].

951 Neethling 2014 *LitNet Akademies* 45.

952 Neethling 2014 *LitNet Akademies* 45.

The respondent had declined to remove the said posting, despite having been requested to do so by the applicant, acting through his attorney. The applicant then sought legal help from the court. The right to freedom of expression and the right to privacy (narrowly linked to human dignity) had to be weighed against each other. Willis J duly noted that social media have created tensions for these rights in ways that could not have been foreseen.<sup>953</sup> As is the custom in South-Africa, each case before the court is judged on its specific merit. In *Heroldt v Wills* Willis J found that the right to privacy outweighed the right to the freedom of expression. The posting was found to be defamatory and unlawful.<sup>954</sup> Furthermore, he was satisfied that the requirements for an interdict had been met.<sup>955</sup> The court ordered the respondent to remove the defamatory statements which referred to the respondent from all social media platforms, as well as to make payment of the applicant's costs.<sup>956</sup>

This case proves that there are indeed legal implications regarding the defamatory statements made on social media platforms. One could even ask (as has recently been done) if defamatory statements made by members of parliament on social media would be protected by parliamentary privilege?<sup>957</sup>

#### 4.7.3 *Isparta v Richter*

Both of the most prominent cases regarding defamation on social media platforms, *Dutch Reformed Church v Rayan Sooknunan* and *Heroldt v Wills*, revolved around interdicts.<sup>958</sup> In *Isparta v Richter and Another* Hiemstra J extended the protection of a good reputation by awarding damages due to the making of a defamatory statement on Facebook.<sup>959</sup>

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953 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [7-8].

954 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [47]; Jacobson 2013 <http://webtechlaw.com/posts/johannesburg-high-court-rules-on-facebook-defamation.html>.

955 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [47].

956 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [47]; Jacobson 2013 <http://webtechlaw.com/posts/johannesburg-high-court-rules-on-facebook-defamation.html>.

957 Sapa 2013 <http://www.timeslive.co.za/politics/2013/03/24/politicians-tweet-at-own-peril>.

958 Neethling 2014 *LitNet Akademies* 49.

959 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [41]; Neethling 2014 *LitNet Akademies* 49.

Recent developments in South Africa have proven that association regarding social media postings will be deemed sufficient for legal liability.<sup>960</sup> Scandalous postings by a woman and her husband about her husband's ex-wife led to a successful damage claim against the parties.<sup>961</sup>

The first defendant, who was married to the plaintiff's ex-husband (the second defendant), made defamatory comments about the plaintiff on Facebook.<sup>962</sup> The defamatory statements were posted on the first defendant's Facebook wall.<sup>963</sup> The second defendant was tagged in most of the defamatory statements.<sup>964</sup> These postings were viewable by all of the first defendant's friends, as well as by the plaintiff's friends.<sup>965</sup> The nature of the defamatory content was that the plaintiff had sexual deviations and that she allowed and encourages paedophilic activities.<sup>966</sup>

Although the second defendant was not the author of the postings, he was tagged in them.<sup>967</sup> He therefore knew about the postings and allowed his name to be associated with the name of his new wife (the author).<sup>968</sup> For this reason Hiemstra J was of the opinion that the husband was just as liable as the first defendant.<sup>969</sup>

The plaintiff's claim was granted.<sup>970</sup> As with both the *Dutch Reformed Church v Rayan Sooknunan* and *Heroldt v Wills* the general principles of the law of defamation were applied to the Facebook publication.<sup>971</sup> Hiemstra J concluded that (as generally required) the allegations concerned the plaintiff by using the reasonable reader test.<sup>972</sup> He further determined that some of the offending allegation was defamatory in nature towards the plaintiff, which injured her reputation.<sup>973</sup>

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960 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [41]; Homann 2013 *European Property Law Journal* 179-182.

961 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [41]; Legalbrief 2013 <http://www.legalbrief.co.za/article.php?story=20130911094536417>.

962 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [10-11]; Neethling 2014 *LitNet Akademies* 49.

963 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [10-11]; Neethling 2014 *LitNet Akademies* 49.

964 Neethling 2014 *LitNet Akademies* 49.

965 Neethling 2014 *LitNet Akademies* 49.

966 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [33]; Neethling 2014 *LitNet Akademies* 49.

967 Homann 2013 *European Property Law Journal* 179-182.

968 Venter 2013 <http://www.security.co.za/fullStory.asp?NewsId=25597>.

969 Legalbrief 2013 <http://www.legalbrief.co.za/article.php?story=20130911094536417>.

970 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [41]; Neethling 2014 *LitNet Akademies* 49.

971 Neethling 2014 *LitNet Akademies* 49.

972 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [21]; Neethling 2014 *LitNet Akademies* 49.

973 Neethling 2014 *LitNet Akademies* 49.

In determining the damages for satisfaction, Hiemstra J fittingly stated that an apology or the removal of the postings would have made a significant difference towards mitigating the plaintiff's damages, seeing that the defendants had refused to do so.<sup>974</sup> Hiemstra J therefore granted in favour of the plaintiff an amount of R40 000.

## **5 Conclusion and recommendations**

From Chapter 1 it is clear that the exponential growth of technology is having an imposing effect on all facets of our day-to-day life. With this increase in the pace of development, the way people communicate with one another is rapidly changing. Statistics clearly indicate that Internet use in developing countries is growing at an staggering rate. This is due to technology's becoming smaller and more affordable for the average person, even in third-world countries. The statement by the United Nations calling upon all member states to facilitate Internet usage so as to improve each person's right to freedom of speech is likely to further increase Internet usage, and therefore the utilization of social media platforms. In conjunction with the drastically increasing number of individuals who access the Internet through mobile phones, this will undoubtedly have a significant impact on communication and publication via social media. This escalation will most certainly result in an upsurge as regards conflicts and hostile encounters on social media platforms. It is important to note in this regard the fact that most individuals who utilize social media platforms are not even aware that their actions (via publication on these platforms) may have serious legal implications. Thus, the law has to adapt to these changes so as to ensure that justice prevails in all circumstances, and the general public should be made aware of the possible liability clinging to actions perpetrated on social media platforms.

The concept of social media is of a diverse nature. Chapter 2 investigated the technical characteristics surrounding social media. A brief overview of technical aspects as regards the Internet and Internet access was presented. The characteristics of social media platforms were analysed, and it was concluded that all forms of social media share certain aspects. Further, the key differences between social media and traditional media were examined, and the vast differences between and innate to these forms of

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974 *Isparta v Richter and Another* 2013 12 SA 243 (GNP) [41]; Neethling 2014 *LitNet Akademies* 49.

media were foregrounded. Thereafter it was established that there are various forms of social media, each unique in its own way, but nonetheless sharing common characteristics.

Chapter 3 attempted to provide the reader with an analysis of the law of defamation in other jurisdictions. As regards the USA legal framework, it was concluded that defamation is divided into two sub-categories, libel and slander. It was also established that a defamatory statement on a social media platform would fit the requirements of libel. Courts in the USA view libel as a First Amendment issue, which resembles the situation in South Africa. Rules and regulations regarding libel are required to keep within the confines of the First Amendment. Therefore a balance should be kept between the rights of free speech as opposed to the protection of an individual's or corporation's reputation, which is once again similar to South Africa's approach concerning the right to free speech versus the right to human dignity. Although the USA has no legislation that specifically deals with libel on social media platforms, the anti-SLAPP statutes, the SPEECH Act, and the so-called "veggie" libel laws have indicated that the USA is well aware of the implications social media can have in the legal sphere. It was concluded that to succeed with a libel action in the USA, the plaintiff would have to prove all five elements of libel. These elements were isolated in a fictitious scenario, and it was concluded that it would undoubtedly be possible to institute a libel claim on the grounds of a defamatory statement made on a social media platform in the USA. This was confirmed by the short case analysis of *Holmes v Love*.

England's approach as regards defamatory statements on social media platforms followed the above analysis. In England defamation falls under the law of tort, a development for compensation for damages suffered and/or reputational damages. As with the USA, England also makes the distinction between libel and slander. On account of the limited scope of this dissertation, libel was the primary area of focus. It was determined that England has only three requirements that must be met to initiate a libel action. These requirements required a more comprehensive overview. It was noted in addition that England's law concerning defamation (previously) strongly favoured the plaintiff. For this reason England (London specifically) was known as "the libel capital of the world", as plaintiffs from across the globe initiated their claims in England (libel tourism). This was one of the reasons for the enactment of the SPEECH Act. As

opposed to both South Africa and the USA, England has specific legislation dealing with defamation. England has introduced the *Defamation Act 2013*, which was set in operation on 1 January 2014. This piece of legislation was introduced to curb the problem described above, as well as to address several other problems which the previous legislation had failed to regulate. These problems arose on account of advancements on the technological front, amongst other reasons. Many of these changes will have a dramatic effect on how defamation published in social media is governed, in particular the change to the single publication rule as well as jurisdiction as regards secondary publishers and website operators.

By instituting this Act, England indirectly acknowledged that new technological advancements (including the advent of social media) had forced them to amend their legislation to accommodate the current state of affairs. The *Defamation Act* also attempts to equalize the previous imbalance between the plaintiff and the defendant, as well as to simplify and increase the approachability of the law of defamation. Once again the scenario was used to establish if a defamatory statement on a social media platform would indeed adhere to the requirements regarding defamation in England. It was found that it would indeed satisfy these requirements. This was confirmed by the case analysis of *McAlpine v Bercow* that followed.

Chapter 4 touched upon how defamatory statements on social media platforms are regulated in South Africa. A bit of background on history and development was provided in order to clearly establish where the law of defamation fits in, in relation to the law in South Africa as a whole. As the law of defamation falls under the law of delict, each of the five elements of a delict was shortly examined. It was also stated that the law of delict in South Africa follows the generalising approach. Constitutional considerations were elaborated upon next, whereafter it was concluded that each individual within South Africa has the right to freedom of expression and the right to dignity. However, these rights are not absolute and, like all other fundamental rights enshrined in the *Constitution*, they are subject to the limitation clause. Thus, when these two rights are in conflict with each other, the courts must weigh them up against each other in order to determine which individual's rights are stronger in the specific instance. To succeed with a defamation action, the plaintiff would have to prove that his/her right to dignity outweighs the defendant's right to freedom of speech. The definition of defamation was

examined, and each of the four elements with its requirements was briefly discussed. The remedies available to plaintiffs were set out, as well as other important miscellaneous aspects (for example, jurisdiction). With regard to the scenario, it was established that a defamatory statement on a social media platform will indeed adhere to each of the four requirements of defamation, depending on the circumstances. This was also duly confirmed in a brief study of the recent case law of *Heroldt v Wills* (interdict) and *Isparta v Richter* (damages). According to Willis J in *Heroldt v Wills*<sup>975</sup>:

We have ancient, common law rights both to privacy and to freedom of expression. These rights have been enshrined in our Constitution. The social media, of which Facebook is a component, have created tensions for these rights in ways that could not have been foreseen by the Roman Emperor Justinian's legal team, the learned Dutch legal writers of the seventeenth century (the "old authorities") or the founders of our Constitution.

It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution. The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the courts, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication.

Nel<sup>976</sup> agrees and makes the following very true statement concerning the use of social media:

The print media always had rules and regulations pertaining to what they publish, but.... There is no regulation on ordinary people and they do not realise that once they publish something on the Internet, they publish it for purposes of publication and there should also be certain rules and regulations that apply to them.

This brings us to the first possible solution. Would it be viable to promulgate new legislation specifically regarding defamatory statements on social media platforms? Would an approach similar to that of the *Defamation Act* 2013 of England resolve the issue? Drafting and promulgating new legislation is a tedious process and it often takes years before a draft is approved and enacted. The legal questions regarding defamation on social media platforms are a current problematic factor, and it seems as if these cases will only increase in frequency. Technological advancements cause constant change, and legislation would have to be amended to keep up with these changes, as seen in England. The core problem lies in the frequency with which these changes

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975 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [7-8].

976 O'Reilly *De Rebus* 14.

would have to be made, which will only increase as technology progresses. This will ultimately lead to legal uncertainty. Therefore, enacting new legislation would not be a viable solution for the current state of affairs.

Delictual liability in South Africa is governed by a generalised approach. It is therefore able to accommodate changing circumstances and new situations. Social media would most certainly fall under this banner. General principles have only to be adapted or applied in a new way because of this flexibility and pliancy. The law of defamation is also governed by this generalised approach, as it forms part of the law of delict. As has already been stated, a specific form of a delict should never be seen in isolation from the law of delict as a whole.

In this context Neethling<sup>977</sup> is of the opinion that there is no need for the courts or the legislator to create or develop new legal principles to protect victims of defamatory comments on social media platforms. He states that the law of delict concerning *iniuria* can (and has been in the cases described above) successfully be applied in instances of defamatory statements made on social media platforms. Neethling<sup>978</sup> thus argues that it is necessary only to adapt established principles to better fit or be more applicable to the issue of social media. Marx<sup>979</sup> also feels that a system based on sound legal principles should be capable (in principle) of coping with any new developments. He is also of the opinion that it is not even necessary to adapt established principles in this context in order to make them applicable to social media situations. What Marx<sup>980</sup> means is that all that is required is to determine that the activity (the action) is unlawful (in the light of the *boni mores*), that the action has a causal link to the damage, and lastly, if fault is present in cases where compensation or damages is a factor. The key concept according to Marx<sup>981</sup> is to understand the “new activity” and then to apply existing legal principles to it.

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977 Neethling 2014 *LitNet Akademies* 49.

978 Neethling 2014 *LitNet Akademies* 49.

979 Marx 2014 <http://www.litnet.co.za/Article/die-skending-van-die-reg-op-die-goeie-naam-en-die-reg-op-privaatheid-met-verwysing-na-sosi>.

980 Marx 2014 <http://www.litnet.co.za/Article/die-skending-van-die-reg-op-die-goeie-naam-en-die-reg-op-privaatheid-met-verwysing-na-sosi>.

981 Marx 2014 <http://www.litnet.co.za/Article/die-skending-van-die-reg-op-die-goeie-naam-en-die-reg-op-privaatheid-met-verwysing-na-sosi>.

From the above viewpoints, it is clear that the common law as regards the law of delict (defamation in specific) is more than adequate to regulate this “new form” of defamation. As Marx<sup>982</sup> states, it is vital that this “new action” be understood in order for courts to be placed in a position where they can correctly apply contemporary legal principles. This is also in line with the Bill of Rights, which explicitly states that the common law should be developed by the courts.<sup>983</sup> Willis J<sup>984</sup> also shares this view, and is of opinion that the interdict should be developed to accommodate social media. He is of the opinion that the law should take note of these social and technical changes; otherwise it (the law) will lose its credibility.<sup>985</sup> In this regard Willis J<sup>986</sup> makes the following statement:

Without credibility, law loses legitimacy. If law loses legitimacy, it loses acceptance. If it loses acceptance, it loses obedience. It is imperative that the courts respond appropriately to changing times, acting cautiously and with wisdom.

The judges have thus far applied these principles flawlessly in the cases discussed above. Most judges in South Africa are fairly senior, and have an abundance of experience in the legal field. Their experience in the technological sphere might not be on the same level. It is of cardinal importance that judges throughout South Africa be educated and informed on the subject of defamation occurring on social media platforms. This can be done in a number of ways. For example, judges are kept informed of most current legal events by their attendance at legal seminars. The current established precedents will further aid judges in developing defamation on social media platforms in the right direction. Educating and informing judges is a minor problem, however, compared to the awareness that needs to be created among the public of South Africa. Although the problem may seem minor to the government, it could possibly lead to complications. If for example every Tom, Dick and Harry starts filing defamation claims, this will result in aggravating the problem of already full court rolls. Awareness must be created for society as a whole, in whichever way. As radio reaches the greatest number of people in South Africa, it is recommended that the government

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982 Marx 2014 <http://www.litnet.co.za/Article/die-skending-van-die-reg-op-die-goeie-naam-en-die-reg-op-privaatheid-met-verwysing-na-sosi>.

983 S 8 of the *Constitution*.

984 Neethling 2014 *LitNet Akademies* 47.

985 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [31].

986 *Heroldt v Wills* 2013 2 SA 530 (GSJ) [31].

sponsor radio adverts informing people of the consequences of making defamatory statements on social media platforms.

In conclusion, South Africa's legal framework is more than adequate to regulate this new form of defamation, provided that judges apply the current legal principles to the new form of defamation correctly. This can be achieved only by educating and informing judges. Last, but not least, the public must be made aware of the consequences of making defamatory statements on social media platforms.

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