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# Tort Law Reform in South Africa

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**Abstract**: This contribution explores the difficulties that stand in the way of large-scale statutory reform and/or the codification of South African tort law (traditionally called the law of delict). South African tort law is mostly embodied in judge-made common law while only a handful of statutory torts exists. The first difficulty identified is that the prevailing legal culture regards the common law of torts as flexible enough to accommodate societal changes that usually require tort-law reform. The flexible South African common law of torts is often reformed by our judges, who are empowered to do so by various constitutional provisions. While judicial reforms attract much praise, concerns are rising about constitutional outcomes-based reasoning at the expense of developing a coherent body of tort-law doctrine. The second difficulty identified relates to legislative incompetence. The South African legislature has brought about tort-law reform in the areas of, among others, hate speech, data privacy violations, product liability, and compensation funds. Our data privacy law, that was spearheaded by a prominent tort lawyer, is the only statutory intervention in tort law that has received unequivocal praise. In spite of these serious difficulties associated with South African statutory tort-law reform, this contribution suggests they can be overcome in time. While a codification of South African tort law might be unlikely at this stage, it is a future transformative possibility that we ought not ignore.

**Résumé**: La présente contribution étudie les difficultés qui entravent une large réforme législative et/ou la codification du droit de la responsabilité civile délictuelle sud-africain (appelé traditionnellement le droit du délit civil). Le droit sud-africain de la responsabilité civile délictuelle est principalement concrétisé par le droit jurisprudentiel de la common law étant donné qu'il n'existe que quelques délits civils. La première difficulté identifiée consiste dans le fait que la culture juridique dominante considère le droit de la responsabilité civile délictuelle de la common law comme suffisamment flexible pour s'adapter aux changements sociétaux qui nécessitent d'ordinaire une réforme du droit de la responsabilité civile délictuelle. Le droit flexible sud-africain de la common law en matière de responsabilité civile délictuelle est souvent réformé par nos juges qui sont habilités à agir ainsi par différentes dispositions de la constitution. Alors que des réformes judiciaires suscitent un grand intérêt, des inquiétudes grandissent au sujet d'un raisonnement constitutionnel axé sur les résultats au détriment du développement d'un ensemble cohérent d'une doctrine du droit de la responsabilité civile délictuelle. La seconde difficulté identifiée est une incompétence en matière de législation. Le législateur sud-africain a mené une réforme de la responsabilité civile délictuelle dans des matières telles que les discours haineux, les violations de données personnelles, la responsabilité en matière de produits et les fonds d'indemnisation. Notre loi sur la confidentialité des données, dont les travaux ont été dirigés par un éminent juriste spécialisé en matière de responsabilité civile délictuelle, constitue la

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seule intervention législative en droit de la responsabilité civile délictuelle qui a reçu un éloge sans équivoque. Malgré ces grandes difficultés liées à la réforme législative du droit de la responsabilité civile délictuelle sud-africain, cette contribution laisse entendre qu'elles peuvent être surmontées dans le temps. Bien qu'une codification du droit de la responsabilité civile délictuelle sud-africain semble improbable en ce moment, il existe bien une possibilité de changement futur que l'on ne peut ignorer.

**Zussammenfasung**: Dieser Beitrag untersucht die Schwierigkeiten, die einer umfassenden gesetzlichen Reform und/oder Kodifizierung des südafrikanischen Deliktsrechts im Wege stehen. Das südafrikanische Deliktsrecht ist größtenteils in einem von Richtern geschaffenen Gewohnheitsrecht verankert, während es nur eine Handvoll gesetzlicher Deliktsrechtsvorschriften gibt. Die erste festgestellte Schwierigkeit besteht darin, dass die vorherrschende Rechtskultur das allgemeine Deliktsrecht als flexibel genug ansieht, um sich gesellschaftlichen Veränderungen anzupassen, die normalerweise eine Reform des Deliktsrechts erfordern. Das flexible südafrikanische Deliktsrecht wird häufig von unseren Richtern reformiert, die hierzu durch verschiedene Verfassungsbestimmungen ermächtigt sind. Während die richterrechtlichen Reformen sehr gelobt werden, wächst die Besorgnis über deren ergebnisorientierte Argumentation auf Verfassungseben, die auf Kosten der Entwicklung einer kohärenten Deliktsrechtsdoktrin geht. Die zweite festgestellte Schwierigkeit bezieht sich auf die Inkompetenz des Gesetzgebers. Der südafrikanische Gesetzgeber hat das Deliktsrecht u. a. in den Bereichen Hassreden, Datenschutzverletzungen, Produkthaftung und Entschädigungsfonds reformiert. Unser Datenschutzrecht, das von einem prominenten Deliktsrechtler vorangetrieben wurde, ist der einzige gesetzliche Eingriff in das Deliktsrecht, der einstimmig gelobt wurde. Trotz dieser großen Schwierigkeiten, die mit der Reform des südafrikanischen Deliktsrechts verbunden sind, zeigt der vorliegende Beitrag, dass diese mit der Zeit überwunden werden können. Auch wenn eine Kodifizierung des südafrikanischen Deliktsrechts zum jetzigen Zeitpunkt unwahrscheinlich sein mag, so ist sie doch eine Möglichkeit für die Zukunft, die wir nicht außer Acht lassen sollten.

**Resumen**: Esta artículo explora las dificultades que se interponen en el camino de la reforma legislativa a gran escala y/o a la codificación de derecho sudafricano de la responsabilidad extracontractual (tradicionalmente llamado 'law of delict'). El derecho sudafricano de la responsabilidad civil se materializa en su mayor parte en el common law creado por los jueces, mientras que solo existe un puñado de ilícitos civiles regulados en leyes. La primera dificultad identificada es que la cultura jurídica predominante considera que el derecho de la responsabilidad civil del common law es lo suficientemente flexible como para adaptarse a los cambios sociales que suelen requerir una reforma del derecho de la responsabilidad extracontractual. El flexible common law sudafricano de la responsabilidad civil suele ser reformado por nuestros jueces, que están facultados para hacerlo en virtud de diversas disposiciones constitucionales. Si bien las reformas judiciales reciben muchos elogios, están aumentando la preocupación por resultados basados en razonamiento constitucionales a expensas del desarrollo de un cuerpo coherente de doctrina de derecho de responsabilidad civil. La segunda dificultad identificada se relaciona con la incompetencia legislativa. El legislador sudafricano ha llevado a cabo una reforma del derecho de responsabilidad civil, entre otras, en las áreas del discurso del odio, las violaciones de la privacidad de los datos, la responsabilidad por productos y los fondos de compensación. Nuestra ley de privacidad de datos, que fue impulsada por un destacado jurista especializado en responsabilidad civil, es la única intervención legislativa en materia de responsabilidad civil que ha recibido elogios inequívocos. A pesar de estas graves dificultades asociadas con la reforma legislativa de la responsabilidad civil

sudafricana, este artículo sostiene que pueden superarse con el tiempo. Si bien la codificación de la responsabilidad civil sudafricana puede ser poco probable en esta etapa, es una posibilidad transformadora futura que no debemos ignorar.

## 1. Introduction

1. This contribution is about South African tort law and why its reform is difficult in one sense but easy in another.[1] South African private law, including our tort law, is largely uncodified.[2] For the most part, it is regulated by our common law.[3] Our common law is judge-made law embodied in precedent, originally based on Roman-Dutch law and later influenced by colonial English law,[4] and steadily developed by the South African courts to meet the needs of a changing society.[5] The South African position on tort-law reform may be of interest to a European private-law audience due to the Western roots of our mixed legal system, coupled with the rise of postcolonial and decolonial approaches to comparative law.[6]

2. There have been two main forces of tort-law reform in South Africa. Firstly, since democratisation – and especially the enactment of the Constitution of the Republic of South Africa, 1996 – the common law has been subject to constitutional testing and development in our courts. It is uncontroversial to state that the constitutional transformation of the common law in the courts has been the primary site of tort-law reform in South Africa.[7] Below, I will show that it has

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1 In South Africa, this field is known as 'the law of delict' and not 'torts', but for the sake of fitting into the theme of the *Symposium on Tort Law Reform in Europe and Beyond: Why is Tort Law Reform so Difficult?* I will speak about our 'tort law'.

2 W. Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)', 60. *Louisiana Law Review* 2000(3), p (667) at 680, doi: 10.1093/ulr/4.3.591.

3 E. Zitzke, 'A Decolonial Critique of Private Law and Human Rights', 34. *South African Journal on Human Rights* 2018(3), p 492, doi: 10.1080/02587203.2018.1543836. It should be noted that African customary law (also called indigenous law) could regulate certain tort disputes, especially in agrarian communal settings. Customary tort disputes generally do not make it to our courts, as evidenced by the lack of reported case law on the topic.

4 This makes ours a 'mixed legal family'. See in this regard K.G.C. Reid, 'The Idea of Mixed Legal Systems', 78. *Tulane Law Review* 2003(1–2), p (5) at 22–23.

5 R. Zimmermann, '"Double Cross": Comparing Scots and South African Law', in R. Zimmermann, D. Visser & K. Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Cape Town: Juta 2004), p 12.

6 Regarding South Africa as a useful comparator in particular see E. Zitzke, 'Decolonial Comparative Law: Thoughts from South Africa', 86. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2022(1), p 189, doi: 10.1628/rabelsz-2022-0008.

7 For an overview of the common law of tort's transformation see C. Roederer, 'Working the Common Law Pure: Developing the South African Law of Delict (Torts) in Light of the Spirit, Purport and Objects of the South African Constitution's Bill of Rights', 26. *Arizona Journal of International & Comparative Law* 2009(2), p 427.

been quite easy to bring about judicial tort-law reform and I will explain why this is the case.

Secondly, since democratisation, the legislature has intervened on a few occasions to bring about tort-law reform.[8] Legislative tort-law reform has been done in a piecemeal manner and no consolidated effort has been made to codify the totality of our tort law. Overall, our tort law remains uncodified with no major holistic or structural reform. Below, I will show that legislative tort-law reform has been fraught with difficulties. I will explain why this is the case and how these challenges could be overcome in future.

3. The other papers in this series on tort-law reform in Europe and beyond may have a different point of departure in that Civil Codes usually provide the rules for tort law and thus legislative reforms are the primary vehicle for reforming this area of law. In what follows, I aim to explain both how and why the South African approach to tort-law reform is so different. I will start by explaining the possible reasons why the South African legislature has not codified nor drastically reformed the law of torts. I then proceed to contrast the judicial reforms of tort law against the legislative interventions. I will provide a critical appraisal of these reforms and also explain the role that new technologies, soft law, and foreign legal developments have played and could play in this regard. Finally, some thoughts will be provided on the prospects and desirability of large-scale legislative tort-law reform in South Africa.

## 2. Legal Culture and the Lack of Large-Scale Legislative Tort-Law Reform in South Africa

4. Why may it have been so difficult to agree on a reform of non-contractual liability law in South Africa? The widespread belief in South Africa seems to be that the common law's flexibility explains the lack of large-scale legislative tort-law reform. The three major modern works on the South African tort law affirm this position, with different points of emphasis.

Johann Neethling & Johan Potgieter explain that our tort law is often adapted through a 'speedy judicial process' because liability is established based on five general elements (conduct, fault, wrongfulness, causation, and damage) which means that new delicts do not have to be created for new situations.[9] In this sense, our tort law has strong Continental European flavour.

Max Loubser & Rob Midgley more specifically pin our tort law's adaptability on the fact that the 'legal convictions of the community' criterion (that constantly

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8 Legislating tort law is the exception rather than the rule. See the overview in B. Wessels, 'Legal and Public Policy Considerations that Justify Legislative Development of the Law of Delict', 25. *Fundamina* 2019(2), p 199, doi: 10.17159/2411-7870/2019/v25n2a8.

9 J. Neethling & J.M. Potgieter, *Law of Delict* (Durban: LexisNexis 2020), p 5.

changes with changing society) plays a significant and formal role in the recognition of wrongs.[10]

Johannes van der Walt & Rob Midgley add that the dynamic nature of judicial tort-law reform has been enhanced by the Constitution's role as the supreme law of South Africa and the courts' role as custodian of its realization.[11]

Neither these major commentaries nor case law from the last 115 years (since the formation of the South African Union) suggest that a large-scale overhaul of our tort law is necessary or even desirable. It will become clear in the next part of this contribution that only a few statutory reforms have taken place where risk distribution and/or tort matters of social-political importance have arisen.

5. The dominant belief that the common law of torts is sufficiently flexible to be reformed through the cases places a lot of trust in our courts. Some would even say it places too much trust in courts, leading to a violation of the separation of powers doctrine through the usurpation of a legislative role.[12] However, the greater faith placed in our judiciary vis-à-vis the legislature might be explained in part with reference to South Africa's political history. The apartheid state managed to oppress and disempower people of colour for years through the instrumentality of the executive working in concert with the legislature.[13] Even though certain judges during this time made various attempts to override the injustices perpetrated by the apartheid government, they had varying degrees of success.[14] Upon the South African turn towards democracy, the hope surely was that the judiciary would play a significant role in constructing a democratic society,[15] being conscious of the historical mistrust in the legislature.

6. The need for a strong judiciary that would play an active role in lawmaking was pre-empted by the Constitution's drafters. Various constitutional provisions cumulatively show that our courts were envisioned to be activist sites of lawmaking. In terms of the Constitution, our courts must, for example: strike down and declare invalid laws and conduct inconsistent with the Constitution[16]; give effect to

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10 M. Loubser & R. Midgley (eds), *The South African Law of Delict* (Cape Town: Juta 2017), p 3.

11 J.C. van der Walt & J.R. Midgley, *Principles of Delict* (Durban: LexisNexis 2016), para. 26.

12 Debates on the far-reaching powers of courts are on the rise in South Africa. See most recently L. Loxton, 'The Dangerous Powers of South Africa's Super Appellate Court', 13. *Constitutional Court Review* 2023, p 291, doi: 10.2989/CCR.2023.0012.

13 An overview of this history is provided by S. Woolman & J. Swanepoel, 'Constitutional History', in S. Woolman & M. Bishop (eds), *Constitutional Law of South Africa* (Cape Town: Juta 2008), p (1) at 13-23.

14 A detailed overview is provided in D.M. Pretorius, '"What's Past is Prologue": An Historical Overview of Judicial Review in South Africa – Part 1', 26. *Fundamina* 2020(1), p (128) at 148-168, doi: 10.47348/FUND/v26/i1a4.

15 See e.g., K.E. Klare, 'Legal Culture and Transformative Constitutionalism', 14. *South African Journal on Human Rights* 1998(1), p (146) at 156-166, doi: 10.1080/02587203.1998.11834974.

16 Section 172.

constitutional rights, vertically and horizontally, through the application or development of the common law[17]; and promote the spirit, purport and objects of the Bill of Rights when developing the common law.[18] As the next part of this contribution will show, the above constitutional provisions have saved the legislature's time and resources by allowing courts to infuse tort law with human-rights principles in an incremental manner.

7. A further concern, which is unarticulated in the South African tort-law literature, might be the perceived dysfunction of the South African parliament that is, according to some, characterized by political grandstanding with far too little meaningful output.[19] Thus, for a variety of possible reasons, the South African legal culture suggests that a holistic project of statutory tort-law reform is largely regarded as unnecessary and/or undesirable at this stage.

## 3. The Relationship Between Existing Judicial Practice and Codification

### *3.1. Two Different Streams*

8. What is the relationship between existing judicial practice and statutory tort-law reform? Our common law of torts has developed incrementally in the courts and, at times, through legislative interventions. The legislative interventions have not been inspired by judicial practices or prompts but have arisen independently, based on constitutional imperatives and/or foreign trends. I will discuss these two streams of tort-law reform in turn.

### *3.2. Judicial Tort-Law Reform*

#### *3.2.1. Overview*

9. Where our common law of torts has fallen short of constitutional spirit, our courts have been at the forefront of legal reform. Most of the impactful developments have related to the rules pertaining to state liability. In this regard mention must be made of the developments pertaining to the wrongfulness of omissions, the determination of factual causation, and the doctrine of vicarious liability. Torts committed by non-state actors have also seen some significant developments, especially on the front of personality injuries. I will briefly survey these key developments.

17 Section 8.
18 Section 39, sub-s. 2.
19 See M. Levy, 'How Parliament Failed', 86. *New Agenda: South African Journal of Social and Economic Policy* 2022, p 6.

### *3.2.2. Reforming Wrongfulness*

10. The case of *Carmichele* was the earliest tort-law development case heard by the Constitutional Court in terms of the 1996 Constitution.[20] It dealt with determining the wrongfulness of state omissions that cause physical harm to a victim's body or property. Before *Carmichele*, it was established law that omissions of this kind were not generally regarded as wrongful; to label an omission as wrongful, one or more conditions had to be met to show that the wrongdoer was dutybound not to inflict harm through negligence. The existence of a duty, in this context, could be shown by demonstrating that the wrongdoer: created a future risk of harm through prior positive conduct[21]; was the owner or controller of dangerous property[22]; and since 1975,[23] owed a statutory duty of protection to the victim; had a special relationship with the victim that gives rise to a protective duty; or a similar factor that could be developed in light of the legal convictions of the community (*boni mores*).

11. In *Carmichele*, the Constitutional Court decided that various constitutional considerations should not be overlooked when determining the wrongfulness of a state omission. These constitutional considerations included the victim's rights to life, dignity, and freedom and security of the person that ought to have been considered, alongside the state's duties in upholding these rights.[24] The judgments in *Carmichele* paved the way for the development of our law, involving a much richer conspectus of factors that are now considered in determining the wrongfulness of a state omission – ultimately inspired by a post-apartheid constitutional understanding of state responsibility. In addition to the historic rules (prior conduct, dangerous property, special relationships and statutory duties), we would now also have to consider the existence of constitutional and international-law obligations imposed on the state. However, courts are also free to consider countervailing considerations that weigh against the aforementioned factors. Anton Fagan, summarizing the case law since *Carmichele*, has identified a variety of countervailing considerations.[25] He mentions the fact that imposing a certain duty on the state would: negatively affect the efficient functioning of government; cause a serious re-allocation of government resources; open the floodgates of litigation; affect an indeterminate class of victims; and/or result in other effective available remedies becoming redundant.

20 *Carmichele* v. *Minister of Safety and Security* 2001 (4) SA 938 (CC).
21 See *Halliwell* v. *Johannesburg Municipality* 1912 AD 659.
22 See *Minister of Forestry* v. *Quathlamba* 1973 (3) SA 69 (A).
23 *Minister van Polisie* v. *Ewels* 1975 (3) SA 590 (A).
24 *Carmichele* 2001 (CC) para. 44.
25 A. Fagan, *Aquilian Liability in the South African Law of Delict* (Cape Town: Juta 2019), pp 182–183.

### *3.2.3. Reforming Vicarious Liability*

12. While *Carmichele* opened the door for more victim-friendly state liability litigation, all obstacles were not yet removed. The state would only be liable if an employee of the state committed a delict in own right in the course and scope of the employee's employment.[26] The course-and-scope requirement sometimes posed significant challenges to victims of state employee abuse. This was particularly seen in the seminal case of *K*,[27] which dealt with rape committed by three on-duty police officers who abused a victim's trust in the police. Up to this point, case law dictated that the course-and-scope requirement would not have been satisfied if an employee abandons his work and causes harm to a victim through the execution of his personal business, not linked to the employer's business.[28] In this regard, courts would consider the employee's subjective intentions as well as the existence of an objective link between the employee's personal pursuit and the employer's business.[29]

13. The Constitutional Court noted that this was a 'deviation case' where the employees committed an intentional delict.[30] The Constitutional Court determined that the existence of an objectively sufficiently close link had to be determined with clear reasons, in line with constitutional spirit.[31] The Constitutional Court effectively developed the law to include the following considerations as clear reasons to find an objective link: the statutory and constitutional duty on the police service as a whole[32]; the fact that a position of trust was created by the police officers wearing official uniforms and offering assistance to the victim[33]; and the fact that the act of rape here constituted a simultaneous relegation of duty through an omission.[34] On the basis of duty, trust, and omission, the Minister was held vicariously liable.[35] This decision has remained impactful in our state liability jurisprudence.[36]

### *3.2.4. Reforming Factual Causation*

14. The next major development in our state liability jurisprudence featured in the law of causation. The common law of torts in South Africa stipulates that

26 See *Mkize* v. *Martens* 1914 AD 382.
27 *K* v. *Minister of Safety and Security* 2005 (6) SA 419 (CC).
28 See *Feldman v. Mall* 1945 AD 733.
29 See *Minister of Police v. Rabie* 1986 (1) SA 117 (A).
30 *K* 2005 (CC) para. 25.
31 *Ibid.*, para. 44.
32 *Ibid.,* para. 50.
33 *Ibid.,* para. 50.
34 *Ibid.,* para. 52.
35 *Ibid.,* para. 57.
36 The Constitutional Court has considered nuanced applications of *K* in two other cases: *F* v. *Minister of Safety and Security* 2012 (1) SA 536 (CC) and *Booysen* v. *Minister of Safety and Security* 2018 (6) SA (CC).

causation is determined with reference to two interrelated conundrums: factual causation and legal causation.[37] For years, the courts applied the so-called 'but-for test' to determine factual causation.[38] In terms of the but-for test, the wrongdoer's conduct would only be regarded as the factual cause of a victim's harm if, but for the wrongdoer's conduct, the victim's harm would not materialize. That exercise would have to be determined on the probabilities of the case. In the case of positive conduct, one would think away the wrongdoer's conduct and determine whether the victim's position would change. In the case of an omission, one would think in a lawful course of conduct and determine whether the victim's position would change. If the victim's position would change during that hypothetical substitution exercise, then factual causation would be established.

15. In the case of *Lee*,[39] a prisoner contracted tuberculosis. It was not certain whether he contracted the disease in prison or outside of it. What was certain is that the poor prison conditions and screening processes in question increased the risk of tuberculosis contraction. The Constitutional Court affirmed all the principles pertaining to the but-for test as I have explained it above but opted to apply a so-called common sense approach instead, where the key question would be whether the conduct of the state increased the risk of the victim's harm, on a balance of probabilities.[40] The Court strangely believed that it did not develop the common law, but academic commentaries regard this as a significant instance of tort-law reform – but they doubt its future impact given the ambiguity about whether the law was actually developed.[41] Even though this case had the potential to cause confusion about the different tests for factual causation, the Constitutional Court subsequently clarified that the but-for test would be the first port of call for determining factual causation and, only in instances where victims are failed by it, may they resort to the increased-risk test.[42]

### *3.2.5. Reforming the Substance of Defamation*

16. The South African common law tort of defamation is established by showing that the wrongdoer intentionally and wrongfully published content about the plaintiff that has defamatory effect.[43] The historical position before constitutional democracy was that a successful case of defamation would inevitably lead to the

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37 See *Minister of Police* v. *Skosana* 1977 (1) SA 31 (A) 34E.

38 For an overview of these cases see A. Fagan, 'Causation in the Constitutional Court: Lee v. Minister of Correctional Services', 5. *Constitutional Court Review* 2013, p (104) at 118.

39 *Lee* v. *Minister for Correctional Services* 2013 (2) SA 144 (CC).

40 *Ibid.,* para. 60.

41 See e.g., Fagan, *Constitutional Court Review*, 2013 pp 133–134; A. Price, 'Factual causation after Lee', 131. *South African Law Journal* 2014(3), p 491.

42 *Mashongwa* v. *Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) para. 65.

43 *Khumalo* v. *Holomisa* 2002 (5) SA 401 (CC) para. 18.

victim claiming damages for non-patrimonial harm and/or an interdict.[44] Our common law of defamation has been developed by the courts in at least two significant respects. A new defence against wrongfulness was introduced, and the law on defamation remedies has been reformed. This section focuses on the new defence, after which remedial reform will be discussed under a separate heading.

17. During the apartheid era, the case of *Pakendorf* confirmed a strict liability regime for media defendants committing defamation.[45] This meant that media defendants were prohibited from relying on a defence targeting the element of intention by, for example, showing that they bona fide believed what they published had been justified in law. This decision was overturned in the case of *Bogoshi*.[46] In that case, the print media published defamatory content that was proven to be untrue in spite of best efforts to report accurately. The strict liability rule from *Pakendorf*, along with the prominence of truthfulness in the other established defences against wrongfulness (like truth and public interest, and protected comment), meant that media freedom was hugely constrained.

18. The court in *Bogoshi* determined that the strict liability regime of *Pakendorf* failed to balance the right to reputation with the right to freedom of expression, which were both important interests worthy of protection in a constitutional democracy.[47] However, the media could not escape liability simply by alleging that they thought their reporting was accurate, while that was not the case. Instead, a new defence of 'reasonable publication' was introduced. This defence is available to media defendants who have published an untruth but the facts and circumstances show that the publication was reasonable in the circumstances.[48] Reasonableness would be determined with reference to factors like public interest, the political or private nature of the material, the tone of the reporting, the sources relied upon and fact checking, whether the plaintiff was given an opportunity to respond to the allegations, and the urgency of publishing the material.[49] This defence has not been extended to non-media defendants, even though it was argued before the Supreme Court of Appeal in the recent *EFF* case.[50]

### *3.2.6. Reforming Defamation Remedies*

19. There have been three notable judicial reforms on the front of defamation remedies. Firstly, in the case of *Le Roux*,[51] the Constitutional Court introduced the

44 See J.M. Burchell, *The Law of Defamation in South Africa* (Cape Town: Juta 1985), Chas 23–24.
45 *Pakendorf* v. *De Flamingh* 1982 (3) SA 146 (A).
46 *National Media* v. *Bogoshi* 1998 (4) SA 1196 (A).
47 *Ibid.*, 1207C-E.
48 *Ibid.*, 1212G-H.
49 *Ibid.*, 1212B-1213C.
50 *Economic Freedom Fighters* v. *Manuel* 2021 (3) SA 425 (SCA).
51 *Le Roux* v. *Dey* 2011 (3) SA 274 (CC).

remedy of retraction and apology which could henceforth be used alongside claims for damages and applications for interdicts.[52] This was done in the spirit of the optimal protection of dignity and restorative justice (which is arguably an underlying value of South Africa's constitutional democracy).[53] This was a development that is also in line with the African traditional value of *ubuntu*, which puts humaneness and interdependent relationships at the centre of all enquiries.[54]

20. The second reform of defamation remedies related to the availability of interdicts of online defamation. The historical legal position had been that mandatory interdicts, instructing a wrongdoer to remove defamatory content, were usually not granted – in part because of the difficulties that this would have caused in stopping printing presses, and in part because victims would have the alternative effective remedy of damages at their disposal.[55] In the case of *Heroldt*, the victim was defamed on Facebook. He did not want to claim damages. He simply wanted the defamatory content removed. The High Court held that the common law had to be developed to allow victims in the position of someone like Heroldt to have an interdict at their disposal.[56] This was because it is easy to require someone to delete a Facebook post compared to stopping a printing press.[57] Furthermore, one could argue, the removal of the content better protects the victim's constitutional rights compared to a claim for damages where the harm could continue indefinitely.[58]

21. The third and most recent reform of defamation remedies relates to the ability of a juristic person to claim damages for non-patrimonial harm arising from a defamation suit. There was a time when it was possible for juristic persons (corporations) to claim damages for non-patrimonial harm on account of defamation. This blanket possibility changed since the Constitutional Court decision in *Reddell* where the 'victim' was a mining company who wanted to silence environmental activists who were critical of mining activities.[59] The Court in *Reddell* held that a trading corporation could in principle succeed with a claim for non-patrimonial damages for defamation but that the remedy would not be available where defamatory content is published 'in the course of … public discourse on issues of

52 *Ibid.,* para. 150.

53 *Ibid.,* paras 195-203.

54 See *Dikoko* v. *Mokhatla* 2006 (6) SA 235 (CC) paras 69-70.

55 *Heroldt* v. *Wills* 2013 (2) SA 530 (GSJ) para. 34.

56 *Ibid.,* para. 47.

57 *Ibid.,* para. 39.

58 See e.g., E. Zitzke, 'Realist Evolutionary Functionalism and Extra-Constitutional Grounds for Developing the Common Law of Delict: A Critical Analysis of Heroldt v. Wills 2013 2 SA 530 (GSJ)', 79. *Journal for Contemporary Roman-Dutch Law* 2016, p (103) at 115-120.

59 In *Mineral Sands Resources* v. *Reddell* 2023 (2) SA 68 (CC), the Constitutional Court determined that the mining company's actions amounted to an abuse of process, regulated by our procedural law, sometimes called SLAPP suits – strategic litigation against public participation.

legitimate public interest'.[60] Other remedies like interdicts and apologies may still be available to juristic defendants in those situations. This decision could have far-reaching implications for the law of defamation. It could mean that even if a wrongdoer fails with a defence of 'truth and public interest' because the statement is, for example, false, the wrongdoer can still avoid paying damages by showing that the defamation was committed in the public interest during public discourse.

### 3.2.7. *Reforming Through Abolishing Antiquated Claims*

22. Historically, the South African law of torts recognized a claim based on adultery.[61] That claim was brought against a third party who committed adultery with a victim's spouse, causing injury to the victim's sense of self-worth. In the case of *DE*, the Constitutional Court had to decide whether a claim of this nature should continue to exist in the modern South African law of torts.[62] The Court decided that adulterous conduct of this kind would no longer be labelled as wrongful (i.e., contrary to the legal convictions of the community) for purposes of a tort claim, ultimately abolishing a claim of this nature.[63] The Court reasoned that the constitutional rights to freedom and security of the person, privacy, and freedom of association would be violated if the claim continued to exist.[64] This claim has been statutorily abolished in many other jurisdictions but what makes the South African experience unique is that this reform was brought about by the courts.[65]

## 3.3. *Statutory Tort-Law Reform*

### 3.3.1. *Overview*

23. The above survey of case law demonstrates that the judiciary has played an instrumental role in effecting tort-law reform in South Africa. I now turn to consider the role that the legislature has played in introducing new torts. The major legislative changes in South Africa since democratisation have primarily focused on the optimal protection of rights for the post-apartheid era. At least three new statutory torts have been introduced: hate speech (protecting the right to dignity); product liability (protecting rights to property and bodily integrity); and data protection violations (protecting the privacy right). Two statutory compensation schemes, with their own rules for liability, have also been created although these are based on older statutory schemes.

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60 *Reddell* v. *Mineral Sands Resources* 2023 (2) SA 404 (CC) para. 114.

61 See *Viviers* v. *Kilian* 1927 AD 449.

62 *DE* v. *RH* 2015 (5) SA 83 (CC).

63 *Ibid.*, para. 63.

64 *Ibid.*, para. 53.

65 See E. Zitzke, 'A Brief Note on the Primacy of the Constitution in the Common Law's Development', 31. *Southern African Public Law* 2016(1), p (232) at 234.

### *3.3.2. Hate Speech*

24. While the South African common law of torts has long recognized insult as an injury against dignity,[66] the legislature introduced a tort of hate speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter 'PEPUDA'). The tort of hate speech is novel and stands distinct from the tort of insult.

25. To succeed with a common-law claim for the tort of insult, a victim must show intention, wrongful conduct, and a dignity impairment.[67] Regarding the impairment of dignity, our Constitutional Court has said[68]:

> Broadly stated, the claim for impairment of dignity comprises both a subjective and an objective element. The subjective element requires that the plaintiff must in fact feel insulted. To satisfy the objective element our law requires that a reasonable person would feel insulted by the same conduct.

After a victim has established the wrongdoer's intention, a wrongful act, and a dignity impairment, the main remedy for common-law insult is an award of damages for non-patrimonial harm.[69]

26. Section 10 of the PEPUDA, in its current form, prohibits hate speech as follows:

> Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

The 'proviso in section 12′ mentioned in section 10 reads as follows:

> Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

The 'prohibited grounds' mentioned in section 10 refer to an open list of characteristics, usually mentioned in the same breath as grounds for unfair discrimination, including 'race, gender, sex, pregnancy, marital status, ethnic or

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66 See J. Burchell, 'Balancing "Equality of Respect" with Freedom of Expression: The Actio Iniuriarum and Hate Speech', 2019. *Acta Juridica* 2019, p 203.

67 *Delange* v. *Costa* 1989 (2) SA 857 (A) 860I–861A.

68 *Le Roux* v. *Dey* 2011 (3) SA 274 (CC) para. 153.

69 See J. Neethling, J.M. Potgieter, & A. Roos, *Neethling on Personality Rights* (Durban: LexisNexis 2019) p 281.

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status'.[70]

While the concepts of intent to hurt and intent to hate are not defined in the Act, our courts have provided working definitions of these concepts. As a starting point, we are not dealing with subjective intention here. The words must be reasonably construed (i.e., objectively interpreted) to be harmful and hateful.[71] Hatefulness is demonstrated by 'extreme detestation and vilification which risks provoking discrimination'[72] and involves 'abhorrence, delegitimization, and rejection'.[73] Unpopular or offensive speech is not necessarily hateful in this sense.[74] Harmfulness is established if the words in question encourage others to discriminate against or abuse a group of people, cause psychological harm to group members, and/or harm the social cohesion of the country.[75]

The remedies for hate speech are listed in section 21 of the PEPUDA. These include damages for patrimonial and non-patrimonial harm, which may be payable to a specific victim or victims, or an 'appropriate body or organisation'; a declaratory order; an order of restraint; an order for an unconditional apology; a referral to the prosecuting authority; and an open-ended 'order for the implementation of special measures to address the ... hate speech ... in question'.

27. There are certainly similarities between the common law tort of insult and the statutory tort of hate speech. Semantic differences aside, both torts are ultimately based on a dignity injury, conduct in the form of communication, and wrongfulness in the sense that there is no good legal reason for inflicting the harm in question. Both torts can result in a claim for damages for non-patrimonial harm.

28. But there are also important differences. Statutory hate speech is focused on group identity and aims to protect those who suffer or have historically suffered discrimination with the aim of preventing the flourishing of social movements geared towards oppression, which also explains the intricate test for harmfulness and hate as the 'damage' in question.[76] Common-law insult is more concerned with the individual, who can be part of a vulnerable group but does not stipulate that as a fundamental requirement. Hate speech does not require the victim to prove the subjective intention of the wrongdoer, while the tort of insult requires it. The remedies for statutory hate speech are also more extensive and innovative than those available in cases of insult, which can also be geared towards protecting a

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70 Section 1 of the PEPUDA.

71 *Qwelane* v. *South African Human Rights Commission* 2021 (6) SA 579 (CC) paras 96–99.

72 *Ibid.*, para. 81.

73 *Ibid.*, para. 103.

74 *Ibid.*, para. 79.

75 *Ibid.*, para. 154.

76 B. Winks, 'Hate Hurts: Qwelane and the Lingering Obscurity in South Africa's Hate Speech Law', 13. *Constitutional Court Review* 2023, p (67) at 70, doi: 10.2989/CCR.2023.0005.

group rather than remedying an individual's feeling of self-worth independent from that group. Holistically viewed, the introduction of the statutory tort of hate speech went far beyond existing judicial practice and law in force at the time in South Africa.

29. This discussion has focused on the current form of the statutory prohibition of hate speech. It should be noted that the current definition of hate speech in section 10 of the PEPUDA is a judicially amended version of the original text passed by the legislature. The original text was clumsily drafted, listing hurtfulness, harmfulness and hatefulness as constituent parts of the definition of hate speech, without clarifying whether all three requirements had to be met or only one, due to the absence of 'and' and 'or' between the requirements. In the case of *Qwelane*, the constitutionality of the hurtfulness component and the vagueness of the relationship between the three concepts was tested. The court determined that hurtfulness should not be part of the hate-speech equation at all due to its potential for subjective whimsicality, and that harmfulness and hurtfulness should be read conjunctively as co-requirements.[77]

30. This brief history reveals that, in this instance, the court had to reform the statutory reform. It seems that without the court's intervention, the legislative reform would have been constitutionally inadequate. This example illustrates that parliamentary ineptitude is a key difficulty in South African statutory tort-law reform.

### *3.3.3. Product Liability*

31. The South African common law of torts long recognized liability for defective products.[78] The ordinary general elements for South African tort liability had to be established: conduct that wrongfully and culpably caused the victim's damage. Notably, the elements of culpability and causation were substantial obstacles that victims of defective products would have to overcome before they could succeed with their claims, because for the average consumer it would be mostly unclear which actor in the supply chain had acted unreasonably and thereby caused the victim's harm.[79]

32. To remedy these difficulties, and to align South African consumer law with international trends, the legislature passed the Consumer Protection Act 68 of 2008 (hereafter 'CPA'). The Act applies to a wide range of scenarios, including product liability.[80] Product liability may arise because of a South African

77 *Qwelane* 2021 (CC) para. 198.
78 See *Ciba Geigy* v. *Lushof Farms* 2002 (2) SA 447 (SCA).
79 C. Gowar, 'Product Liability: A Changing Playing Field?' 32. *Obiter* 2011(3), p (521) at 524–525.
80 See E. van Eeden, 'Consumer Protection', in W.A. Joubert (founding ed.) *The Law of South Africa* (Durban: LexisNexis, 2014) para. 214.

transaction between the consumer and another,[81] or simply by virtue of the consumer being a user, recipient or beneficiary of the product(s) supplied in South Africa.[82]

Section 61 of the CPA provides the intricate rules for statutory product liability. The general rule is that producers, importers, distributors or retailers of goods are liable for harm caused, in whole or in part, because of[83] :

(a) supplying any unsafe goods;
(b) a product failure, defect or hazard in any goods; or:
(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

Producers, importers and distributors are defined in the Act, consistent with their ordinary meaning.[84] Goods are unsafe if they have a failure, defect or hazard posing an extreme risk of harm. A product has a failure if it cannot perform as it is supposed to do.[85] It is hazardous if the law declares it so or if it presents a significant risk to person or property.[86] Defective goods are those that are less acceptable, useful, practicable or safe than one would reasonably expect.[87] Commentators have correctly criticized these definitions for their circulatory verbiage.[88] Harm in this context is defined to include death, injury, illness, tangible property harm, and pure economic loss.[89] This general rule is widely accepted to impose strict liability for products that cause harm.[90]

In spite of the strict liability scheme, the Act provides certain defences to alleged wrongdoers in a product liability suit. These defences include that the unsafe condition, product failure, defect or hazard: is 'attributable to compliance with any public regulation'; did not exist at the time of supply; arose solely because the alleged wrongdoer followed instructions supplied by another higher up the chain of supply; or was not reasonably discoverable by a party who marketed the goods to consumers.[91] These defences have been criticized for substantially undoing the strict liability aims of this statute.[92]

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81 Section 5 sub-s. 1 para. (c) of the CPA.

82 Section 5 sub-s. 5, read with s. 1 of the CPA. See also *Eskom Holdings* v. *Halstead-Cleak* 2017 (1) SA 333 (SCA).

83 Section 61 sub-s. 1 of the CPA.

84 Section. 1 of the CPA.

85 Section 53 of the CPA.

86 *Ibid.*

87 *Ibid.*

88 M. Loubser & E. Reid, 'Section 61', in T. Naudé & S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Cape Town: Juta 2014) para. 3.

89 Section 61 sub-s. 5 of the CPA.

90 Loubser & Reid, in *Commentary*, para. 1; Van Eeden, in *The Law of South Africa*, para. 214.

91 Section 61. sub-s. 4 of the CPA.

92 A. Fagan, 'Product Liability in the Rest of the World', in H. Koziol et al. (eds), *Product Liability: Fundamental Questions in a Comparative Perspective* (Berlin: De Gruyter 2017), p (413) at 418.

The Act continues to clarify that liability is 'joint and several' when there are multiple wrongdoers.[93] Courts are explicitly entitled to consider the victim's duty to mitigate own loss and the apportionment of damages in making an award for compensation.[94]

33. Max Loubser and Elspeth Reid explain that the statutory product liability scheme mostly codifies the existing common-law of delict,[95] and still leaves open the possibility of victims instituting a claim based on the common law.[96] The added value of the statute is that it provides (at least) a qualified form of strict liability and clarifies who can be sued.[97] However, the poor legislative crafting in this Act once again reveals that parliamentary unskillfulness is a difficulty standing in the way of optimal statutory tort-law reform.

### *3.3.4. Data Privacy Violations*

34. Privacy violations have historically been regulated by the South African common law of torts.[98] In spite of the existence of that privacy tort, the South African legislature has introduced a more specific and nuanced data privacy tort as well in our omnibus data protection statute, the Protection of Personal Information Act 4 of 2013 (hereafter 'POPIA'). The statutory data privacy tort is novel and distinct from the common law privacy tort.

35. The requirements for the common law privacy tort are the wrongful and intentional violation of privacy.[99] Privacy violations included (among other things) searches of homes, acquiring and reading private communication, and the publication of private facts.[100] A great deal of litigation related to this common law tort has dealt with the defences against wrongfulness, including necessity, private defence, public interest, and consent.[101] Remedies for common-law privacy violations included interdicts and damages.[102]

36. South Africa's POPIA came into effect in 2020. The promulgation of this Act was conceptualized and driven by an influential South African tort-law scholar, Johann Neethling, whose doctoral work[103] led him to take on the role of project

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93 Section 61 sub-s. 3 of the CPA.
94 Section 61 sub-s. 6 of the CPA.
95 Loubser & Reid, in *Commentary*, para. 81.
96 *Ibid.*, para. 78 read with s. 2 sub-s. 10 of the CPA.
97 Loubser & Reid, in *Commentary*, para. 82.
98 The classical case is *O'Keeffe* v. *Argus Printing and Publishing* 1954 (3) SA 244 (C).
99 *NM* v. *Smith* 2007 (5) SA 250 (CC) para. 55.
100 See D. McQuoid-Mason, 'Invasion of Privacy: Common Law v. Constitutional Delicts – Does it Make a Difference?', 2000. *Acta Juridica* (2000), p (227) at 228–231.
101 See e.g., Neethling, Potgieter & Roos, *Personality Rights*, pp 334–348.
102 *Ibid.*, p 350.
103 J. Neethling, *Die Reg op Privaatheid* (Pretoria: University of South Africa 1976).

leader at the South African Law Reform Commission for their project on privacy and data protection.[104] While the South African common law tort of privacy violation could accommodate various modern rules found in other jurisdictions on data privacy, Neethling nevertheless concluded that concepts like 'openness', 'security safeguards', and 'data subject participation' could not be accommodated by the extant common law or a judicially developed version thereof.[105]

The POPIA is fundamentally a regulatory statute that has tort, criminal and administrative implications.[106] The statute basically applies to the processing of personal information of data subjects by responsible parties.[107] By personal information is meant, roughly, the facts about a person that creates their identity.[108] By processing is meant, roughly, the collection, use, further distribution, and deletion of personal information.[109] The Act does not apply to anonymous data, personal use, use by the state, certain creative and journalistic endeavours, or where an exemption has been granted.[110]

When the Act applies, responsible parties are generally required to process the data in accordance with certain requirements.[111] In overview, data must be processed accountably, lawfully, minimally, directly, with good reason, for a specifically defined purpose that also influences further processing, accurately, in a spirit of openness, subject to appropriate security safeguards, with due regard to the data subject's right to participation.[112] These requirements effectively impose duties on responsible parties and create rights for data subjects.[113]

When a responsible party fails to comply with any of the processing conditions, it would have committed an 'interference' with the data of the data subject.[114] The civil remedies provision of the POPIA is captured in section 99. That section allows a civil action for damages based on an interference with data. It imposes strict liability on responsible parties, subject to certain statutory defences including vis major, consent, contributory fault, unreasonable and impractical compliance. Courts may award damages for patrimonial and non-patrimonial loss, as well as the novel head of aggravated damages. Court orders made in terms of this section must be published in the Government Gazette and another popular news source.

104 South African Law Reform Commission, *Project 124: Privacy and Data Protection Report* (2009).

105 J. Neethling, 'Features of the Protection of Personal Information Bill, 2009 and the Law of Delict' 75. *Journal for Contemporary Roman-Dutch Law* 2012, p (241) at 254.

106 Section 2 of the POPIA.

107 Section 3 of the POPIA.

108 Section 1 of the POPIA.

109 *Ibid.*

110 Sections 6-7 and 36-38 of the POPIA.

111 Section 4 of the POPIA provides a bird's-eye view of the requirements.

112 Sections 8-25 of the POPIA. Special processing conditions apply to particularly sensitive data and certain forms of far-reaching processing detailed in sections 26-35 and 69-72.

113 Section 5 of the POPIA.

114 Section 73 of the POPIA.

37. The introduction of strict liability, new defences, a claim for aggravated damages, and the wide publication of court orders are certainly novelties unknown to the common law of tort's privacy claim. Additionally, the rules imposing duties on responsible parties allude to the common law's concern for protecting personal information, but the nearly thirty sections of intricate and far-reaching detailed provisions signal a significant reform. Overall, the statutory development in the form of the POPIA drew on some existing law but also introduced new concepts, leading to a statute containing much richer content than what was judicially practiced at the time. This Act inspires some hope in parliament's ability to bring about meaningful statutory tort-law reform.

### *3.3.5. The Statutory Compensation Funds*

38. At the start of our democratic transition, the legislature passed two statutes that created statutory compensation schemes. The first was the Road Accident Fund Act 56 of 1996 and the other was the Compensation of Occupational Injuries and Diseases Act 61 of 1997. The simple version is that these statutes take the common law principles of delict as a given, make some minor edits required for the specific context (e.g., limiting the relevant conduct for road accidents to negligent driving and similar wrongful conduct), and then makes government-sponsored Funds liable instead of ordinary wrongdoers.[115] These were continuations of earlier compensation funds and did not radically disrupt the common law tradition of torts. It should be noted that these statutes of reform have themselves been reformed in the courts due to certain provisions being irrational[116] and others unconstitutional.[117] The theme of parliamentary lack of skill once again comes to the fore as a difficulty to effective statutory tort-law reform.

## 4. Critical Evaluation

39. I will now conduct a critical evaluation of our tort-law reform by answering a series of probing questions: What innovations have prompted the greatest rejection or the warmest applause? Have new technologies played an important role in the need to make tort-law reforms? Have soft law and the legislation of other countries had a clear and important impact on the drafting of new provisions?

40. Overall, the judicial developments of the common law have received considerable support.[118] However, concerns have been raised about the judiciary's

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115 Loubser & Midgley, *Delict*, Chas 37-38.

116 *Law Society of South Africa* v. *Minister of Transport* 2011 (1) SA 400 (CC).

117 See e.g., *Mahlangu* v. *Minister of Labour* 2021 (2) SA 54 (CC).

118 The academic praises for our courts are far too many to cite here. In overview, see C. Roederer, 'The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy', 37. *Columbia Human Rights Law Review* 2006(2), p 447.

perceived overemphasis of human rights policy (read: outcomes-based reasoning) at the expense of treating private-law doctrine with analytical rigour.[119] The role of legal history and the integrity of the common law is thus often underplayed in developing common-law rules for the present and the future.

The reviews of the legislative reforms are similarly mixed. The hate speech provisions initially attracted much criticism for being overbroad and poorly drafted. This was judicially remedied by the Constitutional Court judgment in *Qwelane* as explained above. Tort scholars are yet to rise to the challenge of critically evaluating whether the judicial intervention in *Qwelane* has improved the legal position. The product liability rules have been criticised for being 'in shambles'[120] due to poor drafting of certain provisions, even though the gist of introducing qualified strict liability has generally been welcomed. Given the scarcity of reported case law on product liability, it is unclear to what extent the poor legislative drafting will result in tangible problems. The POPIA data privacy law has been warmly welcomed into the South African legal order. I have found no commentaries that have involved serious critique of the legislative scheme. The POPIA's strength, especially insofar as its tort implications are concerned, may be explained by the fact that a tort scholar spearheaded that legislative drafting process.

41. On the front of judicial law reform, the developments pertaining to orders for removal of online content in *Heroldt* was clearly sparked by the novel functionality of social networks.[121] Beyond this case, technology has not played a big role in tort-law reform in the courts.

New technologies have not had a major role to play in the statutory reform of the South African law of torts. The role of new technology is not necessarily explicitly mentioned in the POPIA, but it played some role in its conceptualisation, as communicated in the South African Law Reform Commission's report. South Africa is perhaps lagging behind in this respect, especially in the face of the rise of artificial intelligence. Perhaps lessons could be learned from the EU's process of working towards an Artificial Intelligence Liability Directive.

42. Regarding soft law, none of the South African statutory or judicial developments of our tort law have drawn explicitly on the *Principles of European Tort Law*, or the *Draft Common Frame of Reference.*[122] The African Union and the Southern

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119 For the two most recent big-picture perspectives in this regard see L. Boonzaier, 'Common Law Avoidance', 141. *South African Law Journal* 2024(2), p 213, doi: 10.47348/SALJ/v141/i2a1; E. Zitzke, 'Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development', 7. Constitutional Court Review 2015, p 259, doi: 10.2989/CCR/2015.0011.

120 A. Fagan, in *Product Liability: Fundamental Questions in a Comparative Perspective*, p 418.

121 The rise of the internet also led to the introduction of the Electronic Communications and Transactions Act 25 of 2002 with a chapter (ss 70–79) dedicated to the limitation of liability for internet service providers, which was not a tort-specific development.

122 Some academic commentators have considered these works though. See J. Neethling. 'Toward a European Ius Commune in Tort Law: A Practical Experience', 12. *Fundamina* 2006(1), p 81.

African Development Community do not have similar soft law standards for our local region. This may be fruitful terrain for future research and policy development on what an 'Africanised' tort law might involve.

Regarding comparative law, it should be noted that our courts have drawn heavily on foreign legal developments when developing the common law. These jurisdictions include, most popularly, the United Kingdom, Canada, and New Zealand, and less frequently the United States of America, and on rare occasions the European Union.[123] On the front of statutory law reform, the original version of our hate speech statute was criticised for its lack of comparative consideration, which eventually led to it being declared unconstitutional for its overbroad reach, limiting freedom of expression too extensively.[124] The Constitutional Court in *Qwelane* relied on the hate speech laws of Canada, selected jurisdictions from the European Union, and America. Our data privacy statute was influenced by the Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data, the OECD Guidelines, and the EU Directive on Data Protection that preceded the General Data Protection Regulation.[125] Our product liability provisions were ostensibly partially informed by US and EU law.[126] Comparative tort law, if properly considered and contextualized to the South African situation, could hold much value for our future tort-law reform. In this regard, South Africa should also be encouraged to consider comparative developments from the Global South and Africa in particular.

43. In light of all of this, one might ask about the prospects for large-scale statutory tort-law reform in South Africa. On the one hand, the dominant South African legal culture might lead us to believe that wholesale tort reform is unlikely. The academic canon on South African tort law shows that there is a deep respect for the common law and a belief in its flexibility and overall health, attributable to the transformative work of our courts. This, coupled with the legislature's imperfect attempts at tort-law reform in respect of hate speech, product liability, and the compensation funds, probably solidifies our current common-law-centric approach to torts.

On the other hand, critiques against our judiciary's outcomes-based reasoning at the expense of the common-law tradition should not be ignored. The poor drafting of some modern statutory torts in South Africa could well be attributed to the fact that tort-law scholars were not always invited to be part of that process. If the POPIA is any indication, when tort-law scholars are invited to play a leading role in tort-law reform, there are opportunities for optimal legal development.

123 This summary is derived from a joint reading of the cases discussed above.
124 See Winks, *Constitutional Court Review* 2023.
125 South African Law Reform Commission, Report, Ch. 4.
126 See M. Loubser & E. Reid, *Product Liability in South Africa* (Cape Town: Juta 2012).

Perhaps tort-law scholars in South Africa would do well to reflect on what a statutorily transformed and codified tort law might look like.

## 8. Conclusion

44. From a South African perspective, why is tort-law reform so difficult and what might the future hold? This contribution has shown that there are two main difficulties associated with statutory tort-law reform in South Africa: legal culture (the widespread belief that our common law of torts is optimally healthy and flexible as it stands) and parliamentary incompetence (a recurrent theme of sub-standard statutory intervention in the tort-law realm). The latter difficulty could possibly be overcome if tort-law scholars are intricately involved in statutory tort-law reform going forward. Once the quality of legislative reforms in tort law improve, the chances for a shift in legal culture may also increase. This contribution has also shown that judicial tort-law reform is easier and generally attracts more praise than legislative reform in South Africa. However, South African judicial tort-law reform is hardly perfect and concerns are on the rise about constitutional outcomes-based reasoning at the expense of the integrity of tort-law doctrine. A tentative long-term suggestion is that a rigorously researched and debated codification of our tort law (in which tort scholars have played a significant, comparative role) could potentially balance the desire for tort-law doctrinal integrity against a thoughtfully Africanized, constitutionally-transformed, and technologically-attuned South African law on extra-contractual liability.