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Can emoji constitute defamatory content in the context of the South African law of defamation?

By

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Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

DECLARATION

I, 0602776W (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

The use of emoji in digital communication often reflects a casual and carefree approach to conveying emotions and sentiments. Frequently added alongside text messages, emoji are seen as harmless embellishments, requiring little thought regarding their meaning or potential consequences. However, these seemingly innocuous additions may carry significant legal implications. Some emoji have acquired secondary meanings and connotations, which may give rise to defamation claims.

This research report thus delves into the intersection of defamation law and emoji. Specifically, we examine the potential for emoji to constitute defamatory elements and explore how courts may interpret their usage. Drawing on legal perspectives from the United Kingdom and Australia, this research report sheds light on the evolving challenges posed by emoji in the realm of defamation law. As South African jurisprudence has yet to grapple with the defamatory potential of emoji, this research report explores whether South African courts will follow the lead of their international counterparts in interpreting emoji. This study thus contributes to the evolving discourse on the intersection of technology, communication, and the law in the digital age.

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Finally, to anyone embarking on their own journey, always remember: your mind is your strongest asset, and you are capable of achieving anything you set your heart and mind to. With perseverance, dedication, and the unwavering support of your loved ones, no dream is beyond reach.

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1. Introduction

The principal aim of this research report is to investigate the role of emoji within the framework of the South African law of defamation. Consequently, this study will need to address the question of whether emoji can be considered defamatory and how courts ought to determine their defamatory effect. At the onset, it is important to note that as its stands, no South African court has had the opportunity to address the issue of emoji and its potential defamatory nature.[1]

The South African law of defamation has established longstanding rules for determining whether publications can be deemed defamatory within the framework of the delict of defamation. These guidelines are premised on broad principles, requiring the plaintiff to demonstrate specific elements of the delict of defamation. [2] In essence, defamation, as defined by the courts, entails a publication concerning the plaintiff that has a wrongful and intentional defamatory impact.[3] When assessing whether emoji can be considered defamatory, especially in the context of social media or other digital platforms, it is reasonable to assume that courts will face relatively fewer challenges in establishing that a publication featuring emoji was indeed directed at the plaintiff. [4] The aspect that will demand significant judicial scrutiny is the determination of the defamatory effect.

The component of defamatory effect involves a two-step approach. Initially, the courts must ascertain the interpretation of a publication, specifically the meaning of emoji within this framework. Secondly, the courts will need to assess whether the attributed meaning of the emoji has harmed the plaintiff's reputation or public perception.[5] Fundamental to these two phases of the defamatory effect element is the use of the "reasonable observer standard" to determine both the interpretation of an emoji publication and its potential defamatory effect.[6]

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[1] Priya Singh 'Can an Emoji Be Considered as Defamation? A Legal Analysis of Burrows v Houda [2020] NSWDC 485' PER / PELJ 2021(24) – DOI at 14

[2] Khumalo v Holomisa 2002 5 SA 401 (CC) para 18

[3] Neethling, J., Potgieter, J. M., Visser, P. J., & Law of Delict, L. L (eds) 'Neethling's law of personality' LexisNexis (2015) at 400

[4] Singh, P op cit note 1 at 15 ; SAAN v Estate Pelser 1975 4 SA 797 (A) 810

[5] Le Roux and Others v Dey 2011 (3) SA 274 (CC) para 89

[6] Loubser, M, Midgley, R (eds) 'The Law of Delict in South Africa' 3rd ed (Oxford University Press Cape Town 2017) at 423

From a South African standpoint, the reasonable observer serves as a criterion that blends both objectivity and context. In objective terms, the reasonable observer transcends the subjective reactions of the plaintiff, defendant, and the intended audience. From a contextual criterion, the reasonable observer assumes the role of an audience member of the emoji publication. In doing so, the reasonable observer takes into consideration the textual, situational, and societal context of an emoji publication.[7]

Hence, when deciphering the meaning of an emoji publication, the reasonable observer will appreciate that the meaning of any publication may possess either a primary or secondary interpretation.[8] The primary meaning pertains to the grammatical meaning that a reasonable observer would attribute to a publication considering its explicit and/or implied meanings.[9] In the case of secondary meanings, often referred to as innuendos, these involve insights into particular circumstances not immediately evident in the publication itself. However, when considered in conjunction with the publication, these innuendos reveal the true intent behind the publication.[10] In this context, if an emoji publication can be associated with multiple interpretations, a court, employing the reasonable observer standard, will determine which meaning is most probable in a given factual context.[11]

Moving to the defamatory effect of an ascribed meaning, the general test is articulated as follows: "[t]he test is whether it is more likely, that it is more probable than not, that the statement will harm the plaintiff".[12] In other words, an emoji publication will be defamatory "if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published".[13]

However, in contrast to words, emoji do not constitute a distinct language in themselves. This is primarily because emoji characters lack well-defined rules of

[7] Barnard-Naude, J and De Vos, P, 'The Heteronormative Observer: The Constitutional Court's Decision in Le Roux v Dey' 2011 South African Law Journal 407-419
[8] Le Roux Supra note 5 para 87
[9] Le Roux Supra note 5 para 91 ; Loubser, M, Midgley, R (eds) op cit note 6 at 422
[10] Le Roux Supra note 5 para 86
[11] The Citizen 1978 v McBride (Johnstone and Others Amici Curiae) 2011 (4) SA 191 (CC) ; Loubser, M, Midgley, R (eds) op cit note 6 at 424 – 425
[12] Le Roux Supra note 5 para 91
[13] Ibid

semantics, syntax, and grammar.[14] Instead, emoji are regarded as a communication system whereby the sender encodes a specific message into an emoji, and it is the responsibility of the recipient to decode or interpret this message. In this process of encoding and decoding, the interpretation of emoji becomes subject to variability. This phenomenon is commonly referred to as "emoji variation," wherein multiple factors come into play when determining the meaning of an emoji character.[15] For instance, there are no officially recognized dictionary definitions for emoji, as existing interpretative resources describe their meanings rather than prescribe them.[16] Consequently, the meanings of emoji are not as straightforward to ascertain as those of words, which are typically subject to prescriptive dictionaries. Furthermore, the meaning of emoji is not self-evident, given that they take the form of pictorial characters, each capable of conveying a range of meanings depending on their specific context within a communication.[17] Moreover, the interpretations of emoji can vary based on social factors such as nationality, culture, race, age, gender, sexual identity, and historical context. Therefore, the presence of emoji variation is pervasive when it comes to interpreting emoji.[18]

As previously mentioned, South African courts have yet to encounter cases involving the determination of defamation through the use of emoji, whether within a publication containing emoji or a publication composed solely of emoji.[19] Thus as a point of departure, it could be valuable to explore the experiences of other jurisdictions in deciphering the meanings conveyed by emoji. This is particularly relevant when considering countries within the Commonwealth, such as the United Kingdom and Australia, as they have already encountered cases involving the potential defamatory nature of emoji, yielding varying outcomes. For instance, in the case of *Lord McAlpine v Bercow*[20] in the United Kingdom, the Queen's Bench drew a comparison between the use of emoji and stage directions. Wherein the court noted that emoji essentially serve as instructions to the audience, guiding them to establish a connotation between

[14] Danesi, M 'The Semiotics of Emoji: The Rise of Visual Language in the Age of the Internet' (Bloomsbury Academic London 2017) at 51 – 53
[15] Ibid at 127 – 128
[16] Seargent, P 'The Emoji Revolution' (2019) Cambridge University Press at 105
[17] Ibid at 105 – 107
[18] Goldman, E 'Emojis and the Law' 93 Wash. L. Rev. 1227 (2018) at 1251 – 1252
[19] Singh, P op cit note 1 at 14.
[20] 2013 EWHC 1342 (QB)

the visual elements in the emoji and the intentions of the publisher or sender. In contrast, in Australia, the District Court of New South Wales, in the case of *Burrows v Houda*[21] generally relied on interpretative resources such as Emojipedia,[22] an online reference website for emoji, which provides the common descriptions of various emoji symbols, although not being prescriptive to their meaning(s). Thus by examining these foreign jurisdictions, we gain insight into the various approaches used to interpret emoji and their potential legal implications, when deciding whether to adapt the same or similar approaches within a South African context.

Furthermore, this research report seeks to analyse the appropriateness of the two-pronged inquiry when analysing the defamatory effect of emoji, as set out by the Constitutional Court in the case of *LeRoux and Others v Dey*[23] in order to give effect to the manner in which an ordinary, reasonable emoji user would understand and interpret the meaning of an emoji, notwithstanding the potential for interpretative bias.

Finally this research analysis will explore whether South African courts will follow the lead of the Australian and English courts with regards to the interpretation of emoji, as well as how emoji will manifest in the elements of the delict of defamation, in specific, the element of defamatory effect.

2. Emoji, Linguistics, and Semiotics

The digital age has significantly revolutionized communication, to the point where elements like emoji, email, social networks, and similar technologies have become an integral part of everyday discourse.[24] Despite the generous rewards reaped from such technological advancements, there looms a dark side to digitalization which often translates to an excess of online defamatory conduct.[25] The emergence of electronic communication, particularly the widespread use of emoji, have plagued judiciaries world over with an array of nuanced legal issues in which to decipher.[26] This chapter

[21] 2020 NSWDC 485
[22] 'Emoji FAQ' available at https://emojipedia.org/faq, accessed on 15 May 2022
[23] Le Roux Supra note 5
[24] Papadopoulos and Snail (eds) 'An Introduction to Cyberlaw' Cyberlaw @ SA 111 The Law of the Internet in South Africa 3 ed (2012) at 4
[25] Desan, I 'An Analytical Look Into the Concept of Online Defamation in South Africa' Speculum Juris Vol 32 No 2 (2018) at 126
[26] Pelletier, N 'The Emoji that Cost $20,000: Triggering Liability for Defamation on Social Media' 52 WASH. U. J. L. & POL'Y 227 (2016) at 230

thus delves deeper into the concept of emoji by exploring its implications and significance.

2.1. Demystifying the emoji

Fun and playful little images, known as emoji, have emerged as a significant medium of communication in our era, leading to a notable transformation in contemporary language and human interaction. Fuelled by technological progress, particularly through the proliferation of social media and digital communication platforms, the development and utilization of emoji provide a brief glimpse into the evolution of modern day vernacular. [27] In tandem with the growing influence of social media and digital communication in our daily routines, the use of emoji has likewise experienced a surge in popularity. [28]

Currently, there exist over 3,600 distinct types of emoji[29], and this unique form of communication has even merited its own movie, as well as an annual celebration known as World Emoji Day. Notably, statistics reveal that more than 900 million standalone emoji messages are sent daily, underscoring the widespread usage of these symbols.[30] Moreover, data indicates that over 10 billion emoji are employed daily, and research demonstrates an uptick in user engagement on social media posts containing emoji. Additionally, emoji have proven their effectiveness in digital marketing, with emails incorporating emoji in their subject lines showing significantly higher open rates compared to those without.[31]

These statistics collectively demonstrate that emoji have firmly embedded themselves in contemporary society, and it is only a matter of time before our legal system grapples with the impact that emoji exert across various areas of the law.[32]

The Oxford Dictionary lends credence to the significance of emoji by defining emoji as small, digital icons or images employed to convey ideas and emotions in electronic

[27] Seargent, P op cit note 16 at 5-7
[28] Kirley, E, McMahon, M 'The Murky Ethics of Emoji: Comparative Responses to the Diversity Question' 26 RICH. J.L. & TECH., no. 1, 2020 at 7
[29] 'Emoji FAQ' op cit note 22
[30] Singh P op cit note 1 at 3
[31] Ibid
[32] Singh P op cit note 1 at 17

communication.[33] Originating in Japan and subsequently integrated into Unicode, a universal character indexing system, emoji have achieved standardization across various operating systems.[34] These seemingly harmless additions to our text-based conversations serve as punctuation in our online communications. They are frequently used to express sentiments or emotions that may be challenging to convey with words alone and often serve to attenuate the otherwise emotionally flat tone of digital messaging. [35]

In addition to introducing a fun element into our digital interactions and communications, a well-placed emoji has the potential to impart *"emotional valence, cultural humour, or other valuable information to a message"* [36] Nonetheless, McMahon and Kirley caution that despite the lighthearted and humanizing aspects associated with emoji, we should not underestimate their potential for more sinister purposes.[37] This darker role encompasses the use of emoji in enabling activities like hate speech, cyberbullying, witness intimidation, the online manipulation of children for sexual exploitation, and other grave crimes, including the adoption of emoji by extremist or hate-oriented groups. These instances highlight the complex and multifaceted nature of emoji.[38]

However as the parameters of this research do not extend to examining these sinister roles in which emoji facilitate, as attempting to do so falls outside the scope of this research, focus will rather be lead as to the defamatory capability of emoji.

2.2. Semiotics and Linguistics

Unlike written or spoken words, emoji do not constitute an independent language due to the absence of established rules of semantics, syntax, and grammar. It's crucial to emphasize that emoji were not designed to serve as a replacement for natural

[33] Goldman, E op cit note 18 at 1228
[34] Papadopolous and Snail (eds) op cit note 24
[35] Seargent , P op cit note 16 at 6
[36] Goldman, E op cit note 24 at 1228
[37] McMahon, M, Kirley, E 'When Cute Becomes Criminal: Emoji, Threats and Online Grooming' 21 MINN. J.L. SCI. & TECH. 37 (2019) at 37
[38] Ibid at 42-43

languages. Instead, their purpose is to complement verbal language by adding elements of mood, emotion, humor, and similar nuances to communication.[39]

As such, emoji are regarded as a novel form of a communication system which has evolved from digital technology. In this system, the sender of an emoji imbues it with a specific message, which then requires the recipient of the emoji to decode or interpret it.[40] Throughout this process of encoding and decoding, the interpretation of emoji remains subject to change. This phenomenon is commonly referred to as "emoji variation," wherein various factors come into play, influencing the meaning attributed to an emoji character. For example, there are no officially established dictionary definitions for emoji because the available tools for interpretation describe rather than prescribe their meanings. Consequently, determining the meanings of emoji is not as straightforward as it is for words, which are governed by prescriptive dictionaries. Furthermore, the significance of emoji is not self-evident, as they are visual symbols that can convey a range of meanings depending on their specific use in a given context. Moreover, the interpretations of emoji can vary depending on social factors such as nationality, culture, race, age, gender, sexual identity, and historical context. Therefore, in interpreting emoji, the phenomenon of emoji variation is pervasive.

From a semiotic perspective, emoji are categorized as picture characters or, more precisely, pictogram symbols with the capacity to represent objects, actions, and concepts. Emoji are thus an amalgamation of both pictograms and ideograms, with a significant portion of emoji falling into either category.[41] The source of confusion often arises from the fact that many pictograms possess an inherent level of ambiguity, allowing for diverse interpretations that extend beyond the general meaning and, at times, approaching the specificity associated with ideograms.[42]

Emoji can thus be said to be indubitably far more complex in nature than meets the eye, and in order to fully understand the breadth of emoji one ought to possess an insight into the cultural conventions of society, alongside intricate knowledge

[39] Seargent, P op cit note 16 at 187
[40] Ibid at 35
[41] Seargent, P op cit note 16 at 21
[42] Ibid at 22

pertaining to written and non-verbal languages.[43] It is at this juncture that we pause to consider whether this asking is not too onerous on the ordinary, layman?

Nevertheless, it's crucial to recognize that it constitutes a fundamental and well-established judicial responsibility for courts to interpret various forms of communication. Consequently, challenges related to interpretation are ubiquitous across a wide range of legal doctrines and practice areas. In this context, emoji can be regarded as yet another form of a communication system which necessitates judicial interpretation, in spite of the fact that emoji do possess unique attributes that require extra consideration when interpreted.[44]

2.3. Factors Contributing to Emoji Misunderstandings

Emoji-related misunderstandings are inevitable primarily because emoji can be interpreted in multiple ways regarding both their emotional and semantic significance.[45] As a result, it has been acknowledged that emoji are frequently open to a variety of interpretations, with some emoji carrying secondary meanings. This ambiguity may, in some cases, lead to the conveyance of a defamatory meaning.[46] It is worth noting that discerning sarcasm and irony has become an increasingly formidable challenge, primarily due to the surge in "internet trolls" and the numerous digital platforms in which they operate.[47]

Emoji possess a range of unique technical and social attributes that contribute to the heightened risk of misinterpretation.[48] For instance, unlike words, emoji lack a predefined emotional context, distinct dictionary definitions, or established grammatical rules for consistent interpretation across diverse contexts. In contrast to words, which typically adhere to a standardized dictionary definition, emoji represent nuanced, visually-driven graphics capable of serving various communicative functions that are often open to interpretation.[49] Given the absence of a clear, universally recognized dictionary meaning, fixed emotional context, or specific usage guidelines,

[43] Ibid at 25
[44] Goldman, E op cit note 18 at 1240-1241
[45] Ibid
[46] Burrows v Houda supra note 21 para 43 – 50
[47] Kirley, E, McMahon, M at op cit note 28 at 30
[48] Goldman, E op cit note 18 at 1230
[49] Miller, H 'Identifying the Risks of Miscommunicating with Emoji, University of Minnesota Digital Conservancy' (2018) at 12 ; Goldman, E op cit note 18 at 1230

a single emoji symbol can serve multiple functions within the same message. This multiplicity often results in a variety of potential emoji meanings, with no definitive point of reference available to provide the needed clarity.[50]

Although the Unicode database does account for a concise description of every emoji it defines, so too does it recognize the fact that such descriptions fall short of encompassing all possible definitions of an emoji.[51] This leads to a reliance on Emojipedia as the primary reference source for emoji which has been deemed insufficient at times.[52] The absence of formalized emoji dictionaries creates unwarranted interpretative challenges which may at times warrant judicial interpretation,[53] a concept which will be further developed throughout this research.

To illustrate the diverse interpretations of emoji, consider the example presented by Goldman[54] involving the "folded hands" emoji. This emoji was originally created to convey "please" and "thank you," yet it is commonly used to represent "I'm praying" or to signify a "high five" instead. Therefore, when interpreting an emoji, it is essential to consider its primary communicative function.[55]

Moreover, just as various forms of communication systems develop community-specific dialects, so too do emoji develop platform-specific dialects whereby emoji appear differently on distinct operating systems. Consequently, the dynamics of online conversations can vary significantly because emoji may be understood and interpreted differently within various online communities.[56]

A further example highlighted by Goldman pertains to the use of emoji on Apple devices, wherein eggplants are associated with phallic symbols and peaches with buttocks. This interpretation arises from the visual depiction of these emoji on Apple devices, while users on other platforms may not be aware of such connotations because these emoji are not presented in the same suggestive manner on different operating systems.[57]

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[50] Goldman, E op cit note 18 at 1240-1241
[51] Ibid
[52] Ibid at 1248
[53] Ibid at 1230
[54] Ibid
[55] Goldman, E op cit note 18 at 1240-1241
[56] Wagner, A, Marusek, S, Yu, W 'Emojis and Law: contextualized flexibility of meaning in cyber communication, Social Semiotics' (2020) 396-414
[57] Goldman, E 'What's new with emoji law' (2019) available at https://blog.ericgoldman.org/archives/2019/, accessed on 01 September 2022

2.4. Further issues to consider – Emoji Variation

Another significant factor contributing to the veil of uncertainty surrounding the interpretation of emoji is the varying semantic interpretations of emoji across different operating platforms and devices. This divergence is often the result of intellectual property restrictions placed on certain emoji.[58] Consequently, a situation arises where the emoji graphic sent by one person using a specific operating device may appear significantly different to the recipient using a different operating device.[59]

As a result, it is entirely possible that an emoji sent from one operating platform may not precisely match the emoji received on another platform. Consequently, the message received may not align perfectly with the message sent, potentially leading to different reactions and understandings between senders and recipients utilizing different devices. These disparities can range from minor miscommunications to more significant misinterpretations, carrying the potential for serious legal ramifications.[60]

Further disparities regarding the interpretation of emoji are deeply intertwined within diversity issues such as cultural backgrounds, race, age, gender, sexual identity, and linguistics.[61] Thus we can agree with certainty that "*while emoji might speak to everyone, they are not always saying the same thing*."[62] In light of this, it is crucial for courts to acknowledge that there is no universally accepted or canonical version of any emoji, thus when interpreting emoji, courts should avoid confining themselves to a single rendition or meaning of an emoji. [63]

3. Comparative Defamation Law and Emoji: The United Kingdom and Australia

3.1. General background to United Kingdom Defamation law

Under English law, defamation is defined as a statement which lowers the reputation of the claimant in the eyes of society.[64]

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[58] Ibid
[59] Miller,H op cit note 52 at 12
[60] Goldman, E op cit note 18 at 1230
[61] Kirley, E, McMahon, M op cit note 28 at 10
[62] Ibid
[63] 'There's No One "Right" Version of an Emoji: A Conversation With Eric Goldman (2019)' available at https://www.jdsupra.com/legalnews/, accessed on 29 September 2022
[64] Harpwood, V 'Modern Tort Law' (2005) Psychology Press at 369

Prior to the introduction of the *Defamation Act 2013* [65] defamation law in England was largely developed through the common law, with little statutory input. The law of defamation was outdated in terms of new forms of digital media and did not favour freedom of expression as such.[66] It is important to note that the English law of defamation was significantly amended by the Defamation Act of 2013.[67] The impetus behind the Act was to restore the balance between freedom of expression and the protection of reputation.[68]

According to English law, defamation is categorized as a tort rather than a delict. In cases where no affirmative defence is successfully established, a defendant can be held accountable for defamation.[69] Defamatory statements are presumed to be untrue, and the defendant can be held liable even if they acted recklessly, negligently or without regard for the truth or falsity of the statement.[70] In a defamation claim, the plaintiff bringing the action must demonstrate that a publication containing a defamatory assertion is directed at them.[71]

In order for a statement to qualify as defamatory, it must include false or material facts capable of causing harm to a plaintiff and should also be regarded as defamatory by "reasonable and fair-minded individuals." Consequently, an innuendo can be deemed defamatory if a defamatory statement that includes the innuendo is aimed at the plaintiff.[72]

3.2. *Mc Alpine v Bercow*

In the case of *Mc Alpine v Bercow,*[73] the court was confronted with the task of interpreting stage directions employed on Twitter. [74] This stage direction would be tantamount to the indirect interpretation of an emoji considering the fact that stage

[65] The Defamation Act 2013 (c 26)
[66] 'UK Supreme Court revisits the definition of "serious harm" in the Defamation Act 2013' available at https://www.mondaq.com/australia/, accessed on 29 September 2022
[67] Op cit note 68
[68] 'Defamation Act 2013 - Summary' available at https://www.lawteacher.net/acts/defamation, accessed on 05 September 2022
[69] Eloff, H 'South Africa's media defamation law in a constitutional, digital age' (unpublished LLM thesis, University of Pretoria, 2019) at 150
[70] Eloff, H op cit note 69 at 150
[71] Harpwood, V op cit note 64 at 376
[72] Tolley v Vry & Sons Ltd [1931] at 333
[73] Mc Alpine v Bercow Supra note 20
[74] Ibid para 7

direction refers to a facial expression.[75] The court was consequently tasked with determining whether a stage direction could incur legal liability under the laws of defamation.[76]

The facts pertaining to the case originated from a BBC report that implied a prominent politician's involvement in a paedophilia scandal without explicitly naming Lord Mc Alpine. This report triggered significant commotion on social media, with Twitter users particularly determined to identify the unnamed individual.[77] As a result of their efforts, a trend emerged on both Twitter and Facebook, wherein individuals publicly accused and censured Lord Mc Alpine as the purported culprit behind this grave offense.

Among these individuals was Sally Bercow, a prominent public figure with a considerable twitter following, who weighed in on the debacle by tweeting "Why is Lord Mc Alpine trending? *innocent face emoji*".[78] Notably, the question posed by Bercow was accompanied by a stage direction conveyed through an emoji, suggesting a facial expression of apparent innocence as she asked the question.[79] At the time of her tweet, Bercow had over fifty-six thousand followers, many of whom retweeted her message, thereby extending the reach of the statement to a larger audience.[80]

It was subsequently declared that the accusations against Lord Mc Alpine lacked merit. Nevertheless, since his reputation had already suffered irreparable harm, he decided to take legal action for defamation against both the BBC and Twitter users with more than 500 followers who had implied in their tweets that he was a paedophile.

Lord Mc Alpine's legal actions resulted in settlements with several parties, but Bercow, in contrast, chose not to settle and refuted that she had defamed Lord Mc Alpine. Instead, she maintained that her tweet had merely posed an innocent question. Lord Mc Alpine proceeded to institute a defamation action against Bercow, contending that her tweet, by innuendo, had insinuated that he was a paedophile.[81]

[75] Mc Alpine v Bercow Supra note 20
[76] Pelletier, N op cit note 26 at 244 – 245
[77] Ibid
[78] Mc Alpine v Bercow supra note 20 para 3
[79] Pelletier, N op cit note 26 at 244 – 245
[80] Mc Alpine v Bercow Supra note 20
[81] Ibid para 3

The court was thus tasked with determining whether the use of an emoji as a stage direction in this context was defamatory.[82]

The court dismissed the notion that the wording of Bercow's tweet contained an innocent question and instead focused on how an ordinary and reasonable Twitter follower of Bercow would interpret the emoji meaning in her tweet. The court concluded that the emoji was meant to be ironic and served as a form of 'stage direction,'[83] implying that the text in Bercow's tweet was not a question but rather a suggestion, leading readers to infer that Lord Mc Alpine was the unnamed politician accused of paedophilia. Consequently, Bercow was indirectly associating Mc Alpine with false allegations of paedophilia.[84] Since these allegations against Lord Mc Alpine were unfounded, the court deemed Bercow's tweet to be defamatory in nature.[85] In essence, the secondary meaning of the emoji eliminated any sense of neutrality, conveyed a judgment, and ultimately provided an untrue answer. [86]

Although the court found in Mc Alpine's favor, a closer examination of the statement's ambiguity reveals that various interpretations can be associated with the emoji in question. Thus imploring us to question whether the court undertook a specific type of process to support the approach they chose. Moreover, it raises the question of what unequivocal evidence in these circumstances could have definitively established that the emoji, used as a stage direction, indeed had the intended effect and whether this was Bercow's true intention. Merely speculating that Bercow would have omitted the emoji if she were innocent does not provide sufficient proof. This, at best, could be seen as a conjecture on the part of the court.

Thus if we proceed to juxtapose the position of the court, it is more than likely that on any other day, the court could have just as flippantly decided that a reasonable observer would have found the emoji, acting as stage direction, to mean that Bercow was genuinely expressing curiosity as to why Mc Alpine was trending, and that this

[82] Pelletier, N op cit note 26 at 246
[83] Mc Alpine v Bercow supra note 20 paras 84 - 85
[84] Ibid para 90
[85] Mc Alpine v Bercow supra note 20 para 90
[86] Ibid para 68, 71 & 85

time around, the reason for the inclusion of a stage direction be means of emoji, was only to emphasize her sincerest innocence. Caught in the same conundrum, we would then be guessing whether that truly was the intended effect as created by the emoji in the form of a stage direction.

3.3. General background to Australian defamation law

Defamation law in Australia is a blend of common law principles and statutes like the Defamation Act.[87] The common law foundation draws heavily from English defamation law and has evolved through Australian court decisions over time.[88] In order for a defamation claim to be successful in Australia, certain criteria must be met, the defamatory material must be published to a person who is capable of understanding it to be defamatory. Such a person must be an individual other than the plaintiff and the publication ought to be intentional or as a probable result arising from the defendant's conduct.[89]

Under the Australian law of defamation, a person who republishes a defamatory statement can also be held liable for such a defamatory statement. Furthermore, the publisher of the defamatory material will be held liable even if he acted with reasonable care or lacked intention to cause harm to the plaintiff.[90]

3.4. *Burrows v Houda*

In the case of *Burrows v Houda*,[91] an Australian court had to decide whether an emoji could reasonably be interpreted as conveying a defamatory meaning.[92] Unlike the Mc Alpine case, in this instance, the court directly addressed the issue of emoji usage rather than dealing with them in the context of stage directions.[93]

[87] Defamation Act of 2005 No 77 (NSW legislation)
[88] Singh, P op cit note 1 at 3-4
[89] Ibid
[90] Ibid
[91] Burrows v Houda supra note 21
[92] Ibid para 37-50
[93] Ibid para 12-16

The plaintiff in this case was Burrows, a well-known lawyer, who brought a lawsuit against the defendant, Houda, another high-profile lawyer. The basis of the lawsuit revolved around two separate tweets posted by Houda. [94]

The first tweet contained a hyperlink to a news article with a headline that accused Burrows, who was representing a client Salim Mehajr, of being strongly criticized by a judge for alleged fraudulent activities,[95] and as a result, the judge recommended disciplinary action.[96] A social media user commented on this first tweet, inquiring about the developments of the case in question.[97] As a reaction to this comment, Houda posted a second tweet, which included a single emoji that depicted a face with a zipper over its mouth. [98] Subsequently, various third parties responded to Houda's tweet with emoji that portrayed a clock, a collision, a ghost, and a crying face. [99]

The court was thus faced with the novel case of an emoji related incident for the first time, which led to extreme care and caution being exercised on behalf of the court.[100]

The court determined that the key consideration in this matter should be what interpretation the average, reasonable user would attribute to the emoji in question. [101] To achieve this, the court decided that it would not enlist any expert evidence[102] but instead the court turned to "Emojipedia," an informal online dictionary, as a source of guidance for understanding the meaning of the zipper-faced emoji.[103] The court adopted a similar approach to discern the meaning of the other emoji used in the comments on the tweets.[104] After determining the meaning of these additional emoji, the court considered the meaning of the zipper-faced emoji in the context of the other emoji found in the comments section.[105]

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[94] Ibid
[95] Ibid
[96] Ibid
[97] Ibid
[98] Ibid para 12-13
[99] Ibid para 14
[100] Burrows v Houda supra note 21 para 17
[101] Ibid para 19
[102] Ibid para 27
[103] Ibid para 31
[104] Ibid para 34
[105] Ibid para 31-34

The court also emphasized that the meaning attributed to the emoji should not be overly rigid or strictly limited to the definitions found in Emojipedia. Instead, the court recognized that the context of the tweet should be considered. [106]

Emojipedia indicated that the zipper-faced emoji typically signifies keeping a secret or urging someone to stop talking[107], suggesting that the defendant was dropping hints or being suggestive.[108] It was as if the defendant was aware of the implications and encouraging the reader to make connections.[109]

The meaning ascribed to the other emoji were as follows. The clock insinuated that time was running out.[110] Taking all of this into account, the court concluded that an ordinary user, considering all the information, would understand and be aware of the impending trouble ahead for the plaintiff, stemming from misconduct.[111] Therefore, the court determined that both the words and emoji used were indeed capable of conveying the insinuations as presented in the tweets, thus establishing that the emoji used had the potential to convey a defamatory meaning.[112]

It's important to consider that, unlike text, emoji are not guided by the strict confines of grammar, punctuation, or etymology. When the court interprets the meaning of a particular word or phrase, they often turn to official dictionaries, which are regularly updated and may provide multiple or alternative meanings for words. However, the same level of clarity and consistency cannot be applied to emoji. Unfortunately, emoji have not been in use for an extended period of time, which means we don't have a well-established understanding of exactly what they should mean in every context. As a result, users of emoji face the risk of having the intended meaning of their emoji misconstrued or interpreted differently from what was actually intended.

This disconnect is further underscored by the fact that emoji from one culture or country might convey an entirely different message compared to emoji from another culture or country.[113] Consequently, relying solely on Emojipedia cannot reasonably

[106] Ibid para 35
[107] Ibid para 31
[108] Ibid
[109] Ibid
[110] Ibid para 45
[111] Ibid para 49-50
[112] Singh, P op cit note 1 at 43-50
[113] Singh, P op cit note 1 at 18

be seen as a sufficient tool in our efforts to accurately determine the defamatory effect of such emoji.

Unlike the court's approach in the Mc Alpine case, this matter involves a more context-specific inquiry. As mentioned earlier, the court examined the meanings of the comments, including the second tweet, by using Emojipedia to assess the overall impact they had.[114] This approach helps us gain a clearer understanding of the impression that would be formed in the mind of a reasonable person. It can be argued that there is no better way to determine how a reasonable person would interpret the tweet or what it implied than by closely examining the responses to the tweet itself.

The persistent issue here is that emoji themselves are often not straightforward, and somewhat paradoxically, the methods employed to elucidate their overall meanings, like the use of Emojipedia, are afflicted by the same inherent limitations. It could be argued that this is akin to using reading glasses to scrutinize a blank page.

4. The South African Law of Defamation

Emoji provide users with a unique tool to cause harm, thereby pushing the boundaries of well-established areas of law, such as defamation. As technological advancements outpace the development of legal frameworks and statutes, courts are compelled to stretch and modify existing laws, given the lack of specific statutes to address these emerging forms of harm.[115]

In South Africa, online defamation, also known as digital defamation, falls under the broader framework of traditional defamation law.[116] Much like traditional defamation laws, online or cyber defamation is defined as the act of harming someone's reputation or dignity by making false, offensive, or slanderous statements about an individual within the digital or online sphere. [117]

The long-standing legal concept of defamation, which encompasses the right to one's unimpaired, good name, is a well-established element of individual personality rights under South African law. This right is closely connected to the constitutionally

[114] Burrows v Houda supra note 21
[115] Pelletier, N Supra note 26 at 230
[116] Desan, I op cit note 25 at 126
[117] Neethling J, Potgieter, J. M, Visser, P.J 'Neethling's Law of Personality' (2005) at 131

entrenched right to dignity.[118] Dignity, akin to self-esteem, is related to one's self-worth, while a good name and reputation pertain to how one is viewed and esteemed by others.[119] A person's rights regarding their reputation, or *fama*, which includes the right to a good name, are rights that receive constitutional protection in South African law. These rights play an instrumental role in ensuring the preservation of an individual's right to dignity, as was expressly emphasised by the court in the case of *Bogoshi*.[120]

In the matter of *Heroldt v Wills,*[121] Willis J aptly discusses how the advent of digitalization has placed significant pressure on our long-standing common law principles and constitutionally protected rights to privacy and freedom of speech. He emphasizes that our courts must appropriately evolve the common law, demonstrating the necessary level of expertise, to account for the technological advancements that characterize contemporary society.[122]

In a similar fashion, the evolution of legal principles can be observed in the expansion of traditional aspects of the Law of Delict to effectively address contemporary challenges posed by digital advancements, including the use of emoji.[123] Every individual holds an unassailable right to an untarnished reputation, a good name, and the respect of others. When an individual's reputation is harmed, the common law principle related to the delict of defamation comes into play.[124]

The Law of Defamation serves as a safeguard for an individual's right to maintain a good name,[125] which is considered a fundamental aspect of one's personality rights. It essentially aims to strike a balance between two frequently conflicting rights, an individual's right to a good name or an unblemished reputation, against another person's right to freedom of expression.[126] This limitation on the right to freedom of

[118] Neethling J, Potgieter, JM and Knobel, JC 'Law of Delict' 8th ed LexisNexis Durban (2021) at 399
[119] Burchell, J 'Defamation and Freedom of Expression' in Elspeth Reid & Daniel Visser (eds) Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa (Edinburgh University Press 2013) at 184
[120] National Media Ltd v Bogoshi 1998 (4) SA 1196 SCA
[121] Heroldt v Wills 2013 (2) SA 530 (GSJ)
[122] Ibid paras 7-8
[123] Singh, P op cit note 1 at 617
[124] Brand, 'Defamation in Joubert (ed)' LAWSA vol 14(2) 3 ed (2017) para 109
[125] Neethling et al op cit note 3 at 400
[126] Papadopolous and Snail (eds) op cit note 24 at 251

expression is in place to protect the personality rights of those who have been harmed by the dissemination or publication of false information.[127] Defamation is therefore straightforwardly defined as the unlawful and deliberate dissemination or publication of words or actions that result in harm to another person's good name or reputation.[128] The court in *Khumalo v Holomisa*[129] set out the following five elements which a plaintiff ought to prove when establishing an action for defamation namely, "(a) the wrongful; (b) intentional; (c) publication of; (d) a defamatory statement; (e) concerning the plaintiff".[130] Thus, if a statement injures ones personality, it is arguably defamatory and potentially actionable, and upon proving the elements of publication, defamatory effect and 'about the plaintiff', a *prima facie* case for defamation can be established.

In this context, a presumption of unlawfulness and intent is established, which can be rebutted by a defendant who raises a defence that challenges either the requirement for wrongfulness or intention.[131] Insofar as the truthfulness of a statement is not a prerequisite for such a statement to be deemed defamatory, a defendant may be held liable for defamation even in instances regarding the publication of truthful information.[132]

4.1. The elements of Defamation:

(i) Publication

The element of publication denotes an element of conduct, thus when satisfying the element of Publication, the Plaintiff must prove that the defamatory statement was communicated to a third person, or more, and that such a defamatory statement refers to the Plaintiff in question.[133] Furthermore, Publication only occurs once such other person, or persons, understands the information communicated, or the publication for that matter, to be defamatory in nature.[134] Apart from the obvious forms of speech or

[127] Singh, A 'Social media and defamation online: Guidance from Manuel v EFF' available at https://altadvisory.africa , accessed on 18 May 2022
[128] Neethling et al op cit note 3 at 400
[129] Khumalo supra note 2 para 18
[130] Ibid
[131] Le Roux supra note 5
[132] Mahomed v Jassiem 1996 1 SA 673 (A) 694 ; Bogoshi supra note 120 ; Khumalo supra note 2
[133] Le Roux Supra note 5 para 86 ; Pretorius v Niehaus 1960 3 SA 109 (C) 113 ; Neethling et al op cit note 3 at 401
[134] Vermaak v Van der Merwe 1981 3 SA 78 (N) ; Papadopolous and Snail (eds) op cit note 24 at 253

print, the publication can take numerous forms such as gestures and various forms of visual or audio communication.[135] Upon establishing the element of publication, the Plaintiff must also prove that the defendant was responsible for such publication.[136]

Prior to advancements in technology and digital platforms, the scope of “publication” was limited to hard copy print. However, the transformation of digital communication and the prevalence of social media platforms have expanded the scope of publication. In South African law, an emoji can fulfill the requirement of publication, as established in the case of *Le Roux[137],* as long as the emoji is seen by a third person or more. Furthermore, South African law recognizes that sharing or "liking" defamatory content is a form of 'publication' because it involves an element of endorsement. As a result, such actions can constitute defamation, even if the person sharing the content is not the original author.[138]

In cases involving republication, where a person repeats defamatory content originally authored by someone else, that individual can be held liable for the defamatory publication in addition to the original author. Republication is considered a form of publication in itself. [139]

Thus in a digital context, the reposting, re-sharing, or retweeting defamatory material would suffice as publishing and could trigger liability, depending on the circumstances of a case.[140] Furthermore, every individual who is actively and knowingly involved in a chain of publication will be deemed a publisher and could be held liable for defamation.[141]

In the context of *Burrows,[142]* the element of Publication was fulfilled, as a tweet “published” on Twitter is easily accessible to third parties for viewing. It has also been established that any individual who shares or repeats the defamatory statement of another is recognized as a publisher of such material.[143] Thus there appears to be no

[135] Le Roux supra note 5 para 86
[136] Neethling et al op cit note 3 at 401
[137] Le Roux Supra note 5 para 21
[138] Papadopolous and Snail (eds) op cit note 24 at 254
[139] NEHAWU v Tsatsi 2006 (6) SA 327 (SCA)
[140] Dutch Reformed Church Vergesig v Sooknunan 2012 6 SA 201 (GSJ)
[141] Loubser, M, Midgley, R (eds) op cit note 6 at 418
[142] Burrows v Houda supra note 21
[143] Papadopolous and Snail (eds) op cit note 24 at 254

distinction between “liking” a post or using an emoji to respond to a post, as both interactions amount to drawing attention to the post,[144] which amounts to Publication of the post. We can therefore safely deduce that within a South African context, a defendant such as Houda, would be found to be liable for the defamatory postings of third parties on his social media profile.[145]

(ii) Reference to Plaintiff / About the Plaintiff

The ‘reference to plaintiff’ element in defamation cases pertains to the element of causation. This element consists of two enquiries, first that the victim in question must be capable of being defamed and second, that the victim must be identifiable from a publication in order to satisfy the element of “about the plaintiff”.[146] The reference to the plaintiff may be direct or through implication, and is generally not burdensome to prove as this element will be satisfied when the publication specifically refers to the victim or the fact that the circumstances allow for an ordinary, reasonable reader to be able to associate the defamatory words or conduct with the plaintiff.[147]

In a South African context, considering the example of the Burrows case, Burrows would likely have no trouble showing that the offensive posts referred to her. An ordinary reader of the posts would evidently be able to discern the context and understand that Burrows was the individual to whom the posts were directed.[148]

(iii) Defamatory Effect

As briefly prefaced, and for the purposes of this research, the element that would require extensive judicial attention is the element of defamatory effect.

The element of defamatory effect denotes the element of harm and when considering the defamatory effect of a publication, a court must determine the meaning of such a publication or statement and its effect on the plaintiff, that is was the reputation of the plaintiff harmed by such a publication?[149]

[144] Isparta v Richter 2013 6 SA 529 (GP)
[145] Singh, P op cit note 1 at 16
[146] Loubser, M, Midgley, R (eds) op cit note 6 at 432
[147] Sauls v Hendrickse 1992 (3) SA 912 (A) ; Loubser, M, Midgley, R (eds) op cit note 6 at 432
[148] Singh P op cit note 1 at 19
[149] Loubser, M, Midgley, R (eds) op cit note 6 at 422

As a starting point, it is essential to define what constitutes a defamatory effect. In attempting to do so, the Constitutional Court in *Le Roux and others v Dey*[150] referred to the use of a two-pronged approach to determine whether a publication is defamatory per se or has a defamatory effect. [151]

4.2. Two-stage Approach

Step 1 – Determining the meaning of the publication

The court in *Le Roux* stated that a publication has either a primary or secondary meaning. Thus when establishing the meaning of a publication, that is, emoji in this context, we must rely on either the primary or secondary meaning of the emoji.[152]

4.2.1. The primary or ordinary meaning

Concerning the primary or ordinary meaning, the court further states that this refers to the typical, grammatical interpretation of a publication, including both explicit and implicit meanings, which an ordinary, reasonable observer would attribute to the publication, taking into account the context and circumstances in which the publication occurs.[153] It's important to emphasize that the ordinary or primary meaning of a publication may not be confined to the literal or dictionary definition of the publication.[154]

In addition, and as an implication of the ordinary grammatical meaning of words, the primary meaning also refers to meanings that are both expressly stated and those which are implied, with liability attaching to both the express and implied meanings.[155] The implied meaning of a publication, on the other hand, relates to a meaning that is inherent in the words themselves and is comprehensible to a reasonable person within the given context. This suggests that a publication, including an emoji, should be evaluated as a whole and in the context in which it was used. All meanings should be established with respect to the objective standard of the reasonable observer.[156]

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[150] Le Roux supra note 5
[151] Ibid para 89
[152] Le Roux Supra note 5 para 87
[153] Le Roux Supra note 5 para 91 ; Loubser, M, Midgley, R (eds) op cit note 6 at 422
[154] Loubser, M, Midgley, R (eds) op cit note 8 at 422
[155] Ibid
[156] Tsedu v Lekota 2009 (4) SA 372 (SCA) ; Loubser, M, Midgley, R (eds) op cit note 6 at 422

4.2.2. The Reasonable person standard

The construct of the reasonable person is a legal fiction which was created and adopted by courts as a means to provide insight by objectively evaluating the meaning of a publication.[157] Simply put, the reasonable person standard employed by courts involves a fictitious, reasonable person who may also be described as an average, balanced and logical person, while not overtly emotional and critical, who is committed to upholding the values and norms of the Constitution, and will interpret the meaning of content or a publication, in favour of the defendant where such content reflects a meaning that is both defamatory and innocent.[158] In addition, a reasonable observer does not generally possess specialised skills and the characteristics of such a reasonable observer would depend largely on the circumstances or context of the case at hand, with due regard to the target audience of the publication.[159]

Therefore, in cases involving emoji and digital platforms or social media, the standard of the reasonable person would be tailored to the reasonable emoji user or reasonable social media user who is capable of understanding the common use and interpretation of emoji.[160]

4.2.3. The secondary meaning or innuendo

Apart from the primary or ordinary meaning, a publication may also assume a secondary meaning, often referred to as an innuendo, derived from special circumstances which can be attributed to the publication in question by someone possessing knowledge of such special circumstances surrounding the publication.[161]

Thus a plaintiff seeking to rely on an innuendo must plead the special circumstances from which the publication derives its secondary meaning.[162] Much like words, emoji are capable of sharing more than one meaning, the ordinary or general meaning which

[157] Barnard-Naude, J and De Vos, P (eds) op cit note 7 at 407-419
[158] Stubbs, M 'In Loco Parentis: Le Roux V Dey [Discussion Of Le Roux V Dey (Freedom of Expression Institute and Another as amici curiae) 2011 3 SA 274 (CC)]' (2013) 2 STELL LR at 378 – 379
[159] Loubser, M, Midgley, R (eds) op cit note 6 at 423
[160] Independent Newspaper Holdings Limited v Suliman (2004) 3 All SA 137 (SCA) para 24
[161] Le Roux Supra note 5 para 86
[162] Le Roux Supra note 5 para 43 ; Loubser, M, Midgley, R (eds) op cit note 6 at 423

the ordinary emoji user would ascribe to it as well as the secondary, or hidden meaning attributed through context.[163]

In summation of the above, publications or emoji may at face value seem innocuous, however the addition of specialized knowledge or circumstances helps to reveal the true meaning of such publications or emoji.[164] It is important to note that in this regard, special circumstances and knowledge is not the same as the implied meaning in terms of a primary meaning. Whereas an implied meaning can be determined by a reasonable observer with reference to the general knowledge and the ability of such a reasonable observer to ascertain the meaning of a publication without much difficulty,[165] in contrast, special circumstances and knowledge are not deemed common knowledge and cannot be easily ascertained as such special knowledge or circumstances are rendered exclusive and apply only to certain groups or segments of the population.[166]

Furthermore, the reasonable observer standard will also apply in cases of innuendos, as the fact that a reasonable person does not immediately possess knowledge of the relevant special circumstances and knowledge surrounding the innuendo, does not mean that the reasonable observer is incapable of establishing such meaning.[167]

4.3. Step 2: Determining whether the meaning is defamatory

Upon a determination of the primary and/or secondary meaning of the publication, the courts will decide whether such an established meaning is deemed defamatory, in other words, whether the meaning of the publication was defamatory or harmed the reputation of the victim.[168] Once again we look to the Constitutional Court judgment of *Le Roux* which sets out the relevant principles for the second stage of the "defamatory effect".[169] Our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the reputation or good name of such a plaintiff, in which he is held by the reasonable or average person, to whom it had been published.[170] As such, the effect

[163] Neethling, J; Potgieter, JM and Roos, A 'Neethling on Personality Rights' LexisNexis Durban (2019) at 364
[164] Loubser, M, Midgley, R (eds) op cit note 6 at 423
[165] Ibid at 422
[166] Ibid at 423
[167] Basner v Trigger 1945 AD 22
[168] Loubser, M, Midgley, R (eds) op cit note 6 at 424 – 425
[169] Le Roux Supra note 5 para 91
[170] Ibid

of the publication is that it must lower the victim's public estimation, or harm the reputation of the victim (that is, people will think less of the victim). Thus the test seeks whether it is more likely, that it is more probable than not, that the statement will cause harm to the plaintiff.[171]

In the context of emoji, the courts will have to determine whether the ascribed emoji meaning caused injury to the reputation or lowered the good esteem of the plaintiff in the eyes of the reasonable person,[172] and in cases where multiple interpretations to a publication exist, a court will ascribe the meaning which is most likely in the circumstances.[173]

Moreover, the Court in *Le Roux* provided us with examples of when a publication may be defamatory.[174] The examples provided can be seen as concrete arguments evidencing the defamatory effect of a publication. According to the court, a publication is defamatory when it is likely that the victim will be exposed to one of the following, in accordance to the reasonable observer standard:

(i) exposure to hatred, contempt or ridicule that renders the plaintiff less worthy of respect;
(ii) exposure to a reflection on one's moral character that that diminishes the personal integrity of an individual; or
(iii) exposure to humiliating treatment.

Thus in light of the above two step approach, when establishing defamatory effect in terms of emoji, courts would have to look at the emoji itself, in terms of both the ordinary or implied meaning, as well as the secondary meaning of the emoji, whilst simultaneously being cognisant of the contextual implications surrounding the emoji itself.

5.1. Reasonable person standard - Potential for bias

Although there have been many international studies which have undertaken to determine the meaning which an average user assigns to emoji, it could be argued

[171] Ibid
[172] The Citizen 1978 supra note 11 ; Loubser, M, Midgley, R (eds) op cit note 6 at 425
[173] Loubser, M, Midgley, R (eds) op cit note 6 at 424 – 425
[174] Le Roux Supra note 5 para 91

that these studies prove to be of little value within the South African context, as such studies fail to consider South African study subjects, who may hold diverse socio-normative viewpoints regarding the meaning of emoji.[175]

When attempting to determine the average, reasonable person or average emoji user, there are certain factors of importance which should be taken into account, such as the fact that different countries, cultures and races may assign differing meanings to the same emoji, thus further perpetuating the risk for miscommunications.[176]

We therefore pause to consider whether the application of this reasonable person inquiry is indeed an accurate and objective measure of determining liability for defamation or whether it is in actual fact mere conjecture on the part of the court, sparked with a degree of subjectivity and bias.

In each specific situation, it's crucial to carefully contemplate the identity of this hypothetical individual, to whom we attribute great significance. We must also explore how precisely we can assess 'their' impartiality, objectivity, and 'their' capacity to adjust 'their' behaviour to align with contemporary societal standards.[177] Furthermore, concerns regarding our understanding of the concepts of "normal, ordinary and reasonable" behaviour need to be taken heed of in order to circumvent any discrimination or bias from taking effect.[178] Gender equality is another crucial aspect to consider when applying the standard of the reasonable person, ensuring that it is used consistently for all genders. This approach aims to avoid adopting a viewpoint that is solely representative of white, heteronormative males.[179]

Therefore, our courts should not hesitate to expand existing principles of law and adapting them appropriately to align with contemporary digital practices. These existing principles have a strong foundation in Roman-Dutch law and constitutional

[175] Singh, P Supra note 1 at 18
[176] Ibid
[176] Ibid
[177] Parker, W 'Reasonable Person: A Gendered Concept, The Claiming the Law - Essays by New Zealand Women in Celebration of the 1993 Sufferage Centennial' 23 Victoria U. Wellington L. Rev. 105 (1993) at 105 -106
[178] Ahmed, R 'The Standard of the Reasonable Person in Determining Negligence - Comparative Conclusions' (2021) Potchefstroom Electronic Law Journal (PELJ), 24(1), 1-55
[179] Ibid

principles, making them readily adaptable to address intricate legal challenges stemming from modern digitalization, including the interpretation of emoji.[180]

5.2. Critique regarding the Reasonable person standard

As previously discussed, the doctrine of the reasonable person is one of legal fiction, created by judges as a means by which to better interpret and assess the specifics of a case in a seemingly objective and impartial manner.[181] Whilst the test was first adopted in South Africa in the case of *Kruger v Coetzee,*[182] the origins of the test predates the 1800's and finds roots in the post-enlightenment context of the French, English and Anglo-American legal systems.[183] In this manner, the reasonable man was construed as means for judges to practice objectivity, and instead allowed jurors to step into the shoes of the reasonable man in order to impartially decide on the merits of the case at hand.[184] Nonetheless, even though this long-established interpretative approach has been utilized by the courts, it is not free from criticism. Legal scholars have frequently questioned its efficacy in addressing the issue of judicial bias, deeming it an unsuitable standard.[185]

Moreover, as evident from the implicit heteronormative bias present in the majority judgment of the court in the case of *Le Roux v Dey*,[186] where the concept of the 'reasonable person" led to the inference that two men engaged in a sexual activity were labelled as "promiscuous" due to their involvement in such "immoral activity." In this instance, the majority decision in *Le Roux v Dey* [187] drew unwarranted conclusions and unfair assumptions concerning the promiscuity and immorality associated with same-sex eroticism. The court established that the reasonable person would perceive the depicted image as being marred by indecency, sexual deviance, and immorality.[188] In this specific case we notice that the judge, or rather the majority of the Constitutional court, had in effect used the legal construct of the reasonable person as a vehicle by

[180] Singh, P Supra note 1 at 18
[181] Barnard-Naude, J and De Vos, P (eds) op cit note 7 at 407-419
[182] 1966 (2) SA 428 (A) 430
[183] Jeewa, TR, Bhima, J 'Discriminatory Language: A Remnant of Colonial Oppression' 2021 Constitutional Court Review 323–339.
[184] Ibid
[185] Jeewa, TR, Bhima, J op cit note 183
[186] Le Roux Supra note 5
[187] Ibid
[188] Barnard-Naude, J and De Vos, P (eds) op cit note 7 at 407-419

which to promote personal prejudices and stereotypical heteronormative beliefs to justify such a judgment, failing to take into account the "schoolboy nature" of the prank.[189] And whilst it may be argued that such beliefs and societal stereotypes are not uncommon, a constitutional democracy such as South Africa is meant to be devoid of narrow and religiously backed views being enforced by the law, or through the construct of the reasonable person, for that matter.[190] However as Jeewa and Bhima[191] contend, while the concept of judicial bias exists, it cannot be removed that easily as it is inevitable for judges to hold pre-conceived notions regarding societal standards on normality, morality and socially acceptable standards.[192] Thus Barnard-Naude and de Vos[193] suggest, perhaps a "more reflective and self-critical approach by judges" is needed when employing the legal construct of the reasonable person in a bid to remove any potential for judicial bias.[194]

6. Findings and Recommendations

The rise of social media and digital communication has bolstered the development of a nuanced "digital-semiotic" language consisting of emoji. However, like any form of communication, the usage of emoji can and has been used to defame and inflict harm. It is trite that delictual liability in South Africa is governed by a generalised approach, thus enabling the South African law of defamation to seamlessly fuse with the new demands placed on old laws, thereby accommodating changing circumstances and new situations flowing from the developments created by the advent and usage of emoji.

It is submitted that in reaching a conclusion with regards to establishing the defamatory effect of emoji, the element of defamatory effect will remain at the crux of the matter, thereby enabling emoji to be considered as defamatory provided that the publication in question provides insult to the good standing of the plaintiff. Our courts have ascertained that a digitally altered photo may convey a defamatory meaning,[195] in this

[189] Ibid
[190] Ibid
[191] Jeewa, TR, Bhima, J op cit note 183 at 337
[192] Ibid
[193] Barnard-Naude, J and De Vos, P (eds) op cit note 7 at 407-419
[194] Ibid
[195] Le Roux v Dey Supra note 5

manner it would be possible for our court's to extend our current legal principles to an act of defamation perpetrated via the medium of an emoji, provided that a plaintiff can establish the defamatory effect as caused by the publication of the emoji, causing the plaintiffs reputation to be lowered.

Furthermore, South African courts have already determined that the ordinary reasonable emoji user must be taken into account when dealing with the interpretation of emoji. This would thus require an enquiry into how the ordinary reasonable emoji user would perceive and interpret the meaning of an emoji.

However, as illustrated above, the tools and techniques used to interpret emoji, inhabit a few shortcomings. These shortcomings bear the danger of creating a sharp divide between the objective meaning of the emoji and the subjective intention of the publisher. To narrow this gap and prevent a heinous injustice, we need to deftly nudge the objective meaning closer to the subjective intent, in the following proposed manner. It is essential to introduce a factor-based analysis into the investigation, closely linked to the context of the emoji. These factors should comprise, among others, the prevailing conventions in using the emoji, the purpose behind its usage, whether it's genuine or sarcastic, and the environment in which the emoji is employed. Furthermore, the factor based analysis used cannot be mired by the same concerns that undermine the reasonable person enquiry in the first place.

7. Conclusion

The digital revolution which we are currently experiencing is heavily centred on digital and electronic communication and technology and is vastly impacting society in a profound manner. Emoji, borne as a direct consequence of this digital revolution can be described as an amalgamation of cultural euphuism, perhaps a passing trend and an expected offshoot of the evolution of human communication. However we choose to perceive Emoji, with the manifold implications they hold over our daily lives, it is safe to say that we can now include legal implications to that perception.

While perceived as a fun, playful medium through which we emote on digital platforms, acknowledgement of the distinct interpretative challenges posed by communications

using emoji ought to be borne in mind, as this veil of ambiguity could potentially lead to defamatory consequences as evidenced by cases like *McAlpine*[196] and *Burrows*.[197]

This dissertation thus concludes that although South African Courts are yet to deal with defamation in the context of emoji, it is clear that our courts would be equipped to pronounce upon the defamatory nature of emoji, thus evidencing an important and inevitable evolution of the law, which further demonstrates its adaptation to the digital age.

Furthermore, subjecting emoji to the law of defamation further ensures that emoji have to be interpreted by courts on a case-by-case basis in order to effectuate a determination as to the defamatory effect caused by emoji. In interpreting emoji, courts have highlighted the importance of determining the primary and/or secondary meanings of a publication. Secondly, courts will have to determine whether the ascribed emoji meaning injured the reputation or good esteem of the plaintiff, whilst contextual factors, such as the sender's and recipient's intent, surrounding circumstances and accompanying text, if any, will be taken into account and the application of the reasonable person standard will be employed to establish the meaning of an emoji publication and its defamatory effect. In this manner, courts should also be cognisant of varying cultural opinions and any differences as a result of the usage of different technological or operating platforms.

Given the wide range of emoji interpretations based on cultural, jurisdictional and belief systems, it would make sense for South African courts to follow suit in the steps of our Australian counterparts and rely on the likes of Emojipedia or enlist the help of an interpretative expert when interpreting the meaning of a specific emoji.

[196] Mc Alpine v Bercow supra note 20
[197] Burrows v Houda supra note 21

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