

THE IMPACT OF TECHNOLOGY AND THE INTERNET ON THE LAW OF DEFAMATION

by

IRFAAN BHAYAT
STUDENT NUMBER: 478964

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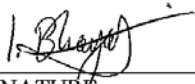
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Supervisor: Ms Verine Etsebeth

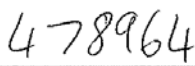
DECLARATION

I, Irfaan Bhayat, declare that this Research Report is my own unaided work. It is 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. It has not been submitted before for any degree or examination in this or any other university.

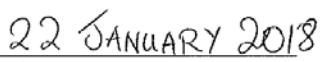
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ABSTRACT

Technology and the internet have greatly impacted the way we interact, communicate and express ourselves. By enabling us to instantly express ourselves to the world, technology and the internet have increased the risk of defamatory content being published while simultaneously increasing the potential harm that may be suffered by the victims of such defamatory content.

The Constitution of the Republic of South Africa Act 108 of 1996 protects the rights to privacy and dignity recognising these as fundamental rights. These rights then give rise to the rights to *fama* and *dignitas* which in turn give rise to the rights to a good name and reputation. The law of defamation thus provides individuals with the ability to protect and defend their good name and reputation. This research report engages in a critical discussion regarding how the law of defamation applies to private individuals in the modern world where communication is largely done through the use of technology and the internet, allowing virtually everybody to be a publisher of content and consequently rendering them vulnerable to liability for defamation. In addition this research report considers the potentially devastating and far reaching impact an act of online defamation may have on a victim.

This research report also discusses whether someone will be able to enforce their rights to reputation and a good name in respect of both their private and online personalities. A further issue considered by this research report is that regarding the enforcement of claims for defamation in light of the difficulties raised by the fact that the internet and technology have eliminated borders. As the law of defamation is not applied uniformly across the world, there are a number of difficulties and cost implications that may hinder the enforcement of peoples' rights, where these have been infringed online.

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1. INTRODUCTION

Technology and the internet have increased the potential occurrence of defamation and the harm suffered by the victims thereof. This research report, through desktop research, will critically discuss the effect of technology and the internet on the law of defamation, in regards to individuals, further considering the future impact they may have on this area of law and its growing importance.

This research report will commence by setting out what the law of defamation entails, including how a claim for defamation may arise. This research report will then discuss the rights to privacy and dignity, firstly under the common and thereafter under the Constitution of the Republic of South Africa¹. Thereafter consideration will be given to the interplay between the law of defamation and the freedom of expression before discussing the limitation of rights in terms of s36 of the Constitution.

Thereafter this research report will consider how technology, the internet and social media have effected communication and the publication of information. Having done so this research report will consider the potential harm that may be suffered due to online defamation and whether it exceeds that of offline defamation. This research report will then engage in a brief discussion regarding the defamation of public officials/personalities/celebrities. Thereafter this research report will briefly comment on the difference between an individual's public and private personalities considering whether it may be possible for a victim to enforce their rights in respect of each, viewing them as separate and distinct from one another. Having done the above this research report will briefly discuss defamation as a crime before considering the remedies available to a victim of defamation and the defences that may be raised to a claim of defamation. This research report will finally discuss the challenges that technology and the internet create in attempting to enforce claims of defamation.

¹ Act 108 of 1996.

2. THE LAW OF DEFAMATION

The right to dignity is vital to the law of defamation as the rights to reputation and a good name directly relate to this fundamental right.² One of the protectable personality rights is the right to *fama*, being an individual's reputation.³ This was emphasised by the court in the case of *National Media Ltd v Bogoshi*⁴ in which it stated that the rights to a good name and reputation are essential to ensuring the Constitutional right to dignity is safeguarded.⁵ Dignity relates to peoples' estimations of themselves, allowing it to be likened to self-esteem; while reputation and a good name relate to other peoples' estimations and views of those people.⁶ It is therefore apparent that the protection of the rights to reputation and good name fall within the ambit of the right to dignity.⁷

Defamation involves the infringement of an individual's reputation through information referring thereto which is published both intentionally and wrongfully.⁸ Defamation by individuals and that by the mass media are distinguishable as individuals require intention to cause injury whereas the mass media merely requires negligence.⁹ In light of the proximate link between ones reputation, good name and the right to dignity, it is clear that the ability to protect oneself from defamation is quite important and necessary. There are a number of elements that make up a claim for defamation, including the publication of defamatory content, which infringes on a person's rights to reputation and a good name and which was published to have such effect.¹⁰

² Anne Hughes *Human Dignity and Fundamental Rights in South Africa and Ireland* (2014) 208.

³ Robert Brand *Media Law in South Africa* (2011) 107-107.

⁴ 1998 (4) SA 1196 SCA.

⁵ Ibid para 41.

⁶ Jonathan Burchell 'Defamation and Freedom of Expression' in Elspeth Reid & Daniel Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 184.

⁷ Ibid.

⁸ Max Loubser 'Law of Delict' in C G van der Merwe & Jaques E Du Plessis (eds) *Introduction to the Law of South Africa* (2004) 326.

⁹ Brand op cit note 3 at 107-107.

¹⁰ Sanette Nel 'Online Defamation: The Problem of Unmasking Anonymous Online Critics' (2007) *XL Comparative and International Law Journal of Southern Africa* at 195.

In evaluating when a claim for defamation arises one must first consider what constitutes defamatory content. Defamatory content may take a plethora of shapes and forms, from expressly written words or verbal statements to suggestive pictures or mere gestures.¹¹ There is no distinction between spoken and written defamation in South Africa, unlike in England where the former is categorised as slander and the latter as libel.¹²

Any content which negatively impacts how the person referred to is viewed by reasonable people with average intelligence or right thinking members of society, may be considered defamatory.¹³ In deciding whether content is defamatory, courts will look at the ordinary meaning of the words; in certain circumstances the words may not seem defamatory, however the inferences drawn therefrom may be of a defamatory nature.¹⁴ It is therefore important to note that statements are capable of multiple meanings, the first being the ordinary meaning, which is the statement's apparent meaning, with the second or alternate meaning being what the people receiving the statement understand it to mean, in light of other information within their knowledge.¹⁵

Therefore, what is considered defamatory content will be dependent on certain factors including what is said, how it is said and whether it alludes to something other than what it appears to speak of. The internet and technology allow people around the world to make written statements with great ease and speed which statements may refer to information known to the recipients thereof. Furthermore, as the internet provides easy access to copious amounts of information, even if some recipients are unaware of the circumstances or information referred to, they may easily ascertain and familiarise themselves therewith. Therefore, the risk of claims for defamation arising due to comments made with reference to certain information can be seen to have increased as a consequence of technology and the internet, with the defamatory content being more devastating due to the availability of the information referred to.

¹¹ Brand op cit note 3 at 108-111.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ John Campbell SC 'Pleading Meaning in Defamation Cases: Le Roux V Dey' (2011) *SALJ* 419 at 420.

Defamation may arise in various situations, including where content results in an individual's reputation being adversely affected in character, business, profession or where it renders them subject to contempt, ridicule or hate.¹⁶ For content to be deemed defamatory the person must be referred to either expressly or by implication, and where reference is by implication it should be of such a nature that a reasonable ordinary person would deduce that the content refers to that person personally.¹⁷ An essential element in determining whether content is defamatory is whether that content was in fact published and in considering this it is irrelevant whether the content was provided to the populous at large or only to a small group of individuals; therefore as long as at least one individual, in addition to the person referred to, received the information then the element of publication will have been satisfied.¹⁸ From this it follows that in any instance of publication there will be at least three people involved, being the publisher, the victim and finally the receiver.¹⁹

It is therefore apparent that defamation may affect various aspects of a person's life and if the content at all negatively impacted the person in one of these it may be considered defamatory. As most individuals have online personalities it is easier for them to fall victim to defamation on the internet. Reference to someone may be made by tagging them in a post, making reference to something they posted or using their online alias. All of these may be seen as sufficient references to a person for the purposes of a claim for defamation. The internet also makes publication a very easy element to satisfy allowing it be done in a number of ways, including the mere sending of an email. Therefore, as the internet makes it relatively easy to publish content referring to someone, it creates an environment in which a lot of information or comment could potentially be deemed to constitute defamation.

¹⁶ Brand op cit note 3 at 108-111.

¹⁷ Loubser op cit note 8 at 326.

¹⁸ Emma Sadlier & Tamsyn de Beer *Don't Film Yourself Having Sex* (2014).

¹⁹ Derigan Silver 'Defamation' in Daxton R Stewart (ed) *Social Media and the Law: A Guidebook for Communication Students and Professionals* (2017) 31.

In determining whether someone has been defamed it is important to establish whether their reputation has suffered actual damage; merely insulting someone may not be deemed defamatory if it lacks effect on that person's reputation.²⁰ Where content goes against the *boni mores* of the community such content will be deemed wrongful.²¹ In performing an assessment as to whether or not content is defamatory the test applied is an objective one based on the views of a reasonable person.²² This reasonable person may be described as a hypothetical, average, balanced and logical person who has normal emotional reactions, believes in and is committed to the values and norms of the Constitution, and will interpret the meaning of content in favour of the defendant where such content has one meaning that is defamatory and another which is innocent.²³

In assessing whether someone has been defamed it is therefore important to consider what damage was actually suffered by that person. Through the internet and technology information travels great distances instantaneously therefore increasing the potential harm a victim of defamatory content may suffer as the damage to their good name or reputation may be very far reaching. The concept of a reasonable person is easily applied and remains relevant to defamation on the internet and technology. Therefore, content posted on the internet is still subject to this objective standard, ensuring it is not blown out of proportion and that the victim's emotions do not influence the determination of whether the content is in fact defamatory.

3. The Right to Privacy Under the Common Law

The right to privacy is rather broad and remains somewhat open ended having yet to be confined by an exact definition. It, however, can be said to include the protection from any invasive behaviour into one's personal life²⁴ and is intimately linked to the concept

²⁰ Brand op cit note 3 at 108-111.

²¹ Mkhululi Stubbs '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.

²² Ibid 378-379.

²³ Ibid.

²⁴ Toby Mendel, Andrew Puddephatt, Ben Wagner, Dixie Hawtin & Natalia Torres *Global Survey on Internet Privacy and Freedom of Expression* (2012) 50.

of identity.²⁵ This view is emphasised under the common law which protects the right to privacy in delict by recognising personality rights, being those incorporeal rights inextricably associated with a person.²⁶ The right to privacy was assessed in the case of *Bernstein v Bester NO*²⁷ which pointed out the difficulty in giving the right to privacy a set definition and stated that the right to privacy is founded on the notion of an individual's personal identity.²⁸ Under South African common law the right to privacy rests within the concept of *dignitas* and is acknowledged as an independent personality right.²⁹ The courts have supported this view and have stated that in some circumstances the right to privacy does not extend to corporations thus excluding juristic persons.³⁰

Thus the right to privacy is recognised under the common law, amongst various other personality rights.³¹ The law of delict protects this right where it was both intentionally and wrongfully infringed.³² Upon establishing wrongfulness, intention is presumed and the burden sits with the infringer to prove a lack thereof or justify the infringement.³³ The *Bernstein* case states that the unlawful infringement of the right to privacy is assessed with reference to the *boni mores* and public policy.³⁴ An infringement must therefore be deemed wrongful according to an objective test judging the infringement in terms of the *boni mores* of the community.³⁵ A wrongful invasion of privacy is evident where there is an intrusion, a disclosure of private information, an inaccurate portrayal of an individual or the use of an individual's likeness without their consent.³⁶

From the above, it can be seen that the right to privacy is recognised under the common law and that this right is deemed to be of great value. This right is further protected by giving reference to the public opinion in making a decision as to whether it has been

²⁵ Hughes op cit note 2 at 263.

²⁶ Alex B Makulilo *African Data Privacy Laws* (2016) 196-7.

²⁷ 1996 (2) SA 751 (CC).

²⁸ Ibid para 65.

²⁹ Ibid para 68.

³⁰ *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A).

³¹ Makulilo op cit note 26 at 197.

³² Ibid.

³³ Brand op cit note 3 at 72.

³⁴ *Bernstein* supra note 27 para 68.

³⁵ Ibid.

³⁶ Brand op cit note 3 at 73-4.

unlawfully infringed. In addition, there is a great deal of importance attributed to an individual's right to dignity and how they are viewed by others thus indicating the need to protect their good name and reputation. The importance of the rights to privacy and dignity are further emphasised by the protection provided thereto by the Constitution.

4. The Right to Privacy Under the Constitution

When engaging in a discussion concerning the right to privacy an inevitable venture is made into other important rights, including the rights to equality, dignity, and freedom.³⁷ This is as the Constitution of the Republic of South Africa³⁸ acknowledges the relationship that exists between the rights to privacy and dignity.³⁹ Section 14 of the Constitution provides everyone with a right to privacy which includes the privacy of electronic communications, protection from property or home searches and the seizure of possessions.⁴⁰ Additionally, section 10 of the Constitution ensures the protection and respect of everyone's right to dignity.⁴¹ While section 14 directly protects the right to privacy it may be argued that section 10 in fact provides greater protection to this right.⁴²

The Constitutional right to dignity extends beyond individual or group feelings of self-worth to include worth within society as a whole; it therefore protects and promotes individual and group interests to reputation and a good name recognising their self-worth, including the worth of an individual or group according to the public.⁴³ Furthermore, section 12 of the Constitution provides the right to freedom and security of the person which further works to bolster the right to privacy and its protection under the Constitution.⁴⁴

³⁷ Ronald J Krotoszynski Jr. *Privacy Revisited: A Global Perspective on the Right to be Left Alone* (2016) at 75.

³⁸ Supra note 1.

³⁹ Krotoszynski Jr. op cit note 37 at 75.

⁴⁰ The Constitution supra note 1 section 14.

⁴¹ The Constitution supra note 1 section 10.

⁴² Krotoszynski Jr. op cit note 37 at 88.

⁴³ Georgia Alida du Plessis 'Freedom of expression and defamation of religion: Mohammedi v SABC3' (2015) *SAJHR* at 200.

⁴⁴ Krotoszynski Jr. op cit note 37 at 89.

The right to privacy is recognised internationally and Article 8(2) of the European Convention of Human Rights protects the right to respect of one's private and family life unless interference therewith is necessitated by law or some other reasonably justifiable reason.⁴⁵ The right to privacy includes one's honour and reputation, not being incorrectly portrayed and having embarrassing information or private photographs published.⁴⁶ The right to privacy must be balanced against various other rights and interests including the freedom of speech and the right of access to information.⁴⁷

From the above, it is clear that the right to privacy is inherent in all individuals and is of fundamental import thereto. As this right is so closely linked to an individual's identity it is necessary to ensure its protection and allow individuals to enforce it when it is threatened or infringed by others. The fact that the protection of this right includes protection from false portrayals and the non-consensual use of one's likeness indicates the intention to protect individuals from defamation. These protections work to prevent an individual's reputation or good name from being tarnished due to information provided by someone else that may be fallacious or malicious. It further works to ensure that individuals are not associated with things or portrayed in a manner that will cause them harm or degrade their position in the eyes of their peers.

5. Defamation vs The Freedom of Speech and the Constitutional Limitation of Rights

An important issue regarding the law of defamation is the balance that must be struck between the rights to reputation and a good name and the right to freedom of expression. The right to freedom of expression is also protected by the Constitution, under section 16, which states that the right to freedom of expression includes artistic creativity, receiving or sharing ideas and information, freedom of the press and media as well as scientific research and academic freedom.⁴⁸ The importance of this right is

⁴⁵ The European Convention of Human Rights Article 8.

⁴⁶ *Bernstein* supra note 27 para 73.

⁴⁷ Lee Swales Protection of Personal Information: South Africa's Response to the Global Phenomenon in the Context of Unsolicited Electronic Messages (Spam) (2016) *SA MERC LJ* at 51.

⁴⁸ The Constitution supra note 1 section 16.

displayed by its international recognition and the protection it is afforded in the European Convention of Human Rights under Article 10.⁴⁹ This right however excludes expressions that constitute propaganda for war as well as the incitement of imminent violence and the promotion of hatred, which equates to incitement to cause harm towards others on the basis of gender, religion, race and ethnicity.⁵⁰

The right to freedom of expression has been said to rest at the very core of democracy, however, despite its import, this right is not absolute and may require some limitation in order to balance it with other rights, such as dignity.⁵¹ It can so be said that the law of defamation resides where the right to freedom of expression and the protection of the right to dignity cross paths.⁵² In the case of *Dutch Reformed Church Vergesig Johannesburg Congregation and another v 99 Sooknunan t/a Glory Divine World Ministries*⁵³ the court stated that in assessing the right to freedom of expression on social media and the internet it must be remembered that in certain circumstances an expression may be strong, distasteful and mean, abusive or angry and it is thus important for the courts to be cognisant of several factors including the circumstances, the context, the people involved, what is published, how it is presented and who it relates to.⁵⁴

In the European case of *Delfi AS v Estonia*⁵⁵ the European Court of Human Rights found that a news website may be held liable for defamatory content posted anonymously by its readers even in instances where they do take such content down, stating that holding them liable for such defamatory content is not an infringement of the right to freedom of expression where they have failed to take the necessary steps to remove the defamatory content timeously and ensure realistic means of holding the authors of the content liable.⁵⁶ This case therefore makes it apparent that the owners of a

⁴⁹ The European Convention of Human Rights supra Article 10. See also Nel op cit note 10 at 188-9.

⁵⁰ du Plessis op cit note 43 at 195. See also s16 of the Constitution supra note 1.

⁵¹ *Print Media South Africa and Another V Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) paras 93-8.

⁵² Nel op cit note 10 at 190.

⁵³ 2012 3 All SA 322 (GSJ).

⁵⁴ Ibid para 23.

⁵⁵ *Delfi AS v. Estonia* (2015) ECtHR 64669/09.

⁵⁶ Ibid para 162.

website will bear the responsibility for all comments and information published thereon and will so be found liable if these contain any defamatory content.

Furthermore, the Constitution under section 36 provides for the limitation of fundamental rights, including the rights to dignity and the freedom of expression, in instances where the limitation is in terms of a law of general application and such limitation is reasonable and justifiable.⁵⁷ A law of general application may be found in common law and should be of such a nature that people are able to understand it and adapt their behaviour to ensure compliance with it.⁵⁸ In determining whether a fundamental right may be limited various factors must be considered including the right's nature, how important the limitation is, the purpose it aims to accomplish, the limitation's nature and how far it goes, how closely related the limitation is with the purpose it aims to accomplish and whether the purpose may be accomplished in a manner that is less restrictive.⁵⁹

A limitation may be defined as an infringement which is justifiable in the circumstances and as such it must fulfil a function that is deemed important to a majority of people.⁶⁰ In assessing whether the infringement of a fundamental right is justifiable, consideration will first be given to whether a right has been infringed by some act and, if so, whether such infringement may be an acceptable limitation by virtue of its justifiability.⁶¹

It is therefore clear that there is a need to ensure a balance between fundamental rights and, where it is justifiable, to limit one in order to ensure the protection of another. This is important when considering the conflict between the rights to reputation and a good name and the right to freedom of expression. Therefore, while it is vital to an open and democratic society to ensure that people are empowered, able to speak freely and to express their thoughts and opinions, it is equally important to ensure the protection of peoples' dignity. It is thus necessary to assess certain expressions and determine

⁵⁷ The Constitution supra note 1 section 36.

⁵⁸ Ian Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2013) 159.

⁵⁹ Ibid 151.

⁶⁰ Ibid.

⁶¹ Ibid 153.

whether they extend beyond what is essential, unjustly impacting someone's dignity including their reputation and good name.

Technology and the internet have allowed everyone to be a publisher, thus ensuring people are provided with the right to express themselves freely. In doing so, they have created the danger of people taking advantage of this freedom and using it to cause harm to others. The law of defamation therefore provides a justifiable limitation to the right to freedom of expression, by limiting this right to ensure the protection of the right to dignity. It further ensures these rights are balanced against one another, receive the necessary protection and are appropriately promoted. Therefore, while people are encouraged to speak their mind, it is important for them to consider what they say in order to ensure productive and beneficial dialogue and that others are not forced to endure unnecessary harm. As seen in the *Delfi AS* case, companies and websites may need to put measures in place to ensure those who visit and comment on their websites are not placing defamatory content thereon as a failure to do so or to remove such content expeditiously may result in them being held liable for such comments.

6. How Technology and Social Media has Effected Communications and Publications

The advancements made in technology have drastically changed the manner in which we communicate. The use of paper is much less relevant and the internet has greatly impacted what can be published. An online publication has no geographic limitation and may find its way around the globe in mere seconds. According to the Oxford dictionary, the internet is defined as “*a global network providing a variety of information and communication facilities, consisting of interconnected networks using standardised communication protocols.*”⁶² From this definition it is evident that the internet has created a means for information and communication to be shared throughout the world. Technology and the internet have thus infinitely expanded the reach of information and communications eliminating the challenges presented by borders and the time delays

⁶² English Oxford Living Dictionaries available at <https://en.oxforddictionaries.com/definition/internet> accessed on 24 November 2017.

associated with relaying information. For example, an email is capable of being received within seconds of it being sent and it can then be forwarded on to other people in perpetuity allowing for it to be viewed by a very large number of people within a short period of time.

In addition, to the above we now live in a world where social media is of exceptional relevance and plays a crucial role in our day to day experiences and activities.⁶³ Social media holds significant power in society and has shown its capacity to influence the political and democratic landscape.⁶⁴ Social media can be defined as electronic communication and websites used for the purposes of sharing information, ideas, messages and other content with online communities and to develop social and professional contacts, which allow the end users to take part and publish portions of the content.⁶⁵ An important feature of social media is that it allows basically anyone to comment, share or copy the content posted on it.⁶⁶

Social media thus allows everyone to be a publisher and to so assume all the responsibilities and obligations associated therewith.⁶⁷ Consequently social media gives rise to situations where multiple people may be liable for defamation as anyone who shares or likes defamatory content will be considered a publisher of that content.⁶⁸ Therefore, if someone draws attention to, repeats or provides confirmation of defamatory content they will be held responsible for its publication.⁶⁹

Technology the internet and social media therefore provide platforms on which people can instantly and frequently, publish information about themselves.⁷⁰ They further

⁶³ Sanette Nel 'Social Media and Employee Speech: The Risk of Overstepping the Boundaries into the Firing Line' (2016) *XLIX Comparative and International Law Journal of Southern Africa* 183.

⁶⁴ M Christian Green 'From Social Hostility to Social Media: Religious Pluralism, Human Rights and Democratic Reform in Africa' (2014) *AHRLJ* at 100.

⁶⁵ Nel op cit note 63 at 184 -185.

⁶⁶ Ibid 187.

⁶⁷ Ibid 190.

⁶⁸ Ibid 191.

⁶⁹ Ibid.

⁷⁰ Scott Sterling 'International Law of Mystery: Holding Internet Service Providers Liable For Defamation and the Need for a Comprehensive International Solution' (2001) 21 *Loyola of Los Angeles Entertainment Law Review* at 327.

provide a means for people to give their opinion to the world at any given time. In addition they have allowed people to gain fame and earn a living through their online personas.

The internet is an open and involving arena for all to engage; it affords people a greater means of expression than was previously available, extending beyond the media's capabilities and working to facilitate perpetual conversation regarding an infinite array of issues.⁷¹ It further provides people with the option of remaining anonymous, thus facilitating participation and ensuring everyone is comfortable with speaking freely and openly.⁷² It can therefore be seen as an incredibly useful mechanism in promoting the right to freedom of expression.⁷³ Most communication done on the internet is written, however, due to the speed of such communication it is as effective as verbal communication, particularly where conducted within a chat room or through instant messaging.⁷⁴

Furthermore, through blogs people are able to share their views with the world, effectively turning themselves into self-published writers; these blogs are often used as a source of income and the more popular the individual writing the blog, the more successful it will be.⁷⁵ A blog may be described as a website containing posts that affords people the opportunity to publicly share their ideas and opinions quickly and cheaply.⁷⁶ The content published on such blogs has the potential to travel to a large number of people within a short period of time and may therefore be catastrophic for someone who is the victim of defamatory content.⁷⁷ In America the courts have deemed bloggers members of the media, especially where the blog is similar to traditional journalism.⁷⁸

⁷¹ Diane Rowland 'Gripping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet' (2006) 110:3 *Penn State Law Review* at 519.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid 527.

⁷⁵ Allison E. Horton 'Beyond Control?: The Rise And Fall Of Defamation Regulation On The Internet' (2009) 43 *Valparaiso University Law Review* at 1267.

⁷⁶ Lauren Guicheteau 'What is the Media in the Age of the Internet? Defamation Law and the Blogosphere' (2013) 8:5 *Washington Journal of Law, Technology & Arts* at 577.

⁷⁷ Horton op cit note 75 at 1268.

⁷⁸ Guicheteau op cit note 76 at 586.

From the above, it is clear that technology and the internet, as well as social media and blogs, have substantial implications for the law of defamation as they allow virtually everyone to be a publisher thus increasing the potential of defamatory content being published on a regular basis, giving rise to a great number of potential claims.⁷⁹ Once something is published on social media it becomes open to pretty much the entire world as one may share it with certain people who in turn share it with other people and within a matter of seconds the content may have been conveyed to thousands. This will have a devastating impact on the person who is the subject matter of the defamatory content and whose reputation is subject to injury.⁸⁰ For certain people it may result in financial loss and the damage to their reputation may have long lasting effects as the information may have reached a great number of people.

7. Defamation and the Internet

This research report will now turn to a consideration of the law of defamation in the specific context of the internet and social media addressing the relevant cases in this regard. In terms of cyber law the issue of defamation is said to fall under the concept of cyberbullying.⁸¹ Cyberbullying is defined as using electronic devices or technology for the purposes of bullying and harassment.⁸²

The case of *H v W*⁸³ dealt with the issue of defamation on social media, more specifically on Facebook. In this case, the court reiterated that the truth is not a sufficient defence to defamation unless it is of public interest or benefit and emphasised the distinction between what is of public interest and what is merely interesting to the public.⁸⁴ In addressing the defence of fair comment, the court stated that the burden rests on the respondent to show that the publication was justified and that it was made in

⁷⁹ Sterling op cit note 70 at 327.

⁸⁰ Ibid.

⁸¹ Nel op cit note 63 at 192.

⁸² Ibid.

⁸³ 2013 (2) SA 530 (GSJ).

⁸⁴ Ibid para 27.

the absence of an improper motive or malice.⁸⁵ The court also addressed the issues around posting information regarding public figures, stating that these individuals still have the constitutional right of privacy and thus the interest of the public must be kept in mind when making any publications.⁸⁶ In addition, public figures also enjoy the right to dignity, which includes reputation, thus fair comment must be borne in mind; however scathing commentaries on public figures will be protected even if made on social media.⁸⁷ This case thus enforced the law of defamation applying it to social media and the internet and making it clear that comments and content posted thereon while in the exercise of free speech will still need to be balanced against the rights to reputation and a good name.

The applicability of the law of defamation as found in *H v W* was supported and reaffirmed in the case of *M v B*.⁸⁸ Furthermore, in the case of *Isparta v Richter*⁸⁹ the court considered the issue of damages in relation to defamation claims on social media. It was stated that damages for defamation are not meant to serve as a punitive measure for the infringement and as a consequence they are generally not very high; the court further stated that the damages claimable will be mitigated by an apology on the same platform as the defamatory content was posted.⁹⁰ In this case the claim for defamation on social media was once again upheld and an award of damages granted in the sum of R 40 000.00⁹¹. It further confirmed that someone who likes, confirms or shares a defamatory post will be held responsible for it; in this case the second defendant had not posted any of the defamatory content however he was also found liable as he was tagged in the posts and thus had knowledge of the defamatory content and allowed himself to be associated with the first defendant.⁹²

⁸⁵ Ibid para 28.

⁸⁶ *H v W* supra note 83 para 45

⁸⁷ Ibid.

⁸⁸ 2015 (1) SA 270 (KZP).

⁸⁹ 2013 (6) SA 529 (GNP).

⁹⁰ *M v B* supra note 88 paras 39-40.

⁹¹ Ibid para 41.

⁹² Ibid para 35.

In the more recent case of *H v B*⁹³ damages were awarded in the substantial sum of R 350 000.00, being the largest damages award for defamation in South Africa yet, in coming to this quantum the court considered various factors including the victims social standing, profession, sex, the inaccuracy of the statements, the motive behind them and the public and private effect thereof.⁹⁴ It has been said that defamatory publications made on the internet or on social media travel with great ease through the use of computers and mobile phones and as the information is shared it spreads to a large number of people.⁹⁵

From the above, it can be seen that the courts have recognised the devastating impact of defamation on the internet and through social media, acknowledging how these allow for defamatory content to travel great distances rapidly and cause the victims a great deal of harm. By awarding a higher quantum the courts have accepted that online defamation has a greater impact and more severe consequences for victims, thus there is a greater need for these victims to be protected. The aforementioned case of *H v B* provides us with the indication that the courts in South Africa are alert to the import of technology and the internet as well as social media and the roles these play in our society. This judgment further allows us to draw the inference that the courts in South Africa may be letting go of their previous reservations and will be willing to grant awards for greater quantum to victims of online defamation in the future.

8. Defamation and Public Officials/Personalities/Celebrities

In as far as the law of defamation applies to public officials and politicians, consideration must be given to whether the content relates to their personal or professional affairs.⁹⁶ This is as the personal affairs of a politician or public figure, presumably due to their existence in the public domain, may be lawfully commented on

⁹³ (20595/2016) 2016 ZAGPPHC 1018.

⁹⁴ Eric van Den Bergh & Catherine Stark 'The cost of a defamatory Facebook post' (May 2017) 50 Without Prejudice at 51.

⁹⁵ Michaela Whitbourn "The tweet that cost \$105,000" available at <http://www.smh.com.au/technology/technology-news/the-tweet-that-cost-105000-20140304-341kl> accessed on 24 November 2017.

⁹⁶ Hughes op cit note 2 at 209.

to some extent.⁹⁷ Similarly, public personalities or celebrities occupy a very public role due to their vocation, for example musicians and athletes, thus opening them up to comment. These individuals, like politicians and public officials, attract attention to their lives and thus comment in respect of their personal lives may be viewed as being lawful to some extent.

Therefore, politicians, public officials and celebrities, due to their existence in the public domain, enjoy a lesser level of privacy and people may lawfully comment and publish content regarding their personal lives, to a certain extent. While these individuals need to tolerate reading what people have to say about them, they too enjoy protection under the law of defamation and as their income and livelihood is largely dependent on their reputation the harm suffered due to defamatory content may result in them receiving greater awards for the infringement of their rights to a good name and reputation. In a 2017 Australian case, an actress was awarded R 47 million in damages for defamatory content published concerning her.⁹⁸

While this research report focuses on private individuals, it is also important to note that the rights to reputation and a good name also apply to judicial persons as injury thereto may have consequences for their trade and patrimony, therefore, judicial persons are able to bring claims for defamation.⁹⁹ However, despite being able to enforce their rights to reputation and a good name under the law of defamation the courts have yet to establish whether these juristic persons in fact have a right to dignity.¹⁰⁰

Advancements in technology and the internet have further resulted in people developing online personalities, which have allowed people to increasingly place themselves in the public domain. They have thus facilitated the creation of more public personalities and online celebrities allowing people to create interest in their lives and develop a

⁹⁷ Ibid.

⁹⁸ Rebel Wilson Wins R47m Defamation Case available at <https://www.iol.co.za/entertainment/celebrity-news/international/rebel-wilson-wins-r47m-defamation-case-11228494> accessed on 25 November 2017.

⁹⁹ Eric Descheemaeker 'Three Keys to Defamation: Media 24 in A Comparative Perspective' (2013) 130:3 *SALJ* at 445.

¹⁰⁰ Hughes op cit note 2 at 210.

following. With these individuals comment and discussion to a certain extent may be acceptable, however, where these constitute defamation such people may be entitled greater quantum as the damage to their reputation or good name will have a more devastating effect.

9. Comments: Defamation Regarding Private and Online Personalities

As has been illustrated in this research report advancements in technology and the internet have drastically changed how individuals interact and live their lives. Furthermore, the internet and social media have allowed people to find fame and make a living from their online personalities. This raises an interesting question regarding the importance of personality. As discussed above, the concept of identity is inextricably linked to individuals. However, in the technological world we live in it is common for people to have an online personality which they treat as separate and distinct from their private personality. The question raised by this development is whether the defamation of one of these personalities may be sufficient to sustain a claim for defamation.

In application of the requirements as stated above, it may be said that if there is defamatory content that is posted on the internet in respect of a person's online personality which is wrongful and results in harm to that person's online personality, then they will be able to bring a claim for defamation. This should be the case even where the information may be true in respect of the person's private personality as the person who posted the defamatory content will only be able to rely on the truth if this information, in addition to being true, is also in the public interest. It may therefore be seen that where a person has a private and online personality, each of these will be protected and they may be able to rely on the law of defamation to protect both.

10. Defamation as a Crime

Defamation in South Africa is considered both a delict and a criminal offence.¹⁰¹ The crime of defamation similarly involves the unlawful, intentional publication of content referring to someone which causes harm to their reputation or good name.¹⁰² In committing the crime of defamation the material elements that will need to be satisfied include an unlawful publication of defamatory content referring to someone, published with the intention of defaming that person.¹⁰³

The crime of defamation is still relevant and applicable in South Africa and has been held to be in line with the Constitution, having been likened to the crime of physical assault in noting that there exists no reason why we should protect an individual in both civil and criminal law in respect of physical injuries suffered due to the acts of another and not provide protection in both civil and criminal law for someone who suffers injury to their good name or reputation.¹⁰⁴ This was expressed in the case of *S v Hoho* where the court further stated that injuries suffered by an individual in respect of their reputation may in fact be more devastating and long lasting than physical injuries.¹⁰⁵

In convicting someone for criminal defamation, consideration must be given to the publisher's intention and where a defence for defamation may apply they cannot be found guilty; therefore, where a publisher acted recklessly they will lack the requisite intention to be found guilty of the crime of defamation.¹⁰⁶ However, it is not necessary for the defamation to be very serious in order to find someone guilty of the crime of defamation, it is only necessary to prove the material elements of the crime beyond a reasonable doubt.¹⁰⁷ The civil law presumptions of unlawfulness and intent that arise

¹⁰¹ Jonathan M Burchell *Principles of Criminal Law* 4 ed (2013) 625.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Nhamo A Mhiripiri & Tendai Chari *Media Law, Ethics, and Policy in the Digital Age* (2017) 16. Also see *S v Hoho* [2008] ZASCA 98 para 35.

¹⁰⁵ *Hoho* supra para 35.

¹⁰⁶ Nhamo op cit note 104 at 16. See Also *Motsepe v S* 2015 (2) SACR 125 (GP) para 20.

¹⁰⁷ Burchell op cit note 101 at 628.

once it has been proved that there is a publication of defamatory content referring to a person are not applicable under the criminal law of defamation.¹⁰⁸

The fact that defamation may also be seen as a criminal offence speaks to the importance of an individual's reputation and good name. This is further emphasised as the courts have recognised that the effects of defamation may be incredibly devastating and may even be of so severe a nature that a person is unable to recover from them.

11. Remedies for Defamation

There are generally two remedies sought in defamation claims, the first being an interdict which is applicable when someone has already been or is about to be defamed and wants to prevent defamatory publications.¹⁰⁹ This remedy effectively prevents the publication of defamatory content, giving rise to issues of freedom of speech; thus due to its censorial nature courts are not willing to readily grant this remedy.¹¹⁰ In pursuing this remedy, the applicant will bear the burden of proof, which is on a balance of probabilities, and will have to show that the publication is imminent, unlawful and that it will cause them to suffer irreparable injury.¹¹¹ The courts, in awarding this remedy, must be of the opinion that the benefit of restraining the defamatory content outweighs the disadvantage of restraining the ability to share information.¹¹²

The second remedy available is that of damages in terms of which the publisher of defamatory content is required to pay the victim an amount of money as compensation for the harm done to their personality and as a punishment for infringing their rights.¹¹³ A claim for damages is preferred to an interdict where the unlawfulness of an allegedly defamatory publication is yet to be proven as damages would adequately enforce the applicant's right, if infringed, rendering the restraint of publication unnecessary.¹¹⁴ In

¹⁰⁸ Ibid.

¹⁰⁹ Brand op cit note 3 at 151-154.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid 155-157.

¹¹⁴ Ibid 151-154.

computing the award for damages, a court will consider a number of factors, including the publisher's attitude, the type of publication, how far it went, its context, popularity, circulation, who viewed the publication, the victim's character and whether there was any apology of worth made.¹¹⁵

In addition, to the aforementioned remedies courts also use the remedy of apology or corrective publication, which they view as being compliant with the constitutional objective of restorative justice.¹¹⁶ It has been stated that it is in fact undesirable to award a large amount for claims of defamation and that an apology is far more desirable as it effectively works to restore dignity and hold the perpetrator accountable.¹¹⁷

From the above, it is clear that the right to freedom of speech is protected and unless the circumstances are rather dire it is unlikely that this right will be infringed in order to shelter someone from potential defamation. While an apology or corrective publication may be viewed as amore appropriate remedy for defamation this may not be sufficient for someone who suffered harm due to the defamatory content published online. It therefore appears that damages in conjunction with an apology may be the best and most effective remedy for defamation.

The far reaching impact and harm that may be suffered by an individual due to defamatory content published on the internet may result in a need for larger quantum being awarded as damages. This is as people now have very active online lives, which are directly linked to their actual and work lives and thus defamatory content published online may reach around the world and have a devastating effect on one's life. Furthermore, while an apology may result in a rectification of the harm done to some extent it may not remedy the prejudice created by the publication so necessitating some award in compensation.

¹¹⁵ Ibid 155-157.

¹¹⁶ Ibid.

¹¹⁷ Hughes op cit note 2 at 211.

12. Defences to Defamation

There are several defences to defamation, including that the defamatory content is both true and for the public benefit.¹¹⁸ This defence applies where the main aspects of the defamatory content are true and thus may be applicable in circumstances where the defamatory content does in fact contain certain untruths, provided that no criminal conduct, fraud or dishonesty exists on the part of the publisher of the defamatory content.¹¹⁹ This defence, however, further requires defamatory content to be for the public benefit, therefore it is not sufficient to rely on the fact that the defamatory content is true as a defence and the publisher will have to show that such content is both true and for the public benefit to find protection under the right of freedom of expression.¹²⁰ In determining whether a publication of defamatory content is in the public interest, the court will have to carefully evaluate factors such as the occasion, timing and means of the publication; courts will therefore be required to assess and determine each case on its own merits.¹²¹

In addition, someone accused of defamation may raise the defence of privileged circumstances to show that the publication of the defamatory content was not unlawful.¹²² Debates in parliament enjoy absolute privilege whereas an individual either exercising a right, performing a duty or furthering a legitimate interest when publishing defamatory content will only enjoy qualified privilege.¹²³ Furthermore, the defamatory content must be published to someone who is receiving such publication in respect of a similar right, duty or interest.¹²⁴ While the duty or right may be either moral, legal or social the interest must always be legitimate and this is evaluated in accordance with a standard of reasonableness.¹²⁵

¹¹⁸ Loubser op cit note 8 at 326.

¹¹⁹ Ibid 326-327.

¹²⁰ Ibid.

¹²¹ *Allie v Foodworld Stores Distribution Centre (Pty) Ltd and Others* [2004] 1 All SA 369 (SCA) para 55.

¹²² Loubser op cit note 8 at 327.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

The defence of privilege also applies to judicial officers performing their duties under their public office and content published in the course of any judicial or quasi-judicial proceedings are considered privileged.¹²⁶ Additionally, the presumption of wrongfulness may be rebutted by litigants and witnesses if they show that the defamatory content is relevant or material to the issue at hand.¹²⁷ This defence will not apply in circumstances where the publication of defamatory content is done with malice.¹²⁸ A publication is deemed to be done with malice or improper motive where the person publishing the defamatory content makes use of privileged occasion to fulfil a purpose other than that envisioned by the privileged occasion.¹²⁹ The onus of proving malice in the publication of the defamatory content rests with the person who was defamed.¹³⁰

A further defence to defamation is fair comment, in terms of which the defamer must show that the defamatory content was published as a fair comment on true facts which are in the public interest.¹³¹ It will therefore be necessary to show that the defamatory content does in fact constitute a comment which is an honest expression of the author's opinion, made without malice, which is relevant and reasonably inferred from the facts.¹³² In addition, the publication containing the defamatory content must refer expressly, indicate clearly or incorporate by reference the facts upon which the comment was made, which facts must be substantially true and which comment must be in respect of a matter of public interest.¹³³

Therefore, to succeed with this defence the defamer would have to establish that the defamatory content is a comment or opinion which is fair, based on true factual allegations, and relates to a matter of public interest.¹³⁴ In terms of this defence, the

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ *Tuch and others NNO v Myerson and Others* [2010] 2 All SA 48 (SCA) para 11.

¹²⁹ Ibid.

¹³⁰ Ibid para 13.

¹³¹ Loubser op cit note 8 at 327.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others as Amici Curiae)* 2011 (8) BCLR 816 (CC) para 80.

word fair is deemed to mean the opinion genuinely held by a fair person, therefore the extravagance, prejudice or extremity of the opinion is inconsequential to the assessment of whether the opinion is fair.¹³⁵ Thus, regardless of its nature the comment will be protected if it is the genuine opinion of the person, made without malice on true facts and in respect of matter which is in the public interest.¹³⁶ Therefore, in making use of this defence the individual accused of defamation is required to justify the facts and not their opinion.¹³⁷

The courts have further stated in *National Media Ltd v Bogoshi*¹³⁸ that strict liability in respect of the media is unsustainable as it conflicts with the right to freedom of expression, further holding that publication of certain untruths could be justified if deemed to be reasonable.¹³⁹ The courts have thus created the defence of reasonable publication which involves the consideration of various factors, including how much research and planning was done before the publication was made, whether the person referred to in the defamatory content was provided an opportunity to respond, how serious the defamation was, the extent of the publication and the public interest involved.¹⁴⁰ Therefore, once consideration has been given to all the relevant circumstances, if it appears reasonable to have published the facts in such manner at that time then such publication of defamatory content will be deemed lawful.¹⁴¹

This defence will only apply where the publication of the defamatory content is in the public interest and thus will not apply where it relates to something which is merely interesting to the public.¹⁴² The onus of proving that the publication of the defamatory content was reasonable and that the person who published it was not negligent rests on the defamer.¹⁴³

¹³⁵ Ibid paras 81-3.

¹³⁶ Ibid paras 81-3.

¹³⁷ Ibid para 83.

¹³⁸ *Bogoshi* Supra note 4.

¹³⁹ Loubser op cit note 8 at 327.

¹⁴⁰ Ibid.

¹⁴¹ *Mthembu-Mahanyele v Mail & Guardian Ltd and Another* [2004] 3 All SA 511 (SCA) para 44.

¹⁴² Ibid para 44.

¹⁴³ Currie op cit note 58 at 369.

In addition to the above, the person accused of defamation may be able to use the defence of jest, which was considered in the case of *Le Roux v Dey*.¹⁴⁴ Where defamatory content is published and appears objectively in the circumstances to be in jest then it will not be considered defamatory.¹⁴⁵ A joke which functions to insult, offend or degrade will be considered an illegitimate jest.¹⁴⁶ Where the attempt at jest is illegitimate in the context it will be deemed a defamatory joke and the publisher of the defamatory content will not be able to rely on this defence.¹⁴⁷

From the above, it is evident that there are a number of defences that may be raised by someone who publishes defamatory content. However, the success of these defences depend on various factors, thus in arriving at a decision the courts will be required to carefully consider the circumstances of and the prejudice caused by a defamatory publication.

13. Enforcement of Defamation Claims

It finally becomes necessary to address the enforcement of defamation claims and the challenges created by technology and the internet. Defamation is enforced differently in various countries and thus there is no international uniformity, which is problematic given the international nature of communication via technology and the internet. In some countries internet service providers (ISPs) are held liable for defamatory publications whereas in others the person who authored or posted the defamatory content is held liable.¹⁴⁸ Due to its ever-changing nature, perpetual development and increasing impact on communication, the internet creates a difficult challenge to establishing the most effective way of dealing with the jurisdictional issues it gives rise to.¹⁴⁹ In regards to enforcing claims against ISPs in South Africa, it must be noted that

¹⁴⁴ *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC).

¹⁴⁵ Ibid para 111.

¹⁴⁶ Ibid para 112.

¹⁴⁷ Stubbs op cit note 21 at 383.

¹⁴⁸ Sterling op cit note 70 at 331.

¹⁴⁹ Horton op cit note 75 at 1314.

the Electronic Communication and Transactions Act (ECTA)¹⁵⁰ states that where a third party makes use of an ISP's services to publish defamatory content the ISP cannot be held liable for damages, provided certain conditions are fulfilled.¹⁵¹ These conditions include the ISP's membership to the Minister elected representative body, adoption and integration of its code of conduct and ability to remove or prevent access to the offending content if they receive a valid takedown notice.¹⁵²

A takedown notice provides a procedure through which people can remove certain content from the internet.¹⁵³ This procedure is envisioned by section 77 of the ECTA which sets out the requirements for a valid takedown notice.¹⁵⁴ Once an ISP receives a takedown notice it will confirm that it hosts the relevant website and if so will provide the owner of the content a reasonable period, usually about four working days, to remove such content failing which the ISP may attend to the removal.¹⁵⁵ However, foreign organisations and ISPs have no obligation to abide by the ECT and thus have no reason to comply with a takedown notice, in addition they may not desire or be willing to register and comply with the code of conduct of a representative body in South Africa. Therefore, if an ISP does not have a place of business within the jurisdiction of a South African court it will be very difficult if not impossible to establish jurisdiction within South Africa.¹⁵⁶

In assessing which country's law will be applicable, it can be argued that the law of the country in which the delict took place will be applicable.¹⁵⁷ In addition, when dealing with a claim for defamation against an American ISP section 230 of the Communications Decency Act 1996 (USA) would result in an order granted by a South

¹⁵⁰ Act 25 of 2002.

¹⁵¹ A Roos and M Slabbert 'Defamation on Facebook: *Isparta V Richter* 2013 6 SA 529 (GP)' (2014) 17:6 *PER/PELJ* at 2857-8.

¹⁵² *Ibid* 2858-9.

¹⁵³ Take-down Notice and Take-down Procedure available at <https://www.michalsons.com/blog/take-down-notice-take-down-procedure/2745> accessed on 25 November 2017.

¹⁵⁴ *Ibid*. See also the ECTA *supra* note 150 section 77.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid* 2858.

¹⁵⁷ *Ibid*.

African court being unenforceable as this act provides ISPs with federal immunity from liability in respect of any cause of action based on a third parties use of the service.¹⁵⁸

Because information on the internet exists virtually forever victims of defamation may wish to have the content removed. In this regard, the right to be forgotten becomes relevant as it allows for the removal and erasure of information which is apparently irrelevant, insufficient or excessive regarding the purpose of and time since its collection.¹⁵⁹ The right to be forgotten has not been formally recognised in South Africa, however its existence may be found in certain legislation including the aforementioned ECTA takedown notice as well as the Protection of Personal Information Act¹⁶⁰ (POPIA), which under section 24 allows people to request the correction or deletion of personal information or records which are obtained unlawfully, are outdated, incomplete, irrelevant, inaccurate or misleading.¹⁶¹

From the above, it can be seen that there are a number of issues that arise when dealing with online defamation. Technology and the internet, while increasing the ability to publish content, have created challenges in enforcing and protecting the rights to a good name and reputation. Given the global nature of online publication there may be a need for uniformity in the law regarding online defamation and it may be necessary for an entity such as the UN to set up a procedure enabling enabling people to effectively protect and enforce their rights to a good name and reputation.

While it may seem that holding ISPs liable will solve the issue this simply places a greater burden on them and will not effectively curtail the publication of defamatory content online. Furthermore, the jurisdictional issues that arise in cases of online defamation and the cost implications of proceeding in another country provide further support to the idea that uniformity and an appropriate procedure be established to deal

¹⁵⁸ Ibid 2859-60.

¹⁵⁹ Dario Milo and Avani Singh *Is there Room for a 'Right to be Forgotten' in South Africa* available at <http://blogs.webberwentzel.com/2014/06/is-there-room-for-a-right-to-be-forgotten-in-south-africa/> accessed on 25 November 2017.

¹⁶⁰ Act 4 of 2013.

¹⁶¹ *The Right to be Forgotten in South Africa* available at <https://www.michalsons.com/blog/the-right-to-be-forgotten/11868> accessed on 25 November 2017.

with online defamation. In South Africa the use of takedown notices will afford victims of defamation a necessary route to enforcing their rights to reputation and a good name and may allow them to get the information removed quickly and without excessive expense. In addition, it may be necessary for victims of online defamation to endeavour to enforce their right to be forgotten and have the information deleted or removed as the defamatory content's existence and accessibility through the internet and technology may result in victims having to endure prejudice and harm for the rest of their life.

14. Findings and Recommendations

From the discussions above and the cases that have been decided in this area of law, it is clear someone who has suffered an infringement to their rights to reputation and good name will be successful in bringing a claim for defamation where the defamatory content is published online and the defamer does not have a valid defence. The case of *H v B*, as mentioned above, indicates that victims of online defamation will be able to claim greater sums in damages as a consequence of the prejudice suffered from online defamation being far greater and more severe.

However, due to the various difficulties associated with online defamation and the enforcement of claims in respect thereof, including the issues of jurisdiction it may be very difficult for the victims of defamation to enforce and protect their rights to reputation and a good name. While takedown notices and the right to be forgotten may be beneficial in this regard they may not be sufficient and further safeguards may be necessary.

In combating the issues arising from online defamation the following measures may be recommended. Firstly, educating internet users about the implications and consequences of the content they publish and making them aware of the potential harm they are able to cause to others, as well as the potential liability they may incur. Secondly, educating website owners and bloggers about their obligations and how to guard against liability for defamation, as well as educating them about the consequences of allowing people to use their websites and blogs to cause harm to others. Finally, it may be necessary to

establish a set of unified laws or a global regulatory body that can assist victims and provide mechanisms for the enforcement of their rights. It is clear that online defamation may cause a victim a significant amount of harm and thus it is important to ensure that they are given sufficient protection and the means to enforce their rights.

15. Conclusion

Technology and the internet, due to the ease and affordability they provide in publishing content and their far reaching potential have and will continue to have a huge impact on the law of defamation. Technology and the internet have further impacted the amount that may be awarded in damages as they have significantly increased the potential harm of defamatory content.

In discussing the law of defamation and its application, this research report considered the beneficial impact the internet has had on the right to freedom of expression and how this right although important may need to be limited in certain circumstances to protect and balance other rights. This research report also gave consideration to the fact that some individuals bring themselves into the public domain through their online personalities. These individuals may enjoy a lesser expectation of privacy, however, where they are defamed they may be entitled to a larger award as the harm to their reputation may be more devastating and have greater economic consequences.

This research report further considered the distinction between private and online personalities considering how the law of defamation may apply to these and whether a claim for defamation may be brought for harm suffered by one and not the other. It appears the law of defamation will be applicable to an individual's private and online personalities respectively as we live in a world where a large number of people are known by their aliases and online personalities making it increasingly important for these individuals to protect these online personalities.

Finally, in addressing the impact of the internet and technology on the law of defamation, this research report discussed the issues faced as a consequence of the fact that the internet is borderless, more specifically the difficulties that arise in enforcing defamation claims where there are parties from different nations involved. Bringing a claim for defamation against someone in a different country may prove an expensive exercise, however due to the devastating harm caused by online defamation it may be necessary for victims to do so. Therefore, despite the fact that the internet and technology afford virtually everyone the opportunity to speak their mind and publish their thoughts it is important for people to be mindful of the statements and comments they make as these may cause someone a great deal of harm and render them liable for a large sum in damages.

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