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Transformative constitutionalism and the fault requirement of the common law of personality

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SUMMARY

This article examines the relationship between transformative constitutionalism, legal ideology, and the fault requirement in South Africa's common law of personality. It emphasises the need to balance individualistic and collectivist values in alignment with transformative constitutionalism's imperatives of personal development and social cohesion in the context of the law of personality. The ensuing analysis reveals that the current fault requirement, an exclusive reliance on intention-based liability, inadequately addresses the collectivist values crucial to transformative constitutionalism. This leads to an underappreciation of the complete constitutional social value of the human personality as a legally protected interest. The article advocates a solution within the transformative constitutionalism paradigm, proposing the horizontal application of fundamental rights and constitutional values. This approach facilitates the articulation of the comprehensive constitutional social value of the human personality, encompassing both individualistic and collectivist dimensions. In conclusion, the article calls for an adjustment of the framework of the common law of personality, recommending the introduction of negligence-based liability into the fault requirement of the *actio iniuriarum*. This adjustment aims to enhance the protection of the human personality while effectively balancing individualistic and collectivist values in line with constitutional imperatives.

1 Introduction

Through the lens of transformative constitutionalism,[1] this article re-evaluates the fault standard required for personality infringements (*iniuriae*) under the *actio iniuriarum* within the common law of personality.

Currently, liability for personality right infringements hinges on intention-based liability,[2] excluding negligence-based liability.[3] Scholars

1 In broad terms, Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 150 described the principle of adjudicative subsidiarity as follows: "… a long-term project of constitutional enactment, interpretation and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction."

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have scrutinised this standard extensively, with some advocating for a shift to include negligence-based liability due to historical, pragmatic, and constitutional reasons.[4]

Historically, intention-based liability under the *actio iniuriarum* represents a "penal relic" from the Twelve Tables era, a time when the distinction between criminal law and delict was blurred.[5] Solely relying on this historical foundation is insufficient in a modern context.[6] Contemporary delictual discourse has shifted focus towards providing plaintiffs with "reparations" for harm caused by defendants, necessitating greater flexibility in fault standards.[7]

From a pragmatic standpoint, establishing intent poses significant evidentiary challenges for plaintiffs.[8] The subjective nature of intent ties the defendant's liability to their specific idiosyncrasies, inferred from

2 Which is known as *animus iniuriandi* in the context of the common law of personality. Translated from Latin, animus iniuriandi refers to "the intention to injure". See *Le Roux v Dey* 2011 3 SA 274 (CC) para 129.

3 *R v Umfaan* 1908 TS 62 66; *SAUK v O'Malley* 1977 3 SA 394 (A) 402-403 and 407; *De Lange v Costa* 1989 2 SA 857 (A) 860-861; *Minister of Justice v Homeyr* 1993 3 SA 131 (A) 154; *NM v Smith* 2007 5 SA 250 (CC) para 55; *Economic Freedom Fighters v Manuel* 2021 3 SA 425 (SCA) para 36; *Reddell v Mineral Sands Resources (Pty) Ltd* 2023 2 SA 404 (CC) para 38.

4 See generally Parsons 1951 *THRHR* 192; Pauw (1976) 211-215; Burchell *The Law of Defamation in South Africa* (1985) 169-171; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 246; Knobel "Nalatige Persoonlikheidskrenking" 2002 *THRHR* 24; Neethling "The Right to Privacy, HIV/AIDS and Media Defendants" 2008 *SALJ* 43; Neethling "Onregmatigheidsbewussyn as Element van Animus Iniuriandi by Iniuria" 2010 *Obiter* 711-712; Knobel "Thoughts on Intention, Consciousness of Wrongfulness and Negligence in Delict" 2012 *THRHR* 487-490; Neethling, Potgieter, and Roos (2019) 125 fn 703.

5 Knobel 2012 *THRHR* 488-490.

6 As above.

7 The notion of reparations is based on the so-called "continuity thesis," with its origin to be found in the law of torts, which contextualises the ideological function of the law of delict. In oversimplified terms, the concept of reparations encapsulates the traditional concepts of "compensation" and "satisfaction" but goes much further. Its central focus is to bring about corrective justice for rights infringements such as property, bodily integrity, and personality, pertinent to the South African law of delict. The right violation continues to exist until "there is some intervening action that remedies it," namely reparations. However, reparations are not limited to monetary awards as the dominant position in the law of delict. They include any remedial action that remedies the wrong caused by a rights infringement, for example, an apology, among others. See generally Gardner "What is Tort Law for? Part 1. The Place of Corrective Justice" 2011 *Law and Philosophy* 1; Gardner "What is Tort Law for? Part 2. The Place of Distributive justice" in Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (2014) 335; DuBois "Punishment, Reparation and the Evolution of Private Law: The *Actio Iniuriarum* in a Changing World" 2019 *Acta Juridica* 229; Zitzke "The *Life Esidimeni* Arbitration: Towards Transformative Constitutional Damages?" 2020 *TSAR* 419; Zitzke "Decolonial Comparative Law: Thoughts from South Africa" 2022 *Rabel Journal of Comparative and International Private Law* 190.

8 Knobel 2002 *THRHR* 32-33 and 36; Knobel 2012 *THRHR* 489-490.

case facts, making it considerably more difficult compared to proving negligence, which relies on more ascertainable objective criteria.[9]

The direct horizontal application of the Constitution of the Republic of South Africa, 1996, has entrenched personality interests protected by *the actio iniuriarum* as fundamental rights, enhancing their protection in positive law.[10] Negligence-based liability is better suited to provide this enhanced protection by casting a wider net of liability than intention-based liability.[11]

Against this backdrop, this article presents additional constitutional and ideological reasons within the transformative constitutionalism paradigm for including negligence-based liability alongside intention-based liability. These reasons stem from the influence of legal ideologies and values on the fault framework within the common law of personality,[12] implicating constitutional imperatives related to individual development and social cohesion.[13]

The realisation of these constitutional imperatives can be assessed through the horizontal application of fundamental rights and constitutional values to the fault requirement of the *actio iniuriarum*.[14] If these imperatives are not adequately realised, adjustments to the fault requirement are warranted.[15] Therefore, this article examines how the fault requirement of the *actio iniuriarum* is embedded in legal ideology and aligns with the principles of transformative constitutionalism.[16]

In the discussion that follows, the article first establishes the transformative constitutionalism paradigm in terms of legal ideology, values, and constitutional imperatives (Part 2). It then applies this paradigm to the fault requirement within the broader context of the common law of delict, addressing intention and negligence (Part 3). Finally, it evaluates whether the exclusive reliance on intention-based liability aligns with transformative constitutionalism principles, providing

9 As above.
10 Knobel 2002 *THRHR* 31-32; Knobel 2012 *THRHR* 488 and 490.
11 As above.
12 See generally Kennedy "Form and Substance in Private Law Adjudication" 1976 *Harvard LR* 1685; Cockrell "Substance and Form in the South African Law of Contract" 1992 *SALJ* 40; Klare 1998 *SAJHR* 150; Bhana "The Role of Judicial Method in the Relinquishing of Constitutional Rights through Contract" 2008 *SAJHR* 300; Davis and Klare "Transformative Constitutionalism and The Common and Customary Law" 2010 *SAJHR* 403 412; Zitzke "Stop the Illusionary Nonsense! Teaching Transformative Delict" 2014 *Acta Academia* 52; Bhana "The Role of Judicial Method in Contract Law Revisited" (2015) *SALJ* 122; Zitzke "The History and Politics of Contemporary Common-Law Purism" 2017 *Fundamina* 185.
13 Post "The Social Foundations of Defamation Law: Reputation and the Constitution" 1986 *California LR* 711 and 716.
14 Bhana 2013 *SAJHR* 351 373-374; Zitzke 2014 *Acta Academica* 71-73; Bhana 2015 *SALJ* 124-133.
15 As above.
16 Bhana and Visser "The Concurrence of Breach of Contract and Delict in a Constitutional Context" 2019 *SAJHR* 107.

constitutional and ideological reasons for incorporating negligence-based liability (Part 4).

This article maintains a high level of abstraction appropriate to the transformative constitutionalism paradigm. It focuses on the conceptual and ideological aspects of the proposed fault inquiry and does not delve into the practicalities of incorporating negligence-based liability for all personality rights.[17] These practical considerations require further study and fall beyond the scope of this article.

2 Transformative constitutionalism, legal ideology, and values

As previously mentioned, the transformative constitutionalism paradigm posits that legal ideologies and their corresponding values significantly influence the frameworks of private common law.[18] These ideologies underscore the roles of private individuals in realising transformative constitutional imperatives, particularly those related to personal development and the maintenance of social cohesion within the broader collective.[19] Therefore, this part of the article interrogates the interrelationship between these constitutional imperatives, legal ideologies, and values, and their balancing within the frameworks of private common law.

To provide an outline of a theoretical framework for this article, it is essential to delineate the interrelationships between constitutional imperatives, constitutional ideologies and values, and private common law ideologies and values. Constitutional imperatives find their origin in relevant constitutional values and represent a more concrete expression of the constitutional ideologies underpinning these values.[20] From this basis, the transformative constitutionalism paradigm seeks to align the private common law with the Constitution.[21] This alignment involves adjusting private common law ideologies and values to better fit the

17 For such considerations, see generally Milo "South Africa's Reasonable Publication Defence and the United Kingdom's Public Interest Defence: Two Sides of the Same Coin?" in Koltay and Wragg (eds) *Comparative Privacy and Defamation* (2020) 399. Furthermore, the Constitutional Court judgment of *NM v Smith* serves as a potential case study to consider the application and re-evaluation of the fault standard of the *actio iniuriarum*.

18 Cockrell 1992 *SALJ* 43-44; Bhana 2008 *SAJHR* 302-303; Zitzke 2017 *Fundamina* 186-187.

19 These constitutional imperatives are unpacked in Part 4 with reference to constitutional values. *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 56; McCrudden "Human Dignity and Judicial Interpretation of Human Rights" 2008 *The European J of Intl Law* 679-680; Steinmann "The Core Meaning of Human Dignity" 2016 *PELJ* 1 5-8; Van Staden "Constitutional Rights and Their Limitations: A Critical Appraisal of the COVID-19 Lockdown in South Africa" 2020 *AHRLJ* 488.

20 Visser "Transformative Constitutionalism and the Framework of the Common Law of Personality" 2023 *Stell LR* 314-321.

21 As above.

constitutional imperatives of the transformative paradigm.[22] This is primarily achieved through the application of fundamental rights and constitutional values, resulting in adjustments to the framework of private common law.[23]

Moving to constitutional imperatives, the transformative constitutionalism paradigm envisions an ideological basis for developing the common law of personality, emphasising the need to align the positive common law with the transformative tenets of the Constitution.[24] These transformative tenets find more concrete expression in the constitutional imperatives related to personal development and the maintenance of social cohesion.[25]

The constitutional imperative related to personal development conceptualises the human personality as encompassing physical, mental, spiritual, and moral qualities that capture the uniqueness of the human image in positive law.[26] These qualities enable individuals to express their unique identity in the pursuit of a meaningful and fulfilling life.[27] This imperative emphasises personal autonomy and self-realisation as integral aspects of the human personality, underscoring the importance of individual growth and development within the framework of transformative constitutionalism.[28]

Similarly, the constitutional imperative related to the maintenance of social cohesion emphasises the shared characteristics of the human image that bind individuals together through solidarity and interdependence.[29] This imperative underscores that the pursuit of a meaningful life is a collective human aspiration, supported by reciprocal respect and mutual recognition.[30] These principles of reciprocal respect and mutual recognition serve as benchmarks guiding social interactions, ensuring the stability and cohesion of societal structures, which are essential for maintaining the social constitution of the broader collective.[31]

Transformative constitutionalism requires a nuanced understanding of human personality in the positive common law that integrates the aforementioned imperatives.[32] On a further technical reading of these imperatives, the constitutional imperative related to personal

22 As above.
23 As above.
24 Visser "Human Dignity and the Human Personality: Developing an Ideological Basis for the Constitutionalisation of the Common Law of Personality" 2023 *SAJHR* 203-206.
25 As above.
26 Visser 2023 *SAJHR* 207.
27 As above.
28 As above.
29 Visser 2023 *SAJHR* 207-208.
30 As above.
31 As above.
32 Visser 2023 *Stell LR* 311-312

development is more aligned with individualistic values while the imperative related to the maintenance of the social cohesion is more aligned to collectivist values.[33] In turn, these imperative must inform and adjust the broader ideological continuum with South African private common law, which ranges from (classical) liberalism to (post-liberal) altruism.[34]

Classical liberalism frames individuals as "atomistic units" whose personal autonomy competes with that of others.[35] Accordingly, individuals are tasked with respecting each other's personal autonomy by refraining from deliberate infringements[36] This ideology emphasises individualistic values such as self-interest, self-reliance, and self-determination. [37]

Conversely, (post-liberal) altruism views individuals as "interconnected selves" whose personal autonomy is constituted not only through individual abilities and achievements but also through social relationships and community membership.[38] This perspective imposes a duty on individuals to exercise reasonable care to avoid carelessly infringing on the interests of others.[39] This ideology highlights collectivist values such as cooperation, solidarity, and interdependence.[40]

Within the transformative constitutionalism paradigm, an appropriate balance must be achieved between individualistic and collectivist values within the frameworks of private common law for several reasons.[41]

First, South African private common law was historically constituted within a pre-constitutional ideology of (classical) liberalism.[42] Classical liberalism tends to entrench the status quo of a pre-constitutional South African legal society[43] and is therefore unable to adequately realise constitutional transformative imperatives related to personal development and social cohesion in a more egalitarian and socially just legal society.[44] Accordingly, a constitutional ideological shift is required

33 Visser 2023 *Stell LR* 320-311.
34 Kennedy 1976 *Harvard LR* 1713; Cockrell 1992 *SALJ* 44; Klare 1998 *SAJHR* 152-153; Zitzke 2014 *Acta Academica* 56-57.
35 Kennedy 1976 *Harvard LR* 1713; Zitzke 2014 *Acta Academia* 56-57; Bhana 2015 *SALJ* 124.
36 As above.
37 Kennedy 1976 *Harvard LR* 1713-1715; Zitzke 2014 *Acta Academia* 56-57; Bhana 2015 *SALJ* 124.
38 Kennedy 1976 *Harvard LR* 1717; Zitzke 2014 *Acta Academia* 56-57; Bhana 2008 *SAJHR* 310.
39 As above.
40 Kennedy 1976 *Harvard LR* 1717-1718; Zitzke 2014 *Acta Academia* 56-57; Bhana 2008 *SAJHR* 310.
41 Zitzke 2014 *Acta Academia* 57-60; Bhana and Visser 2019 *SAJHR* 109-110.
42 Klare 1998 *SAJHR* 149 and 159; Bhana 2008 *SAJHR* 302; Zitzke 2014 61; Bhana (2015) *SALJ* 128; Zitzke 2017 *Fundamina* 186; Zitzke "A Decolonial Critique of Private Law and Human Rights" 2018 *SAJHR* 503-509; Bhana and Visser 2019 *SAJHR* 109-110.
43 Zitzke 2017 *Fundamina* 186-187.
44 As above.

within the frameworks of private common law.[45] This shift involves moving from pre-constitutional notions of (classical) liberalism towards greater (post-liberal) altruism.[46] However, certain caveats are attached to this ideological shift: individuals cannot remain completely unfettered nor be entirely subsumed into the collective.[47] This implies that the transformative constitutionalism paradigm does not advocate for a blanket rejection of individualistic values or a wholesale acceptance of collectivist values.[48] Instead, it calls for a balanced integration where no set of values is privileged at the expense of another.[49]

Secondly, an appropriate balance between individualistic and collectivist values within the frameworks of private common law is essential to ensure that individual interests are sufficiently recognised and linked with the interests of the community.[50] Failure to strike this balance could lead to either insufficient or excessive protection of individual interests in relation to their constitutional social value.[51] Insufficient protection may hinder personal development by failing to adequately recognise individual abilities and achievements.[52] Conversely, excessive protection of individual interests could place an undue burden on society and undermine social stability.[53]

Lastly, achieving this balance is crucial for giving effect to the "single-system-of-law" principle, a foundational pillar of transformative constitutionalism.[54] This principle resists a stark divide between private common law and the Constitution by integrating public values into private law, facilitating the horizontal application of the Constitution.[55] In concrete terms, this integration connects individual and collective interests to the Constitution's objective normative value system, which

45 Visser "Revisiting the Constitutionalisation of the Common Law of Personality: Transformative Constitutionalism and Le Roux v Dey" 2020 *SAJHR* 247.
46 Klare 1998 *SAJHR*.
47 Bhana and Visser 2019 *SAJHR* 107.
48 As above.
49 Bhana 2008 *SAJHR* 303-308; Bhana and Visser 2019 *SAJHR* 105-106.
50 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 3; Bhana and Visser 2019 *SAJHR* 109.
51 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 62-63; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) paras 62–80; Bhana and Visser 2019 *SAJHR* 109.
52 Bhana and Visser 2019 *SAJHR* 109.
53 As above.
54 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 647 (CC) para 44; *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) para 33; *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 (CC) para 71; Bhana "The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution" 2013 *SAJHR* 353.
55 Bhana 2013 *SAJHR* 374-375; Bhana "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" 2015 *Stell LR* 5.

consists of constitutional values and fundamental rights.[56] Foundational values such as human dignity, equality, freedom, and ubuntu guide private relationships, providing interpretative norms for their constitutional regulation.[57] These norms further assist in realising transformative constitutional imperatives by contextualising individuals within a constitutional community.[58] Through the principle of adjudicative subsidiarity,[59] individual interests and those of the broader collective are connected to corresponding fundamental rights, reinforcing the single-system-of-law principle and ensuring that private common law and the Constitution are not treated as distinct sources of law.[60] In this way, these interests are also localised within the aforementioned transformative constitutional imperatives.

Building on this foundation, the next section interrogates the fault requirement within the common law of delict and the common law of personality, examining how these principles can be aligned with transformative constitutionalism.

3 Legal ideology, fault, and the common law of delict

When viewed ideologically, the common law of delict functions as a mechanism to regulate the allocation of losses for harm suffered by a plaintiff concerning their property, person, or personality, attributable to the defendant's conduct.[61] This allocation balances the plaintiff's and

56 *Carmichele v Minister of Safety and Security* para 54; Bhana 2015 *Stell LR* 6.

57 Klare 1998 *SAJHR* 159; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28; *Dawood v Minister of Home Affairs: Shalabi v Minister of Home Affairs: Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

58 Bhana 2008 *SAJHR* 308-311; Bhana 2015 *SALJ* 130-133.

59 *Dendy v University of the Witwatersrand* 2007 8 BCLR 910 (SCA) paras 15 and 24; *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) para 56; Van der Walt *Property and the Constitution* (2012) 24-34 and 37; Zitzke "Constitutional Heedlessness and Over-excitement in the Common Law of Delict's Development" 2015 *CCR* 286. In broad terms, in the context of the law of personality, Visser "Adjudicative Subsidiarity, the 'Horizontality Simpliciter' Approach and Personality Rights: Outlining an Integrated and Constitutional Reading Strategy to the Law of Personality" 2022 *De Jure* 128 described the principle of adjudicative subsidiarity as follows: "In terms of this approach, the starting point of this principle is to identify a potential fundamental right that is implicated between parties to a dispute in a private relationship".

60 As above.

61 *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 1 SA 577 (A) 584; *Chartaprops 16 (Pty) Ltd v Silberman* 2009 1 SA 265 (SCA) para 37; Van Der Walt and Midgley *Principles of Delict* 4th ed (2016) § 27; Loubser and Midgley (eds) *The Law of Delict in South Africa* 3rd ed (2017) 5 and 22-25; Neethling and Potgieter *Law of Delict* 8th ed (2020) 3-6.

defendant's individual interests against the broader societal interests.[62] Specifically, the fault requirement in delict law seeks to establish the defendant's blameworthiness by determining the expected standard of care.[63] This determination rests primarily on two forms of fault: intent and negligence, notwithstanding strict liability in certain exceptional circumstances.[64] These forms of fault embody varying degrees of individualistic and collectivist values in imputing blameworthiness.[65] This part of the article critically examines the interplay between these values through the lenses of intent and negligence in the common law of delict.

With intent (*dolus*), a defendant is held liable for causing harm "deliberately."[66] In positive law, this manifests when the defendant had a legally reprehensible state of mind, characterised by directing their will to cause harm with an accompanying consciousness of its wrongfulness.[67] Thus, intent comprises both the direction of will and knowledge of wrongfulness. [68] Determining intent necessitates an inquiry into the subjective state of mind of the defendant to infer their deliberate intent to cause harm, cognisant of its wrongful nature.[69]

From an ideological perspective, intent reflects a duty not to deliberately harm others, aligning closely with classical liberalism. This standard of care underscores individualistic values such as self-interest, self-reliance, and self-determination. The threshold of blameworthiness is rooted in the subjective mind of the defendant, integrating their specific individual characteristics.[70] Consequently, intent aligns strongly with individualistic values.

However, the sub-components of intent – direction of will and knowledge of wrongfulness – also resonate with societal expectations regarding deliberate harm. Every individual who deliberately causes

62 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387; *Dikoko v Mokhatla* para 68; Loubser and Midgley (2017) 152.
63 Fleming "The Role of Negligence in Modern Tort Law" 1967 *Virgina LR* 816; Cane "Mens Rea in Tort Law" 2000 *Oxford J of Legal Studies* 553; Van der Walt and Midgley (2016) § 27; Loubser and Midgley (2017) 22.
64 Van Der Walt and Midgley (2016) §135; Loubser and Midgley (2017) 138; Neethling and Potgieter (2020) 155-157.
65 Zitzke 2014 *Acta Academia* 58.
66 Cane 2000 *Oxford J of Legal Studies* 535-536 and 546.
67 *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) 396. Furthermore, intent may take three forms, namely *dolus directus*, *dolus indirectus*, and *dolus eventualis*. For a detailed account on the explanation of the different forms of intention, see generally Van der Walt and Midgley (2016) 137; Loubser and Midgley (2017) 144-147; Neethling and Potgieter (2020) 159-160.
68 *Khumalo v Holomisa* 2002 5 SA 401 para 20.
69 *Dantex Investment Holdings (Pty) Ltd v Brenner* 396; Van der Walt and Midgley (2016) 137; Loubser and Midgley (2017) 148-149; Neethling and Potgieter (2020) 160163.
70 *S v Ngubane* 1985 3 SA 677 (A) 686-687; Midgley "Intention Remains the Fault Criterion under the Actio Injuriarum" 2001 *SALJ* 435; Knobel 2002 *THRHR* 35.

harm is measured against these sub-components to address the impact of their conduct on the broader community.[71]

Thus, while intent primarily reflects individualistic values, it also incorporates a weaker reliance on collectivist values.[72]

On the other hand, with negligence (*culpa*), a defendant is blamed for causing harm "carelessly."[73] In positive law, negligence is established when a "reasonable person" would have acted differently under similar circumstances, making the harm foreseeable and preventable.[74] Negligence employs the reasonable person standard to assess whether the defendant exercised the requisite care, considering the specific circumstances of the case while avoiding a high level of abstraction.[75]

Ideologically, negligence embodies a duty to exercise reasonable care to avoid causing harm to others, resonating with post-liberal altruism. This standard of care emphasises collectivist values such as cooperation, solidarity, and interdependence.[76] The threshold of blameworthiness is based on societal expectations, encapsulated in the reasonable person standard.[77] This approach focuses on what a hypothetical reasonable person would have done in similar circumstances, considering the context but not the defendant's unique personal characteristics. [78]

Therefore, negligence strongly aligns with collectivist values, emphasising the duty to prevent harm through reasonable care. While individual circumstances are relevant, they are not prioritised, resulting in a weaker reliance on individualistic values.[79]

When comparing intent with negligence, it becomes evident that these fault standards complement each other in balancing individualistic and collectivist values.[80] Intent emphasises individualistic values by considering the defendant's specific characteristics and confining liability to deliberate acts. This allows individuals' greater freedom of

71 Cane 2000 *Oxford J of Legal Studies* 545.
72 Van der Walt and Midgley (2016) 26 and 148.
73 Cane 2000 *Oxford J of Legal Studies* 537.
74 *Kruger v Coetzee* 1966 2 SA 428 (A) 430; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 21; *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) paras 53-57; Van der Walt and Midgley (2016) 148; Loubser and Midgley (2017) 154-156; Neethling and Potgieter (2020) 164-166.
75 *Cape Town Municipality v Paine* 1923 AD 207 216–217 and 225; *Herschel v Mrupe* 1954 3 SA 464 (A) 490; *Weber v Santam* 1983 1 381 SA (A) 410-411; Van der Walt and Midgley (2016) § 148; Loubser and Midgley (2017) 154; Neethling and Potgieter (2020) 169-170.
76 Van der Walt and Midgley (2016) 26 and 148.
77 *S v Ngubane* 686-687; Cane 2000 *Oxford J of Legal Studies* 545.
78 *Marais v Groenewald* 646; Van der Walt and Midgley (2016) 26 and 148.
79 Knobel 2002 *THRHR* 36.
80 Mashinini "The Processing of Personal Information Using Remotely Piloted Aircraft Systems in South Africa" 2020 *De Jure* 148 and 155.

action, as liability is limited to intentional harm.[81] In this respect, intent casts the net of liability narrowly.[82] In contrast, negligence emphasises collectivist values by holding defendants accountable to societal standards of care, extending liability to careless acts.[83] In this respect, negligence casts the net of liability wider than intention, ensuring the maximum protection of the individual interests of a plaintiff.[84] This ensures broader protection of the plaintiff's interests by encompassing both deliberate and careless harm.

A hypothetical example illustrating these principles involves a journalist who publishes a personal story about an individual's health condition without explicit consent. Suppose the journalist assumes consent based on previous informal discussions but fails to verify it formally. Here, the criteria for intent would not be met due to the lack of direction of will and consciousness of wrongfulness. The journalist did not deliberately intend to harm the individual, nor were they aware that publishing the story would be wrongful without consent. However, the journalist's failure to verify consent meets the criteria of negligence, as a reasonable person would have confirmed consent before publication. The reasonable person standard requires the defendant to foresee the potential harm and take steps to prevent it. In this hypothetical, the journalist's oversight reflects a failure to exercise reasonable care, highlighting the importance of verifying sensitive information.[85]

In essence, the availability of these two forms of fault in the common law of delict seems to work in tandem to ensure that an appropriate balance is achieved between individualistic and collectivist values and

81 Knobel 2002 *THRHR* 31; Neethling 2008 *SALJ* 43; Van Der Walt and Midgley (2016) 26 and 148.

82 As above.

83 As above. Interestingly, this distinction between intent and negligence manifests in positive law through the evidentiary difficulty in establishing intent over negligence. Arguably, on a pragmatic level, intention is a difficult form of fault to prove as one is essentially tasked to determine the subjective mind of a defendant. In comparison to negligence, which hinges liability on comparing the conduct of the defendant to that of the reasonable person, it is an evidentiary challenging task to establish intention. This evidentiary difficulty makes it easier to establish negligence over intention. This then accounts for the proposition of why negligence casts the net of liability wider than intention due to this evidentiary difficulty. See *Marais v Groenewald* 646; Cane 2000 *Oxford J of Legal Studies* 542 and 553; Knobel 2002 *THRHR* 316; Van der Walt and Midgley (2016) 26.

84 As above.

85 This hypothetical draws inspiration from the Constitutional Court case *NM v Smith* 2007 5 SA 250 (CC). For further appraisal of this judgment, see Penfold and Milo, "Media Freedom and the Law of Privacy: *NM and Others v Smith and Others (Freedom of Expression Institute Intervening as Amicus Curiae)* 2007 (5) SA 250 (CC)" 2008 CCR 322-325.

that the necessary protection is afforded to individual and collective interests.[86]

Against this backdrop, the article raises pivotal questions about the adequacy of an exclusive reliance on intention-based liability for personality infringements under the *actio iniuriarum*. Can such an approach facilitate an appropriate balance between individualistic and collectivist values, as necessitated by transformative constitutionalism? Furthermore, does intent alone provide sufficient protection for personality interests within their constitutional social context? These questions probe deeper into whether the current fault standard under the *actio iniuriarum* aligns with the constitutional imperative of transformative justice. The subsequent part of this article addresses these critical inquiries, evaluating the potential integration of negligence-based liability to enhance the protection of personality rights.

4 Legal ideology, fault, and the common law of personality

Regarding the first question, it becomes clear from the discussions above that an exclusive focus on intention-based liability cannot effectively balance individualistic and collectivist values within the common law framework of personality. As demonstrated, intent is predominantly underpinned by individualistic values through its standard of care, firmly situated in the ideology of classical liberalism. Intention-based fault focuses on the defendant's subjective state of mind, emphasising individual autonomy, self-interest, and personal responsibility. This approach aligns with classical liberal principles, where personal freedom and self-reliance are paramount. However, intent lacks internal mechanisms to counterbalance its strong reliance on individualistic values and the advancement of classical liberalism.

Conversely, negligence is closely associated with collectivist values and post-liberal altruism. Negligence-based fault considers the defendant's failure to meet an objective standard of care, measured against societal expectations of a reasonable person. Negligence promotes values such as cooperation, solidarity, and the duty to prevent harm to others, reflecting a broader social perspective. However, similar to intent, negligence cannot internally counterbalance its reliance on collectivist values. Therefore, integrating both intention-based and negligence-based liability provides an external counterbalance, that is, the other form of fault, effectively balancing individualistic and collectivist values within the legal framework.

86 Knobel 2002 *THRHR* 27; Neethling and Potgieter "Accusation of Shoplifting: Actionable Defamation or *Iniuria*? – *Pieterse v Clicks Group Ltd* 2015 5 SA 317 (GJ)" 2018 *THRHR* 148.

From a different perspective, exclusive reliance on intention-based liability cannot facilitate a constitutional ideological shift in the common law of personality from (classical) liberalism to (post-liberal) altruism, as required by transformative constitutionalism. Intent is deeply embedded in classical liberal ideology, where individualistic values dominate the roles of private individuals in realising constitutional imperatives. Intent does not possess significant internal mechanisms to facilitate a shift towards collectivism, given its weak reliance on collectivist values. Consequently, achieving a socially just and egalitarian society becomes elusive as the emphasis on individual autonomy diminishes human interdependence, solidarity, and cooperation.[87] More specifically, with intent, individuals are tasked to "mind their own business" and are not required to share or sacrifice the pursuit of their individual interests.[88] Arguably, this willingness to sacrifice or, at the very least, share the pursuit of individual interests, is a necessary condition to realise the constitutional imperative related to the broader collective.[89]

Therefore, this article argues that intention-based liability alone cannot balance individualistic and collectivist values as required by transformative constitutionalism. This assertion is not merely theoretical but also has pragmatic relevance in positive law. This relates to the second question of whether sufficient protection is afforded to the human personality in relation to its constitutional social value under transformative constitutionalism.

When framing the human personality in classical liberal (individualistic) terms through the fault requirement, its constitutional social value appears limited to individual development. The human personality is conceptualised as an "individualistic good" without collective relevance.[90] Consequently, there is a perception that there is no constitutional impetus to provide extensive protection to this interest.[91] This notion manifests in the fault requirement of the *actio iniuriarum*, where liability for personality infringement is narrowly construed through intent rather than negligence. [92]

However, this article argues that pre-constitutional notions of classical liberalism can be escaped by ideologically adjusting the common law of personality to fit the transformative constitutionalism paradigm.[93] This assertion is based on the horizontal application of fundamental rights

87 Zitzke 2014 *Acta Academia* 56-57.
88 *Bernstein v Bester* 1996 2 SA 634 (CC) para 65; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, amici curiae)* 2005 5 SA 3 (CC) para 36; Kennedy 1976 *Harvard LR* 1713; Botha "Human Dignity in Comparative Perspective" (2009) 20 *Stell LR* 193; Zitzke 2014 *Acta Academia* 56-57; Bhana 2015 *SALJ* 124.
89 As above.
90 Midgley 2001 *SALJ* 440; Van der Walt and Midgley (2016) 26.
91 As above.
92 As above.
93 Bhana 2013 *SAJHR* 351 373-374; Zitzke 2014 *Acta Academica* 71-73; Bhana 2015 *SALJ* 124-133.

and foundational values to create a single constitutionalised common law of personality, balancing individualistic and collectivist values.[94] In doing so, the constitutional social value of the human personality can be re-evaluated through the horizontal application of fundamental rights.[95] The collective dimension of the human personality, currently unarticulated in the fault requirement of the *actio iniuriarum*, can be highlighted through the horizontal application of foundational values.[96]

The development of these assertions culminates in the argument that the human personality has immense constitutional social value, requiring increased protection in the common law of personality.[97] This necessitates adjusting the fault requirement of the *actio iniuriarum* to include negligence-based liability alongside intention-based liability.

Starting with the horizontal application of fundamental rights, the principle of adjudicative subsidiarity under transformative constitutionalism links a plaintiff's delictually protected interests in property, person, and personality to corresponding rights in the Bill of Rights.[98] For instance, a plaintiff's interest in property is protected by section 25 of the Constitution,[99] their bodily interests by section 12,[100] and their personality by section 10 (human dignity), section 14 (privacy), and section 12 (bodily integrity).[101] With the human personality, sections 10, 14, and 12 collectively ensure that the plaintiff's interests are constitutionally recognised and protected, providing a robust framework for safeguarding personality rights.

The entrenchment of these interests through fundamental rights has significant constitutional ideological implications. Constitutional jurisprudence affirms that rights in the Bill of Rights generally enjoy equal status, implying that a plaintiff's interests in property, person, and

94 Bhana 2015 *SALJ* 144-145; Zitzke 2018 *SAJHR* 500-501; Visser 2022 *De Jure* 126.
95 As above. In the context of the common law of personality, generally see Visser 2022 *De Jure* 133-137.
96 As above.
97 Neethling, Potgieter, and Roos (2019) 125-126.
98 Van der Walt *Property and the Constitution* (2012) 24-34; Zitzke 2015 *CCR* 286; Bhana and Visser 2019 *SAJHR* 109; Visser 2022 *De Jure* 128.
99 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002 4 SA 768 (CC) paras 47–48; *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 6 SA 350 (CC) para 35; *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) para 83; Bhana and Visser 2019 *SAJHR* 111-113; Neethling and Potgieter (2020) 19.
100 *AK v Minister of Police* 2023 2 SA 321 (CC) para 71; Zitzke "Critiquing the *Komape* Decision" 2019 *TSAR* 822; Zitzke "The *Life Esidimeni arbitration: Towards* Transformative Constitutional Damages?" 2020 *TSAR* 425; Zitzke "Transforming the Law on Psychiatric Lesions" 2021 *Stell LR* 259 and 263; Neethling and Potgieter (2020) 19.
101 *Khumalo v Holomisa* para 27; *Le Roux Dey* 2011 3 SA 274 (CC) para 141; Knobel 2012 *THRHR* 488 and 490; Neethling, Potgieter, and Roos (2019) 20 and 125; Neethling and Potgieter (2020) 19-20; Visser 2021 *Stell LR* 284.

personality should receive equal protection in positive law.[102] Ideologically, this suggests that a plaintiff's interests in personality should not be afforded inferior protection compared to their property or bodily interests.[103] This assertion is further justified by the horizontal application of constitutional values.

The horizontal application of constitutional values provides interpretative norms highlighting the individual and collectivist dimensions of the human personality.[104] This involves contextualising the human personality against values such as human dignity, equality, freedom, and ubuntu.[105]

Human dignity relates to an individual's absolute worth, rooted in both unique human characteristics and our shared humanity.[106] These unique characteristics include bodily integrity, freedom, reputation, dignity, privacy, identity, and feelings,[107] all of which enable individuals to pursue a meaningful life within the constitutional imperative of self-development.[108] This represents the individualistic dimension of the human personality. Meanwhile, our shared humanity creates a vision where individual development is contextualised within a community.[109] Within this community, the development of individual personalities must be supported and respected by other individuals and the broader collective to maintain social cohesion.[110] This collectivist dimension of human dignity lays the foundation for the broader collective to develop its own cultural identity and preserve the stability of social life.[111] Thus, human dignity embodies both the individualistic and collectivist dimensions of the human personality, reflecting the constitutional imperatives of self-development and social cohesion.

Within the context of the common law of personality, the values of equality, freedom, and ubuntu form an affirmative and mutually supportive triad. These values further support individuals in reaching their full potential and maintaining social cohesion through their unique

102 *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 3 SA 409 (CC) para 41; Neethling, Potgieter, and Roos (2019) 125; Neethling and Potgieter (2020) 21-22; an Staden (2020) *AHRLJ* 490.
103 Knobel 2002 *THRHR* 31.
104 Visser 2023 *SAJHR* 206-208.
105 As above. Also note that in the context of the common law of personality, the constitutional value of human dignity is the central ideological axis for the constitutional interpretation of human personality. In this regard, the remaining values of equality, freedom, and ubuntu support and supplement the ideological tenets of human dignity. See *Khumalo v Holomisa* paras 26-28.
106 *Ferreira v Levin* 1996 1 SA 984 (CC) para 49.
107 Visser 2023 *SAJHR* 206-208.
108 As above.
109 Post 1986 *California LR* 711 and 716.
110 As above.
111 As above.

characteristics and shared humanity, by providing them with social citizenship in a broader community.[112]

Equality ensures each individual's social citizenship, allowing meaningful participation in social life regardless of material conditions. It emphasises that all individuals are entitled to equal concern and respect, which directly impacts their ability to participate fully in society.[113] This value promotes the idea that every person should have an equal opportunity to develop their personality and contribute to the community, regardless of their socio-economic status.[114]

Freedom ensures individuals can reach their potential and establish positive relationships without unjustifiable restraint.[115] This value supports the notion that personal autonomy and freedom are essential for self-development and the pursuit of personal goals.[116] However, freedom must be balanced with the rights and freedoms of others, ensuring that one's actions do not harm the community's social fabric.[117]

Ubuntu advances the social ideal that recognition and protection of individual interests are interdependent on similar recognition and protection for others.[118] It embodies the principle that humanity is interconnected, and one's well-being is intrinsically linked to the well-being of others.[119] This value highlights the importance of mutual support, empathy, and collective responsibility in fostering a harmonious society.[120]

Considering the horizontal application of these constitutional values, it is evident that personality interests extend beyond individual development to include social cohesion. The human personality's collectivist dimension facilitates constitutional imperatives related to social cohesion, providing the basis for social citizenship. The social constitution of the broader collective depends on the harmonious exercise of social citizenship among individuals. Therefore, under transformative constitutionalism, the collectivist nature of the human personality must be recognised in positive law through the fault requirement.

112 *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 113.
113 *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) para 60; Albertyn and Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 *SAJHR* 254.
114 As above.
115 *Ferreira v Levin* 1996 1 SA 984 (CC) para 49-52.
116 As above.
117 As above.
118 *S v Makwanyane* 1995 3 SA 391 para 224; *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) para 24.
119 As above.
120 As above.

Flowing from the discussion above, the plaintiff's personality interests should receive the same protection as their property and bodily interests, as highlighted through the horizontal application of fundamental rights. The human personality is not only an individualistic good but also a collectivist good, as emphasised through the horizontal application of constitutional values. The human personality encompasses both individualistic aspects, such as bodily integrity, freedom, reputation, dignity, privacy, identity, and feelings, and collectivist aspects, rooted in shared humanity and the need for social cohesion. Both individuals and the greater collective have a vested interest in the development of personalities, as the exercise of social citizenship to participate in social life requires an appropriate balance between individualistic and collectivist values. Achieving this balance ensures the social cohesion and stability of the broader collective, thereby reflecting the constitutional imperatives of self-development and community well-being.

Given the human personality's social constitutional value, comprising both individualistic and collectivist dimensions, intent alone does not provide adequate protection. The ideological dimensions of the transformative constitutionalism paradigm necessitate enhanced protection of the human personality in positive law. This enhancement can be achieved by introducing negligence-based liability alongside intention-based liability. Incorporating negligence-based liability addresses the constitutional ideological concerns by ensuring that the human personality receives comprehensive protection that reflects both individual and collective interests. This adjustment to the framework of the common law of personality will align it with the broader framework of the common law of delict, thereby ensuring legal certainty and predictability. Introducing negligence-based liability complements intention-based liability, providing a more robust and balanced approach to safeguarding personality rights within the transformative constitutionalism paradigm.

5 Conclusion

This article has examined the relationship between transformative constitutionalism, legal ideology, and the fault requirement in the common law of personality. It has emphasised the necessity of striking an adequate balance between individualistic and collectivist values, in alignment with the constitutional imperatives of individual development and social cohesion within the transformative constitutionalism paradigm.

The analysis reveals that the exclusive reliance on intention-based liability in the fault requirement inadequately addresses the collectivist values endorsed by post-liberal altruism, as demanded by transformative constitutionalism. Furthermore, it becomes evident that the full constitutional social value of the human personality, as a delictually protected interest, remains underappreciated and unarticulated within

this framework. However, through the horizontal application of fundamental rights and constitutional values, as outlined in the transformative constitutionalism paradigm, the articulation of the comprehensive constitutional social value of the human personality is facilitated, encompassing both its individualistic and collectivist dimensions.

In light of these insights and considerations, it is imperative to adjust the framework of the common law of personality to introduce negligence-based liability in the fault requirement of the actio iniuriarum. This adjustment is essential to provide adequate protection to the human personality while effectively balancing individualistic and collectivist values in line with relevant constitutional imperatives. Introducing negligence-based liability will not only enhance the protection of personality rights but also ensure that the legal framework aligns with the transformative goals of constitutionalism, promoting a more just and equitable society. This change will help realise the constitutional promise of human dignity, equality, and freedom, reflecting the true social constitutional value of the human personality.