THE IMPACT OF THE CONSTITUTION ON THE COMMON LAW OF DEFAMATION

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DECLARATION

I, Shalini Kisten Rajoo, hereby declare that the work contained herein is entirely original and my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements for any other degree or qualification at any other university.

Signed and dated at Durban on the 30th day of March 1998.

Shalini Kisten Rajoo

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CHAPTER 1

INTRODUCTION

"Who steals my purse steals trash - 'tis some-
thing, nothing;
'Twas mine, 'tis his, and has been slave to
thousands;
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed."[1]

The right to defend one's reputation by means of the action for defamation, is a right which has long been protected in society. As changes have occurred in society, our courts have attempted to ensure that the common law of defamation has developed accordingly, so that it may continue to function effectively in the overall scheme of our legalsystem.

In 1994, the South African legal system underwent drastic changes with the advent of the Interim Constitution, and later, in 1996, with the introduction of the Final Constitution. The introduction of guaranteed fundamental rights presented a new vista for all existing law, including the common law of defamation. It was therefore thought that it would be important, to explore the changes which have been wrought, if any at all, in the fabric of the common law of defamation, as a result of the advent of these new constitutional guarantees. It is with this aim in mind that the present dissertation has been written.

The subject matter has been treated by first reviewing the common law of

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1 Othello, Act III, iii, lines 155-162.

defamation, as it existed prior to 1994 (Chapter 2). The focus of this chapter was on those elements of the defamation action, which have proven to be contentious, both before the introduction of a constitutionally protected Bill of Rights, and afterwards as well.

Thereafter, the focus of this work shifted to a discussion of those defamation cases which emanated from our courts after 1994 (Chapter 3). In the scope of this chapter, three main areas of debate have been identified from the case law in question, viz:

1. The issue of whether or not the provisions of the Constitution, apply retrospectively.
2. The question of whether the Constitution (in particular, the Bill of Rights) was meant to be applied to disputes between private individuals (the so-called 'horizontality' debate).
3. The problem of the specific manner in which the common law of defamation should be modified so as to conform to the dictates of the new Constitution.

It was noted that most of the post-1994 defamation cases had become entangled in one or both of the first two issues mentioned above, and as a result, did not address the question of what changes, if any, should be made to the substantive law of defamation. This was regrettable, since many of the problems relating to those first two issues were resolved initially by the Constitutional Court, and then by the changed text of the Final Constitution.

In Chapter 4, a brief examination of the law of defamation in the United States, Australia and Canada is undertaken, in order to determine whether the jurisprudence of those countries, can be of any guidance to our courts, in their attempt to reformulate the common law of defamation. It will be seen that, in fact, our courts can gain little from the judicial pronouncements on the law of defamation, which

have been made in these countries. This is either because such pronouncements have been so roundly criticised that they would not be worth adopting, or because these judicial statements introduce no new concepts, or possible avenues of development, which our courts are not already aware of.

Finally, in Chapter 5, my own submissions as to the effect of the Interim, and Final Constitution, on the common law of defamation, are discussed in conjunction with a summary of the preceding analysis of the law. Possible areas for further research are also identified in this chapter.

CHAPTER 2

THE COMMON LAW OF DEFAMATION PRIOR TO 1994

(a) Introduction

The purpose of this chapter is to set out the basic principles of the South African common law[1] of defamation, prior to the advent of the Interim Constitution.[2] At the outset it must be said that the system of common law in South Africa has always been a dynamic and flexible system of law which has shown itself, over the years, to be capable of adaptation to changing circumstances. As such, the foundational principles relating to the action for defamation, adopted from our Roman-Dutch heritage, have been modified and developed extensively by our courts, and in particular by the Appellate Division (as it then was[3]), in order to give the law the flexibility that it has needed in order to cope with the new demands and interests of a constantly evolving society. The common law in South Africa, and of course the common law of defamation, has therefore evolved in an entirely casuistic manner, and it is this developmental history that this chapter will attempt to trace.

Before entering any discussion of this development however, it must be stated that the growth of our common law of defamation has by no means been an aimless meandering of the law. On the contrary, the common law of defamation has always had as its purpose, the protection of a person's right to an unimpaired reputation.[4] In seeking to protect an individual's right to or interest in his good name, our courts have

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1 The South African common law is based on the system of Roman-Dutch law.

2 The Interim Constitution came into effect on 27 April 1994 in terms of the *Republic of South Africa Constitution Act* 200 of 1993.

3 The Appellate Division is now known as the Supreme Court of Appeals in terms of section 166(b) of the *Constitution of the Republic of South Africa Act* 108 of 1996.

4 Jonathan M Burchell *The Law of Defamation in South Africa* (1985) at 1 and 18.

encountered an equally important and conflicting right viz. the right to freedom of expression. As such, the judiciary has sought to mould the common law of defamation around these two central, and opposing themes viz. the protection of an individual's reputation and the need to foster open communication through protection of the right to freedom of expression. The principles and rules set out in this chapter therefore represent the fruits of the judiciary's attempts to achieve a workable balance between the right to reputation and the right to free speech.[5]

(b) The elements of an action for defamation:

Many authors have attempted to define the legal concept of defamation. Unfortunately, most of these definitions fail to take cognisance of the distinction between the elements of *unlawfulness* and *fault*.[6] It is submitted that Burchell's definition of defamation offers the most useful starting point in any discussion of the basic principles of defamation. He defines defamation by an individual as the *unlawful, intentional, publication of defamatory matter (by words or conduct) referring to the plaintiff, which causes his reputation to be impaired.*[7] It must be pointed out here that although intention or *animus injuriandi* is normally required in order to prove a claim of defamation, this requirement does *not* apply to matter published or disseminated by the press, radio or

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5 Whether or not the judiciary has been successful in finding the right balance has long been the subject of debate in our law. It will be seen later on that the majority of the post-1994 cases relating to defamation, have characterised our pre-constitutional law of defamation as giving the right to reputation the 'upper hand' over freedom of expression. See for instance the comments made by Froneman J in *Gardener v Whitaker* 1994 (5) BCLR 19 (E) at 33 F and by Cameron J in *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W) at 611 D. In fact, Cameron J went so far as to conclude (at 602 D) that the previous Appellate Division decisions "constitute a cumulative repudiation of the notion that the action for defamation, as derived from our common-law, should be circumscribed either in the interests of media freedom or in order to cultivate free political debate.

6 See for instance the definition offered by McKerron *The Law of Delict* 7ed (1971) at 170: "The wrong of defamation consists in the publication of defamatory matter concerning another without lawful justification or excuse". See also the definition offered by Badhra Ranchod *Foundations of the South African Law of Defamation* (1972) at 154: "Defamation may be defined as consisting of the intentional publication of matter which tends to lower the esteem in which the plaintiff is held by others".

7 Burchell op cit 35.

television.[8] The media are therefore held *strictly liable* in a claim for defamation.[9] What follows now is an analysis of the specific elements of a defamation action, which will be of particular relevance to a discussion of the post-Constitution (both Interim and Final) law of defamation.[10]

(1) Publication:

In earlier times it was believed that defamation referred to 'an insulting incident occurring between the plaintiff and the defendant *personally*' (emphasis added), while publication of the insult simply amounted to an aggravation of the injury done to the plaintiff.[11] As such, it was not vital to show that someone other than the plaintiff had actually been aware of the defamatory statement. However, it is clear that the element of publication is now regarded in our law (and has been for a long time), as an essential component of the action for defamation.[12]

In order to show that there has been 'publication' of the defamatory statement, the plaintiff must prove that the defamatory statement or the conduct which conveyed the defamatory imputation was made known to a person (or persons) other than the plaintiff himself.[13] Thus, the element of publication will be satisfied only if a third

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8 This principle has arisen in our law subsequent to the Appellate Division's judgments in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) and *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A). The principle of strict liability for media defendants has been upheld in later decisions of the Appellate Division as well.

9 The principle of strict liability of the media will be discussed more fully under the concept of *animus injuriandi* below at pp15-21.

10 Although it is necessary, in any action for defamation, to prove that the statement in dispute was in fact defamatory in its nature, and did refer to the plaintiff, these elements will not be discussed particularly as they have not been identified as areas of the law of defamation which might require reform in light of the rights entrenched in our Constitution.

11 *Die Spoorbond v SAR* 1946 AD 999 at 1010.

12 Our courts have regarded publication as a basic element required to prove defamation from as early as 1835. See *De Lettre v Kiener* (1835) 3 Menz 12 and *African Life Assurance Society Ltd v Robinson & Co Ltd* 1938 NPD 277 at 295.

13 Burchell op cit 67.

party was made aware of the defamatory 'message'.[14] Furthermore, the third party who becomes aware of the defamation must actually understand the meaning and import of the words or conduct conveyed by the defendant.[15]

Once it is clear that a defamatory message, referring to the plaintiff, was conveyed to a third party and was understood by that third party, the plaintiff would have successfully established the requirement of publication. For the plaintiff, the significance of proving the element of publication lies in the fact that once proven, there arises two distinct presumptions of fact:

1. Firstly, there arises a presumption that the defamatory words or conduct were published *unlawfully* ie without any legal justification; and
2. secondly, there also arises a presumption that the defamatory matter was published *animo injuriandi* ie intentionally.[16]

A defendant may rebut the first presumption by raising defences which show that, objectively speaking, the circumstances under which publication occurred justified the making of the defamatory statement. Examples of these defences would be the defences of truth and public benefit, privilege and fair comment as well as consent and self-defence.[17] The second presumption may be rebutted by defences which are directed against the subjective element of defamation. The defences normally raised in this regard are an absence of knowledge of unlawfulness, absence of animus injuriandi, *rixa* (anger) and mistake.[18]

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14 De Villiers is quoted in Burchell, regarding his commentary on a passage from Voet. He concludes that "[w]hen a person writes any defamatory matter of another but does not disclose the writing to another person, there is no commission of an injury", *op cit* 132. Although reference is made to the writing of defamatory statements, it is clear that the principle must also hold true for defamation that is committed verbally or by conduct.

15 *Vermaak v Van der Merwe* 1981 (3) SA 78 (N) at 83 E-H.

16 *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 401-2; *Borgin v De Villiers* 1980 (3) SA 556 (A) at 571 E-G; *May v Udwin* 1981 (1) SA 1 (A) at 10; *Ramsay v Minister van Polisie* 1981 (4) SA 802 (A) at 807 and 817; *Gardener v Whitaker* 1994 (5) BCLR 19 (E) at 32-33.

17 The traditional defences excluding unlawfulness will be discussed in further detail later on. See pp 9-15.

18 See *Herselman NO v Botha* 1994 (1) SA 28 (A) at 35 C-F. The defences mentioned above will be discussed further at pp 9-15. At this point it should be noted that the presumption of *animus injuriandi* is irrelevant to cases involving media defendants since the principle of strict liability has been applied in such cases. This means that the only defences

An issue that has dogged the law of defamation for many years has been the question of what sort of onus is placed on the defendant once publication has been proved by the plaintiff, and the abovementioned presumptions come into operation: is the onus placed on the defendant a full and proper onus of proof, in terms of which the defendant must prove, on a balance of probabilities, that he did not act unlawfully and/or animo injuriandi? Or, is the onus on the defendant really just an evidential burden, in terms of which he is required to adduce evidence in rebuttal of the two presumptions?

The issue of what 'type'[19] of an onus is to be placed on the defendant has, in some post-Interim Constitution cases, been pinpointed as an issue that may require serious re-evaluation in light of the rights entrenched by the Constitution, and more specifically in view of the right to freedom of expression, which includes freedom of the press and other media. It is therefore submitted that it would be appropriate, at this point, to engage in an analysis of the pre-Interim Constitution rules relating to the defendant's onus of proof, as well as an examination of the reasoning behind these rules.

In the case of *Neethling v Du Preez and Others; Neethling v The Weekly Mail*[20] Hoexter JA made the following statement:

> "...I respectfully conclude that nothing stated in the *O'Malley* case represents authority for the proposition that in our law of defamation a defence raised in order to repel the presumption of unlawfulness attracts no more than an

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available to the media defendant are those which would exclude the element of unlawfulness. The wisdom or otherwise of such a rule, given our new constitutional dispensation with its new 'emphasis' on freedom of expression, will be explored later. See also the discussion under the heading of *animus injuriandi* at pp 15-21.

19 Although reference has been made to the 'type' of onus to be borne by the defendant, it must be emphasised that there are those who believe that there is only one 'true' onus to be spoken of. See for instance *Pillay v Krishna and Another* 1946 AD 946, which is the locus classicus in our law on the rules governing the incidence of onus in a civil case. In that case Davis AJA said "..., in my opinion, the only correct use of the word '*onus*' is that which I believe to be its true and original sense (cf *D 31.22*), namely the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence as the case may be, and not in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent." (at 952-3).

20 1994 (1) SA 708 (A).

evidentiary burden or 'weerleggingslas'."[21]

Thus, in respect of the defences excluding unlawfulness, the defendant bears a 'full onus' of proof.[22]

Hoexter JA came to this conclusion after an exhaustive examination of previous Appellate Division decisions, in which the question of what burden of proof should be placed on the defendant in defamation actions had been discussed, and also after a very careful study of the ordinary rules relating to onus, in the law of civil procedure. The learned judge's reasoning was based on the following propositions:

1. First of all, the rules of civil law in respect of the incidence of proof had been established for a long time. Furthermore, our courts had been applying these rules for many years without any difficulty. In this regard the learned judge pointed to many different judgments in which the rules pertaining to the defendant's burden of proof had been set out.[23] The basic rule that emerged was that the plaintiff has the onus of establishing his claim. This onus is a full onus in the sense that he must prove his claim on a balance of probabilities. If the defendant chooses to set up a defence or an exception then he is, in respect of that exception or defence, in the position of a plaintiff. As such, he will bear the onus of proving his defence or exception on a balance of probabilities. This onus

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21 Op cit 769B.

22 It should be noted that the Court's judgment dealt specifically with the onus to be borne by the defendant when the defences of truth in the public benefit and/or qualified privilege are/is raised. At 770C of his judgment however, Hoexter JA states that "...in principle all three defences [qualified privilege, fair comment and truth in the public benefit] should be governed by the same *onus*,...". On the basis of this statement it is submitted that the defendant bears a full onus of proof in relation to all or any of the defences which seek to exclude unlawfulness. As such, the issue of what onus the defendant should bear in relation to defences excluding *animus injuriandi* remains an open question. In fact, the learned judge goes so far as to point out that although the presumptions of unlawfulness and of *animus injuriandi* both arise from the same event, they are essentially different in character: the presumption of *animus injuriandi* relates to the defendant's subjective state of mind, whereas the presumption of unlawfulness relates to objective circumstances of law and fact. It might therefore be concluded that the learned judge, while firmly committed to the idea of a 'full onus' in relation to the presumption of unlawfulness, is not necessarily averse to the notion of a mere evidentiary burden as far as the presumption of *animus injuriandi* is concerned (see 768J-769A).

23 See for instance *Kunz v Swart and Others* 1924 AD 618 at 662-3; *Pillay v Krishna and Another* supra; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548 A-G; *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A) at 615G-616A; *Klaasen v Benjamin* 1941 TPD 80 at 86 and *Joubert and Others v Venter* 1981 (1) SA 654 (A) at 696D-G.

is *not* transferred from the plaintiff to the defendant, since the onus which lies on the plaintiff is a completely different onus from that which rests on the defendant[24].

2. Secondly, the learned judge observed that previous appellate dicta to the effect that the defendant bore no more than an evidential burden, were based on a misunderstanding or misreading of the judgment handed down by Rumpff CJ in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley.*[25] It appears that most people have simply extrapolated the Chief Justice's

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24 See the words of Davis AJA in *Pillay v Krishna and Another* op cit 952-3: "The first is that, in my opinion, the only correct use of the word '*onus*' is that which I believe to be its true and original sense (cf *D 31.22*), namely the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence as the case may be, and not in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. **The third point is that the *onus*, in the sense in which I use the word can never shift from the party upon whom it originally rested. It may have been discharged completely once and for all, not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto; but the *onus* which then rests upon his opponent is not one which has been transferred to him; it is an entirely different *onus*, namely the *onus* of establishing any special defence which he may have. Any confusion that there may be has arisen, I think, because the word *onus* has often been used in one and the same judgment in different senses, as meaning (1) the full *onus* which lies initially on one of the parties to prove *his* case, (2) the quite different full *onus* which lies on the other party to prove *his* case on a quite different issue, and (3) the duty on both parties in turn to combat by evidence any *prima facie* case so far made by his opponent: this duty alone unlike a true *onus*, shifts or is transferred.**" (emphasis supplied)

25 1977 (3) SA 394 (A). The passage most often relied upon in the judgment handed down by Rumpff CJ reads as follows: "Die vermoede van onregmatigheid kan in ons reg weerle word deur getuienis wat ***aantoon*** dat die lasterlike woorde gebesig is in omstandighede wat onregmatigheid uitsluit en wanneer die vraag ontstaan of die publikasie van die lasterlike woorde regmatig of onregmatig was, is dit die taak van die Hof ***om vas te stel***, vir sover dit die gemene reg betref, of publieke beleid verg dat die publikasie geregverdig is en dus as regmatig bevind moet word....Die omstandighede wat aanleiding gee tot die sgn 'privileges' in die Engelse reg geld ook in ons reg as voorbeelde van omstandighede wat onregmatigheid uitsluit. Die vermoede van die ***opset om te belaster***, wat weens die publikasie van die lasterlike woorde ontstaan, plaas 'n weerleggingslas op die verweerder, wat die vermoede kan weerle deur getuienis voor te le dat hy nie so 'n opset gehad het nie." (emphasis supplied)

It is significant that the wording of this passage clearly indicates a distinction in the way the defendant is expected to deal with the presumption of unlawfulness as opposed to the way in which he would be expected to handle the presumption of *animus injuriandi*. With reference to the presumption of "onregmatigheid" (unlawfulness), the learned Chief Justice refers to a need to produce evidence "...wat *aantoon* dat die lasterlike woorde gebesig is in omstandighede wat onregmatigheid uitsluit...." as well as to a duty on the part of the Court "...*om vas te stel*.." that the publication *is* justified, and therefore *must* be found lawful. The use of these words would seem to indicate, in their ordinary meaning, that the defendant would have to do something more than simply produce evidence in rebuttal of the presumption of unlawfulness. Rather his duty would be to produce evidence that would *show* the court (and thereby satisfy them) that the defamatory matter was published in circumstances which exclude unlawfulness.

As far as the presumption of *animus injuriandi* is concerned, the learned Chief Justice uses the words "...*opset* om te belaster.." and states firmly that in respect of the same, the defendant bears a "weerleggingslas" to place before the Court evidence which indicates that he did *not* have such intention. It is therefore obvious from the words used by the learned Chief Justice that different duties were to be placed on the defendant in an action for defamation, depending on the particular presumption which he was attempting to challenge.

statements in respect of the duty placed on the defendant by the presumption of *animus injuriandi*, and assumed them to be equally applicable insofar as the duty placed on the defendant by the presumption of unlawfulness is concerned. The fact that the Chief Justice made separate comments in respect of the manner in which the defendant must deal with the presumption of unlawfulness had clearly been overlooked.[26]

3. Furthermore, the learned judge also explained that although all the judgments handed down by the Appellate Division after *O'Malley* were based on the assumption that the defendant bears no more than an evidential burden, it was patently clear that statements to this effect in these judgments were no more than *obiter dicta*, since none of the cases heard turned on the issue of what onus of proof was to be borne by the defendant.[27]

Ultimately, the Court in *Neethling* concluded that in respect of the defences excluding unlawfulness, the defendant bears a full onus of proof, in the true sense of the word. The judgment did not treat the issue of what onus should be borne by the defendant, in challenging the presumption of *animus injuriandi*, since this was not an issue which was decisive for the case. However, Hoexter JA did allude to the need to draw a

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26 See note 24 supra for a detailed explanation. Hoexter JA makes the following comment at 768H: "Next it must be remembered that apart from the *O'Malley* case there is in this Court a long line of decisions affirming and reaffirming that in a defamation action a defence of privilege has to be established on a balance of probabilities. Had Rumpff CJ intended to state that a defendant raising the defence of privilege attracts no more than an evidentiary burden in order to succeed therein, it appears to me to be distinctly improbable that he would have done so without so much as a passing reference to the many decisions of this Court holding otherwise which had remained unimpeached for more than half a century."

27 In *Borgin v De Villiers and Another* 1980 (3) SA 556 (A) the defendant had raised the defence of qualified privilege, and this defence was upheld by the trial court. On appeal it was not disputed that the occasion had in fact been one of qualified privilege however, the issue that the court was faced with concerned the ambit of the privileged occasion. Thus the question of whether respondents bore a full *onus* of proof or a 'weerleggingslas', did not fall to be decided on appeal. In the case of *May v Udwin* 1981 (1) SA 1 (A) the plaintiff and defendant had agreed that the defamatory remarks were made on an occasion of qualified privilege and on appeal the question was whether the plaintiff had succeeded in showing that the defendant had abused or exceeded the ambit of the qualified privilege. Since the parties had agreed that the defamatory remarks were made on an occasion of qualified privilege, it was unnecessary to decide whether the defendant would have borne a full *onus* or a mere evidential burden in seeking to establish his defence. Likewise, in *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A), the issue to be decided by the Appellate Division had nothing to do with what burden should be borne by the defendant to a claim of defamation.

distinction between the presumption of unlawfulness and the presumption of *animus injuriandi*.[28] His comments seem to suggest a willingness on his part to accept that in relation to the presumption of unlawfulness, the defendant must prove his defence on a full balance of probabilities, while in relation to the presumption of *animus injuriandi*, the defendant may be required to do no more than produce evidence in rebuttal of the presumption. It is submitted that the learned judge's reasoning and conclusion are based on sound principles of law, as well as common sense. While the ultimate result may have been undesirable, in the context of the specific facts of this case, it is submitted that the legal precedent itself, cannot be faulted.

In summing up the rules relating to publication of defamatory matter, it must first be said that publication only occurs if a third party becomes aware of the defamatory message and actually understands those words to be defamatory of the plaintiff. Once this has been established, a court is entitled to presume that the defendant acted unlawfully or without any legal justification in publishing the defamatory message, and that the defendant acted *animo injuriandi*, in doing so. In order to escape liability on the claim against him, the defendant must prove on a balance of probabilities, that the defamatory matter was published in circumstances which justified their publication (for instance, where the comments were made on an occasion of qualified privilege, as fair comment or they were true and in the public benefit). Where the defendant wishes to challenge the presumption of *animus injuriandi*, he may have to do no more than adduce evidence in rebuttal of the presumption.

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28 Op cit 768J-769A. The learned judge made the following comments: "Finally, it should be borne in mind, I think, that, although both the presumption of *animus injuriandi* and the presumption of unlawfulness arise from the happening of the same event (the publication of matter defamatory of the plaintiff), these two presumptions are essentially different in character. The presumption of *animus injuriandi* relates to the defendant's subjective state of mind (a deliberate intention to inflict injury) whereas the presumption of unlawfulness relates to objective matters of fact and law."See also Burchell op cit 167. Burchell's explanation of the rules relating to *animus injuriandi* accept as given the fact that the defendant is required to do no more than adduce evidence of lack of animus injuriandi in rebutting the presumption of intention.

(2) Unlawfulness

Under the previous heading it was pointed out that once publication has been proven, the unlawfulness of the publication as well as *animus injuriandi* will be presumed. Reference was made to the fact that the defendant may rebut the presumption of unlawfulness by proving one of the 'traditional defences' excluding unlawfulness. The 'traditional defences' which have been recognised in our law, are the defences of *truth in the public benefit, fair comment* and *privilege.*[29] Under this heading these defences will be discussed briefly in relation to the general element of unlawfulness.

Unlawfulness has been described in a number of different ways by different jurists, in different contexts. Burchell[30] points out that some of the labels used to refer to the concept of unlawfulness are *reasonableness*[31], *the legal convictions of the community*[32], *the boni mores of society*[33] and *public (or legal) policy.*[34] Although there has, over the years, been some dispute as to which of these labels is the most appropriate, it is submitted that regardless of the label used to describe the concept of unlawfulness, the basis of this concept is to be sought in what it seeks to achieve.[35]

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29 Burchell op cit 205. Burchell cites these three defences as the most important defences excluding unlawfulness. However, he also mentions the general defences of consent (*volenti non fit injuria*), self-defence, necessity and *de minimus non curat lex* as alternative means of challenging the presumption of unlawfulness. As far as the defence of anger (*iniuria*) is concerned, he says that there appears to be no certainty, and certainly no word from the Appellate Division, as to where this defence stands in an action for defamation. It would seem that the case law is divided on the question of whether or not this defence excludes the element of unlawfulness or *animus injuriandi*.

30 Op cit 59-60.

31 See for instance *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1166 and *Ramsay v Minister van Polisie en Andere* 1981 (4) SA 802 (A) at 817D-E.

32 Or "regsoortuiging van die gemeenskap". See *Marais v Richard en 'n Ander* supra at 1168.

33 Burchell op cit 59.

34 Ibid.

35 Burchell op cit 60. Burchell explains that some of the labels referred to are inappropriate as descriptions of the concept of unlawfulness. For instance, he says that the phrase *'boni mores of society'* has the disadvantage of importing what seems to be a moral standard, into the test for unlawfulness. On the other hand, the phrase *'legal convictions of the community'*, while implying a standard that is purely legal in nature, tends to place too much emphasis on the views of the community. The learned author suggests that the terms 'reasonableness' and 'public/legal policy' are far more appropriate descriptions of unlawfulness as they are terms that are well understood in our law, and they clearly imply a test that is applied [objectively] by the courts.

In a civil claim of any nature, the ultimate function of the court is to determine whether the conduct of a particular party to the litigation should be subjected to legal sanction, or not. In the course of making this determination the court is faced with a number of different factors which it must take into consideration. Some of these factors will be the different rights or interests which have been put forward by each party to the litigation. These are perhaps the most important factors that will affect the court's decision-making process, since the different rights or interests of each party are usually *competing* interests which must be carefully balanced with one another in order to achieve an equitable result.

It is at this point that the element of unlawfulness becomes significant. Traditionally, the element of unlawfulness has served the purpose of facilitating the court's task of balancing the different interests that arise in the case before it.[36] That is, the process of balancing different rights or interests takes place under the element of unlawfulness.[37] This in itself however, does not actually give any clear indication of what the test for unlawfulness entails. It is submitted that by analysing the process engaged in by the court when it balances the competing rights of the parties before it, one may discover the essence of the concept of unlawfulness.

As has been stated above, the interests put forth by the parties to a particular case are often competing interests, and the court is often placed in a predicament because it cannot be said with absolute certainty, that one right should prevail over the other. The consequence of this situation is that the court's decision must, ultimately, turn on the question of *what is right in the specific factual circumstances of the case before it*. The test for unlawfulness is therefore an *objective* test, in the sense that it revolves around the

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36 J M Burchell *(1980) 97 SALJ* 1 at 4-5.

37 Burchell op cit 195. The learned author rightly observes that the right to freedom of speech must be balanced against the right to reputation under the element of unlawfulness.

objectively proven facts of the case.[38] In addition to this however, the test for unlawfulness involves the element of *public policy*, in that the question of what is right in any particular case must be determined or measured with reference to the norms and values of society, and some consideration of *what the community at large would deem to be right*.[39]

If the above statements are applied in relation to the law of defamation, it means that the defendant would have to prove that the publication of the defamatory matter was:

1. on the *objectively proven facts of the case*, fair comment and that *society* would have deemed the publication to be fair comment as well; or
2. on the *objectively proven facts of the case*, the defamatory matter was true and in the public's benefit, and that *society* would similarly have deemed it to be true and in the public benefit; or
3. on the *objectively proven facts of the case*, the defamatory matter was published on a privileged occasion, and that *society* would have considered the occasion to be privileged as well.

A question that has arisen in this regard, is the question of whether the defences available to a defendant in order to challenge the presumption of unlawfulness, is a closed list of defences or not. Burchell is of the opinion that a consequence of having a flexible test of unlawfulness, is that the list of defences available to the defendant, in rebutting the presumption of unlawfulness, is not a closed list.[40] In other words, there are potentially many more defences than the three 'traditional defences' which have crystallised from the case law. The Appellate Division however, has reached a different opinion in respect of this issue.

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38 See, for instance, the comments of Cameron J in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 601 where he says that the criterion of unlawfulness is an objective assessment of the justification for the wrongdoer's conduct.

39 *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 402-3; *Borgin v De Villiers and Another* 1980 (3) SA 556 (A) at 577; *May v Udwin* 1981 (1) SA 1 (A) at 10; *Marais v Richard en 'n ander* 1981 (1) SA 1157 (A) at 1168; *Ramsay v Minister van Polisie en andere* 1981 (4) SA 802 (A) at 817D-E.

40 Op cit 62.

In the case of *Zillie v Johnson and Another*[41], Coetzee J had to adjudicate upon a claim of defamation which involved a media defendant. The defence put forward on behalf of the defendants was that the publication of the defamatory matter was in the public interest, and that they were therefore under a duty to publish the same. The plaintiff however, argued that this alone did not constitute a complete defence since the defence of public interest had to be accompanied by an affirmation of *bona fide* belief in the truth of the matter published.

The learned judge examined *O'Malley's* case, *Borgin v De Villiers*, *May v Udwin* and *Marais v Richard en 'n ander*[42] and in summarising the relevant law, said the following:

> " 1. ....
>
> 2. ...
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> 3. Well known defences such as privilege, fair comment and justification are mere instances of lawful publication and do not constitute a *numerus clausus*.
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> 4. The general principle is whether public policy justifies the publication and requires that it be found to be a lawful one. As the test is an objective one it involves an application of the 'general standard of reasonableness' but it relates to the sense of justice prevailing in South Africa as opposed to that in other countries and systems."[43]

The above statements of the law were considered by the Appellate Division in the *Neethling* case mentioned above. In that case Hoexter JA analysed the judgment handed down by Coetzee J, and then made the following statement in respect of points (3) and (4) set out above:

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41 1984 (2) SA 186 (W).

42 Supra.

43 Op cit 195B.

"In my respectful opinion the above proposition is untenable. It is trite that underlying the three traditional and specialised defences (privilege; truth in the public benefit; and fair comment) are the requirements of public policy. Since these three categories of justification do not represent a *numerus clausus* it may also be accepted that in the further development of our law of defamation, if and when the Courts decide to define and delimit any further categories of justification, the governing factor will likewise be the dictates of policy. The fact that the traditional defences do not constitute a closed list of categories of justification, however, does not mean that in the present state of the law a court is free to consider the issue of liability for the publication of a defamatory statement by a newspaper independently of the substantive requirements of the traditional defences, and simply by abstract reference to a 'general principle...whether public policy justifies the publication and requires that it be found to be a lawful one'. In my opinion our law recognises no such defence to an action for defamation, whether the matter complained of be published by a newspaper or by anybody else."[44]

It is therefore clear that in terms of the pre- Interim Constitution law of defamation, a defendant could only rebut the presumption of unlawfulness by means of proving one of the traditionally recognised defences which exclude the element of unlawfulness. This however, did not mean that a court could not, at some stage, fashion a new defence based on public policy. What it did mean was that the defence had to be clearly defined.

It is submitted that there may be considerable merit in allowing the test for unlawfulness to remain a flexible concept, which is susceptible to adaptation in accordance with the changing needs of society, as well as the new factual scenarios with which courts are faced. This would appear to be the approach favoured in *Zillie v*

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[44] *Neethling v Du Preez and Others; Neethling v The Weekly Mail* 1994 (1) SA 708 (A) at 777D-G.

Johnson and Another. On the other hand, it is also easy to see why the Appellate Division was reluctant to countenance such a possibility: if clear guidelines are not set out to guide the defendant in making his defence, then a defendant being sued for defamation will never quite be certain of what case he must meet in order to successfully challenge the claim against him. As Burchell warns, such uncertainty could lead to self-censorship.[45] For instance, newspapers may decide to act *ex abundanti cautela* and *not* publish certain information because of a fear that they would be unable to defend a claim for defamation, should such a claim arise from the publication of the matter in question.

In conclusion it may be said that the position in our law, prior to the advent of the Interim Constitution, is that the element of unlawfulness may be challenged by a defendant in a defamation action if he can prove one of the accepted defences (privilege, fair comment and truth in the public interest) on a balance of probabilities. Although a less rigid approach to the concept of unlawfulness might have the effect of creating more situations in which a defendant would be able to successfully rebut the presumption of unlawfulness, equally it may be said that the uncertainty inherent in such an approach could have the opposite effect, and simply result in self-censorship. It is submitted that the essence of the concept of unlawfulness is its reliance on the inquiry into the objective facts of the case, as well as the dictates of public policy. These are notions with which our courts are familiar, and it is submitted that the position adhered to in *Zillie v Johnson and Another* may well be worth reconsidering in light of the new considerations with which our courts have been presented, due to the advent of both the Interim and Final Constitutions.

(3) Animus Injuriandi

Having discussed both the elements of publication and unlawfulness, the last element

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[45] Op cit 61 at note 21.

of the action for defamation requiring discussion, is the element of *animus injuriandi*. Again, it must be emphasised that once publication has been satisfactorily proven by the plaintiff, the element of *animus injuriandi* will be presumed, and it will be up to the defendant to rebut that presumption. Whereas with the element of unlawfulness, certain 'traditional defences', and their substantive requirements, could be identified with relative ease, this has not been the case with the element of *animus injuriandi*. In fact, over the years there has been abundant debate about this particular element of the action for defamation, and precisely what constitutes this element of the action for defamation. The discussion under this heading will attempt to outline the casuistic developments that have ensued in the process of defining the concept of *animus injuriandi*, over the years.

In *Delange v Costa*[46] the Appellate Division set out the general requirements for proving a claim based on injuria. The first requirement referred to was "...An intention on the part of the offender to produce the effect of his act;...".[47] According to Innes J, this was understood in our law as entailing that "...the aggressor had in view the necessary consequence of his conduct..." or in other words, "...that he deliberately intended that the operation of this unlawful act should have effect upon the plaintiff...".[48] Thus, as far as any claim based on injuria (and therefore any claim for defamation) was concerned, the element of *animus injuriandi* was met if it could be shown that the defendant had simply intended the publication of the defamatory matter.[49] It should be stressed that it is not an unduly difficult task for a court to decide, on the facts of a given case, whether or not the defendant intended to publish the defamatory matter. Even though the element of *animus injuriandi* is meant to focus on the wrongdoer's state of mind, such a conclusion would still be reached by drawing the appropriate

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46 1989 (2) SA 857 (A) at 860-1.

47 Ibid.

48 *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92 at 124-5.

49 *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 600B-C.

conclusions and inferences from the *objectively proven facts of the case*. As such, the inquiry into the defendant's state of mind and the question of what his intention may or may not have been, would not necessarily be a completely subjective inquiry. In fact, the inquiry would remain largely objective.

In later years, this position has changed almost completely. Due to a renewed adherence to Roman-Dutch principles, the concept of *animus injuriandi* took on a new character.[50] The new approach to *animus injuriandi* was to focus attention on the defamer's subjective belief as to whether or not the publication had been justified, or as to whether or not the subject of the damaging words had been accurately named.[51] The origin of this new approach may be found in the case of *Maisel v Van Naeren*[52] where De Villiers AJ said:

> "Thus, as is the position for *dolus* in general, it is essential that the alleged wrongdoer should be ***conscious of the wrongful character of his act***...*Dolus* or *animus injuriandi* is therefore consciously wrongful intent ,..."(emphasis supplied).[53]

Clearly, De Villiers AJ was saying that in order for the element of *anuimus injuriandi* to be proven it must not only be shown that the defendant intended to publish the defamatory matter, but it must also be shown that he was aware that such publication was wrongful or unlawful.

Shortly after the decision handed down in *Maisel v Van Naeren* there followed a trilogy of judgments by Rumpff CJ in which the Appellate Division made statements similar to those made by De Villiers AJ.[54] As the Appellate Division now expressed it, the

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50 Ibid. See also Burchell op cit 152.

51 *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 at 600B-E.

52 1960 (4) SA 836 (C).

53 *Maisel v Van Naeren* supra at 840-2.

54 *Jordaan v Van Biljon* 1962 (1) SA 286 (A); *Craig v Vootrekkers Bpk 1963 (1) SA 149 (A)* and *Nydoo en Andere v Vengtas* 1965 (1) SA I (A).

inquiry in relation to *animus injuriandi* was "whether in the mind of the defendant the object was to insult".[55] Although the statements made in respect of *animus injuriandi* in these judgments were obiter dicta, their substance was confirmed later on in the *O'Malley* case.[56]

In *O'Malley's* case, Rumpff CJ made it patently clear that knowledge of unlawfulness was now a requirement of *animus injuriandi*. Thus, the decision in *O'Malley* confirmed that if the defendant could show that he had made a *bona fide* mistake, whether of fact or law[57], this would serve to rebut the presumption of *animus injuriandi* that arises from the publication of defamatory matter referring to the plaintiff.[58] By allowing a defendant to rebut the presumption of intention on the basis of nothing more than his own beliefs about the circumstances surrounding the publication of the defamatory matter, the test for *animus injuriandi* became completely subjective.

This, it is submitted, was quite a radical development in the law of defamation. The requirements for proving a claim of defamation had been 'revolutionised', so to speak.[59] It is submitted that to allow a defendant to escape liability on the basis of his personal, subjective beliefs is to give the defendant unlimited licence to exercise his right to freedom of expression. In the first place, any allegations the defendant may make about his state of mind, are not susceptible to challenge by the plaintiff since such allegations of fact amount to information which is peculiarly within the knowledge of the defendant. In the second place, reliance on no more than the say-so of the defendant as to his state of mind, allows the defendant to escape liability for publishing

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55 Per Rumpff JA in *Nydoo en Andere v Vengtas* 1965 (1) SA 1 (A) at 14H-15A.

56 1977 (3) SA 394 (A).

57 A mistake of fact may occur where, for instance, the defendant in good faith believed that the defamatory matter referred to someone *other* than the plaintiff. A mistake of law might occur where, for instance, the defendant honestly believed that the publication of the defamatory matter was lawful eg it was protected by privilege.

58 Burchell op cit 163.

59 *Holomisa v Argus Newspapers Ltd* supra at 600E-F.

damaging statements about the plaintiff, even in a situation where he has been careless about making that statement.[60]

The problems mentioned above soon became particularly disquieting, when considering the position of the media defendant. The subjective test for *animus injuriandi* would have had serious repercussions for media liability in defamation cases, in that a newspaper (or any other media defendant for that matter) would simply be able to aver an honest belief that publication was justified in order to escape liability on a claim of defamation. The problems faced by the plaintiff, as mentioned above, would be magnified tenfold because of the monolithic nature of the media defendant. For instance, if the plaintiff were to challenge the averment that publication occurred pursuant to an honest belief that publication was justified, whose belief would he be challenging? Would he have to argue that it was the reporter who did not honestly believe that publication was justified? Or would he have to argue that it was the editor who did not honestly believe that publication was justified?

Furthermore, if there had been carelessness on the part of the newspaper in ascertaining the information published then, as is the case in any 'ordinary' claim for defamation, this would not afford the plaintiff any relief. Yet, it must be noted that the defamation in question would have been far more damaging to the plaintiff in this situation, than in an 'ordinary' claim involving an 'ordinary' defendant, by mere virtue of the fact that anything printed in a newspaper is disseminated to such a vast audience. From this it appears that the subjective test for *animus injuriandi* does nothing to encourage media responsibility, or to raise the professional standards of journalists/reporters. It is submitted that such a situation is hardly acceptable in light of the general purpose of the law of defamation, which is to *balance* the conflicting

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60 The situation contemplated here would, for instance, refer to the situation where defamatory comments are made with reference to a particular person without checking the veracity of such information. The fact that the defendant held an honest belief that the information in question was true (and obviously also in the public benefit to be heard) will suffice to save the defendant from liability, even if the basis for the defendant's belief was completely arbitrary and without substance.

rights of freedom of expression and dignity. Surely, no such balance is achieved if the defendant (whether a media defendant or not) is left at liberty to say or write what he wishes, and then simply deny his own liability on the basis of subjective beliefs about the circumstances of publication, which are not susceptible to close scrutiny.

In the case of *Suid-Afrikaanse UItsaaikorporasie v O'Malley*, Rumpff CJ bravely addressed the issue of media liability in a defamation claim.[61] After having reviewed those cases that dealt with liability of a newspaper for publication of defamatory material, the learned Chief Justice concluded that our law was on par with English law in respect of this issue. The liability of the press was *not* based on fault, but was based on the principle of *strict liability* instead. The reasoning behind this conclusion was based on concerns similar to those raised above viz the fact that there was a need to protect individuals from the powerful media, with its potential to seriously injure the repuation of the individual in a situation where intention would be difficult to pinpoint.[62] The result was that the only defences that would henceforth be available to the media defendant, were those defences which excluded the element of unlawfulness.

The issue of strict liability for media defendants in defamation cases has received extensive attention and criticism since *O'Malley*.[63] An obvious objection to the imposition of strict liability on media defendants is that it could result in self-censorship. In other words, the media may choose to hold back reports of vitally important but potentially defamatory information, in the fear that they would be sued for defamation, only to find themselves in the position of being unable to prove one of the traditional grounds of justification. Another objection is that while our law accepts that the press should not be placed in a position that is more favourable than

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61 1977 (3) SA 394 (A).

62 See Burchell op cit 159 for a discussion of the findings made by Rumpff CJ in the *O'Malley* case.

63 It should be mentioned that the principle of strict liability of the media was confirmed again by the Appellate Division in *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A), and was accepted as established law more recently in *Neethling v Du Preez and Others; Neethling v The Weekly Mail* 1994 (1) SA 708 (A).

that of the ordinary citizen, it must likewise be accepted that the press should not be placed in a position that is less favourable than that of the ordinary citizen.[64] It cannot be argued that the imposition of strict liability has had precisely this effect in our law.

Finally, there is the argument that strict liability has the effect of suppressing the right to freedom of expression in favour of protecting the right to dignity. Particularly in a country which has been subjected to extensive censorship laws, it is argued that the law of defamation, in imposing strict liability on the media, is perpetuating repression that is reminiscent of the 'old order'. In support of this view it is contended that the media are collectively responsible for ensuring that the political process remains open and democratic, and that if the media is not free to report issues which are germane to the public interest then they lose their ability to expose and ferret out much of the corruption and scandal that plagues modern government. This argument has become particularly relevant in the post-Interim Constitution cases in which the right to freedom of expression has often been raised in defence to a claim for defamation. This is an issue which will be examined more closely in the next chapter, but suffice it to say that this issue has been hotly debated even before the advent of the Interim Constitution, and the introduction of a guaranteed right to freedom of expression including freedom of the press and other media has made the need to re-examine the liability of media defendants a pressing issue.

(c) Conclusion:

The discussion above has attempted to outline the general principles of the law of defamation, as stated by the highest pre-Interim Constitution judicial authority viz the

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64 See *Arnold v The King Emperor* 30 TLR 462 [1914] AC 644 (PC) where Lord Shaw made the following remarks at 468: "The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject *in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher.* The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position." Hoexter JA endorsed these comments as constituting an accurate reflection of the law in South Africa in the *Neethling* case supra.

Appellate Division. In explaining these principles attention has been drawn to some of the more contentious issues arising from the law of defamation.

The first element of the action for defamation which was examined was the element of *publication*. It was seen that publication referred to the act of making defamatory matter, referring to the plaintiff, known to any person other than the person being defamed. It was explained that in order for there to be publication of the defamatory matter, it must be shown that the third party understood the message to be defamatory in meaning. Once this is established, a court may presume the elements of unlawfulness and *animus injuriandi* to be satisfied. These presumptions are open to rebuttal by the defendant however, the discussion above shows that the question of what 'type' of onus lies on the defendant in rebutting the presumptions has previously been the subject of some uncertainty. Although it would appear that this issue has been resolved by the Appellate Division, it has been argued that to place a full burden of proof on a defendant may be violative of his right to freedom of expression. In justification of the pre-existing common law however, it must be emphasised that rules which are based on sound principles of law and common sense, should not be jettisoned for no other reason than the fact that the defendant has based his defence on a constitutionally guaranteed right.

The next element of the action for defamation, which was discussed was the element of unlawfulness. Generally, the test for unlawfulness encompasses a reliance on the objectively proven facts of a particular case, in addition to a consideration of public policy, and what public policy would deem to be unlawful in the specific circumstances of that case. It is for this reason that any consideration of the conflicting rights of the parties involved in the litigation, must take place under the element of unlawfulness, since ultimately it is public policy which will dictate which right should take precedence in a specific set of circumstances.

Traditionally, one of three defences (viz truth in the public benefit, fair comment and

privilege) have been relied on by defendants in challenging the presumption of unlawfulness. However, given the strong reliance on public policy in determining what amounts to unlawful publication of defamatory matter, it has been argued that it is *not* necessary to rely on one of these specific defences in rebutting the presumption of unlawfulness. According to this argument, in our law there is no closed list of defences which exclude unlawfulness. Therefore, where a defendant does not wish to rely on one of the 'traditional defences', it is open to him to defend himself on a policy-based argument. Although the Appellate Division agrees that the list of defences excluding unlawfulness is not a closed list, it does not accept that a defendant may simply rebut the presumption of unlawfulness by means of an argument based on public policy. It is submitted that this view might require amendment in light of the rights guaranteed by our Bill of Rights. The right to freedom of expression granted to every individual, might demand an expansion of the defences available to a defendant in an action for defamation.

Finally, the requirement of *animus injuriandi* was examined as well. This requirement of the defamation action has been through extensive development in the last century, and once again, it is submitted that some of these developments may require re-evaluation. In particular, the principle of strict liability for media defendants in a defamation action has certainly been subject to ardent objections from many quarters. It was observed that the post-Interim Constitution cases have already had to grapple with this precise issue, and once again, the right to freedom of expression has been the foundation for the argument against strict liability for the media.

The post-Interim Constitution cases referred to above, will form the subject-matter of the next chapter, which will focus on the rights introduced and guaranteed by the Interim Constitution, as well as the issues which these newly guaranteed rights have raised in relation to the pre-existing common law of defamation as stated by the Appellate Division.

CHAPTER 3

THE IMPACT OF THE INTERIM AND FINAL CONSTITUTIONS ON THE COMMON LAW OF DEFAMATION

An analysis of the South African case law since 1994

(a) Introduction

The previous chapter reviewed the common law of defamation as it existed immediately prior to the advent of the Interim Constitution.[1] The purpose of this chapter, is to explore how the law set out in the previous chapter has been affected, if at all, by the advent of the new constitutional dispensation in South Africa. In order to facilitate this discussion, mention must be made at the outset, of the somewhat unique constitutional arrangements which have arisen in order to facilitate South Africa's transition, from a government based on institutionalised racism, to a government based on a deep, and all-embracing commitment to the protection and development of basic human rights.[2]

The *Republic of South Africa Constitution Act* 200 of 1993 (better known as the 'Interim Constitution'), is the end product of a long, and arduous process of negotiations and political compromises.[3] Its purpose, as the name suggests, was to provide a constitutional framework for an initial transitional period of two years, during which democratically elected representatives of the 'new South Africa' would draft a final,

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1 *The Republic of South Africa Constitution Act* 200 of 1993, is what we commonly refer to as the Interim Constitution. The Interim Constitution came into effect as at 27 April 1994.

2 See, for instance, the wording of the Preamble to the Interim Constitution:
"...WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races *so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms*;..." (emphasis supplied).

3 For a comprehensive discussion of the negotiations, drafting process and important provisions of the Interim Constitution see K Govender *"The Interim Constitution"*, unpublished paper 1996.

and binding, constitution for the nation.[4] It is somewhat unusual for a country to create a temporary constitution for itself, which is then replaced with a new constitutional text. However, one must remember that the need to bring political parties of all persuasions into the negotiating process was the primary aim of key political leaders at the time. By allowing all political parties who participated in the negotiating process to have an equal say in the drafting of the Interim Constitution, major political parties like the African National Congress ensured that the fears of majority rule (or majority tyranny) were put to rest.[5] Hence, the demand for this rather unusual constitutional arrangement.

Despite its temporary nature, the Interim Constitution was meant to be the supreme law of the land[6] until such time that the Final Constitution had been drafted, approved and certified by the Constitutional Court.[7] Once the Final Constitution had come into operation, the Interim Constitution would no longer be of any force or effect. Although the new text was meant to replace the Interim Constitution, no one

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4 Section 68 (2) of the Interim Constitution states that "The Constitutional Assembly shall draft and adopt a new constitutional text in accordance with this Chapter [Chapter 5 of the Interim Constitution]." In addition, section 73 (1) directs that "The Constitutional Assembly shall pass the new constitutional text within two years as from the date of the first sitting of the National Assembly under this Constitution."

5 To expand on this further, it must be explained that the agreement was, ultimately, that the political parties who sat down to negotiate the provisions of the Interim Constitution would all have equal strength, i.e. representation would not be determined merely by number, or by the size of constituencies. This, in turn, meant that smaller political parties representing minority groups would have just as much influence on the drafting of the Interim Constitution as larger political parties such as the ANC. In addition, the drafters of the Interim Constitution would negotiate and draft a set of Constitutional Principles (see below) which would remain binding on those who would be responsible for drafting the Final Constitution. By entrenching certain forms of minority protection in the Constitutional Principles, minority political groups could ensure that their interests would still be represented when the Final Constitution was drafted by elected representatives in Parliament, even if they themselves did not have many (or any) seats in the newly elected Parliament.

6 See section 4 of the Interim Constitution which says:
"**4 Supremacy of the Constitution**
(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

7 Section 71 (2) of the Interim Constitution directs that the new constitutional text (or any provision thereof) that has been passed by the Constitutional Assembly shall be of no force and effect, unless the Constitutional Court has certified that the text complies with the Constitutional Principles set out in Schedule 4 of the Constitution. The principles in Schedule 4 were meant to reflect the core values and agreements which had been reached by those who negotiated the Interim Constitution. It was agreed that these principles were inviolable and would form the basis of the final text of the constitution, irrespective of any changes that were brought about by the Constitutional Assembly. See Govender op cit 4.

would have expected the provisions of the Interim Constitution, to be entirely jettisoned. Rather, the text of the Interim Constitution would be modified in those instances where circumstances showed that revision was required. Essentially, this meant that the final text would consist of a combination of provisions, carried over from the Interim Constitution as well as some new provisions, drafted by the Constitutional Assembly. As such, it is submitted that judicial pronouncements which were made under the Interim Constitution, in respect of the application and interpretation of its provisions, would still constitute binding precedent under the aegis of the Final Constitution. Thus, the introduction of the Final Constitution in October 1996, does not automatically preclude the relevance of case law that dealt with the provisions of the Interim Constitution.

Having discussed the constitutional arrangements which were responsible for ushering in the 'new South Africa', one may now revert to the question of how the new constitutional dispensation actually affects the common law of defamation. From that which has been explained above, it is clear that one must examine the impact of both the Interim and the Final Constitution, in order to address the subject properly. In this regard, it must first be emphasised that most of the problems which have arisen from the interpretation, and application of the Interim Constitution, revolve around a few major constitutional themes or issues. Furthermore, an examination of the constitutional litigation spawned by the Interim Constitution, showed that most of the post-April 1994 defamation suits have turned on the resolution of one or more of these constitutional dilemmas. This chapter will therefore examine these precedents in order to assess whether or not the constitutional quagmires presented by the Interim Constitution, have resulted in any real change in the form and substance, of the law of defamation.

A second point that must be made is that at least some of the constitutional issues, which perplexed our courts under the Interim Constitution, have now been resolved

either by the Constitutional Court, or by changes that have been wrought in the text of the Final Constitution, or both. This chapter will therefore also examine how specific issues, which have dogged the law of defamation under the Interim Constitution, have been resolved and whether or not the measures adopted are satisfactory answers to the issues in question.

(b) The Interim Constitution

The specific constitutional issues which have been decisive for most of the post-April 1994 defamation cases are:

1. the issue of whether or not the provisions of the Constitution operate *retrospectively*; and
2. the issue of whether or not the provisions of the Constitution were meant to operate *horizontally* or *vertically*.

Disappointingly, it must be noted that since so many of the post-April 1994 defamation cases have focussed on one or both of the issues mentioned above, very few of the cases have actually set out, in concrete terms, what the face of defamation law should look like under the new constitutional dispensation.[8] The cases that have been decided since April 1994 will now be discussed in three categories viz.:

1. those cases that have dealt with the issue of retrospectivity;
2. those cases that have dealt with the issue of horizontality; and
3. those that have actually made concrete proposals as to how the law of defamation must be changed.

It will be seen that many of the cases dealt with fall into at least two or all of the categories mentioned above.

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[8] Usually it has been the case that one or both of the issues mentioned, were decisive for the case in question, and the court was thus able to dispose of the matter without actually making any statements as to how the law of defamation should be changed under the new constitutional dispensation, if at all. Nevertheless, there have been some cases which have advocated definite changes which, in the opinions of those courts, would bring the law of defamation into line with the new constitutional order.

(1) Retrospectivity

The Interim Constitution was responsible for introducing a brand new field of litigation in South Africa viz. constitutional litigation, and with this new type of litigation came a plethora of (potential) new defences and causes of action in our law.[9] The Bill of Rights now allowed for the possibility of defences which had either not existed, or been overshadowed by apartheid legislation in the past.[10] In the context of defamation, the possibility of raising a defence based on the guaranteed right to freedom of expression now became a reality, and those who were already involved in litigation at the time when the Interim Constitution came into effect, were eager to put the provisions of the new Constitution into practice.

Having anticipated the jurisdictional and other problems that would be presented by the foray into constitutional litigation, and the restructuring of the judiciary, the drafters of the Interim Constitution included certain provisions in the Constitution setting out transitional arrangements that would facilitate the continued, smooth operation of the judiciary under the Interim Constitution.[11] Section 241 (8), in particular, has been the source of considerable contention in our courts. According to section 241 (8):

> "All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, *exercising jurisdiction in*

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9 It must be stated that the term 'constitutional litigation' is used to refer to any litigation which is based on the provisions of the Bill of Rights, or any other provisions of the Constitution. It must also be pointed out, that the word 'potential' has been used to describe the new defences and causes of action that have arisen in this field of litigation since they remain only potential defences or potential causes of action until a court has decided that they form a part of South African law.

10 To be more specific, it is submitted that the Interim Constitution has introduced defences and causes of action which are based on, or supplemented by, specifically guaranteed human rights. Under the previous regime, it was not possible to rely on specific constitutional guarantees of such a nature, as is the case now and, in addition, those basic human rights which were protected by the common law were often superseded by the provisions of oppressive apartheid legislation.

11 The transitional arrangements that were agreed upon in respect of the judiciary, are set out in section 241 of the Interim Constitution.

> *accordance with the law then in force, shall be dealt with as if this Constitution had not been passed*: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution." (emphasis added)

The source of confusion is apparent: *prima facie*, section 241 (8) says that if a case had been pending at the time when the Interim Constitution came into operation (ie as at 27 April 1994), then it would be dealt with by the courts in the way that they would have dealt with it, had the Interim Constitution *not* been passed. The burning question, was whether this meant that individuals who had become embroiled in litigation before 27 April 1994, were precluded from relying on the provisions of the Interim Constitution, in particular the rights guaranteed by Chapter 3 (the Bill of Rights), in order to supplement their cause of action or defence, as the case may be. Put differently, the issue was whether or not the Constitution was intended to operate *retrospectively*.

Before discussing those precedents which have reviewed the issue of retrospectivity, in the context of the law of defamation, attention must be brought to certain rules of our law which may help to put the issue in its proper perspective. In the first place, it must be indicated that in our law, there has always been a presumption *against* retrospectivity of legislation.[12] Retrospectivity has been explained as follows:

> "In its narrow connotation an enactment is only retrospective if it provides or has the effect that, as at a particular date, the law shall be taken to be that which it was not. However, a statute is also deemed to be retrospective when it interferes with existing rights and obligations."[13]

From this definition it seems that the presumption against retrospectivity, is intended to ensure that the legislature does not introduce legislation, which will have the effect

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12 G E Devenish *Interpretation of Statutes* (1992) at 187.

13 *Van Lear v Van Lear* 1979 (3) SA 1162 (W) at 1164.

of changing the consequences that the law has upon acts or transactions (or for that matter omissions), which have taken place at some time in the past. Furthermore, the presumption is also intended to protect the rights of individuals from being interfered with, where the rights in question have accrued to the individual at some time in the past. The one important exception to this presumption applies in respect of matters of procedure.[14] In this regard, the simple proposition is that every law which regulates legal procedure, becomes applicable in every suit that comes to trial after the date on which the law in question comes into operation.[15] This will be the case, even if a particular trial was pending at the time when the law came into effect.[16] Having highlighted these rules of law, it remains to see what the courts have had to say about the retrospective operation of the Constitution.

(I) De Klerk and Another v Du Plessis and Others[17]

In this case, Van Dijkhorst J dealt very briefly with the issue of retrospectivity. After mentioning the different cases in which the issue had been decided upon, the learned judge pointed out that those courts which had arrived at a conclusion in favour of retrospectivity, on the basis of a perceived liberal interpretation of the Constitution, were concerned with a scenario in which the Constitution was deemed to operate vertically. None of those cases had considered the effect of retrospectivity of the Constitution, in a situation where the provisions of the Constitution were deemed to operate horizontally.[18] Van Dijkhorst J then stated his conclusion that section 241 (8) precludes retrospective operation of the constitution, without setting out the

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14 Devenish op cit 192.

15 *Curtis v Johannesburg Municipality* 1906 TS 308.

16 Ibid.

17 1994 (6) BCLR 124 (T).

18 Op cit 127.

reasons for this conclusion.[19]

(II) Gardener v Whitaker[20]

In dealing with the issue of retrospectivity, Froneman J first listed those cases in which the matter had already been dealt with.[21] He then went on to state that the objections, which had been levelled at an interpretation of section 241 (8) favouring retrospective application of the Constitution, could be classified into three broad categories:

1. The first type of objection was based on the notion that section 241 (8) was capable of being interpreted merely by means of 'linguistic treatment'. Advocates of this approach seem to believe that a broader construction based on the benevolent spirit of the Constitution is inappropriate to the prosaic issue of jurisdiction.
2. The second type of objection that would be encountered, was based on the presumption against retrospective legislation (as discussed above).
3. The last type of objection was based on concerns regarding the practical difficulties that would arise in respect of the procedure to be adopted in pending proceedings.[22]

In substantiating his view that the provisions of Chapter 3 of the Interim Constitution (the Bill of Rights) should be applied to pending proceedings[23], the learned judge furnished the following rejoinders to the three types of objections, set

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19 Van Dijkhorst J did emphasise that he had already set out the reasons supporting his conclusion extensively in *Kalla and Another v The Master and Others* 1994 (4) BCLR 79 (T). Unfortunately, space does not permit an analysis of the learned judge's decision in that case. Suffice it to say that the decision in this case was decided along the lines of other decisions such as *S v Lombard* 1994 (2) SACR 104 (T).

20 1994 (5) BCLR 19 (E).

21 Op cit 24.

22 Op cit 25.

23 Op cit 26.

out above:

1. Firstly, Froneman J observed that the Appellate Division had already held that section 241 (8) was in fact capable of different interpretations[24]. He therefore concluded that a purely linguistic treatment of the section, would not be without problems. Furthermore, if the jurisdictional provisions of the Constitution were merely concerned with setting out the courts in which the provisions of the Constitution would be applied, then it might be correct to say that an interpretation in keeping with the broader object/spirit of the Constitution was of little assistance. However, where the question was actually whether or not the provisions of the Constitution would be applied at all, it would be permissible to resort to an interpretation based on the inherent values of the Constitution.[25]

2. As far as the presumption against retrospectivity was concerned, the learned judge stated that the purpose of the presumption was to prevent injustice being done to an individual by the operation of a statute "which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new disability in respect of transactions or considerations already past".[26] This presumption would not operate where the retrospective effect of the legislation was beneficial and, as far as the learned judge was concerned, Chapter 3 was clearly legislation with a beneficial effect.[27]

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24 See for instance *S v Makwanyane and Another* 1994 (3) SA 868 (A) at 873 D.

25 *Gardener v Whitaker* op cit 25F-H.

26 Per Corbett J, as he then was, in *Cape Town Municipality v F Robb and Co Ltd* 1966 (4) SA 345 (C) at 351C, quoted by Froneman J op cit 26A.

27 Op cit 26B-C. It is submitted that even though Chapter 3 of the Interim Constitution may be seen as legislation which has a "beneficial effect", there are some major difficulties with the approach adopted by Froneman J in this case. If the purpose of the presumption against retrospectivity is to prevent injustice, and to prevent a statute from creating new obligations or imposing new disabilities in respect of transactions or considerations already past, then it may be argued that the retrospective application of the Bill of Rights to pending cases has precisely that effect: a plaintiff who has initiated a lawsuit against a defendant would, in most cases, only have done so after serious consideration of all the relevant factors. One such factor would be the issue of what defences are available to the defendant. Usually, a

3. Finally, as far as the practical difficulties that would arise in respect of court procedure were concerned, Froneman J went on to mention that the presumption against retrospectivity has never applied in respect of procedural rules.

On the basis of the arguments set out above, it was concluded that the provisions of Chapter 3 may be applied to 'pending proceedings'.

(III) Jurgens v The Editor, The Sunday Times Newspaper and Another[28]

In this case, Eloff JP followed the decision handed down in *Shabalala v Attorney-General of Transvaal*[29], in respect of the issue of retrospectivity. The court in that case adopted an approach to the interpretation of the Constitution which one might describe as a 'generous' interpretation. With this interpretive approach as a starting point the learned Judge President went on to express his support of the view stated by Cloete J that it was "unthinkable, having regard to the spirit and tenor of the Constitution, that its authors could have intended to exclude any person from exercising any of the rights entrenched in Chapter 3 from the moment the Constitution came into force".[30] The court in this case therefore accepted the retrospective application of the provisions of Chapter 3 to pending cases and, by this

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plaintiff will only pursue litigation in those instances where he is fairly sure that the defence(s) averred by the defendant have little chance of standing up in court. To then introduce a completely new defence (the likes of which we have never even dealt with in South Africa, prior to 1994), later in the course of the proceedings, imposes a new and substantial disability upon the plaintiff. One cannot discount the likelihood that the plaintiff might not have pursued the litigation in question had he known that the defendant would have this new defence available to him. Likewise, the opposite may also be true: a defendant may not have decided to defend a particular case had he known that the plaintiff would be able to augment his case by relying on the Bill of Rights. On this basis it is submitted that the retrospective application of the substantive rights in Chapter 3 may have the effect of creating "new obligations" or imposing "new disabilities" in respect of transactions or considerations already past. In this regard see the judgment of the Constitutional Court in *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC), where a similar argument was accepted in respect of this issue.

28 1995 (1) BCLR 97 (W).

29 1994 (6) BCLR 85 (T).

30 Op cit 102.

reason allowed the defendant in this defamation suit to raise a defence based on the right to freedom of expression.[31]

(IV) Holomisa v Argus Newspapers Ltd[32]

Cameron J treated the issue of retrospectivity in very brief terms. He reached the conclusion that the decision given by Eloff JP in *Jurgens v The Editor, The Sunday Times Newspaper and Another* was correct and that, once again, it was unthinkable that the drafters of the Constitution could have intended to prevent any person from exercising the rights guaranteed by Chapter 3, once the Constitution came into operation, given the spirit and tenor of the Constitution as a whole.[33]

(V) Conclusion

The Constitutional Court has finally put to rest all the confusion arising from the question of retrospectivity. In *S v Mhlungu and Others*[34] it was held that section 241 (8) did not preclude an accused person from relying on any of the provisions of Chapter 3 in proceedings which were pending immediately before the commencement of the Constitution.[35] It was determined that the only purpose of

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31 The reasoning behind the conclusion reached in the *Shabalala* case was that section 241 (8) only regulated the *procedure* to be applied in pending proceedings. In other words, having regard to the rest of section 241, it was clear that section 241 (8) was meant to provide for the continuation of legal proceedings which had been pending on 27 April 1994. This in no way meant that an individual was precluded from relying on the provisions of Chapter 3 after 27 April 1994. In this regard, Cloete J reasoned that since Chapter 3 rights could be asserted in an appeal or review which had arisen from a matter that had been initiated before the commencement of the Interim Constitution, it must necessarily follow that such rights accrued not at the time when the appeal or review was brought, but at the time that the Constitution came into operation.

32 1996 (1) SA 478 (W).

33 It should be noted that the decision given in the *Holomisa* case was only made after the Constitutional Court had made a decision on the issue of retrospectivity in *S v Mhlungu and Others* 1995 (7) BCLR 793 (CC).

34 Supra.

35 Op cit 816H-I. Note should be taken of the fact that the judgment of the majority, which was penned by Mohammed J, makes specific use of the words 'accused person', in the order that is ultimately given. This case was determined in the context of, and with reference to the particular hardships and anomalies which might arise in a *criminal* case, if the provisions of the Constitution were deemed to be inapplicable to pending proceedings.

section 241 (8) was to preserve the authority of pre-Constitution courts to continue to function as courts for the purpose of adjudication in pending cases.[36] To adopt an interpretation which would prevent the application of the substantive provisions of the Constitution to pending cases, would negate the spirit and tenor of the Constitution, and would renege on the promise of equal protection of the law to all people.[37] The Constitutional Court therefore adopted an interpretation of section 241 (8) which was based on a generous and holistic construction of the Constitution. The rationale for adopting a liberal approach to this issue may have stemmed from the fact that the case concerned a criminal matter, where the rights of the accused was the central issue. It is submitted that the Court's decision in this regard may be understood in light of this country's particularly abysmal record in respect of protection for prisoners and accused persons.[38]

It must be noted though, that in the case of *Du Plessis and Others v De Klerk and Another*[39], the Constitutional Court held unanimously that the provisions of Chapter 3 of the Interim Constitution could not be invoked as a defence, to a claim arising from facts which had occurred *before* the commencement of the Constitution. The Court held that Chapter 3 did not operate retroactively, i.e. it did not mean that at a past date, the law would be taken to be that which it was not, so as to invalidate what was previously valid, or vice versa.[40] Furthermore, there was nothing in the Interim Constitution which suggested that conduct which was unlawful before the advent of the Constitution, should now become lawful by virtue of Chapter 3.[41] As

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36 Op cit 808-809.

37 Op cit 799E-G.

38 See Kentridge AJ's comments in this regard in *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC). At 668-669, the learned judge explains that the decision in *S v Mhlungu and Others* was meant to operate only in a limited sense.

39 1996 (5) BCLR 658 (CC).

40 Op cit 669A-C.

41 Op cit 669E.

such, a pleading which alleged that articles published in 1993 were lawful, by reason of the existence of section 15 of the Constitution (the right to freedom of expression), was bad in law.[42] It is submitted that there is nothing inconsistent about the Court's conclusion in this case, when compared with the conclusion reached in *S v Mhlungu and Others*. The differing contexts of each case required that different considerations be taken into account. One such consideration was the fact that a right of action is a form of incorporeal property, and to invoke a constitutional right against the individual, which did not exist at the time when he was vested with such property, would be unwarranted.[43]

While the issue of retrospectivity was an important constitutional issue which required clarification, it is submitted that the effect on the law of defamation is negligible. For the common law of defamation, the resolution of the issue of retrospectivity means little more than that those litigants who became involved in defamation suits prior to the commencement of the Interim Constitution, would not be able to amend their defences (or their causes of action), on the basis of the rights guaranteed in Chapter 3.

(2) Verticality v Horizontality

The issue of whether or not the provisions of the Constitution can be applied to relationships between private individuals, or between private individuals and juristic persons, has caused intense debate amongst both academics and practitioners.[44] Professor Dennis Davis comments that since the commencement of the Interim Constitution, there has emerged a substantial body of literature which attempts to

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42 Op cit 670B.

43 Op cit 672A-C. Mention has been made of this argumentat footnote 27 of this chapter.

44 See for instance an article by M L M Mbao *"The Province of the South African Bill of Rights Determined and Redetermined - a Comment on the Case of Baloro & Others v University of Boputhatswana & Others"* (1996) 113 SALJ 33.

deal with the interpretation of section 7 (1) of the Constitution.[45] He goes on to explain that because the judiciary had been omitted from the express wording of section 7 (1), in contrast with section 4 (1) which provides that the Constitution applies to the legislature, executive *and* the judiciary, it has been argued that the Constitution applies vertically i.e. the Constitution applies in those situations where the State is involved, but not to relationships between private parties.[46]

As opposed to this, there is the view that the Constitution *does* apply to private relationships, including relationships between natural and juristic persons. The view has been expressed that if this is the correct interpretation of the Constitution, then the whole gamut of relationships which fall under the aegis of private law may be in serious danger.[47] One of the most common arguments against horizontality seems to be based on a fear that horizontal application of the Bill of Rights, will somehow pose a threat to personal and group autonomy i.e. that it will impose upon us as individuals, obligations that we would not otherwise have had.[48] On this argument, an individual would be obliged to follow the dictates of the Constitution in each and every situation or transaction that he was involved in, whether it is the leasing of premises, the opening of a club, the employment of staff, the making of a will and so on. Given this scenario, those who fear the effects of horizontality would argue that effectively, the State has total control, through the Constitution, over each and every aspect of our lives. Clearly, this would be a step back for South Africa, rather than a step forward.

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45 See Dennis Davis *"Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W)"* (1996) 12 South African Journal on Human Rights 328. Section 7 deals with the application of the fundamental rights set out in Chapter 3.

46 Ibid.

47 See for instance the comments of P J Visser in *"A Successful Constitutional Invasion of Private Law"* (1995) 58 THRHR 745. In discussing the case of *Gardener v Whitaker* mentioned in previous footnotes, Visser states that "...it appears that private law should brace itself for a type of 'total onslaught' on many of its rules and principles." (op cit 745). It is submitted that Professor Visser may have overstated the criticisms that should be levelled at the decision in *Gardener*. His remarks have been cogently criticised by Gretchen Carpenter and Christo Botha in *"The `Constitutional Attack on Private Law': Are the Fears Well Founded?"* (1996) 59 THRHR 126.

48 Stuart Woolman *"Defamation, Application and the Interim Constitution"* (1996) 113 SALJ 428 at 447.

The two opposing positions outlined above, present two opposite ends of the full spectrum of opinions on the issue. In the midst of these two extremes however, there is another view which, it is submitted, is far more sensible than either of the views set out above. In terms of this point of view, the whole debate about verticality as opposed to horizontality is completely misconceived and inappropriate in the existing scheme of the South African legal system.[49] Professor J D Van der Vyver has rightly stated that the very terminology in which the application debate has been cast, is incorrect. The terms 'horizontality' and 'verticality' come from the German system of law where all law is divided into public law and private law. The human rights which have been enshrined in the German Basic Law are applicable to all public law. In respect of private law however, these rights are applied 'mediately' in the sense that all law including private law must be interpreted in conformity with the spirit of the German Basic Law.[50] Professor Van der Vyver states further that, to the best of his knowledge, the German legal system is the only legal system in the world that is based on a distinction between public and private law. As such, it is only with respect to the German legal system that one may speak of 'horizontal' or 'vertical' application of the Constitution.[51] The existence of this (incorrect) terminology in South Africa may be ascribed to the fact that the South African Law Commission, in its constitutional proposals, favoured the German system of application, and in this way the language of horizontality and verticality made its way into the constitutional drafting discussions. The fact that South Africa did not adopt the German system of application however, means that one should abandon the terminology that is germane only to that particular legal system.[52]

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49 See in this regard the article by J D Van der Vyver *"Constitutional Free Speech and the Law of Defamation"* (1995) 112 SALJ 572. It is submitted that the comments made by Prof Van der Vyver reveal an insightful and perceptive understanding of the 'application debate'. His comments put this so-called debate in its proper perspective.

50 Van der Vyver op cit 578.

51 Ibid.

52 Ibid.

A far more important consideration in the application debate though, is the actual wording of Chapter 3. It is submitted that the correct interpretation of Chapter 3, in respect of application, is as follows:

1. Section 7 (1) describes which branches of the government shall be subject to the dictates of Chapter 3, viz. all legislative and executive organs of State at all levels of government.[53]
2. Section 7 (2) says that Chapter 3 "shall apply to all law in force and all administrative decisions taken and acts performed". Chapter 3 therefore draws a distinction between the constitutionality of acts and decisions on the one hand, and law on the other hand. Only an act or decision, or a law may be declared unconstitutional.[54]
3. If the acts or decisions of a person or institution are to be subject to constitutional scrutiny, it must first be shown that the person or institution is an organ of State, belonging to either the legislative or executive branch of government and operating on any one of the various levels of government in existence.[55] These requirements arise from reading section 7 (1) together with section 7 (2).
4. As far as laws are concerned, section 33 (2) says that the common law, customary law and legislation must comply with the rights contained in Chapter 3. As such, the entire body of law that comprises the South African legal system, *is* subject to the dictates of the Constitution.
5. Section 33 (4) makes provision for the enactment of legislation prohibiting unfair discrimination by bodies and persons, other than those bound in section 7 (1). Professor Van der Vyver sees this as an

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53 Davis op cit 330.

54 Van der Vyver op cit 577. In this regard, Professor Van der Vyver states that the total spectrum of juridical reality includes legal institutions which fall outside the definition of either acts and decisions, or law, and therefore these legal institutions are not subject to constitutional scrutiny. For instance, a contract is not what one might call an act or decision. Nor is a contract what one might call a law. Therefore, a contract would not be subject to constitutional testing. Thus, only acts and decisions, or laws may be declared unconstitutional.,

55 Op cit 585.

indication that the South African Constitution is *not* based on a public/private law divide as in Germany, but rather on the classification of law into the law of the State (which, as seen above, is clearly subject to the Constitution), and the legally enforceable internal rules of conduct, of institutions other than the State (i.e. those referred to in section 33 (4)).[56] The consequence is that the legally enforceable, internal rules of those bodies, not referred to in section 7 (1), are also subject to the dictates of the Constitution, albeit in the circumscribed manner allowed for by section 33 (4).

7. A further consequence of section 33 (4), is that even the acts and decisions of persons or bodies that do not fall within the scope of section 7 (1), may be subject to the Constitution in the circumscribed manner mentioned above, as a result of measures adopted by the legislature pursuant to section 33 (4).[57]

In summary then, it is submitted that the debate about horizontal as opposed to vertical application of the Constitution, is actually of no relevance in South Africa. Furthermore, the Constitution is directly applicable to acts and decisions of all executive or legislative organs of State, operating at all levels of government, and is also applicable to all the law that currently forms the composition of the South African legal system. With specific reference to the topic under consideration in this dissertation, it must therefore be pointed out that the common law is subject to the dictates of the Constitution regardless of whether the rule in question is part of private or public law. The question that has to be determined, is whether or not the *law* of defamation is constitutional, and it does not matter that the law in question forms part of what we commonly call *private law*.

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56 Op cit 587.

57 Op cit 589.

Finally, on a more limited basis, the Constitution allows for the acts and decisions, as well as the internal rules of bodies (or, as the case may be, persons) other than those referred to in section 7 (1), to be constitutionally circumscribed by means of measures adopted by the legislature in terms of section 33 (4). It has been mentioned earlier that many of the post-1994 defamation cases have revolved around issues, such as the issue of horizontality. The preceding discussion has, perhaps, shown that these cases need not have deliberated on the issue of application at such great length however, these cases must be discussed because in terms of the horizontality/verticality debate, the impact of the Constitution on the common law of defamation depends on how this debate is resolved. The discussion below will now focus on these cases.

(I) Mandela v Falati[58]

In the *Mandela* case, Van Schalkwyk J concluded that the Constitution was indeed enforceable, in private disputes.[59] He dealt with the issue of horizontality first by examining the textual arguments which were used to support the view that the Constitution applies to private disputes. Counsel for the Respondent in this case made reference to the following provisions of the Constitution in this regard:

1. Firstly, counsel relied on section 4 (1) as support for a horizontal approach to the Constitution. In terms of section 4 (1) "any law...inconsistent with its provisions shall...be of no force and effect". Counsel argued that this provision must be taken to apply to the common law as well, and therefore the Constitution must be applicable to disputes of a private nature.[60]
2. Secondly, counsel for the Respondent argued that certain rights in the

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58 1994 (4) BCLR 1 (W).

59 Op cit 7.

60 Op cit 6.

> Constitution, such as childrens' rights as set out in section 30, pre-eminently required horizontal application. This was therefore an indication that the drafters of the Constitution had meant for the Constitution to apply horizontally.[61]

Van Schalkwyk J accepted the above arguments and added these arguments, in support of his conclusion:

1. The limitation clause (section 33)[62] endows special protection on section 15 (the right to freedom of expression), insofar as that right relates to free and fair political activity. Political activity occurs not only between the State and its citizens (i.e. vertically), but also (and especially) between citizen and citizen (i.e. horizontally). The learned judge explains that all political contests must be fought at the latter level, and the drafters of the Constitution must therefore have anticipated that at least the right to freedom of expression would be enforced as between private individuals.
2. He also makes mention of section 35 (3)[63], which requires a court to have due regard to the spirit, purport and objects of Chapter 3 when it interprets *any* law. According to the learned judge, the spirit, purport

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61 Op cit 7. It is submitted that this argument does not have a sound legal basis: the fact that certain rights appear, from their nature, to require horizontal application simply indicates that the drafters intended *certain, specific rights* to be applied horizontally. This however, simply does not mean that *all* the rights in Chapter 3 were meant to apply horizontally. There is no foundation for making such an extrapolation.

The learned judge believes "It is strange that the drafters of the Constitution did not spell out in plain language what they obviously intended." With all due respect, it is submitted that if the drafters had truly intended the Constitution to be applied in the manner favoured by the learned judge (ie horizontally), then they most certainly would have made that clear. The fact that they did not is, surely, reason for adopting an interpretation that is quite the opposite of the learned judge's.

62 The limitation clause of the Interim Constitution allows for all the rights in Chapter 3 to be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and the limitation in question does not negate the essential content of the right. A further proviso is imposed in respect of the rights set out in sections 10, 11, 12, 14 (1), 21, 25 and 30 (1) (d) or (e) and 30 (2), as well as the rights contained in sections 15, 16, 17, 18 23 and 24 but only insofar as these latter rights relate to free and fair political activity. This further proviso is that the limitation must, in addition to being reasonable, also be necessary.

63 Section 35 of the Interim Constitution is the interpretation section.

> and object of Chapter 3 is to extend fundamental rights (many of which are recognised by the common law anyway) beyond the circumstances for which the common law already makes provision.[64]

The learned judge thus concluded that the Constitution was applicable to private disputes and that the right to freedom of expression could certainly be raised as a defence in a defamation suit.

(II) De Klerk and Another v Du Plessis and Others[65]

In contrast to the *Mandela* case, it was held in *De Klerk* that the Constitution does *not* operate horizontally, and that the decision handed down in *Mandela v Falati* was therefore incorrect.[66] In approaching this issue, the learned judge first explained what he believed to be the correct approach, to interpreting the Constitution. According to Van Dijkhorst J, one must apply a *purposive* approach to the interpretation of the Constitution i.e. one should look at the Constitution as a whole, and then attempt to determine what the aim of Chapter 3 was, what problems and aspirations it sought to address, and what it had in mind for society.[67]

Furthermore, such interpretation would have to take place "against the backdrop of our chequered and repressive history in the human rights field".[68] However, in determining the purpose of the Constitution, one would still have to pay strict

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64 It is submitted that this particular argument lacks cogency. The learned judge seems to have been overly enthusiastic in his endeavour to give the Constitution the "more liberal interpretation" that was urged upon him by counsel (op cit 7). The spirit, purport and object of the Constitution may well be to protect fundamental human rights in those situations where they are not protected, but this in no way means that the common law should automatically be supplanted by the new values of the Constitution or that the Constitution was meant to operate horizontally. All it means is that the common law would have to be developed, where required, to accord with the dictates of the Constitution.

65 1994 (6) BCLR 124 (T).

66 Op cit 133.

67 Op cit 128G-H.

68 Op cit 128J.

attention to the language of the Constitution. In so stating, the learned judge emphasised that the drafters must be presumed to intend, what they expressed to be their intention[69], since "we are but a small step away from Kempton Park and there is not yet much scope for new social, political and historical realities, unimagined by the negotiators."[70]

Having explained the approach he preferred to adopt in interpreting the Constitution, Van Dijkhorst J then explained that traditionally, bills of rights have been inserted in constitutions so as to strike a balance between governmental power and individual liberty.[71] In other words, the primary function of a bill of rights was to act as a form of protection against State tyranny. It was therefore concluded that the Interim Constitution was a 'conventional constitution', unless there were clear indications to the contrary, either in respect of Chapter 3 as a whole or in respect of specific sections thereof.[72] In view of the learned judge's conclusion that the Constitution is of vertical application, it would appear that he did not find there to be anything in the Constitution which might indicate that the Constitution was meant to operate horizontally.

In support of the view that the Constitution and, in particular, the Bill of Rights was meant only to protect the individual from the State, Van Dijkhorst J stated that there was a pressing need for a Bill of Rights in this country because of oppressive State action in the past. In explanation, the learned judge claims that the fundamental rights and freedoms set out in Chapter 3, had not been curtailed by the common law, and that these rights can, in fact, be found enshrined therein. On this

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69 Op cit 130C.

70 Op cit 128C-D. The interpretive approach adopted by Van Dijkhorst J, in analysing the Constitution, is to be welcomed. There is undoubted merit in emphasising the fact that the Constitution was drafted only a short while ago, and that the country and its circumstances have certainly not changed to a degree that would require an interpretation of the Constitution which is supposedly 'liberal' or 'generous'.

71 Op cit 130D.

72 Op cit 131D.

basis he comes to the conclusion that the protection afforded by Chapter 3 is unnecessary at a horizontal level.[73]

Van Dijkhorst J also made reference to certain sections of the text of the Constitution, which to him indicated, that the drafters had actually intended the Constitution to apply vertically:

1. First, mention is made of section 7 (1) which says that Chapter 3 "shall bind all legislative and executive organs of State at all levels of government". The fact that no mention is made of private individuals in this context, is taken to mean that Chapter 3 was not intended to apply to them.[74]
2. Second, reference is made to section 7 (2) which says that Chapter 3 "shall apply to all laws in force and all administrative decisions taken and acts performed during the period of operation of this Constitution". Van Dijkhorst reads this sub-section with section 7 (1), and comes to the conclusion that since section 7 (1) refers only to the State, the words "all law" must be read in that context, in which case it would be a reference to all public law applicable to the State, and its organs.[75]
3. Section 7 (4) (b), which provides for the *actio popularis* is, according to

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73 Op cit 131E. It is submitted that Van Dijkhorst J's claim that the Bill of Rights became necessary because of oppressive State action in the past, paints an incomplete picture. It is true that the conduct of the State in the past has given rise to the need for a Bill of Rights, but surely it is much more than just State action which forms the basis of the need for a Bill of Rights in this country? The apartheid regime, and its statutorily enshrined machinery has given rise to generations of human beings who believe in discrimination for no other reason than the fact that this is what they have learnt to believe in. These generations will certainly be responsible for perpetuating racism, discrimination and disrespect for basic human rights at what one might call 'grassroots' level, for some time to come. It would be naive to assume that this will not be the case. On this basis it is submitted, that the Bill of Rights in this country is required to protect the individual from much more than the State alone: it is, and will be, required in order to protect individuals from each other. Van Dijkhorst J seems to have overlooked the reality of South Africa when he declared that the Bill of Rights was necessary, only to protect individuals from the State.

74 Op cit 133H-I.

75 Ibid.

Van Dijkhorst J incompatible with litigation between citizens.[76]

4. Section 33 (2) and (3) envisage that the common law, customary law and legislation will exist *in tandem* with the Constitution.[77]
5. Section 33 (4) and (5) allows for Parliament to interfere with the relationships between citizens in order to apply certain Chapter 3 rights within those relationships. It would be unnecessary to include provisions of this nature had it been intended that Chapter 3 should apply horizontally.[78]
6. Finally, section 35 (3) is an aid to be used by the courts, in the interpretation of the law, and not in the interpretation of the Constitution itself. Basically, it means that when interpreting existing law, one should begin by examining the values contained in, and underlying the Constitution, in order to interpret such law.[79]

Although the learned judge admitted that certain rights in Chapter 3 were wide enough to support their horizontal application, it was clear that the common law dealt with private law relationships adequately. There was therefore no need for constitutional invasion of the private law since "...Parliament is empowered to alter

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76 Op cit 132. It is submitted that this particular argument has little force, since it appears to be based on the assumption that an indidividual involved in litigation against another private individual, would attempt to base his allegation of *locu standi* on the specific grounds set out in section 7 (4) (b). It is submitted that such a situation would be unlikely to occur since any good lawyer would understand that the basis on which *locus standi* is alleged would have to be appropriate to the circumstances of the case. In litigation between private individuals it would clearly be inappropriate to base *locus standi* on the *actio popularis* provisions contained in section 7 (4) (b).

77 Op cit 133B. Section 33 (2) states the following:

> "Save as provided for in subsection (1) or any other provisions of this Constitution, no law whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter."

Section 33 (3) reads as follows:

> "The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter."

78 Op cit 133B-C.

79 Op cit 133G.

the existing law wherever the shoe pinches".[80] He also sounded a warning in respect of the "unattractive results" that a horizontal application of the Constitution would have for the law, generally. The learned judge was of the opinion that horizontal application of the Constitution, would lead to uncertainty in the law since private rights, relationships and contracts would be tested against broadly defined, and vague constitutional principles.[81] Thus, on the basis of the foregoing arguments, it was held that the Constitution was of vertical application only.

(III) Gardener v Whitaker[82]

In *Gardener v Whitaker*, Froneman J decided that the Constitution is capable of being applied as between private parties, and that in fact, all aspects of the common law including the present state of the law of defamation should be scrutinised in order to decide whether they accord with the demands of the Constitution.[83]

In reaching this conclusion, the learned judge first examined the textual factors that supported the idea that the Constitution is capable of horizontal application. He reasoned that the word "law" in section 7 suggests that not only public law relations are subject to the Constitution.[84] It was further reasoned that sections 33 (2), (3) and

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80 Op cit 132E. This statement by Van Dijkhorst J appears to be based on the assumption that it is the role of Parliament to fill the lacuna that will appear in our common law, as a result of the new standards that are required of the law by the Constitution. It is submitted that this role has, in fact, always been played by the judiciary. It has always been the function of the Courts to apply the common law, and to develop it in accordance with the changes taking place in society. There is no reason why this position should change under the aegis of the new Constitution.

81 Reference was made in an earlier footnote, to the arguments of Professor Van Der Vyver. His argument states that 'legal institutions', such as contracts, would not be subject to direct constitutional scrutiny, since only acts and decisions, or laws are susceptible to constitutional testing. This, it is submitted takes care of any fears there might be of totalitarianism, and State control over every aspect of an individual's life.

82 1994 (5) BCLR 19 (E).

83 Op cit 32C.

84 Op cit 28A.

(4) also support this conclusion.[85]

Froneman J then went on to a comparative study of the general purpose of bills of rights in other countries, and concluded that the primary purpose of a bill of rights is to safeguard the rights of individuals against unjustified intrusion upon those rights by public organs of State.[86] At the same time though, this comparative survey revealed that there was an apparent need to ensure that the values inherent in such charters (or bills of rights, as the case might be) would permeate the *entire* legal system. The rationale for wanting to ensure that the values of the charter/bill of rights would permeate the entire legal system was clear: the very foundations upon which these societies sought to structure, and develop themselves, was to be found in their charters of fundamental rights. If the rules governing private legal relations (i.e. legal relations between citizen and citizen), were allowed to contradict or ignore the values underlying the rights contained in the charter, then those rights would be undermined.[87]

By extrapolation, it was concluded that South Africa was in a position that was very similar to that of many other countries, in the sense that our Constitution was also primarily concerned with the protection of individual rights against State action.[88] Likewise, the South African Constitution was also concerned that the entire legal system (including the common law and customary law), should accord with the broader values of the Constitution. Thus, where the common or customary law corresponded with, or extended the provisions of Chapter 3, their provisions would

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85 Op cit 28A-C. Section 33 (2) provides that neither the common law nor the customary law may infringe any of the rights contained in Chapter 3, other than in accordance with the limitation clause. Section 33 (3) gives recognition to those common law and customary law rights, which are not inconsistent, with the rights set out in Chapter3, and section 33 (4) allows the legislature to adopt measures which will prohibit unfair discrimination by persons and bodies other than those bound by section 7 (1).

86 Op cit 29J.

87 Op cit 30B-D.

88 Op cit 30G.

be left unchallenged. On the other hand, where they restricted or diminished Chapter 3 rights, it was clear that they could not survive.[89]

In short, the learned judge accepted that the Constitution was capable of horizontal application however, as to whether such application required direct constitutional adjudication, as opposed to the gradual development of the common law in harmony with the values of the Constitution, Froneman J stated that this would depend on the "deepest norms" of the Constitution.[90] He also explained that on his approach, the distinction between 'horizontal' and 'vertical' application of the Constitution lost its significance, since the extent of the State's involvement in a particular case would in no way have a bearing on the issue of whether or not the Constitution could be applied to the litigation in question. Rather, the issue of whether or not the Constitution should be brought to bear in a particular case, would depend on the nature and extent of the particular right in question, the values that underlie that right, and the context in which the alleged breach occurs.[91]

(IV) Holomisa v Argus Newspapers Ltd[92]

The decision in *Holomisa* can be said to have been a combination of the judgment given by Van Dijkhorst J in *De Klerk and Another v Du Plessis and Others*, and the

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89 Op cit 30H-I.

90 Op cit 30J-31A. It is submitted that the learned judge's reference to the "deepest norms" of the Constitution lends uncertainty to the issue of how one should go about bringing the common law into line with the dictates of the Constitution. On the basis of Froneman J's statement, it is not clear whether the horizontal application of the Constitution is to be the responsibility of the Constitutional Court or the High Court (previously the Supreme Court).

91 Op cit 31A-C. Froneman J's recognition of the irrelevance of the 'horizontal' v 'vertical' application debate is to be applauded. It is submitted that on any reading of Chapter 3, it is clear that the Constitution was meant to be applied to all law including the common law. Furthermore, his astute exposition of the manner in which one should determine whether or not the provisions of the Constitution should be brought to bear in a particular case, provides an extremely useful guideline to the judiciary in matters of this nature. It must be noted that the approach adopted by the learned judge in this regard has, in its essence, been adopted in the text of the Final Constitution. Section 8 (2) states that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable taking into account the nature of the right, and the nature of any duty imposed by the right. On the approach of both Froneman J and section 8 (2), what is important is the context in which the right is claimed.

92 1996 (1) SA 478 (W).

judgment given by Froneman J in *Gardener v Whitaker*. The decision given in this case was that the Constitution does not apply directly between private parties (in accordance with the judgment of Van Dijkhorst J), but that it *does* apply in some manner to all disputes between litigating parties (in accordance with the decision by Froneman J).[93]

Cameron J examined certain sections of the text which, in his opinion, indicated that without legislative intervention, or further development of the common law, certain bodies and persons would not be bound by the provisions of the Constitution. The specific sections examined by the Court were sections 7 (1), 4 (2) and 33 (4). As has been pointed out before, section 7 (1) states that Chapter 3 shall be binding upon all legislative and executive organs of State, while section 4 (2) states that the Constitution shall be binding upon the legislature, executive and judiciary. Cameron J was of the opinion that these sections together with section 33 (4) (which allows for legislative measures preventing unfair discrimination by persons or bodies other than those bound under section 7 (1)), clearly implied that the Constitution as a whole, was not meant to apply directly between private parties.[94]

At the same time though, the learned judge had also stated that the Constitution was meant to apply *in some manner* to all disputes between litigating parties.[95] The learned judge based this conclusion on a consideration of the Preamble, the section on National Unity and Reconciliation and the chapter on Fundamental Rights. Cameron J explained that together, these sections asserted the new guiding values of our legal system viz. the values of equality, democracy, governmental openness and accountability.[96] Against an appreciation of the revolution that the Constitution had

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93 Op cit 597D-G.

94 Op cit 596H.

95 Op cit 597F-G.

96 Op cit 597I-598A.

wrought, in the fabric of our legal system, the debate about 'verticality' or 'horizontality' was, in his view, misconceived.[97] Furthermore, from this perspective section 35 (3) was no longer merely an interpretive directive, but rather a force that informed all legal institutions and decisions with the new power of constitutional values.[98] There was therefore no doubt that in considering the defences available to a defendant in a defamation action, it would be improper not to take into account the guarantees provided by section 15 (the right to freedom of expression) of the Interim Constitution.

(V) Conclusion

The so-called application debate formed the subject of an appeal to the Constitutional Court in 1996. In *Du Plessis and Others v De Klerk and Another*[99], a majority of the Constitutional Court decided that the provisions of Chapter 3 were, in general, not capable of application to any relationship other than that between persons and legislative or executive organs of government at all levels of government, and that in particular, section 15 did not have direct horizontal application.[100] The majority judgment was written by Acting Justice Kentridge, and was concurred in by all the members of the Court, except Kriegler and Didcott JJ.

Kentridge AJ's judgment set out a clear statement of the questions that had to be answered in order to resolve the 'horizontality' issue. The first question to be answered was "What law does Chapter 3 apply to?", while the second question was

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97 Op cit 598B. It is submitted that Cameron J has displayed a perceptiveness not shown by many others who have entered the debate, about application of the Constitution. Again, it is clear that the very terminology of the debate *is inappropriate in the South African context, and also quite unhelpful in determining how the Constitution should* be applied, in practical terms.

98 Op cit 598D.

99 1996 (5) BCLR 658 (CC).

100 Op cit 693B.

"What persons are bound by Chapter 3?".[101] The learned judge acknowledged that these questions could only be answered by analysing the specific provisions of the Constitution.[102]

In answering the first question, the learned judge referred to the provisions of section 7 (2). In terms of this section, Chapter 3 "shall apply to *all law in force...*"(emphasis added). Clearly, the words "all law in force" had to be interpreted to mean not just statutory law, but the common law as well.[103]

In respect of the second question, reference was made to section 7 (1) which, again, seemed to provide a plain answer to the question. Section 7 (1) states that Chapter 3 shall be binding on all legislative and executive organs of state at all levels of government. Kentridge AJ observed that entrenched bills of rights, are ordinarily intended to protect the subject against legislative and executive action, and the emphatic statement in section 7 (1) must mean that Chapter 3 is binding *only,* on the legislative and executive organs of State. The learned judge also rightly explained that had the intention been to give Chapter 3 a more extended application, then the drafters could easily have expressed this intention.[104]

Other sections considered by the Court were, for instance, section 33 (4) which makes reference to "persons other than those bound in terms of section 7 (1)". Kentridge AJ correctly posed the following question: if Chapter 3 was actually meant to have general horizontal application, then who could the persons and bodies be

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101 Op cit 681G-682A.

102 Op cit 677B.

103 Op cit 682C-H.

104 Op cit 683A-B. Kentridge AJ correctly pointed out that it would have been surprising, if a matter as important as direct horizontal application, were left to be implied.

who were not bound?[105] Further, in respect of section 35 (3), the learned judge again questioned why this provision would have been necessary if Chapter 3 could be directly applied to common law disputes between private litigants.[106]

On the basis of the foregoing considerations, the majority reached the following conclusions:

1. Constitutional rights under Chapter 3 may be invoked against an organ of government, but not by one private litigant against another.
2. In private litigation, any litigant may nonetheless contend that a statute or executive act, relied on by the other party, is invalid as being inconsistent with the limitations placed on the legislature, and executive under Chapter 3.
3. As Chapter 3 applies to common law, governmental acts or omissions in reliance on the common law may be attacked by a private litigant as being inconsistent with Chapter 3, in any dispute with an organ of government.[107]

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105 Op cit 683D-E.

106 Op cit 683E-F.

107 Op cit 684G-685A. An interesting, but perhaps unrelated, aspect of the Court's judgment was its treatment of the question of jurisdiction, which arises from its interpretation of how the Constitution should be applied. The Court explained that its jurisdiction was neither inherent or general in nature, as is the case with courts like the United States Supreme Court, the High Court of Australia or the Supreme Court of Namibia. Rather, its jurisdiction was specifically conferred by section 98 of the Constittuion, wherein there is no mention of a power to declare a rule of the common law invalid. Even if the Court were to strike down a rule of the common law, there would be a resulting *lacuna* in the law which the Constitutional Court would not be able to fill. Traditionally, where there is a 'gap' left in the common law, it would be the task of the Supreme Court and the Appellate Division to reformulate the common law, in order to fill that gap, or it would be left to the Legislature to pass appropriate legislation in order to rectify the situation. There was no reason why the Supreme Court, the Appellate Division and the Legislature would not, or should not, continue to fulfill these functions. In this scenario, the Constitutional Court would still have jurisdiction to determine what the "spirit, purport and objects" of Chapter 3 are, and to ensure that, in developing the common law, the other courts have had due regard thereto. This, according to the Court was a direct consequence of its duty to interpret, protect and enforce the provisions of the Constitution.

In a separate judgment, Kriegler J (Didcott J concurring) set out a strongly worded dissent from the majority opinion. The learned judge summarily dismissed the fears that a direct horiziontal application of Chapter3 would result in an "Orwellian society in which the all-powerful State will control all private relationships" (see 714G-715B). In fact, Kriegler J was of the opinion that it did not matter whether the horizontal application of Chapter 3 was direct or indirect. Rather, it was clear that Chapter 3 was intended to apply to *all* law in force: where the Chapter fits it is applied, and where it does not, its spirit, purport and objects are duly regarded. The learned judge stressed the argument that the Interim Constitution promised an open and democratic society, and a break with the past. It then listed the rights and freedoms necessary to render those benefits attainable by all. No one, the judge declared, familiar with the stark reality of South Africa and the power relationships in its society could believe that protection of the

In the same year that the Constitutional Court handed down its decision in *Du Plessis*, the Final Constitution was passed and brought into operation.[108] In light of the changes wrought in the text of the Final Constitution, it almost seems to be a pity that so much time was spent in litigation, on the so-called 'application debate'. The changes which have been effected now, constructively, reverse the opinion set out by the majority in *Du Plessis*. The pertinent sections of the Final Constitution read as follows:

"**Application**

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1)."[109]

An examination of section 8 (1) shows that *all law*, including the common law will

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individual only against the State could possibly bring about those benefits.

108 The *Republic of South Africa Constitution Act* 108 of 1996 brought the Final Constitution into operation.

109 Section 36 is the successor of section 33 of the Interim Constitution, and is more commonly referred to as the limitation clause.

now be subject to *direct* constitutional scrutiny.[110] In addition, the inclusion of the judiciary in the application provisions now seems to imply that even if there is *no express rule* governing a particular private relationship or dispute, a court must apply the dictates of the Constitution in resolving any dispute, and if necessary formulate and articulate a new rule of the common law to that end.[111]

Section 8 (2) removes any doubts, in respect of whom the Bill of Rights may be applied to: the Bill of Rights may now be applied to *all* private parties, whether natural or juristic. However, this does not mean that the Bill of Rights will be applied to private parties in *all situations or disputes*. Section 8 (2) allows for application of the Bill of Rights between private parties "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". In other words, the Bill of Rights is not to be automatically applied to all disputes involving private parties but rather, it will be in the court's discretion to determine whether the right asserted in the case before it, is applicable in that case taking into account the factors referred to in section 8 (2). Ultimately, the question will be whether or not it would be appropriate, to assert the right in question. It is submitted that the discretion granted to the courts in respect of this issue has been properly limited by the inclusion of the factors referred to above.[112]

It is submitted that the cumulative effect of section 8 (3) is to reiterate the following points:

1. The common law is subject to direct constitutional review.
2. Where no express rule of the common law exists to cover a particular

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110 This is in contrast with the position adopted by the Constitutional Court in *Du Plessis*. The majority stated its preference for an *indirect* application of the rights guaranteed in Chapter 3, in accordance with the German model of 'drittwurking'.

111 See Stuart Woolman *Defamation, Application and the Interim Constitution*" (1996) 113 SALJ at 450.

112 It must be noted that this approach was foreshadowed by that of Froneman J in *Gardener v Whitaker* (supra). Of all the post-1994 defamation cases which dealt with the issue of horizonatlity, only the judgment in *Gardener v Whitaker* recognised that ultimately, the 'application debate' turned on the question of whether or not it would be *appropriate* in a given set of circumstances, to assert a particular right.

relationship, one must be fashioned if this is necessary to give effect to the Bill of Rights.

3. Rules of common law can have their constitutionality measured in terms of the limitation clause.[113]

A further provision of the Final Constitution which warrants analysis is section 39 (2), which one may describe as the successor to section 35 (3) of the Interim Constitution. The wording of this section, has remained largely the same except that where section 35 (3) enjoined the courts to have *due regard* to the spirit, purport and objects of Chapter 3, section 39 (2) now requires that "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum *must promote* the spirit, purport and objects of the Bill of Rights" (emphasis added). What was once an essentially permissive section, has now been made an imperative.[114]

Given the changes that have been rendered in the text of the Final Constitution, it is safe to say that there is no longer substantial room for debate, insofar as the application of fundamental rights is concerned. The discretion granted to the courts by section 8 (2) is not so wide as to be a cause for concern and, it is submitted that the remaining application provisions appear to be quite clear in stating how the Bill of Rights should be applied. Basically, the Bill of Rights must apply to all law, but will only be applied between private litigants if, in the circumstances of the case before the court, it would be appropriate to do so. It is disappointing that such a large proportion of the post-1994 defamation cases focussed only on the 'application debate' however, it is submitted that the price of re-learning, is the price one must

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113 Woolman op cit 451. Again, the approach of the Final Constitution is in stark contrast to that adopted by the Constitutional Court in *Du Plessis*. In *Du Plessis* it was held that the limitation clause could *not* be applied to private relationships governed by the common law (*Du Plessis and Others v De Klerk and Another* supra at 687F-H), whereas the provisions of the Final Constitution clearly contemplate the application of the limitation clause to the common law.

114 Woolman op cit 452. The author contends that this change in wording reinforces the proposition that the Bill of Rights, unlike its predecessor, clearly has direct horizontal application.

pay for the political settlement, which this country has managed to achieve. Furthermore, no one can say that the uncertainty arising under the Interim Constitution, was not expected.

As has been pointed out earlier, this chapter will also undertake an analysis of those post-1994 defamation cases in which concrete proposals for the reform of the common law of defamation, were made. It is to these cases that the discussion will now turn.

(3) Changes in the common law of defamation

It is submitted that an analysis of those cases, in which the Court actually undertook the task of setting out a new approach to the common law of defamation, reveals an overzealous attempt to afford the right to freedom of expression, more protection, than it has received under the common law, prior to the advent of the Interim Constitution. In Chapter 2, it was pointed out that certain areas of the common law of defamation had become the focus of our Courts, after the advent of the new constitutional dispensation. In particular, the two elements of unlawfulness and *animus injuriandi* were highlighted as aspects of the law of defamation, which could be reformed, so as to bring it into line with the dictates of our Bill of Rights. The discussion that follows, will consider the various reformulations of the common law advocated by our Courts, in the quest to find the right balance between protecting an individual's right to dignity and reputation, and the right to freedom of expression including the right to freedom of the press and other media.[115]

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115 Section 15 (1) of the Interim Constitution reads as follows: "Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research." Under the Final Constitution, this right has been amended to read in the following manner:
"Freedom of expression
16. (1) Everyone has the right to freedom of expression, which includes-
(a) freedom of the press and other media;
(b) *freedom to receive or impart information or ideas*;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research." (emphasis added)
It is submitted that the addition of a right to receive or impart information or ideas, may afford an additional defence

(I) Gardener v Whitaker[116]

Froneman J held that the common law of defamation was clearly in conflict with the dictates of the Constitution. He based his conclusion, on a consideration of the following factors:

1. First and foremost, it had to be kept in mind that the common law of defamation was formulated in a rather peculiar context: these rules were formulated without express reference having been made, to the effect that they would have on an open and democratic society, and in addition, they were developed under a system of government in which Parliament rather than the Constitution, reigned supreme.[117]
2. An examination of the common law showed that in the contest between the right to reputation or good name, and the right to freedom of expression, the former has generally held the upper hand.[118] This was evident from the fact that under the traditional defences of truth and public benefit, privilege and fair comment, the right to freedom of expression has only found indirect application.[119] This was also evident from the fact that even when these 'public interest' defences have been raised, the right to reputation has been afforded greater protection by means of the rules relating to onus.[120]

Given the abovementioned considerations, and given also that as far as competing

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to the defendant in a claim for defamation. As yet, there have been no reported defamation cases in which this right has been raised as a free-standing defence, but it will be interesting to see how, if at all, our Courts will accommodate this new right in the common law of defamation.

116 1994 (5) BCLR 19 (E).

117 Op cit 33G.

118 Op cit 33F.

119 Op cit 32G.

120 Op cit 36D-E. It will be remembered from Chapter 2, that the defendant bears a full onus of proof in respect of the defence that he raises, in order to rebutt the presumption of unlawfulness.

fundamental rights are concerned, the Constitution creates no hierarchy[121], the learned judge had no problem in concluding that as far as both substance and procedure were concerned, the common law of defamation was inconsistent with the provisions of the Interim Constitution.[122]

After drawing this conclusion, Froneman J went on to explain the revised procedure that should henceforth be adopted in a claim for defamation. It is at this point that the judgment becomes somewhat confusing. Froneman J makes it quite clear that the common law of defamation raises the problem of two, inherently equal, but competing rights.[123] He then states that when determining which of two rights should take precedence over the other, a court will be called upon to decide the matter by balancing the competing interests, in much the same way as unlawfulness is established in a delictual action, according to the standard of the *boni mores* of the community.[124] Section 33 (the limitation clause) would *not* be relevant in making this determination, since the matter involves competing rights, and section 33 would be conceptually inappropriate in determining whether one right should take precedence over the other.[125]

The learned judge then explains that since it is the plaintiff who seeks to rely on the precedence of one fundamental right over another, it seems eminently reasonable, in practical terms, to require the plaintiff to bear the onus of establishing the basis for such precedence.[126] In keeping with this approach, the plaintiff in a defamation suit would have to show that the right to his good name and reputation should, in that

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121 Op cit 36E-F.

122 Ibid.

123 Op cit 36B-I and 37D-E.

124 Op cit 37A-B.

125 Ibid.

126 Op cit 37C.

particular case, take precedence over the defendant's right to freedom of speech and expression. This would entail proof that:

1. the statement made by the defendant referred to the plaintiff;
2. the statement would have been understood as infringing his right to reputation; and
3. the statement in question was not worthy of being protected as an expression of free speech.[127]

Thus far, Froneman J's approach would appear to be sensible, if nothing else, but then the learned judge states that if the plaintiff has proven the allegations set out above, a defendant may still defeat the claim against him by relying on a defence that is *not based on a fundamental right* and *complies with the provisions of section 33*.[128] The most obvious question that arises is, what defences could possibly be available to a defendant in a defamation suit, that are *not* based on a fundamental right (such as the right to freedom of expression), in one way or another?

The learned judge himself, characterises the law of defamation as involving a conflict between the right to reputation and dignity, and the right to freedom of expression.[129] Implicit in this characterisation of the law of defamation, is a recognition that the defendant's objections to the plaintiff's suit i.e. his defence(s) will ultimately be based on free expression interests. He also states that the traditional defences in a defamation suit have involved an application of the right to freedom of expression, albeit in an indirect manner.[130] It is submitted that at present, in our law, the traditional defences referred to are the only defences which have been recognised by our courts, and thus there are no recognised defences to a defamation

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127 Op cit 37E.

128 Op cit 37H.

129 Supra.

130 Supra.

suit which are *not based on a fundamental right*. That being the case, it is clear from Froneman J's own statements, that the defendant in a defamation suit must inevitably raise a defence that is based on his right to freedom of expression i.e. a *fundamental right*. Without stating why, the learned judge appears to have assumed the existence of some defence(s) to a claim of defamation, which is/are not based on a fundamental right.

Another question that arises from Froneman J's adaptation of the law of defamation, is a consequence of the question raised in the previous paragraph. If the law of defamation involves a consideration of two fundamental rights (which, according to Froneman J, it does) then why is section 33 relevant to the inquiry? Again, it is submitted that the learned judge has assumed the existence of a defence that does not rely on a fundamental right, yet this is completely inconsistent with his characterisation of the law of defamation as entailing a conflict between two fundamental rights.

It is submitted that Froneman J's judgment in this case, may be subject to one further criticism. On Froneman J's approach, the plaintiff bears the full onus of *disproving* the traditional defences to a defamation claim. The rationale behind this rule, is that it is the plaintiff who wishes to claim the precedence of his right to reputation, over the defendant's right to freedom of expression.[131] With all due respect to the learned judge, it is submitted that it makes no sense to burden the plaintiff with disproving the defences, that the defendant would normally have raised. In the first place, this amounts to a blatant disregard for a long-accepted rule of our law viz. that *quoad* his defence, the defendant is regarded as being in the position of a plaintiff.[132] This principle of law is based on the widely recognised difficulty that lies in attempting

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131 Op cit 37E-F.

132 The basis for requiring the defendant to bear the full onus of proving his defence, is discussed more fully in Chapter 2.

to prove facts, which are peculiarly within the knowledge of the other party. Why should our common law of defamation, depart from rules that are based on common sense, practical considerations for no other reason, than the constitutional temperament that the law of defamation has now taken on?

Quite apart from this though, one must also admit that if the defendant wishes to raise considerations of free speech in defending a defamation action, then he must be seen as attempting to assert that his right to freedom of expression must take precedence, over the plaintiff's right to reputation and dignity. On Froneman J's approach, he should then be burdened with proving the basis of such precedence, and this means that there is really no basis for requiring the plaintiff to bear the onus of proving that the defendant's statement is not worthy of protection as an expression of free speech.[133] Rather, it will be the defendant's duty to assert that his statement *is* worthy of protection as an expression of free speech, and that his right to freedom of expression must therefore prevail, over the plaintiff's right to reputation and dignity.

On the basis of the questions raised above, it is submitted that Froneman J's proposed reforms to the common law of defamation, leave much to be desired. The learned judge appears to be guilty of having made an overzealous attempt at reshaping the accepted rules of defamation law, in accordance with the dictates of the Constitution. Unfortunately, this attempt must fail for it lacks a practical appreciation of the nature of a defamation suit.

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133 Op cit 37C.

(II) Holomisa v Argus Newspapers Ltd[134]

In attempting to reach a decision, regarding how the Interim Constitution affected the common law of defamation, Cameron J explained that in a system founded on common-law and statute, the Appellate Division's expositions of the law of defamation, would usually have been definitive. However, in keeping with their duties under the new Constitution all courts would now, as their first duty, have to take into account the provisions of the Constitution.[135] In fact, the learned judge went so far as to say that section 35 (3), which required a court to have "due regard to" the spirit, purport and objects of the Constitution, would necessitate a fundamental reconsideration of any common-law rule that trenched on a fundamental rights guarantee. This duty might, in turn, entail that even the high authority of pre-Constitution judicial determinations (such as those of the Appellate Division), be superseded.[136]

Having thus laid the basis for rejecting pre-1994 Appellate Division authority, Cameron J then went on to observe that when the Appellate Division had assessed the importance of free speech in relation to defamation law, South Africa's system of government was one of racial oligarchy.[137] Given this scenario, the learned judge remarked that any consideration, which may have been given to free speech interests in the course of expounding the common law of defamation, had been given in what one could only call, a constitutional void. Ultimately, the learned judge believed that it was fair to say, that the interest in reputation had generally been given the upper hand over freedom of expression.[138] On this basis, Cameron J concluded that the

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134 1996 (2) SA 588.

135 Op cit 603D-E.

136 Op cit 603G-I.

137 Op cit 604I.

138 Op cit 604I-605B.

common law of defamation needed re-evaluation.

Relying closely on the judgment of the Australian High Court in *Theophanous v Herald and Weekly Times Ltd*[139], the learned judge started his constitutional analysis of the pre-1994 common law of defamation, by stating that the question involved an evaluation of "what is necessary for the working of the Constitution and its principles".[140] With this guideline in mind, the learned judge re-examined the common law rules of defamation, as stated in the *Neethling* case. He concluded that the propositions which formed the kernel of that judgment viz. that the defendant bore a full onus of proving the truth of a defamatory statement, and that there was no general public policy defence for publication of defamatory statements, were incompatible with the scheme of government and the structure of values and principles that the new Constitution created. Further, it was held that the rules enunciated in *Neethling* constituted a limitation on the right to freedom of expression and speech, particularly insofar as that right related to free and fair political activity, which was not warrantable under the Constitution's limitation section.[141] Cameron J reached these conclusions on the basis of the following arguments:

1. The overall structure of the Constitution laid an emphasis on the effective and inclusive functioning of democracy, and highlighted this in the special protection it extended to aspects of free speech and expression which safeguard political activity.[142]
2. The Constitution recognised the value and importance of personal autonomy in political decisions and choices and to that end, media freedom of speech and expression was an indispensable adjunct.[143]

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139 (1994) 124 ALR 1 (HC).

140 Op cit 608C (taken from the judgment of the plurality in *Theophanous*).

141 Op cit 608C-E.

142 Op cit 609E-I.

143 Op cit 610C.

Having found the common law of defamation to be inconsistent with the requirements of the new Constitution, the learned judge then explained that it would be at odds with the Constitution to impose the onus of proving constitutional protection on the defendant publisher in the field of "free and fair political activity". Rather, Cameron J believed that the emphasis which the Constitution placed on free expression in the context of free and fair political activity necessitated that some greater degree of protection be given to those who made false defamatory statements in that field.[144] As such, the onus would now be on the plaintiff to show that the defendant had forfeited his entitlement to constitutional protection. Generally, a defendant publisher would have forfeited this protection if he had acted unreasonably in publishing the defamatory statement eg he did not act with due care, or make due inquiries into the veracity of the statement(s).[145] In addition, it was held that the test now, was whether or not the constitutional guarantee of the right to freedom of speech and expression, justified the defendant's publication and required that it be found lawful.[146] It is submitted that this approach to the question of the unlawfulness of a publication, has tremendous merit. By using a test for unlawfulness which is flexible, and case-sensitive, a court will be more easily able to give the right to freedom of expression, the protection it requires.

Cameron J's judgment relied heavily on the jurisprudence of the Australian High Court, as set out in *Theophanous v Herald and Weekly Times Ltd*[147], and on the opinion set out in *Zillie v Johnson and Another*[148]. The learned judge delivered a judgment which can only be described as having been well-reasoned. However, it is submitted that the one and only flaw in this judgment is the perhaps too-hasty, dismissal of the common

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144 Op cit 612G-H.

145 Op cit 617 C-E.

146 Op cit 613B-C.

147 Supra.

148 1984 (2) SA 186 (W).

law rule in respect of the onus that should be borne by the defendant. As has already been explained at length above, there is no sound reason for so easily setting aside a rule which has not only been in existence for many years, but which also has a sound, common-sense basis. For this reason it is submitted that the judgment delivered by Cameron J is not sound in its modification of this aspect, of the common law of defamation.[149]

(III) McNally v M and G Media (Pty) Limited and Others[150]

In this case, Du Plessis J was required to consider the defendants' claim that in several respects, the plaintiff's summons disclosed no cause of action. In dealing with the exceptions under consideration, the learned judge first observed that if the exception in question intended to introduce a different measure of culpability for media defendants, than had been previously accepted by the common law, then he would be bound by the judgment handed down in *Pakendorf en Andere v De Flamingh*[151], unless he found that it was not a precedent in point.[152] If, as a second possibility, the exception sought to place the onus of proving unlawfulness on the plaintiff, contrary to the judgment in *Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others*[153], then similarly, he would be bound by that judgment, unless it too was not a precedent in point.[154]

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149 It also tends to be entirely unhelpful to the litigants who are involved in a defamation suit which has nothing to do with free and fair political activity. The learned judge prides himself on the idea that his exposition of the 'new' common law of defamation, avoids the problem experienced by the United States in respect of determining whether or not a 'public official' or 'public figure' is involved (op cit 619G). Unfortunately, the learned judge fails to see that his judgment simply presents us with a similarly difficult problem viz the problem of figuring out what amounts to free speech and expression in the context of free and fair political activity.

150 1997 (6) BCLR 818 (W).

151 Supra.

152 Op cit 823F-G.

153 Supra.

154 Op cit 823H-I.

At the outset the learned judge stated that the real question to be decided in respect of the exceptions raised, was whether or not section 35 (3) left the Court at liberty not to follow the Appellate Division authorities referred to above. In attempting to arrive at an interpretation of section 35 (3), Du Plessis J made reference to the judgment of Davis AJ in *Rivett-Carnac v Wiggins*[155] where the learned acting judge had to consider this section, and its consequences for the manner in which the courts would interpret the common law in the future. Davis AJ expressed the firm opinion that the Constitution could never have envisaged such a fundamental rejection of precedents, as to empower an individual judge to overturn decades of precedent developed by the Appellate Division. While the Constitution mandated each court to examine the common law rules afresh, and if necessary, to ensure that the content of the common law was in accordance with the principles thereof, this could only be done cautiously, and after a careful examination of the existing principles which underpin the common law. These principles would then have to be compared with those underlying the Constitution, before one could decide whether or not the common law was in need of modification.[156]

To these cautionary remarks, Du Plessis J added that authorities which would ordinarily be binding, could only be deviated from, if it could truly be said that they no longer constituted precedent. It was therefore vital to examine carefully, the *ratio* of the judgments in question before making a decision as to whether or not they should be followed.[157] As such, the learned judge would only be able to decide whether or not the rules set out in *Pakendorf* and *Neethling* should be rejected in favour of the new tests advocated by the defendants, once he had properly examined the ratio, of each of these Appellate Division judgments.

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155 1997 (4) BCLR 562 (C).

156 Op cit 569D-F.

157 Op cit 824G.

The learned judge first dealt with the possibility that the exception raised by the defendant, had been raised in an attempt to introduce a measure of culpability different from that upheld in the *Pakendorf* case i.e. different from the strict liability principle. The learned judge began his analysis of the issue by examining the *ratio* of the *Pakendorf* case. It was admitted that in *Pakendorf*, the Court did not pertinently consider the opposing interests of the public in a free press, and the rights of an individual to his reputation.[158] He further admitted that in view of the special recognition, and importance, of free and fair political activity, it did seem as if the strict liability principle laid down in *Pakendorf* needed reconsideration.[159]

The learned judge went on to state that in spite of the abovementioned issues, the judgment in *Pakendorf* could only be rejected if he were to examine the *ratio* of each authority relied on in *Pakendorf*, and as a result found that not one of those authorities was binding on it.[160] It is at this stage that the learned judge's reasoning begins to falter because, of its circuity. Very simply, it may be gathered from Du Plessis J's prior statements, that he would only reject the principle of strict liability expounded in *Pakendorf* if he were to find that the *Pakendorf* case, and the authorities relied upon in that case, were not precedents in point. This having been said, the learned judge then simply refuses to analyse the said precedents, for no other reason than the fact that to do so *may* result in a rejection of the strict liability principle![161] It is submitted that the learned judge has entangled himself in his own reasoning: the purpose of examining the *ratio* of the *Pakendorf* judgment, as well as the authorities relied upon therein, would be to determine the possibility of rejecting the strict liability rule, which of course, would be contrary to the existing common law. The learned judge then bases his refusal to undertake this analysis, on the fact that the

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158 Op cit 824I.

159 Op cit 825B.

160 Ibid.

161 Op cit 825C-D.

consequences (viz. a rejection of strict liability) may actually come to fruition![162]

In respect of the further possibility, that the exception raised purported to place the onus of proving unlawfulness on the plaintiff, Du Plessis J said nothing more than the following:

> "The incidence of the *onus* of proof was decided in the *Neethling* case (*supra*) after a full review of our authorities on the subject...The learned judge of appeal pertinently considered in the course of his judgment, the importance of a free press, also in the context of political activity. It is my respectful view that nothing in the Constitution entitles this Court to deviate from that judgment."[163]

The learned judge therefore concluded that the onus of rebutting the presumption of unlawfulness would remain on the defendant.[164] It is submitted, that what one might call the learned judge's 'analysis' of the *Neethling* case, is superficial and lacking in substance. Although in principle, it is submitted that the position adopted by the Appellate Division in *Neethling* is correct, it must also be observed that the learned judge has done a disservice to the law of defamation, by failing to undertake a complete and proper analysis of the Appellate Division authorities which, for the moment, still stand as a statement of the law of defamation in South Africa. It is submitted that Du Plessis J's trite refusal to subject the *Pakendorf* and *Neethling* cases to any taxing form of scrutiny, betrays an unwillingness on his part to depart from our pre-Constitution law of defamation. This in itself is not troublesome however, the changes brought about by the Constitution surely demand a more intense

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162 Ibid. The learned judge states *as an aside*, that any reconsideration, if it is to be done, should be undertaken under the auspices of the element of unlawfulness, rather than *animus injuriandi*. It is not actually clear why the learned judge failed to examine the *ratio* of the *Pakendorf* judgment, or of the authorities relied upon therein. It is submitted that it was completely pointless to indicate the nature of the enquiry required in order to properly reassess the law of defamation, and then simply fail to undertake the task because of a desire to remain bound by precedent. If there was no question of the learned judge overturning the precedents by which he was bound, he should simply have said so at the outset, rather than failing to complete the task in question, for such nebulous reasons.

163 Op cit 825F.

164 The learned judge also upheld the Appellate Division's finding that in our law there is no general, public policy-based defence to a claim for defamation.

investigation of the common law, before simply accepting that the pre-existing common law should remain untouched.

(IV) Conclusion

The only real conclusion that can be drawn from those judgments, which have attempted to reformulate the common law of defamation, is that our courts appear to be committed to endowing the right to freedom of expression with far more protection than the common law of defamation has traditionally accorded to this right. The problem is that, the manner in which our courts have gone about doing this thus far, appears to be highly unsatisfactory. In both the *Gardener* and *Holomisa* cases, the court attempted to grant the right to freedom of expression more protection by placing the onus of proving that the defamatory statement in question was unlawful, on the plaintiff. The consensus furthermore, seems to be that the defendant's right to freedom of expression requires the onus to be placed on the plaintiff.

While the attempts made by both courts, to accord the right to freedom of expression greater protection, are laudable, it is submitted that such attempts have 'thrown the baby out with the bath water', so to speak. The common law rule requiring the defendant to rebut the presumption of unlawfulness has its roots in common sense considerations, which the learned judges in both cases, would have done well to pay attention to. The defendant is in a far better position to rebut the presumption of unlawfulness, than the plaintiff is to prove that the defendant's statements were made unlawfully. This is due to the fact that the information required to disprove the usual defences available to the defendant (truth in the public benefit, fair comment and privilege) is, unavoidably, information that is peculiarly within the knowledge of the defendant. On this basis it is submitted that, having due regard to the right to freedom of expression did not necessarily entail, or necessitate

an abandonment of principles which have been widely accepted for the practical purpose that they serve.

As opposed to the overzealous attempt to grant greater security to free speech interests in the law of defamation, there is the judgment in the *McNally* case. This decision accepts (albeit in a somewhat reluctant manner) that section 35 (3) of the Interim Constitution may require revisions to be made to existing defamation law, but then does as little as possible to investigate this potential avenue of change. In short, there is nothing in the reported judgments dealing with the law of defamation after 1994, thus far, which represents an objective and comprehensive attempt at restructuring the balance between freedom of expression and individual reputation interests, which the common law of defamation seeks to achieve.

Having thus surveyed the South African law of defamation after 1994, and having found little therein which might act as a suitable guide in the reconstruction of the law of defamation, it is submitted that a perusal of the law of defamation in other countries, might provide better guidance in the search for answers to the question of how the law of defamation can be brought into line, with the dictates of the new Constitution. The chapter that follows, will attempt to outline the development in defamation law that has taken place in the United States, Australia and Canada.

CHAPTER 4

OVERVIEW OF COMPARATIVE DEFAMATION LAW

(a) Introduction

Chapter 3 attempted to engage in a comprehensive analysis of those defamation suits which were decided after the advent, and in the light of the Interim Constitution. It became clear, by the end of that chapter, that these cases had not resulted in any noteworthy changes, in the law of defamation, or at least none that were based on sufficiently sound reasoning, to be adopted on a long-term basis. It is for this reason that the discussion must now turn to an overview, of the law of defamation in countries other than South Africa.[1] It is hoped that an examination of the approaches adopted by courts in other jurisdictions, may shed some light on the question of how best one may strike a healthy balance between the right to freedom of expression, and the right to reputation and dignity. The discussion will therefore turn now, to a discussion of the law of defamation in the United States, Canada and Australia.

(b) The United States

In the United States, the law of defamation, and in particular, the relative importance of the right to freedom of expression within the law of defamation, has

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1 It should be noted that under the Interim Constitution, section 35 (1) issues the following directive to our courts:

> "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open *and democratic society based on freedom and equality....*, *and may have regard to comparable foreign case* law."

Section 39 (1) of the Final Constitution simply says that:

> "When interpreting the Bill of Rights, a court, tribunal or forum-
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> ....
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> © may consider foreign law."

The difference between the two is that section 35 (1) of the Interim Constitution, allows a court to have regard to foreign case law, if it is *comparable* foreign case law. Section 39 (1) of the Final Constitution, on the other hand says no more than that a court may consider foreign law, thus leaving it entirely in the Court's discretion to decide whether or not foreign law should be considered at all, regardless of whether or not such foreign law is what one might call *comparable*.

been authoritatively expounded by the Supreme Court, in the case of *New York Times Co. v Sullivan.*[2] Defamation cases heard after the decision handed down by the Supreme Court in *New York Times*, have all relied to some extent on the jurisprudential foundations laid down in this landmark case. In addition, *New York Times Co v Sullivan* has provided food for thought in other jurisdictions, as well as our own, insofar as the law of defamation is concerned.[3] As such, this case will be discussed with a view to determining whether or not this decision of the United States Supreme Court, will be able to provide guidance to South African courts, in their search for the most appropriate means of reforming and revitalising the law of defamation.

In *New York Times Co v Sullivan*, the Supreme Court ruled that the common law of defamation in that country, violated the right to free speech, which was guaranteed under the First Amendment. In reaching this conclusion, the Court considered a number of various factors, the first of which was the meaning and import, of the right to free speech, as guaranteed by the First Amendment. The Court expressed the firm opinion, that the protection afforded by the First Amendment, existed against the background of a "...profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials."[4] In other words, the primary purpose of the right to freedom of expression was to facilitate public criticism of government officials. The Court expressed a deep concern, for the effect that onerous libel (defamation) laws might have, on would-be critics of the government. In fact Brennan J, who authored the majority judgment in *New York Times*, observed that a rule compelling a critic of official conduct, to prove

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2 376 U.S. 254 (1964).

3 The *New York Times* case has been discussed in each of the most important defamation cases in Australia, Canada and South Africa as well. See for instance *Theophanous v Herald and Weekly Times* (1994)124 ALR 1, *Hill v Church of Scientology* [1995] 2 S.C.R., and *Holomisa v Argus Newspapers Ltd* supra.

4 Op cit 270.

the truth of the criticism which he has voiced, would not necessarily act as a deterrent, *only* to those who would make false defamatory statements about public officials. Rather, because of the difficulty inherent in proving the truth of an allegedly defamatory statement, the *bona fide* critic might also be deterred from expressing his criticisms, even if they were true, because of doubt as to whether or not he could prove his statements and/or fear of the expense of having to do so.[5] This was an eventuality which the Court was clearly *not* prepared to countenance.

As a result, the Court's decision-making process, and its formulation of the test to be adopted in future defamation suits brought by public officials, was guided significantly by the value which the Court had attached to the public's right to criticise public officials.[6] In order to give recognition to the same, the Court fashioned a new rule in respect of all defamation suits that related specifically to *public officials*.[7] In terms of this new rule, a plaintiff-public official was prohibited from recovering damages for a defamatory falsehood relating to his official conduct, unless he could prove that the statement had been made with *actual malice*.[8] The Court defined *actual malice* as *knowledge that the statement published was false*, or publication of

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5 Op cit 279.

6 The Court's adamant, and perhaps overly-protective, stance in relation to the individual's right to criticise public officials, does have a perfectly understandable historical basis. The *Sedition Act of 1798* had prohibited "publishing any false, scandalous and malicious writing or writings against the Government of the United States, or either House of Congress...or the President...with intent to defame...or to bring them....into contempt or disrepute...". President Adams' Federalist administration employed the *Sedition Act* against members of Jefferson's Democratic-Republican Party, in order to stem their criticism of his administration. The provisions of the *Sedition Act*, together with the manner in which they were abused by President Adams' government, can only be described as the epitome of an unconstitutional abridgement of free speech. See Nowak, Rotunda and Young *Constitutional Law* 1995 at 990. The Court in *New York Times* obviously felt the same way, for as Justice Brennan later wrote, it was the *Sedition Act* which first crystallised a national awareness of the central meaning of the First Amendment. This historical abuse of the right to reputation in order to prevent criticism of the government, was therefore clearly the motivating force behind much of the Court's judgment. See *New York Times Co v Sullivan* 376 U.S. 254 (1964) at 273.

7 It must be emphasised that the decision in *New York Times* was tailored to deal with defamation suits brought by public officials, regarding criticism of their conduct as public officials. As such, the judgment cannot be seen as answering all the questions that must and will arise, in the course of reformulating the law of defamation so as to accord free speech interests greater protection. However, it will be seen below that this has been one of the greatest weaknesses of the Supreme Court's judgment in this case.

8 Op cit 279-280.

the statement with *reckless disregard as to whether it was false or not.*[9] Given the fact that proving *knowledge of falsity* or *reckless disregard as to whether the statement was false or not,* would require proof of information, which is peculiarly within the knowledge of another party (viz the defendant-publisher), it is clear that the new test would seriously handicap any plaintiff-public official, who wished to shield his reputation by means of a defamation suit. In this way, the Court effectively aborted the spectre of public officials muzzling their critics, with threats of defamation actions.

While the test adopted by the United States Supreme Court in the *New York Times* case, may have sufficed for the purpose of reaching a decision in that particular case, it is submitted that ensuing defamation cases in the United States have had to grapple with a multitude of uncertainties that are intrinsic to the test adopted by the Court. One such uncertainty arises from the Court's failure to define what it means by the term 'reckless disregard'. Eventually, the case of *St Amant v Thompson*, which was decided four years after *New York Times*, provided some clarification of this issue. It was held that proof of mere negligence would *not* serve to meet the requirement of proving that the defendant had published the statement in question, with 'reckless disregard' as to whether it was false or not.[10] Instead, what was required was proof that the defendant had entertained serious doubts, as to the truth of the statement, and had published it despite these doubts.[11]

Further uncertainties have arisen from the absence of any indication, of precisely which people should be classified as 'public officials'. The following is a brief list of some of the extensions, which have been grafted on to the 'public official' concept,

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9 Op cit 280. It is, perhaps, worth noting that the definition of the term 'malice' as explained by the Court, bears no resemblance to the common law definition of 'malice'. In terms of the common law, 'malice' refers to hatefulness or *ill* will. Clearly, the definition adopted by the United States Supreme Court is narrower in scope, than the meaning accorded to the term at common law. This, in turn, means that the plaintiff-public official has a far more difficult cross to bear, in the proof of his claim under the *New York Times* rule, than he would have had to bear under the common law. See criticisms of the *New York Times* rules below.

10 390 U.S. 727 (1968).

11 Op cit 730-733.

since the judgment handed down in *New York Times*:

1. The Court extended the definition of 'public official' to include any person who was a candidate for public office, and provided the protection offered by *New York Times* to any statements concerning a candidate's fitness for office.[12]

2. In *Rosenblatt v Baer* the Court held that in order to encourage criticism of government, the 'public official' designation would have to apply at least "...to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[13]

3. The *New York Times* standard of 'actual malice', has been deemed to apply to people who *do not* fit into the 'public official' category, but who are nevertheless 'public figures'. In the cases of *Curtis Publishing Co v Butts* and *Associated Press v Walker*, Chief Justice Warren noted that the distinction between government, and the private sector was increasingly blurred.[14] For this reason, he created a new category which would operate within the *New York Times* rule. This new category, was that of the 'public figure', and it would include those who were "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[15] The

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12 *Monitor Patriot Co v Roy* 401 U.S. 265 (1971).

13 383 U.S. 75 at 86. In this particular case, the extended definition of 'public official' was held to include the discharged supervisor of a county-owned ski resort. It is submitted that the extension accepted in *Rosenblatt* is overly-broad in its reach, since it embraces not only those people who are *actually* responsible for the conduct of governmental affairs, but those individuals who *appear to the public* to be responsible for the conduct of governmental affairs. What this means is that literally *anyone* whom the public identifies with the conduct of governmental affairs may be subjected to the stringent requirements of the *New York Times* test, even if such individual is *not* responsible *de facto*, for the conduct of the affairs in question. If it is correct to say that the Court in *New York Times* was concerned with preventing public officials from hiding behind the shield of onerous libel laws, then it is difficult to understand what can possibly be gained by making allowances for the publication of false, defamatory material about a person who is in fact not responsible for the governmental affairs which are being impugned. It is submitted that this is the effect which the *Rosenblatt* case has, on the law of defamation in the United States.

14 388 U.S. 130 (1967) and 391 U.S. 966 (1968) respectively.

15 *Curtis Publishing Co v Butts* 388 U.S. 130 (1967) at 164.

learned Chief Justice's reasoning was based on the fact that such individuals are not subject to the checks and balances, imposed by the political process, and the only means by which society could attempt to influence the conduct of such individuals, would be through public opinion.[16] Furthermore, the Chief Justice observed that such people usually attained the status of 'public figure', by assuming roles of especial prominence in the affairs of society. In other words, by thrusting themselves to the forefront of public controversies, these people became public figures, and this justified the application of the *New York Times* test to this particular category of persons.[17]

4. The case of *Time, Inc. v Hill* confirmed that private citizens who had been thrust into the limelight by a particular event, which was not of their own doing, would likewise be subject to the exacting test laid down in *New York Times*.[18] In the case of *Rosenbloom v Metromedia* it was held that the fact that the private individual had been thrust into the limelight *involuntarily*, would not affect this position.[19]

5. In *Gertz v Robert Welch, Inc.* it was decided that a person who was neither a 'public official' nor a 'public figure' could still be treated as a 'public figure' for the purposes of a specific public controversy. Thus, an individual's participation in the particular controversy which had given rise to the defamation, might result in the application of the *New York Times* standard of actual malice, in a subsequent claim for defamation.[20]

The list set out above points plainly to an *ad hoc*, and confusing augmentation of the

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16 Ibid.

17 *Gertz v Robert Welch Inc.* 418 U.S. 323 (1974) at 345.

18 385 U.S. 374 (1967).

19 403 U.S. 29 (1971).

20 418 U.S. 323 (1974).

class of people to whom the *New York Times* test applies. It is on this precisely this score, that the judgment in *New York Times* has been roundly criticised. The proliferation of numerous addendums to the original 'public official' concept, has contributed little more than vast uncertainty to the law of defamation in the United States. A further argument in this regard, is that the *New York Times v Sullivan* decision places unrealistic pressure on the fact-finding process, since courts are now required to make subjective determinations as to who might be a public official/figure and what might constitute a matter of public concern.[21]

A particularly cogent criticism that may be levelled at the Supreme Court's judgment, is that its decision was unduly influenced by the social and political context, in which the case came before it.[22] The impugned publication was an editorial-advertisement, placed in the Appellant's newspaper, entitled "Heed Their Rising Voices". The editorial-advertisement criticised the widespread segregation which continued to dominate the southern states, during the late 1950's and 1960's. Prominent and well-respected individuals lent their name to the advertisement, which communicated information, recited grievances, protested ongoing abuses and sought financial support. In describing the controversy which lay at heart of this defamation action, Black J said the following:

> "One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment."[23]

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21 See for instance the judgment of Cory J in *Hill v Church of Scientology* [1995] 2 S.C.R. and George C Christie *"Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches"* (1976) 75 Mich L Rev 43 at 63-64.

22 The judgment of Cory J in *Hill v Church of Scientology* supra is, again, particularly enlightening on this particular criticism of the *New York Times* judgment.

23 *New York Times Co v Sullivan* supra at 294.

Sullivan, although not mentioned by name in the editorial-advertisement, was an elected commissioner of Montgomery, Alabama. His claim was based on a doctrine whereby, criticism of the Montgomery Police Department was transmuted to criticism of him, as the official in charge. The claim first went to trial in 1960, in a segregated court-room in Montgomery, before an all-White jury and a White judge. Sullivan was awarded $500 000 US in damages. From this it is apparent, that when the United States Supreme Court was called upon to adjudicate the matter, it was being asked to do much more, than just decide whether or not a plaintiff should be awarded damages for defamation.

The truth of the matter is that, the Court was being called upon to make a statement about freedom of the press, and even more important than this, it was being asked to make a statement about desegregation in the southern states. Given this context, the Court could not have avoided the concern that the award of such a gross amount in damages, would threaten the existence of "an American press virile enough to publish unpopular views on public affairs and bold enough to criticise the conduct of public officials".[24] This apprehension would have been intensified by the fact that, at the time, at least eleven other libel suits were pending against the newspaper, because of the same advertisement.[25]

In short, the Supreme Court could not possibly have decided the *Sullivan* case, without being intensely aware of the socio-political consequences its judgment would have across the country, and specifically in the south. One can only empathise with the Court because of the very intricate dilemma it was faced with. However, it must at the same time be stated, that the Court's judgment provides a lucid illustration of

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24 Ibid.

25 It is also worth noting that in terms of American jurisprudence of the time, statements of public officials which fell within the outer perimeters of their duties were privileged unless it could be shown that the statement had been made with 'actual malice'. The rationale underlying this rule was that the threat of defamation suits would "dampen the ardour of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties". See *Barr v Matteo* 360 U.S. 564 (1959). The Supreme Court believed that analogous considerations supported the granting of similar concessions, to critics of the government.

the danger that arises from constructing general legal principles, that are meant to apply to a wide spectrum of factual scenarios, from a case-sensitive foundation.[26]

The most important criticism by far, is that *New York Times* has shifted the focus of defamation law, away from its original purpose with a number of deleterious consequences:

1. Instead of deciding upon the truth of the impugned statement, *New York Times* requires a court to focus on whether the defendant acted with 'reckless disregard'. This denies the plaintiff an opportunity to establish the falsity of the statement, and thus to prove the consequential harm to his/her reputation.[27]
2. The focus on the defendant's state of mind necessitates detailed inquiry into matters of media procedure. Because the plaintiff must show 'knowledge of falsity' or 'reckless disregard', he must have access to information about defendant's editorial processes, measures taken for purposes of verification, and so on. The discovery process therefore becomes protracted and expensive. Given that the Court in *New York Times* was anxious about the 'silencing effect' that large damages awards might have on free speech, it must be observed that the lengthy (and therefore, expensive) discovery process, and trial *caused* by the *New York Times* test does nothing to alleviate this situation. If anything, fear of the expense of having to defend a claim for defamation, may have precisely the silencing effect that the Supreme Court was originally concerned with.[28]
3. The costs involved in this prolonged litigation, may likewise discourage

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26 See in this regard R A Epstein "*Was New York Times v Sullivan Wrong?*" (1986) 53 U Chi L Rev 782 at 787; *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* 472 U.S. 749 (1985) at 767.

27 See R P Bezanson "*Libel Law and the Realities of Litigation: Setting the Record Straight*" (1985) 71 Iowa L Rev 226 at 227.

28 D A Barrett "*Declaratory Judgments for Libel: A Better Alternative*" (1986) 74 Cal L Rev 847 at 855.

potential plaintiffs from defending their reputation. In other words, the plaintiff with limited financial resources, may well be left without any legal recourse in respect of defamatory statements made about him/her.[29]

4. By overlooking the falsity of a statement, because of the overshadowing value placed on the freedom to criticise, *New York Times* has effectively deprecated the value of truth, in society at large and particularly in public discourse.[30]

The case of *New York Times Co v Sullivan* has not, it is submitted, stood the test of time. The case has resulted in numerous undesirable consequences, as outlined above, placed far too heavy a reliance on the socio-political context in which the case was heard, and has contributed to increasing confusion about exactly who should be subject to the standard of 'actual malice'. Finally, and perhaps most importantly, the case has tilted the scales massively in favour of free speech, leaving the right to dignity and reputation with scant protection. Even some of those justices, who had originally participated in the Supreme Court's decision, have expressed the opinion that the case requires reconsideration.[31] As such, it is almost impossible to see how

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29 P N Leval *"The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place"* (1988) 101 Harv L Rev 1287 at 1288; A Lewis *"New York Times v Sullivan Reconsidered: Time to Return to the Central Meaning of the First Amendment"* (1983) 83 Colum L Rev 603; M London *"The 'Muzzled Media': Constitutional Crisis or Product Liability Scam?"* in *At What Price? Libel Law and Freedom of the Press* 1993.

30 L C Bollinger *"The End of New York Times v Sullivan: Reflections on Masson v New Yorker Magazine"* [1991] Sup Ct Rev 1 at 6; J A Barron *"Access to the Press - A New First Amendment Right"* (1966-1967) 80 Harv L Rev 1641 at 1657-1658.

31 In *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* supra White J said the following in his minority opinion (Burger CJ concurring in his opinion):
"In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of information deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*: "(T)here is no constitutional value in false statements of fact. Neither the intention lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."...Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favour, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters...Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without

this landmark American case, could provide any jurisprudential guidance to South African courts in their attempt to find the right balance between protecting freedom of speech interests, and protecting interests in dignity and reputation. In at least three of the defamation cases heard after 1994 in South Africa, *New York Times* has come under consideration as a potential avenue of development, for our common law of defamation.[32] In each of these cases, this option has been rejected as being inappropriate to our law.[33] In view of the fact that such a vast proportion of the law of defamation in the United States, has been based on the ruling in *New York Times*, it is obvious that our courts can gain little, if anything at all, from an examination of such jurisprudence.

(c) Australia

In the case of *Theophanous v The Herald and Weekly Times Ltd and Another*, the High Court of Australia had occasion to consider the constitutionality of the common law of defamation, existing in Australia.[34] At the outset, attention must be drawn to the fact that Australia does not give express protection to specific rights, as is the case with our own Constitution or the Canadian Charter of Rights and Freedoms, for instance. In preceding case law, the High Court had distilled from the provisions and

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foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests...

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting 'our basic concept of the essential dignity and wort h of every human being - a concept at the root of any decent system of ordered liberty.'"

It is worth noting that in *Coughlin v Westinghouse Broadcasting & Cable, Inc.* 476 U.S. 1187 (1986), a majority of the United States Supreme Court refused to grant *certiorari*. Burger CJ and Rehnquist J dissented from the majority opinion because they believed that the Court should re-examine *New York Times Co v Sullivan*, and "give plenary attention to this important issue" (at 1187).

32 The *New York Times* rule has been considered in *Gardener v Whitaker* 1994 (5) BCLR 19 (E), *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 and *McNally v M and G Media (Pty) Ltd and Others* 1997 (6) BCLR 818 (W).

33 See for instance, Cameron J's treatment of this case in *Holomisa v Argus Newspapers Ltd* supra at 613-615.

34 (1994) 124 ALR 1.

structure of the Constitution, and more specifically from the concept of representative government enshrined in the Constitution, an *implied freedom of communication*.[35] This implied freedom was *not* by any means, an unlimited right to freedom of expression. Rather, the implied freedom operated to ensure the efficacious working of representative democracy and government, and it would be protected to the extent that it was necessary, to facilitate that system of representative democracy.[36] As such, the implied freedom of communication had to be seen as a restriction on legislative and executive power, rather than as a free-standing right.

In discussing the scope of the implied freedom, the Court in *Theophanous* made it clear that where the Constitution, either expressly or by implication, was at variance with a doctrine of the common law, the latter would have to yield to the former.[37] In the context of the law of defamation, the Court observed that the balance which Australian courts had attempted to strike, between the public interest in freedom of speech, and the competing public interest in protecting an individual's reputation, had been achieved *without* taking into account the implied freedom of communication.[38] The common law of defamation, would therefore have to be re-examined in light of the freedom of communication, which was implied by the Australian Constitution.

The Court then went on to a brief examination of those defences which the common law of defamation, has traditionally offered to the defendant in a claim for

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35 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

36 *Theophanous v The Herald and Weekly Times* supra at para 16. The majority judgment indicated that there was a significant difference between the freedom of communication which was implied by the Australian Constitution, and an unlimited right to freedom of expression. While admitting that this difference did not lend itself to precise definition, the majority was of the opinion, that the difference was capable of being ascertained when the occasion to do so arose.

37 Op cit para20.

38 It must be noted that similar arguments have been raised against our common law of defamation viz that the balance struck by our courts was achieved without a pertinent examination of the interest in free speech.

defamation. In respect of the defence of fair comment, the Court observed that this defence was only available for expressions of opinion, and then, only if such opinion was based on facts which were notorious or truly stated. The defence of qualified privilege, on the other hand, was dependant on an absence of malice, as well as a relationship of reciprocity between the defendant and the audience, whereby the defendant had an interest or duty to convey the information, and the audience had a corresponding interest or duty in receiving the said information.[39] Clearly, the requirement of reciprocity, would mean that the defence of qualified privilege could rarely be available to a defendant, where the disputed information had been disseminated to the public at large.[40] On the basis of these considerations, the Court held that the common law defences protecting the right to reputation, did so at the expense of significantly inhibiting free communication.[41] The Court reiterated the point that the law of defamation, whether common law or statute, had to conform to the implied freedom of communication, even if such conformity meant that plaintiffs would experience greater difficulty in protecting their reputations.[42]

The Court therefore adopted a test, in terms of which, a defendant who had published false and defamatory matter about a plaintiff, would be liable in damages, unless he could show that:

1. he had been unaware of the falsity; or
2. that he did not publish the matter recklessly i.e. not caring whether it was true or false;
3. and that the publication was reasonable i.e. he could show that he had

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39 Op cit para 33.

40 Ibid.

41 It is submitted that the Court should have treated the common law of defamation with a more detailed analysis. However, it is submitted that the Court was correct in its opinion, that the obstacles placed by the common law in the path of those who wished to publish information to the public at large, did significantly inhibit freedom of communication. This is so particularly because information that relates to the system of representative democracy, and its attendant political processes, must be disseminated to the world at large if it is to have any effect at all.

42 Op cit para 43. The Court did go on to explain, that the protection of the freedom of communication did not necessitate such a subordination of the protection of the individual, as appeared to have occurred in the United States.

> taken steps to check the accuracy of the impugned material, or publication was justified even without taking any such steps.[43]

The Court held that the requirements set out above, would redress the imbalance that had previously existed in the law of defamation, and protect the defendant/publisher, even if the material published was not accurate.

An important aspect of the Court's decision, relates to its ruling in respect of the onus of proof in a defamation action. The Court was opposed to the idea that the plaintiff should bear the onus, of proving that the publication in question was not protected:

> "In our view, it is for the defendant to establish that the publication falls within the constitutional protection. That approach accords with the approach that the courts have taken in the past to proof of matters of justification and excuse and *we are not persuaded that the constitutional character of the justification should make any difference to the onus of proof*. Whether the defendant has acted reasonably will involve consideration of any inquiry made by the defendant before publishing; *that is a matter peculiarly within the knowledge of the defendant*." (emphasis supplied)[44]

It is submitted that the test of 'reasonableness' adopted in the *Theophanous* case, offers the potential for fruitful developments in the common law of defamation. The concept of 'reasonableness' is one with which courts are quite familiar, and it imports a degree of flexibility into the law of defamation, which the traditional defences (fair comment and qualified privilege) simply cannot offer. The *Theophanous* case therefore allows the Courts to decide when and whether, the implied freedom of communication will require that a particular defamatory statement, should be deemed lawful. This approach to the law of defamation, is not unlike the approach

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43 Op cit para 4..

44 Op cit para 47.

adopted in South Africa in the case of *Zillie v Johnson and Another.*[45] It was submitted, earlier on in this work, that the approach in the latter case was to be favoured, since it allows for the type of flexibility, that recognition of the right to freedom of expression (which is a constantly evolving right) demands. On this basis, it is therefore submitted that the *Theophanous* case can be of considerable guidance to South African courts, in their attempt to reformulate the common law of defamation. In fact, Cameron J in the *Holomisa* case, looked upon the Court's judgment with favour, and incorporated the test of 'reasonableness' into the decision in that case.[46]

The *Theophanous* judgment must also be given credit for its stance on the issue of the onus of proof, in a defamation suit. Once again, it has been said earlier, that it should not be left to the plaintiff to prove that a defamatory (and sometimes even false) statement, is *not* worthy of protection in the interests of free speech. Rather, it should be left to the defendant to convince the Court that the disputed statement *is* worthy of protection, and that it would be in the interests of free speech and expression to uphold the defendant's argument. The Court in *Theophanous* correctly stated that the constitutional character of the defence raised, should not affect the onus of proof, which has been determined in accordance with long-standing rules, recognising the futility of asking the plaintiff, to prove that which is peculiarly within the knowledge of the defendant. Again, it is submitted that South African courts would do well to pay attention to the Court's ruling, in this regard.[47]

Although the judgment in *Theophanous* has much to commend it, the High Court of Australia has recently declared that the judgment in this case was *not* determinative of the issues raised in that case. In the case of *Lange v Australian Broadcasting*

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45 Supra.

46 *Holomisa v Argus Newspapers Ltd* supra.

47 It must be pointed out that in the *Holomisa* case, Cameron J declined to follow *Theophanous* in its ruling on the issue of onus.

Corporation, the High Court of Australia had occasion to reconsider the judgment in the *Theophanous* case.[48] In doing so, the Court first explained that it was not bound by its previous decisions, although the Court would only reconsider a previous decision with great caution, and for strong reasons.[49]

The Court then examined the freedom of communication, and noted that this freedom was meant to protect communication between people concerning political or government matters, thereby enabling people to exercise a free and informed choice as electors. Furthermore, it was also noted that the freedom of communication which was implied by the Constitution, did not confer personal rights on individuals, but instead, precluded curtailment of the freedom by the exercise of legislative or executive power. To this end, the freedom of communication would be protected as far as was necessary for the effective operation of the system of representative and responsible government, created by the Constitution. The Court therefore held that in order to determine, whether or not a law had infringed the freedom of communication, the following two questions would have to be answered:

1. Does the law effectively burden freedom of communication about government or political matters, either in its terms, operation or effect?
2. If the law effectively burdens the freedom of communication, then is that law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible, with the maintenance of the constitutionally prescribed system, of representative and responsible government?

The Court held, that in so far as the law of defamation required electors to pay damages, for the publication of communications concerning government/political matters, or resulted in the granting of injunctions against such publications, it

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48 Decided 8 July 1997.

49 At 16.

effectively burdened the freedom of communication about government or political matters. The next question therefore, was whether or not the law of defamation could be considered reasonably appropriate, and adapted to achieving a legitimate end, that was compatible with the constitutionally prescribed system of government operating in Australia. At this stage, the Court paused in its analysis of the issue, to explain that because the *Theophanous* case had failed to address the latter question, it could not be treated as conclusively determining the issue, of whether the law of defamation was compatible with the freedom of communication.

The Court resumed its discussion by examining the defences available to a claim for defamation, in New South Wales.[50] The principal defences referred to, were the defences of truth in respect of a matter of public interest or an occasion of qualified privilege, fair comment on a matter of public interest, common law qualified privilege, fair report of parliamentary and similar proceedings, and a statutory defence of qualified privilege. The Court was convinced that the defences listed above (other than the statutory defence), imposed an undue burden on the freedom of communication, since none of them provided an appropriate defence to a person who mistakenly, but honestly, published communications relating to a government or political matter, to a large audience. This posed a significant problem, since discussion of government and political matters necessitated the freedom for members of the public, to give and receive information of this nature to the public at large.

The Court therefore reasoned that the failure of the common law rules relating to privileged occasions, to cater for the widespread dissemination of information relating to government/political matters, needed to be developed so as to conform with the requirements of a representative and responsible democracy. In order to effect this development, the Court gave recognition to the notion that every member of the

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50 The Court was confined to a consideration of the defences available in the law of defamation, of New South Wales since the case was conducted on the basis that plaintiff's action was to be determined according to the law of that State. Nevertheless, it will be seen that the defences mentioned, are the same defences with which even our own common law is familiar.

Australian community, had an interest in disseminating or receiving information relating to government/political matters, that affected the people of Australia. The interest that each member of Australian society had in such discussion, effectively extended the category of qualified privilege, and it could now be said that the common law rules relating to privileged occasions, were compatible with the prescribed system of government in Australia.

The next question the Court had to address, was the question of whether or not the law was reasonably appropriate and adapted to the legitimate object which it sought to achieve. The ordinary rules relating to privilege protected a defendant in a situation where he honestly, and without malice, used the privileged occasion for the purpose for which it was given. The Court believed that this rule, which had been formulated to deal with a situation where publication had been made to a limited number of people, was not likely to be appropriate to a situation where publication had been made to tens of thousands or more, of readers, listeners or viewers. This was indicated clearly by the fact that in the latter situation, the damage to reputation would be far greater than in the former.

The Court therefore proposed that by requiring reasonable conduct on the part of the defendant, the law would be 'reasonably appropriate and adapted' to achieving the object of protecting the individual's reputation, and at the same time, also be compatible with the system of representative and responsible government prescribed for Australia.

It is submitted that the decision in *Lange v Australian Broadcasting Corporation* has contributed to the law of defamation in Australia, by setting out a clear test for determining whether or not a law violates the implied freedom of communication. However, in substance, it is submitted that the essence of this judgment is in keeping with the opinions expressed in *Theophanous*. As such, it is submitted that the *Lange*

case may prove instructive to our courts only in respect of its adherence to the standard of reasonableness.

(d) Canada

Since the advent of the Interim Constitution, the jurisprudence of the Canadian Courts has proved to be of invaluable assistance to our Courts. The reason for this is that our Chapter on Fundamental Rights has been modelled on lines, similar to those on which the Canadian Charter of Rights and Freedoms has been structured. Like the Charter of Rights and Freedoms, the Chapter on Fundamental Rights sets out specific constitutional guarantees, and has a separate clause which operates to limit the guaranteed rights.

From the case law in Canada, it appears that Canadian courts have also had to grapple with the question of whether or not the Charter rights and freedoms can be applied to litigation between private parties. This is clearly demonstrated in the case of *Hill v Church of Scientology*.[51] In this case, the Supreme Court of Canada was faced with the task of determining whether or not common law of defamation was consistent with the Canadian Charter of Rights and Freedoms. In answering this question, the Court had to first consider whether or not the Charter could be applied directly to disputes between private parties.

To this end the Court first examined section 32 of the Charter. In terms of this section, the actors to whom the Charter applied, were the legislative, executive and administrative branches of government. The Charter would thus apply to the common law, only in so far as the common law formed the basis of the governmental action which allegedly violated a guaranteed right or freedom.[52] In the case before the

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51 (1995) 126 DLR (4th) 129.

52 See *RWDSU v Dolphin Delivery Ltd* [1986] 2 S.C.R. 573.

Court, there was no such government action, and it was therefore held that the Charter could not be applied directly to the common law of defamation.[53]

Nevertheless, the question of whether the law of defamation complied with the *underlying values* of the Charter, remained open. The Court held that it was their duty to interpret the common law in a manner that was consistent with Charter principles, and that this obligation, was simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law, in order to comply with prevailing social conditions and values.[54] The Court made it clear that in fulfilling this duty, a court should not undertake the type of analysis, which would apply in a situation where there had been an alleged violation of a right. It was the Court's belief that the traditional framework for determining an alleged violation of a right (viz. the application of section 1, which corresponds with the South African limitation clause) was *not* appropriate to an assessment of the common law, in the wider context of the Charter values and principles. Rather, the process should consist of balancing or weighing general Charter values, against the principles underlying the common law.[55]

In respect of the onus in such a case, the Court explained that the division of onus which normally operates in a Charter challenge to government action, should not be applicable in a private action, where the common law was being challenged on the basis of Charter values. In other words, the party alleging that the common law is inconsistent with the Charter, must bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified. The Court based its ruling on the question of onus, on the fact that one party would have brought the action in question on the basis of the prevailing common law, which may have a long history of acceptance in the

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53 Op cit para 79.

54 Op cit para 91. See *also RWDSU v Dolphin Delivery Ltd* supra and *R v Salituro* [1991] 3 S.C.R. 654.

55 Op cit para 97.

community. That party should be able to rely upon that law, and should not be placed in the position of having to defend it.[56]

Having clarified these preliminary issues, the Court then went on to examine the competing values that required analysis in this case. The Court spent a fair portion of its judgment, on a discussion of the history and importance of both the right to freedom of expression, as well as the right to reputation and dignity. It then contemplated the wisdom of importing the standard of 'actual malice', adopted in *New York Times Co. v Sullivan*. The learned judge gave a detailed account of all the criticisms which the *New York Times* test had been subjected to, and found that there was no good reason for adopting such a test in Canadian law, especially since none of the concerns which had motivated the decision in *New York Times* were present in the case at hand.[57]

Ultimately, the Court found that the existing law of defamation could simply not be seen as unduly restrictive or inhibiting. The law of defamation sought to prohibit the publication of injurious, false statements, and it was the individual's means of protecting what could be his/her most distinguishing feature viz. his/her reputation. The Court was of the opinion that since the common law defences of fair comment, and of qualified privilege provided sufficient protection for the values underlying the Charter, there was no need to amend or alter the common law of defamation, in any way. Surely, the Court remarked, it was not requiring too much of individuals that they ascertain the truth of the allegations they publish, and that they assume a reasonable level of responsibility?

Given the fact that the Court did not effect any changes to the common law, it is

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56 It is submitted that the Court's ruling on the question of onus, provides a reasonable and practical resolution of this issue. It will be noted that support for this approach to the issue of onus has been expressed earlier in this work.

57 For instance, neither the spectre of grossly large damages awards, nor the threat to freedom of the press, were concerns that the Court in the *Scientology* case had to consider.

clear that the case of *Hill v Church of Scientology*, cannot provide a foundation for future change in the South African law of defamation. Nonetheless, it is still instructive, in its ruling on the issue of who should bear the onus, in a case where one party is challenging the constitutionality of the common law, upon which the other party is relying. It is submitted that South African courts would be well advised to adopt the same approach, since it is not only eminently reasonable, but it has a sound basis in law as well.

(e) Conclusion

An examination of this chapter will show that the jurisprudence of the United States is of absolutely no use to South African courts, unless to show them exactly what they should *not* do, in the course of developing the common law of defamation. On the other hand, it is also clear that the decisions of the Australian High Court and of the Canadian Supreme Court, may be useful in guiding our courts through the redevelopment of the common law. It is submitted that the following points may be crystallised from the foregoing discussion:

1. The onus of proof in a case where one party challenges the constitutionality of the common law, upon which the other party is relying, must not be determined in accordance with some ill-founded deference to the constitutional nature of the case. The rules which have been tried and tested should remain applicable, and this means that the litigant who challenges the constitutionality of the common law of defamation, must bear the onus of proving that the common law is *not* in keeping with the dictates of the Constitution, and should therefore be altered. Recognition of the value that must be attached to freedom of expression, must not cloud the issue so as to result in a situation, where the plaintiff is expected to *disprove* the defences which the defendant would normally be required to *prove*.

2. The standard of reasonableness, as a means of testing the lawfulness of an allegedly defamatory statement, is the most practical solution to a vexing problem. The right to freedom of expression, and the right to reputation and dignity, both have a fluid content which cannot be given effect to by means of rigid rules, that must be adhered to regardless of the specific circumstances of the case. A court must be able to determine, which right should take precedence over the other, on a case-by-case basis, or run the risk of being tied down by rules, which are wholly inappropriate to the determination of a specific dispute. The standard of reasonableness provides the means which will enable a court to achieve this.

The notion that the onus of proof should remain with the defendant, is not unfamiliar to the law of defamation. As such, the foreign cases which say that it is not for the plaintiff to disprove the defences available to the defendant, are simply reiterating a widely accepted rule of law. In other words, there is nothing new about this proposition, and at best it may be said that the foreign cases have simply provided further support for adhering to this rule, in respect of the onus of proof.

So too, the standard of reasonableness, is not unlike the standard urged upon the Court in *Zillie v Johnson and Another*[58]. It is submitted that South African courts may be able to achieve the right degree of protection, for free speech interests, if they adopt a standard such as this one. Nevertheless, it must again be emphasised that the Australian jurisprudence, has not exposed our courts to new ways of developing the law of defamation. In stead, it has simply provided support for concepts with which our courts were already familiar.

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58 Supra.

CHAPTER 5

CONCLUSION

In Chapter 2, it became clear that three issues had given rise to considerable argument, even before defendants were placed in a position to raise a defence, based on their constitutionally guaranteed right to freedom of expression (which includes freedom of the press and other media). These issues were:

1. The question of what onus is to be borne by the defendant in a defamation suit i.e. does he bear a full onus of proof in respect of the defence which he has raised, or must he simply adduce evidence in rebuttal of the evidence produced by the plaintiff?
2. The issue of whether the defences, which could be raised to disprove the element of unlawfulness (viz. truth in the public interest, fair comment and privilege), formed a closed list, or not. In other words, would our law recognise a general, public policy-based defence to a claim for defamation?
3. Whether it was wise to have adopted the rule of strict liability in relation to media defendants.

In the post-1994 defamation cases, which were analysed, it was seen that because of problems relating to the interpretation and application of the Constitution, little attention was actually paid to dealing with the common law of defamation, and how it needed to be remoulded. In addition, those cases in which the issue was addressed, appeared to be overzealous in their attempts at according the right to freedom of expression, greater protection within the law of defamation. As a result, in both *Gardener* and *Holomisa*, the court decided to require the plaintiff to show that the defendant's statement was not worthy of protection, under our free speech guarantee. This modification of the common law of defamation, was undertaken in deference

to the right to free speech.

As far as the defences available to the defendant were concerned, only the *Holomisa* case came out clearly in favour of a flexible approach, such as that advocated in *Zillie v Johnson and Another* however, the judgment was confined to dealing with the exercise of free speech rights in the context of free and fair political activity, and it is therefore of limited applicability.

Finally, in respect of strict liability for the media defendant, it is submitted that there is clearly a desire to abolish this rule, however, none of the cases which have found the common law to be in conflict with the Constitution, have done anything more than simply assume that the rule is no longer of any force. In short, it is submitted that the treatment of how the common law of defamation should evolve, has lacked any real depth or substance.

The discussion therefore turned to an examination of some foreign cases, in the hope that they could shed some light on the manner in which our courts should attempt to develop the common law. It was found that the jurisprudence of the United States had been criticised so extensively, that it would be futile to think of adopting their rules in this country.

In the Australian High Court however, there has been much more fruitful discussion in relation to the reshaping of the common law of defamation. The essence of the judgments from that court, was that the onus should remain with the defendant, to prove the defence he has raised, and that the constitutional character of his defence made no difference to this rule. Further, it was also decided that the criterion of reasonableness should be used to determine, in each case, whether a particular statement should be protected in the interests of free speech, or not.

The Canadian law of defamation was found to be instructive in respect of its decision on the question of onus. It was agreed that the onus should remain with the defendant, to prove his case. It is therefore apparent that while the Australian, and Canadian jurisprudence provides useful guidance to our courts, their statement of what the common law of defamation should be, is hardly new in South Africa. The rules in respect of onus were expounded in the *Neethling* case, while the test of reasonableness finds its expression in the *Zillie* case.

My submissions, in respect of the effect which the Constitutions (both Interim and Final) have had on the common law of defamation are therefore as follows:

1. There has been no change in the substance or form of the common law of defamation. Rather, there have been some suggestions regarding how the law might be changed, but in truth the common law of defamation has not broken ties with its common law past.
2. In light of the comparative law which has been examined, it appears that the best way to adapt the common law of defamation to its new constitutional context, is to import into our law a general test for unlawfulness, which is based on public policy. In so doing, our courts will be able to ensure that a defendant is only found guilty of having defamed a plaintiff, if the circumstances are such that society would *require* such a finding. This case-sensitive approach is necessary because of the fluid nature of the right to freedom of expression i.e. because one cannot say with complete certainty, that speech must be protected in one instance, and not in another.
3. Finally, in respect of strict liability, it is submitted that the approach to the question of unlawfulness outlined above, obviates the problems that arise from imposing strict liability on media defendants. In the first place, it has been accepted that an inquiry into the *animus injuriandi* of a defendant is irrelevant, for if one needs to determine whether or not

> a particular statement is defamatory, one may do so by inquiring into the unlawfulness of the statement. There is therefore *no* need for an inquiry into the element of *animus injuriandi*. Further, by adopting the general test for unlawfulness set out above, the latitude which individuals (whether private or media) are given, in order to publish statements, or disseminate information, is increased enormously. There is therefore more opportunity for a defendant to prove, that he is entitled to escape liability on the claim against him.

It is submitted that the above proposals for the common law of defamation, will alleviate the problems that were so contentious prior to 1994.

Finally, it must be stated that the scope of this dissertation has not allowed for a discussion of responsible journalism, or standards of media responsibility. It is submitted that this area of our law needs to be closely scrutinised because of the number of defamation cases which arise from allegedly irresponsible reporting. It is submitted, that if the media were constrained to abide by certain standards of professional conduct, across the board, one would be able to reassure the public that proper attention was being paid to protecting their interest in reputation and dignity, while also taking care of the media's interest in their right to receive and impart information and ideas, and their general right to freedom of expression. In this way, the potential for claims of defamation arising from media coverage would, it is submitted, be significantly reduced.

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