

UNIVERSITY OF THE WESTERN CAPE

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**The Infraction of the Right to Dignity on Social Media: The Liability of the
Group Administrator and the Commenting Users.**

**UNIVERSITY of the
WESTERN CAPE**

A mini-thesis submitted in partial fulfilment of the requirements for the LLM degree in
the Faculty of Law of the University of the Western Cape

Supervisor: Dr. Tinashe Kondo

Plagiarism Declaration

'I declare that the mini-thesis titled "The Infraction of the Right to Dignity on Social Media: The Liability of the Group Administrator and the Commenting Users" is my work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed:  Signed: 
.....
(Student) (Supervisor)



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Dedication

This thesis is dedicated to my late parents, Philip Okika and Juliana Okika, for instilling in me a desire to love and protect human rights. I also dedicate this thesis to all human rights defenders around the world, especially those in South Africa.

Acknowledgments

I would like to thank the Almighty God, the author of all knowledge, wisdom, and human rights, for allowing this project to come to fruition. Immeasurable thanks and gratitude are extended to the following individuals who, in one way or another, contributed to making this study possible.

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KEYWORDS

Animus iniuriandi

Australia

Canada

Commenting users

Delictual liability

Direct-replying-users

Emoji

Fresh-commenting-user

Group administrators

South Africa

Vicarious liability



Abbreviations.

<i>ACM:</i>	Association for Computing Machinery.
<i>BCSC:</i>	British of Columbia Supreme Court.
<i>BMS:</i>	Bulletin de Methodologie Sociologiques.
<i>CC:</i>	Constitutional Court.
<i>CILSA:</i>	Comparative and International Law Journal of Southern Africa.
<i>CSJ:</i>	Crime and Social Justice.
<i>ECTA:</i>	Electronic Communications and Transactions Act.
<i>FCA:</i>	Federal Court of Australia
<i>FRCIJ:</i>	Forensic Research & Criminology International Journal.
<i>IJECE:</i>	International Journal of Electrical and Computer Engineering.
<i>IJIDT:</i>	International Journal of Information Dissemination and Technology
<i>JIP:</i>	Journal of Information Policy.
<i>JOL:</i>	Journal of Online Law.
<i>NSWDC:</i>	New South Wales District Court.
<i>NSWSC:</i>	New South Wales Supreme Court.
<i>NYUJILP:</i>	New York University Journal of International Law and Politics.
<i>ONSC:</i>	Ontario Superior Court of Justice.
<i>PELJ:</i>	Potchefstroom Electronic Law Journal.
<i>SAJ:</i>	Sabinet African Journals.

SAJCTR: South African Journal of Theory and Research.

SALJ: South African Law Journal.

SAMJ: South African Medical Journal.

SCA: Supreme Court of Appeal.

STELL LR: Stellenbosch Law Review.

TALL: Toronto Association of Law Libraries.

UDHR: Universal Declaration of Human Rights.

UNHRC: United Nations Human Rights Committee.

VSC: Supreme Court of Victoria.

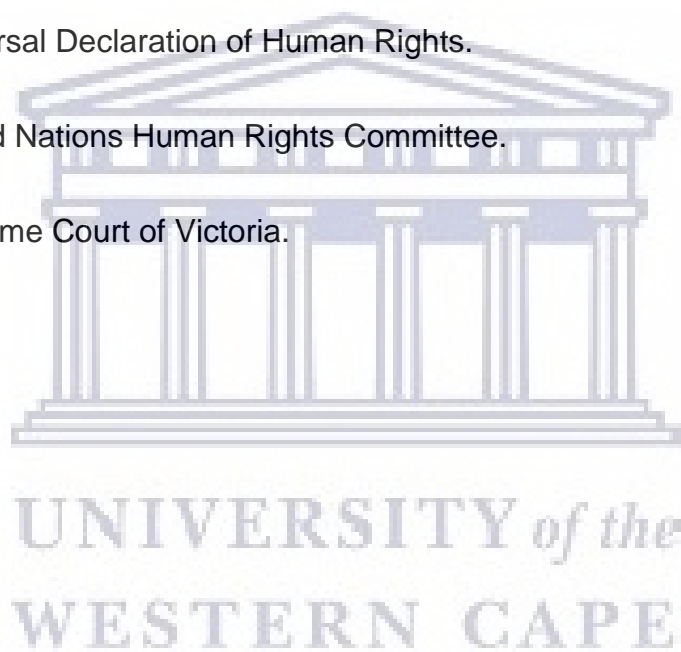


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CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1. Background to the study

In recent times, it has been demonstrated that a huge chunk of the world's population is on some form of social media.¹ It is estimated that between 4.6 and 5 billion people out of the world's population² use social media.³ Such platforms include WhatsApp, Instagram, Twitter and Facebook.

Of these, Facebook has the biggest following, boasting of an estimate of over 2.9 billion monthly active users (as of January 2022).⁴ WhatsApp, as a cross-platform instant messaging service, is Facebook's closest competitor (although now owned by Facebook), frequented by more than two billion monthly active users.⁵ Instagram and Twitter follow behind WhatsApp with figures of 1.48 billion and 436 thousand active users respectively.⁶

¹ Statista Research Department 'Social media – Statistics & Facts' available at <https://www.statista.com/topics/1164/social-networks/> (accessed on 26 April 2022).

² Datareportal 'Digital 2021: global overview report' available at <https://datareportal.com/reports/digital-2021-global-overview-report> (accessed on 7 March 2021). See also Internet World Stats 'world internet usage and population statistics 2022 Year-Q1 Estimates' available at <https://internetworldstats.com/stats.htm> (accessed on 26 April 2022). It estimates that the world's population as of January 2022 is 7,934,716,815.

³ Statista 'Global Digital Population as of January 2021' available at <https://www.statista.com/statistics/617136/digital-population-worldwide/> (accessed on 26 April 2022).

⁴ Statista 'Most popular social networks worldwide as of January 2022, ranked by number of monthly active users' available at <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (accessed on 26 April 2022).

⁵ Statista 'Most popular social networks worldwide as of January 2022, ranked by number of monthly active users' available at <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (accessed on 26 April 2022). See also The New digits 'WhatsApp Group Link March 2021' available at <https://www.thenewsdigit.com/whatsapp-group-link/435/> (accessed on 27 February 2021).

⁶ Statista 'Most popular social networks worldwide as of January 2022, ranked by number of active users' available at <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (accessed on 26 April 2022).

While Facebook, by means of monthly users, remains the leading platform, WhatsApp is dominant in other respects.⁷ For instance, it could be argued that it has more unique features: any communication within the app is end-to-end encrypted;⁸ It allows users to easily create and organise chat groups, in which users can broadcast messages.⁹ An interesting statistic is that there are more than one billion groups on WhatsApp.¹⁰ Further to this, WhatsApp currently delivered an impressive 100 billion messages a day. This is in contrast to 50 and 60 billion messages delivered in 2014 and 2016 respectively.¹¹

The development of these groups and their use to share and disseminate information and knowledge poses a big challenge in today's technologically charged and driven societies.¹² These groups present opportunities for people to share information with people, not only at a domestic level but at a global level.¹³ The challenge, however, is that the correctness or accuracy of the information can sometimes be in question.¹⁴ Many times, within these groups, there are no checks and balance systems to check the veracity of the information.¹⁵ Some users may sometimes also take the information presented as facts.

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⁷ Resende G *et al.* '(Mis)Information Dissemination in WhatsApp: Gathering, Analysing and Counter measures' 2019 *The World Wide Web Conference ACM* 818.

⁸ Resende G (2019) 818.

⁹ Resende G (2019) 818.

¹⁰ Fortunly 'WhatsApp Statistics: Revenue, Usage, and History' available at <https://fortunly.com/statistics/whatsapp-statistics> (accessed on 9 April 2021).

¹¹ Singh M 'WhatsApp is now delivering roughly 100 billion messages a day' *TECHCRUNCH* 30 October 2020 available at <https://techcrunch.com/2020/10/29/whatsapp-is-now-delivering-roughly-100-billion-messages-a-day/> (accessed on 14 March 2021).

¹² Resende G (2019) 819.

¹³ See Tandale MS 'Use of WhatsApp as tool for information dissemination in the colleges of western region of Mumbai: A study' (2018) 8(3) *IJIDT* 147-148.

¹⁴ Dumisani M, Admire M & Hayes M 'Social media, the press, and the crisis of disinformation in Africa' (2020) 46(4) *SAJCTR* 3 - 4.

¹⁵ Rossini P *et al* 'Dysfunctional information sharing on WhatsApp and Facebook: The role of political talk, cross-cutting exposure and social corrections' (2021) 23(8) *New Media & Society* 2434. Here it notes, among others, that while WhatsApp does not feature a "news feed", it has features such as encryption of messages and the ability to send viral messages to several groups and users, it becomes challenging to research and track illegitimate or malicious activities and to study the content of conversations.

Another challenge in the context of these groups is that the information shared may occasionally violate constitutionally enshrined and internationally recognised rights.¹⁶ For example, defamatory statements made in a group may violate the right to dignity of others, both within and outside the group.¹⁷ These groups sometimes test the delicate balance between the rights to freedom of expression and dignity.

The right to dignity is protected in section 10 of the Constitution of the Republic of South Africa, Act 108 of 1996.¹⁸ The right to dignity is one of the central tenets of the Constitution.¹⁹ It is one of the founding values of the Constitution.²⁰ Section 1 of the Constitution provides that South Africa is a democratic and sovereign country that is built on the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms.²¹ This right is also closely related to many of the rights enshrined in the Bill of Rights (BORs).²² For example, it has a strong connection to the right to freedom and security of the person, which provides that everyone has the right not to be treated in a manner that is cruel, inhumane, or degrading.²³ Being treated degradingly has ramifications for the right to dignity.²⁴ This demonstrates how human rights are interdependent and inseparable.

¹⁶ Burns Y & Smidt-Burger A A *Commentary on the Protection of Personal Information Act* (2018) 320.

¹⁷ *RM v RB* (2015) 1 SA 270 (KZP), para 28.

¹⁸ Constitution of the Republic of South Africa, s 10 states that everyone has inherent dignity and the right to have their dignity respected and protected.

¹⁹ *S v Makwanyane* (1995) 2 SACR 1 (CC), para 328; *President of the Republic of South Africa v Hugo* (1997) 4 SA 1 (CC), para 92; Reyneke M 'The Right to Dignity and Restorative Justice in Schools' (2011) 16(6) *PELJ* 130.

²⁰ Constitution of the Republic of South Africa, ss 1, 7(1), 36(1) & 39(1).

²¹ Constitution of the Republic of South Africa, s 1.

²² Such as right to privacy, right to life and right to equality; see Burchell J 'Protecting dignity under common law and the Constitution: The significance of *crimen iniuria* in South African criminal law' (2014) 27(3) *SAJCL* 256 & 267 (hereinafter *Protecting dignity*).

²³ Constitution of the Republic of South Africa, s 12.

²⁴ Burchell J *Protecting dignity* (2014) 254 – 255; Goolam N 'Human Dignity - Our Supreme Constitutional Value' (2001) 4(1) *PELJ* 46.

The right to dignity is also recognised and proclaimed at the international level.²⁵ Both the International Covenant on Economic, Social, and Cultural Rights (ICESCR)²⁶ and the International Covenant on Civil and Political Rights (ICCPR)²⁷ made references to human dignity in their preambles, stating that all human rights are derived from the inherent dignity of the human person.²⁸ In addition to these two documents, the Universal Declaration of Human Rights (UDHR)²⁹ recognises human dignity as a fundamental value or right required for a peaceful, free, and just society.³⁰ The UDHR³¹ also protected other rights that are aspects of the right to dignity.³² These other rights, when upheld, are rooted in dignity and advance the right to dignity.³³

At a regional level, the African Charter on Human and Peoples' Rights (ACHPR) specifically provides for the right to human dignity.³⁴ The ACHPR on the Rights of Women in Africa recognised the link between human dignity and gender equality in its protocol, declaring that "every woman shall have the right to the dignity inherent in a human being, as well as the recognition and protection of her human and legal rights."³⁵ Through its Charter, the Southern African Development Community (SADC) reaffirmed member

²⁵ Botha H 'Human Dignity in Comparative Perspective' (2009) 20(2) *STELL LR* 174; also see *ANC v Sparrow* (2019) JOL 44908 (EqC), para 40(20).

²⁶ International Covenant on Economic, Social and Cultural Rights, 1966 United Nations General Assembly Resolution 2200A (XXI) (1966) (hereinafter International Covenant on Economic Social and Cultural Rights).

²⁷ International Covenant on Civil and Political Rights, 1966 United Nations General Assembly Resolution 2200A (XXI) (1966) (hereinafter International Covenant on Civil and Political Rights).

²⁸ International Covenant on Economic Social and Cultural Rights preamble; International Covenant on Civil and Political Rights preamble.

²⁹ Universal Declaration of Human Rights, 1948 United Nations General Assembly Resolution 217 A (III) (1948) (hereinafter Universal Declaration of Human Rights).

³⁰ Universal Declaration of Human Rights preamble.

³¹ Universal Declaration of Human Rights Art 1, 7, 5 and 3.

³² Burchell J *Protecting dignity* (2014) 267-268.

³³ Khan F 'Does the right to dignity extend equally to refugees in South Africa' (2020)20 *AHRLJ* 262.

³⁴ African Charter on Human and Peoples' Rights, 1981 Organisation of African Unity Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art 5 (hereafter Banjul Charter).

³⁵ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2005, Art 3.

states' commitment to human rights as enshrined in the UDHR.³⁶ It also provided for the protection of other rights related to the right to dignity by prohibiting discrimination and promoting gender equality as well as equal treatment of all people.³⁷

Section 38 of the Constitution states that anyone may approach a competent court if they believe a right guaranteed by the Bill of Rights has been threatened or violated.³⁸ As a result, the right to dignity has been the subject of much litigation. In *NM & others v Smith & others*, for example, the petitioners sought damages for a violation of their rights to dignity, privacy, and psychological integrity.³⁹ The third respondent granted the first respondent permission to write the second respondent's biography.⁴⁰ The second respondent's exploits in defending the rights of people living with HIV/AIDS were to be included in the book.⁴¹ The applicants' names and HIV status were included in the book, which was published.⁴² More than 5000 copies were printed and distributed to various bookstores for sale.⁴³ When the applicants learned of the book's publication, which revealed the applicants' HIV/AIDS status without their express authority and consent,⁴⁴ they sent a demand letter to the respondents, requesting that their names be removed from the book, but their request was denied.⁴⁵

The High Court heard the case and issued a decision that was unsatisfactory to the applicants because the issue was decided partly in favour of the applicants and partly in

³⁶ Charter of the Fundamental Social Rights in SADC, 2003 Southern African Development Community, Art 6 - 9, 14-15.

³⁷ Charter of the Fundamental Social Rights in SADC, 2003 Southern African Development Community, Art 6.

³⁸ Constitution of the Republic of South Africa, s 38.

³⁹ *NM & others v Smith & others* (2008) JOL 19615 (CC), para 1.

⁴⁰ *NM & others v Smith & others*, para 15.

⁴¹ *NM & others v Smith & others*, para 15.

⁴² *NM & others v Smith & others*, para 16.

⁴³ *NM & others v Smith & others*, para 16.

⁴⁴ *NM & others v Smith & others*, para 22.

⁴⁵ *NM & others v Smith & others*, para 18.

favour of the respondents.⁴⁶ In order to vindicate their constitutional rights, the applicants filed an appeal with the Constitutional Court.⁴⁷ The Court reasoned along the lines of the right to dignity, stating that while living with HIV/AIDS should not be viewed as an infringement of one's right to dignity, the disclosure of a person's HIV status or any other private medical information without his or her consent by another person is an insult to the infected person's right to dignity.⁴⁸ The court also stated that the right to human dignity, which is a cornerstone of the South African Constitution, must be jealously guarded and protected.⁴⁹ The court concluded that the respondents' disclosure of the applicants' names and HIV status in a book amounted to a serious violation of the applicants' right to dignity and psychological integrity.⁵⁰

This right has recently been the subject of litigation in internet-related cases.⁵¹ Many of the cases concerned violations of the right to dignity (reputation) on social media platforms like Facebook,⁵² Twitter,⁵³ and WhatsApp.⁵⁴ In *Lawrence and others v Mitha and others*, the second defendant made vulgar comments⁵⁵ on the first defendant's Facebook page,⁵⁶ implying that the plaintiffs were dishonest and that the first defendant acted immorally and dishonourably.⁵⁷ The plaintiffs were seeking monetary compensation. In determining whether the plaintiffs' reputations had been harmed by the

⁴⁶ *NM & others v Smith & others*, para 26.

⁴⁷ *NM & others v Smith & others*, para 29.

⁴⁸ *NM & others v Smith & others*, para 48.

⁴⁹ *NM & others v Smith & others*, para 50.

⁵⁰ *NM & others v Smith & others*, para 54.

⁵¹ See *Economic Freedom Fighters and others v Manuel* (2020) JOL 49196 (SCA), para 2; *Afriforum NPC and another v Pienaar* (2017) JOL 37568 (WCC), para 13-15.

⁵² See *Lawrence and others v Mitha and another* (2019) JOL 45891 (GJ), para 1; *Heroldt v Wills* (2014) JOL 31479 (GSJ), para 1- 7.

⁵³ *Koko v Tanton* (2021) JOL 51086 (GJ), para 3 - 7; *Netshipise v Shantye* (2021) 10 ECL 100 (GJ), para 4 - 10.

⁵⁴ *Manyi v Dhlamini* (2019) JOL 43286 (GP), para 1-4.

⁵⁵ *Lawrence and others v Mitha and another*, para 13 – 15.

⁵⁶ *Lawrence and others v Mitha and another*, para 10.

⁵⁷ *Lawrence and others v Mitha and another*, para 31.

second defendant's statements,⁵⁸ the court reasoned, *inter alia*, that the constitutionally protected right to dignity extends to the right to reputation,⁵⁹ and that posting such vulgar personal comments about the plaintiff on Facebook, an international social media platform with a large audience,⁶⁰ was primarily intended to discredit the plaintiffs and cast them in an unfavourable light.⁶¹ The court ruled that the postings were unlawful, intentional, and violated the applicants' right to dignity (reputation).⁶²

Similarly, in *Isparta v Richter*, the first defendant made a series of defamatory statements about the plaintiff on the first defendant's Facebook wall page,⁶³ calling her a bad mother who allowed an improper relationship between her daughter and stepson.⁶⁴ The second defendant was tagged for the slanderous comments.⁶⁵ The court ruled that the disparaging posts were both individually and collectively defamatory.⁶⁶ The court also held that even though the second defendant wasn't the person who made the defamatory statement, he was just as liable as the first defendant because he knew about the statement and let his name be linked to it.⁶⁷

More relevant to the focus of this mini-thesis is the case of *Manyi v Dhlamini*.⁶⁸ In this case, the defendant was accused of making defamatory posts about the applicant on a WhatsApp group.⁶⁹ The statements were widely distributed on various media platforms and circulated in numerous other WhatsApp groups.⁷⁰ The defendant intended the

⁵⁸ *Lawrence and others v Mitha and another*, para 27.

⁵⁹ *Lawrence and others v Mitha and another*, para 33.

⁶⁰ *Lawrence and others v Mitha and another*, para 30.

⁶¹ *Lawrence and others v Mitha and another*, para 32.

⁶² *Lawrence and others v Mitha and another*, para 35.

⁶³ *Isparta v Richter and Another*, para 12 – 16.

⁶⁴ *Isparta v Richter and Another* 2013 (6) SA 529 (GNP), para 19 (hereinafter *Isparta v Richter and Another*).

⁶⁵ *Isparta v Richter and Another*, para 18.

⁶⁶ *Isparta v Richter and Another*, para 34.

⁶⁷ *Isparta v Richter and Another*, para 35.

⁶⁸ *Manyi v Dhlamini* (2019) JOL 43286 (GP) (hereinafter *Manyi v Dhlamini*).

⁶⁹ *Manyi v Dhlamini*, para 3.

⁷⁰ *Manyi v Dhlamini*, para 3.

statements to imply that the plaintiff was dishonest in the following ways: that he was cheating on his wife, that he was sleeping around with students, that he used money to induce students to sleep with them, and that he was a person of low morals; further, that he was a lazy animal who sexually abused and unduly influenced girls with money.⁷¹ The court reasoned that such postings violated the plaintiff's right to dignity and the right to have that dignity respected.⁷² The court also reasoned that one of the requirements for determining delictual liability in defamation actions was publication,⁷³ and that because the defamatory words were published on WhatsApp, a social media platform with a large and diverse readership,⁷⁴ the requirement was met.⁷⁵

It can be drawn from these aforementioned cases that upholding the right to dignity extends to social media platforms, including WhatsApp groups. Online and social media users can be held liable for infringing on the right to dignity of others online. Against this backdrop, this mini-thesis investigates the liability of users and group administrator(s) in cases of alleged violations in social media groups.

1.2. Research question.

This mini-thesis poses the question: to what extent can the WhatsApp group administrator and "commenting users" be held liable for a post that infringes the right to dignity of other users in South Africa?

⁷¹ *Manyi v Dhlamini*, para 8.

⁷² *Manyi v Dhlamini*, para 13.

⁷³ *Manyi v Dhlamini*, para 7 and 14.

⁷⁴ *Manyi v Dhlamini*, para 8

⁷⁵ *Manyi v Dhlamini*, para 14.

1.3. Research objectives.

To give effect to the main question, this mini-thesis will be guided by the following objectives:

- To outline the regional and international frameworks on the right to human dignity.
- To unpack South Africa's legal framework on giving effect to the right to human dignity online, with a special focus on online groups.
- To compare South Africa's framework in relation to this right online with select countries (Canada and Australia).
- To furnish a conclusion and provide recommendations.

1.4. Research methodology.

This research will make use of both primary and secondary legal sources. Primary sources include the Constitution of the Republic of South Africa, legislation, conventions, treaties and case law. Secondary sources include textbooks, journal publications, opinion papers, online publications, and any other relevant work for this mini-thesis.

The mini-thesis employs a mixed methodology approach. To begin, an analytical approach is used to analyse the relevant documents from the jurisdictions under consideration. The mini-thesis also employs a comparative approach to learn from the experiences of other jurisdictions. Canada and Australia are used as comparisons in this section. These countries were chosen after careful consideration. Canada was chosen because its constitution is similar to that of South Africa. Both Canada and South Africa have a bill of rights as part of their constitutions that protect and guarantee rights and freedom.⁷⁶ They acknowledge and stipulate the supremacy of the rule of law.⁷⁷ Both the

⁷⁶ Constitution Act of 1982 Part 1 and Constitution of the Republic of South Africa, ss 7-39.

⁷⁷ Constitution Act of 1982 Part 1 and Constitution of the Republic of South Africa, s 1(c) and 2.

South African Bill of Rights and the Canadian Charter of Rights and Freedoms protect the rights to dignity (protection against cruel and unusual punishment),⁷⁸ life,⁷⁹ and equality before the law.⁸⁰ Both constitutions provide for the limitation of rights.⁸¹ As a result, It is conceivable that the South African constitution was influenced by the Canadian Constitution.

Australia was chosen because, in addition to having uniform defamation legislation,⁸² it has recently dealt with new cases involving online protection of human dignity.⁸³ This includes defamation cases such as *Dutton v Bazzi*,⁸⁴ *Goldberg v Voigt*,⁸⁵ *Nettle v Cruse*,⁸⁶ and *Dean v Puleio*.⁸⁷ The historical approach is used, to a lesser extent, to trace the history of certain concepts.

1.5. Benefits of the study.

This mini-thesis' findings will have far-reaching implications. This is due to the fact that the study deals with a problem that affects a large portion of the population.⁸⁸ Many children and adults are members of various online groups in social media for a variety of reasons. Social media gives everyone a voice and an opportunity to broaden their social

⁷⁸ Constitution Act of 1982 s 12 and Constitution of the Republic of South Africa, ss 10 and 12 (1) (e).

⁷⁹ Constitution Act of 1982 s 7 and Constitution of the Republic of South Africa, s 11.

⁸⁰ Constitution Act of 1982 s 15 and Constitution of the Republic of South Africa, s 9.

⁸¹ Constitution Act of 1982, s 6(3)15 and Constitution of the Republic of South Africa, s 36.

⁸² Defamation Act of 2005.

⁸³ *Burrows v Houda* (2020) NSWDC 485.

⁸⁴ *Dutton v Bazzi* (2021) FCA 1474.

⁸⁵ *Goldberg v Voigt* (2020) NSWDC 174.

⁸⁶ *Goldberg v Voigt* (2020) NSWDC 174.

⁸⁷ *Dean v Puleio* (2021) VCC 848.

⁸⁸ It is estimated that there are over 2 billion active monthly users of WhatsApp social media as of January 2022. see Statista Research Department 'Most popular social networks worldwide as of January 2022, ranked by number of monthly active users' available at <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (accessed on 26 April 2022).

participation.⁸⁹ Unfortunately, these groups give members the opportunity to violate the rights of others, particularly the right to dignity, without much thought.

This, however, has serious ramifications for the alleged offenders. As stated in the preceding sections, those who believe their rights have been violated, including the right to dignity, may seek redress in court under Section 38 of the Constitution. As a result, the findings will benefit the community as a whole, particularly those who participate in social media groups. The study will also be of interest to human rights practitioners and researchers, technology practitioners and researchers, researchers working in general governance and policy, and students in these fields.

1.6 Literature review.

In their article,⁹⁰ Ben Medeiros and Pawan Singh investigated the issue of misinformation on WhatsApp by researching several factors such as managing misinformation on social media, changes in the legal liability that platforms face for third-party speech, changes in platform technical design, and providing public information on disinformation.⁹¹ The article explored the liabilities of intermediary platforms and the possibility of proposed changes to the rules, the investigation into the remote cause of the spread of misinformation and hate speech, the possibility of the alterations in the technical design of platforms (whether voluntary or compelled by law), engagement with local journalism to debunk misinformation and the public information endeavours to inculcate public media literacy.⁹²

⁸⁹ Burn & Burger-Smidt *Protection of Personal Information Act* 322.

⁹⁰ Medeiros B and Singh P 'Addressing Misinformation on WhatsApp in India Through Intermediary Liability Policy, Platform Design Modification, and Media Literacy' (2020) 10 *Journal of Information Policy*.

⁹¹ Medeiros B, & Singh P (2020) 277.

⁹² Medeiros B, & Singh P (2020) 277.

On the issue of liability on social media, the article discussed the liabilities of intermediaries such as Facebook and WhatsApp platforms.⁹³ It emphasised the emergence of a wave of stringent intermediary liability laws in several countries that were of the view that intermediary platforms were not doing enough to tackle problematic content on Social media.⁹⁴ Germany, for instance, passed recent legislation⁹⁵ colloquially referred to as NetzDG that governs privacy and online speech and requires intermediary platforms like Facebook and Twitter to remove posts that contain hate speech or incite violence within 24 hours⁹⁶ or face fines as high as €50 million for non-compliance.⁹⁷ Social media companies are also required to file reports on their progress every six months.⁹⁸

A similar approach has been adopted by Singapore,⁹⁹ which, passed legislation¹⁰⁰ that “will require intermediary platforms such as online sites to show corrections to false or misleading claims¹⁰¹ and takedown falsehoods”¹⁰² while creating criminal and civil penalties for “those who spread an online falsehood with intent to prejudice the public interest, and those who make a bot to spread an online falsehood.”¹⁰³

A more stringent approach seems to be approved by India.¹⁰⁴ It adopted an intermediary liability rule which requires WhatsApp social platforms to modify their platform to allow tracing of online offenders.¹⁰⁵ A further amendment to the law will require online platforms to break end-to-end encryption to ascertain the origin of messages.¹⁰⁶ In addition, the

⁹³ Medeiros B, & Singh P (2020) 279.

⁹⁴ Medeiros B, & Singh P (2020) 279.

⁹⁵ Network Enforcement Act (NetzDG) of 2017.

⁹⁶ Network Enforcement Act (NetzDG) of 2017 Section 3.

⁹⁷ Network Enforcement Act (NetzDG) of 2017 Section 4(2).

⁹⁸ Network Enforcement Act (NetzDG) of 2017 Section 2(1).

⁹⁹ Medeiros B, & Singh P (2020) 279.

¹⁰⁰ Protection from Online Falsehoods and Manipulation Act 2019.

¹⁰¹ Protection from Online Falsehoods and Manipulation Act 2019, Section 21 (1) - (2).

¹⁰² Protection from Online Falsehoods and Manipulation Act 2019, Section 22.

¹⁰³ Protection from Online Falsehoods and Manipulation Act 2019, Section 7.

¹⁰⁴ Medeiros B, & Singh P (2020) 280 - 281.

¹⁰⁵ Information Technology [Intermediaries Guidelines] (Amendment) Rules, 2018 Rule 4(2).

¹⁰⁶ Information Technology [Intermediaries Guidelines] (Amendment) Rules, 2018 Rule 3(5).

social media platforms will be required to “deploy technology-based automated tools or appropriate mechanisms, with appropriate controls, for proactively identifying or removing or disabling access to unlawful information or content”.¹⁰⁷

The article while discussing the liability of intermediaries in different forms left open the liability of Group administrators of WhatsApp social media platform or any other social media platform in relation to any content/platform abuse. Instead, it emphasized the need to explore the remote causes of the spread of misinformation and hate speech and the need to engage local journalism services in the action of debunking misinformation using the same social media and other online platforms,¹⁰⁸ and to promote media literacy among the public.¹⁰⁹ It is this aspect that was not discussed that this mini-thesis tends to explore.

In his article,¹¹⁰ Zi En Chow discussed the kind of liability to be imposed by the government on social media companies for hosting prohibited content on their platforms.¹¹¹ There were three options proposed: not holding these social media platforms liable at all; holding them strictly liable in all instances; or holding them liable in only certain instances.

In the case of not holding internet intermediaries liable at all, the article held that such intermediaries, such as social media platforms, are not publishers in the eyes of the law because they do not edit or approve content before users publish it online.¹¹² The article supported its point of view by citing the United States Communications Decency Act,

¹⁰⁷ Information Technology [Intermediaries Guidelines] (Amendment) Rules, 2018 Rule 9.

¹⁰⁸ Medeiros B, & Singh P (2020) 294.

¹⁰⁹ Medeiros B, & Singh P (2020) 288 – 293.

¹¹⁰ Zi En Chow, ‘Evaluating the Approaches to Social Media Liability for Prohibited Speech’ (2019) 51(4) *New York University Journal of International Law and Politics*.

¹¹¹ Zi En Chow(2019) 1295.

¹¹² Zi En Chow(2019) 1301.

which shields websites and social media platforms from third-party content and encourages them to block offensive content without holding them accountable if they do so ineffectively.¹¹³ According to the article, this approach will give freedom of speech more leeway, but it will also mean that prohibited speech will remain online for longer because these intermediaries appear to be under no legal obligation to regulate proscribed content.¹¹⁴

With reference to holding social media platforms as internet intermediaries strictly liable in all instances, the article argued that this is possible since social media platforms serve as enablers in the spread of hateful and incendiary content to a wider audience, which may result in further incitement to violence against certain individuals and groups.¹¹⁵ The article supported this position by referring to the Thailand law¹¹⁶ which provides that social media platforms are held liable for intentionally supporting or consenting to prohibited speech on their platforms.

The article went on to argue that, while such liability may make social media platforms more proactive in dealing with prohibited content, it also has drawbacks. It is likely to infringe the freedom of expression,¹¹⁷ and in the long run, would turn out to be a very onerous task on some of these intermediaries. In situations where these obligations are not onerous to these social media platforms, it has been observed that they rely on extensive word filters and are unafraid of restricting freedom of expression and online discourse.¹¹⁸

¹¹³ Communications Decency Act of 1996, section 230.

¹¹⁴ Zi En Chow(2019) 1302.

¹¹⁵ Zi En Chow(2019) 1303.

¹¹⁶ Computer Crime Act 2 of 2017, section 15

¹¹⁷ Zi En Chow(2019) 1305.

¹¹⁸ Zi En Chow(2019) 1306.

On the option of holding social media platforms liable under certain circumstances, it was argued that this should be so since these intermediaries as just intermediaries whose role is facilitation and not publication.¹¹⁹ They should be held liable only when they fail to comply with a court order to remove prohibited content. However, they should not be held liable for failing to remove prohibited content that a user has flagged and notified them of. The reasoning is that the massive amount of content that social media platforms must review must be considered.¹²⁰

The issue of holding the creators and managers of a social media group or page liable was not addressed in any of these explanations. This is what this mini-thesis seeks to investigate and address when administrators of WhatsApp groups can be held liable for postings on their group of prohibited content that violates third-party users' rights to dignity.

In some decided cases, South African courts argued whether one can be held liable for what one says both online and offline. In *Heroldt v Wills*¹²¹ the applicant sought an interdict against the respondent for posting the defamatory statement on Facebook. The court found the statements defamatory and ordered that the respondent delete all posts made on Facebook or other sites in the social media platform referring to the Plaintiff and pay his costs.¹²² In *Manyi v Mhlamini*¹²³ the court reasoned along the lines that one can be held liable for what one says online when it carefully analysed the meaning of the words used to refer to the plaintiff's infidelity and dishonesty on various WhatsApp groups

¹¹⁹ Zi En Chow(2019) 1306.

¹²⁰ Zi En Chow(2019) 1307.

¹²¹ *Heroldt v Wills* para 1.

¹²² *Heroldt v Wills* para 47.

¹²³ *Manyi v Dhlamini* (2019) JOL 43286 (GP) at 13.

and found that those words were beyond doubt in violation of the plaintiff's right to dignity. One therefore can be held liable for what one says online.

This liability online is not restricted to positive acts alone, but also extends to omissions (negligent actions). In *Isparta v Richter* the first defendant posted a series of defamatory statements about the Plaintiff on the defendant's Facebook wall page, calling her a bad mother who allowed an improper relationship between her daughter and stepson. And the second defendant was tagged for the slanderous comments. The court held that the second defendant, although not the author of such statement, was as liable as the first defendant in that he knew about the defamatory statement, and yet allowed his name to be tagged to and associated with such messages.¹²⁴ While confirming that the publication of a defamatory words with an honest belief in the truth thereof does not absolve the publisher from liability, the court in *Manuel v Ecoomic Freedom Fighters and others* held that a person who repeats a defamatory allegation made by another is treated as if he had made the allegation himself, even if he attempts to distance himself from the allegation.¹²⁵

Liability also extends to owners of Facebook accounts. In *Dutch Reformed Church Vergesig Johannesburg Congregation & another v Rayan Sooknunan t/a Glory Divine World Ministries* the court, while referring to anonymous Facebook posters held that the creator of a Facebook profile is responsible for what is posted on its profile wall.¹²⁶ All of this demonstrates that the courts have never limited liability to the authors of the defamatory statement, but that anyone who negligently furthers such publication, draws

¹²⁴ *Isparta v Richter and Another* 2013 (6) SA 529 (GNP) at 36.

¹²⁵ *Manuel v Ecoomic Freedom Fighters and others* 2019 JOL 42080 (GJ) at 60.

¹²⁶ *Dutch Reformed Church Vergesig Johannesburg Congregation & another v Rayan Sooknunan t/a Glory Divine World Ministries* 2012 JOL 28882 (GSJ) at 49.

attention to such publication, or has a duty to know the contents of what they distribute is also liable.

While many of the issues revolved around Facebook as a social media platform, very little has been considered when it comes to WhatsApp social media, despite the fact that the platform has a large number of active users. Would users or the group administrator be held liable for their negligent actions? Would liability also be extended to the commenting users or the creators of WhatsApp groups? This mini-thesis attempts to investigate these issues and, in particular, addresses the WhatsApp feature that allows users to attach their replies to messages posted by other users in the same group.

1.7 Chapter outline.

This mini thesis consists of five chapters, including this one. Chapter two provides an overview of the legal frameworks that govern the right to human dignity at the regional and international levels. The chapter discusses major international treaties and conventions, including the ICCPR, ICESCR, UDHR, ACHPR, and SADC. It examines which documents South Africa has ratified and which commitments the country has made. It also examines the contents of General Commentaries on this right, as well as the work of special rapporteurs or experts on this right.

Chapter three considers the legal position in South Africa in relation to the right to human dignity and the liability for infringement of this right. The chapter considers the right to human dignity as a constitutional right and how this right is given effect in the online realm. It traverses jurisprudence on the right to dignity and the internet, with a particular interest in matters involving social media groups and group administrators. Focus is also placed on enforcement of the right to human dignity and the role of institutions in achieving this goal. Beyond that, the chapter looks at how the legal framework for the

right to dignity works with other laws, like the ECTA¹²⁷ and the Cybercrimes Act.¹²⁸ These laws have an effect on how certain issues are regulated online.

Chapter four considers how the right to dignity has been given effect online in selected jurisdictions (Canada and Australia). The relevant laws, jurisprudence, and institutions are taken into account. In this chapter, a method similar to that used in Chapter three is used. The hope is that by doing so, South Africa will be able to learn from these countries.

Chapter 5 concludes with recommendations.



¹²⁷ Electronic Communications and Transactions Act 25 of 2002.

¹²⁸ Cybercrimes Act 19 of 2020.

CHAPTER TWO

INTERNATIONAL FRAMEWORK

2.1 Introduction.

Several international and domestic law jurisdictions recognise the right to dignity as a foundational and indispensable right worthy of protection.¹²⁹ Among them are the various United Nations resolutions, conventions, treaties, and constitutions. Some of these treaties and conventions will be briefly stated, and the various provisions that recognise human dignity will be highlighted. Their ratification status, reservations, and declarations in relation to South Africa will be mentioned, as will the implications for South Africa.

2.2. Universal Declaration of Human Rights.

The UDHR recognises human dignity as an inherent and fundamental right.¹³⁰ It asserts in the first clause of its preamble that the inherent dignity of all members of the human family is the foundation of a peaceful and just society.¹³¹ Article 1 of the UDHR recognises and affirms that all human beings are born free and equal in dignity and rights.¹³² This means that all humans are born free and with unique thoughts and ideas. All humans should be treated equally. The document also forbids any attack on one's honour or reputation.¹³³ The document reiterates the foundational nature of the right to human dignity by providing additional rights based on the inherent right to dignity of human beings, thereby reinforcing and upholding our dignity.

¹²⁹ Steinmann A 'the Core Meaning of Human Dignity' (2016) 19 *PELJ* 1.

¹³⁰ Hughes G 'the Concept of Human Dignity in the Universal Declaration of Human Rights' (2011) 39(1) *JRE* 4.

¹³¹ Universal Declaration of Human Rights, preamble.

¹³² Universal Declaration of Human Rights, Art 1.

¹³³ Universal Declaration of Human Rights, Art 12.

The rights to life, liberty, and personal security,¹³⁴ as well as the right to be free from torture and other forms of ill-treatment,¹³⁵ are built on and extend the inherent right to dignity. The rights to life, liberty, and personal security affirm that we all have the right to life and to live in freedom and security.¹³⁶ The right to life is a prerequisite for the enjoyment of all other human rights.¹³⁷ The right to life (and dignity) is the most important of all human rights and the source of all other personal rights.¹³⁸ The right to be free from torture and ill treatment is absolute and can never be taken away from anyone.¹³⁹ Torture is regarded as one of the most heinous violations of human rights¹⁴⁰ and a heinous assault on the right to human dignity.¹⁴¹

Furthermore, the right to be recognised as a person in the eyes of the law,¹⁴² as well as the right to be free from interference in these human rights,¹⁴³ reinforce and sustain the right to dignity. The right to be recognised as a person before the law includes the right to be treated equally before courts, tribunals, and all other organs or authorities that administer justice.¹⁴⁴ It also includes the right to exercise and promote human rights, the right to an effective remedy, and the right to be protected in the event that these rights

¹³⁴ Universal Declaration of Human Rights, Art 3.

¹³⁵ Universal Declaration of Human Rights, Art 5.

¹³⁶ Universal Declaration of Human Rights, Art 3.

¹³⁷ United Nations Human Rights Council 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' A/HRC/26/36, 1 April 2014 para 42 (hereafter United Nations right to protection from arbitrary deprivation of life).

¹³⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC), para 144.

¹³⁹ United Nations Human Rights Council 'Torture and other cruel, inhuman or degrading treatment or punishment' A/HRC/43/49, 20 March 2020, para 11; International Covenant on Civil and Political Rights, Art 6.

¹⁴⁰ United Nations Human Rights Council 'Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,' 2006 General Assembly Resolution A/RES/57/199 (22 June 2006), preamble.

¹⁴¹ United Nations Human Rights Council 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment' 1975 General Assembly Resolution A/RES/3452(XXX), 9 December 1975, Art 2.

¹⁴² Universal Declaration of Human Rights, Art 6.

¹⁴³ Universal Declaration of Human Rights, Art 30.

¹⁴⁴ United Nations Human Rights Council 'Declaration on the human rights of individuals who are not nationals of the country in which they live,' 1985 General Assembly Resolution A/RES/40/144 (13 December 1985) Art 5(c) (hereinafter United Nations Declaration on Human Rights of individuals).

are violated.¹⁴⁵With these rights, an individual has the right to be protected by the law and to be able to enforce his or her rights,¹⁴⁶ including fundamental rights such as the right to dignity.¹⁴⁷

In other words, all human beings have the right to all human rights as well as the protection of the law.¹⁴⁸ Being recognised as a person before the law allows one to enjoy and exercise the rights associated with human dignity. The right to non-interference affirms that all human rights and fundamental freedoms of individuals and peoples are inalienable.¹⁴⁹ And that "the state has the primary responsibility and duty to promote and protect human rights and fundamental freedoms."¹⁵⁰ Individuals, groups, and associations have the right and obligation to promote respect for and knowledge of human rights and fundamental freedoms at the national and international levels.¹⁵¹

Other rights that reinforce the right to dignity are the right to privacy¹⁵² and the right to social order.¹⁵³ The right to privacy is an expression of human dignity and is linked to the protection of human autonomy and personal identity.¹⁵⁴ It allows us to define who we are and how we want to interact with others. Similarly, the right to social and international order allows us to enjoy a variety of human rights.¹⁵⁵ It obligates the state to respect,

¹⁴⁵ United Nations Human Rights Council 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms' 1998 General Assembly Resolution A/RES/53/144 (9 December 1998), Art 9 (hereafter Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society).

¹⁴⁶ United Nations Declaration on Human Rights of individuals, preamble.

¹⁴⁷ Universal Declaration of Human Rights, preamble.

¹⁴⁸ Universal Declaration of Human Rights, Art 7.

¹⁴⁹ United Nations Human Rights Council 'Alternative approaches and ways and means within the United Nations systems for improving the effective enjoyment of Human Rights and Fundamental freedoms' 1977 General Assembly Resolution A/RES/32/130 (16 December 1977) para 1(a) and 1(c). (hereinafter United Nations systems for improving the effective enjoyment of Human Rights).

¹⁵⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society, preamble.

¹⁵¹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society, preamble.

¹⁵² Universal Declaration of Human Rights, Art 12.

¹⁵³ Universal Declaration of Human Rights, Art 28.

¹⁵⁴ Human Rights Council 'Report on the Right to Privacy in the Digital Age' 2021 A/HRC/48/31 (6 April 2022) para 7.

¹⁵⁵ United Nations systems for improving the effective enjoyment of Human Rights para 1(f).

protect, and realise our rights, as well as to create a society that respects the dignity of all people.¹⁵⁶

The UDHR document was ratified by the General Assembly of the UN by a vote of 48 to 0, and the Union of South Africa was one of the eight-member states that abstained.¹⁵⁷ However, the Republic of South Africa now fully supports the principles underlying the document.¹⁵⁸ The Republic is currently a member of the UN and the African Union. It has, as a state party or signatory, ratified¹⁵⁹ many UN Human Rights Conventions which have adopted the principles proclaimed in the Charter of the UN;¹⁶⁰ and has the obligation to give effect to the rights proclaimed in these treaties and conventions, through legislation, policies, programmes, and the creation of domestic remedies for their violation.¹⁶¹

2.3. The International Covenant on Economic, Social and Cultural Rights.

The ICESCR recognises dignity as an inherent right that all human beings possess simply by virtue of being human, and as a foundational right¹⁶² from which all other rights, such as the right to self-determination, health, and housing,¹⁶³ flow. Article 5 of the Covenant affirms the right to dignity's fundamental nature, stating that "nothing in the Covenant

¹⁵⁶ United Nations 'systems for improving the effective enjoyment of Human Rights', preamble & para 1(d).
¹⁵⁷ Hinds L 'Apartheid in South Africa and the Universal Declaration of Human Rights' (1985) 24 *JSTOR* 6.
¹⁵⁸ Both the Constitution of the Republic of South Africa and the UDHR share, promote and protect the rights to equality and freedom from discrimination of all people.
¹⁵⁹ United Nations Human Rights, 'status of ratification interactive dashboard' available at <https://indicators.ohchr.org/> (accessed on 17 July 2021).
¹⁶⁰ These include the ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination, Optional Protocol to the International Covenant on Civil and Political Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment et cetera.
¹⁶¹ UN Committee on Economic, Social and Cultural Rights, 1998 General Comment No. 9: The domestic application of the Covenant, E/C.12/1998/24 (3 December 1998) para 4-5.
¹⁶² International Covenant on Economic, Social and Cultural Rights, 1966 General Assembly Resolution 2200A (XXI) (1966), preamble (hereafter International Covenant on Economic, Social and Cultural Rights).
¹⁶³ International Covenant on Economic, Social and Cultural Rights Art 1, 6, 7 and 11.

shall be described as providing person or party the right or power to destroy or derogate from any of the rights or freedoms included therein, including the right to dignity."¹⁶⁴

The ICESCR came into effect in 1976 and was ratified by the South African Government on January 12th, 2015.¹⁶⁵ This means that South Africa is bound by the Covenant's rights and obligations. It also ensures that through promoting socio-economic rights, it can solidify its commitment to eliminating poverty, ensuring social justice, and fostering dignity for all. South Africa is anticipated to join the increasing list of nations that have signed and approved the Optional Protocol to the ICESCR in the not-too-distant future.

2.4. The International Covenant on Civil and Political Rights.

The ICCPR also recognises human dignity as an inherent and foundational right.¹⁶⁶ The covenant document states in its preamble that human dignity is an inherent right that all human beings have.¹⁶⁷ The Covenant stated in Article 10 that the right to human dignity must be respected even when one is denied liberty.¹⁶⁸ Furthermore, it held that several other rights flow from the basic right to dignity,¹⁶⁹ such as the inherent right to life that every human being possesses.¹⁷⁰ It also prohibits any treatment or conduct that diminishes this right to dignity, by stating that no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment;¹⁷¹ and that no one shall be subjected to unlawful attacks on his honour and reputation; or arbitrary or unlawful interference with

¹⁶⁴ International Covenant on Economic, Social and Cultural Rights, Art 5.

¹⁶⁵ United Nations Human Rights, 'status of ratification interactive dashboard' available at <https://indicators.ohchr.org/> (accessed on 7 April 2022).

¹⁶⁶ International Covenant on Civil and Political Rights, 1966 General Assembly Resolution 2200A (XXI) (1966), Art 10(1). (hereafter International Covenant on Civil and Political Rights).

¹⁶⁷ International Covenant on Civil and Political Rights, preamble.

¹⁶⁸ International Covenant on Civil and Political Rights, Art 10.

¹⁶⁹ International Covenant on Civil and Political Rights, preamble.

¹⁷⁰ International Covenant on Civil and Political Rights, Art 6.

¹⁷¹ International Covenant on Civil and Political Rights, Art 7.

his privacy, family, home, or correspondence;¹⁷² and that these human dignity rights are non-derogative rights.¹⁷³

The ICCPR entered into force on March 23, 1976, and was ratified by the South African government on January 12, 1998.¹⁷⁴ This document, like every other covenant to which South Africa is a party or signatory, creates rights and international obligations that are binding on the Republic and other state parties.¹⁷⁵ Furthermore, South Africa ratified the Optional Protocol to the ICCPR in 2002,¹⁷⁶ which serves as a mechanism by which parties (to the covenant) have agreed that the UNHRC has the competence to consider complaints from individuals who claim their rights under this Covenant have been violated and that all local remedies have been exhausted.¹⁷⁷

2.5. African Charter on Human and Peoples' Rights (ACHPR).

The document refers to the UDHR and the UN Charter in its third preambular paragraph, which recognises the right to dignity of every human being as an inherent right that must be protected.¹⁷⁸ Article 4 states that every human being has the right to integrity of person and respect for their life,¹⁷⁹ and that no one can be arbitrarily denied this right.¹⁸⁰ It went on to say that everyone has the right to respect the dignity that each and every human

¹⁷² International Covenant on Civil and Political Rights, Art 17.

¹⁷³ International Covenant on Civil and Political Rights, Art 4 (1).

¹⁷⁴ United Nations Human Rights, 'status of ratification interactive dashboard' available at <https://indicators.ohchr.org/> (accessed on 7 April 2022).

¹⁷⁵ International Covenant on Civil and Political Rights, Art 2.

¹⁷⁶ United Nations Human Rights, 'status of ratification interactive dashboard' available at <https://indicators.ohchr.org/> (accessed on 7 April 2022).

¹⁷⁷ Optional Protocol to the International Covenant on Civil and Political Rights 1966 General Assembly resolution 2200A (XXI) (1966), Art 1 -2.

¹⁷⁸ African Union 'African Charter on Human and Peoples' Rights' available at <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed on 23 July 2021), preamble.

¹⁷⁹ Banjul Charter, Art 4.

¹⁸⁰ Banjul Charter, Art 4.

being possesses. Torture and cruel, inhumane, or degrading treatment are all prohibited forms of exploitation and degradation.¹⁸¹

The document also affirms other rights that reinforce and sustain the right to dignity. These include the rights to be free from discrimination on any basis in exercising the rights and freedoms guaranteed by the Charter;¹⁸² the right to equality before the law and equal protection under the law;¹⁸³ the right to liberty and the security of one's person, as well as freedom from arbitrary arrest or detention;¹⁸⁴ the right of peoples to equality¹⁸⁵ and the right of all peoples to exist, including the right to self-determination.¹⁸⁶

The document entered into force on October 21, 1986,¹⁸⁷ and was ratified by South Africa, which is also a member of the Organisation of African Unity (OAU), on July 9, 1996.¹⁸⁸ This establishes rights as well as international obligations that bind all state parties, including South Africa.¹⁸⁹ Furthermore, on July 3rd, 2002, South Africa ratified the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights.¹⁹⁰ This additional document aims to achieve the ACHPR's objectives by supplementing and reinforcing the functions of the African Commission on Human and

¹⁸¹ Banjul Charter, Art 5.

¹⁸² Banjul Charter, Art 2.

¹⁸³ Banjul Charter, Art 3.

¹⁸⁴ Banjul Charter, Art 6.

¹⁸⁵ Banjul Charter, Art 19.

¹⁸⁶ Banjul Charter, Art 20.

¹⁸⁷ African Union 'African Charter on Human and Peoples' Rights' available at <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed on 23 July 2021).

¹⁸⁸ African Union 'list of countries which have signed, ratified/acceded to the African charter on human and people's rights <https://au.int/sites/default/files/treaties/36390-sl-african-charter-on-human-and-peoples-rights-2.pdf> (accessed on 23 July 2021)

¹⁸⁹ Banjul Charter, Art 25.

¹⁹⁰ African Union 'Protocol to the African Charter on Human and Peoples' rights on the establishment of an African Court on Human and Peoples' Rights' available at <https://au.int/sites/default/files/treaties/36393-sl-protocol-to-the-african-charter-on-human-and-peoplesrights-on-the-estab.pdf> (accessed on 23 July 2021).

Peoples' Rights,¹⁹¹ which include ensuring the protection of human and peoples' rights under the ACHPR's conditions.¹⁹²

2.6. Special Rapporteur on minority issues.

The Rapporteur on minority issues approached and reported on the issue of the human right to dignity in light of threats to it as well as violations on social media.¹⁹³ Such violations include hate speech or advocacy of hatred, incitement to violence, and discrimination.¹⁹⁴ The Special Rapporteur observed and stated that the impact of social media today on the spread of hate speech constituted grave violations of the rights of millions of people (particularly minorities) and even threatened their life and safety.¹⁹⁵

What makes matters worse is the lack of effective legal and other responses by public authorities and the owners of social media platforms to hold those who use such platforms to perpetuate such massive atrocities and violations of human rights accountable.¹⁹⁶ These flaws manifest themselves as a lack of enforcement of legislation protecting the right to dignity by prohibiting hate speech, or as legislation that is onerous or too vague to be successfully invoked for prosecution. Similarly, the lack of accurate data on hate speech cases on social media, as well as victims' unwillingness to cooperate, contribute to the lack of accountability.¹⁹⁷

The Special Rapporteur made recommendations on how to protect the right to dignity in the face of threats and violations. One of these is that states must pass legislation

¹⁹¹ This includes the rights which have right to dignity as their foundation; such as the right to life, right to freedom from discrimination, right to equality before the law and prohibition of torture

¹⁹² Banjul Charter, Art 45.

¹⁹³ United Nations Human Rights Council 'Report of the Special Rapporteur on minority issues' A/HRC/46/57 3 March 2021, para 23 (hereafter United Nations *Minority issues*).

¹⁹⁴ United Nations *Minority issues* (2021), para 21, 27 & 34.

¹⁹⁵ United Nations *Minority issues* (2021), para 47.

¹⁹⁶ United Nations *Minority issues* (2021), para 46.

¹⁹⁷ United Nations *Minority issues* (2021), para 46.

prohibiting certain types of hate speech, such as the prohibition of any advocacy of national, ethnic, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence, as well as the criminalisation of incitement to genocide on social media.¹⁹⁸This national legislation must, *inter alia*, require social media platforms to implement policies and protocols to identify hate speech in its various forms while respecting individuals' right to privacy.¹⁹⁹

2.7. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

The Special Rapporteur emphasised that the right to dignity (reputation) can also be protected by enforcing permissive restrictions on freedom of expression as enshrined in the ICCPR²⁰⁰and the Convention on the Prevention and Punishment of the Crime of Genocide.²⁰¹This permissive restriction (on expression) may be invoked and implemented only when required by law to respect the rights or reputations of others, or to protect national security, public order, public health, or morals.²⁰²The conditions for this limitation, namely legality, legitimacy, necessity, and proportionality, must always be met.²⁰³In other words, the limitation of some rights can be justified when the goal is to protect, among other things, the right to dignity (reputation). Much of this demonstrates the importance of the right to dignity, which is an inalienable and fundamental right that everyone has.

¹⁹⁸ United Nations *Minority issues* (2021) para 85.

¹⁹⁹ United Nations *Minority issues* (2021) para 88.

²⁰⁰ International Covenant on Civil and Political Rights Art 19 (2) and 20.

²⁰¹ Convention on the Prevention and Punishment of the Crime of Genocide, 1948 General Assembly resolution 260 A (III) (1951) Art 3(c).

²⁰² United Nations Human Rights Council 'Report of the Special Rapporteur on the Promotion and protection of the right to freedom of opinion and expression' A/74/486 9 October 2019 para 6 (hereafter United Nations Human *Right to freedom of opinion and expression*).

²⁰³ United Nations Human *Right to freedom of opinion and expression* para 11.
See also International Covenant on Civil and Political Rights, Art 19 (3).

2.8. Some African Countries and the right to human dignity.

Since 1990, several African countries have enacted human dignity as a right, with it explicitly recognised and protected in their constitutions. The Ivory Coast Constitution states that everyone has the right to be treated with dignity and to be recognised as a person in the eyes of the law.²⁰⁴ Similarly, Ethiopia's Constitution states that everyone has the right to have their human dignity, reputation, and honour respected,²⁰⁵ and that all people who are detained or imprisoned as a result of a conviction or sentence have the right to be treated with dignity.²⁰⁶ The Nigerian Constitution states that every individual has the right to have his or her dignity respected and protected;²⁰⁷ similarly, the constitutions of Kenya,²⁰⁸ Togo,²⁰⁹ and Tanzania²¹⁰ state that everyone has inherent dignity and the right to have that dignity respected and protected. South Africa has also enacted the right to dignity as a non-derogable²¹¹ constitutional right²¹² as well as a constitutional value.²¹³

One can conclude that the right to dignity has received greater global recognition and protection, as evidenced by international law, treaties, conventions, and national legislation, as well as the various nations that have signed on to them. Although implementation has been inadequate in many cases to ensure enforcement of the right and hold those who violate the obligation accountable, there is a framework in place to

²⁰⁴ Constitution of the Republic of Ivory Coast 2016, Art 2.

²⁰⁵ Constitution of the Federal Democratic Republic of Ethiopia 1995, Art 24(1).

²⁰⁶ Constitution of the Federal Democratic Republic of Ethiopia 1995, Art 21(1).

²⁰⁷ Constitution of the Federal Republic of Nigeria 1999, para 34(1).

²⁰⁸ Constitution of Kenya 2010, Art 28.

²⁰⁹ Constitution de la IVe République [Togo] 1992, Art 28.

²¹⁰ Constitution of The United Republic of Tanzania 1995, Art 12(2).

²¹¹ Constitution of the Republic of South Africa 1996, s 37(5) (c) [see table].

²¹² Constitution of the Republic of South Africa 1996, s 10.

²¹³ Constitution of the Republic of South Africa 1996, s 1(a) and 7(1).

ensure the protection of the right to dignity. In addition, several countries have demonstrated a willingness to strengthen the protection of the right to dignity in their national legal frameworks. All of this points to the undeniable fact that the right to dignity is a universal right that deserves to be protected. The following chapter will look at how South Africa has incorporated the protection of the right to dignity into its legal framework.



CHAPTER THREE

SOUTH AFRICAN LEGISLATIVE POSITION ON THE RIGHT TO DIGNITY AND THE LIABILITY FOR ITS INFRINGEMENT.

3.1. Introduction.

The concept of *dignitas* encompasses several judicially recognised concepts such as the right to privacy, right to identity, right to feelings and the right to dignity.²¹⁴ Although these rights relate to *dignitas*, they do not equate *dignitas*. Rather they are delimited within the concept of *dignitas*.²¹⁵ For instance, the right to dignity and privacy were separately recognised and protected within the South African Constitutional framework.

This chapter proceeds to discuss the right to dignity as a distinct constitutional right and value, as well as the constitutional framework for the limitation of rights, including the right to dignity as an independent personality right. In addition, other legislative provisions in South African law that directly or indirectly protect the right to dignity, as well as the criterion for imputation of liability for its violation, will be discussed.

3.2. Constitutional legal framework.

The right to dignity is legislatively recognised in South Africa as a Constitutional value and an independent personality right. According to the Constitution,²¹⁶ human dignity is a founding constitutional value as well as a democratic value²¹⁷ that must be promoted when interpreting other rights²¹⁸ and considered during the limitation inquiry of other

²¹⁴ Neethling J Potgieter JM & Roos A *Neethling on Personality Rights* 3 ed (2019) 270-271.

²¹⁵ Neethling J, Potgieter JM & Roos A (2019) 309.

²¹⁶ Constitution of the Republic of South Africa 1996.

²¹⁷ Constitution of the Republic of South Africa s 7(1).

²¹⁸ Constitution of the Republic of South Africa s 39 (1) (a).

rights.²¹⁹In *Dawood and Others v Minister of Home Affairs and Others*, the court defined dignity as a constitutional value that informs the adjudication and interpretation of other rights.²²⁰It seeks to contradict the failures of the past in which human dignity was denigrated based on race, and it seeks to create and envision a future based on the dignity of all human beings.²²¹

In *S v Makwanyane*, the court ruled that the right to dignity and the right to life were the most important of all human rights because they are the source of all other personal rights and were crucial to the case's outcome.²²² In *Le Roux v Dey*,²²³ the court stated that dignity is fundamental to the constitution and essential to the society to which we aspire.²²⁴ Human dignity, however, is recognised as an independent protected right in addition to being a constitutional value.²²⁵

The right to dignity is recognised as a separate and distinct right that is justiciable, enforceable, and inherent in all human beings.²²⁶ The Constitution guarantees every person "the right to respect for and protection of his or her dignity".²²⁷As the Constitutional Court stated in *S v Makwanyane*, the right to dignity is the recognition of human beings' intrinsic worth, and (human beings) are entitled to be treated as worthy of respect and concern.²²⁸ In *Teddy Bear Clinic for Abused Children and Others v Minister of Justice and Constitutional Development and Others*, the court held that it is the recognition of the

²¹⁹ Constitution of the Republic of South Africa s 36 (1).

²²⁰ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (2000) JOL 7063 (CC), para 18.

²²¹ *Dawood and Another v Minister of Home Affairs and Others*, para 35.

²²² *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC), para 722.

²²³ *Le Roux and Others v Dey* 2011 (3) SA 274 (CC).

²²⁴ *Le Roux and Others v Dey* (2011), para 202.

²²⁵ Neethling J & Potgieter JM *Law of Delict* 8 ed (2020) 420.

²²⁶ *Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others* (2000) JOL 7063 (CC), para 19.

²²⁷ Constitution of the Republic of South Africa, s 10.

²²⁸ *S v Makwanyane and Another*, para 328 – 329.

inherent worth of all individuals (including children) as members of our society, as well as the value of the choices that they make.²²⁹ This right to dignity, however, is not an absolute right.²³⁰

3.2.1. *Limitation of rights.*

The right to dignity is not without limitations.²³¹ This restriction is imposed to avoid conflicts with other rights or with certain general interests.²³² Section 36 of the Constitution²³³ limits constitutional rights enshrined in the Bill of Rights, including those not expressly prohibited by Section 16(2) of the Constitution. The limitation of rights is based on two fundamental principles: first, that not all rights can or should be protected in absolute terms;²³⁴ and second, that the limitation of these rights must be done in accordance with the requirements outlined in the Constitution.²³⁵ These requirements as set forth demand that the limitation of rights may be done only in terms of law of general application and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²³⁶

The requirements of general applicability, reasonableness, and justifiability make up the "threefold test formula"²³⁷ with which the courts assess whether a limitation is lawful. The

²²⁹ *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and others* (2013) JOL 30845 (CC), para 52.

²³⁰ van Staden M 'Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa' (2020) 20 *AHRLJ* 488 & 491; Section 7(3) of the Constitution provides: "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

²³¹ *Minister of Home Affairs and Others v Watchenuka and Another* (2003) JOL 12158 (SCA), para 28.

²³² Makarim E, Brata M & Arsyafira N "Limitation of Rights as a Manifestation of Duties and Responsibilities Pertaining to the Freedom Expression in Digital Communications" (2019) 9(3) *Indonesia law review* 280.

²³³ Constitution of the Republic of South Africa, s 36.

²³⁴ Ahmed D & Bulmer E "Limitation Clauses" (2014) Stockholm: International *IDEA* at 6.

²³⁵ Rautenbach I 'Proportionality and The Limitation Clauses of The South African Bill of Rights' (2014) 17(6) *PELJ* 2248.

²³⁶ Constitution of the Republic of South Africa, s 36(1).

²³⁷ Rautenbach I (2014) 2240.

law of general application requires all limitations to be authorised by legal rules²³⁸ and to apply to all people, not just one or a group of people.²³⁹ The requirements of reasonableness and applicability imply that there are good reasons to limit the right, and that such a limitation can be justified in society.²⁴⁰ In determining whether the requirements of reasonableness and applicability have been met, the courts must examine the nature, extent, and purpose of the right and its limitation, as well as the rationality and proportionality of the limitation.²⁴¹ Furthermore, the courts must consider whether there are less restrictive ways to achieve the goal of the limitation.²⁴² When a court receives an allegation of a violation of a constitutional right, it must evaluate it against this formula.

This formula was applied in *Minister of Home Affairs and Others v Watchenuka and Another*.²⁴³ The court reasoned that limiting asylum seekers' rights to study and work passed the general application test because such a law can be inferred from Section 27 (f) of the Refugees Act, as well as constitutional provisions²⁴⁴ that limit citizens' right to enter and remain in the Republic, as well as their right to choose a trade, occupation, or profession. However, it failed the reasonableness and justifiability test (in this case) because it restricted the right to employment, which was viewed as the only reasonable means of a person's (a refugee's) support. This limitation limits one's ability to live without positive humiliation and degradation.²⁴⁵ The formula showed that the limitation was not justified.

²³⁸ Rautenbach I (2014) 2249.

²³⁹ De Waal J & Currie I "The Bill of Rights Handbook 6ed (2015) 156.

²⁴⁰ De Waal J & Currie I (2015) 162-163.

²⁴¹ Constitution of the Republic of South Africa, s 36(1) (a - d).

²⁴² Constitution of the Republic of South Africa, s 36(1) (e).

²⁴³ *Minister of Home Affairs and Others v Watchenuka and Another*, para 24 -36.

²⁴⁴ Constitution of the Republic of South Africa, ss 21 and 22.

²⁴⁵ *Minister of Home Affairs and Others v Watchenuka and Another*, para 32 -33.

Similarly, in *Dladla v City of Johannesburg*, the test was applied.²⁴⁶ In this matter, Mhlantla J had to decide whether the constraints imposed by the use of lockout and family separation rules²⁴⁷ justified infringing on the applicants' rights to dignity, freedom and security of the person, and privacy. Initially, the court determined that these rights were implicated²⁴⁸ and limited.²⁴⁹ The court then used the formula to determine that the challenged lockout rules did not meet the test of "law of general application" because they were imposed by a contract between the City of Johannesburg and the Metropolitan Evangelical Services (MES). Third parties were not bound by the contract because it was a private agreement.²⁵⁰ As a result, the application of the challenged rules was unjustified.²⁵¹ Several laws give effect to the provisions of Section 10 of the Constitution.

3.3. Statutory framework giving effect to the right to dignity.

The right to dignity is enshrined in the Bill of Rights.²⁵² When there is a violation of dignity, our common law of delict is invoked. This violation can occur when a constitutionally protected right, particularly the right to express oneself, is exercised in a way that exceeds the limitations of that right. This can result in the slander of someone else's good name or reputation. To protect one's dignity, the law of defamation is invoked.

In *Le Roux v Dey*, Jacob J ruled that defamation law is intended to protect a person's dignity and privacy by compensating the victim for any publication that harms his or her

²⁴⁶ *Dladla and others v City of Johannesburg and another* (Centre for Applied Legal Studies and another as amici curiae) [2017] JOL 39329 (CC).

²⁴⁷ Rules 3 and 4 of the Ekuthuleni Overnight/Decant Shelter House Rules.

²⁴⁸ *Dladla and others v City of Johannesburg and another*, para 42.

²⁴⁹ *Dladla and others v City of Johannesburg and another*, para 47 – 51.

²⁵⁰ *Dladla and others v City of Johannesburg and another*, para 52.

²⁵¹ *Dladla and others v City of Johannesburg and another*, para 53.

²⁵² Constitution of the Republic of South Africa, s 10.

good name or reputation.²⁵³ As a result, one of the legislative frameworks protecting the right to dignity is the Law of Defamation.²⁵⁴

3.3.1 *Law of defamation.*

The law of defamation, which derives from Roman law and is based on action injuriarum, gives a person the right to sue for damages if his or her right to dignity has been violated by the unlawful act of another person.²⁵⁵ Burchell defined defamation as the unlawful, intentional publication of defamatory matter (by words or conduct) about the plaintiff that harms his reputation.²⁵⁶ Similarly, Papadopoulos *et al* define it as any intentional publication of words or behaviour relating to another that tends to undermine that person's status, good name, or reputation.²⁵⁷ These definitions include the elements that must be proven in a defamation suit.

3.3.1.1. *Elements of the law of defamation.*

Certain elements must be present for a person to succeed in a delictual claim of defamation. The elements include wrongfulness and intentional publication of a defamatory statement about the plaintiff.²⁵⁸ These elements fit into the general principles of delict law, whereby publication falls under conduct, intention falls under fault, defamatory statements fall under causation and damage (harm to dignity), and wrongfulness falls under wrongfulness or unlawfulness.

²⁵³ *Le Roux and Others v Dey* (2011), para 31.

²⁵⁴ Davey R & Dahms-Jansen L *Social Media in the Workplace* (2017) 100 (hereinafter Davey & DahmsJansen *Social Media in the Workplace*).

²⁵⁵ *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), para 17.

²⁵⁶ Burchell J (1985) 35.

²⁵⁷ Papadopoulos S & Snail S *Cyberlaw @ SA III: the law of the internet in South Africa* 3 ed (2018) 252.

²⁵⁸ *Le Roux and Others v Dey* (2011), para 54.

3.3.1.1.1. Wrongfulness.

Wrongfulness, as a component of defamation, is a violation of a person's legally protected right to dignity, which includes the right to a good name and reputation.²⁵⁹ The objective "reasonable person" test will be the proper test for unlawfulness or wrongfulness.²⁶⁰ The application of this objective test of wrongfulness is considered in relation to whether the conduct (the publication) itself is defamatory, as it is rebuttably presumed that the publication of material that is defamatory of the plaintiffs is intentionally (*animo iniuriandi*) and is wrongful/unlawful.²⁶¹

This application entails that a judicial determination must be made as to "whether it would be reasonable to impose liability on a defendant for the damages or harm flowing from the specific conduct. This determination would be made by testing the conduct of the alleged wrongdoer against the legal convictions of the community, which are by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution,²⁶² "to determine wrongfulness.

Simply put, determining whether a statement is defamatory involves a two-fold inquiry.²⁶³ First, the meaning of the words used must be established. Second, one must consider whether that meaning was defamatory in the sense that it was likely to harm the plaintiff's reputation among the reasonable or average person to whom the statement was published.²⁶⁴

²⁵⁹ Burns Y de Beer T & Sadleir E *Communications Law* 3 ed (2015) 203.

²⁶⁰ *Dendy v University of the Witwatersrand & others* (2007) JOL 19536 (SCA), para 6.

²⁶¹ *Rapp Van Zyl Inc and Others v Firststrand Bank And Others* 2022 (5) SA 245 (WCC) para 61.

²⁶² *Oppelt v Department Of Health Western Cape* (2016) 1 SA 325 (CC), para

²⁶³ *Le Roux and Others V Dey* (2010) 4 SA 210 (SCA) para 5.

²⁶⁴ *Economic Freedom Fighters and others v Manuel* para 30.

In *Le Roux and Others v Dey*,²⁶⁵ which was an appeal application against the decisions of the court a quo²⁶⁶ where the respondent, a deputy principal at a high school in Pretoria filed two claims for sentimental damages under the *actio iniuriarum* for insult (injury to dignity) and defamation (injury to reputation) against three school learners (the applicants).²⁶⁷ The Applicants published manipulated pictures of the Respondent and the principal of the school depicting them both naked and sitting alongside each other with their hands indicative of immoral conduct or stimulation. The school crests were superimposed over their genital areas.

On deciding the appeal, the court had to make a determination on the wrongfulness of the publication. To begin, the court reiterated the trite principle that the issue of wrongfulness and intention can be rebuttably present in conduct (publication) only if the publication is defamatory.²⁶⁸ The court then proceeded to interpret the meaning of the alleged statement (image), taking into account all relevant circumstances and whether such interpretation would convey to a reasonable observer²⁶⁹ a defamatory meaning.

In determining the meaning of the conduct, and because it was a publication of an image, the court took a two-pronged approach, first describing the image and then deciphering the message that the image conveys in words²⁷⁰ to ascertain whether it is defamatory. To this end, the court rejected the description of the image as two men engaged in immoral conduct.²⁷¹ Instead, it described the image as that which shows that the men in the photograph that was used to create the image had been engaged in immoral conduct

²⁶⁵ *Le Roux and Others v Dey* (2011) 3 SA 274 (CC).

²⁶⁶ *Dey v Le Roux en Andere* (GNP case No 21377/06, 28 October 2008), unreported, and *Le Roux v Dey* (2010) 4 SA 210 (SCA).

²⁶⁷ *Le Roux and Others v Dey* (2011) paras 1 -20.

²⁶⁸ *Le Roux and Others v Dey* (2011) para 36.

²⁶⁹ *Le Roux and Others v Dey* (2011) para 57.

²⁷⁰ *Le Roux and Others v Dey* (2011) para 60.

²⁷¹ *Le Roux and Others v Dey* (2011) para 61.

in that photograph.²⁷² It further described the image as that which shows the heads of two men put on the bodies of other men who had been engaged in immoral conduct before the heads were transposed.²⁷³

On the question of what message the image conveyed, the court held that it conveyed nothing more than an immature reaction of a vulnerable child to authority.²⁷⁴ The presence of a school badge in the image reinforces the message that the image is merely an expression of children's feelings about the exercise of authority at school.²⁷⁵ In other words, the image conveys the expression of how young children who are dissatisfied with the way authority is exercised at school react to such authority.²⁷⁶

On testing the conduct against public and legal policy in accordance with constitutional norms, the Court argued that an ordinary reasonable person in the same position and with similar years of experience as the respondent would be motivated by the values of the Constitution.²⁷⁷ Such a person would understand that children need to express their feelings, understand that such an image is simply an expression of children's feelings and nothing more than a reaction to authority, would not be overly sensitive, and would strive to strike a balance between over-sensitivity and unsensitivity.²⁷⁸

The court concluded that the Respondent was more sensitive than a reasonable deputy principal would be.²⁷⁹ The court held that the meaning of the image was neither

²⁷² *Le Roux and Others v Dey* (2011) para 61.

²⁷³ *Le Roux and Others v Dey* (2011) para 61.

²⁷⁴ *Le Roux and Others v Dey* (2011) para 64(3).

²⁷⁵ *Le Roux and Others v Dey* (2011) para 64(4).

²⁷⁶ *Le Roux and Others v Dey* (2011) para 65.

²⁷⁷ *Le Roux and Others v Dey* (2011) para 71.

²⁷⁸ *Le Roux and Others v Dey* (2011) para 71

²⁷⁹ *Le Roux and Others v Dey* (2011) para 74.

defamatory nor injurious to the image of the Respondent, and that wrongfulness has not been established.²⁸⁰

The court also held that imposing liability on the Applicants would be unreasonable because, even if the respondent experienced any hurtful feelings as a result of the image publication, the hurt is not sufficiently serious to justify a claim for damages.²⁸¹ This is because the conduct (expression) was essentially that of a powerless child in the process of growth and development in response to authority being exercised at school.²⁸²

In *Economic Freedom Fighters and Others v Manuel*, the court, in determining the wrongfulness of the statement made against the respondent, followed the two-fold enquiry method.²⁸³ The court held that an analysis of the words²⁸⁴ of the statements showed that they had defamatory meaning²⁸⁵ and that they were defamatory of the Respondent, in that the effect of these statements would, in the eyes of a reasonable reader, diminish the esteem in which any person about whom they were made.²⁸⁶

Finally, regarding wrongfulness, it should be noted that the plaintiff alleging defamation bears the burden of proof, and he or she must provide evidence to show that the infringement of the right was indeed wrongful.²⁸⁷ Wrongfulness does not always imply

²⁸⁰ *Le Roux and Others v Dey* (2011) para 78.

²⁸¹ *Le Roux and Others v Dey* (2011) para 73.

²⁸² *Le Roux and Others v Dey* (2011) para 73.

²⁸³ *Economic Freedom Fighters and Others v Manuel* para 30.

²⁸⁴ “That he (Manuel) was corrupt; nepotistic; conducted himself unlawfully; conducted 'secret interviews' and participated in a secretive process to select the new Sars Commissioner; that the secretive process was a deliberate attempt to disguise his familial relationship and business association with Mr Kieswetter; that he conducted an unlawful appointment process; and that he had previously made unlawful appointments to positions at Sars when he was Minister of Finance”; and “that Mr Manuel and Mr Mboweni were trying to impose on Sars someone with a dubious background involving corruption and unethical conduct.

²⁸⁵ *Economic Freedom Fighters and Others v Manuel* para 32-34.

²⁸⁶ *Economic Freedom Fighters and Others v Manuel* para 35.

²⁸⁷ This means that a plaintiff in a defamation action must show that the allegedly defamatory statements were made in reference to him or her. If a plaintiff is not directly referred to in the defamatory statement, he or she must allege the circumstances that would have led to his or her identification by the addressees.

that the statements or actions were false.²⁸⁸ True defamatory words may also be actionable.

3.3.1.1.2. *Intention.*

Intention falls under the fault requirement for defamation and can take two forms: intentional and negligent. Intention manifests itself as *animus iniuriandi*, or the desire to cause harm (defamation).²⁸⁹ The person who made the defamatory statements must have had the intent or desire to harm another person's reputation.²⁹⁰ Whether the defendant's conduct is expressed through statements or comments, he must have been aware of the wrongfulness of his actions.²⁹¹ This conduct must be aimed at causing harm to another person's good name or dignity.²⁹²

Negligence, on the other hand, has been identified as a fault requirement for certain types of defamation. In *Khumalo and Others v Holomisa*, the court had to decide whether media defendants should be allowed to overcome the presumption of intentional harm by demonstrating a lack of knowledge of wrongfulness, even if such a lack arose negligently. It reasoned that doing so would make it easier for media defendants to use the lack of knowledge of wrongfulness as a defence.²⁹³ The court then concluded that media defendants could not avoid liability solely by demonstrating ignorance of the illegality.

See *Isparta v Richter and another* (2013) 6 SA 529 (GNP), para 20; Neethling J, Potgieter JM & Roos A (2019) 211.

²⁸⁸ *Khumalo & others v Holomisa*, para 18.

²⁸⁹ *Khumalo and Others v Holomisa*, para 20.

²⁹⁰ Neethling J, Potgieter JM & Roos A (2019) 239-240.

²⁹¹ Neethling J, Potgieter JM & Roos A (2019) 241. In *Le Roux & others v Dey* (2010) JOL 25202 (SCA), para 39, the Supreme Court held that the *animus iniuriandi* requirement generally does not require consciousness of wrongfulness; but in *Le Roux & others v Dey* (2011), para 69 the Constitution Court 'ignored' that principle.

²⁹² *Le Roux & others v Dey* (2011) para 58.

²⁹³ *Khumalo & others v Holomisa*, para 19 – 20.

They would also have to demonstrate that they were not negligent.²⁹⁴ In other words, liability is found for a non-intentional but negligent mistake.

3.3.1.2. *Liability in defamation law.*

To establish liability, all of the elements of defamation do not have to be directly established.²⁹⁵ Once a plaintiff establishes that a defendant published a defamatory statement about the plaintiff, the publication is presumed to be both unlawful and intentional.²⁹⁶ If a defendant wishes to avoid liability for defamation, he or she must first raise a defence that refutes the unlawfulness or intent.²⁹⁷ As a result, publication is a critical factor in determining liability.

3.3.1.2.1. *Publication as a positive act.*

Publication in this context can take various forms. In *Le Roux v Dey*, the court defined publication as communicating or making known to at least one person other than the plaintiff.²⁹⁸ It can take the form of speech, print, or innuendo.²⁹⁹ In terms of internet publication, it can happen by posting a defamatory message in a website's discussion forum, on a Facebook wall, in WhatsApp groups,³⁰⁰ or on any other social networking platform.³⁰¹ A publication could also occur through the transmission of an email message, video conferencing, or file transfer via internet protocols.³⁰²

²⁹⁴ *Khumalo & others v Holomisa*, para 20.

²⁹⁵ *Khumalo and Others v Holomisa*, para 18.

²⁹⁶ *Khumalo & others v Holomisa*, para 18; see also *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* (1977) 3 SA 394 (A), para 401.

²⁹⁷ *Khumalo & others v Holomisa*, para 18.

²⁹⁸ *Le Roux and Others v Dey* (2011), para 86.

²⁹⁹ Papadopoulos S & Snail S (2018) 252.

³⁰⁰ Burns Y, de Beer T & Sadleir E (2015)592.

³⁰¹ Burns Y, de Beer T & Sadleir E (2015)530.

³⁰² Papadopoulos S & Snail S (2018) 252.

3.3.1.2.2. *Publication as omission.*

In addition to being a positive act, publication can also occur by omission.³⁰³ The term "omission" refers to the failure to act³⁰⁴ when there is a legal obligation to do so.³⁰⁵ In *Byrne v Deane*, a libel action in which a "lampoon,"³⁰⁶ which the plaintiff claimed referred to him and suggested was defamatory of him, was hung on a wall in the club where the defendants were proprietors and directors.³⁰⁷ The trial judge ruled that the defamatory material had been published.³⁰⁸ The appeal court had to decide, among other things, whether the (trial) judge was correct in ruling that the defendants had published these words.³⁰⁹

The court reasoned that the defendants, as club proprietors, and one (Mrs. Deane), as secretary, had the authority to remove the lampoon and were entitled to do so. However, by allowing the lampoon to remain on their wall and failing to remove it, they were consenting parties to the defamatory statement, knowing that if they did not remove it, it could be read by people passing by or entering the club, to whom it would convey the meaning that it did,³¹⁰ and thus participating in its publication.³¹¹ As a result, their failure to act is legally construed as a publication.

³⁰³ Burchell J (1985) 75.

³⁰⁴ Burchell J (1985) 75.

³⁰⁵ Burchell J (1985) 76.

³⁰⁶ The lampoon was typewritten and concluded with these words: "But he who gave the game away, may he byrnn in hell and rue the day."

³⁰⁷ *Byrne v Deane* (1937) (2) All ER 204.

³⁰⁸ *Byrne v Deane*, para 206.

³⁰⁹ *Byrne v Deane*, para 206.

³¹⁰ *Byrne v Deane*, para 206.

³¹¹ *Byrne v Deane*, para 207.

3.3.1.2.3. *Participatory publication.*

Another interesting form of publication occurs when a third party participates in the publication of a defamatory statement.³¹² Participation, in this context, refers to involvement in the process that allowed the libellous statement to become public. By being involved in the process, the third party, who is typically any other person or entity other than the author of the defamatory statement, is considered to have participated in the publication.³¹³ He or she is regarded as a co-publisher of the defamatory statement.³¹⁴

In the case of a newspaper with defamatory content, for example, the author is the primary publisher of the libellous statement. However, the editor, printer, publisher, and proprietor are all considered participants in the publication and can all be held liable for it as 'co-publishers'.³¹⁵ The reasoning behind this stance is that participation in the publication of a defamatory statement by another person creates a separate cause of action, which amounts to republication on the part of each of the participants involved.³¹⁶

Case law supports the reasoning underlying publication participation. In *National Education, Health and Allied Workers Union and Another v Tsatsi*, the appellants were held liable for the publication of a report to non-members of National Education, Health and Allied Workers Union (NEHAWU).³¹⁷ Although the appeal was upheld,³¹⁸ the court reasoned that, while it was undisputed that one or more of the NEHAWU members present at the meeting published the report to non-members, there was no evidence that

³¹² Burchell J (1985) 77-78.

³¹³ Papadopoulos & Snail S *Cyberlaw @ SA III* 252.

³¹⁴ Burns Y, de Beer T & Sadleir E (2015)198.

³¹⁵ Burchell J (1985)77.

³¹⁶ Van der Merwe *et al Information and Communications Technology Law* 2 ed (2015) 495.

³¹⁷ *National Education, Health and Allied Workers Union and another v Tsatsi* 2006 (1) All SA 583 (SCA), para 3 – 4.

³¹⁸ *National Education, Health and Allied Workers Union and another v Tsatsi*, para 17.

the appellants were directly responsible for the publication,³¹⁹ nor was there evidence that they authored or authorised the publication.³²⁰ This means that if the appellants were found to have authorised (or consented to) the report's publication, they would be considered participants in the publication and thus liable.

The same principle was affirmed in *African Life Assurance Society Ltd v Robinson & Co Ltd*.³²¹ In this matter, the court ruled that "a person who republishes a defamatory rumour without endorsing it cannot escape liability solely because he passes it on as a rumour."³²² This is because, by passing such a statement on, such a person is involved in the process of making the statement public and is legally regarded as its originator.³²³ The person assumes the role of a publisher; such behaviour gives rise to a separate cause of action.³²⁴ This participatory publication principle has been applied to publications that take place on social media platforms as will be shown below.

In *Dutch Reformed Church v Rayan Soknunan*, the court had to grapple with an application for an order interdicting the respondent from, among other things, publishing certain allegedly harmful allegations, comments, and personal information on the internet.³²⁵ The court held that anyone who creates a Facebook page has made available a public notice board and is, *ipso facto*, a co-publisher of any (unlawful) content posted therein by himself or any other known or unknown third party.³²⁶ This means that the people who create Facebook pages are involved in the posting of any content on their

³¹⁹ *National Education, Health and Allied Workers Union and another v Tsatsi*, para 15.

³²⁰ *National Education, Health and Allied Workers Union and another v Tsatsi*, para 16.

³²¹ *African Life Assurance Society Ltd, African Guarantee and Indemnity Co Ltd, African Consolidated Investment Corporation Ltd v Robinson and Co Ltd and Central News Agency Ltd* 1938 NPD

³²² *African Life Assurance Society Ltd, African Guarantee and Indemnity Co Ltd, African Consolidated Investment Corporation Ltd v Robinson and Co Ltd and Central News Agency Ltd*, para 302.

³²³ Van der Merwe et al (2015) 495-496.

³²⁴ Burns Y, de Beer T & Sadleir E (2015) 198.

³²⁵ *Dutch Reformed Church Vergesig Johannesburg Congregation and another v Rayan Soknunan t/a Glory Divine World Ministries* (2012) JOL 28882 (GSJ) (hereinafter *Dutch Reformed v Rayan Soknunan*), para 15.

³²⁶ *Dutch Reformed v Rayan Soknunan*, para 49.

pages,³²⁷ even if they are unaware of it. The same principle applies to group administrators of WhatsApp Social Media in relation to any content posted on the WhatsApp group they create or manage.

This begs the question: will the same be true for WhatsApp users? An operative question in this regard will be whether a user who reposts or forwards a defamatory statement on a platform is considered a co-publisher of the statement. In *Tsedu and Others v Lekota and another*, Nugent JA noted the principle of the repetitive rule, which states that when a defamatory statement is re-published by another person, that person becomes the originator.³²⁸ In other words, each time a defamatory statement is republished, a new cause of action arises for the republisher.

The plaintiff must allege and prove the publication of a defamatory statement.³²⁹ This publication must be made to someone other than the Plaintiff.³³⁰ While another person's republication of a defamatory statement creates a separate cause of action, the same person's republication does not. Instead, it may worsen the situation.

3.3.1.3. *Onus of proof.*

When the publication of a defamatory statement is established, the elements of wrongfulness and intent are presumed to be present.³³¹ In other words, the publication was made with the intent of causing harm (the *animus iniuriandi*).³³² The plaintiff must also establish that the defamatory material was directed at him or her.³³³ If a plaintiff is

³²⁷ *Dutch Reformed v Rayan Soknunan*, para 34-36.

³²⁸ *Tsedu and Others v Lekota and another*, para 5.

³²⁹ *Foodworld Stores Distribution Centre (Pty) Ltd and others v Allie* (2002) JOL 9639 (C), para 34

³³⁰ *Papadopoulos S & Snail S* (2018) 252.

³³¹ *Foodworld Stores Distribution Centre (Pty) Ltd and others v Allie* (2002) JOL 9639 (C), para 34.

³³² *Economic Freedom Fighters and others v Manuel* (Media Monitoring Africa Trust as amicus curiae) (2020) JOL 49196 (SCA), para 36.

³³³ *Neethling Potgieter & Roos Personality Rights* 215.

not directly referred to in a defamatory statement, the plaintiff must state the circumstances that would have led to his or her identification by the addressees.³³⁴

When this is accomplished, the onus will be on the publisher of the defamatory statement to establish either that the publication was not wrongful, or that it was not published with the required intent³³⁵ (or negligence in cases where the defendant is the press or media) to avoid liability.³³⁶ The onus on the defendant to rebut these presumptions is limited to adducing evidence, but it carries a full burden that must be discharged on a preponderance of probabilities.³³⁷

Similarly, if the defendant fails to discharge the burden of proof to rebut wrongfulness, intent, or negligence, the plaintiff is entitled to satisfaction from the defendant. If the plaintiff's financial loss is proven, an award of damages may be made. In cases where there is a continuing threat to the plaintiff's right to dignity, the plaintiff may also apply for an interdict, provided that the requirements for granting an interdict are met.³³⁸ Some defences can be raised to rebut the presumption of wrongdoing.

3.3.1.4. *Defences refuting liability.*

To avoid liability for defamation, the respondent may raise a defence that refutes unlawfulness or intent. This would include whether or not the publication: (1) was true and in the public interest;³³⁹ (2) was fair comment;³⁴⁰ (3) was made on a privileged

³³⁴ Roos A & Slabbert M "Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)" (2014) 17(6) *PELJ* 2853 (hereafter *Roos & Slabbert Defamation*).

³³⁵ *Economic Freedom Fighters and others v Manuel* para 36.

³³⁶ *Roos & Slabbert Defamation* (2014) 2852.

³³⁷ *Hardaker v Philips* 2005 (4) SA 515 (SCA), para 14.

³³⁸ *Papadopoulos S & Snail S* (2018) 264.

³³⁹ *Khumalo and Others v Holomisa*, para 18.

³⁴⁰ *Democratic Alliance v African National Congress and another* 2015 (2) SA 232 (CC), para 64.

occasion;³⁴¹ (4) the defamatory statement was made in jest;³⁴² or (5) the defamatory words were made in *rixa*.³⁴³

3.3.1.4.1. *The publication was a fair comment.*

The defendant may raise the defence that the publication was a fair comment.³⁴⁴ To be successful with this defence, the defendant must allege and prove that the defamatory publication was an opinion or comment rather than a statement of fact.³⁴⁵ He must demonstrate that the comment was fair and that the facts on which it was based were accurately stated.³⁴⁶ The comment must also be about a matter of public interest.³⁴⁷ The plaintiff may rebut this defence by alleging and proving, on the balance of probabilities, that the defendant acted with malice.³⁴⁸ The evidence used to prove malice may also be used to refute claims that the opinion was genuine and that the subject matter was of public interest.³⁴⁹

3.3.1.4.2. *Truth and public interest.*

The defendant may raise the defences of truth and public interest.³⁵⁰ This is accomplished by alleging and proving that the published statement was true and was made available for the public's benefit.³⁵¹ In relation to this defence, Brand JA held in *Modiri v Minister of Safety and Security and Others*³⁵² that if the truth and public interest

³⁴¹ *Khumalo and Others v Holomisa*, para 18.

³⁴² *Le Roux and Others v Dey*, (2011) para 113-115.

³⁴³ *Jeftha v Williams* 1981 (3) SA 678 (C) at 683; *Jasat v Paruk* 1983 (4) SA 728 (N) 733 – 734. *Rixa* means dispute or quarrel

³⁴⁴ Neethling J, Potgieter JM & Roos A (2019) 232.

³⁴⁵ Burchell J (1985)221.

³⁴⁶ *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC), para 37.

³⁴⁷ Burchell J (1985)221.

³⁴⁸ Burchell J (1985)230.

³⁴⁹ *Economic Freedom Fighters and others v Manuel*, para 38.

³⁵⁰ Neethling J, Potgieter JM & Roos A (2019) 226.

³⁵¹ *Economic Freedom Fighters and others v Manuel*, para 37.

³⁵² *Modiri v Minister of Safety and Security and Others* 2011 6 SA 370 (SCA).

were established in a defamatory case, this was sufficient to conclude the matter.³⁵³ The underlying reasoning behind this defence of truth and public interest was that a plaintiff was not entitled to recover damages for an injury to his reputation that he did not deserve. When establishing truth as a defence, it is not necessary for every word used to be proven true; it is sufficient for the majority of the statement to be true.³⁵⁴ To qualify as a public benefit, the statement or publication must inform the public of something they were unaware of and it was in their best interest to be aware of it.

3.3.1.4.3. *That the publication was made on a privileged occasion.*

Another defence available to the defendant is that of privileged occasion.³⁵⁵ This is a defence that sets aside the prima facie wrongfulness of the conduct of the defendant.³⁵⁶ It can be raised by the defendant if the defamatory statements were made in the course of performing a legitimate duty or in furtherance of a legitimate interest;³⁵⁷ or if a special type of relationship exists between the person making the defamatory statement and the person to whom the content was communicated (like in the case of an attorney-client relationship). The defendant must allege and prove the existence of a privileged occasion, as well as that his remarks or utterances were reasonably related to the object of the privilege.³⁵⁸ The plaintiff can show that the defendant took advantage of the privileged time by acting outside the bounds of the privilege, or that he did something else that was not allowed.³⁵⁹ An example of this would be when the defendant acted for reasons other than a sense of duty or the desire to protect a legitimate interest.

³⁵³ *Modiri v Minister of Safety and Security and Others*, para 11.

³⁵⁴ *Modiri v Minister of Safety and Security and Others*, para 13.

³⁵⁵ Neethling J & Potgieter JM (2020) 407.

³⁵⁶ Neethling J, Potgieter JM & Roos A (2019) 217.

³⁵⁷ Neethling J, Potgieter JM & Roos A (2019) 218.

³⁵⁸ Neethling J, Potgieter JM & Roos A (2019) 222.

³⁵⁹ *Vincent v Long* 1988 (3) SA 45 (C), para 14.

The right to dignity is also protected by other legislation that prohibits conduct that is harmful to the dignity of the human person. One of these acts is hate speech. Van der Merwe *et al*/ noted that hate speech is insulting and hurtful and infringes on the dignity of the people at whom it is directed.³⁶⁰In *Anc v Sparrow*, the Court ruled that hate speech violated the human dignity of those affected.³⁶¹These laws may not explicitly mention dignity protection, but they do protect interests whose violation would constitute a violation of the right to dignity. They accomplish this by regulating people's communications and interactions on the internet and social media. Several pieces of legislation prohibit hate speech.

3.3.2. *Films and Publication Act.*

This Act protects the right to dignity by prohibiting the publications that advocate hatred. Among other things, the Act defined publication as "any message or communication, including a visual presentation, placed on any distributed network, including, but not limited to, the Internet."³⁶²It prohibits any publication that advocates hatred based on any identifiable group characteristic and constitutes incitement to cause harm (unless it is a legitimate documentary).³⁶³It also prohibits any publication that depicts conduct that violates or shows disrespect for any person's right to human dignity,³⁶⁴or that degrades human beings; or that constitutes incitement, encouragement, or promotion of harmful behaviour. Such publications are classified as "refused classification" and "XX

³⁶⁰ Van der Merwe et al (2015) 543.

³⁶¹ *ANC v Sparrow* (2019) JOL 44908 (EqC), para 52.

³⁶² Films and Publications Act 65 of 1996, s 1.

³⁶³ Films and Publications Act s 16 (4) (a) (ii).

³⁶⁴ Films and Publications Act s 16 (4) (b) (i) to (iii).

publications" by the classification committee.³⁶⁵This protection is enforced by penalising defaulters with a fine or imprisonment or both.³⁶⁶

3.3.2.1. *Liability in terms of the Films and Publication Act.*

To found liability, among other elements, there must be publication or distribution of hate speech and it must be done knowingly. According to Van Der Merwe, a service provider with no knowledge of the content of the material cannot be held guilty of distributing hate speech.³⁶⁷On the other hand, this implies that a service provider who is aware that hate speech is being circulated on his or her platform but does nothing about it can be held liable. Similarly, a user who downloads hate speech but does not distribute it will not be held liable.³⁶⁸

3.3.3. *Promotion of Equality and Prevention of Unfair Discrimination Act.*

One of the main objectives of the Promotion of Equality and Prevention of Unfair Discrimination Act³⁶⁹ (Equality Act) is to prevent and prohibit unfair discrimination from flourishing in our society by putting s 9(4) of the Constitution³⁷⁰ into effect. One way it realises this commitment is through prohibiting hate speech.³⁷¹ The term "hate speech" is not universally defined,³⁷² but it has been used to describe words that are derogatory, abusive, or offensive to someone or a group based on their ethnicity, race, or other common characteristic such as gender, sexual orientation, religion.³⁷³ It is considered

³⁶⁵ Film and Publication Board 'Classification Guidelines for the Classification of Films, Interactive Computer Games and Certain Publications' No. 539 GG 42380 of 5 April 2019 at 29,51,56 & 57.

³⁶⁶ Films and Publications Act s 24A (2) (b) to (c).

³⁶⁷ Van der Merwe et al (2015) 546.

³⁶⁸ Van der Merwe et al (2015) 546.

³⁶⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s 2 and the preamble.

³⁷⁰ *Qwelane v South African Human Rights Commission and Another* (2021) ZACC, para 48.

³⁷¹ *Qwelane v South African Human Rights Commission and Another*, para 49.

³⁷² *Qwelane v South African Human Rights Commission and Another*, para 79.

³⁷³ Marx F 'Hate speech on social network sites: perpetrator and service providers' liability' (2011) 32 *Sabinet African Journals* 325.

one of the practices that violates the right to dignity and equality. Hate speech and discrimination are prohibited under the Equality Act because they both undermine human dignity and jeopardise an individual's equal enjoyment of rights and freedom. The Act provides a "bulwark against invasions of the right to human dignity" by promoting equal treatment of people.³⁷⁴

Section 10 of the Equality Act expressly prohibits the communication or publication of hate speech intended to cause harm or incite hatred.³⁷⁵ The hurtful nature of these prohibited utterances, especially when they (intentionally) incite hatred, erodes a person's dignity and right to be respected.³⁷⁶ This not only undermines a person's inherent worth, but also puts the person who holds that right at risk of harm. The right to dignity is protected by prohibiting such utterances.

However, not all hurtful statements are considered an infringement on dignity.³⁷⁷ In *Masuku & Ano v SAHRC*, the court had to determine whether the appellant's (Mr. Masuku's) statements constituted hate speech.³⁷⁸ It came to the conclusion that such statements did not constitute hate speech and are therefore protected. The court reasoned that just because an expression is hurtful to people's feelings or outright offensive does not mean it is unprotected by the constitution.³⁷⁹ The utterances that are prohibited are those that expose the target group to hatred and are likely to perpetuate

³⁷⁴ *Qwelane v South African Human Rights Commission and Another*, para 62.

³⁷⁵ Promotion of Equality and Prevention of Unfair Discrimination Act, s 10(1).

³⁷⁶ Promotion of Equality and Prevention of Unfair Discrimination Act, s 8 (d) and s 14(3).

³⁷⁷ Van der Merwe et al (2015) 544.

³⁷⁸ *Masuku and another v South African Human Rights Commission obo South African Jewish Board of Deputies* (2019) JOL 40675 (SCA), para 20.

³⁷⁹ *Masuku and another v South African Human Rights Commission obo South African Jewish Board of Deputies*, para 31.

negative stereotyping and unfair discrimination are prohibited.³⁸⁰ In other words, they must incite hatred and act as an incitement to harm.³⁸¹

The Constitutional Court has held that the term "hurtful" was an unjustifiable limitation on freedom of expression.³⁸² It reasoned that there was no proportional link between the nature of the limitation and the purpose. This is due to the fact that hurtful speech does not always seek to incite hatred against a person because of their membership in a specific group.³⁸³ Besides, there are other less restrictive means of limiting hate speech.³⁸⁴ The court eventually removed "hurtful" from the definition of hate speech because it was too broad and constituted an unjustifiable restriction on the right to free expression.³⁸⁵

Human dignity is still protected and central in the rights limitation inquiry, with or without this limitation brought about by the troublesome concept "hurtful." In *Afri-Forum & another v Malema & another*, the court held that when a speaker's right to expression and his or her obligation not to use words that constitute hate speech conflict, the test to be used to balance the interests must always be whether the measure under consideration promotes or hinders the achievement of human dignity, equality, and freedom.³⁸⁶

³⁸⁰ *Qwelane v South African Human Rights Commission and Another*, para 118.

³⁸¹ *Masuku and another v South African Human Rights Commission obo South African Jewish Board of Deputies*, para 31.

³⁸² *Qwelane v South African Human Rights Commission and Another*, para 144.

³⁸³ *Qwelane v South African Human Rights Commission and Another*, para 139.

³⁸⁴ *Qwelane v South African Human Rights Commission and Another*, para 140 – 141.

³⁸⁵ *Qwelane v South African Human Rights Commission and Another*, para 159.

³⁸⁶ *Afri-Forum & another v Malema & another* (Vereniging van Regslui vir Afrikaans as amicus curiae) (2011) JOL 27740 (EqC), para 34.

3.3.3.1. *Liability in terms of the Equality Act.*

To establish liability, there must be publication, propagation, advocacy, or communication of hate speech.³⁸⁷ In *ANC v Sparrow*, the court had to decide if the respondent's Facebook post was hate speech.³⁸⁸ The court found that the respondent's words constitute hate speech³⁸⁹ because they have racial connotations and discriminatory implications;³⁹⁰ and they directly incite enmity and ill will toward black people simply because they are of a particular race, ethnic origin, or colour.³⁹¹ The court also held that the respondent's posting of her comments on Facebook amounted to publication because they were communicated to third parties³⁹² and that she was thus liable for the statement's primary publication.

Furthermore, the court held the respondent liable for the republication of the hate speech words she posted.³⁹³ The court reasoned that the respondent should have known or should have reasonably foreseen that the words she posted would be republished on social media and in the press.³⁹⁴ As a result, she should be held accountable for the secondary publication of the words she posted.³⁹⁵ It should be noted that, while the defendant may raise the issue of fairness in cases of discrimination, it is irrelevant when determining liability for hate speech.³⁹⁶

³⁸⁷ Promotion of Equality and Prevention of Unfair Discrimination Act, s 10 (1) & s 12.

³⁸⁸ *ANC v Sparrow*, para 43.

³⁸⁹ *ANC v Sparrow*, para 52.

³⁹⁰ *ANC v Sparrow*, para 44.

³⁹¹ *ANC v Sparrow*, para 46.

³⁹² *ANC v Sparrow*, para 47.

³⁹³ *ANC v Sparrow*, para 47(10).

³⁹⁴ *ANC v Sparrow*, para 47(10).

³⁹⁵ *ANC v Sparrow*, para 47 (10).

³⁹⁶ *ANC v Sparrow*, para 47(15).

3.3.4. *Protection from Harassment Act*

The right to dignity is also protected by making harassment illegal. The Harassment Act defined harassment as

“[D]irectly or indirectly engaging in conduct that the respondent knows or ought to know causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably- “following, watching, pursuing or accosting of the complainant or a related person”;³⁹⁷

“[E]ngaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person”³⁹⁸

According to this definition, harassing behaviour includes both online and offline communications that cause or threaten to cause harm to another. Harm can be mental, psychological, physical, or financial in nature.

Conduct that causes or inspires harm can be done in either a direct or indirect manner. Direct positive actions include letters, telegrams, packages, facsimiles, electronic mail, and other items that are sent, delivered, or made to be sent. Whereas leaving them (the electronic communications) where they will be found, given to, or brought to the attention of the complainant (victim) can be considered an indirect act that also constitutes harassment.

³⁹⁷ Protection from Harassment Act 17 of 2011, s 1.

³⁹⁸ Protection from Harassment Act, s 1.

3.3.4.1. *Liability under the Protection from Harassment Act.*

Liability as intended herein is derivative, in that the Harassment Act does not expressly provide for liability for harassment but It is based on other sources³⁹⁹. In its definition of harassment, the Harassment Act includes "directly or indirectly engaging in conduct that the respondent knows or ought to know amounts to sexual harassment of the complainant or a related person."⁴⁰⁰ Sexual harassment is regarded as a form of discrimination⁴⁰¹ under the Employment Equity Act 55 of 1998 (EEA) and is prohibited.⁴⁰² Furthermore, the EEA places a duty on an employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice reasonable,⁴⁰³ of which harassment is a form.

Furthermore, section 60 of the EEA holds employers liable for their employees' actions if they (employers) violate any EEA provision (including sexual harassment) while performing their duties, unless the employer can demonstrate that it took the necessary steps to prevent or eliminate the undesired act.⁴⁰⁴

Put slightly different, an employer who fails to act to prevent or address a harassment complaint can be held (vicariously) liable for the wrongful conduct. In *Media 24 Ltd & another v Grobler*, the court considered whether the first appellant, along with the second

³⁹⁹ These sources include: section 60 of Employment Equity Act 55 of 1998; Protected Disclosures Act 26 of 2000, section 1 read with Sections 3, 3A and 4, wherein harassment was included in the definition of occupational detriment and that no worker or employee be subjected to occupational detriment and that liability falls on whoever subjected an employee or worker to occupational detriment; section 23(1) of the Constitution of the Republic of South Africa read with section 38 provides that everyone has right to fair labour practices, which includes right to be protected from harassment (s 186(2) of the Labour Relations Act 66 of 1995) and that victims or parties with interest therein can approach the competent court.

⁴⁰⁰ Protection from Harassment Act, s 2 (C) (ii)

⁴⁰¹ Employment Equity Act 55 of 1998, s 6(1).

⁴⁰² Employment Equity Act, s 6 (3).

⁴⁰³ Employment Equity Act, s 5.

⁴⁰⁴ Employment Equity Act, s 60.

appellant, should have been held jointly and severally liable for the respondent's damages.⁴⁰⁵

The court ruled that the appellants (the employer) owed a duty of care to their employees (based on the legal convictions of the community)⁴⁰⁶ and violated that duty by failing to take reasonable steps to protect the employees from sexual harassment.⁴⁰⁷ It reasoned that sexual harassment violates everyone's right to the integrity of their body and personality(dignity), which is protected by our legal system. Furthermore, it leaves the victim feeling intimidated and humiliated, as well as making the work environment hostile and offensive; a situation that may have an impact on work performance.⁴⁰⁸ An employer has a duty to protect employees from such violations in the workplace, as well as a duty to compensate the victim for any harm caused if it fails to do so negligently.⁴⁰⁹

3.3.5. *Preventing and Combating Hate Crimes and Hate Speech, Bill.*

Another bill (legislation-in-the-making) that protects the right to dignity by outlawing hate speech is the Preventing and Combating Hate Crimes and Hate Speech Bill (Hate Speech Bill). The Hate Speech Bill aims, among other things, to prevent and criminalise hate crimes and hate speech, as well as to prosecute offenders. Hate crimes were defined in s 3(1) of the Bill.⁴¹⁰ It further outlawed hate speech by making it an offence for "any person who intentionally publishes, propagates, or advocates anything or

⁴⁰⁵ *Media 24 Ltd & another v Grobler* (2005) JOL 14595 (SCA), para 62.

⁴⁰⁶ *Media 24 Ltd & another v Grobler*, para 68.

⁴⁰⁷ *Media 24 Ltd & another v Grobler*, para 71-72.

⁴⁰⁸ *Media 24 Ltd & another v Grobler*, para 67.

⁴⁰⁹ *Media 24 Ltd & another v Grobler*, para 68.

⁴¹⁰ A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics. The characteristics include: albinism; birth; colour; culture; disability; ethnic or social origin; gender or gender identity; HIV status; language; nationality, migrant or refugee status; occupation or trade; political affiliation or conviction; race; religion; sex, which includes intersex; or sexual orientation.

communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm; to promote or propagate hatred, based on one or more of the listed grounds."⁴¹¹

Additionally, someone commits hate speech when they intentionally distribute or make available an electronic communication that they know constitutes hate speech via an electronic communications system that is accessible to any member of the public; or accessible to, or directed at, a specific person who can be considered a victim of hate speech.⁴¹² The offence created by this provision extends not only to the primary author of hate speech but also to all those who advance or promote such speeches. Similarly, the Bill provides that anyone who intentionally (in any manner whatsoever) displays or makes available any material which is capable of being communicated and which constitutes hate speech is guilty of an offence.⁴¹³

3.3.6. *Cybercrimes Act.*

This Act,⁴¹⁴ which came into force on May 26, 2021, defends human dignity by making some abusive WhatsApp messages or texts on social media and other internet platforms illegal. To be considered harmful, a message must incite property damage⁴¹⁵ or violence against another person or group of people,⁴¹⁶ or threaten to do so,⁴¹⁷ or unlawfully disclose unlawfully disclosing an intimate image of a person without his/her consent.⁴¹⁸

⁴¹¹ Preventing and combating hate crimes and hate speech bill (hereinafter Hate Speech Bill) s 4 (1) (a).

⁴¹² Hate Speech Bill, s 4 (1) (b).

⁴¹³ Hate Speech Bill, s 4 (1) (c).

⁴¹⁴ Cybercrimes Act 19 of 2020 (hereafter Cybercrimes Act).

⁴¹⁵ Cybercrimes Act, s 14(a).

⁴¹⁶ Cybercrimes Act s 14(b).

⁴¹⁷ Cybercrimes Act s 15.

⁴¹⁸ Cybercrimes Act s 16.

Defaulters are deemed to have committed an offence and are subject to penalties if proven and convicted.

However, holding defaulters of cybercrimes accountable by way of prosecution remains an enduring challenge. According to Kondo *et al.*, this difficulty in investigating crimes and arriving at convictions is relatively occasioned by the presence of inadequate laws or a lack of up-to-date laws to address the ever-growing threat of cybercrimes.⁴¹⁹ This leaves a lot of people vulnerable to cybercriminals. Similarly, the challenges of ensuring the integrity of evidence and maintaining a clear chain of custody of digital evidence,⁴²⁰ as well as balancing the rights at play in cybercrime investigations, posit a real challenge to the process of holding cybercriminals accountable in some jurisdictions.⁴²¹ An instance would be the balancing of the right to privacy and the failure of the investigative officer to secure an official search warrant.⁴²²

One can therefore conclude that the right to dignity is highly valued and protected in South Africa. This protection extends to both offline and online platforms, including social media platforms. This protection is so valued that liability is incurred for anyone who infringes it. Some jurisdictions have, through their courts, advanced the protection of the right to dignity and imposed liability for its infraction. This next chapter would examine some of these jurisdictions.

⁴¹⁹ Kondo T, Katsenga NN & Zvidzayi T 'Cybercrime and human rights: A case for the due process of internet criminals' (2018) 6(2) FRCIJ 120.

⁴²⁰ Kondo T, Katsenga NN & Zvidzayi T (2018) 121.

⁴²¹ Kondo T, Katsenga NN & Zvidzayi T (2018) 121.

⁴²² Kondo T, Katsenga NN & Zvidzayi T (2018) 121.

CHAPTER FOUR

JURISDICTIONS WITH SIMILAR JURISPRUDENCE ON THE PROTECTION OF THE RIGHT TO DIGNITY.

4.1. Introduction.

Some jurisdictions have legal structures that are comparatively and fairly similar to the South African legal framework in that they incorporate rights protection into their overall Constitutional Framework. These jurisdictions, in particular, protect the right to dignity and the liability for its violation on the internet. This chapter investigates such jurisdictions by examining specific legislations enacted to protect the right to dignity on the internet in Australia and Canada. To that end, this chapter discusses how these jurisdictions' defamation laws protect the right to dignity on the internet, as well as what constitutes an infraction and who is liable for it.

4.2. *Australia.*

The Defamation Act, for example, protects the right to dignity.⁴²³ It does this by allowing for a cause of action to a victim of defamation. A cause of action arises when a defamatory imputation has been published⁴²⁴ to a third party. The third party can be a single person or a plural group of people. In *Ritson v Burns*, the court dealt with a case where legal proceedings were brought in respect of a single comment made by the defendant to a third person.⁴²⁵ The defamatory statement, made over the phone to a process server,⁴²⁶ was that “the plaintiff is a criminal.” I’m not going to give you my

⁴²³ Defamation Act 2005.

⁴²⁴ Defamation Act, s 8.

⁴²⁵ *Ritson v Burns* (2014) NSWSC 272, para 3.

⁴²⁶ *Ritson v Burns*, para 12.

address; you can go and serve Santa Claus.⁴²⁷ The court found that the statement was defamatory⁴²⁸ and thus fulfilled the requirement of publication (even though of limited scope).⁴²⁹ It awarded damages with interest in favour of the plaintiff.⁴³⁰

However, under Australian law, determining publication is a critical factor in establishing liability for infringement of dignity via defamation. Although the Defamation Act did not define publication, the courts appear to have adopted the common law view of publication, namely, that publication occurs when defamatory material is communicated to someone other than the plaintiff. In *Mickle v Farley*, several defamatory comments were posted about the plaintiff through the social mediums of Twitter and Facebook⁴³¹ which also came to the knowledge of the principal.⁴³² The court, on considering the matter, was satisfied that the requirements of establishing defamation were met, and held that Plaintiff was entitled to an award of compensatory damages flowing from the established defamatory publications.⁴³³

Publication and the liability thereof also extend to those who participated in the publication. These include those who shared defamatory content or allowed the content to be displayed on their social media platforms or websites, even when they are not the author. In *Von Marburg v Aldred & Anor*,⁴³⁴ two Facebook posts were alleged to have defamed the Plaintiff. The first defendant was the administrator of the Facebook page, and the second defendant was alleged to be the publisher, as he directed and instructed the first defendant on what to post on the Facebook page. In deciding the case, the court

⁴²⁷ *Ritson v Burns*, para 13.

⁴²⁸ *Ritson v Burns*, para 43.

⁴²⁹ *Ritson v Burns*, para 19.

⁴³⁰ *Ritson v Burns*, para 43-44.

⁴³¹ *Mickle v Farley* (2013) NSWDC 29,5 para 8.

⁴³² *Mickle v Farley*, para 9.

⁴³³ *Mickle v Farley*, para 13.

⁴³⁴ *Von Marburg v Aldred* (2015) VSC 467.

had to distinguish between a primary and secondary publisher of defamatory material on Facebook.

According to the court, in order to establish that someone is the primary publisher of defamatory material, two things must be alleged and proven. First, the defendant contributed to or participated in the act of publication. This means that the defendant was complicit in the act of making or authorising the comments, or failing to take reasonable steps to prevent or remove the derogatory or degrading content, in any way and by any means.⁴³⁵ Participation in this manner should be alleged even if the defendant was aware of the content of the communication but did not realise it was defamatory. Second, and in the absence of the knowledge factor, there is the control factor, which alleges that the defendant had control over whether or not publication occurred. In other words, a "person who exercises control over the publication, or the published content, of the communication independently of the author or originator at the time of publication is regarded as a primary publisher."⁴³⁶

A knowledge factor is essential for a secondary or subordinate publication and must be alleged. The plaintiff must first prove that the defendant was aware of the presence of the defamatory statement.⁴³⁷ The court ruled that:

"when a relevant party communicates a defamatory statement by using an internet platform, such as Facebook, through a medium such as a comment button or other invitation to post communication to the platform, the internet, through an intermediary, is not the publisher of it if it is not aware of its existence."⁴³⁸

A second requirement in considering secondary publication is that of ratification. This entails that the intermediary such as the owner or sponsor or administrator of the

⁴³⁵ *Von Marburg v Aldred*, para 37 (a).

⁴³⁶ *Von Marburg v Aldred*, para 37 (b).

⁴³⁷ *Von Marburg v Aldred*, para 37 (c).

⁴³⁸ *Von Marburg v Aldred*, para 37 (c).

Facebook page must have sufficient responsibility for the content and exert control over its content.⁴³⁹ In other words, an administrator of a social media platform can be held liable, as a secondary publisher, for a defamatory post on his or her Platform if he fails to remove or terminate the communication.⁴⁴⁰

The court eventually let the case move forward because there was enough evidence to support the claim that the second defendant was a subordinate publisher.⁴⁴¹ The court's decision means that even if the second defendant wasn't the creator of the defamatory content, they can still be held liable for defamation because they let the defamatory content be shown on their social media platforms or websites.

Australian courts have also held that someone who republishes a defamatory statement can be held liable. In *Lewis v Daily Telegraph Ltd*, the court held that the republication of someone else's defamatory statement constitutes a new and actionable defamatory publication, and the perpetrator is just as liable as the original publisher.⁴⁴² Similarly, in *Visscher v Maritime Union of Australia*, the court emphasised the republication principle, stating that "if one person repeats, another writes, and a third approves a libel, then they are all makers of it; for all persons who concur, and show their assent or approbation to do an unlawful activity are guilty."⁴⁴³ The reason for this principle in the law of defamation in Australia is that libel is only a legal wrong if it is published, not if it was written.⁴⁴⁴

In addition to the repetition principle, courts have extended liability to social media users who use "emoji"⁴⁴⁵ in a way that can convey a violation of the right to dignity. In *Burrows v Houda*, the defendant objected to whether certain emojis were capable of conveying

⁴³⁹ *Von Marburg v Aldred*, para 37 (d).

⁴⁴⁰ *Von Marburg v Aldred*, para 37 (d).

⁴⁴¹ *Von Marburg v Aldred*, para 71.

⁴⁴² *Lewis v Daily Telegraph Ltd* (1964) AC 234, para 283 - 284.

⁴⁴³ *Visscher v Maritime Union of Australia* (2014) NSWSC 350, para 19.

⁴⁴⁴ *Davey & Dahms-Jansen Social Media in the Workplace* 122.

⁴⁴⁵ Emoji- a hieroglyphic-style language consisting of pictographs of faces, objects and symbols.

the imputation that a lawyer was guilty of misconduct and was being disciplined or investigated.⁴⁴⁶ Aside from the emojis of a "Zipper-mouth face" and a "face of a clock,"⁴⁴⁷ another challenged imputation was a "retweet with comment" from a third party that republished the defendant's tweet and added three emojis:⁴⁴⁸ 🌟, 😂, 👻.⁴⁴⁹

The issue of publication was settled by agreement.⁴⁵⁰ The court found that the words and emojis in the comments and replies were capable of conveying the alleged imputations and that it was simply a matter of connecting the dots between the emojis and the context surrounding the tweets.⁴⁵¹ The court noted that an "ordinary, reasonable" person who reads tweets can figure out what the imputation means by looking at the context of the tweet.⁴⁵² When the emoji in question is used in a tweet about serious misconduct, it can be used to make imputations to that effect.⁴⁵³ This implies that social media users can be held liable if they like, comment on, or respond to tweets or posts on a social media platform that could harm someone's right to dignity (reputation), even if they did so innocently. Similarly, a series of comments and replies on one's account can expose the social media account holder or group administrator to liability for third-party comments.

4.3. Canada.

While Canadian legislation protects the right to dignity by prohibiting cruel treatment⁴⁵⁴ and advocating for the right to life,⁴⁵⁵ the Defamation Act imposes liability on perpetrators

⁴⁴⁶ *Burrows v Houda* (2020) NSWDC 485, para 2

⁴⁴⁷ *Burrows v Houda*, para 13 to 14.

⁴⁴⁸ *Burrows v Houda*, para 15.

⁴⁴⁹ Meaning: "collision", "Face with tears of joy", and "ghost" respectively.

⁴⁵⁰ *Burrows v Houda*, para 3.

⁴⁵¹ *Burrows v Houda*, para 41.

⁴⁵² *Burrows v Houda*, para 26

⁴⁵³ *Burrows v Houda*, para 29.

⁴⁵⁴ The Canadian Charter of Rights and Freedoms, s 12.

⁴⁵⁵ The Canadian Charter of Rights and Freedoms, s 7.

of human dignity violations on social networking platforms. The Act defines the scope of defamatory statements,⁴⁵⁶ the potential damages that an injured party can recover,⁴⁵⁷ and the potential defences⁴⁵⁸ or mitigating factors that a party who made a defamatory statement can raise.⁴⁵⁹

As with most Commonwealth jurisdictions, Canada (excluding Quebec) follows English law for slander and libel cases. The criminal code provides that

“a defamatory libel is a matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published”.⁴⁶⁰

To establish defamation, the plaintiff must show that the words in question were defamatory, that they referred to the plaintiff, and that they were published.⁴⁶¹ In defamation cases, it is very important to be able to show that an alleged defamatory post was published.⁴⁶²

To establish publication, the plaintiff must show that the defendant, through any act, communicated defamatory information to a single third party who received it. In *Crookes v Newton*, the legal issue was whether hyperlinks to allegedly defamatory material can be said to "publish" that material. In its majority decision, the court defined publication as the communication of defamatory information in such a way that it is made known to a third party.⁴⁶³ This consists of two parts: making the defamatory information understandable to a third party and having the third party receive and comprehend the

⁴⁵⁶ The Defamation Act (Province of Alberta), ss 3 & 7,

⁴⁵⁷ The Defamation Act (Province of Alberta), ss 8 and 16.

⁴⁵⁸ The Defamation Act (Province of Alberta), ss 9 and 10.

⁴⁵⁹ The Defamation Act (Province of Alberta), ss 4 and 15.

⁴⁶⁰ Criminal Code. R.S. c. C-34, s 298 (1).

⁴⁶¹ *Grant v Torstar* (2009) SCC 61, para 28.

⁴⁶² *Crookes v Newton* (2011) SCC, para 55.

⁴⁶³ *Crookes v Newton*, para 55.

defamatory information.⁴⁶⁴ However, the court went on to rule that, in the case of a defendant who created hyperlinks to allegedly defamatory articles, it would be considered a publication if, when read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to.⁴⁶⁵ To put it another way, the defendant must adopt or endorse the defamatory words or material in order to be held liable. The court agreed that primary and secondary publishers could be held liable for their work.

In the context of a hyperlink to a defamatory article on a website, the author of the defamatory article is the primary publisher. The person who simply included hyperlinks to an article that turned out to be defamatory on his webpage is not legally considered a publisher (of the article) because he or she has no control over the content of the article referred to; he is also not the creator. There's also the fact that the content of the article can be changed at any time, too.⁴⁶⁶ However, if the 'hyperlinker' adopts or endorses the defamatory article in the text depicting the hyperlink, the 'hyperlinker' becomes a secondary publisher and is liable for the defamatory information.⁴⁶⁷

Canadian courts have ruled that administrators of internet forums can be held liable for defamatory content. In *Weaver v Corcoran* the court had to determine whether the defendants were the people who posted the reader posts from Weaver's Web II, the Climate Agency Going Up in Flames.⁴⁶⁸ The Court ruled that the operator of an internet forum, which is a reader comment area on a newspaper website, may be held liable for the publication of defamatory postings on the forum if it becomes aware of them and does

⁴⁶⁴ *Crookes v Newton*, para 55.

⁴⁶⁵ *Crookes v Newton*, para 48 and 50.

⁴⁶⁶ *Crookes v Newton*, para 47.

⁴⁶⁷ *Crookes v Newton*, para 42.

⁴⁶⁸ *Weaver v Corcoran* (2015) BCSC 165, para 11.

nothing to remove them.⁴⁶⁹ However, because the defendants removed the offending comments as soon as they were brought to their attention, the court concluded that the defendants were not publishers of the reader postings and thus not liable.⁴⁷⁰

Baglow v Smith is another significant Canadian court decision that held that liability could be extended to the moderator(s) or creator(s) of social network pages for defamatory posts made by a third party.⁴⁷¹ This was a defamation case against the defendants. The plaintiff was defamed as a result of a blog post made by one of the defendants on an online message board. The plaintiff argued that Mr. Smith's blog post went too far in labelling him as one of the Taliban's most vocal supporters.⁴⁷² He wanted to hold the blog post author and the people who run the message board responsible for defamation.

The reasoning on display in this court case is noteworthy because the court rejected the defendant's contention that the message board was analogous to a hyperlink and that they (the defendants) were not publishers. The court held (in reference to the Supreme Court's decision in *Crookes*)⁴⁷³ that a message board or forum is specifically designed to provide content to its readers. Its whole purpose is to provide content.⁴⁷⁴ A hyperlink, on the other hand, refers to another piece of content without implying control over that content.⁴⁷⁵

Furthermore, communicating something is not the same as simply communicating that something exists or where it exists. The former involves content dissemination and implies control over both the content and whether the content reaches an audience at all,

⁴⁶⁹ *Weaver v Corcoran*, para 275 to 286.

⁴⁷⁰ *Weaver v Corcoran*, para 287.

⁴⁷¹ *Baglow v Smith* (2015) ONSC 1175.

⁴⁷² *Baglow v Smith*, para 6.

⁴⁷³ *Crookes v Newton*, para 26.

⁴⁷⁴ *Baglow v Smith*, para 192.

⁴⁷⁵ *Crookes v Newton*, para 30 & 41.

whereas the latter does not.⁴⁷⁶ Unless the text of the hyperlink indicates adoption or endorsement of the hyperlinked text's content or communicates agreement with the content linked to,⁴⁷⁷ the hyperlink remains content-neutral and expresses no opinion.⁴⁷⁸ Moreover, the defendants (the moderators) were not just passive bystanders. They made their own posts and participated in threads on their site.⁴⁷⁹ In some cases, when negative comments were made, they looked into the situation more and deleted the comment or banned the person who made it if they thought it was necessary.⁴⁸⁰

Furthermore, the court stated that holding the moderators liable in this context does not go beyond the scope of the purpose of defamation law. It reasoned that based on the evidence in front of the court, almost all of the people who post or comment on the Free Dominion online message board do so without giving their real names.⁴⁸¹ Absolving the moderators from liability would leave potential plaintiffs with little ability to correct reputational damage. This would hurt the delicate balance between people's rights to dignity and freedom of expression that the law of defamation is meant to protect and limit.⁴⁸² In the end, the court held that even though the plaintiff had met all three of the requirements for a defamation case,⁴⁸³ the defence of fair comment had also been proven.⁴⁸⁴ The plaintiff's claim is therefore dismissed.⁴⁸⁵

From the foregoing, one can reasonably conclude that jurisdictions that provide for the protection of the right to dignity in their legal systems, in addition to placing a high value

⁴⁷⁶ *Baglow v Smith*, para 167.

⁴⁷⁷ *Baglow v Smith*, para 191.

⁴⁷⁸ *Baglow v Smith*, para 190.

⁴⁷⁹ *Baglow v Smith*, para 193.

⁴⁸⁰ *Baglow v Smith*, para 79.

⁴⁸¹ *Baglow v Smith*, para 196.

⁴⁸² *Baglow v Smith*, para 196.

⁴⁸³ *Baglow v Smith*, para 215.

⁴⁸⁴ *Baglow v Smith*, para 241.

⁴⁸⁵ *Baglow v Smith*, para 249.

on it, extend such protection to both offline and online platforms, including social media platforms. And that liability extends to those who use, participate in, or manage such platforms. Furthermore, the elements of a delict must be present in order to establish this liability. The following chapter will discuss these elements briefly before contextualising them within the framework of the right to dignity on the WhatsApp social media platform and the liability that follows.



CHAPTER FIVE

WHATSAPP SOCIAL MEDIA AND LIABILITY ARISING FROM TRANSGRESSION OF THE RIGHT TO DIGNITY.

5.1 Introduction.

A person can be held liable for a wrong done if all the elements of a delict have been established. The processes involved in establishing these essential elements form the principles of liability. These elements are drawn from the nature of a delict, which has been defined as a person's act that causes harm to another in a wrongful and culpable manner.⁴⁸⁶ If any of these requirements is not met, there is no delict and no liability,⁴⁸⁷ except in the case of strict liability, which excludes fault.

This chapter will traverse the pertinent elements underlying the delictual legal framework. It would also explore the nature and features of WhatsApp social media platform, as well as contextualize the general principles of delictual liability in the context of defamation on a WhatsApp group. It would finally draw a reasonable determination as to the liability of Group Administrator and Commenting users on the violation of the right to dignity on WhatsApp social media platform.

5.2. Elements of delictual liability.

5.2.1 *Conduct.*

Conduct is described as a voluntary human act or omission.⁴⁸⁸ This description encompasses the three characteristics of conduct. First and foremost, the act must be

⁴⁸⁶ Neethling J & Potgieter JM (2020) 4.

⁴⁸⁷ Van Der Walt J & Midgley J *Principles of Delict* 4 ed (2016) 2.

⁴⁸⁸ Neethling J & Potgieter JM (2020) 27.

that of a human being.⁴⁸⁹Second, the act must be performed voluntarily.⁴⁹⁰Finally, the behaviour can take the form of a positive act or an omission.⁴⁹¹The term "omission" refers to a failure to act when someone has a legal obligation to act.⁴⁹²These three characteristics must be present for an act to be considered conduct when determining liability. The absence of, for example, voluntariness, as in the case of automatism, serves as a defence against an allegation of conduct.

5.2.2. Wrongfulness.

Conduct that is both human and voluntary is insufficient to confer liability.⁴⁹³ For delictual liability to follow, the conduct must be considered wrongful.⁴⁹⁴ Wrongfulness has been said to be when someone violates a legally protected interest (or an interest that should be protected) in a way that is legally wrong.⁴⁹⁵This description implies that a two-form inquiry is required to determine whether a particular act is unlawful or not.⁴⁹⁶

These inquiries are whether a legally recognised interest has been violated,⁴⁹⁷ and if so, whether the violation was wrongfully⁴⁹⁸ or unreasonably committed.⁴⁹⁹ An affirmative answer to these inquires conveys that the conduct is wrongful.⁵⁰⁰ Wrongful conduct can be excused if it is done for: private defence, necessity, provocation, consent, statutory

⁴⁸⁹ Neethling J & Potgieter JM (2020) 27.

⁴⁹⁰ Neethling J & Potgieter JM (2020) 28.

⁴⁹¹ Neethling J & Potgieter JM (2020) 28.

⁴⁹² Neethling J & Potgieter JM (2020) 32.

⁴⁹³ Neethling J & Potgieter JM (2020) 35.

⁴⁹⁴ Neethling J & Potgieter JM (2020) 35.

⁴⁹⁵ Neethling J & Potgieter JM (2020) 35.

⁴⁹⁶ Neethling J & Potgieter JM (2020) 36.

⁴⁹⁷ Neethling J, Potgieter JM & Roos A (2019) 78.

⁴⁹⁸ i.e., contrary to the legal convictions of the community: *boni mores* of society which in effect constitute expressions of considerations of legal and public policy.

⁴⁹⁹ Neethling J, Potgieter JM & Roos A (2019) 79.

⁵⁰⁰ Neethling J, Potgieter JM & Roos A (2019) 79.

authority, official capacity,⁵⁰¹ execution of an official command, and power of chastisement.⁵⁰²

5.2.3. *Fault.*

Except in the case of strict liability, wrongful human conduct will result in delictual liability if the perpetrator is at fault.⁵⁰³ In this context, the term "fault" means that a person is to blame for their actions. Before a person can be held accountable for his or her actions, it must first be determined whether or not they are blameworthy. A person is held accountable if he has the mental ability to distinguish between right and wrong and is capable of acting in this manner.⁵⁰⁴ Certain factors may absolve a person of responsibility. They include minors (those under the age of seven),⁵⁰⁵ mental illness or disease, intoxication, and provocation.⁵⁰⁶ There are two types of fault recognised: intent (*dolus*) and negligence (*culpa*).⁵⁰⁷

5.2.3.1 *Intent.*

A person acts intentionally if he deliberately does something he knows to be wrong.⁵⁰⁸ "Deliberately," as used here, means that a person directed his or her will to perform an act that he or she knew was wrong.⁵⁰⁹ Acting with intent entails not only being aware that

⁵⁰¹ Neethling J, Potgieter JM & Roos A (2019) 83.

⁵⁰² Neethling J & Potgieter JM (2020) 108 – 147.

⁵⁰³ Neethling J, Potgieter JM & Roos A (2019) 85.

⁵⁰⁴ Neethling J & Potgieter JM (2020) 157.

⁵⁰⁵ A child below 7 years is not accountable; a child above 7 years but below 14 years is presumed to lack accountability unless proven; a child between 14 and 18 years are deemed to be adults in terms of delictual capacity and are accountable.

⁵⁰⁶ Neethling J & Potgieter JM (2020) 158 – 159.

⁵⁰⁷ Neethling J & Potgieter JM (2020) 155.

⁵⁰⁸ Neethling J & Potgieter JM (2020) 158.

⁵⁰⁹ Neethling J & Potgieter JM (2020) 160

what one is doing will produce a specific (wrongful) result, but also anticipating the possibility that such conduct will produce a wrongful or unlawful result.⁵¹⁰

5.2.3.2. *Negligence.*

A person is said to have acted negligently when he or she performs or renders services without following the required standard of care.⁵¹¹ The standard of care required by the law is typically that which a reasonable person in the same situation would exercise. The reasonable person's test entails asking whether a reasonable person would have foreseen that his conduct would cause damage or harm, and if so, whether any steps should have been taken to prevent such damage or harm.⁵¹² An affirmative answer to these questions means that the person acted in a negligent way.

5.2.4. *Causation.*

For a legal wrong that would provide liability to exist, there must be a factual connection (causal nexus) between the conduct of a plaintiff and the damage or harm sustained by the defendant.⁵¹³ In *Lee v Minister for Correctional Services*, the court held it was important for the applicant to show that the negligent act or omission caused the harm. The test for this is whether the event that caused the harm would have occurred had it not been for the respondent's negligent act or omission.⁵¹⁴

⁵¹⁰ *Minister, Justice & Constitutional Development & others v Moleko* (2008) JOL 21600 (SCA), para 65

⁵¹¹ Van Der Walt J & Midgley J (2016) 237.

⁵¹² Van Der Walt J & Midgley J (2016) 239.

⁵¹³ Van Der Walt J & Midgley J (2016) 275.

⁵¹⁴ *Lee v Minister for Correctional Services* (Treatment Action Campaign and others as amici curiae) 2013 (2) BCLR 129 (CC), para 19.

5.2.5. Damage.

Damage has been defined as a reduction in the utility or quality of a (legally protected) patrimonial or personal interest caused by a damage-causing event.⁵¹⁵ Damage, in other words, refers to the consequences of wrongdoing. The term "damage" refers to any harm for which compensation or satisfaction is awarded.⁵¹⁶ Damage is typically comprised of patrimonial (monetary) and non-patrimonial (non-monetary) losses.⁵¹⁷ Patrimonial loss can be directly or inadvertently expressed in monetary terms.⁵¹⁸ Non-patrimonial loss, on the other hand, has no monetary value and can only be measured indirectly in monetary terms.⁵¹⁹ In general, when we talk about patrimonial loss, we are referring to the diminished utility of a patrimonial interest. In the case of non-patrimonial loss, a personality interest is reduced or impaired.⁵²⁰

5.3. The nature of WhatsApp social media.

WhatsApp is a free social media app that is primarily designed for smartphones.⁵²¹ It was founded in 2009 by former Yahoo! employees Brian Acton and Jan Koum in response to the launch of Apple's app store,⁵²² and it has since been acquired by Facebook.⁵²³ It is an instant messaging and Voice over Internet Protocol (VoIP) service that allows users to send and receive not only text, but also real-time locations, images, voice recordings,

⁵¹⁵ Potgieter JM Steynberg L & Floyd TB *Law of Damages* 3 ed (2018) 27 (hereafter *Damages*).

⁵¹⁶ Potgieter JM, Steynberg L & Floyd TB *Damages* (2018) 30.

⁵¹⁷ Potgieter JM, Steynberg L & Floyd TB (2018) 33.

⁵¹⁸ Potgieter JM, Steynberg L & Floyd TB (2018) 37.

⁵¹⁹ Potgieter JM, Steynberg L & Floyd TB (2018) 37.

⁵²⁰ Potgieter JM, Steynberg L & Floyd TB (2018) 38.

⁵²¹ Jailobaev T *et al* 'WhatsApp Groups in Social Research: New Opportunities for Fieldwork Communication and Management' (2021) 149 *BMS* 62.

⁵²² Stortz M 'App Advice: Spotlight on WhatsApp' (2018) 37(2) *TALL Quarterly* 11.

⁵²³ Sutikno T *et al* 'WhatsApp, Viber and Telegram: which is the Best for Instant Messaging?' (2016) 6(3) *IJECE* 909.

documents, and videos, as well as voice or video calls.⁵²⁴ It has over 2 billion users in more than 180 countries.⁵²⁵

Despite the fact that it is an app, it can also be accessed from any Web browser on desktop PCs and notebooks, once an account has been created via the app on the user's smartphone.⁵²⁶ End-to-end encryption is applied to all data,⁵²⁷ which allows data between communicating parties to be secure, eavesdropping-free, and difficult to crack.⁵²⁸

5.3.1. *Setting up WhatsApp.*

WhatsApp as an application (app) can be downloaded from the respective app stores for Android, iOS, Windows Phone, BlackBerry OS, and Symbian.⁵²⁹ To set up and operate WhatsApp, one requires a smartphone or a tablet with a SIM card and an internet connection.⁵³⁰ To use the app after downloading and installing it, one must first create an account. The application uses the SIM card's phone number as its username, and the account created is limited to one phone at a time, even though contacts (other users' names and contact information) can be transferred to other devices.⁵³¹

5.3.2. *Features of WhatsApp.*

WhatsApp has a number of intriguing features and functions, some of which are shared by other social networking sites and applications. It offers services such as text and audio

⁵²⁴ Dodds T 'Reporting with WhatsApp: Mobile Chat Applications Impact on Journalistic Practices' (2019) 7(6) *Digital Journalism* 725.

⁵²⁵ WhatsApp 'About WhatsApp' available at <https://www.whatsapp.com/about/>. (accessed 7 April 2022).

⁵²⁶ Boulos M, Giustini D & Wheeler S 'Instagram and WhatsApp in health and healthcare: An Overview' (2016) 8(37) *Future Internet* 3.

⁵²⁷ Stortz M (2018) 11.

⁵²⁸ Dodds T (2019) 726.

⁵²⁹ Stortz M (2018) 11.

⁵³⁰ Mahmoud R & Bellengère A 'A social service? A case for accomplishing substituted service via WhatsApp in South Africa' (2020) 137 *SALJ* 376.

⁵³¹ Mahmoud R & Bellengère A (2020) 376.

messaging, free voice calls, photo and video exchange, and the sharing of limited types of documents.⁵³² Another feature of WhatsApp is that it offers an official web-based application that runs on a Windows desktop. It is also compatible with Google's Chrome web browser.⁵³³ Another advantageous feature of the WhatsApp app is its end-to-end encryption service, which protects privacy and ensures the authenticity of communications at both ends of the message.⁵³⁴

WhatsApp, on the other hand, has a feature that distinguishes it from other wrongdoing. The social media tools and Internet-based communication platforms.⁵³⁵ WhatsApp communication is faster than email because it allows for immediate response. In WhatsApp, users can also see if their contacts are online and if the message has been delivered and read.⁵³⁶

Another unique feature of WhatsApp relates to how easily a prospective or new subscriber can connect to his or her contact base, and the ability to create WhatsApp groups.⁵³⁷ After installing and configuring the app, users can virtually connect with all contacts in their phone's address book who have also installed and are using WhatsApp. A user, known as the Group Administrator, can also create a WhatsApp group,⁵³⁸ which allows for more extensive engagement among users in the same mobile space.

⁵³² Sutikno T *et al* (2016) 909.

⁵³³ Sutikno T *et al* (2016) 910.

⁵³⁴ Mahmoud R & Bellengère A (2020) 377.

⁵³⁵ Jailobaev T *et al* (2021) 63.

⁵³⁶ Church K & de Oliveira R 'What's up with WhatsApp? comparing mobile instant messaging behaviors with traditional SMS.' (2013) 13 *MobileHCI* 353.

⁵³⁷ Sutikno T *et al* (2016) 910.

⁵³⁸ Bouter C, Venter B & Etheredge H 'Guidelines for the use of WhatsApp groups in clinical settings in South Africa' (2020) 110(5) *SAMJ* 366.

5.4. WhatsApp groups, WhatsApp users, and the group administrator.

WhatsApp groups are groups that are available on WhatsApp. They usually have more than one person in them,⁵³⁹ and they let you keep in touch with the group of people, like your family, co-workers, or friends, through the app.⁵⁴⁰ Group chats are possible within this group. Members of the group can send messages, photos, and videos to up to 256 people at the same time.⁵⁴¹ Members can mute⁵⁴² or customise notifications,⁵⁴³ and the group can be named.

Anyone who has a WhatsApp subscription is a WhatsApp user.⁵⁴⁴ In our context, a user is a member of the WhatsApp group.⁵⁴⁵ A user can use the group chat to post, share, and communicate text messages, emojis, videos, audio messages, pictures, and documents.⁵⁴⁶ Users can also comment on posts made by other members of the group by replying to comments in new messages or reposting a statement and attaching a comment to it.⁵⁴⁷ A WhatsApp user can also forward an invite link created by the group administration to other WhatsApp users so that they can join the group via the link.⁵⁴⁸

A WhatsApp group is created by an administrator (also known as the "Group Admin") who serves as the group's leader and "dictates" the group's activities in terms of the

⁵³⁹ Dodds T (2019) 725.

⁵⁴⁰ WhatsApp 'Features' available at <https://www.whatsapp.com/features> (accessed 3 April 2022).

⁵⁴¹ WhatsApp 'Features' available at <https://www.whatsapp.com/features> (accessed 7 April 2022).

⁵⁴² WhatsApp 'How to mute or unmute group notifications' available at <https://faq.whatsapp.com/web/chats/how-to-mute-or-unmute-group-notifications> (accessed 5 April 2022).

⁵⁴³ WhatsApp 'How to manage your notifications' available at <https://faq.whatsapp.com/web/chats/how-to-manage-your-notifications> (accessed 5 April 2022).

⁵⁴⁴ WhatsApp "how to use WhatsApp responsibly" available at <https://faq.whatsapp.com/general/security-and-privacy/how-to-use-whatsapp-responsibly/?lang=en> (Accessed 5 April 2022).

⁵⁴⁵ Bouter C, Venter B & Etheredge H (2020) 365.

⁵⁴⁶ Jailobaev T et al (2021) 61-62.

⁵⁴⁷ Jailobaev T et al (2021) 62.

⁵⁴⁸ WhatsApp 'How to create and invite into a group' Available at <https://faq.whatsapp.com/android/chats/how-to-create-and-invite-into-a-group/?lang=en> (accessed 5 April 2022).

contents of the group chat.⁵⁴⁹ The group administrator can add new members to his or her group either directly or through the use of an invite link or QR code.⁵⁵⁰ In the case of an invite link, the group administrator simply creates a WhatsApp group link for his or her group and sends it to anyone who wants to be added. Furthermore, the people to whom he sends the link can forward it to other WhatsApp users, allowing them to join the group via the link as well. The administrator can reset the link at any time, rendering the previous invite link ineffective and creating a new link.⁵⁵¹

5.4.1. The "Powers" of the group administrator.

Aside from creating the group and adding members to the group, a group administrator can do other things exclusively for the group. The Group Administration has the ability to remove a group member or all members of a group.⁵⁵² He has the ability to bring the group to a close.⁵⁵³ A participant in a WhatsApp group can be made an administrator by any administrator in the group,⁵⁵⁴ and a WhatsApp group can have an unlimited number of admins.⁵⁵⁵ The original creator of a group, on the other hand, cannot be removed and will remain an administrator until they leave the group.⁵⁵⁶ A Group Administrator may also block or revoke the group link he established. He can also change the group settings so

⁵⁴⁹ Bouter C, Venter B, & Etheredge H 'Guidelines for the use of WhatsApp groups in clinical settings in South Africa' (2020) 110(5) *SAMJ* 366.

⁵⁵⁰ WhatsApp 'How to create and invite into a group' Available at <https://faq.whatsapp.com/android/chats/how-to-create-and-invite-into-a-group/?lang=en> (accessed 5 April 2022).

⁵⁵¹ WhatsApp 'How to create and invite into a group' Available at <https://faq.whatsapp.com/android/chats/how-to-create-and-invite-into-a-group/?lang=en> (accessed 5 April 2022).

⁵⁵² WhatsApp 'How to add and remove group participants' available at <https://faq.whatsapp.com/web/chats/how-to-add-and-remove-group-participants> (accessed 5 April 2022).

⁵⁵³ WhatsApp 'How to exit and delete groups' available at <https://faq.whatsapp.com/web/chats/how-to-exit-and-delete-groups> (accessed 5 April 2022)

⁵⁵⁴ Bouter C, Venter B & Etheredge H (2020) 366.

⁵⁵⁵ WhatsApp 'How to manage Group Admins' available at <https://faq.whatsapp.com/web/chats/how-to-manage-group-admins> (accessed 5 April 2022)

⁵⁵⁶ WhatsApp 'How to manage WhatsApp group admins' available at <https://faq.whatsapp.com/web/chats/how-to-manage-group-admins> (accessed 7 April 2022).

that only administrators can edit group information or send messages.⁵⁵⁷ The administrator can also limit or prohibit other members from sending messages to the group, so that only the administrator(s) can send messages in the group.⁵⁵⁸

5.5. Infringement of the right to dignity in the WhatsApp group.

The right to dignity can be violated in a variety of ways in WhatsApp groups. This includes when a WhatsApp user and member of the WhatsApp group sends or posts insulting, offensive, humiliating, ignominious or degrading statement(s)⁵⁵⁹ about anyone on the group, irrespective of whether the victim(s) is/are in the group or not. In *Brenner v Botha*, the court acknowledged that sending verbally injurious messages, which amounted to degrading, humiliating, or ignominious treatment of another person, were violations of the person's right to dignity.⁵⁶⁰

Defamation in a WhatsApp group constitutes a collective and general violation of the right to dignity. This would occur if a member of the group posted a statement on the group that harmed the reputation of another person who may or may not be a member of the group. In *Khumalo & others v Holomisa* the court confirmed that the right to dignity includes the right to unimpaired reputation.⁵⁶¹ The court reasoned that human dignity, which is a constitutional value, includes the value that all people have as well as the reputation that each person has built up because of his or her own unique achievements.⁵⁶² It is primarily from this perspective that the right to dignity is interpreted to include the right to an unimpaired reputation (*Fama*). As a result, the South African

⁵⁵⁷ WhatsApp 'how to change group admin settings' available at <https://faq.whatsapp.com/web/chats/how-to-change-group-admin-settings> (accessed 5 April 2022).

⁵⁵⁸ Mehvish '6 Rights and Powers What-sApp Group Admins Enjoy' available at <https://www.guiding-tech.com/whatsapp-group-admin-rights/> (accessed on 5 April 2022).

⁵⁵⁹ *Le Roux & others v Dey* (2011), para 91.

⁵⁶⁰ *Brenner v Botha* 1956 (3) All SA 407 (T), para 262.

⁵⁶¹ *Khumalo & others v Holomisa*, para 27-28.

⁵⁶² *Khumalo & others v Holomisa*, para 27.

Constitution values both a person's sense of self-worth and the public's estimation of that person's worth or value through the right to dignity.⁵⁶³

5.6. Contextualising the general principles of delictual liability in the context of defamation on a WhatsApp group.

5.6.1. *Publication as conduct.*

Conduct is one of the elements that must be proven in order to establish liability.⁵⁶⁴ In the context of defamation on a WhatsApp group, the publication (of the defamatory material) in the group satisfies the conduct element in defamation.⁵⁶⁵ Publication, as used here, is the physical act of making defamatory material known to someone other than the person who is the subject of that material.⁵⁶⁶ Publishing can be in the form of postings to a WhatsApp group, or by sending video messages, graphics, or audio messages to the group, as well as text messages.⁵⁶⁷ Unless it can be proven that no one read or heard the material, publication is presumed if it has been distributed to the public.⁵⁶⁸

Publication can also take the form of an omission. An omission occurs when defamatory material is not removed or when one does not actively and overtly disassociate himself or herself from such publication.⁵⁶⁹ This failure to act constitutes publication and thus satisfies the conduct element. The requirement for conduct is also met by republication. Other acts or omissions, as discussed in chapter three of this mini-thesis, are considered publications. Individually, each of them satisfies the element of conduct.

⁵⁶³ *Khumalo & others v Holomisa*, para 27.

⁵⁶⁴ Neethling J & Potgieter JM (2020) 27.

⁵⁶⁵ Van Der Walt J & Midgley J (2016) 177.

⁵⁶⁶ Bouter C, Venter B & Etheredge H (2020) 364.

⁵⁶⁷ Bouter C, Venter B & Etheredge H (2020) 365.

⁵⁶⁸ Burns Y, de Beer T & Sadleir E (2015) 530.

⁵⁶⁹ Bouter C, Venter B & Etheredge H (2020) 365

5.6.2. *Published defamatory content presupposes wrongfulness.*

The presence of defamatory material published on the WhatsApp group gives rise to the presumption that the requirement of wrongfulness has been met in relation to the perpetrator(s).⁵⁷⁰ This is due to the fact that the defamatory material already defames or has the potential to defame the WhatsApp user to whom it refers. And when it is posted, allowed to remain, or made available on the WhatsApp group, it diminishes, tends to diminish, or undermines the dignity and reputation of the WhatsApp user (victim) in the eyes of the other WhatsApp group members.

5.6.3. *Intentional or non-intentional publication, as a fault.*

When a WhatsApp user intentionally publishes a defamatory matter on a WhatsApp group, the element of fault by way of intent (to injure) is satisfied.⁵⁷¹ This is due to the fact that the material is defamatory and has been published in the group, and the WhatsApp user who made the posting has demonstrated an intent to harm the victim's dignity (reputation). When a WhatsApp user (the perpetrator) invokes any recognised defence, he is not erasing the fault element of his/her conduct; rather, he is indicating that it is an excusable and justified fault.

The fault element is also satisfied when other WhatsApp group members, including the group administrator, fail to uphold the "WhatsApp-user- victim's" right to dignity. They have either directly or indirectly contributed to the continuation of the violation of the "WhatsApp-user victim's right to dignity." Or by allowing such a violation to continue when they should have taken action to stop dignity. They are referred to as negligence.

⁵⁷⁰ Papadopoulos S & Snail S (2018) 254.

⁵⁷¹ Burns Y, de Beer T & Sadleir E (2015) 203.

5.6.4. Causation requirement.

The harm to the reputation of the "WhatsApp-user-victim" must be linked to the publication of defamatory matter about the "WhatsApp-user-victim" in the WhatsApp group chat by any member of the WhatsApp group. This connection meets the requirement for causation. A major requirement for establishing causation is that the defamatory material refer to the 'WhatsApp-user-victim' either explicitly or implicitly, and must be capable of impairing his/her dignity in its meaning. It is immaterial to the cause whether the statement is true or false.

5.6.5. Violation of the right to dignity as damage.

The 'WhatsApp-user-victim' suffers damage to his or her dignity as a result of the publication of defamatory content on the WhatsApp group. In *A Neumann CC v Beauty Without Cruelty International*, the court stated that a defamatory statement injures the reputation of another with reference to moral character, professional or business reputation, or matters that expose him or her to enmity, ridicule, and contempt.⁵⁷² The test for determining whether this type of damage occurred is said to be whether the defamatory material published could be reasonably understood by an ordinary member of the WhatsApp group of average intelligence as injuring the 'WhatsApp-user-victim' in its good name and reputation.⁵⁷³ In the absence of any justification, this violation of the right to dignity is thus the harm that the 'WhatsApp-user-victim' suffers.

5.6.6. Legal and Acceptable Use of WhatsApp service.

⁵⁷² *A Neumann CC v Beauty Without Cruelty International* 1986 (4) All SA 524 (C), para 535.

⁵⁷³ *A Neumann CC v Beauty Without Cruelty International*, para 535.

WhatsApp LLC expressly states that access and use of their services are only for legitimate, authorised, and acceptable purposes. It prohibits the use of its services for sharing content (in the status, profile photos, or messages) that is illegal, obscene, defamatory, threatening, intimidating, harassing, hateful, racially or ethnically offensive, or instigates or encourages conduct that would be illegal, or is otherwise inappropriate, such as promoting violent crimes, endangering or exploiting children or others, or coordinating harm.⁵⁷⁴

To enforce this, WhatsApp encourages users, including group administrators, to report problematic content and contacts to them, or to report the account directly from the media viewer.⁵⁷⁵ Once reported, WhatsApp would receive the most recent messages sent to the reporting WhatsApp group admin or user by a reported user or group, as well as information on the administrator(s) or users' recent interactions with the reported user.⁵⁷⁶

WhatsApp will ban a user if it finds that the user is violating or violated its Terms of Service.⁵⁷⁷

5.7. Can a group administrator be held liable for a defamatory post on a WhatsApp group?

A group administrator can be legally regarded as a publisher on a WhatsApp group media platform. Group Administrators are classified into two types: prime Group Administrators and appointed Group Administrators. The former is the one who started the WhatsApp

⁵⁷⁴ WhatsApp 'Acceptable Use of Our Services' available at <https://www.whatsapp.com/legal/terms-of-service#terms-of-service-acceptable-use-of-our-services> (accessed 6 April 2022).

⁵⁷⁵ WhatsApp 'How to stay safe on WhatsApp' available at <https://faq.whatsapp.com/general/security-and-privacy/staying-safe-on-whatsapp> (accessed 6 April 2022).

⁵⁷⁶ WhatsApp 'How to block and report contacts' available at <https://faq.whatsapp.com/iphone/security-and-privacy/how-to-block-and-unblock-contacts> (accessed 6 April 2022).

⁵⁷⁷ WhatsApp 'About Accounts ban' available at <https://faq.whatsapp.com/general/account-and-profile/about-account-bans> (accessed 6 April 2022).

group and is still the administrator. The latter is a WhatsApp user who joined the WhatsApp group and was made administrator by the prime group administrator.

The prime group administrator is responsible for everything posted on the WhatsApp group he or she created and remains the administrator thereof. Publication does not occur in a vacuum. Some processes are involved. To publish means to make information available to the public. To make content available to the public, someone must disseminate it; there must be a location or forum where the content is disseminated and accessible to the public. Each of these components contributes to the publication processes.

By creating the WhatsApp group, the prime group administrator has made available a public forum where materials are posted or shared and which is accessible to the public (other members of the group). He has made available the opportunity for such (unlawful) content to go public. This act of the WhatsApp group administrator constitutes participation in the process of publication. It qualifies as a participatory publication. In terms of the principles of the law of defamation, every person who participates⁵⁷⁸ or contributes to the process of publication is liable.⁵⁷⁹ Therefore, when a message that infringes on the right to dignity of someone is posted on a WhatsApp group chat, the WhatsApp group administrator can be held liable.

Furthermore, co-publication is a concept that stems from the principle of participatory publication. When a material that violates a person's right to dignity is posted or shared on a WhatsApp group and the group administrator, whether prime or appointed, is aware of such material, knows that it defames, deliberately closes its eyes to the nature of the

⁵⁷⁸ Papadopoulos S & Snail S (2018) 255.

⁵⁷⁹ Burns Y et al *Communications* (2015) 198.

material, and fails to take any action to alleviate the situation,⁵⁸⁰ the group administrator is deemed to be propagating, promoting, adopting, and ratifying the material and its effects. This was also emphasized by Ebersohn, who stated that a "defendant is responsible for a publication where he is aware or can reasonably expect that a third party will take cognizance of the defamatory statements."⁵⁸¹ The presence of a legal duty to act underpins such conclusions.

When it comes to upholding the right to dignity, the legal duty to act cannot be overlooked. Several human rights documents and instruments (both national and international), as discussed in chapter two, uphold the right to dignity. Besides, in South Africa, human dignity is a constitutional right that must be respected and protected by all,⁵⁸² as well as a constitutional value that must be promoted.⁵⁸³ Even where it is necessary to limit the right to dignity in order to achieve a balancing of rights, the limitation must recognise that human dignity is a foundational and democratic value that must be considered⁵⁸⁴ and promoted.⁵⁸⁵ In all circumstances, everyone has a "universal" duty to protect and promote the human right to dignity.

Although the group administrator is unable to directly remove the defamatory comment, he has the option to request the culprit to remove it or to remove the user from the group⁵⁸⁶ or to report the user to WhatsApp LLC through the appropriate medium, as such action violates the terms of service of WhatsApp.⁵⁸⁷ To limit further comments in the group

⁵⁸⁰ Nel S 'Defamation on the internet and other computer networks' (1997) 30(2) *CILSA* 159 (hereafter *Defamation on the internet*).

⁵⁸¹ Ebersohn G 'Online defamation' (2003) 2003(428) *De Rebus* 17.

⁵⁸² Constitution of the Republic of South Africa, s 10

⁵⁸³ Constitution of the Republic of South Africa, ss 1 (a), 7(1),

⁵⁸⁴ Constitution of the Republic of South Africa, s 36 (1).

⁵⁸⁵ Constitution of the Republic of South Africa, s 39 (1) (a).

⁵⁸⁶ WhatsApp 'How to add and remove group participants' available at <https://faq.whatsapp.com/android/chats/how-to-add-and-remove-group-participants> (accessed 6 April 2022).

⁵⁸⁷ WhatsApp 'Acceptable Use of Our Services' available at <https://www.whatsapp.com/legal/terms-of-service#terms-of-service-acceptable-use-of-our-services> (accessed 6 April 2022).

on those materials, the administrator can (temporarily) restrict messaging in group chat so that only the administrator(s) can send messages in the group until the defamatory material is removed.⁵⁸⁸ In addition, the administrator must act decisively to disassociate the group from the defamatory post.⁵⁸⁹ This disassociation may manifest itself in the form of a comment on the inappropriateness of the post or the removal of the offending member from the group.⁵⁹⁰ Not doing any of these is really a failure to act when there is a duty and available options to act.

By failing to act while knowing that the comment or material posted violates the right to dignity, the WhatsApp group administrator is deemed to be "propagating," or furthering or endorsing the defamatory comment that exists in the WhatsApp group chat. In the absence of any justification, this makes him/her a co-publisher of the defamatory statement. As a result, he or she may be held liable.

The same principle applies in a situation where the group administrator is unaware of the presence or nature of the defamatory post. This "unawareness" is hardly reasonable, given that the Group Administrator is a member of the WhatsApp group and participates or should participate in the WhatsApp group chat. In the case of a prime WhatsApp group administrator, he is both the original creator of the group and the manager of the group chat. The group chat was created for a specific purpose. He cannot remain unaware or unconcerned about what is happening in the group chat he created or manages.

Besides, the WhatsApp application as a whole is easily accessible. The principle that "(in certain cases), an omission due to negligence may constitute a publication (of

⁵⁸⁸ WhatsApp 'How to change group admin settings' available at <https://faq.whatsapp.com/kaio/chats/how-to-change-group-admin-settings> (accessed 6 April 2022).

⁵⁸⁹ Bouter C, Venter B & Etheredge H (2020) 366.

⁵⁹⁰ Bouter C, Venter B & Etheredge H (2020) 366.

defamation)"⁵⁹¹ applies as well. The administrator had a reasonable expectation of knowing what was going on in the group chat that he created and managed. He would not be exempt from liability if he did not know (due to negligence) that the content of the group chat was likely to contain libellous material.⁵⁹² Therefore, the group administrator may be held liable for a defamatory comment made in the group chat.

5.8. Can delictual liability be vicariously imposed on a WhatsApp group administrator?

The prerequisite for vicarious liability is that there must be a specific relationship between two or more people, such as an employment relationship; a delict (negligent act or omission) committed by the employee; and the employee acting within the course and scope of his/her employment.⁵⁹³ As a general rule, an employer is vicariously liable for an employee's wrongful act/s or omission/s committed during the course and scope of the employee's employment, or while the employee was engaged in any activity reasonably incidental to it.⁵⁹⁴

The (Rabie) test⁵⁹⁵ for determining vicarious liability entails asking two main questions. The first is whether the employee improperly carried out what he was employed to do, and the second is whether his act was unrelated to the employee's business.⁵⁹⁶ The first question requires a subjective assessment of the employee's mental state to determine whether the wrongful acts were committed solely for the employee's benefit. This is a purely factual question.⁵⁹⁷ It is important because the employee's subjective intention is

⁵⁹¹ Burchell J *The Law of Defamation in South Africa* (1985) 75.

⁵⁹² Nel S *Defamation on the internet* (1997) 159.

⁵⁹³ *Loureiro and others v iMvula Quality Protection (Pty) Ltd* 2014 (5) BCLR 511 (CC), para 50.

⁵⁹⁴ *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC), para 24.

⁵⁹⁵ *Minister of Police v Rabie* 1986 (1) All SA 361 (A).

⁵⁹⁶ *Minister of Police v Rabie*, para 368.

⁵⁹⁷ *K v Minister of Safety and Security*, para 32.

a factor in determining whether the employee acted in the course and scope of their employment.⁵⁹⁸ However, this investigation is not conclusive.

If the first question is answered affirmatively, the employer may be held vicariously liable if the second, objective question is also answered affirmatively. The second question seeks to ascertain whether there is a sufficiently close link between the employee's interests and the employer's purposes and business.⁵⁹⁹In *Stallion Security v Van Staden*, the courts argued, citing Canadian and British jurisprudence,⁶⁰⁰that in determining the sufficiently close link criteria, South African law should be developed further to recognise that an employer's creation of a risk of harm may, in an appropriate case, satisfy such criteria.⁶⁰¹

To summarise, the plaintiff bears the burden of alleging and proving the elements of delictual liability in order to establish vicarious liability. He must also allege and prove that the person who committed the delict was an employee of the defendant; the scope of the employee's duties at all times; and that the delictual act was committed in the course and scope of the employee's employment.

With the COVID-19 pandemic necessitating virtual and online engagement, there is a possibility that an employer will create a WhatsApp group to conduct and further his company's activities. The employees are made members of the group and participants in the group chat. If an employee (a member of the WhatsApp group chat) who is communicating on behalf of the company makes a comment on the group chat that infringes on the right to dignity of another employee who is also a member of the group chat, or the right of any other person, the employer, as the group's administrator, can be

⁵⁹⁸ *Minister of Police v Rabie*, para 372 (1).

⁵⁹⁹ *Minister of Police v Rabie*, para 372(1).

⁶⁰⁰ *Stallion Security (Pty) Limited v Van Staden* (2019) JOL 45876 (SCA), para 28 – 31.

⁶⁰¹ *Stallion Security (Pty) Limited v Van Staden*, para 32.

held vicariously liable for such remarks if the defamatory remarks were made in a context that furthers the company's activities and there was a close link between the secretary's acts and the employer's purposes and business.

Besides, it was the employer who created the risk of harm by creating the WhatsApp group and allowing the company's activities to be carried on in that setting. Therefore, once it is established that the WhatsApp user who posted the comments was an employee acting in an official capacity, the administrator (employer) can be held vicariously liable. In a similar vein, *Burns* observed that employers are liable in delictual claims for defamatory emails sent by their employees.⁶⁰²

5.9. Commenting users.

Apart from the group administrator (s), every other WhatsApp subscriber in a particular group chat is a user. These users, whom I refer to as commenting-users, can be divided into two groups based on how they post comments or replies: those who make or post new comments (fresh-commenting-users), and those who reply directly to a specific message (posted by another user) by embedding that message in their replying comments (direct-replying-users). When a new-commenting user posts a defamatory comment in a WhatsApp chat group, he or she is liable as the prime publisher of such comments, unless there is justification to rebut the wrongfulness and unlawfulness.

The leading case in support of this position is *Heroldt v Wills*. In this case, an interdict was issued against the defendant for posting derogatory messages about the applicant, implying that he was an unfit father to his daughters due to "the alcohol, the drugs, and the church."⁶⁰³ The postings were deemed defamatory and unlawful, as well as unfair

⁶⁰² Burns Y et al *Communications* (2015) 538.

⁶⁰³ *Heroldt v Wills* para 6.

and not in the public interest.⁶⁰⁴ After reviewing several authorities on the subject, the court ordered that the defendant remove all of his Facebook postings and pay the plaintiff's legal costs.⁶⁰⁵

Furthermore, any "fresh commenting user" in a WhatsApp group who forwards material that infringes on another WhatsApp user's right to dignity in the group chat is liable for such an infraction, even if he is not the author of the defamatory post. This is consistent with re-publication principles, which state, among other things, that anyone who contributed to the publication of a defamatory statement can be held liable for its content. This is because the individual repeats the posting by forwarding the statement. Besides, each re-publication gives rise to new causes of action for defamation. This principle was reaffirmed in *Tsedu & others v Lekota & others*, where the court ruled that any "newspaper that publishes a defamatory statement made by another is as much the publisher of the defamation as the originator."⁶⁰⁶ Moreover, the newspaper's claim that what was published was simply repetition will not serve as a defence.

Another instance of liability arises when a fresh-commenting user in a WhatsApp group posts a hyperlink to a website or article containing defamatory material about a group chat participant. In such a case, the fresh-commenting-user who posted such a hyperlink will not be held liable if the following conditions are met: the text of the hyperlink does not in any way repeat the defamatory statement or endorse it. The fresh-commenting-user is not aware of the defamatory nature of the article or webpage, and the fresh commenting user has no control over its content, and it is proven on a balance of probabilities that members of the group chats did not click and access the hyperlink. The underlying reason

⁶⁰⁴ *Heroldt v Wills*, para 27 – 28.

⁶⁰⁵ *Heroldt v Wills*, para 47.

⁶⁰⁶ *Tsedu & others v Lekota & another* (2009) JOL 23301 (SCA), para 5.

guiding these circumstances is that posting a hyperlink to defamatory content does not, by itself, even if the hyperlink is followed and the content is accessed.⁶⁰⁷

However, if the text of the hyperlink that the fresh-commenting-user posted on the group chat is defamatory, repeats the defamatory contents, or endorses the defamatory material on the webpage or article in any way, the fresh-commenting-user who posted such hyperlink on the group chat would be held liable as a publisher.⁶⁰⁸ The same is true if the new commenting user is aware of the defamatory article or webpage but still posts the link to the group chat and the members of the group access the material the link pointed to. This would amount to a conscious act of approval and propagation on his part. If the fresh-commenting-user had control over the article or webpage containing the defamatory material and was the one who sent the hyperlink to such materials, he may be liable as a co-publisher.

Another intriguing aspect of liability concerns the direct-replying-user. This type of user comments on a WhatsApp group chat by pressing and holding the message to which he or she wishes to respond. A menu of options, including reply, will then appear above it. The user will then select 'reply.' The message (being replied to) will now be embedded in the user's textbox. The user then types or adds his/her comment in the text box and click send.⁶⁰⁹ The type of message sent is also known as 'quote message'.

When a direct-replying-user makes a 'quote message' comment by embedding a defamatory comment posted by another user on a WhatsApp group chat into his/her reply, the direct-reply-user is held liable on multiple fronts. The first is that he republishes

⁶⁰⁷ *Crookes v. Newton* 2011 SCC 47, [2011] 3 S.C.R. 269, para 14.

⁶⁰⁸ *Crookes v. Newton*, para 42.

⁶⁰⁹ Gadget Now 'How to use the new 'reply' feature in WhatsApp' available at <https://www.gadgetsnow.com/how-to/How-to-use-the-new-reply-feature-in-Whatsapp/articleshow/52940072.cms> (Accessed 3 April 2022).

the contested comment by embedding it in his comment. He is, in principle, responsible for the publication and thus liable. This is consistent with the repetitive rule, which was affirmed in *Tsedu and Others v Lekota and another*,⁶¹⁰ where the court held that when a defamatory statement is re-published by another person, that person becomes the originator.⁶¹¹

Second, with regard to the 'quote message,' the direct-replying-user may also be held liable. This is because, by embedding the defamatory comment in one's comment in an attempt to make a direct reply to an individual message, the direct-replying user is also drawing attention to the defamatory comment. The court has argued that when a defendant's action is proven to be drawing attention to a defamatory matter, such action constitutes publication in law, and the defendant is liable.⁶¹² Furthermore, liability for drawing attention to the matter does not disappear when the comment personally added by the direct-replying-user to the 'quote message' does not endorse the defamatory material.

5.10. Can a WhatsApp user who uses emoji to comment on a WhatsApp group chat be held liable for defamation?

Emoji is defined as a small digital image or icon that is used in electronic communications to express an idea, emotion, or other feeling.⁶¹³ It can be used in conjunction with other meaning-conveying tools such as hashtags and "like" or "retweet" buttons.⁶¹⁴ South African courts have not directly decided on a matter involving posts made with emoji that are defamatory. However, in *Isparta v Richter*, the court ruled that a person who was only

⁶¹⁰ *Tsedu and Others v Lekota and another* 2009 (4) SA 372 (SCA).

⁶¹¹ *Tsedu and Others v Lekota and another*, para 5.

⁶¹² *African Life Assurance Society Ltd, African Guarantee and Indemnity Co Ltd, African Consolidated Investment Corporation Ltd v Robinson and Co Ltd and Central News Agency Ltd* 1938 NPD 277, para 307.

⁶¹³ *Burrows v Houda* [2020] NSWDC 485, para 22.

⁶¹⁴ *Burrows v Houda*, para 23.

tagged⁶¹⁵ in a defamatory message but knew about it and permitted it was liable for defamation.⁶¹⁶ In addition, courts are willing to apply the defamatory test to any material presented to them in order to determine whether it is defamatory.⁶¹⁷ When confronted with such issues, the court is likely to simply adapt the principles of liability in defamation cases to address the issue.

It would consider whether the plaintiff has established that defamatory material about him has been published. In the context of a WhatsApp group chat in which emoji are used, the court would decide whether the use of an emoji can have a defamatory meaning⁶¹⁸ and whether its publication harmed his reputation.⁶¹⁹ To accomplish this, it would consider the emoji's meaning, which is the meaning that an ordinary reasonable reader of an emoji on WhatsApp Social media would assign to it. This enquiry includes any implications arising from this primary meaning⁶²⁰ as well as any potential secondary meaning.

After determining the meaning of the specific emoji used, the court will consider whether those words or conduct defames the plaintiff.⁶²¹ To do so, it would consider whether the words or conduct lowered the plaintiff's standing in the eyes of right-thinking people in general.⁶²² This could include connecting the dots between the emoji and the context of the tweets. If the plaintiff can show that the publication of the emoji harmed his reputation, the defendant (WhatsApp user) will be held liable.

⁶¹⁵ *Isparta v Richter and another* (2013) JOL 30782 (GNP), para 12.

⁶¹⁶ *Isparta v Richter and another*, para 35.

⁶¹⁷ Singh P 'Can an Emoji Be Considered as Defamation? A Legal Analysis of *Burrows v Houda* (2020) NSWDC 485' (2021) 24 *PELJ* 14 (hereafter *Emoji*).

⁶¹⁸ Singh P (2021) 16.

⁶¹⁹ Singh P (2021) 16 – 17.

⁶²⁰ *Argus Printing & Publishing Company v Esselen's Estate* 1994 (2) SA 1 (A), para 20.

⁶²¹ *Burrows v Houda*, para 18-35.

⁶²² *Burrows v Houda*, para 37 – 50.

This principle was applied in the *Burrows v Houda* case.⁶²³ The court found that the words and emojis in the comments and replies were capable of conveying the alleged imputations and that it was a matter of joining the dots between the emojis and the surrounding context surrounding the tweets.⁶²⁴ Therefore when the current defamatory principles of liability for defamation are adapted and applied, a WhatsApp user who comments on a WhatsApp group chat using emoji may be held liable for defamation. Besides, South African courts can rely on Section 39(1)(c) of the Constitution, which provides that a court may consider foreign law.

Overall, there is no doubt that a WhatsApp group administrator(s) and/or commenting WhatsApp group members can be held liable for acts or conducts on a WhatsApp group that violate another person's right to dignity. The following and final chapter would conclude this Mini thesis by providing, among other things, recommendations on how to continue to protect the right to dignity while not stifling the right to freedom of expression.



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⁶²³ *Burrows v Houda*, para 485 & 37

⁶²⁴ *Burrows v Houda*, para 41.

CHAPTER SIX.

CONCLUSION AND RECOMMENDATION

6.1. Conclusion.

The administrator of a WhatsApp group chat can be held liable for violations of the right to dignity on the WhatsApp social media platform.⁶²⁵ This position is justified by liability principles,⁶²⁶ specifically the existence of a "universal" legal obligation to promote and protect human dignity.⁶²⁷ It seeks to hold those who violate the right to dignity on social media accountable; it promotes the protection of this constitutional value; and it advances the development of a society in which the right to dignity is a central value.⁶²⁸ Maintaining liability also provides some checks and balances on those who may be tempted to abuse the right to free expression in ways that do not promote collective democratic values.⁶²⁹ Similarly, commenting users on a WhatsApp group chat can be held liable for statements that violate the right to dignity in which they participated in their publication, even if they are not authors. This stance is also based on everyone's obligation to advance the right to human dignity both online and offline. It also confirms the age-old adage that "two wrongs do not make a right." As a result, users who repeat, endorse, allow, or draw attention to comments or statements that violate the right to dignity will be held accountable as new agents of the conduct.

⁶²⁵ See chapter 4 of this Mini-Thesis pages 70-75.

⁶²⁶ See chapter 4 of the Mini-Thesis pages 66-68 & chapter 3 pages 29-36.

⁶²⁷ See chapter 2 of the Mini-Thesis pages 13-23.

⁶²⁸ See chapter 3 of the Mini-Thesis pages 24-25.

⁶²⁹ See chapter 3 of the Mini-Thesis pages 26 -28.

6.2. Recommendations.

Holding Group administrators and commenting users accountable for violations of the right to dignity on WhatsApp social media may appear to create accountability, but there are some drawbacks. This is a reactionary strategy. Accountability comes into play only after the conduct that infringes on the right to reputation, as in the case of defamation, has occurred. Furthermore, because the internet is open to an infinite number of users, defamatory comments on the WhatsApp social media platform spread quickly. As a result, the harm or infringement continues indefinitely. In some cases, the allegedly defamatory comments are still available to the public while the defamation action is pending or ongoing. Furthermore, with the increased movement and use of cyberspace, a number of defamation lawsuits are likely to follow.

Aside from being a reactive approach, it has the potential to stifle freedom of expression by making Group administrators' liability the primary form of demanding accountability. This is because when acts of defamation occur on WhatsApp groups and the group administrators are held liable as participatory publishers of defamatory comments (even when the original perpetrator is known), many of them would not want to create WhatsApp groups because they do not want to be held liable for another person's comment. When WhatsApp subscribers stop creating chat groups, the opportunity for more extensive engagement on these platforms will be reduced. Expression, imparting and receiving of information would suffer as a result.

Furthermore, expecting the courts to apply the principles of delict in every instance of violation of the right to reputation (dignity) can lead to a series of inconsistent judgments, as the circumstances surrounding each case may differ, leading the courts to reach

different conclusions. This would not provide the level of certainty required for the rule of law to thrive.

Besides, the repeated adaptation of the principles of delict may cause the philosophy underlying the separation of powers between the legislature and the judiciary to become blurred. In this scenario, the courts would have to constantly adapt the principles of delict in order to find liability for violations of the right to dignity on the internet, particularly on social media. As time passes and circumstances change, the courts may be forced to use 'reading in' or 'striking out' or provide an interpretation in such legal proceedings. This would imply the creation (via amendments) of new 'rules' and 'laws,' thereby assuming the responsibility reserved for parliament and the legislature.

To avoid such a scenario and to take a proactive approach to protecting reputation (dignity) and holding WhatsApp group administrators and commenting WhatsApp subscribers accountable for violations, a statutory framework that provides a legal blueprint for the protection of the right to dignity must be developed. This can be referred to as the "Social Media and Defamation Act." This legislation would address and guide the adjudication of cases involving violations of the right to dignity on social media in particular. Legislative interventions have been developed to protect a variety of rights that are under attack, including harassment,⁶³⁰ equality,⁶³¹ hate speech, privacy,⁶³² cybercrime,⁶³³ and others. The same is required in terms of the right to reputation.

This legislative framework would provide in its preamble the aims and objectives it hopes to ensure and achieve. This would include stating precisely that the legislative act aims at solely protecting the right to dignity (reputation). This would entail explicitly stating that

⁶³⁰ Protection from Harassment Act.

⁶³¹ Promotion of Equality and Prevention of Unfair Discrimination Act.

⁶³² Protection of personal Information Act.

⁶³³ Cybercrimes Act.

the legislative Act's sole purpose is to protect the right to dignity (reputation). This would help to determine what should be included in the legislation. This would help to dictate what should be included in the legislation. In addition, this would help to dispel at least some "fears" that the right to free expression is being or appears to be undermined.

Furthermore, enacting the legislation would allow for extensive reflection on these issues. This occurs when the processes involved in bringing legislation into being and effect, such as consultation processes and the opportunity for public comment, have served their purpose. The legislative outcome would reflect not only the public's wisdom in dealing with the right to an unimpaired reputation, but also (there would be) a clearer perspective of what is acceptable or not acceptable in terms of public policy as it relates to the balancing of competing interests of freedom of expression and reputational harm, as well as addressing the challenges of online jurisdiction and anonymity, amongst others.

In addition, this legal blueprint would provide a scope to the definition of conducts on social media that would constitute an infringement of the right to dignity, as well as a list of statements that may be considered privileged and thus unactionable, taking into account South Africa's unique circumstances (and diversity) as well as the Constitutional values that underpin its current democratic dispensation. As things stand now, any word or action that is published can be construed as infringing on the rights to dignity.⁶³⁴ As the use of cyberspace expands rapidly, and if such a delimitation of the definitional scope is not established, there will come a time when unlimited instances of violations of the right to dignity will be continuously alleged, followed by legal recourse. This would make

⁶³⁴ Singh P (2021) 17.

it increasingly difficult for WhatsApp group administrators and commenting users to avoid liability for statements made by third parties in a group chat.

Additionally, the proposed legislation should include provisions for the establishment of a regulating body to ensure compliance with the provisions of the aforesaid legislation. Just as we have an information regulator tasked with monitoring and enforcing compliance by public and private bodies with the provisions of the Promotion of Access to Information Act, 2000 (Act 2 of 2000) and the Protection of Personal Information Act, 2013 (Act 4 of 2013), we need a content moderator (for social media) body that is statutorily established and has regional offices in the provinces.

Like its counterpart, it will be subject only to the law and the constitution and be accountable to the national assembly. This content moderator, among others, would be empowered to monitor and enforce compliance by public and private bodies with the provisions of the recommended legislation or any other legislative instrument that protects the right to dignity online.

Again, this proposed legislation would require all public and private bodies that use social media platforms like WhatsApp groups to have a social media policy with the goal of preventing users (or participants in the group chat) from violating the right to dignity of others in such groups. Furthermore, the legislation would require any group administrator to obtain and include a concise version of such a policy in the WhatsApp group's description section, along with a link directing subscribers' attention to the full social media policy. In the case whereby the WhatsApp group was formed by ordinary (private) individuals operating outside of public corporations, it should be a requirement that a concise policy be created, displayed, and brought to the attention of prospective group chat users by the group administrator before they are allowed to join the group.

It is undeniable that some companies, and even some individuals, already have social media policies in place for their various online groups. WhatsApp LLC even has its own terms of service that prohibits using its online services to violate anyone's right to dignity in any way. However, the reality is that very few people are aware of or comply with such terms of service. Aside from that, company or individual group social media policies do not have the "full" force of law. They may help to provide context for internal disciplinary actions against culprits in the company or individual groups. When national legislation requires groups that use social media platforms in their operations to have a social media policy, it not only provides legal grounds for enforcing non-compliance in the courts, but it may also absolve group administrators from direct liability (particularly in terms of negligence) if they have complied with the provisions of the proposed legislation.

Another important aspect of this proposed legislation is that it should include a provision that allows the matter (infringement of the right to reputation) to be referred to mediation by the relevant court in defamation actions, as well as guidelines on the basis on which such a court may refer such matter for mediation. This is especially important because cases of online defamation are on the rise, and our courts are eager to make access to justice affordable and to resolve disputes or claims as quickly as possible. Moreover, our courts are gradually advancing court-annexed mediation⁶³⁵ in order to transform civil justice and improve access to justice.

While developing this legislation, care must be taken not to repeat the mistakes made by other countries that have enacted Defamation legislation. Malta, for example, enacted the Media and Defamation Act in 2018 which included a provision requiring online news websites and services to register with the government.⁶³⁶ In our case, this would imply

⁶³⁵ Magistrates' Courts Rules, Ch 2.

⁶³⁶ Media and Defamation Act XI of 2018, ss 19 (2) and 21

that WhatsApp groups would have to register with the government or another authority. This would undoubtedly be an attack on free expression as well as a limitation on internet freedom. Besides, such an approach would be considered archaic.

Similarly, care must be taken to avoid enacting legislation that is "overarching." In Australia, for example, there is a defamation law. This law defines what is meant by publication of defamatory matter⁶³⁷ and provides a definition of the matter⁶³⁸ in a way that allows for a broad application of the law. One of the consequences is the recent decision of the High Court of Australia on September 8, 2021.⁶³⁹

In this landmark decision in the Australian case (also known as the *Dylan Voller* defamation case),⁶⁴⁰ the court dismissed the appeal in a majority decision and held that the appellants' actions in facilitating, encouraging, and thus assisting the posting of comments by third-party Facebook users made them publishers of those comments.⁶⁴¹ In other words, media outlets are considered publishers of defamatory comments posted by third parties on their Facebook pages because, by allowing such comments, they facilitate and encourage them, and thus participate in their communication. Consequently, when drafting legislation to this effect, care must be taken to ensure that the scope of the law's operation is clearly defined.

Another recommendation is to make use of the features of WhatsApp social media. As with Facebook, a feature that allows a group administrator to disable comments that appear to be defamatory from posts made in a group chat should be added to WhatsApp

⁶³⁷ The Defamation Act of 2005 (NSW), ss 8 and 32.

⁶³⁸ Defamation Act (NSW), s 4.

⁶³⁹ *Fairfax Media Publications Pty Ltd v Voller Nationwide News Pty Limited v Voller Australian News Channel Pty Ltd v Voller* [2021] HCA 27.

⁶⁴⁰ *Fairfax Media Publications Pty Ltd v Voller Nationwide News Pty Limited v Voller Australian News Channel Pty Ltd v Voller*, para 27.

⁶⁴¹ *Fairfax Media Publications Pty Ltd v Voller Nationwide News Pty Limited v Voller Australian News Channel Pty Ltd v Voller*, para 55.

applications. This would not only protect the group administrators from being sued for defamation by victims or interested parties, but it would also prevent further republication or making of comments that would draw attention to the defamatory material.



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