RISK AS INJURY: AN ALTERNATIVE INTERPRETATION OF THE SOUTH AFRICAN LAW OF DEFAMATION

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ABSTRACT

This thesis presents an alternative interpretation of the rules constituting the South African law of defamation. Defamation is typically understood to be a wrong in which the defendant has caused the plaintiff reputational harm. It is argued that it is more justifiable to view the wrong as a wrong of having increased the risk of reputational harm. Defamation law is an instance of state power and it is argued that this alternative interpretation better justifies that exercise of power. In making this argument, the fundamental features of the law are analysed, including what reputation is and why we value it, why it is problematic to view the wrong as being about the causation of reputational harm, and why liability for risk is problematic in the case of negligence but less problematic in the case of defamation. As the risk interpretation is meant to be an alternative interpretation of the existing rules, it is also shown that this interpretation is compatible with those rules, such as the presumptions and defences, and the standard remedial response of damages. While this thesis argues for an alternative interpretation of the rules, it is hoped that this analysis of those rules will shed new light on the law even if the risk interpretation is not accepted wholesale.

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CHAPTER 1: INTRODUCTION

I INTRODUCTION

The South African law of defamation has long been a site of jurisprudential debate. The intermingling of English and Roman-Dutch sources led to significant theoretical disagreements about fault and the nature of the wrong, and debate on those themes continues. There is still disagreement about the fault standard, for example, such as whether fault in the form of intentional conduct requires 'consciousness of the wrongfulness' of one's actions,[1] and whether such a fault standard is compatible with the defences borrowed from English law.[2] It is also controversial whether media defendants can be liable if they merely acted negligently, rather than intentionally.[3] The nature of the wrong also appears open to doubt. While there are many dicta stating the law exists to protect one's reputation, it is also sometimes claimed that defamation is really a form of aggravated insult. In line, perhaps, with this debate about whether the law is protecting reputation or protecting one from insult, the function of damages also sometimes appears open to question. The focus of the courts sometimes falls heavily on the idea of hurt feelings, and sometimes on the idea of publicly vindicating the plaintiff's reputation. Over-reliance on the idea of hurt feelings recently led the Supreme Court of Appeal to struggle to explain the function of damages in cases involving corporations.[4]

The law of defamation is replete with doctrinal controversy, then. This thesis adds new fuel to that controversy, rather than attempting to defend one well-known position against another well-known position. The stance taken here is that the best interpretation of the current practice requires one to reconceptualise that practice. The wrong of defamation is best understood not as a wrong of having caused reputational harm, but as a wrong of having increased the risk of reputational harm. In making this argument, the hope is that this thesis will also shed light on the controversies that already exist, such as whether the interest is best understood as being about reputation rather than insult, the nature of the remedial response,

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[1] See Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90. The debates about fault are discussed in more detail in Chapter 5.

[2] Helen Scott 'Contumelia and the South African law of defamation' in Eric Descheemaeker and Helen Scott (eds) *Iniuria and the Common Law* (2013).

[3] For general discussion of the various perspectives, see Daniel Visser 'Compensation for harm to the personality - *actio iniuriarum*' in Francois du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 1187-1190.

[4] See *Media 24 Ltd and others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and others as* Amici Curiae*)* 2011 (5) SA 329 (SCA). This doctrinal problem, and how to resolve it, is discussed in Chapter 8.

and the way in which one's understanding of fault interacts with these other debates. Therefore, even if one did not accept the position taken in this thesis in its entirety, the intention is that this exercise in jurisprudence will shed new light on various aspects of the law of defamation, some of which may help with the resolution of existing debates. The argument in support of the risk interpretation of the law of defamation unfolds in the following way:

This chapter outlines the general argument that is presented in the thesis, and places the law of defamation, and the existing doctrinal disputes, in historical context. Here, the conflict between reputation and insult is made clear.

If an argument is to be made that the wrong is best understood as a wrong of having increased the risk of reputational harm, then it first needs to be established that the law is concerned with reputation, rather than insult. Chapter 2 defends this position by explaining the nature of reputation, why we might value it, and why the South African law is best understood as being about reputation rather than insult. The arguments made in that chapter would be compatible with a more orthodox understanding of defamation being about the causation of reputational harm. So, it is not only relevant to the risk interpretation pursued in later chapters.

Chapter 3 outlines the orthodox understanding of the law of defamation, namely, that it involves the causation of reputational harm. Specifically, it outlines the elements of liability and what the plaintiff needs to establish in order to succeed in his or her claim. The chapter then proceeds to contrast the approach in defamation with the approach in the South African lex Aquilia (the delict of negligently causing harm that causes patrimonial loss). By contrasting the elements of liability for Aquilian delicts with the elements of liability for defamation, one can see that it is much harder to justify the claim that the defendant probably has caused harm to the protected interest in the case of defamation as compared to Aquilian delicts.

The fact that the causation of harm hypothesis is harder to justify in the case of defamation presents a philosophical problem for the state. If the state is to exercise its power in imposing liability for defamation, then it needs to be able to present a convincing argument that the exercise of force is justifiable. When one considers the basis upon which the courts find that liability has been established, there is reason to doubt whether the practice really is justifiable. If the wrong really is about having caused harm to the plaintiff's reputation, then more should be required in order to establish liability. As Chapter 3 notes, there are two possible responses to this concern. One could either change the rules to require more evidence of reputational harm, or one can justify the existing rules in some other way. This thesis (in the

argument developed in Chapters 3, 4, and 5) takes the latter route, and presents an alternative justification. The alternative justification is that the defendant is liable, not for probably having caused harm to the plaintiff's reputation, but for probably having increased the risk of harm to the plaintiff's reputation.

Chapters 4 and 5 develop this alternative interpretation of defamation by explaining why the wrong of defamation is best understood as being about an increase in the risk of reputational harm, rather than the causation of reputational harm. Chapter 4 unpacks the concept of risk, and some of the ways in which it has been employed in the lex Aquilia and the English tort of negligence. These areas of law are considered both because they demonstrate some of the different ways in which risk can feature in the law of delict (some of which are more controversial than others), and because the idea of risk-as-injury has been explored by some English judges as a viable idea. While this shows that risk-as-injury is not a completely untenable idea, the primary benefit of this analysis is to show that the arguments that speak against adopting risk-as-injury in the law of negligence or the lex Aquilia do not apply as forcefully to the law of defamation. There are crucial differences between Aquilian liability and defamation that make risk-as-injury more tenable in the case of defamation.

Chapter 5 then demonstrates why the objections against adopting risk-as-injury in the context of negligence are overcome in the case of defamation. The main problem with adopting risk in the context of negligence is that the lex Aquilia and the tort of negligence are transversal torts, i.e. they protect a variety of interests against various forms of conduct. Imposing liability for mere risk in this context would err too far on the side of security and impose too high a cost on freedom of action (and negatively affect other matters, like the costs of insurance and litigation). By contrast, the South African law of defamation is a vertical tort, meaning that it protects a particular interest (reputation) from a particular form of conduct (the publication of a defamatory assertion). This, along with its non-negligible fault standard, helps to limit the scope of liability. When one then also takes into account the importance of protecting one's reputation (Chapter 2) and the difficulty of proving reputational harm (Chapter 3), then imposing liability for increasing the risk of reputational harm becomes justifiable.

As the risk interpretation is supposed to be an alternative justification of the existing rules, the remaining chapters then demonstrate that that interpretation does fit with the current structure of the South African law. Chapter 6 attempts to show that the risk interpretation is compatible with the presumptions of defamation law and the defences. Chapters 7 and 8 show

that the risk interpretation is compatible with the remedial response, namely, damages. Chapter 7 unpacks the idea of public vindication, while Chapter 8 unpacks the idea of damages for hurt feelings. These chapters also consider recent developments in Anglo-American tort theory and explain why the new concepts of vindicatory damages and substitutive damages – although prima facie good explanations of the function of damages in defamation – are not preferable to the orthodox ideas of public vindication and hurt feelings. So, while these chapters aim to show that the risk interpretation is compatible with the standard remedial response, these discussions should also help to shed light on the nature of these remedial responses in general, in a way that would be relevant to a more standard interpretation of the law of defamation.

As noted above, this thesis adds to the existing jurisprudential controversies surrounding the law of defamation, but, in so doing, hopes also to shed new light on those controversies. In order to understand the new position or how it might shed light on existing controversies, it is helpful to have a historical overview of these controversies. The rest of this chapter therefore presents an historical introduction to the law of defamation and its doctrinal disputes.

II AN HISTORICAL INTRODUCTION TO THE SOUTH AFRICAN LAW OF DEFAMATION

South Africa's colonial history has had a significant impact on the legal system that exists today. As an area that was under Dutch and then English control, Roman-Dutch and English legal principles found their way to southern Africa. These legal principles were then interwoven with one another by the courts of the early southern African colonies, and the courts of the later political entities such as the Union of South Africa and the Republic of South Africa.[5] As a result of this colonial history, South Africa's common law has three traditional primary sources: Roman-Dutch law, English law, and South African judicial precedents.[6] In the mid-twentieth century, the law of defamation was the subject of a fierce debate between those who wanted to embrace English principles and those who wanted to affirm a more

[5] For an overview of South African legal history and the influence of Roman-Dutch and English sources, see H R Hahlo and Ellison Kahn *The Union of South Africa. The development of its laws and constitution* (1960) ch 2; Reinhard Zimmermann & Daniel Visser 'South African law as a mixed legal system' in R Zimmermann & D Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (1996); and Eduard Fagan 'Roman-Dutch law in its South African historical context' in R Zimmermann and D Visser *Southern Cross* op cit. For an historical overview of the protection of personality interests in particular in South Africa, see J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2ed (2005).

[6] Francois du Bois 'Sources of law: Common law and precedent' in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 65.

Roman-Dutch or Civilian approach to defamation.[7] More recently, the end of white minority rule in South Africa and the advent of constitutional democracy in 1994 has led to a tendency on the part of the courts to re-examine existing common law principles and rules in the light of the new Constitution and its binding bill of rights (such as the right to freedom of expression and the right to dignity), rather than being strictly bound by historical sources of law like judicial precedent.[8] The law of defamation has never been codified in South Africa, moreover, and so, in order to understand the law, one needs to engage with the case law and the competing interpretations of that law.

As noted above, the law of defamation was an important battleground in the academic conflict now known as the *Bellum Juridicum*. In general, this 'jurisprudential war' was a debate between those who supported the incorporation of English principles into the South African law, sometimes just out of respect for the doctrine of precedent, and those who thought that the elegant principles of Roman-Dutch law were preferable to seemingly chaotic English case law.[9] In the context of defamation, this debate centred to a large degree on the ways in which one could escape liability. The debate was about whether the defendant was restricted to the closed list of defences offered by English law, such as truth, privilege and fair comment, or, whether, perhaps because of a fault requirement, there were other ways to exclude liability, such as pointing to the fact that one had made a mistake.[10]

In *Maisel v van Naeren*,[11] the Cape High Court appeared to side with the advocates of Roman-Dutch law when it allowed a defendant to escape liability due to a mistaken belief that his defamatory statement was privileged. The court argued that the sophisticated, flexible principles of Roman-Dutch law were superior to the casuistic and rigid English principles: the adoption of English law in the place of Roman-Dutch law would 'amount to the sacrifice of the fruits of centuries of evolution from primitive rigidity and formalism to the refined principles of a developed system of law.'[12]

[7] Discussed in more detail below.
[8] F du Bois 'Sources of law' op cit note 6 65; see *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) for an example of common law principles of defamation being subjected to constitutional analysis.
[9] See the exchanges between Roger McKerron 'Fact and fiction in the South African law of defamation' (1931) 48 *SALJ* 154, and Melius de Villiers *'Animus injuriandi*: an essential element in defamation' (1931) 48 *SALJ* 308. For an overview of the debate see PQR Boberg 'Defamation South African Style – the odyssey of animus injuriandi' in Coenraad Visser (ed) *Essays in honour of Ellison Kahn* (1989) 35; and Proculus 'Bellum Juridicum: two approaches to South African law' (1951) 68 *SALJ* 306.
[10] See references in footnote 9.
[11] 1960 (4) SA 836 (C).
[12] Ibid at 846C-847.

In a sense, the decision in *Maisel v van Naeren* has since been vindicated, as South Africa generally did not follow English law in adopting strict liability in the context of defamation,[13] except for a period when media defendants were held strictly liable.[14] It is now well-established that *animus injuriandi* or fault is an essential feature of liability for defamation in South Africa.[15] On the other hand, it would be too simple to claim that *Maisel v Van Naeren* paved the way for a simple or wholesale vindication of Roman-Dutch law in the place of English law. After *Maisel v van Naeren*, commentators went on to note that the law of defamation is a mixture of Roman-Dutch and English principles that is more properly described as South African than Roman-Dutch or English. Paul Boberg states that 'today it can fairly be said that we have our own, unique brand of defamation,'[16] and Reinhard Zimmermann argues that 'what has emerged, over the years, is a truly hybrid system that has emancipated itself from the Roman-Dutch and English roots and has, instead, acquired a distinctive flavour of its own'.[17] Judicial recognition that the law is, in general, mixed pre-dated the seemingly one-sided decision in *Maisel v van Naeren* (which had so eagerly embraced Roman-Dutch law). In *Ex parte de Winnaar*,[18] Holmes J had stated the following:

> Our country has reached a stage in its national development when its existing law can better be described as South African than Roman-Dutch [...] No doubt its roots are Roman-Dutch, and splendid roots they are. But continuous development has come through adaptation to modern conditions, through case law, through statutes, and through the adoption of certain principles and features of English law, such as procedure, and the law of evidence. The original sources of the Roman-Dutch law are important, but exclusive preoccupation with them is like trying to return an oak tree to its acorn. It is looking ever backwards.[19]

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[13] See *E Hulton & Co v Jones* [1910] AC 20.

[14] This position was explained by the Supreme Court of Appeal in *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA) as follows: 'The effect of the judgment [in *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A)] was that, unlike ordinary members of the community - and, for that matter, also unlike distributors - newspaper owners, publishers, editors and printers are liable without fault and, in particular, are not entitled to rely upon their lack of knowledge of defamatory material in their publications or upon an erroneous belief in the lawfulness of the publication of defamatory material' (at 1205G).

[15] *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 18 ('At common law, the elements of the delict of defamation are: *(a)* the wrongful and *(b)* intentional *(c)* publication of *(d)* a defamatory statement *(e)* concerning the plaintiff'); *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* amici curiae*)* 2011 (3) SA 274 (CC) para 85 ('All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional'). There is some controversy whether intention is always required in order for media defendants to be liable after *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA). See Jonathan Burchell 'Media freedom of expression scores as strict liability receives the red card: *National Media Ltd v Bogoshi*' (1999) 116 *SALJ* 1; JR Midgley 'Media liability for defamation (1999) 116 *SALJ* 211; and Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90 at 101-106.

[16] Boberg 'Defamation South African Style' op cit note 9 at 35.

[17] Reinhard Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1996) at 1080.

[18] 1959 (1) SA 837 (N).

[19] Ibid at 839.

In many ways, contemporary jurisprudential controversies affecting the law of defamation resonate with these historical debates. Even if the mixed nature of the legal system is accepted, the nature of various aspects of the law of defamation still appear open to question.

As noted above, the traditional debate about the Civilian or English nature of the law of defamation centred largely on fault and the flexibility of the means of excluding liability. The significance and role of fault is still a subject of debate, however, particularly whether fault in the form of intentional conduct requires 'consciousness of the wrongfulness' of one's actions, and whether such a fault standard is compatible with the defences borrowed from English law.[20]

The nature of the wrong also appears open to question. There is still dispute about whether the wrong is essentially a form of aggravated insult, or whether it is essentially about an infringement of a right to reputation, regardless of whether or not the conduct is insulting. Tied to this debate about the nature of the wrong, the losses for which one is being compensated also sometimes appears to be open to question.[21] If the law of defamation is going to be reconceptualised as being about the wrong of having increased the risk of reputational harm, however, then it must at least be established that the law is concerned with reputation rather than insult. An overview of this dispute in particular is therefore presented below.

In *National Media Ltd and others v Bogoshi*, the Supreme Court of Appeal states that 'it is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other.'[22] This sentiment has been endorsed by that court subsequently,[23] as well as by the Constitutional Court. In *Khumalo v Holomisa*, for example, the Constitutional Court states that 'the law of defamation seeks to

[20] See Helen Scott 'Contumelia and the South African law of defamation' in Eric Descheemaeker and Helen Scott (eds) *Iniuria and the common law* (2013) at 119. Fault will be discussed in more detail in Chapter 5.
[21] In *Media 24 v Taxi Securitisation* op cit note 4, the SCA struggled to explain the function of damages for defamation, even though it was clear that they were not for patrimonial loss. See the discussion in Chapter 8.
[22] Supra note 15 at 1207C.
[23] *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and others* 2001 (2) SA 242 (SCA) para 23 ('In *National Media Ltd and Others v Bogoshi*1998 (4) SA 1196 (SCA) at 1207D Hefer JA stated: "It is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other." He went on to observe (at 1207E) that "(i)t would be wrong to regard either of the rival interests with which we are concerned as more important than the other", a matter on which he then proceeded to elaborate. This is particularly so where the Constitution in terms seeks to protect both the dignity of the individual and freedom of speech (see ss 10 and 16(1) of the Constitution of the Republic of South Africa Act 108 of 1996)'); *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) para 12 ('The Constitutional Court has held in *Khumalo and Others v Holomisa* that the principles of the common law as recently developed in *National Media Ltd and Others v Bogoshi* are consistent with the provisions of the Constitution and maintain a proper balance between the right to reputation and the right to freedom of expression. It remains to apply those principles to the facts').

protect the legitimate interest individuals have in their reputation'.[24] One way to understand these comments about 'a right to reputation' is that the law of defamation exists to protect one's reputation against unlawful injury. There is an alternative view of the law of defamation, however, which characterises defamation as a form of aggravated insult. This idea that the law of defamation is really about a wrong of insult extends back at least to the nineteenth century. F.G. Gardiner, for example, argued that publication to a third party should not be a requirement of defamation in South Africa given that the gist of the Roman and Roman-Dutch action was insult.[25] The argument was that if the wrong was about the insult, then it should not be a necessary condition that it be communicated to third parties. It should be enough if the statement was communicated to the defamed individual herself, for that would still be a form of insulting conduct. The idea that insult is the gist of the action still sometimes finds expression in modern case law. In *Le Roux and others v Dey*,[26] the Supreme Court of Appeal was considering the question whether a plaintiff has to institute a separate action for infringement of dignity when also suing for defamation. Harms DP gave the following reasons for his conclusion that one does not need to institute a separate action:

> I am unaware of any instance in the history of the *actio injuriarum* where a particular defamatory act gave rise to two causes of action. (I exclude the cases where patrimonial damages are also claimed.) The reason is in my view that *any defamation is in the first instance an affront to a person's dignity which is aggravated by publication*. Someone who is not affronted by a publication and who does not feel humiliated will not sue for defamation. That is why the award of damages compensates "the plaintiff for injured feelings and for the hurt to his or her dignity and reputation". As FP van den Heever J once said, "an action on defamation has several purposes: to kill libel, to recover a *solatium* for injured feelings and to recover a penalty from the slanderer". In other words, in assessing compensation in a defamation case a court must have regard to the effect the publication had on the plaintiff. In *Gelb v Hawkins* this court's determination of compensation in a defamation case was said to relate "in the main to *contumelia*, but does not overlook the elements of loss of reputation, and penalty", which means that on the facts of the case the plaintiff's humiliation, and not loss of reputation, was the major factor in deciding quantum.[27]

Rather than insulting conduct and subsequent hurt feelings being a potential, perhaps exceptional, harmful consequence of a statement that injured one's reputation, hurt feelings are presented as the natural consequence of a wrong of insult. From the above, one might interpret the wrong as essentially being about insult (albeit an insult aggravated by publication) rather

[24] Supra note 15 para 28.
[25] F G Gardiner 'Is publication essential to an action for defamation?' (1897) 14 *Cape Law Journal* 184.
[26] 2010 (4) SA 210 (SCA).
[27] Ibid para 23. Emphasis added.

than essentially being about one's reputation (with publication to a third-party being an essential rather than an aggravating feature of the wrong).

It might seem as if the focus on insult comes directly from the Roman-Dutch sources. Harms DP refers to the 'actio injuriarum' and to 'contumelia', for example, and these are Roman concepts that do relate to insulting conduct. As Peter Birks explains, the harm typically suffered by someone who had suffered an *iniuria*, in the sense relevant to the Roman *actio iniuriarum*, was outrage or feelings of distress.[28] The wrong that one committed when one committed an *iniuria* was the wrong of holding another in contempt, hence the description of the frame of mind of the defendant as 'contumelious', meaning hubris or 'a kind of arrogance or pride, an over-confident exaltation of the self, manifested in violence or other misbehaviour towards others'.[29] The best English word for contumelia, Birks argues, is 'contempt: when a man thinks another of little worth in comparison to himself'.[30] In summary, then, *iniuria* was 'the contemptuous harassment of another, calculated to cause distress in the nature of anger and humiliation (the desire for revenge, joined with grief) but violating, not an interest in emotional calm, but the victim's right to his or her proper share of respect'.[31] Another example of the link between Roman law and insult can be seen in Schreiner JA's judgment in *Die Spoorbond and another v South African Railways*,[32] where Schreiner JA assumed that the South African law had a Romanistic historical pedigree, with the concept of insult that it brought with it, even if he did so only to discredit the idea that it still represented the modern law:

> Our action for defamation is derived ultimately from the Roman *actio injuriarum* which "rested on outraged feelings, not economic loss" (Buckland, *Textbook of Roman Law,* sec. 202). Even in the early days of recorded Roman law mention was specifically made, in this connection, of *public* insults, but the gist of the action was the intentional and unjustified hurting of another's feelings and not the damage to his reputation considered as something that belonged to him. In our modern law, as often happens, the wide old delict of *injuries* has split up into different delicts, each with its own name, leaving a slight residue to bear the ancient title. The particular delict now known as defamation has lost a good deal of its original character since it is no longer regarded primarily as an insulting incident occurring between the plaintiff and the defendant personally, with publicity only an element of aggravation by reason of the additional pain caused to the plaintiff.[33]

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[28] Peter Birks 'Harassment and hubris. The right to an equality of respect' (1997) 32 *Irish Jurist* 1 at 12.
[29] Ibid at 11.
[30] Ibid.
[31] Ibid at 14.
[32] *Die Spoorbond and another v South African Railways; van Heerden and others v South African Railways* 1946 AD 999.
[33] Ibid at 1010.

The influence of Roman-Dutch law probably is one reason why the courts do sometimes link defamation with insult and the feelings that come from being insulted. But English law is actually another important source of this idea. Following his description in *Le Roux v Dey* of defamation as 'an affront to a person's dignity which is aggravated by publication,'[34] Harms DP also refers to the Common Law tradition in support of the idea that damages are a form of *solatium* or compensation for outraged feelings:

> Risking the wrath of those who believe that our law of defamation has not been contaminated by the common law, I believe that the following statement by Windeyer J encapsulates what I wish to say: "It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways: as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a *solatium* rather than a monetary recompense for harm measurable in money. The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is the product of a mixture of inextricable considerations."[35]

The idea that the South African law of defamation might have something to do with insulting conduct has two potential sources, then, namely, the Common Law tradition and the Roman tradition. This idea, moreover, sometimes clashes with the idea that the law of defamation protects a right to reputation that is capable of existing regardless of whether or not the infringement of the right happened in an insulting way. The fact that an infringement of a right to reputation could also be insulting and so could aggravate the wrong or provide a reason for increasing the damages adds to the potential for confusion of the ideas of damaging one's reputation and insulting one.

Chapter 2 will provide reasons for preferring the view that defamation protects a right to reputation, rather than insult, and why our reputations are something that we might value and want the state to protect. This will also be a step towards the establishment of an alternative interpretation of the wrong of defamation, namely, that it is about having increased the risk of reputational harm, rather than having caused reputational harm. The controversies surrounding fault and the function of damages will also be picked up again in later chapters.

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[34] Supra note 26 para 23.

[35] Supra note 26 para 24. Square brackets in the original. The reference is to *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (HCA) at 150.

CHAPTER 2: A RIGHT TO REPUTATION

I INTRODUCTION

In the previous chapter, we saw that there are two competing ways to characterise the wrong of defamation in South Africa. The one view characterises the wrong as an infringement of a right to reputation while the other characterises the wrong as an aggravated insult. This chapter will endorse the former view, namely, that defamation is an infringement of a right to reputation. The chapter will elaborate on that view by discussing what reputation is and why we would value reputation and want to protect it. It will then provide reasons for why the South African law of defamation is best seen as protecting a right to reputation rather than a right to be free from insult.

II DEFINING REPUTATION

Reputation is generally recognised as being an under-theorised aspect of the law of defamation. Lawrence McNamara, in one of the major recent contributions to the legal literature that deals with the nature of reputation, notes that '[t]he literature on reputation consists, perhaps surprisingly, of only a few key works'.[1] Robert Post, moreover, in a well-known article that often stands centre-stage in discussions of reputation and defamation,[2] states that '[i]t is all too easy to assume that everyone knows the value of reputation, and to let the matter drop with the obligatory reference to Shakespeare's characterization of a "good name" as the "immediate jewel" of the soul'.[3]

I will adopt one of the definitions of reputation put forward by Lawrence McNamara, namely, that '[a]n individual's reputation is a social judgment of the person based upon facts which are considered relevant by a community.'[4] McNamara, however, expands upon this definition in a very specific way, which I think undermines its usefulness as a general definition. McNamara's theory ties reputation to moral judgements, but, while assertions of immorality are the primary form of defamatory statement, they are not the only type of defamatory statement. I think that McNamara's more general definition (which he later transforms into something too specific) is capable of accommodating the various kinds of

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[1] Lawrence McNamara *Reputation and Defamation* (2007) 19.

[2] McNamara op cit note 1 states that 'Post's work is without question the benchmark in contemporary commentary and critique' (at 37 fn 5).

[3] Robert C Post 'The social foundations of defamation law: Reputation and the constitution' (1986) 74 *California Law Review* 691 at 692.

[4] McNamara op cit note 1 at 21.

statements that have been found to be defamatory and which can be understood to pose a threat to one's 'reputation'. So, I will endorse the more general definition.

I do not engage with Post's work on reputation because the concern here is whether a general, abstract account of reputation can be articulated. Post, however, thinks that the nature of reputation varies depending on the kind of society in which one lives. His argument is that the Anglo-American law of defamation has developed in accordance with different conceptions of reputation, namely, reputation as property, honour, and dignity, which he thinks explains some of its oddities.[5] It was never his intention to give a general account of reputation, then, because he thinks that the nature of reputation varies as societies change.[6] Contrary to Post's hesitance to present a general account of reputation, McNamara thinks that a general account can be given, and I also think that McNamara's general definition of reputation has value in explaining what reputation is in the context of the South African law of defamation.

III LAWRENCE MCNAMARA'S THEORY OF REPUTATION AND ITS FOCUS ON MORAL JUDGEMENTS

McNamara begins his argument by providing a basic definition of reputation: 'An individual's reputation is a social judgment of the person based upon facts which are considered relevant by a community.'[7] This definition, which does seem to accord with a common-sense understanding of reputation, is derived from two sources. First, McNamara relies on the reasonable person test that is used by Common Law courts to see what the courts understand 'defamatory' to mean and thus what reputation (the thing being injured by defamatory statements) means.

According to the courts, one's reputation is 'the view of a person that is held by ordinary decent or right-thinking folk in the community'.[8] After all, defamatory statements caused right-thinking people to think less of one, so the thing being protected must be the view of a person that is held by right thinking people. This definition only takes into account right-thinking people, however. And, McNamara reasons, it might be too soon to exclude other people in the very definition of reputation itself. Therefore, he turns to Thomas Gibbons' view of reputation,[9] which is different to the courts' view because it focuses on one's actual or real reputation, rather than on one's reputation among right-thinking people. As McNamara explains,

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[5] Post op cit note 3 at 692-693.
[6] Ibid at 699-700.
[7] McNamara op cit note 1 at 21.
[8] Ibid.
[9] Thomas Gibbons 'Defamation reconsidered' (1996) 16 *Oxford Journal of Legal Studies* 587.

'[r]eputation, according to Gibbons, is "the outcome of [others'] judgments [about a person]" where "an external assessment has been made of the person's behaviour and characteristics, and that...represents the views of a community of interests"'.[10] According to Gibbons, 'the law does not have the function of protecting reputation because it is not concerned with real reputations'.[11]

In order to retain the possibility of addressing both of these understandings of reputation - the courts' view which focuses on the opinions of right-thinking people, and a more general view that tries to define one's real or actual reputation - McNamara introduces the following definition of reputation, which can encompass both: 'An individual's reputation is a social judgment of the person based upon facts which are considered relevant by a community.'[12] In the case of the courts, the community being focused on is right-thinking members of society, while in the case of one's actual reputation it might be whatever community one finds relevant, regardless of whether or not they are right-thinking or decent members of the wider community.

This is just a starting point for McNamara, however, for he thinks that this definition can be elaborated upon to shed further light on the concept of reputation. In order to expand this definition, McNamara turns his attention to the concept of community, and it is his understanding of community that leads him to draw a strong link between moral judgements in particular and reputation.

Drawing on sociology, a community, for McNamara, is a 'moral construct', because communities define themselves in terms of shared values. Judging if someone possesses those values, or if they transgress them, is a way of determining who is part of the community and who is not. An assessment of whether someone possesses the right values is a means of determining insiders from outsiders:

> A community is a group of people that see themselves united by the values that they consider they share. It is both an inclusive and exclusive concept. Just as those who share the values are bound together and recognize their equivalent moral goodness, a failure to share those values means that one is, necessarily, not a part of the community.[13]

Using studies of honour in Mediterranean communities, McNamara derives a general proposition that communities are constituted by, and rely on, 'moral taxonomies (or ethical

[10] McNamara op cit note 1 at 21. Square brackets and ellipsis by McNamara.
[11] Gibbons op cit note 9 at 589.
[12] McNamara op cit note 1 at 21.
[13] Ibid at 26.

rules)'.[14] These ethical rules contain 'the criteria for moral judgement', which form 'the bases for judgments of social worth and self-worth in a community.'[15] These rules 'consist of criteria that are recognized by a community as constituting and being evidence of moral goodness or moral badness'.[16] These criteria get their important status either because they are 'the characteristics of those who have social power', or they are regarded as significant just because the community views them as significant, i.e., they are based on 'tradition': 'some things are virtues for no other reason than that the community regards them as virtues'.[17]

It seems, then, that McNamara thinks that one's reputation is based on moral judgements specifically, for it is moral judgments that matter when a community is assessing one's membership of the community. One can see this in his frequent use of the word 'moral' in the quotations above. There are times, however, when his theory has the potential to include judgements other than moral judgements, such as when he says that '[a] community is a group of people that see themselves united by the values that they consider they share,'[18] or when he refers to 'judgements of social worth',[19] or 'virtues'.[20] These terms are not necessarily restricted to moral judgements. A human being can have the virtue of being friendly or cool-headed. A society can value commerce and thus ascribe high social worth to skilled businesspeople. It seems clear, however, that McNamara is interested in specifically moral judgements. If we are dealing with values that refer to inclusion or exclusion in a community, then the stakes seem quite high. Even if one thought that someone lacks the virtues of being friendly or cool-headed and that she is a terrible businessperson, one would probably still regard them as being a member of the wider community. It is true that certain smaller communities or social groupings – such as a network of businesspeople – might start to exclude such a person. In any event, if McNamara's theory is restricted to moral judgments in particular, then this is a problem for his account of reputation, given that the courts do not restrict claims of defamation to assertions of immoral behaviour. So, unless his references to morality are interpreted to include a wider set of values, McNamara seems to make a wrong turn when he ties the concept of reputation closely to moral judgements. In the next section, we will see what kinds of statements the South African courts have found to be defamatory and that McNamara's initial definition of

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[14] Ibid at 53.
[15] Ibid.
[16] Ibid at 54.
[17] Ibid at 55.
[18] Ibid at 26.
[19] Ibid at 55.
[20] Ibid at 49-50, 55.

reputation is broad enough to include these other instances where reputation is not based on moral judgements specifically.

IV THE KINDS OF STATEMENTS THE COURTS HAVE FOUND TO BE DEFAMATORY

In *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* Amici Curiae*)*,[21] Brand AJ stated the following for the majority of the Constitutional Court:

> Examples of defamatory statements that normally spring to mind are those attributing to the plaintiff that he or she has been guilty of dishonest, immoral or otherwise dishonourable conduct. But defamation is not limited to statements of this kind. It also includes statements which are likely to humiliate or belittle the plaintiff; which tend to make him or her look foolish, ridiculous or absurd; and which expose the plaintiff to contempt or ridicule that renders the plaintiff less worthy of respect by his or her peers.[22]

A similar idea had previously been expressed by the Appellate Division. In *Die Spoorbond v South African Railways*,[23] Watermeyer CJ stated the following: 'a man's reputation […] includes in an appropriate case not only his moral and social reputation but also his professional or business competence and his financial credit'.[24]

The Constitutional Court and the Appellate Division clearly think that one's reputation, and the kind of statement that can damage it, encompasses more than one's moral character, and that it also includes one's professional competence and financial credit. At first, it might be tempting to conclude that allegations of professional incompetence really boil down to accusations of immorality. As Jonathan Burchell notes, '[t]here are many instances in which the courts have held that the plaintiff has been defamed by the defendant impugning his fitness for his occupation or profession. Such an allegation exposes the plaintiff to ignominy or degradation. Usually such an imputation affects his moral character, but an aspersion on his competence alone may be sufficient to constitute defamatory matter'.[25] Indeed, many cases of alleged professional incompetence[26] do involve allegations of immorality. In *May v Udwin*,[27] for example, an attorney was accused of dishonesty and being professionally unethical. In

[21] 2011 (3) SA 274 (CC).
[22] Ibid at para 91.
[23] *Die Spoorbond and another v South African Railways; van Heerden and others v South African Railways* 1946 AD 999.
[24] Ibid at 1007.
[25] Jonathan M Burchell *The Law of Defamation in South Africa* (1985) 125.
[26] See the cases cited by Burchell op cit note 25 at 125 fn 277.
[27] 1981 (1) SA 1 (A).

South African Associated Newspapers Ltd v Yutar,[28] the Attorney-General had been accused of deliberately misleading the court, which suggests deceitfulness or immoral conduct. In *Borgin v De Villiers*,[29] the allegation was summarised as largely being one of dishonesty, which rendered the plaintiff ineligible for an academic position.[30] As Burchell also points out, however, there have been cases that seem to be focused on professional competence per se, without any reference to immoral conduct. In *Jordaan v Van Biljon*,[31] the allegation was that a teacher took no interest in the progress of his pupils and was thus unsuited to be a teacher. In *Craig v Voortrekkers Bpk*,[32] the allegation amounted to incompetence in the management of a veterinary clinic. There have also been judgments in the High Courts that support this idea. One of the clearest is *Yates v MacRae*,[33] where the allegation was that the plaintiff performed his work inefficiently and poorly. In *Gluckmann v Holford*,[34] the allegation was that the plaintiff's reputation as an attorney was poor in general. And in *Kritzinger v Perskorporasie van Suid-Afrika*,[35] it was held that it can be defamatory to say that someone is bankrupt even if he is not a businessman.

One can summarise this in the following way. Defamatory assertions often relate to one's moral character. But, in some cases, defamatory assertions relate to personal attributes, such as professional skill or competence, that are not necessarily a concern about one's moral character. Finally, in some cases defamatory assertions relate to claims about one's creditworthiness in particular. McNamara's initial definition of reputation, before he elaborates on his conception of community and places emphasis on moral judgements, is capable of capturing these different elements: 'An individual's reputation is a social judgment of the person based upon facts which are considered relevant by a community.'[36]

If this is what reputation means, the next section will elaborate on why reputation matters and why it is worthwhile protecting it using the law of delict.

V WHY WE VALUE REPUTATION

There are two well-established ways to explain the function of rights, namely, will theories and interest theories. Will theories point to the way in which rights give people control over the

[28] 1969 (2) SA 442 (A).
[29] 1980 (3) SA 556 (A).
[30] Ibid at 571.
[31] 1962 (1) SA 286 (A).
[32] 1963 (1) SA 149 (A).
[33] 1929 TPD 480.
[34] 1940 TPD 337.
[35] 1981 (2) SA 373 (O).
[36] McNamara op cit note 1 at 21.

duties of others. You can waive your rights and so allow others to act in ways that otherwise would not be permitted, such as use your property. Interest theories focus on the ways in which rights are good for those who hold them; that rights further the right-holder's interests.[37] In what follows I adopt an interest-based account of the function of the right to reputation, namely, that we should protect people's reputations because doing so furthers their interests.

The legal literature on reputation generally acknowledges two interests that are furthered by protecting reputation, which we can call 'internal' interests and 'external' interests. Internal interests relate to one's sense of self-esteem and personal identity. On this account, attacking people's reputations is wrong because it hurts their feelings and confuses the image they have of themselves. External interests, on the other hand, relate to the way in which reputations help us achieve things in the world. Our reputation, like our property and our bodily integrity, is a tool that we use to pursue opportunities and further our life's projects. These two reasons for valuing reputation are explained in what follows.

Thomas Gibbons notes that one's reputation can be valued for various reasons, including both one's sense of self and one's relations with the world:

> In one sense, the desire to control our public image is an assertion of autonomy, whereby we retain power over the transition from a private world, where others do not have knowledge about us and do not demand reasons for our actions, to a social world where others' attitudes and responses can have unpredictable effects. It may also manifest our own sense of self or our personal history and identity, and it may incorporate a claim about our integrity, implying that we are consistent in espousing and implementing our values and aims. Another important reason for wanting to control the public presentation of our personal image relates to the social benefits that it may bring. The commercial advantages of a good reputation are obvious. Professionals and traders, for example, will foster a reputation that secures repeated business and most individuals will be interested in their creditworthiness. In addition, favourable assessments of our behaviour bring social advantages. They include friendship and association, respect and admiration, and being part of a group or community. These advantages may be invaluable, even if they cannot always be financially quantified.[38]

Eric Barendt focuses on self-esteem as an aspect of dignity, in conjunction with economic loss:

> it is surely more common today to see the value of reputation in its connection with the fundamental right of all individuals to respect for their personal dignity […] Sociologists and psychologists would, I imagine, agree that the esteem in which we are held by others is an integral aspect of our own dignity and self-esteem. As a matter of

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[37] Leif Wenar 'Rights' in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2015 Edition). Accessible online at https://plato.stanford.edu/archives/fall2015/entries/rights/.

[38] Gibbons op cit note 9 at 589-590.

> commonsense, to allege that someone is, say, seriously incompetent or dishonest may well damage the esteem in which he, or she, is held by others and consequently wound his (or her) self-esteem. Such allegations may additionally cause significant economic damage. Any civilized legal system should be prepared to provide redress in these circumstances. It is this argument which persuades me that there is a point to libel law.[39]

Lawrence McNamara also notes the temporal advantages of a good reputation, even though he argues that it should be seen as a form of personality interest, rather than a form of property. And in arguing for why it should be seen as a personality interest, he, like Eric Barendt, notes the role that reputation plays in one's sense of self-worth:

> There is no doubt that a good reputation may in the ordinary course of events carry some material advantage. […] To that extent, it seems entirely appropriate to recognize through the remedy of pecuniary damages the loss that may accompany a diminution of reputation. However, to say that we have 'worldly interests' in reputation, and to say that the law will recognize that those interests carry material consequences is far from saying that reputation *is* property. Rather, it is simply to say that: "Reputation is regarded by the law in the same light as that in which it is regarded by the common understanding of mankind, viz as carrying with it, if good, temporal advantages . . ." […T]here is broadly based agreement that an individual's sense of self-worth is intimately related to how other people see them, and that means reputation *matters*.[40]

The two groups of reasons for valuing reputation that these authors identify can be called external benefits and internal benefits. External benefits are those social benefits and temporal advantages that a good reputation can generate, and the internal benefits are those relating to one's sense of self-esteem and personal identity.

The capacity to generate these external and internal benefits are what makes reputation, like property and bodily integrity, an important 'welfare interest'. In other words, reputation is a particularly important thing to protect.

The idea of a welfare interest has featured in some attempts to define the nature of harm. John Kleinig defines 'welfare interests' as

> those interests which are indispensable to the pursuit and fulfilment of characteristically human interests… Being foundational, their satisfaction is not to be identified with a person's happiness or well-being so much as the conditions which make happiness and well-being possible […] Obvious candidates are bodily and mental health, normal intellectual development, adequate material security, stable and non-superficial

[39] Eric Barendt 'What is the Point of Libel Law?' (1999) *Current Legal Problems* 110 at 116-117.
[40] McNamara op cit note 1 at 42, 46. Emphasis by McNamara.

> interpersonal relationships, and a fair degree of liberty […] It is with welfare interests that rights are primarily concerned.[41]

For Kleinig, harm is best understood as an 'impairment of a being's welfare interests'.[42] An impairment is more than a mere interference; it is 'to make something worse or cause it to deteriorate. Impairment is thus an interference which has substantial deleterious effects'.[43]

Joel Feinberg also acknowledges the importance of welfare interests in his discussion of harm, even though he would not restrict the concept of harm to invasions of welfare interests:

> a person's most important interests […] are rather his interests, presumably of a kind shared by nearly all his fellows, in the necessary means to his more ultimate goals, whatever the latter may be, or later come to be. In this category are the interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion […] These minimal but non-ultimate goods can be called a person's "welfare interests" […] an invasion of a welfare interest is the most serious, but not the only kind of harm a person can sustain.[44]

There are a number of ways in which one could defend the moral significance of welfare interests and why one should not violate them, depending on one's preferred moral theory. A consequentialist, for example, could point to the social benefits of allowing people to act freely and the personal benefits like happiness and fulfilment. Another justification would be to rely on the value of autonomy. Stephen Perry, for example, argues that 'the harm involved in damaging or destroying tangible property also constitutes an interference with autonomy. The use-value and exchange-value of property both represent opportunities for the owner, and adversely affecting either type of value harms the owner precisely because it diminishes her opportunities'.[45] Stephen Perry is relying here on Joseph Raz, who makes a similar argument:

> Respect for the autonomy of others largely consists in securing for them adequate options, i.e. opportunities and the ability to use them. Depriving a person of opportunities or of the ability to use them is a way of causing him harm. Both the use-

[41] John Kleinig 'Crime and the Concept of Harm' (1978) 15(1) *American Philosophical Quarterly* 27 at 30-33.
[42] Ibid at 33.
[43] Ibid at 32.
[44] Joel Feinberg *The Moral Limits of the Criminal Law: Harm to Others* (1987) 37-38.
[45] Stephen Perry 'On the relationship between corrective and distributive justice' in J Horder (ed) *Oxford Essays in Jurisprudence* 4th series (2000) 256.

> value and the exchange-value of property represent opportunities for their owner. Any harm to a person by denying him the use or the value of his property is a harm to him precisely because it diminishes his opportunities. Similarly injury to the person reduces his ability to act in ways which he may desire. Needless to say a harm to a person may consist not in depriving him of options but in frustrating his pursuit of the projects and relationships he has set upon. Between them these cases cover most types of harm.[46]

Reputation also seems like one of those things that makes further projects and opportunities possible, and it too could be defended on the basis of autonomy, if one preferred a non-consequentialist approach.

To summarise, Perry and Raz highlight the way in which property damage and injury to one's body affect one's options and one's ability to fulfil one's plans, yet it is clear that reputation also plays an important role in providing opportunities and achieving the goals one has set oneself. The way in which other people see you can play an important role in their further dealings with you, and the opportunities extend from commercial opportunities to relationships pursued for non-commercial reasons. Feinberg was right to include 'the capacity to engage normally in social intercourse' in his list of welfare interests, which is affected when one's reputation is tarnished, and Kleinig also refers to 'stable and non-superficial interpersonal relationships'. I think that this capacity of reputation to make one's further projects possible weighs heavily in explaining why reputation matters. One could also rely on the fact that reputation plays a role in constituting one's sense of self-esteem and personal identity.

It is the fact that having a good reputation is a welfare interest that explains why the law should be concerned to protect it. This is the same reason underlying the desire to protect property and bodily integrity; these things matter because of the role that they play in the pursuit of one's other goals and projects. As a welfare interest, reputation clearly deserves protection.

VI A RIGHT TO REPUTATION VERSUS A RIGHT NOT TO BE INSULTED: CONSIDERATIONS BASED ON THE CASE LAW

Even if there are reasons to protect a right to reputation, what reason is there to think that the South African law of defamation protects a right to reputation rather than a right not to be insulted? The first reason is the repeated reference to a right to reputation in the case law.

In *National Media Ltd and others v Bogoshi*,[47] the Supreme Court of Appeal states that 'it is trite that the law of defamation requires a balance to be struck between the right to

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[46] Joseph Raz *The Morality of Freedom* (1988) 413.
[47] 1998 (4) SA 1196 (SCA).

reputation, on the one hand, and the freedom of expression on the other.'[48] This sentiment has been endorsed by that court subsequently,[49] as well as by the Constitutional Court. In *Khumalo and others v Holomisa*,[50] the Constitutional Court states that 'the law of defamation seeks to protect the legitimate interest individuals have in their reputation'.[51] In other words, it appears right that the majority in *Media 24 v SA Taxi Securitisiation*[52] chose to endorse Schreiner JA's statement in *Die Spoorbond* that the modern law is different to its Roman ancestor.[53] As Schreiner JA put it:

> [t]he particular delict now known as defamation has lost a good deal of its original character since it is no longer regarded primarily as an insulting incident occurring between the plaintiff and the defendant personally, with publicity only an element of aggravation by reason of the additional pain caused to the plaintiff. [...T]he delict of defamation has come to be limited to the harming of the plaintiff by statements which damage his good name. The opinion of other persons is of value to him and . . . it has become in some degree assimilated to wrongs done to property.[54]

We can understand the idea that it has become assimilated to wrongs done to property by referring to the fact that both property and reputation are welfare interests that play a role in furthering one's ends, as we saw above.

Furthermore, as the Supreme Court of Appeal points out in *Media 24 v Taxi Securitisation*, damages can be recovered regardless of whether or not one suffered hurt feelings (whether one is a natural person or an artificial person) and the emphasis of the court in that case is on a corporation's right to reputation per se and the need to provide means for remedying infringements of that right in particular:

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[48] Ibid at 1207C.
[49] *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and others* 2001 (2) SA 242 (SCA) para 23 ('In *National Media Ltd and Others v Bogoshi*1998 (4) SA 1196 (SCA) at 1207D Hefer JA stated: "It is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other." He went on to observe (at 1207E) that "(i)t would be wrong to regard either of the rival interests with which we are concerned as more important than the other", a matter on which he then proceeded to elaborate. This is particularly so where the Constitution in terms seeks to protect both the dignity of the individual and freedom of speech (see ss 10 and 16(1) of the Constitution of the Republic of South Africa Act 108 of 1996)'); *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) para 12 ('The Constitutional Court has held in *Khumalo and Others v Holomisa* that the principles of the common law as recently developed in *National Media Ltd and Others v Bogoshi* are consistent with the provisions of the Constitution and maintain a proper balance between the right to reputation and the right to freedom of expression. It remains to apply those principles to the fact').
[50] 2002 (5) SA 401 (CC).
[51] Ibid para 28.
[52] *Media 24 Ltd and others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and others as* Amici Curiae*)* 2011 (5) SA 329 (SCA).
[53] Ibid paras 37-38: 'As to the historical argument based on the original scope and purpose of the *actio iniuriarum* it was pointed out by Schreiner JA in *Spoorbond* how the law had since changed [...]Though traditionally the function of the *actio iniuriarum* was to provide a *solatium* or solace money (satisfaction or "genoegdoening" in Afrikaans) for injured feelings, the position has become more nuanced in modern law.'
[54] *Die Spoorbond* supra note 23 at 1010-1011.

> The only remedy available at present that can serve to protect the reputation worthy of protection, is damages. A legal system which acknowledges an interest worthy of protection, but provides no remedy to afford that protection fails in the performance of its function. And, as I see it, the same must be said about a legal system that says to a plaintiff in the position of the present respondent that, although it should have a remedy, the nature of that remedy is unclear; that although an award of damages has been regarded as the only appropriate remedy for nearly a century, we now hold that it is no longer the case, without offering a firm alternative; and that because the respondent is seeking a remedy which we now decide to exclude, its claim based on the protection of its reputation is dismissed with costs. All I can say is that I find myself unable to subscribe to this conclusion.[55]

Another feature of the law suggesting that defamation is concerned with reputation per se is the fact that publication is a necessary element of the wrong.[56] As F.G. Gardiner postulated, if the gist of the wrong is insult, then publication to a third person should not be essential for liability.[57] It also seems strange, if defamation did principally protect one from insult, to make a merely aggravating feature essential for actionability. It is true that someone might feel more outraged in the face of defamation than a private insult, but why do we need a distinct legal wrong of defamation to take that into account? Why not simply take publication into account when determining the quantum of damages for the delict of insult?[58] We do need a distinct legal wrong of defamation, however, if we are dealing with a distinct kind of social wrong, that is, a wrong that is distinct from the wrong of insult. An attack on one's reputation would be such a wrong.

That is not to say that insult or hurt feelings are irrelevant to defamation, however. It only means that they are not necessarily implicated in the nature of the wrong (in the way that hurt feelings seems to be naturally associated with insulting conduct) or in the justification for why damages are being provided. Harms DP's point in *Le Roux v Dey* (SCA)[59] about not needing to institute a separate action for insult can be explained on the alternative basis of hurt feelings or insult aggravating damages in cases where one's right to reputation has been infringed (as discussed in Chapter 8). This kind of approach would still be consistent with the

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[55] *Media 24 v SA Taxi Securitisation* supra note 52 para 54.

[56] *Khumalo and others v Holomisa* supra note 50 ('At common law, the elements of the delict of defamation are: *(a)* the wrongful and *(b)* intentional *(c)* publication of *(d)* a defamatory statement *(e)* concerning the plaintiff' (para18)).

[57] FG Gardiner 'Is publication essential to an action for defamation?' (1897) 14 *Cape Law Journal* 184.

[58] See *Delange v Costa* 1989 (2) SA 857 (A).

[59] *Le Roux and others v Dey* 2010 (4) SA 210 (SCA).

claim by the majority in *Le Roux v Dey* (CC),[60] that 'according to established principle, an award of damages for defamation should compensate the plaintiff for both wounded feelings and loss of reputation' and that 'it is also accepted that in some cases the former may outweigh the latter'.[61] Insult can be a feature of some cases of defamation, if the conduct was also insulting or contumelious. The point is that attacks on reputation are not necessarily insulting or contumelious. A newspaper that fails the *Bogoshi* (reasonable publication) test[62] because it intentionally published a defamatory statement in the negligent belief that it was true and in the public interest, does not necessarily hold one in contempt. Such media defendants could just be bad at their job, rather than disrespecting one's dignity. It is difficult to see how publication in these circumstances could be an affront to one's dignity. Failure to comply with an objective negligence standard does not suggest that one personally disrespects the humanity of the person whom one has wronged in failing to meet that standard.

There is, however, a feature of the law of defamation that might make one think that disrespect and insult are, in fact, intimately wound up with injuries to reputation, at least in the case of natural persons. This feature is the frequent references to 'dignity' in cases of defamation involving natural persons. In *Khumalo v Holomisa*,[63] the Constitutional Court states the following:

> In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution. [...] The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is

[60] *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* amici curiae*)* 2011 (3) SA 274 (CC).
[61] Ibid para 151 per Brand AJ.
[62] *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA).
[63] Supra note 50.

> one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.[64]

In this extract, the Court is attempting to found the right to reputation on the right to human dignity. Does this mean that we care about reputations because infringing someone's reputation is disrespectful? And is this an explanation for why defaming someone might be insulting, i.e. disrespectful and therefore insulting? This connection of reputation and human dignity occurs in a number of other appellate level cases.[65] One reason for this, perhaps, is that the right to reputation is not given special protection in the South African Constitution's Bill of Rights.[66] As the Supreme Court of Appeal noted, reputation is 'not protected *eo nomine* as a fundamental right' in the Bill of Rights,[67] unlike freedom of expression,[68] the interest against which reputation is most frequently contrasted, and also unlike the right to privacy.[69] It was perhaps easier, then, to institute a balancing act between reputation and freedom of expression when one was able to balance two fundamental rights in the form of dignity and freedom of expression. Yet, the mere fact that a link is drawn between reputation and human dignity does not mean that the one simply collapses into the other. There are reasons to draw such a link

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[64] Ibid paras 27-28.

[65] *Mthembi-Mahanyele v Mail & Guardian Ltd and another* 2004 (6) SA 329 (SCA) para 98 ('Even though the right to reputation is not protected *eo nomine* as a fundamental right, it is considered to be part of the right to respect for, and protection of, the dignity of an individual, which is protected by s 10 of the Constitution. It is therefore crucial to strike a fair balance between the right to freedom of expression, and the right to dignity and reputation, so that one right is not accorded more value than the other');
Hardaker v Phillips 2005 (4) SA 515 (SCA) para 15 ('In the final analysis, whether conduct is to be adjudged lawful or not depends on a balancing of the constitutionally enshrined right of dignity, including as it does the right to reputation on the one hand, and the right to freedom of speech, on the other');
Dikoko v Mokhatla 2006 (6) SA 235 (CC) para 90 per Moseneke DCJ ('It seems to me that the delict of defamation implicates human dignity (which includes reputation) on the one side and freedom of expression on the other');
Mogale and others v Seima 2008 (5) SA 637 (SCA) para 9 ('The Constitution, in line with the common law, places a great value on human dignity (including reputation). It also, more so than the common law, emphasises the right to the freedom of expression. These two rights have to be balanced, a somewhat delicate and difficult exercise. But it is not only in regard to justification of a defamation that the freedom of expression impacts on the right of dignity. It also impacts on questions such as the interpretation of an allegedly defamatory statement: life is robust and oversensitivity does not require legal protection; and of quantum: too high an award of damages may act as an unjustifiable deterrent to exercise the freedom of expression and may inappropriately inhibit the exercise of that right');
Modiri v Minister of Safety and Security and others 2011 (6) SA 370 (SCA) para 22 ('As explained by the Constitutional Court in *Le Roux v Dey* 2011 (3) SA 274 (CC) para 122, common-law grounds of justification play a pivotal role within the framework of our Constitution. The reason is that it is primarily in the province of justification that the common law allows the courts to strike a proper balance between the often conflicting fundamental rights of freedom of expression, including freedom of the press, on the one hand, and the rights to freedom of privacy and dignity, including reputation, on the other').

[66] Constitution of the Republic of South Africa, 1996.

[67] *Mthembi-Mahanyele v Mail & Guardian Ltd and another* 2004 (6) SA 329 (SCA) para 98.

[68] s 16 Constitution of the Republic of South Africa, 1996.

[69] s 14 Constitution of the Republic of South Africa, 1996.

without also accepting that a concern about injuring someone's reputation is in itself a concern about dignity or insult. The rights entrenched in the Bill of Rights are, in the first instance, a means of protecting private individuals from the actions of the state and a means of guiding state action. In light of this, and the interest that people have in their reputations being protected, it seems to follow that if the state did not protect our reputations, then it would be failing to respect our constitutionally entrenched right to dignity. Given the ways in which having a good reputation can allow us to fulfil our life projects and the harms that can follow attacks on our reputation, it seems plausible to say that a failure on the part of the state to protect one's reputation in some way would amount to a failing to take our right to dignity seriously. It does not follow from this, however, that every infringement of one's right to reputation necessarily involves disrespect for one's dignity, as we saw above in the example of a negligent newspaper that fails the reasonable publication test.

VII CONCLUSION

Reputation, then, can be understood as 'a social judgment of the person based upon facts which are considered relevant by a community'. These judgements often relate to one's moral character. But, in some cases, defamatory assertions relate to other personal attributes, such as professional skill or competence, that are not necessarily a concern about one's moral character. Finally, in some cases defamatory assertions relate to claims about one's creditworthiness in particular.

Reputation deserves protection because, like property and bodily integrity, it is a welfare interest: it is the sort of thing that enables people to live a flourishing life. More specifically, reputation has both internal benefits (like allowing one to maintain a sense of self, and self-esteem) and external benefits (like the pursuit of relationships that have commercial and non-commercial benefits).

It has been controversial, however, whether the South African law of defamation does protect one's reputation, rather than one's right to be free from insult. There are reasons to think that it in fact protects one's reputation, such as the many references to a right to reputation in the case law, the requirement of publication, the fact that hurt feelings are not essential for liability, and the existence of alternative explanations for the link that is frequently drawn between reputation and dignity. The most descriptively accurate account of the South African law of defamation appears to be that it protects one's reputation as an interest in and of itself.

CHAPTER 3: THE NATURE OF THE WRONG: SOME PROBLEMS WTH THE ORTHODOX CAUSATION-OF-HARM HYPOTHESIS

I INTRODUCTION

Even if one accepts the value of reputation, and that it is an interest worth protecting, one might still wonder about the manner in which it is being protected, and the way in which that protection is justified by the state.

Delicts are typically understood as wrongful acts that cause harm. It is sometimes stated, for example, that '[a] delict is a wrongful and culpable act which has a harmful consequence.'[1] If delicts concern conduct that has a harmful consequence, and if defamation law protects one's reputation, then it seems to follow that the delict of defamation concerns (wrongful and culpable) conduct that has resulted in harm being caused to one's reputation. However, given what a plaintiff has to establish to receive compensation - the 'elements of liability' and the evidence one has to bring to establish them - this is not actually the best way to characterise the injury (or the wrong) for which one is being compensated.

The orthodox interpretation of the wrong of defamation does seem to be that the delict of defamation concerns conduct that has harmed one's reputation. But it appears to be more justifiable to view the compensation being meted out as compensation for someone unjustifiably increasing the *risk* of reputational harm occurring, rather than for the probable *causation* of reputational harm. The core of this argument will be constructed in the next few chapters (Chapters 4 - 6). This chapter will discuss the elements of liability for defamation and some of the differences between defamation and Aquilian delicts. By contrasting the elements of liability for Aquilian delicts with the elements of liability for defamation, one can see that it is much harder to justify the claim that the defendant probably has caused harm to the protected interest in the case of defamation as compared to Aquilian delicts. The next two chapters will then present an alternative interpretation of the practice of defamation, which is that defamation concerns unjustifiable increases in the risk of reputational harm, rather than the causation of reputational harm. Liability for merely increasing risk is in itself a controversial idea, but I

[1] J Neethling & JM Potgieter *Law of Delict* 6ed (2010) 211.

think that it is more justifiable in the case of defamation than it is in the case of the English tort of negligence or Aquilian liability, as the next two chapters explain.

The argument will begin in this chapter, then, with a critique of the orthodox interpretation of defamation (the causation of harm hypothesis). It will present this critique by contrasting defamation with Aquilian cases to help demonstrate why the causation of harm hypothesis is weaker in the case of defamation than in Aquilian cases.

II JUDICIAL SUPPORT FOR THE ORTHODOX CAUSATION OF HARM HYPOTHESIS

In *Le Roux v Dey* (CC),[2] Brand JA states the following for the majority of the Constitutional Court (CC):

> our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published. [...] The test is whether it is more likely, that it is more probable than not, that the statement will harm the plaintiff. The view of Neethling that a mere tendency or propensity — as opposed to a likelihood — of harm would suffice, does not appear to be supported by any authority in our law.[3]

Froneman J and Cameron J present a similar argument in their judgment:

> The conventional test for determining whether a statement is defamatory is if it would probably lower the plaintiff in the estimation of right-thinking members of society generally. [...] This test is useful and practically expedient if it is understood properly as an objective test to determine whether the reputation of a person has been objectively infringed, on a balance of probabilities. The Supreme Court of Appeal appears to have taken this test to mean that likelihood is not a requirement, but that it is sufficient if a statement merely has the "tendency" to undermine the status, good name or reputation of a person, to qualify as defamatory. In our view this approach does not take sufficient account of constitutional values and norms, nor the practice in our courts even before the advent of the Constitution.[4]

From these comments, it appears accurate to say that the orthodox interpretation of defamation is that it is concerned with the causation of reputational harm, albeit the causation of harm in the eyes of the reasonable person, rather than in the eyes of any particular, real-life audience. This seems to be a natural way to interpret the statement by the CC that 'a statement

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[2] *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* Amici Curiae*)* 2011 (3) SA 274 (CC).
[3] Ibid para 91.
[4] Ibid paras 168-169.

is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published'.[5]

Nevertheless, there is also some disagreement here between the CC and the Supreme Court of Appeal (SCA), and the SCA's judgment could potentially support something more like a risk interpretation than a causation of harm reputation. But the CC does not consider this interpretation, perhaps because it would be so unusual. I do not think that the SCA intended such an unusual interpretation of the law either: In *Le Roux and others v Dey* (SCA),[6] the SCA stated the following about the nature of the injury involved in defamation:

> A publication is defamatory if it has the "tendency" or is calculated to undermine the status, good name or reputation of the plaintiff. It is necessary to emphasise this because it is an aspect that is neglected in textbook definitions of defamation because it is usually said that something can only be defamatory if it causes the plaintiff's reputation to be impaired. That is not the case, as Neethling explains with reference to authority:
>
> > "It is notable that the question of a factual injury to personality, that is, whether the good name of the person concerned was actually injured, is almost completely ignored in the evaluation of wrongfulness of defamation. In fact, generally a witness may not even be asked how he understood the words or behaviour. In addition, it is required only that the words or behaviour *was calculated* or *had the tendency or propensity* to defame, and not that the defamation actually occurred. In short, *probability of injury* rather than actual injury is at issue. It can be concluded, therefore, that the courts are not at all interested in whether others' esteem for the person concerned was in fact lowered, but only, seen *objectively*, in whether, in the opinion of the reasonable person, the esteem which the person enjoyed was adversely affected. If so, it is simply accepted that those to whom it is addressed, being persons of ordinary intelligence and experience, will have understood the statement in its proper sense".[7]

There are at least three possible interpretations of what is being claimed here, one of which is evident in the CC's own interpretation of the SCA, offered above. First, the CC interprets the SCA to be saying that the fact that a defamatory statement had a less than 50% chance of causing reputational harm is sufficient for liability for defamation. This is how they interpret the SCA's statement that '[a] publication is defamatory if it has the "tendency" or is calculated to undermine the status, good name or reputation of the plaintiff''. The CC interprets this to mean that something less than probable reputational harm is required. On this

[5] Ibid para 91.
[6] *Le Roux and others v Dey* 2010 (4) SA 210 (SCA).
[7] Ibid para 8.

interpretation, the wrong is still arguably about having caused reputational harm, but something less than a 50% chance of harm is sufficient for liability.

A second interpretation is that the SCA was just emphasising the fact that the test for defamation involves an objective test about the impact the statement would have on a reasonable person, rather than it being an enquiry into the effect the statement had on particular, real-life individuals. This explains the emphasis on the fact that witnesses need not be called, and the references to the reasonable person test. The statement that that a publication can be defamatory if it merely has a tendency, or is calculated, to defame could then be interpreted to mean that the impact on a reasonable person is all that matters, rather than the impact on particular individuals, or the plaintiff's actual community. Moreover, this could be interpreted as being consistent with the idea that the nature of the wrong is still the probable causation of reputational harm. The caveat is simply that in establishing probable causation of reputational harm, the only evidence required in support is that one's reputation would have been lowered in the eyes of a reasonable person.

A third, more radical, interpretation is that the SCA is really adopting a risk interpretation of the law of defamation. The Court could be saying that the legal injury in question is really about having caused an increase in the risk of reputational harm, rather than having caused reputational harm. This interpretation is supported by the following statement: 'it is usually said that something can only be defamatory if it causes the plaintiff's reputation to be impaired. That is not the case […]'. But a risk interpretation is so unusual that one would expect the Court to say something more by way of defence of that position. Liability for merely increasing the risk of harm, rather than causing harm, is highly controversial in the law of delict (as Chapters 4 and 5 demonstrate). A risk interpretation is so unorthodox that the Constitutional Court does not even consider it when it interprets the above statement by the Supreme Court of Appeal.

For our purposes, the correct interpretation of what the SCA meant is less important than what the Constitutional Court's comments suggest about how the law of defamation is normally interpreted by the courts. The CC claims that 'a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published'.[8] This seems to align with the general understanding of

[8] *Le Roux v Dey* (CC) supra note 2 para 91.

the nature of delicts outlined above, that '[a] delict is a wrongful and culpable act which has a harmful consequence.'[9]

The CC's interpretation of defamation seems similar to the way in which the *lex Aquilia* is typically understood, which is that proof of harm needs to be established on a balance of probabilities. For example, in the Aquilian case of *Jowell v Bramwell-Jones and others*,[10] the Supreme Court of Appeal stated that '[w]hether a plaintiff has suffered damage or not is a fact which, like any other element of his cause of action and subject to what is said below, must be established on a balance of probabilities'.[11]

Even though, on the orthodox interpretations, there seems to be agreement in Aquilian cases and defamation cases that delicts require proof of harm on a balance of probabilities, there are in fact differences in the nature of the evidence that needs to be tendered by the plaintiff to prove his or her case. And, upon closer inspection of this evidence, it appears that liability for the causing of harm is not, in fact, the best way to explain liability for defamation. This fact might explain why the SCA's account of the law of defamation does seem to lend itself quite naturally to competing interpretations. The causation-of-reputational-harm interpretation seems to be the approach favoured by the CC, but I do not think that that is the most defensible interpretation of the rules underlying the practice. The rest of this chapter attempts to demonstrate the differences between defamation cases and Aquilian cases, paving the way for the alternative interpretation of defamation as being concerned with a probable increase in the risk of reputational harm, rather than the probable causing of reputational harm.

III PHYSICAL CHANGES IN THE WORLD AND PATRIMONIAL LOSS VERSUS THE INTERPRETATION OF WORDS

To succeed in a civil case, the plaintiff has to convince the court that his or her version of events is the more probable one. The classical South African discussion of this idea is found in *West Rand Estates Ltd v New Zealand Insurance Co Ltd*,[12] where the Appellate Division stated the following:

> The learned judge in the court below has examined very fully and carefully into this matter. He found that the probabilities are very strongly in favour of the correctness of the theory put forward by the witnesses for the insurance company [...] The learned judge, having come to the conclusion that the probabilities in regard to the origin of the

[9] Neethling & Potgieter op cit note 1 at 211.
[10] 2000 (3) SA 274 (SCA).
[11] Ibid para 22.
[12] 1925 AD 245.

> fire are strongly in favour of the theory of the insurance company, emphasized that he was accordingly justified in acting on such probabilities and making them the basis of his decision. [...] No doubt such a method, rightly understood and applied, is a correct mode of procedure, for the principle invoked by the court below is well-established, and so far as the English law is concerned, it dates back to the reign of Elizabeth [...] The rule that a judge may, in his discretion, act on the probabilities of the case, in other words that a reasonable presumption or a strong probability may shift the *onus probandi,* and, if not rebutted, may form the basis of judicial decision, is traceable to the civil law, and is fully recognized by the Roman-Dutch jurists. [...] The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to throw the *onus* on the other side to rebut it. If he cannot do so satisfactorily then, according to the jurists I have mentioned and the commentators generally, the party in whose favour such a probability or presumption exists will be entitled to judgment. It must needs be so, for presumption is founded on probability and human experience, and consequently the rule above stated is very necessary and essential in the due administration of justice.[13]

This judgment is quite striking in that it correctly identifies the kind of probabilistic reasoning at work, namely, that a judge is assessing whether the probabilities favour 'the correctness of the theory put forward by [the plaintiff]'. The focus on 'theory' is correct, because the assessment being made by the judge is of what probability scholars call 'epistemic probability'.[14] Unlike, say, the 50/50 probability that an atom of radium will decay within 1600 years, which is a feature of the world that is independent of what human beings think about it, *epistemic probability* is not a feature of the world in this sense. Epistemic probability is, instead, an assessment of the extent to which the evidence before one supports a particular theory. For example, epistemic probability is at work when one considers 'how far evidence confirms or disconfirms hypotheses about the world' such as the hypothesis that 'the butler did it.'[15] When courts decide something on a balance of probabilities, then, they are simply trying to determine whether the evidence before them makes it appear more probable than not that the plaintiff's version of events is true. As the Appellate Division also points out, it has to be a 'reasonable presumption or a strong probability', but not quite as high as in a criminal case. This is sometimes expressed by saying that 'the "balance of probabilities" is satisfied once a degree of belief in a proposition (such as, the defendant's breach caused the injury) just exceeds 50 per cent.'[16] Essentially, in the judge's opinion it must be more likely than not that the plaintiff's version of events is correct.

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[13] Ibid at 262-263.
[14] DH Mellor *Probability: A Philosophical Introduction* (2005) 11-12.
[15] Ibid.
[16] Chris Miller 'Causation in Personal Injury Law: The Case for a Probabilistic Approach' (2014) 33 *Topoi* 385 at 388.

If one examines the elements of liability in Aquilian cases and defamation cases, one can see that there is a difference in the nature of the evidence the plaintiff has to tender to convince the court that his or her point of view is the most probable one. This difference might partly be the result of the different interests at stake (property/bodily integrity vs reputation), but it remains true that the requirements are different, and they are different to the extent that the hypothesis of 'causation of harm' is much more firmly founded in Aquilian cases than in defamation cases. In other words, there seems to be ample reason to think that the defendant *probably has* caused the plaintiff harm in successful Aquilian cases, and reason to *doubt* that the defendant probably has caused the plaintiff reputational harm in successful defamation cases. Given that court orders involve the exercise of state power, moreover, they need to be properly justified.[17] I think that this difference in Aquilian cases and defamation cases results in defamation law being an unjustifiable exercise of state power, so long as one adopts the causation of harm interpretation. At the same time, there are reasons why an effort should be made to protect people's reputations.

In response to these concerns, one can either adjust the current practice to bring defamation law more in line with Aquilian cases (by changing the nature of the evidence required to prove one's case) or attempt to justify the current practice of defamation in some other, more justifiable, way. I favour the latter approach, in which the current practice of defamation law is provided with an alternative justification, one which makes it a justifiable exercise of state power. The details of this argument will be provided in the following chapters. In the rest of this chapter, we will first examine the different types of evidence that plaintiffs need to tender to succeed in defamation and Aquilian cases, and why this makes the causation of harm hypothesis less defensible in the case of defamation than the lex Aquilia.

IV THE ELEMENTS OF AQUILIAN LIABILITY

Anton Fagan's analysis of a number of South African Aquilian cases shows that the lex Aquilia generally requires proof of two types of harm: physical harm to persons or property, and patrimonial loss. The exception to this is cases of pure economic loss, which do not require harm to people's bodies or property, but these cases still require proof of patrimonial loss. He states the following:

[17] This idea is elaborated upon in Chapter 5.

> For about a hundred years now, the central case of Aquilian liability for negligently caused loss in South African law has been one in which liability is justified by the following two rules:
>
> (1) If a person commits a wrong against another by breaching the duty, which every person owes to every other, not to cause physical harm to his person or property by a negligent positive act and, by committing such wrong, causes the victim of the wrong to suffer patrimonial loss, then he owes the victim of the wrong a duty to compensate him for that loss.
>
> (2) A positive act causing physical harm to another's person or property is negligent if and only if a reasonable person in the position of the harm-causer would have foreseen that the act might cause such harm and for that reason would have refrained from performing it.[18]

From this analysis one can see that two of the essential elements for Aquilian liability are the following: that the defendant has to 'cause physical harm to [the plaintiff's] person or property', and the defendant must also cause 'patrimonial loss'.

These two requirements - a physical change in the world (harm to person or property) and patrimonial loss - provide a good foundation for thinking that the defendant probably has damaged a protected interest of the plaintiff. Cases of pure economic loss do not require that the plaintiff prove a physical change in the world, but they still require proof of patrimonial loss. This is still a tangible change in the world that has to be proven by the plaintiff before he or she has any hope of shifting the onus to the defendant to rebut one of the elements of liability.

The relationship between these two forms of harm (persons/property, and patrimonial loss) is controversial. According to Fagan, the interests protected by Aquilian liability are not patrimonial interests. If one looks at the first of the two rules above, liability does not simply turn on the causing of patrimonial loss. Liability also requires some other kind of harm, such as 'physical harm to his person or property'. According to Fagan, the lex Aquilia is really trying to undo certain non-patrimonial harms, but that undoing the patrimonial consequences of these harms is often the best and the only way to attempt to undo the non-patrimonial harms:

> The wrongs which the rules justifying Aquilian liability in the central case are seeking to undo are non-patrimonial in nature. That is, they are wrongs committed by the breach of duties the content of which can be specified without any reference to actual or foreseeable patrimonial loss. However, they are also wrongs which often, even typically, have negative patrimonial consequences for their victims. Persons who are physically injured frequently suffer a loss of income. The destruction or damaging of property usually reduces its monetary value. When that happens, the best, and often the only, way to undo the non-patrimonial wrong (the bodily injury, the destruction of the

[18] Anton Fagan 'Aquilian liability for negligently caused pure economic loss - Its history and doctrinal accommodation' (2014) 131 *South African Law Journal* 288 at 288.

> property) is by undoing its negative patrimonial consequences (the loss of income, the reduction in monetary value). In sum, the purpose of the rules justifying Aquilian liability in the central case is not to undo certain patrimonial wrongs, but to undo certain non-patrimonial wrongs by undoing their patrimonial effects.[19]

Whether one characterises the wrong as a wrong against a non-patrimonial interest or as a wrong against a patrimonial interest, no one denies that Aquilian liability requires (1) some kind of harm to persons or property, or, in exceptional cases, pure economic loss, as well as, (2) in all cases, patrimonial loss.

One way to explain the requirement of patrimonial loss is to say, as Fagan does, that undoing the patrimonial consequences of the wrong is the best way to undo or correct the wrong. This seems to be the explanation favoured by the Constitutional Court as well. In *Van der Merwe v Road Accident Fund*,[20] the Court stated the following:

> The notion of damages is best understood not by its nature but by its purpose. Damages are "a monetary equivalent" of loss "awarded to a person with the object of eliminating as fully as possible [her or] his past as well as future damage." The primary purpose of awarding damages is to place, to the fullest possible extent, the injured party in the same position she or he would have been in, but for the wrongful conduct. Damages also represent "the process through which an impaired interest may be restored through money." To realise this purpose our law recognises patrimonial and non-patrimonial damages. Both seek to redress the diminution in the quality and usefulness of a legally protected interest.[21]

This argument is a convincing explanation of the utility and function of monetary damages in many cases, but it does fully explain why patrimonial loss is a requirement of Aquilian liability. It may be true that undoing the patrimonial consequences is the best way to undo the harm, but one does not need to make patrimonial loss a requirement of liability in order to award monetary damages. Monetary damages are also the standard remedial response in cases involving personality interests[22] and yet there is no need to prove patrimonial loss in those cases in order to establish liability or to get damages. This is one reason why people might be tempted to characterise the interests protected by the lex Aquilia as *patrimonial interests*: by making patrimonial loss a necessary feature of liability, the lex Aquilia makes one's patrimony a central concern in a way that is different to other delicts.

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[19] Ibid at 313.
[20] *Van der Merwe v Road Accident Fund* and another (*Women's Legal.Centre Trust* as Amicus Curiae*)* 2006 (4) SA 230 (CC).
[21] Ibid para 37. Square brackets in original.
[22] Neethling & Potgieter op cit note 1 at 234 ('In delict, damages (compensation) are the primary remedy').

It is not my objective, however, to answer the question of why the lex Aquilia focuses on patrimonial loss in this way, but rather to explain one of the consequences of this requirement, which is that it helps make findings of harm or damage in these cases more certain or probable. By requiring proof of physical changes to persons or property, as well as requiring proof of patrimonial loss, the court seems to be in a good position to find that there has probably been harm done to a protected interest (such as property or one's bodily integrity). In other words, these are quite firm grounds upon which to say that the plaintiff's hypothesis that the defendant caused damage to a protected interest is more probable than not. If one is concerned about 'damage' in the sense of a 'detrimental impact' upon an 'interest deemed worthy of protection by the law,'[23] then a physical change in the protected interest, along with proof of patrimonial loss, is one way of proving that it is more probable than not that there has been a reduction in the utility or quality of that interest. Besides a physical change to the interest, patrimonial loss helps to indicate that there has been a reduction in utility or quality. Patrimonial loss essentially quantifies the damage that was done. There is little room to argue that something has not been reduced in utility or quality if there is a proven repair cost, for example. Proof of patrimonial loss is probably a robust rule of thumb indicating that the physical changes really do indicate a change in the utility or quality of the interest, as well as being a means of quantifying the damage done.

It may be that the recovery of all of one's consequential patrimonial losses also speaks to an attempt to protect patrimony in some way, but the requirement of patrimonial loss nevertheless plays a role in establishing proof of damage to a protected interest. Along with a physical change to a protected interest - such as one's person or property - proof of patrimonial loss helps to establish that the defendant has reduced the value or utility of the protected interest.

V THE ELEMENTS OF LIABILITY FOR DEFAMATION

The requirement of proof of patrimonial loss is not a feature of liability for defamation, however. Moreover, while there must be harm to a protected interest, 'physical harm' is not one of the requirements of defamation. It is generally accepted that 'the elements of the delict of defamation are: (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff.'[24] There is no requirement of patrimonial loss. One might

[23] Neethling & Potgieter op cit note 1 at 212.
[24] *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 18; see also *Le Roux v Dey* (CC) supra note 2 para 84.

claim that the requirement of proving that a statement is defamatory is tantamount to proving a physical change in the world (a change in people's thoughts, which might amount to a physical change in the world), but the evidence that one needs to bring to prove such a change is far more tenuous than when one proves that one's property or one's body has been changed. One cannot present something as clear as a damaged piece of property or an injured body, for example. It should therefore be a lot harder for the plaintiff to prove that the defendant has in fact wronged him or her, at least if the wrong is thought of as the wrong of having caused reputational harm. Let us look more closely at what is needed to prove the alleged change in people's thoughts about the plaintiff.

In order to establish that a statement is defamatory the courts first establish the meaning of the statement and then determine if that meaning is defamatory. None of this involves a serious attempt to prove reputational harm, however. The Constitutional Court explains this process as follows:

> Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.
>
> The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question.
>
> At the second stage, that is whether the meaning thus established is defamatory, our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published. [...] Because we are employing the legal construct of the "reasonable", "average" or "ordinary" person, the question is whether the statement was "calculated to expose a person to hatred, contempt or ridicule". Evidence of whether the actual observer actually thought less of the plaintiff is therefore not admissible. The test is whether it is more likely, that it is more probable than not, that the statement will harm the plaintiff.[25]

[25] *Le Roux v Dey* (CC) supra note 2 at paras 89-91. Square brackets, except for the ellipsis, in the original.

As in the case of Aquilian liability, there is a prima facie attempt to establish that the protected interest has probably been damaged, but the grounds upon which this determination is based seem more tenuous here. In fact, in the above quote, it is not clear what the court really means when it says that, on the one hand, no attempt is made to determine what effects the statement actually had, but that, on the other hand, the court is attempting to test whether it is 'more probable than not that the statement will harm the plaintiff'. If no attempt is being made to determine the consequences of the conduct, then in what sense is an attempt being made to determine likely harm? One has more reason to think that the plaintiff has been harmed in Aquilian cases, given that Aquilian cases involve readily observable physical changes to persons or property, and/or readily observable changes to one's patrimony. In the case of defamation, one just needs to establish that the words have a defamatory meaning. But, in and of itself, that does not go very far in establishing whether anyone believed those words or will believe them in the future, or whether those words have adversely affected the plaintiff. It is true that the courts include 'likely harm' in the definition of defamatoriness, but they do not test this likelihood in any tangible way. This is not a plea for absolute certainty in the standard of proof as opposed to probability, but interpreting text seems a significantly less convincing basis to found the proposition of probable injury to a protected interest than observing actual changes in the protected interest and/or observing some further proof of harm, such as consequential patrimonial loss.

Others have expressed disquiet, in other legal systems, about the tenuous basis upon which findings of reputational harm are based. English tort scholars, for example, have raised objections against the English law of libel which would also apply to the South African law of defamation. When these arguments were made, the English law of libel required little in the way of evidence proving that the publication has probably harmed the plaintiff's reputation.[26] The rule was that upon proof of publication of a written defamatory statement, damage was presumed, and so one did not need to call witnesses or provide evidence (other than the bare publication) that one had been harmed. This seemed to some tort scholars to be an unusual and unjustifiable feature of the tort of libel, as compared with other torts that did require proof of harm (typically proof of patrimonial loss), especially when one noted that similar torts like

[26] Arguably, this remains the case, even after the promulgation of the Defamation Act 2013. Section 1(1) of that Act does state that '[a] statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant,' but this requirement of 'seriousness' does not seem to change the nature of the evidence that the plaintiff needs to tender.

slander and malicious falsehood did (typically) require proof of patrimonial loss.[27] After noting that some instances of slander, and malicious falsehood, do require proof of patrimonial loss, Eric Barendt states the following:

> A plaintiff in a libel action should, in my view, be required to prove that his reputation has been injured, just as he is in those cases of slander which are not actionable *per se.* In other words, a plaintiff should be asked to show how he has suffered some loss of standing or esteem and that the publication was probably responsible for the loss. [...] There are a number of ways in which the plaintiff could show harm to reputation. In the first place, he might call evidence indicating that existing social and professional relationships have been damaged as a result of the defamatory publication. Secondly, he might be able to show that he has lost opportunities which prior to publication he had reasonably anticipated.[28]

Thomas Gibbons also dislikes the presumption of damage in certain cases of defamation, and imposing liability without substantial evidence of harm:

> Once it is ascertained that the offending statement has a defamatory tendency, the next step is to determine what harm it may have caused. Again, the actual effect of the statement is not taken into account. Instead, it is presumed that damage has occurred, because it is presumed that the plaintiff enjoys a good reputation; the speculative exercise is transformed into a empirical assumption. It is an unfounded assumption, however, insofar as it stipulates what the causal impact of the statement will be. Contemporary media research rejects the idea that the effects of communication can be easily predicted, especially in isolation from the context in which they are received. […] Various suggestions have been offered to explain the law's position on this issue. One view is that the law recognizes the human mind's propensity to believe evil on the slightest evidence, but there is no support for this reason in the law itself, nor is it clear that the mind does work in that way. Another suggestion is that it would be impracticable to measure the actual effects of a statement; this may be true, and may be the most likely explanation, but it points equally against presuming that damage will be caused by the statement. Yet another suggestion is that, even if the plaintiff's reputation is not diminished, the element of harm which justifies the tort, is the obvious proposition that needs no proof, that plaintiff suffers "annoyance or worse" when he learns of the statement, but this indicates possible confusion about the nature of reputation itself.[29]

The difficulty in tracking the causal impact of statements has also been recognised by English judges, but that did not deter them from awarding damages. In *Ley v Hamilton*,[30] Lord Atkin stated the following:

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[27] Slander was a slightly complicated case as some instances of slander, like libel, were actionable without proof of patrimonial loss. Section 14 of the Defamation Act of 2013 has altered this position somewhat as some instances of slander that did not require proof of patrimonial loss do now require proof of patrimonial loss for liability.
[28] Eric Barendt 'What is the Point of Libel Law?' (1999) *Current Legal Problems* 110 at 123-124.
[29] Thomas Gibbons 'Defamation reconsidered' (1996) 16 *Oxford Journal of Legal Studies* 587 at 599.
[30] (1935) 153 LT 384.

> [Damages] are not arrived at as the Lord Justice seems to assume by determining the "real" damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times. The "punitive" element is not something which is or can be added to some known factor which is non-punitive.[31]

Relatedly, English courts have noted that it is also hard to track the *future* impact of defamatory assertions (over and above the difficulty in tracking the causal impact the statement might already have had). In *Cassell & Co Ltd v Broome*,[32] Lord Hailsham noted the need to point to a convincing award if the matter were to come to the public's attention again in the future:

> In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.[33]

I believe that these English judicial statements noting the difficulty of tracking the causal impact of defamatory assertions, as well as the disquiet voiced by Barendt and Gibbons are correct, and applicable to the South African law. Especially when compared with Aquilian liability, the basis for saying that the defendant has probably harmed the plaintiff's reputation is more tenuous, and there is less reason to think that damage probably has been done. As discussed in Chapter 5, this is problematic if we would like exercises of state power, such as court orders, to be justified by clear and persuasive arguments.

At this point, there are two options available. Either one can adjust the current practices so that better evidence is required in order to found the claim of causation of harm. Or one can provide an alternative interpretation and justification of the existing rules, such that the practice amounts to a more justifiable instance of state power.

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[31] Ibid at 386.
[32] [1972] AC 1027.
[33] Ibid at 1071

VI CONCLUSION

The orthodox interpretation of the law of defamation is that it involves the causing of reputational harm. The problem with the orthodox interpretation is that even though causing harm to someone's reputation would justifiably be a delict, the current practice does not require enough in the way of evidence to support the plaintiff's position that such an injury has materialised. The lack of evidence that an injury of that sort has been committed calls the practice into question, for its justifiability as an exercise of state power is questionable. This can be contrasted with Aquilian delicts that do require proof of physical harm to a protected interest and/or proof of patrimonial loss, both of which go some way to establishing that the quality or utility of a protected interest has in fact been diminished on a balance of probabilities.

One could attempt to bring defamation law in line with the apparently more justifiable Aquilian practices by requiring the plaintiff to tender more substantial proof of harm. This is the approach favoured by some English tort scholars in the context of English law. An alternative approach to the problem would be to reconceptualise the injury such that the current practice, and the evidence that currently gets tendered, does amount to a justifiable exercise of state power. In the case of defamation, I think that this kind of alternative justification of the current practice can be provided, by conceptualising the injury as a probable increase in the risk of reputational harm, rather than the probable causing of reputational harm. The challenge with this approach is that imposing liability for merely increasing the risk of harm is highly contentious. One might wonder, in this case, whether imposing liability for risk is, in fact, a justifiable instance of state power, even if the evidence that gets tendered is sufficient to prove that the defendant probably did cause an increase in the risk of harm.

In the chapters that follow, I will show why the risk-as-injury interpretation of the law of defamation is justifiable, and more justifiable than the causation-of-reputational harm interpretation.

Chapter 4 will examine the concept of risk in more detail and discuss instances from the law of negligence where the idea of risk as damage has ostensibly been advanced. That chapter will also explain why risk-as-injury is a bad idea in the law of negligence. Chapter 5 will then explain why the objections against risk as damage in the law of negligence are overcome in the context of the South African law of defamation. The subsequent chapters will then demonstrate that the current rules of defamation law are in fact consistent with the risk-as-injury interpretation. Specifically, they will explain how the defences for defamation and

damages for defamation are currently understood by the courts, and that one does not need to change those understandings much to reconcile them with the risk-as-injury interpretation of the wrong of defamation.

CHAPTER 4: RISK-AS-INJURY IN THE LEX AQUILIA AND THE TORT OF NEGLIGENCE

I INTRODUCTION

In the previous chapter, we saw that the orthodox interpretation of defamation is that it involves liability for probably having caused harm to the plaintiff's reputation. We also saw that there was reason to doubt whether the evidence that the plaintiff needs to produce to succeed in his or her claim provides sufficient reason to say that it is more probable than not that the defendant has harmed the plaintiff's reputation.

If the state is to exercise its power in imposing liability for defamation, then it needs to be able to present a convincing argument that the exercise of force is justifiable. When one considers the basis upon which the courts find that liability has been established, then there is reason to doubt whether the practice really is justifiable. If the wrong really is about having caused harm to the plaintiff's reputation, then more should be required in order to establish liability. As noted in the previous chapter, there are two possible responses to this concern. One could either change the rules in order to require more evidence, as some English tort scholars advocate in relation to the English law of libel, or one can justify the existing rules in some other way. This thesis (in the argument developed in Chapters 3, 4, and 5) takes the latter route, and presents an alternative justification. The alternative justification is that the defendant is liable, not for probably having caused harm to the plaintiff's reputation, but for probably having increased the risk of harm to the plaintiff's reputation.

The concept of imposing liability for mere risk raises its own concerns, however. In order to address those concerns, this chapter begins by elaborating on the concept of risk, and how that concept has been employed in the lex Aquilia and the English law of negligence. These areas of law need to be considered both because they will demonstrate some of the different ways in which risk can feature in the law of delict (some of which are more controversial than others), and because the idea of risk-as-injury has been explored by some English judges as a viable idea. While this shows that risk-as-injury is not a completely untenable idea, the primary benefit of this analysis is to show that the arguments that speak against adopting risk-as-injury in the law of negligence or the lex Aquilia do not apply as forcefully to the law of defamation. There are crucial differences between Aquilian liability and defamation that make risk-as-injury more tenable in the case of defamation as compared

to the lex Aquilia or the English law of negligence. Therefore, in order to tease out these differences and ultimately to explain why liability for risk-creation is justified in the case of defamation, this chapter will elaborate on the concept of risk and why imposing liability for risk is not justifiable in the case of Aquilian liability. Having noted the objections against imposing liability for risk in Aquilian cases, the next chapter will then demonstrate why those objections are overcome in the case of defamation.

II THE MEANING OF RISK

Risk is a central concept in the alternative justification for defamation that is being proposed in this thesis, so it is necessary to unpack the meaning of risk.

There is academic disagreement about when the word 'risk' should be used. Some think it should be reserved for scenarios when one can mathematically assess the probability of the outcome occurring, such as an actuarial or statistical assessment of the likelihood of harm occurring.[1] But the word is also sometimes used to denote 'threats', rather than only referring to mathematically determined probabilities.[2] In fact, risk can mean various things, depending on the relevant discipline or area of enquiry, but, at the same time, there does appear to be something that underlies most conceptions of risk, namely, that 'we are faced with a situation of "risk" when circumstances may (or importantly, may not) turn out in a way that we do not wish for.'[3] This general definition of risk identifies that assessments of risk are concerned with how things might turn out in the future, and the possibility that things might not turn out well.

This general definition of risk aligns with attempts to define risk in legal contexts. In a survey of the role of risk in the law of civil wrongs of various legal systems, including South Africa, Matthew Dyson explains that '[o]ur systems seem to employ a working definition of risk: *the probability of a negative outcome in the future*'.[4] Similarly, Stephen Perry states that '[i]n ordinary language conduct is typically said to be risky when it gives rise to a chance of a bad outcome of some kind. The concept thus involves two main elements: first, a notion of chance or probability, and second, a notion of harm.'[5]

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[1] See Jenny Steele *Risks and Legal Theory* (2004) 6 for a discussion of this view.
[2] Ibid at 6-7.
[3] Ibid at 6.
[4] Matthew Dyson 'What Does Risk-Reasoning Do in Tort Law?' (July 29, 2017) Oxford Legal Studies Research Paper No. 52/2017 at section 1. Available at SSRN: https://ssrn.com/abstract=3010696 (Advance access to Matthew Dyson (ed) *Regulating Risk Through Private Law* (2017)).
[5] Stephen R Perry 'Risk, harm and responsibility' in David G Owen (ed) *The Philosophical Foundations of Tort Law* (1997) 322. See also Gemma Turton 'Risk and the damage requirement in negligence liability' (2015) 35(1) *Legal Studies* 75 for discussion of these views of risk in the legal context.

Risk involves an assessment of probability, then, but it is not synonymous with probability. Jenny Steele explains that risk is generally concerned with the probability that some harmful event will occur in the future, yet assessments of probability as such can also apply to the past, and are not necessarily concerned with harmful events. For example, the statement 'the probability that X caused Y' is concerned with some past event and Y need not be something harmful or unwelcome. So, risk involves probability, but is not synonymous with probability. For our purposes, we can say that risk is concerned with the chance of a harmful event occurring in the future, but this is not necessarily being determined with statistical or actuarial accuracy in legal contexts.

In the context of the law of delict or tort, Matthew Dyson explains that risk can feature in different ways in a law of civil wrongs. When considering whether risk should be construed as a harm in and of itself, we are interested in what he calls risk's 'normative function', i.e., when 'it justifies and limits liability'.[6] However, as he explains, the concept of risk can justify and limit liability in various ways:

> It most commonly does so as a test for fault, by asking what risks were unreasonable to take. It is also often a claim that taking/generating/imposing *particular* risks *which then eventuate* can generate liability without regard to fault. Risk-reasoning can also have effects on tort law, typically by reconceptualising what has been done to the victim (causation and damage/harm/loss), such as by treating loss of a chance or the imposition of a risk as a harm in themselves.[7]

The alternative explanation of defamation that I will present is using risk in the last-mentioned way: treating the imposition of a risk as a harm in itself. This is probably the most controversial type of risk-reasoning, however. Liability for exposing someone to a risk of reputational harm probably falls into the category that Dyson calls 'liability for endangerment',[8] but this is a kind of liability that does not find much recognition in the surveyed legal systems:

> Our systems do not recognise that D endangering C is itself an actionable tort. Criminal law across our systems very commonly does prohibit endangerment, but tort liability requires some kind of actionable harm not just endangerment.[9]

There have, in fact, been instances of liability for negligence where English courts have, at first glance, at least, imposed liability for the creation of risk, but even in these cases there needed to be proof of a physical change in the world. Moreover, upon closer inspection, the

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[6] Dyson op cit note 4 at Introductory section.
[7] Ibid.
[8] Ibid at section 2.5.2.
[9] Ibid.

best interpretation of these cases is that the creation of risk is not the actionable injury. It is good that this is so, for there are reasons why treating risk as the actionable injury is not a good idea in negligence or Aquilian cases.

In the rest of the chapter I will unpack the various ways in which risk can feature in the law delict, such as its uncontroversial application in the test for fault, as well as its more controversial application as the actionable harm. This discussion will focus on the law of negligence, which will not only help to demonstrate how risk can feature in the law of delict, but also why the concept of risk-as-injury is defensible in the case of defamation, even if it is not defensible in the case of Aquilian liability or Negligence.

III AN UNCONTROVERSIAL APPLICATION OF RISK IN THE LEX AQUILIA: FAULT

A relatively uncontroversial application of risk in the law of delict is its application in the test for negligence. As Dyson states, the 'normative function' of risk is to 'justify and limit liability', and one of the most common ways in which it does that is 'as a test for fault, by asking what risks were unreasonable to take'.[10] One can see this use of risk in the negligence fault standard in South African Aquilian cases.

The test for negligence requires one to ask whether a reasonable person in the position of the defendant would have foreseen a risk of harm and would have taken steps to guard against that risk materialising. The classical statement of this principle is in *Kruger* v *Coetzee*,[11] where the Appellate Division stated the following:

> For the purposes of liability *culpa* arises if -
> *(a)* a *diligens paterfamilias* in the position of the defendant -
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
> (ii) would take reasonable steps to guard against such occurrence; and
> *(b)* the defendant failed to take such steps.[12]

In this test, the court asks whether a reasonable person would have foreseen a reasonable possibility of harm and would have guarded against it. This involves an assessment of risk, as well as an assessment of the pros and cons of guarding against that risk materialising.

[10] Dyson op cit note 4 at Introductory section.
[11] 1966 (2) SA 428 (A). For a more specific, modern version of this test, see *Mukheiber* v *Raath* 1999 (3) SA 1065 (SCA) at 1077E-F. For more detailed discussion, see Anton Fagan 'Negligence', in R Zimmermann, K Reid and D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005).
[12] *Kruger v Coetzee* supra note 11 at 430E-F.

So, the test for negligence involves a risk assessment, but it also involves more than that, such as a weighing up of the costs of guarding against that risk. This is just a determination of whether the defendant acted negligently, however. Usually, more than negligent conduct is required in order for the defendant to be liable. In other words, simply having acted in a risky or negligent manner is not sufficient for liability. As we saw in the previous chapter, typically, there must also have been physical damage to persons or property, and patrimonial loss.[13] As the Supreme Court of Appeal put it in *Jowell v Bramwell-Jones and others*,[14] '[t]he element of damage or loss is fundamental to the Aquilian action and the right of action is incomplete until damage is caused to the plaintiff by reason of the defendant's wrongful conduct.'[15]

Lord Atkin's statement in *Donoghue v Stevenson*[16] on the English law of negligence indicates that something similar is true for the English law of Negligence: '[t]he law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage.'[17]

In the typical case of Aquilian liability, then, it appears as though risk features in the fault enquiry as one aspect of the enquiry into the defendant's liability, but increasing the risk of harm is not sufficient for liability. One also needs to have caused physical damage and to have caused patrimonial loss.

IV UNUSUAL NEGLIGENCE CASES WHERE RISK COULD, CONTROVERSIALLY, BE CONSTRUED AS DAMAGE

Risk features uncontroversially as one aspect of the test for negligence, but there are some unusual types of tort cases where one might be tempted to view the increase in risk as the damage or harm for which one is being compensated. This idea of risk-as-injury is the position being advocated for here in the context of defamation, but I do not think it is a good idea to view an increase in the risk of harm as a wrong in the context of the lex Aquilia. In order to see why risk-as-injury is justifiable in the law of defamation but not in the lex Aquilia or what one might call the Law of Negligence generally, one needs to survey these unusual types of negligence. This survey will bring to light crucial differences between the tort of Negligence (and the similarly structured lex Aquilia) and the South African law of defamation. These

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[13] Anton Fagan 'Aquilian liability for negligently caused pure economic loss - Its history and doctrinal accommodation' (2014) 131 *South African Law Journal* 288 at 288.
[14] 2000 (3) SA 274 (SCA).
[15] Ibid para 22.
[16] [1932] AC 562.
[17] Ibid at 618 (Lord Macmillan).

differences mean that the objections against risk-as-injury in the Law of Negligence do not apply as forcefully to defamation.

There have been controversial cases in England that could be interpreted as treating an increase in risk as the damage for which the plaintiff is being compensated. These are cases where factual causation cannot be established using the traditional 'but-for test' due to gaps in scientific knowledge, but where the courts still think it would be reasonable to impose liability. This lack of scientific knowledge impeding the establishment of factual causation has come to be known as the problem of the 'evidentiary gap'.[18] It is necessary to explore this problem here in order to contextualise the discussion in these cases around whether an increase in risk could be construed as an actionable harm.

In *Barker v Corus UK plc*,[19] the majority of the House of Lords, according to one interpretation, approached the problem of the evidentiary gap by suggesting that the injury for which one is being compensated is the injury of having been exposed to a risk of harm. This interpretation was later rejected by the UK Supreme Court in *BAI (Run Off) v Durham*, however.[20] Nevertheless, the risk-interpretation was ostensibly embraced by some members of the House of Lords in *Barker*.

In South Africa, *Lee v Minister of Correctional Services*[21] has the potential to be interpreted in a similar way to these English cases, as it too involved a substitution of the but-for-test for causation in favour of culpability based on increasing the risk of a harm that then eventuated.[22] It is possible, therefore, that *Lee* could be subjected to a risk-as-injury interpretation in the future, similar to what happened in *Barker v Corus UK plc*.

It is a useful exercise to review the risk-as-injury interpretation in the English negligence cases because they provide insight into why risk-as-injury is a bad idea in the law of negligence (or the lex Aquilia) and why it is nonetheless justified in the South African law

[18] Gemma Turton *Evidential Uncertainty in Causation in Negligence* (2016) 168.
[19] *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.
[20] *BAI (Run Off) Ltd v Durham* [2012] UKSC 14, [2012] 1 WLR 867.
[21] 2013 (2) SA 144 (CC).
[22] Alistair Price 'Factual Causation after *Lee*' (2014) 131 *South African Law Journal* 491 at 492 states the following: 'the majority appeared to accept (see paras 58 and 62) that the requisite factual causal link may exceptionally be established simply if a defendant's negligent conduct *increased the risk* of the plaintiffs harm, so that a smaller risk of that harm would have existed had the defendant acted reasonably'. The court in *Lee* supra note 21 states the following in para 58, for example: 'It would be enough, I think, to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures'. For further discussion, see Anton Fagan 'Causation in the Constitutional Court: *Lee v Minister of Correctional Services*' (2013) 5 *Constitutional Court Review* 104.

of defamation. Due to the apparent embrace of risk-as-injury in *Barker* and the rejection of that position in *BAI (Run Off) v Durham*, the English cases provide more detailed arguments and reasoning on the idea of risk-as-injury than the South African case of *Lee*. There has also been more extensive academic scrutiny of the English cases. Therefore, the discussion of risk-as-injury in the law of negligence below will focus on the English cases, but the principles derived from this discussion about why risk-as-injury in the law of negligence is not a good idea are just as applicable to the South African lex Aquilia.

(a) An evidentiary gap versus unsatisfactory theories of causation

In ordinary cases of negligence, the plaintiff must establish that the defendant's negligent conduct is a factual cause of the plaintiff's injury. The usual test for this is the but-for test for factual causation, which requires one to ask the following: But for the defendant's negligent conduct, would the injury still have occurred? If the injury still would have occurred, then the negligent conduct was not a factual cause of the injury. Corbett JA puts it the following way in the South African case of *Siman and Co (Pty) Ltd v Barclays National Bank Ltd*:[23]

> The enquiry as to factual causation generally results in the application of the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. This test is applied by asking whether but for the wrongful act or omission of the defendant the event giving rise to the loss sustained by the plaintiff would have occurred. [...] In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the unlawful act or omission of the defendant. In some instances this enquiry may be satisfactorily conducted merely by mentally eliminating the unlawful conduct of the defendant and asking whether, the remaining circumstances being the same, the event causing harm to plaintiff would have occurred or not. If it would, then the unlawful conduct of the defendant was not a cause in fact of this event; but if it would not have so occurred, then it may be taken that the defendant's unlawful act was such a cause. [...] In many instances, however, the enquiry requires the substitution of a hypothetical course of lawful conduct for the unlawful conduct of the defendant and the posing of the question as to whether in such case the event causing harm to the plaintiff would have occurred or not; a positive answer to this question establishing that the defendant's unlawful conduct was not a factual cause and a negative one that it was a factual cause. This is so in particular where the unlawful conduct of the defendant takes the form of a negligent omission.[24]

In the Anglo-American context, Richard Wright sums up the but-for test in the following way:

[23] 1984 (2) SA 888 (AD).
[24] Ibid at 914-915

> The most widely used test of actual causation in tort adjudication is the but-for test, which states that an act (omission, condition, etc.) was a cause of an injury if and only if, but for the act, the injury would not have occurred. That is, the act must have been a necessary condition for the occurrence of the injury. The test reflects a deeply rooted belief that a condition cannot be a cause of some event unless it is, in some sense, necessary for the occurrence of the event. This view is shared by lawyers, philosophers, scientists, and the general public.[25]

The but-for-test can run into difficulty even in cases that do not involve an evidentiary gap, such as cases of over-determined causation, and the usual response to this is to advocate for a more sophisticated account of causation. In cases of over-determined causation, the but-for test returns the result that the conduct in question is not a cause of the injury even though it is clear that the conduct played a role in causing the injury. These are cases of supervening (or pre-emptive) causation and concurrent (or duplicative) causation.[26] An example of supervening causation is when A shoots and kills P, just as P is about to drink a cup of tea that has been poisoned by B. An example of concurrent causation is when A and B both start fires which converge on P's house and destroy it. In both of these cases, the but-for test fails to say that either A or B's conduct was a cause of the injury, because it is not true that but for A's conduct, the injury would not have occurred, nor is it true that but for B's conduct, the injury would not have occurred.[27] The result is that liability cannot be established even though it is clear that A's conduct caused the death of P in the first case and that either A or B's conduct, or both, caused the destruction of the house. An attempt to deal with these difficulties using a more sophisticated account of causation is the Necessary Element of a Sufficient Set (NESS) test, developed by Richard Wright,[28] building on the work of Tony Honore and HLA Hart.[29] Instead of asking one to imagine what would have happened if the defendant's negligent conduct had been replaced with non-negligent conduct, the NESS test asks whether the conduct 'was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence'.[30] This test captures the idea that 'causes' are conditions that are *sufficient* for the occurrence of some outcome. The test also attempts to focus only on the conditions that are causally relevant. Hence, the focus is on conditions that are *necessary* for the set to be *sufficient*.[31]

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[25] Richard W Wright 'Causation in Tort Law' (1985) 73 *California Law Review* 1735 at 1775.
[26] HLA Hart and Tony Honore *Causation in the Law* 2ed (1985); Wright op cit note 25.
[27] Wright op cit note 25 at 1775-1776.
[28] Wright op cit note 25.
[29] Honore and Hart op cit note 26; Wright op cit note 25 at 1788.
[30] Wright op cit note 25 at 1774.
[31] Ibid at1789-1790

The NESS test appears to be able to deal with the problem of causal over-determination but we do not need to get into the details of how it does that here, as the crucial point for us is that the NESS test, and any other account of causation, is incapable of dealing with cases involving an evidentiary gap. Gemma Turton explains that the problem posed by the evidentiary gap is not one that can be overcome simply by having a more accurate and sophisticated understanding of causation. No test for causation can cope with the evidentiary gap because the evidentiary gap arises precisely in those circumstances where there is a deficit in knowledge as to how the outcome was caused. The problem is not with our theory of causation but with a lack of factual knowledge as to the causes of certain things.[32] Nevertheless, the English courts have gone on to impose liability in cases involving an evidentiary gap, and the solution that they adopted is capable of different interpretations. The two major competing interpretations of the solution that was devised to overcome the evidentiary gap are, first, that it involves a weakening or relaxing of the requirement of causation, or, second, that the solution reconceptualises the injury as the causing of an increase in risk, rather than the causing of physical injury. We will see that there are reasons to prefer the first interpretation in this instance, but that this does not prevent us from seeing risk as the gist of the injury in defamation.

(b) Cases involving an evidentiary gap: relaxation of causation versus risk-as-injury

Cases that have given rise to the problem of an evidentiary gap are those in which (a) physical harm to the claimant has occurred in the form of a disease (e.g., contracting mesothelioma), (b) the claimant was exposed to a substance that is known to play a causal role in the development of the disease (e.g., asbestos) but (c) due to scientific uncertainty as to how the disease develops and (d) the fact of multiple exposures to the harmful substance, it is (e) impossible to say that any particular exposure was the cause of the injury.[33]

The solution developed by the House of Lords in response to this uncertain chain of causation means that claimants can succeed in claiming damages despite the fact that causation cannot be established in the usual way using the but-for test. The solution is 'to hold the defendant liable on the basis that his negligence had materially increased the risk of the harm suffered'.[34]

[32] Turton op cit note 18 ch 5.
[33] Turton op cit note 18 at 166-167.
[34] Ibid at 169.

This rule was first adopted, arguably, in *McGhee v National Coal Board*[35] and then applied again in *Fairchild v Glenhaven Funeral Services Ltd*.[36] It has also been implemented, or re-interpreted, in *Barker v Corus (UK) Plc*,[37] *Sienkiewicz v Greif (UK) Ltd*[38] and *BAI (Run Off) Ltd v Durham*.[39] The nature of the rule has been controversial and judicial opinions in these cases often involve close textual analysis of previous judgments, which makes any attempt to summarise these cases susceptible to error.[40] However, while there has been serious disagreement, some features of the rule are clear. First, none of the opinions in these judgments thought that the *McGhee/Fairchild* principle was itself unjust, i.e., none of the opinions thought that causation in the usual sense was absolutely essential to the law of tort. Second, none of the opinions suggested that proof of physical harm was not a necessary requirement for liability. Even when risk began to be construed as the injury for which one is being compensated, rather than simply as a means of relaxing the causation requirement, it was still held that proof of physical harm was essential to liability. As we will see, risk-as-injury was actually devised as a way of overcoming the problem of how to apportion damages fairly, rather than as a means of overcoming the need to prove physical injury. The risk-as-injury interpretation, moreover, which ostensibly formed the ratio of the majority decision in *Barker v Corus*, has since been rejected by the majority in *BAI (Run Off) Ltd v Durham*. While this seems like the correct decision for the law of negligence, we will also see that these developments do not undermine the risk-as-injury interpretation of the law of defamation.

(c) An analysis of the findings in these cases

We have already noted that the factual scenario that brings the *McGhee/Fairchild* principle into play is that an employee was exposed to a substance while at work that is known to play a causal role in the development of a disease, and the employee then went on to develop that disease. There were multiple exposures to the substance, however, either at the hands of other employers or during a period of self-employment, such that it cannot be said that the exposure that actually played a role in the development of the disease happened while working for a

[35] [1972] 3 All ER 1008 (HL), 1 WLR 1. There is some debate about whether the *McGhee/Fairchild* rule is different from an earlier rule in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 (HL) concerning a 'material contribution to harm', but that is not relevant for our purposes here. See Turton op cit note 18 at 65-77, 170-172 for an explanation of why the *Fairchild* principle is different from the *Wardlaw* principle, due to the different problems regarding causation in these two cases.
[36] [2002] UKHL 22, [2003] 1 AC 32.
[37] Supra note 19.
[38] [2011] UKSC 10, [2011] 2 WLR 523.
[39] Supra note 20.
[40] For critical analysis of these cases, see Turton op cit note 18 ch 5.

particular employer. One of the reasons why the causal development of the disease cannot be traced more accurately is because we lack the scientific knowledge to make that determination. As Lord Rodger put it in *Fairchild*,

> [b]ecause of the current state of medical knowledge about the aetiology of mesothelioma, it was impossible for the claimants to prove on the balance of probabilities that the men's illness had been triggered by a fibre or fibres inhaled while working with any particular employer and, more especially, while working with the particular defendants whom they had sued. For that reason the Court of Appeal rejected their claims. The claimants thus failed because of the particular stage which medical science has reached.[41]

The difficulty, then, was with establishing causation in circumstances where the current state of scientific knowledge could not provide enough information to answer the question of which employer had caused the disease. The question of law in *Fairchild* was whether liability should be refused due to a failure to satisfy the causation requirement or whether a different approach to causation should be taken which allowed the claimants to succeed despite the impossibility of proving causation in the usual way. The court ultimately viewed this as a question of fairness and justice; they had to balance the injustice of an employer being held liable when it was possible that he had not caused the injury, with the injustice of an employee not being able to recover compensation when he had been negligently exposed to a harmful substance that had increased the risk of developing a disease that he in fact contracted.[42]

The answer to this dilemma, according to the House of Lords in *Fairchild*, was to follow the rule in *McGhee*, which the majority interpreted as providing an exception to the usual causation requirement. Instead, one could hold the employers liable on the ground that they had materially increased the risk of the injury developing. According to Lord Hoffmann, 'the law should treat a material increase in risk as sufficient to satisfy the causal requirements for liability'.[43]

There are at least three ways to interpret the *McGhee/Fairchild* rule. First, one can claim that the court is still inferring causation, albeit in circumstances where there is no scientific certainty as to the causal process. One could perhaps try to argue that this inference is based

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[41] Supra note 36 para 124.

[42] Ibid para 33. Lord Bingham stated the following: 'It can properly be said to be unjust to impose liability on a party who has not been shown, even on a balance of probabilities, to have caused the damage complained of. On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered.'

[43] Ibid para 67.

on the balance of probabilities, which is different to scientific certainty, but this is not a good view to take.[44] Second, one can view the rule as doing away with any pretence of a normal causal link and view it as a means of attributing culpability for materially increasing the risk of physical injury, rather than causing the physical injury. Third, one can attempt to reconceptualise the injury for which one is being compensated as the increase in the risk itself, rather than physical harm in the form of a disease being the injury. In this way, causation is still preserved because by increasing the risk of injury one is causing the injury of exposing another to a risk of harm.[45]

This third interpretation is the most relevant for our purposes here, as it supports the idea of risk-as-injury in the law of negligence. Lord Hoffmann adopted this third option in *Barker v Corus*, and it appears, at first glance, as though he spoke for the majority. On closer inspection, however, it is less clear that the majority actually adopted the risk-as-injury approach, even though they expressly stated that they agreed with Lord Hoffmann's reasoning.[46] The risk-as-injury interpretation was then subsequently rejected in *BAI v Durham*. As I am advocating the idea of risk-as-injury in the law of defamation, let us look closer at why the idea of risk-as-injury was adopted in *Barker* and why the Supreme Court was right to reject it in *Durham*.

The primary issue in *Barker* was the potential unfairness of holding all of the defendants jointly and severally liable under the *Fairchild* principle. Joint and several liability is the norm when the injury in question is 'indivisible', i.e., when it is impossible to identify discrete injuries for which particular defendants can be held liable. Divisible injuries, on the other hand, are capable of being divided up among the different defendants, holding each defendant liable only for his portion of the injury. The classical statement of this rule is that of Lord Devlin in *Dingle v Associated Newspapers Ltd*:[47]

> Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose

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[44] Gemma Turton makes the point well: 'For a court to find that causation has been established on the balance of probabilities when the scientific evidence is that *causation* cannot be established because of an evidentiary gap, is to make a deliberately misinformed judgment based on intuition both as to causation and as to overall responsibility for the loss. It is one thing for the court to be satisfied on the balance of probabilities where there is some degree of doubt or uncertainty in the expert evidence because the law requires only probability not certainty, but it is entirely different for a court to resort to intuition about what probably happened where the expert evidence clearly states that causation cannot be established' (op cit note 18 at 174 - 175).

[45] Turton op cit note 18 at 182.

[46] See *BAI (Run Off) v Durham* supra note 20 paras 59-65 (Lord Mance); Turton op cit note 18 at 182-191.

[47] [1961] 2 QB 162.

> acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly. These are elementary principles and readily recognisable as such in the law of damage for physical injury. It is not so easy to distinguish and apply them in the law of damage for loss of reputation.[48]

Mesothelioma is regarded as an indivisible injury. One either contracts the disease or one does not. So, the normal rule of joint and several liability would seem to apply. As Lord Hoffmann put it in *Barker*, '[t]he disease is undoubtedly an indivisible injury', and so it would seem as though the 'reasoning of Devlin LJ in *Dingle's case [1961] 2 QB 162* would have been applicable.'[49] The problem with this, however, was that it meant that someone who made a material, yet comparatively small, contribution to the risk of contracting the disease would be liable for the losses in their entirety, and in a situation where they might not, in fact, have caused the disease. The injustice of this was recognised in *Fairchild*, but it was made more acute in *Barker*, where the claimant himself was responsible for exposing himself to asbestos during a period of self-employment. In *Fairchild*, all of the exposures were at the hands of employers. Another issue raised in *Barker* was that some of the defendants who were responsible for a significant period of exposure to the harmful substance, e.g., more than 80% of the exposure, were no longer solvent. Their insurers were also insolvent. This meant that defendants who were still solvent or who were still insured would be liable for the entire damages claim, even though they made a comparatively small contribution to the risk of the

[48] Supra note 47 at 188–189.
[49] Supra note 19 para 31.

harm.[50] As in *Fairchild*, the House of Lords took itself to be grappling with questions of fairness and justice with respect to both the claimants and the defendants.[51]

The solution by the majority in *Barker* to the problem of apportionment, at least at first glance, was to re-construe the injury as being the exposure to risk itself, rather than the physical harm in the form of mesothelioma. Risk, after all, is a divisible injury. One could work out the extent to which each party had increased the risk of mesothelioma developing, such as by analyzing the length of employment and the intensity of the exposure. As risk was a divisible injury, each defendant would only be liable for the particular injury that he had caused. In other words, each defendant would only be liable for his personal contribution to the chance of the employee developing mesothelioma.[52] This allowed a fairer distribution of liability in circumstances which already involved a delicate balancing act between the interests of claimants and the interests of defendants. This is certainly the approach taken by Lord Hoffmann, but it is less clear that those who claimed to endorse his reasons actually relied on those reasons in their own judgments.[53]

The primary motivation for interpreting *Fairchild* in this way, then, was to overcome the problem of apportionment. In any event, the British Parliament reversed this decision in the Compensation Act of 2006,[54] declaring that liability for mesothelioma in these circumstances has to be joint and several.[55]

The question of the correct interpretation of *Fairchild* then came up again in *BAI (Run Off) v Durham*. In this case, the Supreme Court rejected the risk-as-injury interpretation of *Fairchild*.

The issue in *Durham* was whether liability under *Fairchild* was the kind of liability that would trigger an employer's liability insurance. The insurers argued that mesothelioma must have manifested itself during the insurance period, while the employers and employees argued that all that was necessary was an exposure to asbestos during the insurance period under circumstances which gave rise to liability under *Fairchild*. Part of the problem was how to interpret the words 'sustained' and 'contracted' in the insurance clauses, i.e. whether these

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[50] Supra note 19 paras 3-4 (Lord Hoffmann).
[51] Ibid para 117 (Lord Walker). See also paras 124-127 (Baroness Hale) and para 86 (Lord Rodger).
[52] Ibid paras 31-48 (Lord Hoffmann); Turton op cit note 18 182-185.
[53] See the references in fn 46 above.
[54] 2006 c 29.
[55] See *BAI (Run Off) v Durham* supra note 20 paras 57-67 (Lord Mance) for discussion of the Compensation Act and its consequences.

words suggested that a disease needs to have manifested during the insurance period or whether one needs just to have been exposed to a harmful substance.[56] *Fairchild* and its possible interpretations also gave rise to various questions about whether they would fall under the insurance contract. If an increase in risk was the actual damage being considered, then this might not be covered by a policy covering accidents or diseases. Moreover, even if the damage was physical injury in the form of disease, it was not clear that *Fairchild* cases involved *causation* of a disease, as liability was being imposed for increasing the risk of injury, rather than causing injury in the usual sense.

The court began by holding that the insurance policies were triggered by exposure to a harmful substance or event during employment, rather than requiring a disease to actually manifest itself during the employment period.[57] So, if one was exposed to radiation at work that only later developed into cancer once one had left employment, the insurance liability would still be triggered. The next question was whether an employer's liability under *Fairchild* could be said to be liability for having caused a disease and thus trigger the employer's liability insurance. Lord Phillips, in a dissenting judgment, held that the correct interpretation of *Fairchild* and *Barker* was that the injury was the risk, rather than the causing of a disease, and so the insurance liability would not be triggered. His main concern was to avoid radical judicial law-making and a departure from precedent.[58] The majority declined to follow the risk-as-injury interpretation of *Fairchild* that was put forth in *Barker*, however. Lord Mance stated that even though the majority in *Barker* 'were at pains to reject any analysis of *Fairchild* as proceeding upon a fiction that each exposure had caused or materially contributed to the disease', the distinction the majority in *Barker* attempted to draw between 'materially contributing to increasing the risk of, and causing, a disease' proved 'elusive' on closer analysis.[59] In other words, no clear distinction could be drawn between increasing the risk of a disease and causing a disease. Moreover, 'no cause of action at all exists unless and until mesothelioma actually develops'.[60] So that would seem to imply that it is wrong to say that the gist of the injury is the risk, rather than the disease itself:

> In reality, it is impossible, or at least inaccurate, to speak of the cause of action recognised in *Fairchild* and *Barker* as being simply "for the risk created by exposing" someone to asbestos. If it were simply for that risk, then the risk would be the injury;

[56] Supra note 20 paras 3-5 (Lord Mance).
[57] Ibid paras 49-50 (Lord Mance).
[58] Ibid paras 123-125, 134-137 (Lord Phillips).
[59] Ibid paras 59-61 (Lord Mance).
[60] Ibid para 64 (Lord Mance).

damages would be recoverable for every exposure, without proof by the claimant of any (other) injury at all. That is emphatically not the law.[61]

The majority stated that the best way to describe the 'legal responsibility' created in *Fairchild*, then, is 'responsibility for the mesothelioma, based on a "weak" or "broad" view of the "causal requirements" or "causal link" appropriate in the particular context to ground liability for the mesothelioma.'[62] In the context of employers' liability insurance, this was a sufficient causal connection to trigger liability under the insurance policies as well.[63]

V CRITIQUING RISK-AS-INJURY IN THE LAW OF NEGLIGENCE: FROM *BARKER* TO GENERAL PRINCIPLES

The cases outlined above in which the *Fairchild* principle is applied raise a number of issues. Our purpose here is to understand the role that risk played in these cases, whether the idea of risk as damage is justifiable in the law of negligence, and what lessons we can glean for a risk-as-injury interpretation of the law of defamation.

There are good reasons to reject the idea of risk-as-injury that Lord Hoffmann proposed in *Barker*. The judgment itself actually undermines a risk as injury interpretation, on a closer analysis. More important for our purposes, however, is that a discussion of these cases will also provide more general reasons for thinking that risk-as-injury is almost always going to be a bad idea for the law of negligence. This is due to the fact that negligence protects a variety of interests and the negligence standard encompasses a variety of forms of conduct. Allowing risk to be the injury in this context will expose one to liability in far too many circumstances. The law of defamation manages to avoid these concerns, however.

(a) Why Barker does not really support a risk-as-injury interpretation.

Gemma Turton provides a compelling argument for why Lord Hoffmann is not really making risk the injury, despite his express claims to the contrary. This has to do with the nature of risk and the role he has it play in apportioning liability.

Turton notes that risk is a forward-looking concept; it relates to the future. More specifically, it is a product both of the magnitude of the possible harm and the probability of that harm occurring.[64] As risk is a product both of the probability of harm occurring and the

[61] Ibid para 65 (Lord Mance).
[62] Ibid para 66 (Lord Mance).
[63] Ibid para 73 (Lord Mance).
[64] Turton op cit note 18 at 191.

magnitude of the harm, it is possible to determine the risk that you have exposed someone to before the risk materialises (if it ever does) and the quantification of the risk (if it is correct) remains settled. For example, based on the duration and intensity of an employee's exposure to asbestos at the hands of an employer, that employer would have increased the probability of her developing mesothelioma by, say, 18%, in relation to the rest of the population. If the employee starts to work for a subsequent employer, this would not change the fact that the original employer had increased her risk of mesothelioma by 18%. If liability in *Barker* was being based on risk, then an employer's liability would not change in response to the behaviour of other employers. The fact that some other employer exposed the employee to a risk of mesothelioma would not change the fact that the original employer increased her risk by 18%. Yet, that is not how Lord Hoffmann approaches the issue of apportionment. Lord Hoffmann varies each employer's liability in proportion to the extent to which they probably caused the disease.[65] In other words, if someone worked for someone for 20 years and someone else for 5 years, the first employer would be responsible for a proportionally higher amount of damages, once one has also taken into account things like the intensity of the exposure. Lord Hoffmann puts it the following way:

> The damages which would have been awarded against a defendant who had actually caused the disease must be apportioned to the defendants according to their contributions to the risk. It may be that the most practical method of apportionment will be according to the time of exposure for which each defendant is responsible, but allowance may have to be made for the intensity of exposure and the type of asbestos.[66]

In reality, then, Lord Hoffmann is not basing liability on risk nor apportioning liability based on risk. He is instead apportioning liability based on the statistical probability that the particular employer was the cause of the disease. If P worked for A for 20 years and B for 5 years, then, other things being equal, it is more likely that A caused the disease than B.[67] What this approach amounts to is 'to make the defendant liable for the mesothelioma itself, but to discount the extent of his liability to reflect the uncertainty over whether the risk he created was the risk that actually materialised. The method used to calculate the appropriate discount is the probability that it was the defendant's risk rather than another source of risk that materialised'.[68]

[65] Ibid at 184-193.
[66] *Barker* supra note 19 para 48.
[67] Turton op cit note 18 at 189-193.
[68] Ibid at 191.

So, it is questionable whether Lord Hoffman actually made risk the injury in *Barker*, despite claiming that he was. But this does not end the insight that can be gained from these cases about the idea of risk-as-injury. The majority in *BAI (Run off) v Durham* expressly rejected the idea of risk-as-injury. Let us turn next to some of their reasons for doing so and whether there are good reasons to reject the idea of risk-as-injury in its entirety. We will see that while risk as injury does not sit well with the law of negligence, that does not prevent it from being a justifiable approach to the law of defamation.

(b) Why risk-as-injury is a bad idea in the law of negligence: a consequentialist approach.

In *Durham*, Lord Mance notes that

> [i]n reality, it is impossible, or at least inaccurate, to speak of the cause of action recognised in *Fairchild* and *Barker* as being simply "for the risk created by exposing" someone to asbestos. If it were simply for that risk, then the risk would be the injury; damages would be recoverable for every exposure, without proof by the claimant of any (other) injury at all. That is emphatically not the law.[69]

An implicit concern here, perhaps, is that if an increase in risk was the injury, then every (negligent) exposure would be actionable. Note that in none of the cases involving the *Fairchild* principle did any of the opinions hold that proof of physical harm in the form of mesothelioma was not required. Why, one might ask, was there unanimity on this even when some of their Lordships preferred to view the risk as the injury? One answer is derived from the realisation that much of the law of torts seems to involve a rudimentary kind of cost-benefit analysis. In other words, the law of torts proceeds on a consequentialist basis, and in light of consequentialist considerations, it would be bad to make risk per se actionable, at least in the law of negligence.

One can see the courts openly engaging in cost-benefit analysis in their discussions about the fairness of imposing liability in *Fairchild*-type cases. It seems clear that they are weighing up the costs and benefits to both parties of holding an employer liable. This is what they mean when they say that the imposition of liability and the apportionment of damages is a question of justice and fairness; they are weighing up the costs and benefits of imposing liability. In fact, this is recognised by those who reject consequentialism. Gemma Turton, who endorses a particular conception of corrective justice as a means of explaining the law of torts, states that '[s]ince the defendant is liable in circumstances where she may not have been a cause of the loss, corrective justice is abandoned in these cases in favour of the pursuit of

[69] Supra note 20 para 65.

consequentialist goals. The effect has been to throw negligence into the state of incoherence that is inherent in the pursuit of consequentialist goals within the bipolar framework of the tort action'.[70] It seems undeniable, however, that much of the law of tort does proceed on a consequentialist basis, both in the sense of taking into account the interests of society at large but also when assessing what would be fair between the parties.

Consequentialism has had its advocates in the context of tort law. Barbara Fried, for example, has argued that some form of cost-benefit analysis is required if we are to have anything meaningful to say about when negligent injuries should be wrongful or when they should be permitted.[71] Her primary target is non-consequentialist theories of tort, by which she means any theory that holds that an individual's right to be free from harm always trumps an analysis that attempts to aggregate the costs and benefits of the conduct.[72] Others, such as HLA Hart,[73] and Neil MacCormick, following Hart,[74] have interpreted the objective test for negligent conduct as a mechanism by which competing interests are balanced. This, too, looks like an interpretation of a feature of tort law that takes it to be a rudimentary form of cost-benefit analysis; we are weighing up the costs and benefits to the defendants, and sometimes to society at large, in prohibiting or allowing certain forms of conduct. Hart, for example, states that '[w]hat we are striving for in the application of standards of reasonable care is to ensure (1) that precautions will be taken which will avert substantial harm, yet (2) that the precautions are such that the burden of proper precautions does not involve too great a sacrifice of other respectable interests'.[75] In the South African context, Van den Heever JA interpreted aspects of the law of negligence in a similar way to Hart, prior to the publication of Hart's *The Concept of Law*. Van den Heever JA seems to have the question of duty or wrongfulness in mind, however, rather than the question of negligent conduct. In *Herschel v Mrupe*,[76] he stated that

> [w]hatever the scope of the moral duty, not to cause foreseeable harm to others in their persons or estates, may be, in law this duty is restricted in the interests of the individual's freedom of action and legitimate initiative. After all, law in a community is a means of effecting a compromise between conflicting interests and it seems to me that according to the principles of Roman-Dutch law the Aquilian action in respect of *damnum injuria datum* can be instituted by a plaintiff against a defendant only if the

[70] Turton op cite note 18 165.
[71] Barbara H Fried 'The Limits of a Nonconsequentialist Approach to Torts' (2012) 18 *Legal Theory* 231.
[72] Ibid at 232, fn 1.
[73] HLA Hart *The Concept of Law* (1961) 129-130.
[74] Neil MacCormick 'Reasonableness and Objectivity' (1999) 74 *Notre Dame Law Review* 1575 at 1584-1585.
[75] Hart op cit note 73 129.
[76] 1954 (3) SA 464 (A).

> latter has made an invasion of rights recognised by the law as pertaining to the plaintiff; apart from that, loss lies where it falls.[77]

Anton Fagan has also shown how the courts use the wrongfulness standard to determine when it would be reasonable to impose liability for negligently causing harm, and that, when wrongfulness is in issue, this will frequently involve an evaluation of the costs and benefits of imposing liability.[78] Wrongfulness 'is there to rein in negligence when the cost of letting negligence run loose would exceed the benefit.'[79] For example, in those cases where delictual liability is imposed in order to give effect to the constitutional principle of public accountability, such as in *Minister of Safety and Security v Van Duivenboden*,[80] liability is being imposed to foster the 'public good'[81] of an 'open, uncorrupt and responsive government'.[82] There are also costs attached to imposing liability, however, such as uncertainty due to the vagueness of the negligence standard, which can lead to over-insurance, an inability to plan one's affairs properly, and an increase in the likelihood of litigation.[83] Another cost is that of undermining the autonomy of other state institutions, such as municipalities, by holding them to have breached a duty not to act negligently.[84]

If one interprets the decisions that have dealt with the *Fairchild* rule through a consequentialist lens that takes into account the costs and benefits of imposing liability, then one can see that there are reasons not to impose liability for risk per se. The insistence on concrete injury in the law of negligence is a balancing act, as Van den Heever JA recognised, that occurs prior to the balancing act that takes place in the test for fault and reasonableness described by Hart. One reason for this is that negligence is a 'transversal' tort and this plays a role in explaining why liability for risk is a bad idea in the law of negligence.

As some commentators note, the English law of torts is 'bi-focal': some torts are defined in terms of the interests they protect (or the right that is infringed) while the tort of negligence is defined in terms of the fault of the defendant, without reference to any specific interest being

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[77] Ibid at 489H-490A.
[78] Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) *South African Law Journal* 90 at 132-139. See also Francois du Bois 'Getting wrongfulness right: A Ciceronian attempt' in TJ Scott & Daniel Visser (eds) *Developing Delict: Essays in Honour of Robert Feenstra* (2000).
[79] Fagan 'Rethinking Wrongfulness' op cite note 78 at 139.
[80] 2002 (6) SA 431 (SCA).
[81] Fagan 'Rethinking Wrongfulness' op cit note 78 at 135.
[82] Ibid, quoting Cameron JA in *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).
[83] Fagan 'Rethinking Wrongfulness' op cit note 78 at 136-137.
[84] Ibid at 137-138.

protected or right being infringed.[85] In line with this method of categorising torts, Eric Descheemaeker describes negligence as a 'transversal wrong', as opposed to a 'vertical' wrong (which would be centred, like a column, on a particular interest), for negligence cuts across various protected interests, being defined instead by a degree of fault.[86] This feature of negligence means that the kind of conduct that it encompasses is theoretically limitless, so long as the conduct is also negligent. For a great many activities that one can carry out, it will be possible to do it negligently. How, then, does the law limit the scope of liability? It does so by insisting on particular, albeit still quite general, types of conduct, such as causing physical injury. If such a general, transversal wrong like negligence were to make risk per se actionable, it would err too far on the side of security,[87] prohibiting a variety of conduct that is simply a part of life, and thus imposing too high a cost on our interest in freedom of action. The costs of imposing liability for risk, then, would be too high. It is recognised in scholarship dealing with risk regulation that an unqualified right against being exposed to risk would be unmanageable. Madeleine Hayenhjelm and Jonathan Wolff note that '[v]irtually every action carries with it some risk, however small, of serious harm to others, and so assigning individuals the right not to be subjected to risk, without their consent, is an impossible position.'[88] This concern would still be real even if one restricted the right to negligent increases in risk, and even if one restricted it to something even more specific, such as negligently increasing the risk of another person developing a disease like mesothelioma. Even this kind of restriction would probably impose too high a cost on employers, insurers and the courts. Lord Mance was probably alive to this kind of concern when he stated that 'it is emphatically not the law' that someone could be liable merely for increasing the risk of disease, making damages 'recoverable for every exposure, without proof by the claimant of any (other) injury at all'.[89] The cost of imposing liability for risk using a transversal tort provides a good moral reason for why the law does not construe risk-as-injury in the law of negligence.

[85] Donal Nolan and John Davies 'Torts and Equitable Wrongs' in A Burrows (ed) *English Private Law* 3ed (2013) §§17.08-17.09.
[86] Eric Descheemaeker 'Protecting Reputation: Defamation and Negligence' (2009) 29 *Oxford Journal of Legal Studies* 603 at 603.
[87] MacCormick op cit note 74 at 1584. See also Neil MacCormick 'The Obligation of Reparation' in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982) 217-218.
[88] Madeleine Hayenhjelm and Jonathan Wolff 'The Moral Problem of Risk Impositions: A Survey of the Literature' (2012) 20 (S1) *European Journal of Philosophy* e26 at e26.
[89] *Durham* supra note 20 para 65.

VI CONCLUSION

In order to develop the idea that liability for defamation is based on increasing the risk of harm, this chapter began by elaborating on the concept of risk. Risk can be defined as a concern about the possibility that an unwelcome event will materialise in the future; it is a product both of the magnitude of the possible harm and the probability of that harm occurring. In the context of the law of delict, this concept is typically used to either justify or limit liability, but it can do this in various ways. An uncontroversial application of the concept is in relation to fault, where foresight of the risk of harm is used to determine whether the defendant's conduct was culpable. Risk could also be used, more controversially, as a way to hold someone liable simply for having increased the risk of harm occurring, even in the absence of a finding that the risky conduct caused some other, more tangible harm. This application has been used and understood in various ways in the English tort of negligence, either as a way of relaxing the requirement of causation or as a new way to understand the harm for which one is being compensated. It appears, however, that even though the courts sometimes understood themselves to be construing risk-as-injury, there is reason to doubt that they actually were doing that. Nevertheless, the consideration of those cases presented more general reasons for thinking that risk-as-injury is a bad idea in the law of negligence. If one takes a consequentialist approach, then one can see that imposing liability for mere risk in the context of a transversal tort like negligence would err too far on the side of security and impose too high a cost on freedom of action (and negatively affected related matters, like the costs of insurance and litigation).

Understanding why risk-as-injury is problematic in the context of negligence provides a foundation to assess its applicability in the context of defamation. In the next chapter, we will see that these objections against viewing risk as damage in the law of negligence are attenuated in the context of defamation in South Africa.

CHAPTER 5: WHY RISK-AS-INJURY IS A SUPERIOR JUSTIFICATION OF THE RULES UNDERLYING DEFAMATION

I INTRODUCTION

In the previous chapter we saw that there are strong objections against viewing an increase in risk as the compensable injury for a transversal tort like negligence or the lex Aquilia. In this chapter, we will see that these same concerns do not apply as strongly to defamation law in South Africa. Viewing an increase in risk as the compensable injury would be justifiable in the law of defamation, and probably more justifiable than viewing the injury as the causation of reputational harm.

The argument takes the following form: According to the current rules, the plaintiff does not need to produce much evidence in order to establish her claim. When one compares this to the nature of Aquilian liability, where the protected interests allow for a ready observance of damage, alongside a requirement of patrimonial loss that also helps to establish and quantify that damage, the unsatisfactory nature of the requirements for defamation becomes clear. A major reason for the difficulty in establishing damage is that it is hard to track the causal impact of defamatory publications. Nevertheless, one's reputation matters and deserves protection, and, rather than just declaring the law of defamation unjustifiable, one can attempt to amend or justify the practice in some way. For example, one can amend the practice by requiring the plaintiff to tender better evidence that reputational harm was caused, or one can justify the practice in an alternative way by reinterpreting the nature of the wrong, such that the current evidential requirements are sufficient to establish that this other type of harm was caused by the defendant. Reinterpreting the harm as causation of an increase in the risk of reputational harm is an example of this latter option.

Viewing risk-as-injury is controversial, however, and arguably unjustifiable in the case of some delicts, like the lex Aquilia. But the objections that apply to the concept of risk-as-injury in the context of the lex Aquilia do not apply as strongly to defamation. First, as we will see, defamation is a vertical tort, rather than a transversal tort: it protects a particular interest from very particular types of conduct. This limits the scope of conduct that can attract liability, and therefore does not unduly limit freedom of action. Second, defamation in South Africa has a non-negligible fault standard, which makes risk-as-injury a more justifiable interpretation than it might be in a place like England, where liability for libel and slander is strict. The non-

negligible fault standard helps to limit the scope of liability-attracting conduct. The view taken in this thesis, then, is that the risk interpretation, all things considered, is more justifiable than the causation-of-reputational-harm interpretation. The justification of the rules matters, moreover, because the law of defamation is an instance of force being applied by the State.

The different evidential requirements between defamation and the lex Aquilia was discussed in Chapter 3, while the importance of reputation was discussed in Chapter 2. The concept of risk and reasons for not accepting risk-as-injury in the context of the tort of Negligence and the lex Aquilia was discussed in Chapter 4. In this chapter, we will see why the objections against risk-as-injury that were raised in Chapter 4 do not apply as strongly in the context of defamation in South Africa, due to it being a vertical tort that has a non-negligible fault standard. We will also see why it matters that the rules constituting defamation receive appropriate justification.

II REPUTATION MATTERS BUT IT IS HARD TO TRACK THE CAUSAL IMPACT OF DEFAMATORY PUBLICATIONS

In Chapter 2, value of reputation was established. It was noted that scholarly perspectives on the value of reputation could be placed into two camps: sometimes the external benefits of reputation are highlighted and sometimes the internal benefits are highlighted. External benefits are those social benefits and temporal advantages that a good reputation can generate, and the internal benefits are those relating to one's self-esteem and personal identity. The capacity to generate these internal and external benefits makes reputation, like property and bodily integrity, an important welfare interest, i.e., something that is foundational to the pursuit of other interests. It was also noted that the moral significance of welfare interests, and the reason why one should not violate them, depends on one's preferred moral theory. A consequentialist, for example, could point to the social benefits of allowing people to further their interests, and the individual utility or happiness that generates. While a deontologist might point to the value of autonomous decision-making. Joseph Raz and Stephen Perry, for example, argue that interfering with property and bodily integrity diminishes the owner's opportunities (their scope for autonomous decision-making),[1] and the same could be said for damaging someone's reputation. Since reputation is a welfare interest, it clearly deserves protection; the

[1] Stephen Perry 'On the relationship between corrective and distributive justice' in J Horder (ed) *Oxford Essays in Jurisprudence* 4th series (2000) 256; Joseph Raz *The Morality of Freedom* (1988) 413.

reasons supporting the protection of reputation seem to be the same reasons underlying the protection of bodily integrity and property.

We saw in Chapter 3, however, that it is difficult to observe reputational harm or to track the causal impact of defamatory assertions, and that the courts currently rely on slender evidence when declaring that reputational harm has been caused. Unlike in Aquilian cases, there are no readily observable physical changes in the world, nor is there a call for indirect proof of a reduction in quality or utility like patrimonial loss. Instead, a plaintiff merely alleges that a defamatory statement concerning herself has been published. There is no need to provide any further evidence about the causal impact the publication has had.

One might argue that the difficulty in tracking the causal impact of statements is a reason simply to presume that damage has been done. However, as Thomas Gibbons argues, that is equally a reason to presume that damage was not done.[2] At this point, one can either change the rules of defamation law and ask the plaintiff to provide more compelling evidence that harm was caused, or one can attempt to justify the established practice in some other way. Due to the difficulty in tracking the causal impact of statements, and proving reputational harm, this work prefers the latter option of justifying the current practice in some other way. Reputation does need protection, but the rules protecting it require better justification. The alternative explanation preferred here is that liability is not for having caused reputational harm, but for having increased the risk of reputational harm.

III DEFAMATION AS AN EXERCISE OF STATE POWER

We saw in Chapter 3 that when a judge is assessing a case according to the balance of probabilities, the judge is trying to determine if the evidence before her makes it seem as if the plaintiff's hypothesis is more probable than not. If the evidence succeeds in doing that, then, all things considered, the plaintiff is successful, and the defendant is liable. This process is an exercise of state power, however. The judge does not simply decide whose theory is correct for the sake of knowledge, but rather to make an enforceable judgment that has practical implications for the plaintiff and the defendant. If the defendant is ordered to compensate the plaintiff by paying damages, then the defendant is under a legal obligation to do so, an obligation backed up by the authority and might of the state. Robert Cover put the point dramatically when he argued that '[l]egal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result,

[2] Thomas Gibbons 'Defamation reconsidered' (1996) 16 *Oxford Journal of Legal Studies* 587.

somebody loses his freedom, his property, his children, even his life.'[3] This is true in the context of South African civil cases too. First, the judgment will typically require the payment of money in the form of damages (see Chapters 8 and 9), which is a sanction or hardship imposed by the state. Second, court orders, such as the order to pay compensation, are backed up with a threat of criminal proceedings should the order be ignored. In South Africa, disobeying a civil court order is an instance of the crime of contempt of court. Contempt of court consists in 'unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it'.[4] One of the ways in which one can commit this crime is to disobey court orders, thereby threatening 'the integrity of judicial orders and instructions.'[5] As Jonathan Burchell puts it,

> [i]t is clear that in our law both 'civil' and 'criminal' contempt are species of the same criminal offence. 'Civil' contempt is accordingly committed by failing to obey an order of court (provided the definition of the crime is satisfied) and it does not matter that the court order which is disobeyed was made in a civil case.[6]

These instances of state power need to be justified and supported by compelling reasons if they are to be justifiable in a constitutional democracy. As Etienne Mureinik explains, legal culture under the apartheid government was essentially a culture of authority: 'The leadership of the ruling party commanded Parliament, Parliament commanded its bureaucracy, the bureaucrats commanded the people.'[7] The new constitutional order, on the other hand, is supposed to instantiate a move away from this culture of authority and towards a culture of justification. A culture of justification is 'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.'[8]

Considering this ideal of a culture of justification, in a civil case where the plaintiff is attempting to establish his case on a balance of probabilities, and where the court's finding in that regard has practical implications for people's well-being and freedom, it is not sufficient that the courts simply say that they are persuaded that the plaintiff's version of events is the

[3] Robert M Cover 'Violence and the word' (1986) 95 *The Yale Law Journal* 1601 at 1601.
[4] Jonathan Burchell *Principles of Criminal Law* 3ed (2006) 945.
[5] Ibid.
[6] Ibid at 955. See also *S v Beyers* 1968 (3) SA 70 (A).
[7] Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31 at 32. See reference to Mureinik's article by Ackermann J in *Ferreira v Levin NO and others* 1996 (1) SA 984 (CC) para 51.
[8] Mureinik op cit note 7 at 32.

more probable one. It must also be clear that there were good reasons for making that determination. As discussed in Chapter 4, however, even in successful defamation cases, there are compelling reasons to doubt that the defendant has caused harm to the plaintiff, especially when compared to successful Aquilian cases. In Aquilian cases, the plaintiff has to tender proof of patrimonial loss, which is a good indicator that there probably has been damage to the utility or usefulness of a protected interest, given that there has been consequential patrimonial loss. Moreover, damage to property or persons is usually readily observable, given that these will typically involve observable physical changes in the protected interest. In the case of defamation, however, all that needs to be proven is the publication of words that the court then deems to be likely to lower the plaintiff's reputation in the eyes of right-thinking people. The plaintiff does not need to tender any other evidence in support of that finding of likely harm. English tort scholars have rightly questioned whether the mere fact of publication is really sufficient reason to believe that there has been probable causation of reputational harm. For one thing, the causal impact of statements is hard to track; moreover, one cannot simply observe a physical change in the world. Instead, whatever change that might occur as a result of an assertion happens inside people's minds. One is also not required to bring indirect proof of harm, such as proof of consequential patrimonial loss. All in all, the finding of probable causation of harm seems to be based on slender evidence, and it is highly questionable that the orthodox understanding of defamation law amounts to a sufficient justification for the use of state power.

One possible response is to call for better evidence to be produced, as favoured by Eric Barendt, who argues that '[a] plaintiff in a libel action should, in my view, be required to prove that his reputation has been injured.'[9] Rather than restructuring the law, however, an alternative approach would be to justify current practices in a different way, a way that overcame the problem of proof of harm in a context where there is an important threatened interest, but where actual harm is hard to prove. After all, it can be difficult to track the causal impact of statements in a way that does not appear to be true in the case of property and bodily interests where harm can more readily be observed. The alternative justification here would be to view the compensable injury not as the causation of reputational harm, but as the causation of an increase in the risk of reputational harm. Even if it not probably true that the defendant has caused the plaintiff reputational harm just by publishing a defamatory assertion, it is probably true that the defendant has increased the risk of reputational harm by publishing a defamatory assertion. It

[9] Eric Barendt 'What is the Point of Libel Law?' (1999) *Current Legal Problems* 110 at 123.

might be hard to track the causal impact of defamatory assertions, but, by publishing a defamatory assertion, the defendant has, more probably than not, increased the risk of reputational harm. It seems safe to say that there is a greater risk of harm to the plaintiff's reputation after the publication of the statement than there was before the publication of the statement.

As we saw in Chapter 5, however, viewing an increase in risk as an injury for which one can be compensated is controversial, and there are good reasons not to adopt that idea in the tort of Negligence or the lex Aquilia. What reason is there for thinking that those same objections do not apply to the law of defamation? The following sections attempt to answer this question by explaining how the objections that were levelled against risk-as-injury in the law of negligence do not apply as strongly to the law of defamation in South Africa. When one couples the fact that these objections do not apply as strongly to defamation with the legitimate interest we have in protecting people's reputations, the result is that imposing liability for risk in the case of defamation would be justifiable.

IV HOW DEFAMATION LAW OVERCOMES THE USUAL OBJECTIONS TO VIEWING AN INCREASE IN RISK AS THE COMPENSABLE INJURY

We saw in Chapter 4 that risk-as-injury would not be a good addition to the law of negligence, so why might it be justifiable in the law of defamation?

One of the reasons for disallowing risk liability in the case of negligence was that negligence is a transversal tort, meaning that it protects a variety of different interests from a variety of different harm-causing conduct. This meant that the tort encompassed a plenitude of conduct, and imposing liability for increasing a risk of harm in these multitudinous ways would err too far on the side of security and impose too many costs, either limiting our freedom of action or increasing economic costs like insurance prices and increased litigation.

The law of defamation is not a transversal tort, however. It is a vertical tort, as it is defined by a particular protected interest. This singular interest means that it can only be infringed by very particular types of conduct. The South African law of defamation also has the advantage of requiring fault of some kind, which further limits the types of conduct that can attract liability. This makes the imposition of risk-liability more justifiable in South Africa than it would be in England, for example. The following sections unpack these features of defamation that help to explain why risk-as-injury is more justifiable in the case of defamation than the lex Aquilia.

(a) A vertical tort

While the lex Aquilia protects a number of interests, such as property, bodily integrity, and, arguably, patrimony (and, perhaps, autonomy),[10] the South African law of defamation only protects one's reputation. We saw in Chapter 2 that the interest being protected is best characterised as an interest in one's reputation, rather than, say, freedom from insult. The law of defamation also does not allow for the recovery of consequential patrimonial losses; these losses need to be recovered under the lex Aquilia.[11] It is harder to argue, therefore, that the South African law of defamation is an 'economic tort' that largely protects one's patrimony, which is an argument sometimes made about the interests being protected by the English law of defamation. J.H. Baker, for example, sees the English tort of defamation as an economic tort, albeit one that has been narrowed down to protecting patrimonial losses caused by defamatory words.[12] Eric Descheemaeker, on the other hand, argues that, while the English law of defamation is indeed sometimes concerned with patrimony, this is a mistake that should be reformed as the predominant interest being protected is really reputation.[13] A similar debate took place in the nineteenth century. William Blake Odgers, whose *Digest of the Law of Libel and Slander* (1881) was one of the first attempts to describe the English law of defamation using general principles,[14] argued that injury to reputation was the gist of the action, as opposed to financial loss.[15] Yet, he spent some time objecting to John Townshend's position in Townshend's American treatise on slander and libel, for Townshend 'devote[ed] a whole chapter to maintaining "that pecuniary loss to the plaintiff is the gist of the action for slander or libel"'.[16] Since at least the nineteenth century, then, it has been controversial whether the

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[10] See Anton Fagan 'Aquilian liability for negligently caused pure economic loss - Its history and doctrinal accommodation' (2014) 131 *South African Law Journal* 288 for an argument that cases of pure economic loss involve the protection of the non-patrimonial interest of autonomy.

[11] *Matthews and others v Young* 1922 AD 492 at 498 ('Damages for patrimonial loss can only be claimed under the *Lex Aquilia*'); *Media 24 Ltd and others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and others as* amici curiae*)* 2011 (5) SA 329 (SCA) para 8 ('the rule of our law, in principle, is that patrimonial damages must be claimed under the *actio legis Aquiliae*, while the *actio iniuriarum* and its derivative actions, including the action for defamation, are only available for sentimental damages. In theory, the person injured by a defamatory publication would therefore have to institute two actions: a defamation action for general damages and the *actio legis Aquiliae* for special damages. But, as further explained by De Villiers JA, even at the time when *Matthews* was decided, two actions were no longer required by our practice. Accordingly, so De Villiers JA held, if one suffers an injury to your reputation, you can claim both kinds of redress in the same action, provided, of course, that the requirements of both actions are satisfied').

[12] John H Baker *An introduction to English legal history* 4ed (2002) 448.

[13] Eric Descheemaeker 'Defamation outside reputation: proposals for the reform of English law' *Tort Law Review* (2010) 18(3) 133.

[14] See Blake Odgers' own comments in this regard in his preface to *A digest of the law of libel and slander* (1881) vii. Available online at https://archive.org/details/digestoflawoflib00odge.

[15] Ibid at 4: 'The mischief complained of is the injury to the plaintiff's reputation and not the pecuniary damage he has suffered'.

[16] Ibid at 18-19.

Anglo-American law of defamation is primarily protecting one's wealth or one's reputation. The South African law, by contrast, seems squarely focused on one's reputation.

This limited range of protected interests is coupled with a similarly limited range of conduct that can give rise to liability. One's reputation is not protected from any and all diminishments, but only from conduct that takes the form of publication of a defamatory assertion.

There are a number of ways in which one's reputation can be diminished. A company's reputation can be diminished by a hacker breaching their security and stealing customers' data,[17] for example, but that is not covered by the law of defamation. The range of actionable conduct is limited to the specific form of publication of a defamatory assertion.

So, there is a limited range of interests, coupled with a limited range of liability-inducing conduct. Even if one did contend that the law of defamation does, directly or indirectly, protect other interests, like dignity, privacy or patrimony, the scope of actionable conduct is still far narrower than the scope covered by the modern lex Aquilia. Aquilian liability not only protects various interests, but also protects them from virtually unlimited forms of conduct, so long as that conduct is negligent. In defamation, because the conduct is defined so specifically (i.e., as the publication of an assertion) the problem of over-prohibition, and of imposing too high a cost on freedom of action, is largely avoided. One is prohibited from doing something (publishing a defamatory assertion) that is not a part of everyday life, and which does not constrain one's behaviour in a general way. It is usually not a regular part of life to publish defamatory things about people. Journalists are perhaps the group whose everyday conduct is most affected by defamation law, which is one reason why they deserve special consideration, like the defence of reasonable publication.[18] Unlike the transversal tort of negligence, the vertical delict of defamation does not succumb to the objection of over-prohibition of conduct. In other words, imposing liability for increasing the risk of harm in these circumstances would not err too far on the side of security or impose undue costs, either in the form of unduly limiting freedom of action or increasing economic costs like insurance premiums and litigation.

[17] See, for example, Doug Drinkwater 'Does a data breach really affect your firm's reputation?' (2016) *CSO*. Available online at: https://www.csoonline.com/article/3019283/data-breach/does-a-data-breach-really-affect-your-firm-s-reputation.html

[18] *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA).

(b) Fault in the form of intention is required in many cases, and liability is never strict

The limited range of protected interests and the limited range of liability-inducing conduct are not the only reasons why the net of liability would not be cast too wide if an increase in risk was to be regarded as the injury. The South African fault standard helps to further limit the range of actionable conduct. This is something that sets the South African law apart from a system like the English law of defamation, and which helps to make the risk-as-injury interpretation more acceptable in South Africa than it might be in England.

One of the most controversial features of the English law of defamation is that liability is strict in the sense that, unless one can raise one of the stereotypical defences, one cannot excuse oneself from liability by saying that one did not intend to injure the plaintiff's reputation or that one did not act negligently. This is different to the South African law where fault of some kind is required. Admittedly, it is not easy to determine what the exact fault standard is for defamation, as it is complicated by at least two ongoing debates. But, whatever position one takes in these debates, it is undeniable that more is required in the way of fault in South Africa than in England. The English law is discussed here as a counterpoint, helping to explain what it means to say that the South African law of defamation has a fault standard that helps to limit the range of actionable conduct.

(i) Fault in the English law of defamation

The role of fault in the English law of defamation is complicated when one gets into the details. Paul Mitchell explains that the English approach to fault shifted during the nineteenth century. He argues that, until the early nineteenth century, liability for defamation required subjective malice in the sense of a spiteful intention to injure the plaintiff. 'Spiteful' intention was required in the sense that, if one acted intentionally, but for motives other than injuring the plaintiff, then one was not liable, such as if one was repeating the defamatory words out of sorrow in sympathy with the plaintiff.[19] This changed with the judgment in *Bromage v Prosser* (1825),[20] however. In that case, the court held that malice in the legal sense is 'a wrongful act, done intentionally, without just cause or excuse'.[21] So, instead of requiring the intention to do harm, all that was required was intention in the form of voluntary conduct. This was an adoption of the criminal law's definition of malice.

[19] Paul Mitchell 'Malice in Defamation' 114 *LQR* (1998) 639 at 639.
[20] (1825) 107 ER 1051.
[21] Mitchell op cit note 19 at 641.

This was not in itself a transition to liability without fault, however.[22] Mitchell maintains that liability was still based on fault in the sense that this inference of legal malice was still rebuttable if a reasonable person in the position of the defendant would have been unaware that the publication could cause injury.[23] The transition in *Bromage v Prosser*, then, was not one from fault to strict liability, but rather from being able to avoid liability by pointing to non-malicious motives, to being liable, regardless of motive, if one causes that person injury, provided that a reasonable person would have been aware that they would probably injure someone's reputation.[24] That final caveat maintained a fault standard.

A second shift then occurred in the twentieth century in *E Hulton & Co v Jones* (1910),[25] where the requirement of reasonable foreseeability was eroded. In that case, it was held that the author of a fictional narrative was liable for defaming someone who happened to have the same name as the fictional character. This decision resulted in liability even in circumstances where it was not foreseeable that one probably would injure either that person's, or anyone else's, reputation. Mitchell argues that this judgment was a response to the rise in literacy levels and the advent of the tabloid press, whose scandalous articles about public figures led to a dislike of newspapers on the part of juries and judges. Being held strictly liable for defamation was a response to their profiting from fictitious gossip.[26]

(ii) Fault in the South African law of defamation

The South African law of defamation certainly seems to require more in the way of fault than the fault standard implicit in *E Hulton & Co v Jones*, although the nature of the fault standard is highly controversial. The controversy is caused by two debates: The first is about the fault standard applicable to media defendants, namely, whether intention is required or whether negligence is sufficient. The second debate is about the meaning of intention and whether intention requires that one be conscious of the wrongfulness of one's actions.

As we will see, regardless of one's position in either of these debates, the South African law still requires fault of some kind, which helps to restrict the scope of liability for defamation.

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[22] Mitchell 'Malice in defamation' op cit note 19 at 641-642.
[23] Mitchell 'Malice in defamation' op cit note 19 at 643-645; Paul Mitchell *The Making of the Modern Law of Defamation* (2005) 106-109.
[24] It is not perfectly clear whether abstract or relative foreseeability was required. That is, whether probable harm to the plaintiff in particular had to be foreseeable or whether probable harm to some or other person had to be foreseeable. For a discussion of these concepts in the context of negligence law, see Anton Fagan 'Negligence', in R Zimmermann, K Reid and D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005).
[25] [1910] AC 20.
[26] Mitchell *The Making of the Modern Law* op cit note 23 at 118-120.

In the case of media defendants, however, accepting that negligence is sufficient would cast the net of liability wider than if they were required to have acted intentionally.

Media defendants

As we have seen, the Constitutional Court has stated that 'the elements of the delict of defamation are: (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff.'[27] It is controversial, however, whether media defendants need only to have published the assertion negligently rather than intentionally.

Media defendants have been treated differently to other defendants in the past, having once been held strictly liable.[28] This strict liability was then removed in *National Media v Bogoshi*.[29] But, whether the court reintroduced the traditional fault standard of intention in that case, or replaced strict liability with negligence liability, remains controversial.

The state of the law before the judgment in *Bogoshi* was explained by that court as follows:

> The effect of the judgment [in *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A)] was that, unlike ordinary members of the community - and, for that matter, also unlike distributors - newspaper owners, publishers, editors and printers are liable without fault and, in particular, are not entitled to rely upon their lack of knowledge of defamatory material in their publications or upon an erroneous belief in the lawfulness of the publication of defamatory material.[30]

In *Bogoshi*, the Supreme Court of Appeal overruled its predecessor's (the Appellate Division's) earlier judgment in *Pakendorf* and rejected strict liability for the press. This was done in light of the need for information to flow freely in a democracy.[31] The Supreme Court of Appeal explicitly followed Common Law cases like the Australian case of *Lange v Australian Broadcasting Corporation*[32] and the English case of *Reynolds v Times Newspapers Ltd*,[33] and developed a defence of reasonable publication for the press:

> the solution of the problem in England, Australia and the Netherlands seems to me to be entirely suitable and acceptable in South Africa. In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of

[27] *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 18; see also *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* amici curiae*)* 2011 (3) SA 274 (CC) para 84.
[28] See *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A).
[29] Supra note 18.
[30] Ibid at 1205G.
[31] Ibid at 1209-1211.
[32] (1997) 189 CLR 520.
[33] 2 AC 127 (HL).

> fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.[34]

A source of lingering confusion is the fact that in adopting this defence, the court also stated that media defendants could not escape liability by pointing to a negligent mistake demonstrating that they had lacked subjective awareness of the wrongfulness of their actions (consciousness of wrongfulness) and that they had therefore acted without fault and so should not be liable. Consciousness of wrongfulness is sometimes regarded as an aspect of intention or animus injuriandi,[35] and the court thought it would upset the balance between freedom of expression and reputation to introduce a new defence of reasonable publication, but then also give media defendants another opportunity to escape liability by pointing to a negligent mistake which negated intention because it negated subjective consciousness of wrongfulness. The court stated the following:

> Against this background, it is necessary to raise the question left open in *Pakendorf* (at 155A), namely whether absence of knowledge of wrongfulness can be relied upon as a defence if the lack of knowledge was due to the negligence of the defendant. If media defendants were to be permitted to do so, it would obviously make nonsense of the approach which I have indicated to the lawfulness of the publication of defamatory untruths. In practical terms (because intoxication, insanity, provocation and jest could hardly arise in the present context) the defence of lack of *animus injuriandi* is concerned with ignorance or mistake on the part of the defendant regarding one or other element of the delict (*Burchell (op cit* at 283); see also Raifeartaigh 'Fault Issues and Libel Law - A Comparison between Irish, English and United States Law' (1991) 40 *ICLQ* 763). The indicated approach is intended to cater for ignorance and mistake at the level of lawfulness; and in a given case negligence on the defendant's part may well be determinative of the legality of the publication. In such a case a defence of absence of *animus injuriandi* can plainly not be available to the defendant.[36]

The above makes it clear that what the court was really considering was whether or not a negligent mistake should allow media defendants to escape liability, and the court thought that such an approach would not be consistent with a defence of reasonable publication. It would seem strange, in other words, to make liability turn on the reasonableness of the

[34] *Bogoshi* supra note 18 at 1212G.
[35] See, for example, J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2ed (2005): '*Animus iniuriandi* or the intention to defame, which can assume any of the three forms *dolus directus* , *dolus indirectus* and *dolus eventualis*, means the mental disposition to direct the will towards a certain consequence (the defamation of the plaintiff), with the knowledge that the consequence will be wrongful. If either *direction of the will* or *consciousness of wrongfulness* is absent, there is no question of intent to defame' (163). Emphasis in the original.
[36] Ibid at 1214.

publication, and then allow another way to avoid liability even in circumstances where one had been negligent in some way (i.e., if one had made a negligent mistake).

It does not inevitably follow from this decision, however, that no form of intention is required whatsoever. For a reduced form of intention, such as one that did not require subjective consciousness of wrongfulness, would be compatible with a defence of reasonable publication. One can require intentional (non-accidental) conduct for liability, and also require that one's intentional conduct be reasonable. But some courts and scholars have interpreted the *Bogoshi* decision as doing away with intention altogether for media defendants, and instead having introduced fault in the form of negligence.[37] Others, however, have argued that the decision reversed strict liability, reinstated a minimal form of intention (minimal because it does not require consciousness of wrongfulness), and introduced an unlawfulness or wrongfulness defence of reasonable publication.[38] On this interpretation, the reasonableness of one's conduct plays a role in excluding the wrongfulness of one's conduct, rather than excluding fault in the form of negligence.

The precise fault standard for media defendants is, therefore, controversial.

The meaning of 'intention'

The above debate is especially complicated due to the controversy about whether or not consciousness of wrongfulness is, in any event, a normal or necessary aspect of legal intention. While some courts and scholars insist that intention requires consciousness of wrongfulness, others argue that intention does not require consciousness of wrongfulness, except in unusual cases.[39]

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[37] See Jonathan Burchell 'Media freedom of expression scores as strict liability receives the red card: *National Media Ltd v Bogoshi*' (1999) 116 *SALJ* 1; *Mthembi-Mahanyele v Mail & Guardian Ltd and another* 2004 (6) SA 329 (SCA).

[38] See Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90 at 103ff. See also JR Midgley 'Media liability for defamation' (1999) 116 *SALJ* 211 for a third interpretation that the *Bogoshi* defence relates to consciousness of wrongfulness as an aspect of intention. This interpretation is contrary to the Supreme Court of Appeal's interpretation in *Mthembi-Mahanyele* supra note 37, but support by the judgment in *Khumalo v Holomisa* supra note 27 para 20. For general discussion of the competing interpretations, see Daniel Visser 'Compensation for harm to the personality - *actio iniuriarum*' in Francois du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 1187-1190.

[39] Fagan 'Rethinking wrongfulness' op cit note 38; *Le Roux and others v Dey* 2010 (4) SA 210 (SCA) para 39: 'I therefore conclude, especially in view of precedent and the constitutional emphasis on the protection of personality rights, that the *animus injuriandi* requirement generally does not require consciousness of wrongfulness (wederregtelikheidsbewussyn).'

What is clear is that there are some delicts where consciousness of wrongfulness certainly is not required as an aspect of legal intention. In *Minister of Justice v Hofmeyr*,[40] the Appellate Division stated that consciousness of wrongfulness is not a requirement for committing the delict of unlawful detention, even though intention is required.[41] The principle expounded in that case was then affirmed in the context of wrongful attachment of goods, where consciousness of wrongfulness was again not required for liability.[42] The same principle (that consciousness of wrongfulness is not a requirement of intention) was also adopted by the High Court in *C v Minister of Correctional Services*,[43] in the context, ostensibly, of privacy.[44] In *Le Roux and others v Dey*,[45] the Supreme Court of Appeal noted these developments, and stated that this trend was also applicable to defamation, and personality rights in general: 'I therefore conclude, especially in view of precedent and the constitutional emphasis on the protection of personality rights, that the *animus injuriandi* requirement generally does not require consciousness of wrongfulness (wederregtelikheidsbewussyn).'[46] The Court was motivated by two considerations: First, there are clearly cases where consciousness of wrongfulness is not a requirement of intention (the argument from 'precedent'). Second, that it seems 'incongruous' to allow a defendant who cannot establish a defence excluding wrongfulness (such as truth and public benefit) to escape liability on the basis of a mistaken belief that such a defence existed (a mistake which would exclude consciousness of wrongfulness, and therefore exclude fault in the form of intention, and therefore exclude liability):

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[40] 1993 (3) SA 131 (A).
[41] Ibid at 154-157.
[42] In *Sheriff, Pretoria East v Meevis* 2001 (3) SA 454 (SCA) paras 11-14, the Supreme Court of Appeal stated that when a sheriff attaches goods that are not in the possession of the judgment debtor, then the sheriff bears the risk that the goods might belong to someone other than the judgment debtor, and is liable for any losses suffered by the true owner that flow from the attachment, regardless of the fact that the sheriff thought that she was acting lawfully.
[43] 1996 (4) SA 292 (T).
[44] The case concerned a prisoner who had consented to a blood test for the purpose of detecting HIV, but, due to institutional negligence, the consent given was not fully informed consent. The Court found that the plaintiff was aware that the test was for HIV and that he had a right to refuse the test, but, in this context, according to the Department of Correctional Services' own policy, informed consent meant also having undergone pre-test counselling, which did not occur. The Sergeant who carried out the blood test was not aware of the policy, however, 'through no fault of his own', and it was accepted that he acted 'bona fide'. The Court held, following the unlawful detention cases of *Hofmeyr* and *Whittaker v Ross and Bateman* 1912 AD 92, that acting deliberately, albeit with good intentions, was sufficient to meet the requirement of *animus iniuriandi* in such a case.
[45] Supra note 39.
[46] Ibid para 39.

> It appears to me to be incongruous that a defendant who, for example, cannot establish truth and public benefit to justify defamation, can nevertheless escape liability by relying on a belief in either the truth or public benefit.[47]

On appeal from that case, however, the Constitutional Court questioned the necessity of this enquiry into the nature of animus iniuriandi,[48] thus leaving the door open for consciousness of wrongfulness to reassert itself in the context of defamation.

Ultimately this debate about consciousness of wrongfulness seems to be a question of how to balance the protection of personality rights with freedom of action. In *Maisel v Van Naeren*,[49] for example, the Cape High Court thought that it was unreasonable to impose liability on someone who had mistakenly believed themselves to be acting lawfully (the defendant mistakenly thought that his publication was privileged). While in *Le Roux v Dey* (SCA), the Supreme Court of Appeal thought that a defence of mistake would clash with the defences that rebut wrongfulness. The fundamental issue here seems to be about where to draw the line in cases of mistake so as to balance freedom of action with the protection of reputation: Should we protect people's freedom to act (such as when they are acting in good faith, whether or not they were negligent), or should we protect people's reputations against innocent but potentially harmful positive conduct, positive conduct that one was free not to undertake? This is a question that seems to be resolvable either way without any obvious injustice or any obvious conceptual contradictions. It is, fundamentally, a policy decision about which reasonable people might disagree.

The fault standard in defamation is controversial, then, but what is clear is that more is required in the way of fault than in the English law of defamation. It is uncontroversial that, for ordinary defendants, intention is required, although it is controversial whether intention requires consciousness of wrongfulness. One of the unifying features of intention in South African law, however, is that it always seems to require some form of subjective foresight of harm. Intention (with or without consciousness of wrongfulness) seems to require that the defendant either subjectively intended the injury (dolus directus), saw it as a foregone conclusion (dolus indirectus), or foresaw the possibility of injury to some person and proceeded

[47] Ibid para 37. See also Helen Scott 'Contumelia and the South African law of defamation' in Eric Descheemaeker and Helen Scott (eds) *Iniuria and the Common Law* (2013) for discussion.
[48] *Le Roux and others v Dey* (CC) supra note 27 para 137 ('It was therefore not necessary for the Supreme Court of Appeal to embark upon the enquiry as to whether our law should still require knowledge of wrongfulness as part of *animus iniuriandi*. Nor do I find it necessary for this court to do so.')
[49] 1960 (4) SA 836 (C).

in any event (dolus eventualis).[50] This aspect of intention would help to limit the scope of actionable conduct, regardless of whether or not consciousness of the wrongfulness of one's actions was also required. The English approach does not even appear to require foresight of harm.

In the case of media defendants, if the fault standard is negligence, then foresight of injury by a reasonable person is, once again, required.[51] Both of these forms of fault restrict the net of liability by at least requiring some kind of foresight of injury. This is a reason why liability for risk is more justifiable in South Africa than it might be in England, for example. Not only are we dealing with a particular form of conduct infringing a particular interest, but the conduct also requires some kind of foreseeability of injury. A requirement of foreseeability of injury would exclude those cases where the requisite foresight was lacking, thereby restricting the net of liability, and further helping to avoid concern about over-prohibition of conduct that otherwise plagues the idea of risk-as-injury.

V CONCLUSION

Building on propositions established in earlier chapters, this chapter has helped to establish that the risk-as-injury interpretation is a more justifiable interpretation of the law of defamation than the causation-of-reputational-harm interpretation. The overall argument has taken the following form:

According to the current rules, the plaintiff needs to produce slender evidence in order to establish her claim. When one compares this to the nature of Aquilian liability, where the protected interests allow for a ready observance of damage, alongside a requirement of patrimonial loss that helps to establish that damage, the unsatisfactory nature of the requirements for defamation becomes clear. A major reason for the difficulty in establishing damage is that it is hard to track the causal impact of defamatory publications. Nevertheless, one's reputation matters and deserves protection, and, rather than just declaring the law of defamation unjustifiable, one can attempt to amend or justify the current practice in some way. For example, one can amend the practice by requiring the plaintiff to tender better evidence that reputational harm was caused, or one can justify the practice in an alternative way. Given the difficulty in tracking the causal impact of statements, this thesis has taken the approach of

[50] J Neethling & JM Potgieter *Law of Delict* 6ed (2010) 126-129; Neethling, Potgieter & Visser op cit note 35 at 163; Burchell *Principles of Criminal Law* op cit note 4 at 461-463.

[51] *Kruger v Coetzee* 1966 (2) SA 428 (A); *Mukheiber* v *Raath* 1999 (3) SA 1065 (SCA) at 1077E-F. For more detailed discussion, see Fagan 'Negligence' op cit note 24.

justifying the current rules in another way. Rather than seeing the elements of liability as an attempt to establish causation of reputational harm, one can view them as an attempt to establish causation of an increase in the risk of reputational harm. By publishing a defamatory assertion, the defendant probably has increased the risk of reputational harm, even if it is less clear that the defendant has caused reputational harm.

Viewing an increase in risk as the injury for which one is being compensated is controversial, however, and arguably unjustifiable in the case of some delicts. But the objections that apply to the concept of risk-as-injury in other contexts do not apply as strongly to defamation. This makes the imposition of liability for risk less controversial than it usually is. First, defamation is a vertical tort, rather than a transversal tort: it protects a particular interest from very particular types of conduct. This limits the scope of conduct that can attract liability. Given the value that reputation has, and the need to protect it, imposing liability for risk in these limited circumstances would not unduly limit freedom of action. Second, defamation in South Africa has a non-negligible fault standard, which also helps to limit the scope of liability. The fault standard always requires some kind of foresight of harm (either actual foresight, in the case of intention, or foresight by a reasonable person, in the case of negligence). This further helps to limit the scope of actionable conduct and makes risk-as-injury more justifiable in South Africa than it might be in other jurisdictions or contexts, once one also takes the value of reputation into account.

The justification of the rules matters because the law of defamation is an instance of force being applied by the State. The judgment will typically require the payment of money in the form of damages, which is a sanction or hardship imposed by the state. Second, court orders are backed up with a threat of criminal proceedings should the order be ignored. In a culture of justification, rules that are enforced with the might of the State need to be convincing. While it is not convincing that findings of probable causation of harm are justified, findings of a probable increase in a risk of reputational harm would be convincing. Moreover, given the value of reputation, and given the ways in which usual objections against imposing liability for risk do not apply in the case of defamation, the risk-as-injury interpretation of the law of defamation appears to be preferable. The view taken here, then, is that the risk interpretation, all things considered, is more justifiable than the causation-of-reputational-harm interpretation.

As the risk-as-injury interpretation is supposed to be an alternative justification of the existing rules, the following chapters will now demonstrate that this interpretation does fit with

the current structure of the South African law. These chapters will focus on the presumptions that feature in defamation cases, the defences, and the function of damages.

CHAPTER 6: THE COMPATIBILITY OF THE RISK INTERPRETATION WITH THE PRESUMPTIONS AND DEFENCES OF DEFAMATION LAW

I INTRODUCTION

The previous chapters have explained the idea of risk and why risk-as-injury might be a better, alternative justification for the practice of defamation law in South Africa. Those chapters presented the fundamental ideas involved in the risk-as-injury interpretation and why one might prefer it, in the case of defamation, over the orthodox causation-of-reputational-harm interpretation. More should be said, however, about how the risk-as-injury interpretation fits with the existing case law.

Defamation law makes use of legal presumptions, allows for particular defences, and features particular remedial responses. One might wonder whether the unorthodox risk interpretation is compatible with these essential features of the law. Risk-as-injury is being presented as an alternative justification of the existing rules, so it must fit with these rules. This chapter begins this demonstration of compatibility by showing how the risk interpretation fits with the presumptions and the defences of defamation law. The next two chapters will focus on its compatibility with the primary remedial response: damages.

II THE STRUCTURE OF DEFAMATION LAW

As noted in Chapter 3, it is generally accepted that 'the elements of the delict of defamation are: (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff.'[1] The plaintiff does not need to tender evidence to support every one of these elements to establish a prima facie case, however. All that the plaintiff needs to do to establish a prima facie case is prove that the defendant published a defamatory assertion about the plaintiff (items (c)-(e) above). It is then presumed that the publication was both intentional and wrongful (items (a) and (b) above). It is then up to the defendant to rebut one of the elements of liability to avoid being found liable. The Constitutional Court put it the following way in *Khumalo v Holomisa*:[2]

[1] *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 18; see also *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* amici curiae*)* 2011 (3) SA 274 (CC) para 84.
[2] Supra note 1.

> Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention. Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public benefit, that the publication constituted fair comment and that the publication was made on a privileged occasion. Most recently, a fourth defence rebutting unlawfulness was adopted by the Supreme Court of Appeal in *National Media Ltd v Bogoshi*. […] This fourth defence for rebutting unlawfulness […] allows media defendants to establish that the publication of a defamatory statement, albeit false, was nevertheless reasonable in all the circumstances.[3]

This is the basic structure of the modern law of defamation. The risk-as-injury interpretation holds that the injury is not the causation of reputational harm but the causation of an increase in the risk of reputational harm. Is the structure described here consistent with the risk-as-injury interpretation of the law?

The first feature of this structure that will be considered is the fact that wrongfulness and fault are *presumed* once a plaintiff has established that a defamatory statement concerning the plaintiff was published. The second feature that will be discussed in this chapter is the defences that *rebut* wrongfulness and fault, and how they are justified.

(a) The presumptions of wrongfulness and fault

The first notable feature of the structure of defamation law is that the plaintiff does not need to tender proof of every element of liability in order to establish a prima facie case. All that the plaintiff needs to do is establish that a defamatory statement was published by the defendant about the plaintiff. It is then presumed that the publication was wrongful and intentional, and the defendant then needs to raise a defence rebutting either wrongfulness or intention. The question is whether the risk-as-injury interpretation is consistent with this presuming of wrongfulness and fault, and the burden that then falls on the defendant to raise a defence.

One way to approach this problem is to consider how this structure is currently justified, and then see whether that orthodox justification is still consistent with the risk interpretation, or whether a new justification would be necessary. Fortunately, I think the existing justifications for this structure are consistent with the risk interpretation.

[3] Ibid paras 18-19. See also *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) 588G-I; *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) 25C-E; *Le Roux v Dey* (CC) supra note 1 para 85, 121-124.

In general, a plaintiff bringing a civil case needs to provide enough initial evidence to tip the balance of probabilities in his or her favour. As explained in Chapter 3, the balance of probabilities refers to epistemic probability, meaning that it must be more likely than not that the plaintiff's version of events is correct. If the plaintiff cannot establish a prima facie case on a balance of probabilities, then the defendant will be absolved from liability without having to present any evidence to counter the plaintiff's argument.

This could imply that the plaintiff needs to provide positive evidence for *all* the essential elements of liability in order to establish that prima facie case, but the law of delict does not, in fact, always require this of the plaintiff. In this respect, civil law is different to criminal law, in that the civil law does not always require the individual bringing the claim to establish every element of liability. The Appellate Division put it the following way in *Mabaso v Felix*:[4]

> In its anxiety that no accused should be punished for a crime without proof of his guilt our common law deliberately places the burden of proving every disputed issue, save insanity, on the prosecution. But in civil law, as will presently appear, considerations of policy, practice, and fairness *inter partes* may require that the defendant should bear the overall *onus* of averring and proving an excuse or justification for his otherwise wrongful conduct.[5]

Defamation is one of those cases where it is not necessary for the plaintiff to tender evidence for each of the elements of liability, as unlawfulness and intention are presumed, thus leaving it to the defendant to provide a justification or an excuse for his own behaviour.[6] As we have seen, all that a plaintiff needs to do to establish a prima facie case is to provide evidence for the propositions that the defendant published a defamatory assertion about the plaintiff. It is then presumed that those publications were unlawful and intentional. The burden then falls on the defendant to rebut the presumption of unlawfulness or intention.

In order to fully understand this structure, however, it is not enough to simply know what the plaintiff needs to establish. One also needs to understand the nature of the burden that

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[4] 1981 (3) SA 865 (A).

[5] Ibid at 872H.

[6] An example of a delictual case where the plaintiff is required to prove every element to establish a prima facie case are those instances of Aquilian liability involving so-called pure economic loss. In these cases, the wrongfulness of the defendant's conduct is not presumed, and the plaintiff has to establish wrongfulness. Whether or not the conduct will be wrongful in a specific case depends on the policy considerations. See *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 (3) SA 138 (SCA) para 10. For general discussion of how pure economic loss in particular fits within the normal Aquilian framework, see Anton Fagan 'Aquilian liability for negligently caused pure economic loss - Its history and doctrinal accommodation' (2014) 131 *South African Law Journal* 288.

then falls on the defendant, for this affects the overall fairness of the chosen structure and its justification. The decision not to require the plaintiff to prove every element of liability directly feeds into the question of what the defendant needs to do to escape liability. So, in determining the fairness and practicality of this arrangement, one needs to understand not only what the plaintiff must prove, but also the nature of the burden that then falls on the defendant. As the Appellate Division stated in *Mabaso v Felix*, the decision not to place 'the burden of proving every disputed issue' on the plaintiff is affected by 'considerations of policy, practice, and fairness *inter partes*'.[7] So what is required of the defendant, then, once the plaintiff has established that a defamatory assertion was published?

There was a debate in South African jurisprudence about the nature of the burden that fell on the defendant once the plaintiff had discharged her responsibilities. The courts' responses to this debate help to explain why the burden to rebut these presumptions falls on the defendant, and also why these presumptions are made in the first place.

For a time, it was controversial whether the burden that fell on the defendant in defamation cases was a mere 'burden of adducing evidence in rebuttal' or whether it was a 'full onus' in the sense of having to establish one's position on a balance of probabilities. The difference between these two burdens was explained by the Appellate Division in *Pillay v Krishna and another*:[8]

> Any confusion that there may be has arisen, as I think, because the word *onus* has often been used in one and the same judgment in different senses, as meaning (1) the full *onus* which lies initially on one of the parties to prove *his* case, (2) the quite different full *onus* which lies on the other party to prove *his* case on a quite different issue, and (3) the duty on both parties in turn to combat by evidence any *prima facie* case so far made by his opponent: this duty alone unlike a true *onus*, shifts or is transferred.[9]

The primary distinction being made here is that between a full onus (to establish a prima facie case), and a duty to rebut any prima facie case that has been made. It is only the latter duty that may shift from party to party throughout a case as evidence is tendered and arguments are made that may shift which version of events appears to be more likely.

The difference between the duty to rebut a prima facie case that has been established, and the full onus to establish a prima facie case, is that the former only requires the party on

[7]Supra note 4 at 872H.
[8] 1946 AD 946.
[9] Ibid at 952-3.

whom the burden falls to call the other party's evidence into question. If enough doubt can be cast to prevent the balance of probabilities from tipping in the plaintiff's favour, for example, then the burden to adduce evidence in rebuttal has been discharged. In the case of a full onus, however, one can only discharge that onus by doing enough to establish one's case on a balance of probabilities. It would not be enough to merely call things into question. How this usually plays out is that the plaintiff has a full onus of establishing certain propositions, which the defendant would then need to call into question if the plaintiff had done enough initially to tip the balance of probabilities in his favour. In such a scenario, the defendant would not have to establish her own case on a balance of probabilities; she would just need to cast enough doubt on the plaintiff's claims to prevent the plaintiff from succeeding in establishing his case on a balance of probabilities.

The debate in the law of defamation in particular was whether the defendant had a full onus when attempting to rebut the presumption of wrongfulness or intention[10] (and thus had to meet the higher standard of establishing his defence on a balance of probabilities), or whether it was merely a burden to provide evidence in rebuttal that merely called the plaintiff's version of events into doubt. This matter was settled in *Neethling v Du Preez*,[11] where the Appellate Division stated that the defendant had a full onus when establishing the defences of qualified privilege and truth and public benefit. It was not simply a case of needing to provide enough evidence to call the plaintiff's claims into question; the defendant has to do enough to establish the defence on a balance of probabilities. In other words, the judge needs to be convinced that the defendant's version of events is more likely than not:

> If the defendant raises the defence of qualified privilege then he must prove his duty or right to communicate the defamatory matter to another; and the latter's reciprocal interest to receive the communication. These are matters which need to be established on a balance of probabilities. The requirements of the substantive law cannot here be satisfied by a mere equiponderance of evidence which leaves the Court unable to say whether or not either element of the defence has been established. To hold otherwise would be subversive of principles governing the law of defamation deeply entrenched

[10] It has been controversial whether a different burden of proof fell on the defendant when the defendant was attempting to rebut wrongfulness as opposed to when she was attempting to rebut intention (see J Burchell *Personality Rights and Freedom of Expression* (1998) 245-250). This issue seems to have been overlooked or treated as academic by the Supreme Court of Appeal in *Hardaker v Phillips* 2005 (4) SA 515 (SCA) para 14, which treats both of these presumptions in the same manner when it states the following: 'It is now settled that the *onus* on the defendant to rebut one or other presumption is a full *onus*, ie it must be discharged on a preponderance of probabilities.' The reference to 'one or other presumption', after having discussed both the presumption of wrongfulness and the presumption of fault suggest that the same burden of proof applies to both of them. For reasons discussed below, this position makes sense, when one analyses the reasons why one might have such presumptions in the first place.

[11] *Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A).

> in our legal system […A]lso in regard to the defence of truth in the public benefit there is venerable authority in this Court for the proposition that the defendant likewise bears a full *onus*. […] I conclude that in our law a defendant in a defamation action is encumbered with a full *onus* in regard to the defences of truth in the public benefit and of qualified privilege. Such defences can be sustained by nothing less than proof on a balance of probabilities.[12]

This position has been affirmed in subsequent cases. In *Hardaker v Phillips*,[13] the Supreme Court of Appeal stated the following:

> Until comparatively recent times, there was doubt as to the nature of the *onus* of rebuttal. It is now settled that the *onus* on the defendant to rebut one or other presumption is a full *onus*, ie it must be discharged on a preponderance of probabilities. (*Mohamed and Another v Jassiem* 1996 (1) SA 673 (A) at 709H - I.) A bare denial on the part of the defendant will therefore not suffice. Facts must be pleaded by the defendant that will legally justify the denial of unlawfulness. (*National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1) at 1202H (SA).)[14]

The nature of the burden that falls on the defendant is clear. If the defendant wishes to escape liability, he must prove, on a balance of probabilities, that his actions were not wrongful or that they were without fault. But what justification have the courts offered for this position? Reasons for imposing a full onus on a defendant were enunciated by the Appellate Division in *Mabaso v Felix*,[15] where the Court stated that 'considerations of policy, practice, and fairness *inter partes* may require that the defendant should bear the overall *onus* of averring and proving an excuse or justification for his otherwise wrongful conduct'.[16] This foundational idea was quoted and endorsed more recently by the Supreme Court of Appeal in *National Media Ltd and others v Bogoshi*.[17] Policy, practice, and fairness *inter partes* are very broad and open-ended considerations, but in *Mabaso v Felix* the Court went on to specify what some of the more concrete considerations might be in cases involving personality rights.

First, the court seems to endorse the following point made by the American jurist John Wigmore in his work on the law of evidence:

> in most actions of *tort* there are many possible justifying circumstances - self-defence, leave and license, *volenti non fit injuria*, and the like; but it would be most unfair and

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[12] Ibid at 769G-I.
[13] Supra note 10.
[14] Ibid para 14.
[15] Supra note 4.
[16] Ibid at 872H.
[17] 1998 (4) SA 1196 (SCA).

> contrary to experience to assume that one of them was probably present, and to require the plaintiff to disprove the existence of each of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which if they existed leave him without a claim, are put upon the defendant to prove.[18]

Rather than presuming that the defendant's actions were lawful, then, and requiring the plaintiff to show that none of the many possible defences existed, the burden is instead placed on the defendant to choose an appropriate defence and prove that defence. This appears to be a practical consideration that perhaps falls under the banner of fairness *inter partes*.

The Court in *Mabaso v Felix* also presents another argument, however, which is also endorsed in *Bogoshi*,[19] namely, that 'usually the circumstances so excusing or justifying [the defendant's] wrongdoing are peculiarly within his own and not the plaintiff's knowledge […] it would for that reason be fair and accord with experience and good common sense that in such delicts the defendant should ordinarily bear the *onus* of proving the excuse or justification'.[20]

In other words, as the defendant is best placed to shed light on the factual circumstances that might support a defence, the defendant should have the burden of proving those facts and establishing the defence for himself. This is seen as preferable to requiring the plaintiff to establish factual circumstances relating to the defendant's own conduct that the plaintiff is not well-positioned to discuss, in order to show why an excuse or justification is not present. This consideration also seems to fall under the banner of fairness *inter partes.*

(i) The relationship between placing a full onus on the defendant and presuming elements of liability in the first place

These are the traditional reasons that the courts have offered for placing a full onus on the defendant to prove a defence. These considerations also appear to be reasons for having the presumptions of wrongfulness and fault in the first place, however. The Court in *Bogoshi* calls attention to this relationship between placing a full onus on the defendant and presuming certain elements of liability when it states the following:

> In civil law, as was said in *Mabaso v Felix* 1981 (3) SA 865 (A) at 872H, considerations of policy, practice and fairness *inter partes* may require that the defendant bears the overall *onus* of averring and proving an excuse or justification for his otherwise unlawful conduct. *This remark is particularly apposite to cases of the present kind,*

[18] *Mabaso v Felix* supra note 4 at 873C.
[19] Supra note 17 at 1215C-F.
[20] *Mabaso v Felix* supra note 4 at 873E.

> *where there is a presumption of unlawfulness arising from the publication of defamatory material*. And, even in the absence of a presumption, considerations of policy, practice and fairness would require the defendant to prove the justificatory facts.[21]

In this extract, the Court states that the fact that it is dealing with certain presumptions makes it an even stronger case for placing a full onus on the defendant to prove a justificatory defence. The idea seems to be that in certain cases considerations of policy might require that a full onus be placed on a defendant to establish a defence, and that where there are presumptions of wrongfulness involved then this is an additional reason to place such an onus on the defendant. That it is, in other words, 'particularly apposite'. However, the reasons the courts have presented for placing a full onus on the defendant also appear to be reasons for having such presumptions in the first place. Presumptions might not make it *more* appropriate to place a full onus on the defendant, then, for the same underlying reasons might be justifying both the presumptions and the fact that a full onus is being placed on the defendant. This might all be a single process, then, that is justified for the same fundamental reasons. For example, one reason why one might presume wrongfulness and intention in the first place is because it is peculiarly difficult for the plaintiff to provide proof of these elements. One reason why it might be difficult to prove these elements is because the facts for and against them might be peculiarly within the knowledge of the defendant. For example, damaging someone's property, or someone's body, or someone's reputation appear to be acts that, more often than not, are not justifiable acts. It might accord with human experience, then, to presume that such acts are wrongful, and that a justification would require knowledge of unusual circumstances. The person who carried out these acts would also usually be best placed to prove why they were actually, and unusually, justified. This seems to be captured by the idea, endorsed in *Mabaso v Felix*, that it would be 'contrary to experience to assume that one of [the defences] was probably present, and to require the plaintiff to disprove the existence of each of them'.[22] This is probably one aspect of what the Supreme Court of Appeal meant in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer*,[23] when it stated that 'negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful.'[24] The Court might be making a technical legal point about the mere fact that technical legal wrongfulness is presumed in such cases, but it could also be alluding to the idea that certain

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[21] Supra note 17 at 1215C. Emphasis added.
[22] Supra note 4 at 873C.
[23] Supra note 6.
[24] Ibid para 10.

acts are, on the face of it, unjustifiable (prima facie wrongful), and require an unusual explanation – an explanation outside the scope of typical, everyday human experience - to make them justifiable. It is usually unjustifiable to take positive steps that cause damage to someone's property, and so it seems practical to assume that it was wrongful and require the defendant to explain himself if there were unusual circumstances that justified the conduct. Similarly, positive conduct causing damage to someone's reputation is prima facie wrongful; it is not the sort of thing that seems obviously justified in the normal course of experience. It would therefore be practical to assume that it is wrongful and require the defendant to explain her conduct by establishing a defence. These considerations seem to be reflected in the law of defamation itself. Certain circumstances may require that one say defamatory things, and in such cases the courts do not, in fact, presume wrongfulness. For example, judicial officers might need to say things about the parties present before them that might otherwise be construed as defamatory. In such cases, wrongfulness is not, in fact, presumed, and the plaintiff needs to establish wrongfulness by providing reasons for thinking that the judicial officer was acting outside the scope of his or her duty.[25]

Similar arguments – from everyday experience, and from the idea that the defendant is best placed to present certain evidence - can be made about why intentional conduct is presumed to have occurred. The making of defamatory assertions is not the sort of thing that tends to happen accidentally, and, so, it seems practical to presume that the conduct happened intentionally. Moreover, the factual circumstances as to whether or not the defendant had acted intentionally are, once again, especially within the defendant's sphere of knowledge, and the defendant is best placed to tender evidence as to why the conduct was, say, accidental.

So, the courts have offered two arguments for placing a full onus on the defendant to justify or excuse his behaviour, instead of simply making it the plaintiff's responsibility to discuss these issues when establishing a prima facie case. First, there are many ways in which a delict might be justified, and it would be overly burdensome to require the plaintiff to show why none of the defences are present in their case. Second, the defendant is often best placed to prove the factual circumstances that are necessary to establish a defence rebutting wrongfulness or fault.

These reasons are often presented in the context of why a full onus is being placed on the defendant, but this is essentially the same as explaining why certain presumptions are being

[25] See *May v Udwin* 1981 (1) SA 1 (A) at 16.

made in the plaintiff's favour in the first place. In other words, the reasons that justify placing a full onus on the defendant are also the reasons that support having presumptions in place that work to the plaintiff's benefit.

(ii) Constitutional reasons for placing a full onus on the defendant

The question of why one might place a full onus on the defendant to defend himself has also recently been infused with constitutional principles. As we have seen, to have a prima facie case, a plaintiff in a defamation case has to prove that the defendant published a defamatory statement about the plaintiff. It is then presumed to be unlawful and intentional and it is up to the defendant to establish a defence. This structure was challenged in the Constitutional Court by the applicants in *Khumalo v Holomisa*,[26] who argued that in defamation cases where the plaintiff is a politician or a public figure, or where the statement is in the public interest, the common law should also require that the plaintiff allege and prove that the defamatory statement is false. So, instead of merely requiring the plaintiff to prove that a defamatory assertion was published, the plaintiff would also have to establish that the statement is false. This argument was based on the constitutional right to freedom of expression,[27] and the idea that, where the statement was in the public interest, not requiring a plaintiff to prove the falsity of the defamatory statement unduly limited freedom of expression.[28]

The Court proceeded to balance the interest of freedom of expression with the interest in one's reputation, stating that '[t]here can be no doubt that the constitutional protection of freedom of expression has at best an attenuated interest in the publication of false statements.'[29] In other words, false statements made by the defendant should receive limited protection. At the same time, 'no person can argue a legitimate constitutional interest in maintaining a reputation based on a false foundation.'[30] So, while the defendant should not be overly protected in making false statements, so too a plaintiff should not be overly protected in having a reputation that is based on a false foundation. The question of where the balance between freedom of expression and reputation should lie, and what this means for true statements and false statements, led the Court to consider the structure of defamation law as a whole, including the way in which the defences are structured. The Court noted that, even if a plaintiff is not required to prove the falsity of the defamatory statement when establishing a prima facie case,

[26] Supra note 1.
[27] Section 16 Constitution of the Republic of South Africa, 1996.
[28] Supra note 1 paras 1-4.
[29] Ibid para 35.
[30] Ibid.

'the common-law delict of defamation does not disregard truth entirely.'[31] Instead, truth features in the defence of truth and the public benefit:

> [Truth] remains relevant to the establishment of one of the defences going to unlawfulness, that is, truth in the public benefit. The common law requires a defendant to establish, once a plaintiff has proved the publication of a defamatory statement affecting the plaintiff, that the publication was lawful because the contents of the statement were true and in the public benefit. The burden of proving truth thus falls on the defendant.[32]

The Court then had to ask whether this was a suitable arrangement. In other words, given the overall structure of defamation law, including the defences, was a suitable balance being struck between freedom of expression and reputation by not requiring the plaintiff to prove falsity, and leaving the burden to prove truth on the defendant. The Court noted that '[i]n considering the constitutionality of this rule, it must be realised that it is often difficult, and sometimes impossible, to determine the truth or falsity of a particular statement.'[33] And that '[i]n not requiring a plaintiff to establish falsity, but in leaving the allegation and proof of falsity to a defendant to a defamation charge, the common law chooses to let the risk lie on defendants. After all, it is by definition the defendant who published the statement and thereby caused the harm to the plaintiff.'[34]

The Court acknowledged that this arrangement could have a 'chilling effect' on publishers of information, who would be defendants with the burden of proving truth and the public benefit, when truth can be difficult to prove.[35] Nevertheless, besides the point above about letting the risk of liability fall on those who publish the statement and thereby cause the harm, the Court also noted that the defence developed in *Bogoshi* (of reasonable publication) reduced the potential chilling effected created by not requiring the plaintiff to establish falsity. The chilling effect is reduced because proving truth in the public benefit is not the only way for the defendant to escape liability. According to the defence created in *Bogoshi*, the defendant could also prove that it was reasonable to publish the assertion in question in the manner in which it was published:

> this chilling effect is reduced considerably by the defence of reasonable publication established in *Bogoshi's* case. For it permits a publisher who is uncertain of proving the

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[31] Ibid para 37.
[32] Ibid.
[33] Ibid para 38.
[34] Ibid.
[35] Ibid para 39.

truth of a defamatory statement nevertheless to publish where he or she can establish that it is reasonable.[36]

From this analysis, it is clear that the underlying justifications for the structure of defamation law – such as who needs to prove what - have taken on a constitutional dimension. The discussion in *Khumalo v Holomisa* indicates that the balancing act that was already taking place with respect to the interests of the parties has now had an additional consideration added in the form of 'constitutional interests', such as the defendant's interest in freedom of expression and the plaintiff's interest in reputation. In *Mabaso v Felix*,[37] the Appellate Division stated that 'considerations of policy, practice, and fairness *inter partes* may require that the defendant should bear the overall *onus* of averring and proving an excuse or justification for his otherwise wrongful conduct'.[38] In *Khumalo v Holomisa*, constitutional rights and interests were added into this pre-existing policy framework. The Constitutional Court stated that the defence of reasonableness developed in the *Bogoshi* case 'strikes a balance between the constitutional interests of plaintiffs and defendants'.[39]

This policy framework in which the structure of defamation law is constructed is not only concerned about the interests of the particular parties, however. It is also about public policy considerations, such as the type of society that is modelled in the Constitution and that the courts are obliged to protect. In *Khumalo v Holomisa*, the Court stated the following:

> The importance of the right of freedom of expression in a democracy has been acknowledged on many occasions by this Court and other South African Courts. Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.[40]

In this paragraph, the Court refers to the two different types of justification that get offered in defence of freedom of expression.[41] The first is about how freedom of expression relates to the interest every individual has in being able to express him or herself freely. In other words, that

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[36] Ibid.
[37] Supra note 4.
[38] Ibid at 872H.
[39] Supra note 1 para 43.
[40] Ibid para 27. See also *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC) paras 7-8; *Phillips v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 (3) SA 345 (CC) para 23.
[41] Iain Currie and Johan De Waal *Bill of Rights Handbook* 5ed (2005) 360-362.

freedom of expression is 'constitutive of the dignity and autonomy of human beings'.[42] The second type of justification relates to the public, instrumental reasons for protecting freedom of expression, namely, that it enables 'citizens to make responsible political decisions and to participate effectively in public life'.[43] These two different ways of justifying freedom of expression were highlighted by Ronald Dworkin, who argued that the various defences of freedom of expression can be divided into constitutive, personal reasons, and instrumental, political reasons.[44] The law of defamation, and the policy considerations that affect its structure, has therefore been infused with constitutional reasoning that has both personal and public dimensions.

It is clear, then, that the structure of defamation law, such as who bears the burden of proof with respect to which elements of liability, is affected by various policy considerations, some of which relate to questions of fairness and justice between the parties themselves, such as what it would be reasonable to require someone to prove, given the information that they have access to (whether something is peculiarly within one individual's sphere of knowledge); and what their personal interests are in freedom of expression and reputation. Other considerations, however, relate to broader social interests such as the public value of freedom of expression, and how these affect the structure of defamation law, and the consequences this should have for the individual parties before the court and the defences available to them. The *Bogoshi* defence, for example, helps to protect society's interest in responsible journalism.

III THE COMPATIBILITY OF THIS STRUCTURE WITH THE RISK-AS-INJURY INTERPRETATION OF DEFAMATION LAW

It is clear from the above that the structure of defamation law is justified in various ways. The presumptions of wrongfulness and intention can be justified by referring to the fact that, in the course of human experience, defamatory publications tend to happen intentionally and they tend to be unjustified. Furthermore, the circumstances that might justify the publication, or explain why it was not intentional, are usually essentially within the defendant's sphere of knowledge. These reasons help to justify why the presumptions are made in the first place, and why a full onus is placed on the defendant to justify or excuse his behaviour. Constitutional considerations also now feature in this policy mix. Besides the fact that the defendant is usually best placed to justify his own behaviour, placing the onus on the defendant to defend his

[42] *Khumalo v Holomisa* supra note 1 para 27.
[43] Ibid.
[44] Ronald Dworkin *Freedom's Law* (1996) 200. See also Currie and De Waal op cit note 41 360-361.

behaviour is now also regarded as the most appropriate way to balance the public and private interests in freedom of expression and reputation, given the defences that have been made available to him. The question now is whether this existing framework is consistent with the risk-as-injury interpretation.

First, the justificatory defences that have been designed to regulate the expression of defamatory assertions would still be applicable, in and of themselves, to defamatory assertions that increased the risk of reputational harm. The conduct in question is still the publication of a defamatory assertion, and so defences that concern themselves with defamatory assertions could still sensibly be applied. The risk interpretation does not alter the type of conduct that is under review, only the nature of the harm to which that conduct gives rise. So, the question is not whether the defences could still apply to that type of conduct, but whether they would still be justified. The nature of the wrong has been reinterpreted, so would the defences still be attaining the right balance of personal and public interests?

The risk-as-injury interpretation fits with the considerations described above just as easily as the causation-of-harm interpretation. Construing the delictual act as an increase in the risk of reputational harm, rather than the causing of reputational harm, does not clash with the justifications that are currently used to justify the presumptions and the structuring of the defences. For example, the defendant would still be best placed to explain why the publication of an assertion (and the consequential increase in risk) was justified, or why it was accidental. The factual circumstances that would establish one of the justificatory defences, or a lack of fault, would still essentially lie within the defendant's sphere of knowledge.

The balancing of constitutional interests that also manifests itself in the defences would also remain unaltered. The respective weight attached to freedom of expression and protecting people's reputations would remain essentially the same. The fact that one is dealing with an increase in the risk of reputational harm, rather than the causing of reputational harm would not seem to require an alteration to the existing defences and the burdens that fall on the defendant. The concern would still essentially be about protecting people's reputations versus the need to allow people to express themselves. For example, given the acknowledged difficulties that can arise in proving the truth and falsity of statements, it would still seem appropriate not to require the plaintiff to prove the falsity of the defamatory assertion, and instead require the person who made the decision to publish the defamatory assertion to establish the defence of truth and public benefit. As the Constitutional Court stated in *Khumalo*

v Holomisa, '[i]n not requiring a plaintiff to establish falsity, but in leaving the allegation and proof of falsity to a defendant to a defamation charge, the common law chooses to let the risk lie on defendants. After all, it is by definition the defendant who published the statement and thereby caused the harm to the plaintiff.'[45] The same consideration would apply to someone who has chosen to publish a statement that has increased the risk of reputational harm; the defendant has chosen to publish a statement that has increased the risk of reputational harm.

Moreover, the other ways in which a publication might be justified, such as it being reasonable to have published the statement in the circumstances (*Bogoshi*) or the fact that the situation was privileged, or that one was making a fair comment, still apply to statements that increase the risk of reputational harm, just as clearly as they applied to statements that caused reputational harm. The reasons that justify a statement that caused reputational harm would also be reasons that justified a statement that merely increased the risk of reputational harm. This is the fundamental point when it comes to the compatibility of the existing defences with the risk interpretation. If a defence exists that was held to rebut the presumption of wrongfulness in the context of causation of reputational harm, then such a defence would certainly remain a good defence in the context of an increase in the risk of reputational harm. If anything, the risk interpretation would lower the weight that gets attached to reputation, rather than the weight that gets attached to freedom of expression. For an increase in the risk of reputational harm appears to be a lesser infringement of the right to reputation than the causing of reputational harm. In the one case you just have an increase in the risk of harm, while in the other case you have actual reputational harm. Presumably, actual reputational harm is a more egregious wrong than risking reputational harm. So, the existing defences, which amount to circumstances in which freedom of expression outweighed reputation, would apply just as forcefully, if not more forcefully, in the case of risk.

Moreover, this shift in weight does not seem sufficient to precipitate a change in the structure of the law, such as attempting to make things easier for the defendant. One might think that if the defendant has infringed the right to reputation to a lesser degree by merely increasing the risk of reputational harm, rather than having caused reputational harm, then the respective obligations that fall on the plaintiff and the defendant in a defamation case might need to be altered to make things easier for the defendant. Reputations do still deserve protection, however, and the existing balancing act that is captured in the existing structure of

[45] Supra note 1 para 38.

defamation law still seems to be an appropriate way to balance our interests in reputation and freedom of expression. If one bears in mind that it can be difficult to prove the causal impact of defamatory assertions (and thereby prove that harm was actually done), in conjunction with the fact that the defendant chose to publish the statement and thereby increase the risk of reputational harm, then there does not seem to be a reason to change the law to be more defendant friendly.

IV CONCLUSION

Given that the risk-as-injury interpretation is being presented as an alternative way of justifying the current practice, it is important that that interpretation fits with the outward appearance and structure of that practice. Defamation law is constituted by legal rules and presumptions, defences, and remedies, and the risk-as-injury interpretation would need to be consistent with these if it hopes to be regarded as a way of justifying these practices. This chapter began the demonstration of compatibility by showing that the current way in which the presumptions and defences of defamation law are understood is consistent with the risk-as-injury interpretation.

The respective burdens of plaintiffs and defendants are currently justified by referring to the way in which defamatory conduct is usually unjustified, and that the defendant is best placed to prove factual circumstances that might justify or excuse the conduct. These reasons still hold when assuming the risk-as-injury interpretation.

The overall fairness of the law is also influenced by other considerations, such as the various defences that are available to the defendant, and how these relate both to fairness *inter partes* and personal and public constitutional considerations. These, too, seem consistent with the risk-as-injury interpretation. First, if the defences could justify the behaviour of a defendant who had actually caused reputational harm by making an assertion, then they would certainly justify the behaviour of a defendant who had merely increased the risk of reputational harm by making an assertion. Second, this shift in the gravity of the infringement of the right to reputation (merely increasing risk versus causing reputational harm) does not seem to require a change in the respective burdens of the plaintiff and the defendant. It remains the case that reputation needs to be protected, and it remains the case that the causal impact of defamatory assertions can be hard to trace. Moreover, the defendant has also made the decision to publish the defamatory assertion. These considerations, along with the fact that the defendant is best placed to justify or excuse his own behaviour, suggest that the current burdens of proof that are

placed on the defendant remain sound, even when the defendant has merely increased the risk of reputational harm, rather than having caused reputational harm.

CHAPTER 7: THE FUNCTION OF DAMAGES (1): RISK AND PUBLIC VINDICATION

I INTRODUCTION

Previous chapters have attempted to explain why the current rules constituting defamation law are best interpreted through the lens of risk. In particular, it was argued that the wrong for which the defendant is being held liable is best construed as a wrong of having increased the risk of reputational harm, rather than a wrong of having caused reputational harm. As that argument is an attempt to interpret the existing rules in a new way, this alternative justification needs to be compatible with the current features of the law, including the remedial response.

The primary remedy for defamation in South Africa is damages. The courts, moreover, typically understand those damages as serving two functions, namely, vindicating the plaintiff's reputation and compensating the plaintiff for hurt feelings. This chapter will explain that the idea of damages as public vindication is compatible with the risk interpretation. The following chapter will explain that the idea of damages for hurt feelings is also compatible with the risk interpretation. In that way, the alternative interpretation of the wrong can be seen to be consistent with the existing remedial response.

II DAMAGES AS PUBLIC VINDICATION AND THEIR COMPATIBILITY WITH THE RISK-AS-INJURY INTERPRETATION

Damages for defamation are generally interpreted by the South African courts as serving two purposes. First, they act as compensation for the damage to the plaintiff's reputation by serving as a public vindication of the plaintiff's reputation. Second, they act as compensation for hurt feelings. In *Le Roux v Dey* (CC),[1] Brand AJ states for the majority that 'according to established principle, an award of damages for defamation should compensate the plaintiff for both wounded feelings and loss of reputation. It is also accepted that in some cases the former may outweigh the latter'.[2] What it means to compensate one for 'loss of reputation' can be hard to pin down, however. Compensation for loss of reputation, as distinct from compensation for hurt feelings, has historically been interpreted by the courts as either vindicating one's reputation in the eyes of the public, or as having to do with indemnifying one for the various

[1] *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as* amici curiae*)* 2011 (3) SA 274 (CC).
[2] Ibid para 151.

losses that may have arisen from an injury to one's reputation. Both of these ideas can be accommodated under the concept of 'compensation for loss of reputation'. The idea of vindication in the eyes of the public is the more modern interpretation, however, with only older cases giving express recognition to the idea of a full indemnification of the plaintiff for any losses that have arisen as a result of the defamatory publication, such as financial losses. The following extracts demonstrate this emphasis on public vindication.

In *Mogale and others v Seima*,[3] a unanimous Supreme Court of Appeal endorsed a High Court decision that explained general damages in terms of wounded feelings and vindication in the eyes of the public. The context was a discussion of the inappropriateness of punitive damages in the law of delict but the SCA was nevertheless discussing the 'principles' of damages[4] in a case where the 'sole issue' was one of 'quantum',[5] so the dicta about the function of damages carries some weight. The court endorsed the following statement made by Hattingh J in *Esselen v Argus Printing and Publishing Co Ltd and Others*:[6]

> In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in two ways - as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating the defendant's conduct may, of course, serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*. In general, a civil court, in a defamation case, awards damages to solace plaintiff's wounded feelings and not to penalise or to deter the defendant for his wrongdoing nor to deter people from doing what the defendant has done. Clearly punishment and deterrence are functions of the criminal law, not the law of delict.[7]

So, while the SCA was focusing on the unacceptable nature of punitive damages, that Court and the High Court understood non-punitive damages as essentially being about compensation for wounded feelings and vindication in the eyes of the public.

A similar view was endorsed by Willis J in *Mineworkers Investment Co (Pty) Ltd v Modibane*[8] when discussing the function and value of possible alternative remedial responses, such as apologies. His view has also been endorsed by a minority judgment in the Constitutional Court.[9] Willis J stated that 'the harm done by a defamatory statement is the

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[3] 2008 (5) SA 637 (SCA).
[4] Ibid para 12.
[5] Ibid para 8.
[6] 1992 (3) SA 764 (T).
[7] *Mogale v Seima* supra note 3 para 11.
[8] 2002 (6) SA 512 (W).
[9] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 64 per Mokgoro J who was in the majority on the merits but was in the minority on the question of damages.

damage to the reputation of the victim. A public apology which will usually be far less expensive than an award of damages, can "set the record straight", restore the reputation of the victim, give the victim the necessary satisfaction, avoid serious financial harm to the culprit and encourage rather than inhibit freedom of expression'.[10] Therefore, even though Willis J was considering the value and function of an unorthodox remedial response (namely, an apology), he also ultimately endorses the modern understanding of the basic function of any remedial response to defamation, namely, that it must satisfy the victim and 'set the record straight', i.e. vindicate the victim's reputation in the eyes of the public.

One might wonder, though, how a monetary award can signify that someone's reputation should be restored or has been vindicated.[11] Where might a monetary award get its communicative potential or symbolic significance? Two features of the wider social and legal context appear to be relevant: First, damages are coupled with a declaratory judgment, where the meaning of the award can be expressed using spoken and written language. Second, the legal community assumes that the wider community ascribes meaning to different quantums of damages, an assumption that probably made its way into South African legal practice from English law. These two features of the vindicatory potential of damages will be unpacked below, before it is shown that this account of damages is consistent with the risk interpretation.

(a) Declaratory judgments and public vindication of the plaintiff's reputation

When speaking about damages serving as a vindication of the plaintiff's reputation, one cannot overlook the supportive communicative role played by the declaratory judgment itself. The vindicatory potential of a declaratory judgment was noted by Nugent JA in his minority decision in *Media 24 v Taxi Securitisation*.[12] In his argument that corporations do have a right to their reputations[13] but that they should not be entitled to general damages under the law of defamation,[14] Nugent JA argues that a corporation's reputation can be vindicated in the eyes

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[10] *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at 525.

[11] The idea that damages or declaratory judgments can be an effective means of communication or vindication has been criticised. See Dario Milo *Defamation and Freedom of Speech* (2008) 261-264; Norman Witzleb and Robyn Caroll 'The role of vindication in torts damages' (2009) 17 *Tort Law Review* 16 at 34-35.

[12] *Media 24 Ltd and others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and others as* amici curiae*)* 2011 (5) SA 329 (SCA).

[13] 'I see no reason why a trading corporation should not have the right to insist that others must not damage its good name unless they show legal justification for doing so, and that it is entitled to a legal remedy when that occurs' (para 78).

[14] 'The view that I take is that general damages to a trading corporation are inherently punitive, and thus not permitted by our law' (para 65).

of the public by non-monetary remedies such as declaratory judgments.[15] He thought that general damages in the law of defamation are primarily about compensating human beings for hurt feelings, which corporations do not have.[16] Nugent JA therefore thought that vindication can occur by way of the declaratory judgment, rather than needing damages to assist in that vindication.

Even if one disagreed with the claim that damages are not necessary, it seems likely that the vindicatory significance of damages is necessarily supported by the contents of the declaratory judgment itself. The declaratory judgment provides significant communicative context and helps to provide symbolic significance to the damages themselves. The fact that the damages even relate to a wrong against one's reputation is only achieved through the declaratory judgment, for example.

An interesting feature of declaratory judgements, however, is that their vindicatory potential can vary, depending on what the courts actually say about the character of the plaintiff and the reasons for their final judgment. If one's reputation has actually been lowered (i.e, if people do actually think less of one), then a declaratory judgment can signify that the attack was *unlawfully* made. Yet that does not necessarily amount to an actual vindication of one's reputation, for the courts might say very little about one's deserved reputation or character, and might instead focus on the unlawfulness of the defendant's conduct. In other words, declaratory judgments can express nuanced judgments about one's character, which may or may not help to clear one's name. While the basic idea behind public vindication must be that the written opinion of the courts and an award of damages can help to restore one's reputation by helping to make people change their opinion about you once again (or not believe the assertion in the first place), what the court actually says affects the vindicatory potential of the judgment. For example, in *Norton and others v Ginsberg*,[17] the Trial Court had stated the following:

> Plaintiff is entitled to be awarded a sum of money which, so far as is possible, bears a proper relation to the nature of the defamation and which will serve as the clearest proof of the Court's view that the defamatory statements were and are *completely devoid of truth*.[18]

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[15] 'Good name is restored when those who have heard the defamation are told that what was said is not true and it is retracted. So far as courts can restore good name, it is restored when a declaration to the same effect is made... That applies as much to a natural as to a juristic person' (para 66).

[16] 'Damages in our law are meant to compensate for loss. Humans suffer loss from defamation because humans experience feeling, and they experience feeling because they are alive... What is compensated for is harm to feelings […] Juristic persons do not experience feeling because they exist but they are not alive' (paras 79-80).

[17] 1953 (4) SA 537 (A).

[18] Ibid at 543. Emphasis added.

The reasons the Trial Court gives for its finding for the plaintiff and the quantum of damages serve as a relatively emphatic vindication of the plaintiff's character. The statement that the defamatory assertions were 'completely devoid of truth' is an emphatic vindication of the plaintiff's reputation. The vindicatory potential of a judgment can vary, however, for the courts do not always go as far as the Trial Court did in *Norton v Ginsberg*. In *African Life Assurance Society Ltd v Phelan and others*,[19] for example, the Cape Supreme Court was more reserved, only going so far as to say that the attack was unlawfully made:

> As to whether this company is or is not a company which is stable and carrying on sound business on safe lines it is not for me here to say or pronounce upon, for I am not in a position to know whether the company is a good one or not, that not having been the object of the present inquiry. The only point before me is whether Mr. Phelan when he wrote the article was commenting in a fair way upon the position of the company, and was taking up the stand of a critic of a matter of public importance on the proper basis and within his rights as recognised by law. I do not think that he confined himself within his rights or that he commented in the manner accepted as fair. I am of opinion that there should be damages of a substantial nature. The judgment of the Court is for the plaintiff for the sum of £300 with costs.[20]

The vindicatory intention or effect of this sort of statement is questionable, given that the focus is on the lawfulness of the defendant's conduct rather than on the true state of the plaintiff's character or deserved reputation. Not every finding of *unlawful* publication necessarily entails vindication of one's character in any strong sense, and whether it does will partly depend on what the court actually says. A finding that the situation was not privileged, for example, need not indicate anything about the plaintiff's actual character, but it would be open to the court to say something in that regard. The English Court of Appeal has recognised this point, stating that a judgment rejecting a defence of truth by the defendant is 'at least capable of providing some vindication of a claimant's reputation', but that the extent of the vindication depends on the circumstances, such as whether the defence was struck out for technical reasons or whether it had been dismissed on the merits, and that a judgment might still need to be supported by damages if it is to have an adequate vindicatory effect.[21]

Declaratory judgments can operate to clear the plaintiff's reputation, then, by being an authoritative statement about one's character by an important public institution, in the hope,

[19] (1908) 25 SC 743.
[20] Ibid at 759-760.
[21] *Purnell v BusinessF1 Magazine Ltd and another* [2007] EWCA Civ 744 paras 27, 29-30, 34 (per Laws LJ).

presumably, that the plaintiff can actively use the judgment to vindicate his reputation in his community. What the courts actually say can affect the vindicatory potential of these awards, however.

In the case where reputational harm has already occurred, the hope must be that the declaratory judgment will help to persuade people to change their minds about the plaintiff's character again. As far as risk of reputational harm is concerned, an authoritative statement by a public institution about one's character could mitigate the risk of reputational harm, either by being wielded by the plaintiff in his or her community or by the judgment being communicated by the press. In the same way that one assertion can increase the risk of reputational harm, another, authoritative assertion can decrease the risk that the defamatory assertion will be heeded. The judgment can be used, in other words, to pre-empt people resolving to think less of the plaintiff.

It is true that these attempts at vindication might not always be effective. As Kit Barker puts it, discussing the general idea that declaratory judgments can be used to mark wrongs or declare rights publicly, '[s]ince all such public messaging functions rely for their validity upon untested empirical assumptions, it is only right to question them. Most judicial declarations of right will reach only a narrow audience, unless it is made a condition of an order that they are more broadly publicised.'[22] The same point could be applied in the context of public vindication of one's reputation. Nevertheless, one can still theoretically understand the function of declaratory judgments as being an attempt to mitigate the risk of reputational harm materialising by communicating vindicatory assertions that authoritatively oppose the defamatory assertion. Whether the plaintiff can wield the judgment effectively and whether it reaches necessary members of the community might indeed be questionable. But those empirical concerns do not seem to be good enough reasons, in and of themselves, to make no effort to mitigate the risk that reputational harm will materialise. And one way to mitigate the risk of reputational harm is to give the plaintiff an authoritative counter-assertion that can help prevent people from resolving to actually think less of the plaintiff.

However, even if using the law to perform acts of public messaging is questionable, there are reasons that it is essential in the case of defamation. There is a difference between using the law to vindicate rights generally (i.e., attest to the importance of the right or the underlying interest) and using the law to counteract a defamatory assertion by making

[22] Kit Barker 'Private and public: The mixed concept of vindication in torts and private law' in Stephen GA Pitel, Jason W Neyers & Erika Chamberlain (eds) *Tort Law: Challenging Orthodoxy* (2013) 84.

vindicatory assertions in response. This difference will be explored in the following section, where the idea of general vindicatory damages will be unpacked, and its relationship to damages for defamation made clear.

(b) Declaratory judgments and vindication of the right to reputation

It is possible to supplement the above explanation of the function of declaratory judgments by also recognising the role that those declarations play in attesting to the value of reputation itself. This supplementary explanation is derived from recent theoretical developments in Anglo-American tort law. The Anglo-American theory is worth examining because it sheds further light on the meaning of public vindication in the context of defamation, and helps to explain why defamation law's social messaging function is necessary.

(i) Rights-based accounts of tort law and their contributions to the theory of damages

One of the most significant theoretical debates about English tort law in recent years has been about whether tort law is rights-based or loss-based.[23] What it means to have a 'rights-based view' can vary, however. Nevertheless, Donal Nolan and Andrew Robertson have outlined some general themes that tend to be associated with the rights movement in tort law. First, rights-based accounts are strongly associated with an anti-instrumentalist view of tort law. Rights-scholars emphasise the fact that tort law is about interpersonal morality, rather than being about the pursuit of public welfare goals. Second, rights-based accounts are sometimes contrasted with loss-based accounts. Robert Stevens, a prominent advocate of a rights-based view, defines loss-based accounts as those that hold that 'the defendant should be liable where he is at fault for causing the claimant loss unless there is a good reason why not'.[24] This contrasts with rights-based accounts in that liability does not seem to require the violation of primary rights, and instead starts with the premise that losses should always be compensated unless there is a good reason why they should not be. Loss-based accounts start with loss and look for reasons not to compensate them, while rights-based accounts start with a rights violation and ask what remedy is required for such a violation. Nolan and Robertson make the important point, however, that whether loss-based accounts are distinct from rights-based accounts largely turns on whether the compensation for loss is based on social or public-welfare grounds (such as a desire to spread losses fairly across society or across those who can bear

[23] As Donal Nolan and Andrew Robertson put it, 'rights analysis has been at its most provocative and vociferous in relation to tort law, and has attracted an equally vociferous response from its critics' (Nolan & Robertson 'Rights and Private Law' in Donal Nolan & Andrew Robertson (eds) *Rights and Private Law* (2011) 2).
[24] Robert Stevens *Torts and Rights* (2007) 1.

them most easily) or whether it is based on a need to compensate for *wrongful* losses, i.e. losses that arise from *rights* violations. They note that if the loss-based approach limited compensation for loss to compensation for wrongful losses, then the difference with a rights-based approach becomes less clear. So long as wrongful losses means losses caused by infringing a right (and therefore being a wrong), there is less to distinguish such a loss-based account from a rights-based approach.[25] The third general characteristic of rights-based approaches is their approach to methodology. They emphasise the fact that their approach is 'interpretive'; they claim to be striving for the 'best account' of private law or private law doctrines.[26] According to Stephen Smith, interpretive accounts do not attempt simply to describe the law as it currently stands (descriptive), nor to give an account of an idealised law (prescriptive), nor to explain the historical forces that have led to the law's current shape (historical). Instead, interpretive accounts aim to reveal 'an *intelligible order* in the law, so far as such an order exists'.[27] The focus, then, is on providing a compelling moral or normative justification of the law in a way that more or less fits with the existing outward appearance and structures of the law. According to Nolan and Robertson, interpretive theories aim to provide 'the most plausible, coherent and appealing account of the law as it stands'.[28] One of the most interesting aspects of the various rights-based accounts, however, has been their reinterpretation of the function of damages. As Donal Nolan and Andrew Robertson put it, 'the most striking claims of rights theorists, and the most significant implications of rights analysis, may well be those that concern secondary or remedial rights, rather than primary rights', and that 'rights-based analysis has ignited debate on a number of significant remedial issues in private law'.[29]

(ii) Vindicatory damages

One prominent idea associated with rights-based accounts is that there might be a separate head of damages called 'vindicatory damages'. This idea is associated with rights-based accounts because the focus of these damages is on vindicating the infringed right, rather than, say, compensating one for loss. As Jason Varuhas explains,

> 'Vindication' is accepted by many textbook writers as a function of the law of torts. It is a concept increasingly invoked in case law and commentary within tort, one which

[25] Nolan & Robertson op cit note 23 at 3-4.
[26] Ibid at 5.
[27] Stephen A Smith *Contract Theory* (2004) 4-5. See also A Beever & C Rickett 'Interpretive legal theory and the academic lawyer' (2005) 68 *Modern Law Review* 320.
[28] Nolan & Robertson op cit note 23 at 6.
[29] Ibid at 19-20.

> has rhetorical appeal particularly when coupled with the idea of 'rights', and which has gained increasing currency with the emergence of a 'rights'-movement within the law of torts and the ever-growing influence of human rights.[30]

He also notes, however, that 'the exact meaning of the concept has not been closely examined and remains relatively obscure.'[31]

The concept has indeed been used in different ways. Robert Stevens notes that the label vindicatory damages is sometimes used to describe something similar to his substitutive damages thesis (discussed in more detail in the following chapter):

> A meme which has gained significant prominence recently within private law is the idea that damages are sometimes awarded not to compensate for losses consequential upon the suffering of a wrong, nor to strip the defendant of any gain he or she may have made as a result of the wrong, but rather because of the wrong itself. I have labelled this award substitutive damages, whilst others have preferred the label vindicatory damages.[32]

The idea of damages being awarded 'because of the wrong itself' is capable of many interpretations, however, rather than only being synonymous with the idea of substitutive damages. Andrew Burrows, for example, notes that the term vindicatory damages has been used by the Privy Council in cases on appeal from Commonwealth courts that involved the breach of Commonwealth constitutional rights (meaning that these are cases that fall outside of tort law). His analysis of vindication in the context of those cases is that the term is being used to capture something similar to punitive or exemplary damages in English tort law, a function that is obscured by the language of 'vindication':

> "vindicatory damages" are multi-functional and are concerned, where compensatory damages are inadequate to achieve these aims, to reflect public outrage, to emphasise the importance of the right or the seriousness of the infringement, and to deter future wrongdoing [...] It further follows that, given the existence of punitive or exemplary damages in tort law, there would be nothing to be gained, except confusion, by introducing the idea of awarding "vindicatory damages" into tort law' [given that the above functions are carried out in tort law using punitive or exemplary damages].[33]

Jason Varuhas' concept of vindication provides a third way to understand the idea of vindicatory damages. It deserves consideration because it might at first seem like a better, alternative explanation of damages for defamation. However, there are reasons not to prefer it over the traditional idea of public vindication, as explained below. An analysis of his account

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[30] Jason NE Varuhas 'The concept of 'vindication' in the law of torts: rights, interests and damages' (2014) *Oxford Journal of Legal Studies* 1 at 2.
[31] Ibid.
[32] Robert Stevens 'Rights and other things' in Nolan & Robertson op cit note 23 at 121-122.
[33] Andrew Burrows 'Damages and Rights' in Nolan & Robertson op cit note 23 at 304-306.

of vindication also helps to explain why public messaging is necessary in the case of defamation.

Varuhas attempts to draw a middle course between the camps represented by Robert Stevens (damages are non-compensatory) and Andrew Burrows (damages are compensatory). Varuhas agrees with Stevens that the idea of damages that do not have compensation-for-factual-loss as their primary function is a crucial concept, but he disagrees with Stevens that such damages are the primary form of damages in tort law. Instead, they feature in certain torts, most significantly in the torts actionable per se (torts that typically feature strict rather than fault-based liability and that allow for substantial damages even in the absence of proof of factual loss).[34] Varuhas also disagrees with Andrew Burrows, however, because Varuhas sees Burrows as attacking the idea of damages that do not compensate one for factual loss by pointing to weaknesses in others' accounts, rather than conclusively showing that such damages do not exist.[35] Varuhas attempts to steer a middle course by explaining how some damages have an overarching vindicatory function which is not about compensation for loss, but which can still be described as compensatory.

In one sense, a right is vindicated whenever a remedy is offered for its infringement. If there was no right, then there would be no remedy. So, every remedial response affirms or vindicates rights in this weak sense. The concept of vindication at work in Varuhas's account means more than this, however; vindication in Varuhas's strong sense means 'to attest to, affirm and reinforce the importance and inherent value of particular interests.'[36] In performing a vindicatory function in the strong sense, the law is doing more than just affirming the existence of a right, but affirming the special importance of the interest underlying a particular right. Varuhas thinks that this sense of vindication can be found in the English law of torts and that this function explains some of the differences between, say, the torts actionable per se and torts that require proof of loss before they are actionable, like negligence: 'For the TAPS [torts actionable per se] vindication is the primary function. For other torts, specifically negligence, their radically different structures and remedial approach suggest a primary function of compensating for fault-based harm.'[37]

[34] Varuhas op cit note 30 at 7.
[35] Ibid at 3.
[36] Ibid at 6.
[37] Ibid at 8.

The vindicatory purpose of torts actionable per se is 'to afford strong protection from external interference to the most basic of personal and proprietary interests'.[38] This vindicatory function explains some of their features, such as strict rather than fault-based liability and getting substantial damages even in the absence of proof of factual loss.[39] In order to achieve the vindicatory purpose outlined above, the courts construct what he calls 'normative damage',[40] and it is for this normative damage that one is receiving compensatory damages that have the ultimate function of vindicating the protected interest:

> That an interference with the protected interest is in itself recognized as a form of damage is explicable by reference to the vindicatory aims of the law: in "constructing" this form of damage the law is seeking an end, to protect basic interests and to attest to and reinforce their importance and inherent worth. The status within the legal order and inherent value of the interests are reinforced by providing for monetary redress wherever those interests are wrongfully interfered with regardless of whether the interference has any negative effects on the claimant, such as lost earnings or mental suffering.[41]

Given this type of compensatory damages, as well as the existence of exemplary damages, there is then also no need for a special head of damages called vindicatory damages, he argues.[42] Varuhas endorses a particular concept of vindication, then, without thinking that a new category of damages needs to be recognised.

The question now is whether Varuhas's functional account is a superior justification for damages for defamation in South Africa than the orthodox accounts that view damages as being aimed at public vindication of the plaintiff's reputation and compensation for hurt feelings. Defamation in South Africa, after all, does not require proof of factual loss, which might suggest that normative damage and vindication in Varuhas's sense is at work.[43] Furthermore, Varuhas notes that reputation is the kind of important interest that vindicatory torts would protect.[44] Could it be, then, that the idea of normative damage and vindicatory damages offers a better account than compensation by way of public vindication and hurt feelings? I think that there are two reasons to deny that vindication provides a superior alternative to the functions described in this and the following chapter, although vindication in the weak sense can still be retained when thinking about the function of declaratory judgments and damages.

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[38] Ibid at 7.
[39] Ibid.
[40] Ibid at 16.
[41] Ibid.
[42] Ibid at 39.
[43] See the discussion of defamation by Varuhas op cit note 30 at 24-26.
[44] Ibid at 10.

(iii) Vindication in the weak sense being a subsidiary function of all judicial remedies

The first reason to deny that vindication offers an alternative understanding of damages is the point made by Andrew Burrows and Kit Barker that vindication in some sense is achieved through all judicial remedies and recognitions of rights. This is not vindication in Varuhas's strong sense, however. Andrew Burrows makes the following point about the way in which a weak sense of vindication underlies all judicial remedies for civil wrongs:

> all judicial monetary and non-monetary remedies for civil wrongs can be seen as having the *subsidiary* function of vindicating the right infringed. So, for example, the primary function of compensatory damages is to compensate the claimant's loss but, in so doing, one is also inevitably vindicating the right infringed [...] It is only in respect of declarations and nominal damages that, in contrast, can one come close to saying that the *primary* function is to vindicate the right.[45]

The concept of vindication at work here is Varuhas's first, weak sense of vindication:

> Legal rights are vindicated by tort law in the basic sense that the law affirms the existence of the right through recognition of an action for breach, and providing for remedies such as damages and injunctions to redress violations. In this sense all torts share a vindicatory function, as do any bodies of law that provide for actions in respect of breaches of given rights.[46]

A similar point is made by Kit Barker, who defines vindication in such a way that the term captures a number of well-recognised judicial practices:

> At its highest level of generality, then, a court vindicates private rights when it acts positively to affirm them. It does so, I suggest below, when it (i) prevents their infringement, when it (ii) declares them publicly, when it (iii) enforces them specifically and when it (iv) reverses the effects of their infringement. It is less clear that it does so in any way that is distinct from those just mentioned when it punishes those who violate them, although there is some debate about this issue [...] Collectively, these four events comprise private law's conception of vindication.[47]

If this definition of vindication is used, then the orthodox understanding of damages would already amount to a vindication of the right to reputation. Vindication in this sense would not provide an alternative to the function of those damages, then, but would merely bolster one's general understanding of their function. They would still be mitigating the risk of reputational harm, but in so doing one could also say that they are thereby vindicating the right to reputation in the sense of confirming its existence. This view is compatible with, and supplements, the orthodox understanding of declaratory judgments and damages, rather than

[45] Burrows op cit note 33 at 304.
[46] Varuhas op cit note 30 at 6.
[47] Kit Barker 'Private and public: The mixed concept of vindication in torts and private law' in Stephen GA Pitel, Jason W Neyers & Erika Chamberlain (eds) *Tort Law: Challenging Orthodoxy* (2013) 68.

being an alternative to them. However, this does not provide a response to Varuhas's account of vindication, for it does not respond to Varuhas's second (strong) sense of vindication, which could indeed provide an alternative explanation of the function of damages. Explaining why it is not a superior alternative helps to shed light on the nature of traditional public vindication too.

(iv) Scepticism about vindicatory social messaging

There is reason to be sceptical about whether Varuhas's strong sense of vindication does provide a better account in the South African context than the orthodox account.

The first obstacle is that it would be at odds with the case law and what judges understand themselves to be doing. The concepts of public vindication and compensation for hurt feelings are well-established in the case law, as shown in the previous chapter. Nevertheless, one can still ask whether Varuhas's account offers a better moral justification of damages, such that one should replace the standard justification of those damages. If we adopted an 'interpretive' methodological approach, then Varuhas's account would be assessed according to four criteria, namely, fit, transparency, morality and coherence.[48] Fit concerns how well the theory matches the case law, such as the outcomes of decisions. Transparency concerns how well the theory matches the reasoning expressed by judges. Morality concerns how the law might best be justified, even if this justification is not widely adopted in practice. And coherence means, in its weakest sense, that the law is not presented as contradictory, or, in its strongest sense, that the law is a unified system, perhaps under a single principle. It might be that Varuhas's account scores low on transparency because it does not match the reasoning of judges, but it might score highly on fit, because it matches the outcomes of cases, and highly on morality, because it might be a superior moral justification of the practice of defamation law. It is not clear, however, that it does provide such a compelling moral justification that it manages to overcome the low score on transparency. The reason is that Varuhas's second and strong sense of vindication views damages as having an expressive function: they exist to attest to the importance of the underlying interest (reputation). But it is questionable whether such an expressive function really deserves to be elevated to the primary justification of damages, rather than being a subsidiary function that happens by way of public vindication of the plaintiff's reputation and general recognition of the right to reputation. Kit Barker presents the following argument against damages having a primary expressive function:

[48] Smith op cit note 27 at 7-32.

> Since all such public messaging functions rely for their validity upon untested empirical assumptions, it is only right to question them. Most judicial declarations of right will reach only a narrow audience, unless it is made a condition of an order that they are more broadly publicised. The extent to which monetary judgments are capable of conveying precise public messages is also seriously questionable and indeed, in the majority of cases, the provision of clear reasons for judgment may be a more exact educational tool when it comes to explaining and validating the values upon which society is based. Money is a powerful incentive, but an inarticulate mode of expression. There are also, I think, real issues about whether it would be appropriate to make a defendant pay, through private litigation costs and damages awards, *simply* for the public to be better informed about rights generally.[49]

It may seem ironic that an argument was presented earlier generally supporting the idea about judicial declarations publicly vindicating one's reputation through their expressive function, and now expressing scepticism about damages being able to perform the social messaging of attesting to the importance of reputation in general. But in the case of defamation, messaging is at the heart of the wrong - a message about one's reputation constitutes the wrong - and it makes sense to counter that with an alternative, authoritative judicial message about the plaintiff's reputation. One is fighting symbols with symbols, or messages with messages. What is being doubted here is the need to view the primary function of damages for defamation as being about generally attesting to the importance of people's reputations, which is what vindication in Varuhas' strong sense is all about. It makes sense to communicate something about the *plaintiff's* reputation in order to combat the wrong of defamation, given that the wrong itself is a message about the *plaintiff's* reputation. And in so doing, one is also attesting to the importance of the underlying interest (vindication in the weak sense). Moreover, it is open to the courts to *declare* the importance of reputation in general whenever they try these kinds of cases. There does not seem to be a need in the context of defamation to elevate vindication in the strong sense to the primary function of damages or the declaratory judgment.

From a functional point of view, the idea of vindicating the plaintiff's reputation seems to be a more compelling justification for the function of damages and the declaratory judgment. The idea of vindication in the sense of attesting to the importance of reputation in general could rather be seen as a subsidiary function of these awards, one which is probably more precisely carried out in the declaratory judgement than in the quantum of damages. In the same way that the extent to which the plaintiff's reputation is vindicated depends on what is said in the declaratory judgment, what is said about the value of reputation in general will provide much of the substance if vindication of the right to reputation is also sought.

[49] Ibid at 84.

We have seen, then, that declaratory judgments are crucial to the idea of public vindication, and that this aspect of the remedial response to defamation is compatible with the idea of risk.

(c) The symbolic significance of monetary awards

The courts usually focus on the vindicatory potential of damages, however, rather than focusing on the fact that a declaratory judgment is being made. It is perhaps taken for granted that the damages are awarded in the context of a declaratory judgment. However, one might ask why an award of damages is needed on top of a declaratory judgment and how the damages themselves can have symbolic significance. One can also ask if this understanding of damages is compatible with the risk interpretation.

We saw above that in his minority judgment in *Media 24 v SA Taxi Securitisation*,[50] Nugent JA thought that a declaratory judgment would be sufficient to vindicate a corporation's reputation. The idea that damages themselves are also necessary to symbolise that one's reputation has been vindicated has deep roots in South African legal history, however, and probably has its origins in English law.

In *Steenberg v Cooper*,[51] De Villiers CJ stated that

> the only question which remained was what damages should be awarded. The Magistrate said that if he had found for the plaintiff, he would have given a farthing damages. That would certainly not have cleared the plaintiff's character [...] It was poor compensation to a man to have a farthing damages awarded him when he sought to clear his character, and show that he had not been guilty of a dishonourable act imputed to him. It appears to me that the Magistrate would have been quite justified in giving at least £5 damages. The appeal will be allowed, with costs in this Court, and judgment entered for the plaintiff for £5 damages.[52]

As explained by Buchanan J in *Hefer v Botha*,[53] the idea seems to be that 'something substantial should have been awarded to show that the plaintiff had cleared his character'.[54] A similar idea is expressed in *Merwitz v Morris*,[55] where Juta JP states that '£12 would be a substantial amount, and would not convey the impression to that section of the public which has dealings

[50] Supra note 12.
[51] (1904) 21 SC 493.
[52] Ibid at 495-496.
[53] 1910 CPD 238.
[54] Ibid at 239.
[55] 1916 CPD 164.

with the plaintiff that, although he succeeded in his case yet, as a matter of fact, an imputation still clings to him'.[56]

This concern about a suitably high quantum is probably adopted from English law. In English law, nominal damages were sometimes awarded by a jury who were obliged to award some damages due to the fact that a right had been infringed, but who did not think that the plaintiff was deserving of substantial compensation. According to Frederick Pollock, whose work would have been influential in South Africa at the turn of the twentieth century:[57]

> The other kind of award of nominal damages, where the plaintiff's demerits earn him an illusory sum such as one farthing, is illustrated chiefly by cases on defamation, where the words spoken or written by the defendant cannot be fully justified, and yet the plaintiff has done so much to provoke them, or is a person of such generally worthless character, as not to deserve, in the opinion of the jury, any substantial compensation.[58]

It was probably this English custom of awarding nominal damages that led the South African courts to adopt the idea that a quantum that was too small would not vindicate a deserving plaintiff's character, and that it could instead signify that there is something troubling about the plaintiff's character. Consistent with this, a suitably large quantum is regarded as necessary in order to indicate that the plaintiff's reputation was vindicated.

This idea that the quantum of damages itself has a symbolic, communicative function is still endorsed in England and in other jurisdictions that were influenced by the English

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[56] Ibid at 166-167.

[57] See Herman Robert Hahlo and Ellison Kahn *The Union of South Africa: the Development of its Laws and Constitution* (1960) 17-20, for a general account of the influence of English law; and Martin Chanock *The Making of South African Legal Culture, 1902-1936* (2001) 159 for reference to Pollock's work on tort law in particular. See also Helen Scott *Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer* (2013) 41, noting the influence of English nineteenth century textbooks on judges in the Cape Colony.

[58] Frederick Pollock *The Law of Torts* (1887) Philadelphia: Blackstone Publishing Company 122 [158]. The Philadelphia edition of the first edition of this work has been digitised by Google and it is in the public domain. It is available online at http://hdl.handle.net/2027/mdp.35112105001152. There had been some renumbering in the original Philadelphia text itself and the number in square brackets refers to the corresponding page number of the original English edition.

common law.[59] In England, in *Associated Newspapers Ltd v Dingle*,[60] Lord Radcliffe stated that '[a] libel action is fundamentally an action to vindicate a man's reputation on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as the demonstrative mark of that vindication.'[61] In *Cassell & Co Ltd v Broome*,[62] Lord Hailsham took a similar approach, although he also noted the need to point to a convincing award if the matter were to come to the public's attention again in the future:

> In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.[63]

The underlying assumption here on the part of the courts is a sociological one. Perhaps due to the practice of juries awarding nominal damages in certain circumstances, the public is presumed to understand the symbolic connotations of the various amounts of damages in cases such as this one. Whether damages do signify anything at all, then, would depend on whether the courts are right to make such assumptions about the public's understanding of damages.[64]

It seems clear, however, that this is the standard justification on the part of Common Law courts, and it seems like the most plausible explanation of what the South African courts also mean when they refer to the symbolism that damages can have, as seen the early judgments discussed above.

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[59] In *Carson v John Fairfox & Sons Ltd* (1993) 178 CLR 44 at 60-62, the Australian High Court stated the following: 'Specific economic loss and exemplary or punitive damages aside, there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that "the amount of a verdict is the product of a mixture of inextricable considerations". The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation. "The gravity of the libel, the social standing of the parties and the availability of alternative remedies" are all relevant to assessing the quantum of damages necessary to vindicate the appellant'.

[60] [1964] AC 371.

[61] Ibid at 396.

[62] [1972] AC 1027.

[63] Ibid at 1071

[64] The idea that damages or declaratory judgments can be an effective means of communication or vindication has been criticised. See Dario Milo *Defamation and Freedom of Speech* (2008) 261-264; Norman Witzleb and Robyn Caroll 'The role of vindication in torts damages' (2009) 17 *Tort Law Review* 16 at 34-35.

Where one's reputation has actually been lowered, the idea is that the amount of damages awarded has the potential to indicate to people that one's reputation has now been authoritatively cleared, and that they should once again have positive opinions about the plaintiff's character. As Kit Barker puts it, '[s]ince reputational damage actually *consists in* a deleterious change in the *public perception* of a person, its remediation entails an equivalent change for the better in that perception and monetary sums are calculated symbolically with this objective in mind'.[65]

These sorts of symbolic damages are also capable, in theory, of addressing a risk of reputational harm, in the same way that declaratory judgments attempt to decrease the chances that the defamatory assertion will be heeded. If the awards do have symbolic significance, then the meaning communicated through these awards could reach relevant parties before the defamatory assertion does, either by being wielded by the plaintiff in his or her community or because the award gets communicated in the press. This would help to mitigate the chances that actual reputational harm will materialise. Attempting to decrease the probability that the unwelcome event will materialise appears to be a sensible way to provide compensation for a harm that is constituted by risk. One could question whether these awards have the symbolic significance ascribed to them,[66] but, from a doctrinal point of view, symbolic damages are consistent with the idea of risk.

III CONCLUSION

We have seen that damages for defamation are generally interpreted by the South African courts as serving two purposes. First, they act as compensation for the damage to the plaintiff's reputation by serving as a public vindication of the plaintiff's reputation. The role of declaratory judgments in this respect should not be overlooked. Second, they act as compensation for hurt feelings. This chapter has attempted to unpack the idea of public vindication and show that it is compatible with the risk interpretation of defamation.

As the risk interpretation is being proposed as an alternative interpretation of the existing practices, it is important that it is compatible with the existing remedial responses. Damages that aim at publicly vindicating the plaintiff's reputation can help to mitigate the chances that the threatened damage to the plaintiff's reputation will materialise, for the plaintiff can wield the vindicatory assertions in his or her community to help prevent people from

[65] Barker op cit note 22 at 76. Emphasis in the original.
[66] See Dario Milo *Defamation and Freedom of Speech* (2008) 261-264; Norman Witzleb and Robyn Caroll 'The role of vindication in torts damages' (2009) 17 *Tort Law Review* 16 at 34-35.

resolving to think less of the plaintiff. The vindicatory assertions could reach potentially important members of the community through the press, or the plaintiff can wield the judgment herself, should she suspect that someone is apt to think less of her as a result of the defamatory publication.

The compatibility of the second justification for damages with the risk interpretation, namely, compensation for hurt feelings, will be explored in the following chapter.

CHAPTER 8: THE FUNCTION OF DAMAGES (2): RISK AND HURT FEELINGS

I INTRODUCTION

As seen in the previous chapter, damages for defamation in South Africa are understood to serve two functions: first, they help to publicly vindicate the plaintiff's reputation. Second, they aim to compensate the plaintiff for hurt feelings. This chapter will explain the idea of damages for hurt feelings and show that they too are compatible with the idea that defamation concerns an increase in the risk of reputational harm rather than the causing of reputational harm. This chapter will also unpack the idea of substitutive damages in more detail, and defend the orthodox understandings of damages against that rival explanation.

II TWO CATEGORIES OF HURT FEELINGS IN SOUTH AFRICAN LAW

In South African case law, 'hurt feelings' is a compendious term that captures distinct sets of feelings. There are two broad categories. First, hurt feelings can refer to the feelings of annoyance that are caused by having to deal with something unpleasant. This is not a concern about insult but rather about the emotional or psychological consequences of having been the victim of a troublesome wrong. Second, it can refer to the specific feeling of having been insulted or treated in a disrespectful manner.

The first category is exemplified by the following: The courts, especially in older judgments, have referred to 'the inconvenience and annoyance [the plaintiff] had been subjected to',[1] and the 'natural irritation caused by the article.'[2] Such irritation can be caused by the fact that one has been worried about friends and family thinking less of one: 'it has cost him a great deal of anxiety and trouble I mean by that mental worry and so forth, in regard to his family and his friends; they have all heard what has been said of him.'[3] Or the worry could be caused by a fear for one's personal safety as a result of the publication. For example, in a case concerning a member of parliament who was said to have asked the police to shoot protesting mine workers during a time of labour unrest, the court stated the following:

> the Court must bear in mind, in connection with this action, the pain and suffering which the words complained of, and spoken of him, have caused him. In the very nature of things it must have caused a great deal of mental worry and suffering […] It placed him,

[1] *Smith v Gradwell* (1902) 16 EDC 79 at 85.
[2] *Taylor v Rand Daily Mails Ltd* 1912 WLD 202 at 219.
[3] *De Beer v De Villiers* 1913 CPD 543 at 553

> as an employer of labour, in a very difficult position, and I am satisfied upon the evidence, also a dangerous position from a personal point of view. His personal safety was certainly endangered by the remarks of the defendant.[4]

The concern in these cases is the emotional turmoil and stress caused by the defamatory assertion, turmoil and stress that are not necessarily caused by the insult of the attack, but rather from having to deal with the social fallout of the statement.

The second category does concern feelings brought about by insult and that particular type of injustice. We have here the perhaps better-known idea that damages are for the insult or *contumelia* connoted by the attack. Innes ACJ, a great proponent of this idea, stated the following for the Appellate Division in *Salzmann v Holmes*[5]:

> The result is that there is no proof that the plaintiff's reputation did actually suffer as a result of these publications. […] The position then is this[:] there is no special damage and no proof of any general damage to reputation other than that implied by the bare publication. But the slander was of the grossest possible nature and the malice and ill-feeling undoubted. Under these circumstances, the Court should have awarded a very substantial sum by way of compensation to the plaintiff for the contumelia inflicted, and by way of penalty upon the defendant for his aggravated and malicious defamation. To my mind, £1,000 would have been a suitable and proper award under the circumstances.[6]

The concern here is to compensate the plaintiff for the feelings of indignation and outrage the disrespectful attack caused, although the Court does also refer to a 'penalty' being imposed upon the defendant, which might be aimed at punishing the defendant rather than compensating the plaintiff.

In order to see whether the concept of damages for hurt feelings is compatible with the idea of risk, we need to unpack what it means to say that damages are compensation for hurt feelings, and the relationship between compensating the plaintiff and punishing the defendant.

III THE RELATIONSHIP BETWEEN COMPENSATION AND PUNISHMENT IN DAMAGES FOR HURT FEELINGS

One influential understanding of damages for hurt feelings is that they are really a form of civil punishment. Unlike compensatory damages which focus on the plaintiff's loss, damages for

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[4] *Farrar v Madeley* 1913 CPD 888 at 893-4.

[5] 1914 AD 471.

[6] Ibid at 482-483. Innes CJ had expressed similar ideas about insult when acting as the Chief Justice of the Transvaal Supreme Court. See his comments in *Farrar v Hay* 1907 TS 194 at 201-202, and *Macgregor v Sayles* 1909 TS 553 at 557-558.

hurt feelings, or satisfaction, focus on the moral blameworthiness of the defendant. PJ Visser was a proponent of this idea, arguing that satisfaction is distinct from *skadevergoeding* or 'damage compensation'. *Skadevergoeding*, or compensatory damages proper, is aimed at providing an equivalent for the affected interest, so as to neutralise the 'damage'.[7] Satisfaction, on the other hand, is not concerned with neutralising the loss, but responds rather to the fact that the conduct was wrongful or blameworthy, in much the same way that a criminal punishment might look to the extent of the wrongdoer's moral blameworthiness and the need to deter such conduct, rather than speaking to the extent to which the victim has been injured and the need to redress that injury. In this respect, satisfaction pays attention to the wrongdoer's fault and motives, the victim's feelings of injustice and questions of punishment and deterrence.[8] Instead of focusing on the victim's loss, then, satisfaction is focused on the defendant's conduct and aims to punish and deter. Visser was a proponent of the idea that satisfaction is an important feature of the South African *actio iniuriarum*.[9] One can see this idea reflected in Innes ACJ's opinion above, where he speaks not only of a 'substantial sum by way of compensation to the plaintiff for the contumelia inflicted' but also about imposing a 'penalty upon the defendant for his aggravated and malicious defamation'.

The problem with this interpretation of damages for hurt feelings is that the South African jurisprudential landscape has become extremely critical of punishment and deterrence in civil law.

The need to embrace a compensatory approach to damages in the law of delict was confirmed by the Supreme Court of Appeal in *Mogale v Seima*.[10] *Mogale v Seima* was a defamation case in which the 'sole issue' before the SCA was the quantum of damages that the trial court had awarded.[11] The trial court had granted the plaintiff an award of R70 000, the size of which the defendants subsequently appealed. When considering whether the trial court had erred in arriving at that amount, the SCA stated the following:

> As to the general approach to quantum, there are many dicta that create the impression that compensation may be awarded as a penalty imposed on the defendant and that the amount is not only to serve as compensation for the plaintiff's loss of dignity, for example, *Die Spoorbond and Another v South African Railways; Van Heerden and Others v South African Railways* 1946 AD 999 at 1005. These dicta were put in context

[7] PJ Visser 'Genoegdoening in die deliktereg' (1989) 51 *THRHR* 468.at 485.
[8] Ibid at 486. Emphasis by Visser.
[9] Ibid.
[10] 2008 (5) SA 637 (SCA).
[11] Ibid para 8.

by Didcott J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851) at 830 para 80 when he said the following:

> "Past awards of general damages in cases of defamation, *injuria* and the like coming before our courts have sometimes taken into account a strong disapproval of the defendant's conduct which was judicially felt. That has always been done, however, on the footing that such behaviour was considered to have aggravated the actionable harm suffered, and consequently to have increased the compensation payable for it. Claims for damages not purporting to provide a cent of compensation, but with the different object of producing some punitive or exemplary result, have never on the other hand been authoritatively recognised in modern South African law."

In like vein Hattingh J said in *Esselen v Argus Printing and Publishing Co Ltd and Others*1992 (3) SA 764 (T) at 771G - I:

> "In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in two ways - as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating the defendant's conduct may, of course, serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*. In general, a civil court, in a defamation case, awards damages to solace plaintiff's wounded feelings and not to penalise or to deter the defendant for his wrongdoing nor to deter people from doing what the defendant has done. Clearly punishment and deterrence are functions of the criminal law, not the law of delict. Only a criminal court passes sentence with the object of *inter alia* deterring the accused, as well as other persons, from committing similar offences in future; it is not the function of a civil court to anticipate what may happen in the future or to "punish" future conduct (cf *Lynch v Agnew* 1929 TPD 974 at 978 and Burchell *The Law of Defamation in South Africa* (1985) at 293)."

I mention this because the learned trial judge was not made aware of these principles and he apparently considered that an award, which would teach newspapers to limit themselves to inform and entertain the public without affecting anyone, was justified. The "teach them a lesson" theme underlies the judgment, as the learned judge himself later emphasised. In this regard he erred.[12]

The SCA, after canvassing other ways in which the trial court had erred,[13] went on to reduce the award from R70 000 to R12 000.[14]

As is apparent from the sources that the SCA quotes, the SCA was confirming a move away from punitive damages that other courts had already been urging. *Mogale v Seima* was the first time that the Supreme Court of Appeal had definitively applied the principle of non-

[12] Ibid paras 10-12.
[13] Ibid paras 16-17.
[14] Ibid para 18.

punishment in the ratio of its decision, however. While the Constitutional Court in the earlier decision of *Fose v Minister of Safety and Security*[15] had encouraged a move away from punishment in non-criminal contexts, the court did not have to decide whether there is any role for punishment in delictual damages. The question in *Fose* was whether, in the context of an assault by members of the South African police service, a new category of constitutional damages was needed in order to vindicate fundamental constitutional rights. These constitutional damages were framed by the plaintiff as going beyond that which was already recoverable in the law of delict for an assault, and which would be used, in part, to punish organs of state that had infringed fundamental rights.[16] *Fose* was concerned, then, with the need to create a new category of constitutional damages, rather than with the nature of common law damages. Yet, in deciding that there was no need, on the facts, to create a new category of damages, the majority did question the desirability of blurring civil and criminal remedies. Ackermann J, for the majority, stated that

> I have come to the conclusion that we ought not, in the present case, to hold that there is any place for punitive constitutional damages. I can see no reason at all for perpetuating an historical anomaly which fails to observe the distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution.[17]

Despite the impression created by the quotations used in *Mogale v Seima*, and Didcott J's concurring judgment in *Fose*, the idea of civil punishment did have some purchase on the South African law of delict, as we saw above in Innes ACJ's judgment in *Salzmann v Holmes*. As Ackermann J states in *Fose*:

> The question whether, in addition to compensatory damages, "penal" or "punitive" or "exemplary" damages (expressions often used interchangeably and confusingly) are (or ought to be) awarded in delictual claims is a matter of some debate in South Africa. It appears to be accepted that in the Aquilian action and in the action for pain and suffering an award of punitive damages has no place. The Appellate Division has, however, recognised that in the case of defamation punitive damages may in appropriate cases be awarded. In the case of damages for adultery it has been accepted that a penal component is still appropriate. It must of course be borne in mind that it is not always easy to draw the line between an award of aggravated but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the

[15] 1997 (3) SA 786 (CC).
[16] Ibid paras 11-13.
[17] Ibid para 70.

> *injuria* have justified a substantial award, and the award of punitive damages in the strict and narrow sense of the word.[18]

The significance of *Mogale v Seima*, then, is that it was the first time that this move away from punitive damages had been used as part of the ratio of a decision in the Supreme Court of Appeal. It is all the more significant because it happened in the context of defamation, an instance of delictual liability where previous statements by the courts could be interpreted as saying that punishment was playing a role.

The concern that South African courts and scholars have about not blurring the lines between civil and criminal proceedings is probably either based on concerns about the injustice of penalising people without ensuring that that appropriate procedural safeguards are in place, or it could be about the doctrinal untidiness that seems to result when different categories (compensation and punishment; civil and criminal) start to blur together. In *Fose v Minister of Safety and Security*, Ackermann J, for the majority of the Constitutional Court, expressed both types of concern, although he was probably most concerned about the question of safeguards, when he rejected the proposal to create a new category of punitive constitutional damages. He stated that 'I can see no reason at all for perpetuating an historical anomaly which fails to observe the *distinctive functions of the civil and the criminal law* and which sanctions the imposition of a penalty *without any of the safeguards afforded in a criminal prosecution*.'[19] PJ Visser was perhaps foregrounding the concern about doctrinal confusion when he stated that, due to its punitive nature, satisfaction conflicted with certain jurisprudential perspectives, such as there being a firm distinction between compensatory and punitive functions in the civil and criminal law ('in stryd met sekere dogmatiese beskouinge').[20]

How, then, should damages for hurt feelings be understood if they are to be viewed as purely compensatory? There is prima facie agreement on the following: damages that had previously been construed as punitive should now be viewed as aggravated damages that are aimed at compensating the plaintiff for feelings of outrage at having been disrespected. The Supreme Court of Appeal endorsed this perspective in *Mogale v Seima*, where they quoted Didcott J's statement in *Fose* that abhorrent behaviour 'was considered to have aggravated the actionable harm suffered, and consequently to have increased the compensation payable for it.'[21]

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[18] Ibid para 62.
[19] Ibid para 70. Emphasis added.
[20] Visser 'Genoegdoening' op cit note 7 at 489.
[21] *Fose* supra 15 para 80, quoted in *Mogale v Seima* supra 10 para 10.

South African scholars have largely supported this idea. Jonathan Burchell states the following:

> In essence, the controversy surrounding punitive damages is one of emphasis. The critics of punitive damages rightly stress that the court in a civil case must not make an award of damages (or a portion of the award) purely to penalize the defendant for his conduct or to attempt to deter people in future from doing what the defendant has done: punishment and deterrence are functions of the criminal law, not delict. But even the critics of "punitive" damages would, I think, accept that factors aggravating the defendant's conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as solatium. The emphasis must therefore be on compensating the plaintiff, not on making an example of the defendant.[22]

More recently, Johann Neethling has also considered whether the idea of satisfaction is compatible with the courts' increasing resistance to punitive damages.[23] He essentially endorses the above view of Burchell and the similar position taken by Van der Walt and Midgley.[24] The essence of this position is that so long as the courts are not allowing considerations of deterrence to motivate the quantum of the award, and so long as the focus is on compensating the victim, rather than on punishing the wrongdoer, then all is well: the distinct functions of the civil and criminal law can be maintained. Neethling, however, is reluctant to jettison every trace of punishment from satisfaction, given that he endorses PJ Visser's understanding of what satisfaction is, which is that it is essentially punitive.[25] This leads Neethling to view aggravated damages as including a 'disguised penal element that will still do justice to the true concept of satisfaction'.[26]

The basic idea espoused above seems essentially correct: damages for hurt feelings can be accommodated within a compensatory framework so long as the focus is on the plaintiff's losses rather than on deterrence or punishment per se. But Neethling's continued emphasis on punishment does highlight a potential source of theoretical disagreement among these scholars. For one can still ask what it means to say that aggravated damages compensate the plaintiff for his or her hurt feelings. In what way does a higher sum of money compensate the plaintiff for hurt feelings?

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[22] Jonathan M Burchell *The Law of Defamation in South Africa* (1985) 293.
[23] Johann Neethling 'The law of delict and punitive damages' (2008) 29 (2) *Obiter* 238.
[24] Ibid at 245-246. See JC van der Walt and JR Midgley *Principles of Delict* 3ed (2005) 217 [par 143].
[25] Neethling op cit note 23 at 245-246.
[26] Ibid at 246.

The general idea could be that damages for hurt feelings are an attempt to counterbalance the diminishment in the plaintiff's wellbeing. The unpleasant emotional experiences that one has experienced, whether they are merely frustration or a deep-seated anger at the insulting nature of the conduct, constitute diminishments in one's well-being that are addressed by a monetary award, probably in an attempt to provide pleasure that counterbalances the negative experiences that the defendant caused.

While the concept of well-being is controversial, there are few people who disagree with the claim that unpleasant subjective experiences, such as frustration and anger, are generally bad for one's well-being. As S. Andrew Schroeder puts it, 'on nearly any account of well-being, pain and distress generally reduce well-being'.[27] The key philosophical debates about pain and well-being are not about whether pain is bad, but about what makes it bad, whether it is always bad, and whether it is the only thing that should count as bad on one's theory of well-being.[28] And at least some of these discussions of pain also assume that things like 'heartache, bitter disappointment, loss, despair, depression, [and] hopelessness' count as 'pain',[29] which would allow the feelings falling under the legal category of 'hurt feelings' to be included as well.

In any event, it is prima facie plausible that feeling distress and outrage are generally unpleasant experiences that one would prefer to go without. Having caused them, one can sensibly be said to be under a moral duty to correct that diminishment in well-being by providing a benefit of some kind aimed at equalising the overall amount of well-being that the victim would have had but for the wrong. At this point, however, there might be theoretical disagreement, such as how damages do in fact counterbalance the diminishment in well-being.

In the case of mild hurt feelings, i.e., frustration and annoyance, the creation of well-being arguably comes from having the wrong recognised and addressed. Ronen Perry, for example, has argued that 'imposing liability on the aggressor symbolizes public recognition of the wrong - a social validation of the victim's personal sense of injustice', and that there is some reason to think that public recognition of a traumatic event can help facilitate the plaintiff's recovery.[30] Even if the wrong was not quite a 'traumatic event', it is possible that

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[27] S. Andrew Schroeder 'Health, disability and well-being' in Guy Fletcher (ed) *The Routledge Handbook of Philosophy of Well-Being* (2016) 223.
[28] Guy Kahane 'Pain, experience, and well-being' in Fletcher op cit note 27 at 208-209.
[29] Ibid 208.
[30] Ronen Perry 'Empowerment and Tort Law' (2009) 76 (4) *Tennessee Law Review* 959 at 987. Perry's position has been endorsed by other tort scholars: see Robyn Carroll and Normann Witzleb '"It's not just about the money": Enhancing the vindicatory effect of private law remedies' (2011) 37 *Monash University Law Review* 216 at 229-230. See, also, Bruce Feldthusen 'The civil action for sexual battery: therapeutic jurisprudence?' (1993) 25 *Ottawa*

such recognition and an attempt at redress may at least alleviate feelings of frustration and help one to move on by instilling a sense that justice has been done.[31]

If the wrong was particularly malicious or disrespectful, however, then it may be that only by extracting a significant amount of money from the defendant personally will the victim's feelings of outrage be assuaged. For this reason, the damages are increased in order to allow for this (aggravated damages). In this instance, the plaintiff is given the specific joy of seeing the person who insulted one being heavily penalised. As J.M. Kelly put it in the context of English tort law, 'the purpose of damages for non-pecuniary loss in the tort action is to put the plaintiff in possession of a sum of money *which in the court's judgment ought to be enough to satisfy his vindictive feelings against the wrongdoer*'.[32] This is perhaps also what Neethling has in mind when he states that satisfaction still requires the concept of punishment, that it is only by seeing the defendant punished (by having a suitably large quantum extracted) that the plaintiff's feelings will be assuaged, and the diminishment in the plaintiff's well-being subsequently undone by having the troubling feelings cease.

This view seems to require quite a dark view of human nature (which may or may not be warranted), and there is an alternative theoretical explanation. Here too one could adopt Perry's point about the therapeutic effects that a public validation of one's sense of justice might have, and that this could explain how well-being is being restored in contumelious cases. In other words, pleasure might be derived from the validation of one's sense of justice, rather than it just being about the vindictive pleasure of seeing the defendant having to pay a penalty.

IV THE RELATIONSHIP BETWEEN DAMAGES FOR HURT FEELINGS AND AN INCREASE IN THE RISK OF REPUTATIONAL HARM

The idea of hurt feelings is arguably of lesser importance than public vindication once has moved away from the idea of insult to the idea of mitigating the risk of reputational harm. Nevertheless, there is still scope for the idea that damages are for hurt feelings if one adopts the risk interpretation of defamation. For example, damages for annoyance and frustration might be appropriate for most cases where someone has increased the risk of reputational harm.

Law Review 203 for further discussion of the possible therapeutic effects of tort law, as well as scepticism about whether the advantages would really outweigh the costs.

[31] Kit Barker notes, in passing, that an argument could be made that 'declarations of right provide a degree of psychological relief for a victim […] (don't we all feel the better for being publicly affirmed?) […] The argument is then […] that it helps to reverse the effects of the wrong, where these effects take the form of harm done to a plaintiff's mental welfare, dignity or autonomy' (Kit Barker 'Private and public: The mixed concept of vindication in torts and private law' in Stephen GA Pitel, Jason W Neyers & Erika Chamberlain (eds) *Tort Law: Challenging Orthodoxy* (2013) at 73).

[32] JM Kelly 'The inner nature of the tort action' (1967) *Irish Jurist* (2) 279 at 287.

A defamatory publication is a vexatious thing to deal with, and if the courts can help to counterbalance that reduction in one's well-being by awarding damages for hurt feelings then that seems prima facie justifiable. The hurt feelings would be consequential damage that is also being addressed in the remedial process, alongside the attempt to protect the primary protected interest (reputation).

An important point, however, is that not every intentional increase in risk is necessarily contumelious or insulting. Whether it is contumelious is dependent on one's definition of 'intentional', the different approaches to which in South Africa were outlined in Chapter 5. Given the tendency to focus on insult and contumelia in South African defamation cases, however, it is worth elaborating on this point. Simply assuming the presence of insult and contumelia in circumstances which do not really connote insult and contumelia can confuse one's view about the nature of the wrong. It can lead one to view defamation as being primarily about insult, rather than reputation, for example.

Do all wrongs committed intentionally connote contumelia? In a discussion of the advantages and disadvantages of exemplary (punitive) damages in English tort law, Andrew Burrows raises the following concern:

> Even if one does confine exemplary damages to where a tortfeasor has acted in wanton and contumelious disregard of the plaintiff's rights, is it not true that a vast number of cases fall within that test? For surely the test is sufficiently wide to encompass every case of a tort committed intentionally or with a high degree of recklessness. And if that is correct, do we really want to shake up the present law in such a radical way as to render exemplary damages commonplace rather than exceptional?[33]

The force of Burrows' point is really felt in the context of English law, where exemplary damages are supposed to be exceptional, rather than commonplace. Yet it does raise an interesting question about the role of damages for hurt feelings in the South African *actio iniuriarum*, which generally requires intentional conduct. Does the fact that defamation requires intentional conduct automatically imply that damages for hurt feelings (in the sense of damages for contumelia or insult) are always appropriate? The answer depends on one's understanding of intention.

We saw in Chapter 5 that the definition of intention in the South African law of defamation is controversial. In particular, it is controversial whether intention requires

[33] Andrew Burrows 'Reforming exemplary damages: Expansion or abolition?' in Peter Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (1996) 167.

consciousness of the wrongfulness of one's actions. Whether it does require consciousness of wrongfulness also speaks directly to the appropriateness of damages for insult.

If acting intentionally simply means acting deliberately, as opposed to inadvertently causing something to happen, then one can act with intention even though one did not act in wanton or contumelious disregard of someone's rights. A journalist can deliberately defame someone in the belief that the defamatory assertion is true and in the public benefit, or that it was reasonable to publish the facts in the manner in which they were published. In neither case could such a person be said to be acting wantonly or contumeliously. Such a person might regret the fact that they are causing injury but still feel that the action is justified by a greater cause or public interest. This is intentional (deliberate) conduct that included foresight of injury but which is nevertheless devoid of contumelia or disrespect for the person being injured.

Acting deliberately with foresight of injury is not what some South African scholars have in mind when they speak about legal intention, however, as we have seen. Some scholars think that legal intention requires that one be conscious of the wrongfulness of one's actions.[34] If this were true, then it would probably not be possible to act intentionally without also acting in wanton disregard of someone's rights, or contumeliously. If one acted with foresight of injury and with knowledge that what one was doing was wrongful, then it would follow that one was acting in an insulting or disrespectful manner, disregarding the rights of the individual being injured. We saw in Chapter 5, however, that there is some reason, based on case law, to think that consciousness of wrongfulness is not always a requirement of intention in the law of defamation, which certainly leaves room for the position that not every intentional act necessarily implies insult or contumelia.

What this analysis does show is that we should not accept the proposition that every intentional delict would require damages for insult or contumelia without agreement on what legal intention means.

Depending on the definition of intention that the courts ultimately adopt, damages for hurt feelings need not necessarily be about insult or contumelia. Damages for mild hurt feelings for vexatious conduct might be appropriate even in cases where one has not been insulted or disrespected; merely defending an action for defamation will bring emotions that tend to diminish one's well-being. Whether damages for insult would also be appropriate would depend on the circumstances of the case and whether it could be said that the defendant had

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[34] See Chapter 5 for discussion of this view. Generally, see Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) *SALJ* 90 at 117-122 for references as well as criticism of this position.

indeed acted contumeliously. In either case, damages for hurt feelings are consistent with the risk-as-injury interpretation, for either kind of emotional distress could be caused, depending on whether the defendant acted contumeliously in publishing the assertion.

V THE DOCTRINAL PROBLEMS THAT CAN ARISE WHEN ONE FOCUSES EXCLUSIVELY ON HURT FEELINGS IN THE CONTEXT OF A RIGHT TO REPUTATION

It was noted above that the idea of hurt feelings is arguably of lesser importance than public vindication once one has moved away from the idea of insult to the idea of mitigating the risk of reputational harm. The case of *Media 24 v Taxi Securitisation*[35] presents an interesting case study for demonstrating the doctrinal knots that can develop when one focuses too heavily on hurt feelings in the context of a delict that is largely focused on protecting one's reputation.

The plaintiff in that case was a corporation that was claiming 'general damages' and 'special damages' for defamation. By 'special damages' the court seems to mean patrimonial loss *per se*, rather than provable and quantifiable patrimonial loss that is special to the plaintiff.[36] The majority then held that patrimonial loss suffered as a result of a defamatory statement needs to be regarded as an instance of pure economic loss that has to be recovered in terms of the lex Aquilia, rather than the law of defamation, which is an instance of the actio iniuriarum. As an instance of pure economic loss, wrongfulness will not be presumed, and instead the plaintiff will have to provide reasons in each case as to why the defendant's conduct should be regarded as wrongful (i.e. why there really has been a breach of a legal duty giving rise to liability).[37] The claim for general damages was also in dispute, however, for the defendants argued that the function of general damages under the actio iniuriarum is compensation for hurt feelings, and so corporations should not be able to recover general damages as they have no feelings to hurt; corporations should only be able to recover consequential economic loss using the lex Aquilia. This is an argument that has been popular in South Africa for some time,[38] but, as the court in *Media 24* notes, there is strong Appellate level authority that unequivocally grants corporations a right to claim damages for defamation

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[35] *Media 24 Ltd and others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and others as* Amici Curiae*)* 2011 (5) SA 329 (SCA).
[36] Ibid paras 7-8. On the way in which the terms general and special damages can become misleading see JA Jolowicz 'The changing use of "special damage" and its effect on the law' *Cambridge Law Journal* 18 2 (1960) 214. For the same perspective in a South African context, see MM Corbett & JJ Gauntlett *The Quantum of Damages in Bodily and Fatal Injury Cases. Vol 1. General Principles* 4ed (1995).
[37] *Media 24 v SA Taxi Securitisation* supra note 35 paras 8 - 11.
[38] Ibid para 41.

using the actio iniuriarum. The court found, ultimately, that there were no good reasons for overturning the established precedent that had been set allowing corporations a right to sue for general damages, especially in light of the fact that corporations do have an interest in their reputation that deserves protection, and that our legal system would be failing to perform a key function if it recognised an interest worthy of protection but did not grant a remedy if that interest was attacked.[39] In arriving at this conclusion, however, the court seemed unable clearly to articulate the function of general damages for defamation in a case such as this (i.e. involving a corporation). On the one hand, the court relies on the premise that damages for defamation are essentially about compensation for hurt feelings when it banishes the recovery of economic loss to the lex Aquilia. The court states that 'the rule of our law, in principle, is that patrimonial damages must be claimed under the actio legis Aquiliae, while the actio iniuriarum and its derivative actions, including the action for defamation, are only available for sentimental damages.'[40] While the court does not explain what it means by 'sentimental damages', the standard interpretation of that term is compensation for hurt feelings.[41] On the other hand, the court also rejects the idea that damages are just compensation for hurt feelings. After quoting Schreiner JA's statement about how the modern law has moved away from its Roman ancestor, the Court states that 'though traditionally the function of the actio iniuriarum was to provide a solatium or solace money for injured feelings, the position has become more nuanced in modern law. A natural person is not required to show sentimental loss. He or she will receive damages for defamation even in the absence of injured feelings'.[42] Later in the judgment, however, the court then states that it is 'mindful of the criticism based on mathematical logic, that an award of damages for defamation to a corporation is inappropriate, because it cannot serve to compensate the wounded feelings of an entity which has none'.[43] The court clearly wants to allow corporations the right to sue for damages to protect their reputations using the actio iniuriarum, as an alternative to them only being allowed to sue for provable financial losses using the lex Aquilia, but it is unable to articulate what the function of these damages is and how they might relate to the damages recovered by a natural person for defamation. In short, while the court is certain that it wants corporations to be allowed to sue for defamation, it is not certain about how best to understand the damages being recovered.

[39] Ibid paras 39, 53-55.
[40] Ibid para 8.
[41] Jonathan M Burchell *The Law of Defamation in South Africa* (1985) 46.
[42] *Media 24 v SA Taxi Securitisation* supra note 35 para 38.
[43] Ibid para 53.

The fact that the damages cannot be understood to be about the recovery of financial losses, as these need to be recovered under the lex Aquilia, further complicates any possible explanation. It is not about hurt feelings and it is not about financial loss, yet these are the two things that damages are typically understood to be addressing: Andrew Burrows, for example, claims that 'ultimately all non-pecuniary loss is concerned with the claimant's distress or loss of happiness'.[44] Eric Descheemaeker takes up Burrows' point, arguing that the 'harms (injuries, detriment)' that flow from wrongs are either pecuniary or non-pecuniary, and that all non-pecuniary losses 'are reducible, in the final analysis, to mental distress in the widest sense of the term: emotional or sentimental harm [...] Injuries that flow from the wrong are either to the claimant's wallet or to the claimant's mind.'[45] The damages awarded in *Media 24* seem to be a direct challenge to this idea, for they are not about hurt feelings or financial loss. At the same time, however, the court is unable to articulate what the function of these damages is supposed to be. The concept of damages for public vindication in the previous chapter provide the solution. Once the courts accept the idea that defamation is primarily about one's reputation, then the typical function of damages should be to vindicate that reputation. That would make sense even in the context of corporations. Damages for hurt feelings could then be used where necessary in cases involving natural persons.

VI WHETHER DAMAGES FOR RISK ARE BETTER EXPLAINED USING THE CONCEPT OF SUBSTITUTIVE DAMAGES

In the previous chapter, the rights movement in tort was outlined, and it was noted that one of the major contributions of that movement has been to reconceptualise the function of damages. It was also noted that one of the important concepts that has arisen from that movement, namely, the idea of vindicating rights, does not present a superior alternative to the orthodox understandings of damages. One might wonder, however, whether another important theoretical development, namely, the concept of substitutive damages, might present a better explanation of the function of damages for defamation than the orthodox accounts discussed here, especially if the harm is being construed as an increase in the risk of harm. After all, the substitutive damages thesis rejects the idea that all damages are compensation for a loss of some kind. Instead, damages are awarded as a substitute for the infringed right. One might argue that if one reconceptualises a wrong as being about an increase in the risk of harm, rather than the causing of harm, then perhaps something like substitutive damages best explains the

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[44] Andrew Burrows *Remedies for Torts and Breach of Contract* 3ed (2004) 31.
[45] Eric Descheemaeker 'Unravelling harms in tort law' (2016) *Law Quarterly Review* 595 at 597.

function of damages. Particularly as merely increasing the risk of harm does not necessarily mean that there has been any consequential loss. So, perhaps a theory of damages that does not rely on the idea of compensation for loss is a superior explanation of the function of damages in those circumstances. There are reasons to doubt that Stevens' account is preferable to the orthodox accounts defended in this chapter and the previous chapter, however.

Andrew Burrows explains the novelty of Stevens' thesis well: Burrows notes that the term 'compensatory damages' is quite new, because the 'traditional starting assumption was that all damages, with a few minor exceptions, aim to compensate loss'.[46] According to Burrows, Stevens' thesis rejects this assumption, and Stevens instead claims that 'the basic award of damages in all cases of tort and breach of contract is non-compensatory.'[47] Instead, 'the basic award of damages is to provide a substitute for, and hence to vindicate, the right that has been infringed. They are substitutive damages. They are concerned to value the right infringed and will be assessed, if there is no ready market value, by the methodology of constructing a reasonable hypothetical bargain between the parties. It is irrelevant to these damages whether a claimant has suffered any loss although, where it has, consequential compensatory damages can be added'.[48]

Stevens' approach is novel, then, because instead of viewing damages as essentially compensatory, damages are instead seen as essentially non-compensatory. Rather than compensating one for loss, the primary function of damages is to provide a substitute for the right that has been infringed, and this is done by assigning a value to the right and providing damages in proportion to that value. In *Torts and Rights*, Stevens outlines the difference between substitutive damages and consequential damages in the following way:

> In the assessment of damages it is necessary to distinguish between damages awarded as a substitute for the right infringed and consequential damages as compensation for loss to the claimant, or gain to the defendant, consequent upon this infringement. Damages which are substitutive for the right which has been infringed are assessed objectively, save where the infringement is particularly egregious. The time for the assessment of the value of the right is the moment of infringement. The cause of action accrues at that point. Damages are awarded even if there is no loss to the claimant or gain to the defendant consequent upon the infringement of the right. All loss consequential upon the infringement of the right, generally economic loss, is also prima facie recoverable. Such loss is specific or special to the claimant and must be proven. It is not objectively assessed. Such loss may be, and generally is, suffered after the infringement of the right and is assessed at the time of judgment. Consequential loss is

[46] Andrew Burrows 'Damages and Rights' in Donal Nolan & Andrew Robertson (eds) *Rights and Private Law* (2011) at 277.
[47] Ibid.
[48] Ibid 277

> subject to limitations which do not apply to the substitutive award. For example, consequential loss which is too remote is not recoverable.[49]

Substitutive damages are a substitute for the right and as such they are quantified by assessing the value of the right. But how can a right be valued? Stevens acknowledges that this is easier to answer when the right pertains to something that actually has a market value, such as a right in relation to property that has been damaged, with the property itself having a market value. He notes the following:

> The distinction between damages which are awarded as a substitute for the right and those awarded to compensate for consequential loss can be obscured because in most cases the value attached to the right is precisely the same as the loss suffered, usually financial, by the claimant. If you smash someone else's car the value of the right is the economic cost of fixing it. Where substitutive damages are recoverable and result in full compensation of loss, no further award should be made. The claimant cannot recover twice, although consequential losses over and above the value of the right infringed are recoverable, for example a taxi driver's loss of earnings while his damaged car is being repaired. However, it is a mistake to think that where no loss is suffered no claim for damages is available.[50]

In some ways it seems too quick to tie the value of a right to the value of the underlying asset. The value that should be ascribed to property rights could be much higher than the value of the underlying asset in any one instance. Property rights might be valued for the freedom that they bring, rather than because they protect something that happens to have a particular market value. But it does make sense to look at the underlying asset and its market value if one is actually concerned about the loss that has been caused. In response to this sort of concern, Stevens has pointed out that what is being quantified or valued is not the full right in and of itself, but the value (or the cost) of the *infringement*. Therefore, if your property has been damaged in a minor way, you are not entitled to the full value of the property.[51] You are only awarded the value of the right to the extent of the right's infringement. This does not avoid the objection that non-property rights, like the right to reputation, do not seem capable of being valued in any meaningful way, at least not if one is referring to the right's market value. The very idea of a market value makes little sense. Ultimately, Stevens' point above about valuing the infringement of the right rather than the full right does not seem like an adequate answer to the general objection that 'the Stevens approach falls down in imagining that we sensibly can,

[49] Robert Stevens *Torts and Rights* (2007) 60.
[50] Ibid at 61.
[51] Robert Stevens 'Rights and other things' in Nolan & Robertson op cit note 46 at 126-127.

or would want to, put a value on the right that has been infringed rather than the consequential impact of the infringement.'[52]

VII CONCLUSION

As the risk interpretation is being proposed as an alternative interpretation of the existing practices, it is important that it is compatible with the existing remedial responses. This chapter has focused on the compatibility of the risk interpretation with the idea that damages compensate for hurt feelings.

The position taken here is that damages can help to counterbalance any reduction in wellbeing that has been felt as a result of the emotional turmoil caused by the publication. This turmoil could be in the form of annoyance at having to take action to defend oneself against a defamatory assertion. Or, if the conduct was also contumelious, the turmoil could relate to having been insulted or disrespected. Defamatory assertions that increase the risk of reputational harm can cause these kinds of unpleasant emotions, and, therefore, the risk interpretation is compatible with this orthodox understanding of damages.

In this chapter and the previous chapter, it was also noted that the orthodox understandings of damages remain preferable to the new accounts of damages that are being developed in Anglo-American tort theory, even though defamation is the sort of wrong that might, at first, seem to lend itself to ideas of (strong) vindicatory damages and substitutive damages.

[52] Burrows op cit note 46 at 280; See also J Edelman 'The meaning of loss and enrichment' in R Chambers, C Mitchell & J Penner (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (2009) at 219.

CHAPTER 9: CONCLUSION

This thesis has attempted to shed new light on the law of defamation by presenting an alternative interpretation of the current practice. It began by noting the lingering controversies surrounding the nature of the wrong, the fault standard, and the function of damages. As a step towards developing the alternative interpretation, it was argued that reputation can be understood as 'a social judgement of the person based upon facts which are considered relevant by a community'. These judgements often relate to one's moral character. But, in some cases, defamatory assertions relate to other personal attributes, such as professional skill or competence, that are not necessarily a concern about one's moral character. Finally, in some cases defamatory assertions relate to claims about one's creditworthiness in particular.

Reputation deserves protection because, like property and bodily integrity, it is a welfare interest: it is the sort of thing that enables people to live a flourishing life. More specifically, reputation has both internal benefits (like allowing one to maintain a sense of self, and self-esteem) and external benefits (like the pursuit of relationships that have commercial and non-commercial benefits).

It has been controversial, however, whether the South African law of defamation does protect one's reputation, rather than one's right to be free from insult. There are reasons to think that it in fact protects one's reputation, such as the many references to a right to reputation in the case law, the requirement of publication, the fact that hurt feelings are not essential for liability, and the existence of alternative explanations for the link that is frequently drawn between reputation and dignity. The most descriptively accurate account of the South African law of defamation appears to be that it protects one's reputation as an interest in and of itself.

Even if one accepts the value of reputation and that it is an interest worth protecting, however, one might still wonder about the manner in which it is being protected, and the way in which that protection is justified by the state.

The orthodox interpretation of the law of defamation is that it involves the causing of reputational harm. The problem with the orthodox approach is that even though causing harm to someone's reputation would justifiably be a delict, the current practice does not require enough in the way of evidence to support the plaintiff's position that such an injury has materialised. The lack of evidence that an injury has been committed calls the practice into question, for its justifiability as an exercise of state power is questionable. This can be

contrasted with Aquilian delicts that do require proof of physical harm to a protected interest and/or proof of patrimonial loss, both of which go some way to establishing that the quality or utility of a protected interest has in fact been diminished on a balance of probabilities.

One could attempt to bring defamation law in line with the apparently more justifiable Aquilian practices by requiring the plaintiff to tender more substantial proof of harm. An alternative approach to the problem would be to reconceptualise the injury such that the current practice, and the evidence that currently gets tendered, does amount to a justifiable exercise of state power. In the case of defamation, it was argued that this kind of alternative justification can be provided, by conceptualising the injury as a probable increase in the risk of reputational harm, rather than the probable causing of reputational harm. The challenge with this approach is that imposing liability for merely increasing the risk of harm is highly contentious. One might wonder, in this case, whether imposing liability for risk is, in fact, a justifiable instance of state power, even if the evidence that gets tendered is sufficient to prove that the defendant probably did cause an increase in the risk of reputational harm.

In order to show that liability for risk is justifiable in the case of defamation, the thesis elaborated on the concept of risk and the various ways in which it might feature in the law of delict. Risk was defined as a concern about the possibility that an unwelcome event will materialise in the future; it is a product both of the magnitude of the possible harm and the probability of that harm occurring. In the context of the law of delict, this concept is typically used to either justify or limit liability, but it can do this in various ways. An uncontroversial application of the concept is in relation to fault, where foresight of the risk of harm is used to determine whether the defendant's conduct was culpable. Risk could also be used, more controversially, as a way to hold someone liable simply for having increased the risk of harm occurring, even in the absence of a finding that the risky conduct caused some other, more tangible harm. This application has been used and understood in various ways in the English tort of negligence, either as a way of relaxing the requirement of causation or as a new way to understand the harm for which one is being compensated. It appears, however, that even though the courts sometimes understood themselves to be construing the increase in risk as the injury, there is reason to doubt that they actually were relying on the idea of risk-as-injury. Nevertheless, the consideration of those cases presented more general reasons for thinking that risk-as-injury is a bad idea in the law of negligence. If one takes a consequentialist approach, then one can see that imposing liability for mere risk in the context of a transversal tort like

negligence would err too far on the side of security and impose too high a cost on freedom of action (and negatively affect related matters, like the costs of insurance and litigation).

However, understanding why risk-as-injury is problematic in the context of negligence provided a foundation to assess its applicability in the context of defamation. It was argued that the risk-as-injury interpretation is a more justifiable interpretation of the law of defamation than the causation-of-reputational-harm interpretation. The overall argument took the following form:

According to the current rules, the plaintiff needs to produce slender evidence in order to establish her claim. When one compares this to the nature of Aquilian liability, where the protected interests allow for a ready observance of damage, alongside a requirement of patrimonial loss that helps to establish that damage, the unsatisfactory nature of the requirements for defamation becomes clear. A major reason for the difficulty in establishing damage is that it is hard to track the causal impact of defamatory publications. Nevertheless, one's reputation matters and deserves protection, and, rather than just declaring the law of defamation unjustifiable, one can attempt to amend or justify the current practice in some way. For example, one can amend the practice by requiring the plaintiff to tender better evidence that reputational harm was caused, or one can justify the practice in an alternative way. Given the difficulty in tracking the causal impact of statements, this thesis took the approach of justifying the current rules in another way. Rather than seeing the elements of liability as an attempt to establish causation of reputational harm, one can view them as an attempt to establish causation of an increase in the risk of reputational harm. By publishing a defamatory assertion, the defendant probably has increased the risk of reputational harm, even if it is less clear that the defendant has caused reputational harm.

As noted in the context of negligence, viewing risk-as-injury is controversial and arguably unjustifiable in the case of some delicts. But the objections that apply to the concept of risk-as-injury in other contexts do not apply as strongly to defamation. This makes the imposition of liability for risk less controversial than it usually is. First, defamation is a vertical tort, rather than a transversal tort: it protects a particular interest from very particular types of conduct. This limits the scope of conduct that can attract liability. Given the value that reputation has, and the need to protect it, imposing liability for risk in these limited circumstances would not unduly limit freedom of action. Second, defamation in South Africa has a non-negligible fault standard, which also helps to limit the scope of liability. The fault

standard always requires some kind of foresight of harm (either actual foresight, in the case of intention, or foresight by a reasonable person, in the case of negligence). This further helps to limit the scope of actionable conduct and makes risk-as-injury more justifiable in South Africa than it might be in other jurisdictions or contexts, once one also takes the value of reputation into account.

The justification of the rules matters because the law of defamation is an instance of force being applied by the State. The judgment will typically require the payment of money in the form of damages, which is a sanction or hardship imposed by the state. Second, court orders are backed up with a threat of criminal proceedings should the order be ignored. In a culture of justification, rules that are enforced with the might of the State need to be convincing. While it is not convincing that findings of probable causation of harm are justified, findings of a probable increase in a risk of reputational harm would be convincing. Moreover, given the value of reputation, and given the ways in which usual objections against imposing liability for risk do not apply in the case of defamation, the risk-as-injury interpretation of the law of defamation appears to be preferable. The view taken here, then, is that the risk interpretation, all things considered, is more justifiable than the causation-of-reputational-harm interpretation.

Given that the risk-as-injury interpretation is being presented as an alternative way of justifying the current practice, it is important that that interpretation fits with the outward appearance and structure of that practice. Defamation law is constituted by legal rules and presumptions, defences, and remedies, and the risk-as-injury interpretation would need to be consistent with these if it hopes to be regarded as a way of justifying these practices. The thesis began the demonstration of compatibility by showing that the current way in which the presumptions and defences of defamation law are understood is consistent with the risk-as-injury interpretation.

The respective burdens of plaintiffs and defendants are currently justified by referring to the way in which defamatory conduct is usually unjustified, and that the defendant is best placed to prove factual circumstances that might justify or excuse the conduct. These reasons still hold when assuming the risk-as-injury interpretation. The overall fairness of the law is also influenced by other considerations, such as the various defences that are available to the defendant, and how these relate both to fairness *inter partes* and personal and public constitutional considerations. These, too, seem consistent with the risk-as-injury interpretation. First, if the defences could justify the behaviour of a defendant who had actually caused

reputational harm by making an assertion, then they would certainly justify the behaviour of a defendant who had merely increased the risk of reputational harm by making an assertion. Second, this shift in the gravity of the infringement of the right to reputation (merely increasing risk versus causing harm) does not seem to require a change in the respective burdens of the plaintiff and the defendant. It remains the case that reputation needs to be protected, and it remains the case that the causal impact of defamatory assertions can be hard to trace. Moreover, the defendant has also made the decision to publish the defamatory assertion. These considerations, along with the fact that the defendant is best placed to justify or excuse his own behaviour, suggest that the current burdens of proof that are placed on the defendant remain sound, even when the defendant has merely increased the risk of reputational harm, rather than having caused reputational harm.

The next step in the demonstration of compatibility was to show that the risk interpretation is consistent with the current remedial response, namely, damages. It was shown that damages for defamation are generally interpreted by the South African courts as serving two purposes. First, they act as compensation for the damage to the plaintiff's reputation by serving as a public vindication of the plaintiff's reputation. The role of declaratory judgments in this respect should also not be overlooked. Second, they act as compensation for hurt feelings.

Damages that aim at publicly vindicating the plaintiff's reputation can help to mitigate the chances that the threatened damage to the plaintiff's reputation will materialise, for the plaintiff can wield the vindicatory assertions in his or her community to help prevent people from resolving to think less of the plaintiff. The vindicatory assertions could reach potentially important members of the community through the press, or the plaintiff can wield the judgment herself, should she suspect that someone is apt to think less of her as a result of the defamatory publication.

As far as damages for hurt feelings is concerned, it was shown that damages can help to counterbalance any reduction in wellbeing that has been felt as a result of the emotional turmoil caused by the publication. This turmoil could be in the form of annoyance at having to take action to defend oneself against a defamatory assertion. Or, if the conduct was also contumelious, the turmoil could relate to having been insulted or disrespected. Defamatory assertions that increase the risk of reputational harm can cause these kinds of unpleasant emotions, and, therefore, the risk interpretation is compatible with this orthodox understanding

of damages. It was also noted that the orthodox understandings of damages remain preferable to the new accounts of damages that are being developed in Anglo-American tort theory, even though defamation is the sort of wrong that might, at first, seem to lend itself to ideas of (strong) vindicatory damages and substitutive damages.

Even if the risk interpretation is not accepted wholesale, it is also hoped that the light shed on various aspects of the law of defamation in this thesis will provoke further scholarly investigation and shed some light on current controversies.

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