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THE LAW OF DEFAMATION – A COMPARISON BETWEEN THE SOUTH AFRICAN, THE CANADIAN AND THE GERMAN LEGAL SYSTEMS

by

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BIBLIOGRAPHY

Chittharanjan Felix Amerasinghe *'Defamation and other aspects of the Actio Injuriarum in Roman – Dutch Law (in Ceylon & South Africa)'*, Colombo 1968

Jonathan M. Burchell *'The Law of Defamation in South Africa'*, Cape Town – Wetton – Johannesburg 1985

Jonathan M. Burchell *'Personality rights and freedom of expression – The modern Actio Injuriarum'*, Juta & Co. Ltd. 1998

Jonathan M. Burchell *'The Fault Element in the Law of Defamation'*, SALJ, Vol.95, 1978 p.170

Raymond E. Brown *'The Law of Defamation in Canada'*, Vol. I and II, Toronto – Calgary – Vancouver 1987

Walter Ermann *'Handkommentar zum Buergerlichen Gesetzbuch'*, 1. Band par. 1-853 BGB, 7th edition, Muenster 1981

Otto-Friedrich Frhr. von Gamm *'Persoenlichkeitsschutz und Massenmedien'*, NJW 1979 p.513

John Grogan, J.R. Midgley *'Corporate Reputation and Title to Sue'*, SALJ, Vol.106, 1989 p.587

P.R. Handford *'Moral Damages in Germany'*, ICLQ, Vol.27, 1978 p.849

W.A. Joubert, LTC Harms, RGT Wessels *'The Law of South Africa'*, Vol.7: Defamation, Durban 1995

Lewis Klar *'Studies in Canadian Tort Law'*, Chapter 9: Decorum in Defamation, Toronto 1977

Louis Kok *'The Elements of Iniuria'*, SALJ, Vol.102, 1985 p.388

Allen M. Linden *'Canadian Tort Law'*, Chapter 19: Defamation, Toronto 1982

PR MacMillan *'Animus injuriandi and privilege'*, SALJ, Vol.92, 1975 p.144

B.S. Markesinis *'A Comparative Introduction to the German Law of Torts'*, 3rd edition, Oxford 1994

'Muenchener Kommentar zum Buergerlichen Gesetzbuch' Band 1: Allgemeiner Teil par. 1-240, 2nd edition, Muenchen 1984

J. Neethling, JM Potgeier, PJ Visser *'Law of Delict'* 2nd edition, Durban 1994

Palandt *'Buergerliches Gesetzbuch'*, 58th edition, Muenchen 1999

Robert M. Solomon, Bruce P. Feldthusen, Stephen G. Mills *'Cases and Materials on the Law of Torts'*, Chapter 28: Defamation, Toronto 1982

J. von Staudinger *'Kommentar zum Buergerlichen Gesetzbuch mit Einfuehrungsgesetz und Nebengesetzen'*, 1.Buch Allgemeiner Teil par. 1-12, 13th edition, Berlin 1995

S.M. Waddams *'The Law of Defamation'*, Chapter 4: Loss of Reputation, Toronto 1983

Jeremy S. Williams *'The Law of Defamation in Canada'*, Toronto 1976

1.0 INTRODUCTION

"The law of defamation aims at the protection of a person's reputation." This definition was found in the Canadian, the South African as well as in the German law.[1] However, the question that arises is whether the law of defamation only protects the reputation and the good name of a person. Defamation can affect an individual's personality with all its aspects such as reputation, dignity or privacy. One can think of a broad range of possible violations.

Due to the broad concept of the law of defamation, this article can only focus on the civil law of defamation and will analyse some specific legal problems that arise in all of the aforementioned legal systems. Therefore, the thesis begins with an analysis of the ambit of the law of defamation in the three different legal systems and examines the similarities and the differences. The second chapter deals with the problem of the title to sue in a defamation action. Not only living persons can be the target of defamatory words and conduct but also deceased person as well as legal entities. What parties have a right to sue for compensation in the aforementioned legal systems will be analysed. The third chapter illustrates under which circumstances a person will be held liable in a defamation action. Here, some major differences between the three legal systems are presented. In the fourth chapter the criteria of defamatory words and conduct, which are required in the Canadian, the South African and the German law, are examined and it is demonstrated how the different legal systems deal with the difficult problem of defining a defamatory action. After examining the different criteria for a successful action of defamation, the article goes on to compare the different defences that a defendant can raise under the three different legal systems. Eventually, the issue of compensation in an action for defamation arises. Therefore, the last chapter analyses what kind of damages the plaintiff can claim in an action for defamation and makes clear that major differences exist between the three legal systems.

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[1] Burchell 'The Law of Defamation in South Africa' (1985) p.1; Brown 'The Law of Defamation in Canada' Vol.1 (1987) p.9; Thomas in Palandt 'Buergerliches Gesetzbuch' 58th edition (1999) par.823 p.178

2.0 THE PURPOSE AND THE SCOPE OF THE LAW OF DEFAMATION

2.1 The protection of the reputation under Canadian and South African law

In both the South African and the Canadian legal systems, the law of defamation seeks to protect an individual's right to an unimpaired reputation or good name.[2] The individual's reputation is the one that the person actually enjoys not that which he deserves. It reflects the estimation which the person has in the eyes of the society. Thus, an impairment of reputation constitutes a lowering of the individual's position in the estimation of others.[3]

In both the Canadian and the South African legal system the law of defamation is regarded as a part of the law of delict.[4]

Under South African law the reputation of a person is protected under the framework of the actio iniuriarum which applies to non-patrimonial loss.[5] The actio injuriarum under South African law is a general remedy for violations of personality rights. It covers the three fields of impairments of reputation, which are the law of defamation, the impairment of dignity including invasions of privacy and unlawful arrest and the impairment of person.[6] Under South African law the term "dignity" is defined as "self-esteem." Its protection is guaranteed by s 10 of the South African Bill of Rights, which states that "everyone has inherent dignity and the right to have their dignity respected and protected." Reputation, as opposed to dignity, connotes the estimation of others.[7] The law of defamation is only aiming at the protection of the reputation of a person. It does not cover the protection of a person's dignity, including violations of privacy because the latter is a different branch of the actio injuriarum. Although both notions are clearly distinguished in their definition, South African courts sometimes do not draw a clear distinction. In *Buthelezi v. South African Broadcasting Corporation,* for instance, the court raised the question "why an invasion of a

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[2] Burchell 'Defamation' supra p.1; Brown supra p.9;
[3] Burchell 'Defamation' supra p.18
[4] Kinghorn in Joubert/Harms/Wessel 'The Law of South Africa' Vol.7 'Defamation' (1995) p.225; Brown supra p.6
[5] Burchell 'Defamation' supra p.18; Kinghorn supra p.225
[6] Burchell 'Personality rights and freedom of expression – The modern Actio Injuriarum' (1998) p.133
[7] Burchell 'Personality rights' p.329

person's right to dignity and reputation should be treated differently because both rights are one of the individual's fundamental rights."[8] In *Holomisa v. Argus Newspapers Ltd.*, Judge Cameron defined the notion of "reputation" as "integral to the essential dignity and worth of every human being."[9] He continued to state that the right of dignity must include the right to a good name and reputation.[10] The Supreme Court of Appeal in *National Media Ltd. v. Bogoshi* confirmed this judgment by stating that the right to dignity encompasses the right to a good name and also the right to a good reputation.[11] These decisions show that both rights are closely related to each other. A clear distinction between dignity on the one hand and reputation on the other is difficult to draw.

In the Canadian law, as with the South African law, the law of defamation encompasses both the protection of a person's reputation and the protection of his good name. The right of dignity and the right of privacy are protected by related torts, although the law of defamation sometimes overlaps with the invasion of privacy or dignity at various points.[12]

2.2 The "general right of personality" under German law

In the German law the distinction between a person's reputation, on the one hand, and his dignity or privacy, on the other hand, is not clearly drawn. The reputation and the good name of a person are protected by par. 823 of the German Civil Code (BGB), subsection 1, which covers the general right to one's personality as an "other right."[13] Par. 823 BGB, subsection 1, states that

> "a person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or **any other right** of another is bound to compensate him for any damages arising therefrom".[14]

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[8] *Buthelezi v. South African Broadcasting Corporation* (1998) 1 B All SA p.147 at p.156
[9] *Holomisa v. Argus Newspapers Ltd.* (1996) (2) SA p.588 at p.611
[10] *Holomisa v. Argus Newspapers Ltd.* supra p.607
[11] *National Media Ltd. v. Bogoshi* (1998) (4) SA (SCA) p.1196 at p.1216
[12] Williams 'The Law of Defamation in Canada' (1976) p.28
[13] Schwerdtner in 'Muenchener Kommentar zum BGB' Band 1 Allgemeiner Teil par. 12 Rz.164
[14] Par.323, subsection 1, German Civil Code

The right to one's own personality protected under par. 823 of the BGB was first introduced by the BGH in the *Letters from readers* case in 1954.[15] In this case the defendant company published an article in its weekly journal in 1952. The article concerned the establishment of a new bank called "Bank for Foreign Trade" founded by Mr. Schacht who had been Economics Minister under the Nazi regime during the Second World War. In order to challenge these allegations the plaintiff, the attorney of Schacht who acted on his behalf, sent a letter to the publisher in which he claimed that the allegations made in the article were incorrect and needed to be corrected. The defendant, instead of issuing a correction, published the letter of the attorney along with other letters on the same issue in the following edition under the heading "Letters from Readers".[16] This publication made it appear that the attorney had taken a personal stand in the matter. Schacht's lawyer argued that the publication of the letter in the journal violated his right of personality. He wrote the letter in his capacity as an attorney and the letter was not meant to be published, particularly not in the context in which it was. The court acknowledged a general right to "free development of the personality" under par. 823 of the BGB as a right to be universally respected. This means that the general right of personality functions as an absolute right which can be asserted against everyone and which can be violated by everyone. The Court pointed out that this right flowed from the German Basic Law, particularly from art. 1 and art. 2, subsection 1. [17] Art. 1, subsection 1, provides that the "dignity of man is inviolable. To respect and protect it shall be the duty of all public authority." Art. 2, subsection 1, states that "everybody has the right to self-fulfilment in so far as they do not violate the rights of others or offend against the constitutional order or morality." Art. 1, subsection 1, declares that "the following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law." All of these provisions have an impact on the interpretation of the civil law and create the right to one's own personality protected under the term "other right" in par. 823, subsection 1 BGB. From this right the court follows that the plaintiff is entitled to decide whether his letter is made public. In publishing the letter under the rubric "Letters of the Readers" the readers are able to draw conclusions about the plaintiff's

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[15] BGHZ 13, 334, 338
[16] BGHZ 13, 334, 341
[17] BGHZ 13, 334, 339; Markesinis 'A Comparative Introduction to the German Law of Torts' 3rd edition (1994) p.59

personality. The unauthorised publication does not only constitute an infringement of the plaintiff's right of secrecy, it also leads to a violation of the author's protected right of personality. This is because the publication of the letter, without the author's consent, may spread a false picture of his personality.[18] Consequently, the court ordered the defendant to correct the misleading impression which was created in publishing the letter of the plaintiff under the rubric "Letters from the Readers."

However, the right to one's own personality is not exclusively protected by the provision of par. 823, subsection 1 of the BGB. Other provisions also cover special aspects of the human personality. Par. 12 of the BGB, for instance, protects the human name. The provision of par. 824 of the BGB can give rise to a civil action against a person who publishes wrong facts which calculate to endanger the credit of another person and which the publisher knows or should know are false. Under par. 826 BGB a person who wilfully causes damages to another person in a "manner contra bonos mores" has to pay compensation. Par. 12 to 14 of the Copyright Act (Urhebergesetz) provides protection for the dignity and the personality of an author. Par. 22 ff. of the Act on Artistic Creations (Kunsturhebergesetz) prohibits the publication of a person's picture without his consent unless he is a public figure. Finally, the crime of insult or slander according to par. 185 of the German Criminal Code can be used in combination with par. 823, subsection 2, BGB to claim damages in an action for defamation. Due to the fact that all of these aforementioned statutes protect special aspects of the human personality, these provisions are called "special personality rights" ("besondere Persoenlichkeitsrechte"). These provisions have to be distinguished from the general personality right pursuant to par. 823 BGB that covers all general aspects of the human personality and dignity and have held primary consideration in a defamation case.

2.3 Comparative Conclusion

The comparison between the South African law on the one hand and the German law on the other demonstrates that the scope of the law of defamation under the German law is broader. The general right to one's personality according to par. 823 of the

[18] BGHZ 13, 334, 339-341

BGB not only comprises the protection of the reputation and the good name as in the Canadian and the South African legal systems, it also protects a person's dignity and honour and guarantees a general right of privacy. Thus, the German law of defamation focuses on the protection of an individual's personality with all of the aspects inherent to a human being's personality such as honour, dignity and privacy. In contrast, the law of defamation in both the Canadian and the South African legal systems only aims at the protection of the reputation leaving other aspects of a human's personality such as dignity to be protected by related torts as in the Canadian system. This narrow approach might cause difficulties because it is sometimes difficult to distinguish dignity, for instance, from the reputation of a person. It frequently occurs that in a defamation action a person's dignity is also affected in a case where his reputation is harmed. The fact that various aspects of the human personality are closely related to each other was recognised by the South African Supreme Court in the case of *National Media v. Ltd v. Bogoshi.* In this case the court decided that dignity encompass the reputation of a person. This approach comes close to the German law and should be followed. Personality, like privacy, is a vague, elusive, essentially non-legal concept that covers any human aspect. Its various elements are difficult to separate. The best protection can only be guaranteed if the legal system understands this broad concept and tries to provide a system of protection that covers the human's personality with all its aspects.

3.0 TITLE TO SUE

After having examined the ambit of the law of defamation under the three different legal systems, a question arises as to who has a title to sue for damages in a defamation action. A defamatory statement may concern an individual as well as a legal entity. With regard to individuals the defamatory statement may affect a living person as well as a deceased person. This chapter analyses the ways in which the Canadian, the South African and the German legal systems recognise a title to sue for all of the aforementioned persons and entities.

3.1 Defamation of individuals

In Canada, natural persons have a title to sue in an action for defamation. Because defamation is regarded as being of a personal nature, the Canadian law only recognises a title to sue for living people.[19] Thus, it is not actionable when a person publishes a defamatory statement about a deceased person. However, this rule does not apply if the imputation against the deceased person reflects upon the living.[20] This is the case, for instance, if someone insults the deceased as a "whore" which may amount to a defamation of the family of the deceased.

Defamatory statements directed towards a class of persons may amount to defamation of a particular individual only if the words can be reasonably understood to single this individual person out.[21]

As with the Canadian legal system, the South African legal system recognises the right for all natural persons to sue in their own capacity for impairment of their reputations.[22] In the case of a "group defamation", the plaintiff similarly has to show that the words concerned him personally. The action of the plaintiff will only be successful if he can prove that the statement which is related to a group of which he is a member concerns in fact him personally.[23]

With regard to defamation of a deceased person, the South African law is similar to the Canadian law. The South African law does not recognise a claim for defamation for deceased persons. This principle was laid down in the leading case of *Spendiff v. East London Daily Despatch Ltd.*[24] In this case the defendant newspaper had called a deceased person a "murderer". The widow and the son of the dead person sued the newspaper in a defamation action. The court decided that the son is not entitled to sue for injuries done to his father's reputation even if the son feels disparaged by the fact that his father has been called a "murderer". A relative of a deceased person has no right to claim for damages unless "he himself (the son) was directly referred to and

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[19] Brown supra p.821
[20] Linden 'Canadian Tort Law' 3rd edition (1982) p.685
[21] Brown supra p.218
[22] Burchell 'Defamation' supra p.39
[23] Burchell 'Personality rights' supra p.198

the false statement concerning his father was therefore an actual attack upon himself."[25] This decision is in accordance with the principle that the actio injuriarum is not transmissible neither actively nor passively.[26]

Despite the clear statement in *Spendiff v. East London Daily Despatch Ltd.* it is sometimes suggested that the dignity or privacy of a deceased person should be protected.[27] A British newspaper, for instance, published a picture of the actor David Niven just before he died of a muscle-wasting disease. For some authors this publication has the same effect to the actor's privacy and dignity no matter if he is still alive or already deceased.[28]

Under German law - as under the South African and the Canadian legal systems - every natural person is entitled to sue for damages in an action for defamation. Even individuals who are charged with a criminal offence or are already convicted can assert this right. The German law also extends the protection of the personality right to children no matter if the child is - due to his age – aware of the violation of his dignity.[29]

Unlike the South African and the Canadian legal systems the German legal system allows a group to claim damages in a defamation action under special circumstances. In order to have a successful claim it is required that the defamatory statement concern a group which can be clearly distinguished from the general public by special characteristics such as the profession or the race.[30] Examples are the insult of a group like "the police", "the soldiers" or "the Jews." If this requirement is met the specific group of people has a title to sue for defamation.

Regarding the protection of the reputation of deceased persons the German system is different to the Canadian and the South African legal systems. German courts and also legal writers generally recognise a right of personality to person after their death.

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[24] *Spendiff v. East London Daily Despatch Ltd* (1929) EDL p.113
[25] *Spendiff v. East London Daily Despatch Ltd* supra p.131
[26] Burchell 'Defamation' supra p.137
[27] Burchell 'Personality rights' supra p.202-203
[28] Burchell 'Personality rights' supra p.203
[29] Schwerdtner supra par.12 Rz.205
[30] Schwerdtner supra par.1 Rz.206

This is known as "postmortaler Persoenlichkeitsschutz."[31] This right "postmortem" is based on the consideration that a sufficient protection of the development of dignity and personality is only achieved under the German Basic Law if the individual's personality is not defamed after they have died. In other words, a person must be sure that the personal image that he has established during his life remains untouchable after his death.

The leading case in which the BGH recognised the personality right "postmortem" was the *Mephisto* case. This case concerned a novel called "Mephisto – Roman einer Karriere" written by the author Klaus Mann. The novel described the life and the career of the actor and director Gustav Gruendgens. Gruendgens played a major role during the Second World War as a supporter of the Nazi regime. Although Mann did not use Gruendgens' real name, it was without doubt for the public that he referred to Gruendgens. The author committed suicide in 1949 and Gruendgens also died. Shortly after the novel was published in Germany, Gruendgens' adopted son sued the editor of Mann's novel in an action for defamation.[32]

The Court confirmed the existence of a personality right "postmortem." It argued that the people who read the novel will remember Gruendgens as he was described in it, namely as the great Nazi supporter and Gruendgens is not able to challenge this image presented by Mann in the novel. The need for protection therefore endures long after a person has died. This right is based on art. 1 and 2 of the German Basic Law. However, the Court pointed out that a deceased person is only protected against serious defamation of his personality or dignity.[33] In other words, the violation of the reputation must be serious to the extent that his image established during his lifetime is completely disparaged. The persons who are entitled to claim damages on behalf of the deceased person are the closest relatives.[34]

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[31] Gamm 'Persoenlichkeitsschutz und Massenmedien' NJW 1979, p.513 at p.517
[32] BGH NJW 1968, 1773
[33] BGH NJW 1968, 1773, 1777

3.2 Defamation of a non-natural person

In the Canadian legal system, along with individuals, certain legal entities such as associations, corporations or other cohesive groups, also have a title to sue in an action for defamation. In order to have a successful claim the defamatory statement must reflect upon the reputation of the entity and must affect its reputation in a material respect.[35] The reputation of an entity is limited by its nature, for instance, a trading corporation has a "trading" reputation, a local government corporation has a "governing" reputation. The general test is that the sting of the defamatory statement must refer to the "business character" of the entity and not to the individuals associated with it.[36] Thus, a corporation may sue for damage to its business interests or goodwill by false imputations of insolvency, inefficiency or impropriety in the conduct of its affairs.[37] Unincorporated associations, other than partnerships, trade unions and employer's associations, do not have the legal status to sue in their own right. The members of these associations have a title to sue only if they can prove that the words complained of refer to them as individuals.[38]

As with the Canadian legal system, the South African legal system also recognises the right for trading corporations to sue for defamation provided that the defamatory statement was intended to impair its business reputation.[39] This principle was laid down in the landmark decision of *Fichardt Ltd. v. The Friend Newspapers Ltd.* In this case the Friend Newspaper published an article in which the plaintiff, a trading corporation running a business in Bloemfontein during the First World War, was alleged to be a German place of business. Although the Appellate Division stated that the publication could not be considered defamatory, it discussed the issue of whether the plaintiff as a trading corporation has a title to sue for defamation.[40] The Court decided that a corporation does not need to prove actual damage. The suing corporation must rather show that the defamatory statement was calculated to "injure

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[34] Staudinger 'Kommentar zum BGB' (Band 1 par.1-12) 13th edition (1995) Vorbem. zu par.1 Rz.30
[35] Williams supra p.22
[36] Linden supra p.685
[37] Linden supra p.685
[38] Linden supra p.686
[39] Kinghorn supra p.234
[40] *Fichardt Ltd. v. The Friend Newspapers Ltd.* (1916) A.D. p.1 at p.6

the business reputation of the corporation or to affect the trade or business which it was established to carry on."[41]

More controversial was the issue of whether or not a non-trading corporation is entitled to sue for injury to its reputation.[42] In earlier decisions it was stated that such corporations should not have a title to sue in a defamation action because these corporations have no business and therefore no personal reputation to protect.[43] This view has been criticised with the argument that if a statement is calculated to prejudice a non-trading corporation in carrying out the purpose for which it has been established, such statement must be considered defamatory.[44] The Appellate Division in *Dhlomo NO v. Natal Newspapers Ltd.* terminated this dispute when it decided that non-trading corporations are entitled to sue for defamation if they are calculated to suffer financial prejudice and where "appropriate circumstances" so dictate.[45] The Court stressed that non-trading corporations also depend on financial support from the public. Therefore they are as vulnerable in terms of defamatory statements about the matter in which they conduct their affairs as trading corporations are. It would be thus "illogical and unfair" to deny such a corporation the right to sue for defamation.[46] The non-trading corporation can therefore sue for compensation in a defamation action. It is not required that the corporation prove the existence of special damages.[47]

However, the court pointed out that not every non-trading corporation has the title to sue in an action for defamation. A political party, for instance, may not be entitled to recover damages for an impairment of its reputation. The principle of freedom of political debate requires that statements in a political discussion can be made without fearing legal consequences.[48] The issue of a political party's right to sue in an action for defamation was picked up in *Argus Printing and Publishing Co. Ltd. v. Inkatha*

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[41] *Fichardt Ltd. v. The Friend Newspapers Ltd.* supra p.6
[42] Kinghorn supra p.234; Amerasinghe 'Defamation and other aspects of the Actio Iniuriarum in Roman-Dutch Law' (1968) p.46
[43] *Bhika v. Prema* (1910) T.S. p.101; *Die Spoorbond v. South African Railways* (1946) A.D. p.999 at p.1011
[44] Amerasinghe supra p.46
[45] *Dhlomo NO v. Natal Newspapers Ltd.* (1989) (1) SA (A.D.) p.945 at p.954; Grogan/Midgley 'Corporate Reputation and Title to Sue' (1989) SALJ vol.106 p.587 at p.589
[46] *Dhlomo NO v. Natal Newspapers Ltd.* supra p.954
[47] Kinghorn supra p.234
[48] *Dhlomo NO v. Natal Newspapers Ltd* supra p.954

Freedom Party. Contrary to the decision in *Dhlomo NO v. Natal Newspapers Ltd.*, the court reached the conclusion that political parties have the same right as other non-trading corporations to sue for damages in response to statements calculated to cause them pecuniary loss. The court applied the same limits to political parties as it applied to other non-trading entities.[49] However, it pointed out that in determining of whether or not a political party has the title to sue, it always has to take into account the policy need for free political debate.[50]

As in the Canadian legal system, unincorporated associations do not have the legal status to sue for damages in a defamation action. Only their members are entitled to sue and that is if they can show that the statement complained of refers to them.[51]

Under German law non-natural entities are also entitled to sue in an action for defamation. The general test is whether the defamatory remark refers to the business character of the non-natural person. The protection is therefore limited to those cases in which defamatory statements concern the business' reputation.[52] The legal entities which enjoy this protection, are corporations, partnerships ("Personengesellschaften des Handelsrecht"), associations ("Vereine") and also political parties.[53]

3.3 Comparative Conclusion

Regarding the title to sue in an action for defamation, a lot of similarities exist between the three different legal systems. All three legal systems recognise the right to sue for individuals. The only difference can be seen in the fact that the German law acknowledges a right to sue in a defamation action for groups whereas the South African and the Canadian legal systems do not allow groups to claim damages in a defamation action. In the two latter legal systems an action is only successful if the individual proves that the defamatory statement, which refers to a group, also concerns him personally.

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[49] *Argus Printing and Publishing Co. Ltd. v. Inkatha Freedom Party* (1992) (3) SA p.579 at p.589
[50] *Argus Printing and Publishing Co. Ltd. v. Inkatha Freedom Party* supra p.585
[51] Kinghorn supra p.234
[52] Staudinger supra Vorbem. zu par.1 Rz.30
[53] Palandt supra par. 823 Rz.181,182

Moreover, all three legal systems recognise a title to sue for legal entities. They all provide the same requirement for a non-natural entity to sue in an action for defamation. The defamatory remark must be related to the business character or reputation and not to a member or the individual representing the legal entity. In other words, the statement complained of must affect the trade or the business in which the legal entity is involved. Furthermore, all three legal systems also recognise a right to sue for non-trading entities and political parties.

The only major difference between the legal systems is in regards to the defamation of deceased persons. In contrast to the German law neither the Canadian nor the South African law acknowledges a right of personality "postmortem." The only exception they make is in the case of a defamatory statement that concerns a deceased person reflects upon the living, particularly the relatives of the dead person. Only if the family members can prove that the defamatory imputation violates their reputation will they have a title to sue.

This principle, confirmed by both Canadian and South African courts, implies that the personality with all its aspects such as dignity and reputation ends with the death of the person. However, this view is questionable. As the German court in the *Mephisto* case made clear, a person's personality does not end with his or her death. This is because the person, particularly public figures or celebrities, remain in the memory of others after their death. A person who has passed away has established a special personal image during his lifetime, which is protected under the Constitution. This person has a legitimate interest in keeping his image of personality even after his death. Neither the German nor the South African or Canadian Constitutions provide that the right of personality or dignity *only* apply to living people. Consequently, there is a need for a deceased person to be protected against serious violations of their personality. Especially in cases where the violation tends to disparage completely one's reputation or the image established during a person's lifetime. Therefore, it can be concluded that a personality right "postmortem" should be acknowledged in every legal system.

4.0 LIABILITY

This chapter about liability examines under which circumstances a person is liable in a defamation action. Through this analysis it is clear that major differences exist between the three different legal systems.

4.1 Defamation as a strict liability tort in the Canadian legal system

In the Canadian law, defamation is a strict liability tort. That means that the law of defamation imposes liability regardless of the fault of the defendant.[54] Even if the defendant does not intend to make a defamatory statement which disparages another person's reputation he will be held liable. The publication of a defamatory statement alone is actionable. The rule that liability is imposed regardless of the intention of the defendant was demonstrated in the case of *Cassidy v. Daily Mirror Newspaper Ltd.*[55] In this case the newspaper published a picture of Cassidy posing with a woman to whom he said he was engaged. The picture, which shows Cassidy together with the woman, underlined this statement. In reality, he was married to the plaintiff who sued the newspaper agency successfully in a defamation action. The court rejected the defendant's argument that the newspaper agency had no intention of defaming Cassidy with the picture. In fact, the agency did not even know that it was making a statement about him.[56] The court held that the intention of the publisher is irrelevant. Consequently, liability is imposed regardless of an intention to disparage another person's reputation on the part of the defendant.[57]

However, Canadian courts have occasionally departed from the rule of strict liability. In *Hein v. Canadian Fairbanks Morse Co.* the defendant sent a letter to a third party in which he stated that the plaintiff had sold a "used" water plant to this person though the plaintiff had sold it as "new."[58] The court held that the defendant was not liable unless he "knew or ought to have known the letter would be understood by those to

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[54] Williams supra p.5
[55] *Cassidy v. Daily Mirror Newspaper Ltd.* (1929) 2 K.B. p. 331 (C.A.) reprinted in Brown supra p.25
[56] *Cassidy v. Daily Mirror Newspaper Ltd.* supra p.25
[57] *Cassidy v. Daily Mirror Newspaper Ltd.* supra p.25
[58] *Hein v. Canadian Fairbanks Morse Co.* (1938) 13 M.P.R. p.255

whom it was published in a libellous sense."[59] Similarly, in *Grant v. Simpson,* Judge Smith could not understand how a person could be held liable for a meaning "resting upon knowledge to which the defendant was not privy."[60] Despite the critiques of these judgements, the majority of Canadian courts still apply the strict liability rule.

4.2 The element of animus injuriandi in the South African legal system

Unlike in the Canadian legal system the law of defamation under South African law is not a strict liability tort. Rather, defamation requires an element of animus injuriandi, otherwise known as conscious intention.[61] This requirement of the element of fault is one of the major differences between the South African and the Canadian legal systems. The requirement is recognised as an essential element of a defamation action and its establishment has been part of long juridical process and discussion.[62] One of the most crucial cases in which the principle of animus injuriandi in an action of defamation was laid down is the case of *South African Broadcasting Corporation v. O'Malley,* decided by the Appellate Decision. The court defined the criterion of fault as the subjective intention to injure the reputation of a person with knowledge or at least foresight of the unlawfulness of the publication.[63] Intention includes all forms of dolus, as it is known in the criminal law such as dolus directus, dolus indirectus and dolus eventualis.[64] Negligence is therefore insufficient to cause liability in an action for defamation.

However, for a great length of legal history, the South African law made a remarkable exception to the application of the fault element. Concerning the media including print media, television and radio it applied the strict liability rule as in the Canadian law. Defamation through the mass media amounted therefore to strict liability.[65] This principle was recognised in the leading case of *South African Broadcasting Corporation v. O'Malley.* In this case the plaintiff stated in a news report that the defendant, an editor of a daily newspaper, had attended an unlawful gathering and

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[59] *Hein v. Canadian Fairbanks Morse Co.* supra p.264
[60] *Grant v. Simpson* (1878) 12 N.S.R. p.145
[61] MacMillan 'Animus injuriandi and privilege' (1975) Vol.92 SALJ p.144
[62] Ibid; Amerasinghe supra p.8; Neethling/Potgieter/Visser 'Law of Delict' 2nd edition (1994) p.327
[63] *South African Broadcasting Corporation v. O'Malley* (1977) (3) SA (AD) p.606 at p.613
[64] Kinghorn supra p.226
[65] Kok 'The Elements of Injuria' (1985) vol.102 SALJ p.388 at p.392

been arrested on a charge of having done so. In reality, the defendant had been arrested at a wine tasting contest at a hotel in connection with an advertisement for the prohibited gathering, which had appeared in his newspaper.[66] The South African Broadcasting Corporation argued that the report was true and correct in every respect, that it had been published without animus injuriandi towards O'Malley and in the interest of the general public.[67] The Court rejected this argument and pointed out that the liability of the press is not based on fault but is strict.[68] It argued that the South African law is closely related to the English law where liability for the press is based on the publication of defamatory material and is dependent on any particular intention. The reason for strict liability is according to the Court the need to protect the ordinary citizen against the powerful media and its potential for injuring a citizen's reputation. In these situations it may be difficult to pinpoint the intention of a particular person. The average intelligent listener to the radio has only one opportunity to hear a story and so the first impression will remain. Another policy reason for holding the press strict liable is that the intention on the part of the persons involved is difficult to prove.[69] In applying these principles to the case in question the Court held that a reasonable listener would in fact gain the impression after listening to the news report that O'Malley had participated in a prohibited meeting.[70] In accordance with the English law the court decided that the principle of strict liability should be applied to the owners, editors, publishers and printers of newspapers. The only exception that was made was for distributors. News distributors can escape liability for defamation on the ground of lack of negligence.[71]

In *Pakendorf v. De Flamingh* the Appellate Division confirmed the principle of strict liability for the press laid down in *South African Broadcasting Corporation v. O'Malley*. It held that the owner, publisher, printer or editor of a newspaper may be held strict liable even if they did not intend to defame a person.[72] Absence of animus injuriandi is therefore not a valid defence for the press. In accordance with the decision in *South African Broadcasting v. O'Malley* it was held that only distributors

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[66] *South African Broadcasting Corporation v. O'Malley* (1977) (3) SA (AD) p.606 at p.607
[67] *South African Broadcasting Corporation v. O'Malley* supra p.607
[68] *South African Broadcasting Corporation v. O'Malley* supra p.612
[69] *South African Broadcasting Corporation v. O'Malley* supra p.613
[70] *South African Broadcasting Corporation v. O'Malley* supra p.617; Burchell 'The Fault Element in the Law of Defamation' (1978) vol.95 SALJ p.170 at p.172
[71] *South African Broadcasting Corporation v. O'Malley* supra p.615

might be excepted from the strict liability principle if they show that they were not aware of the defamatory meaning of the statement. However, the Court stressed that the press can always rely on the defences which exclude unlawfulness even where strict liability exists.[73]

The decision in *Pakendorf v. De Flamingh* was overruled by the Supreme Court of Appeal in the case of *National Media Ltd. v. Bogoshi*.[74] In this case the owner, publisher, editor, distributor and printer of the City Press had been sued by the respondent for damages arising from the publication of a series of allegedly defamatory articles published in the newspaper between 1991 and 1994. One of the major arguments of the appellants was that the articles had been published without animus injuriandi and consequently the publication had been lawful.

The Supreme Court expressly reasoned that the judgement of *Pakendorf v. De Flamingh* confirming the principle of strict liability for the press was wrong. For the integrity of the common law the press should be treated like ordinary individuals, which means that members of the press can escape liability in proving that they did not act intentionally.[75] The Court based this decision basically on two major arguments. First, it pointed to the crucial role of the constitutional right of freedom of expression and speech. Freedom of expression including the media freedom constitutes one of the essential foundations of a democratic society.[76] A truly democratic system is best served by the free flow of information, particularly provided by the press. In holding the press strictly liable in an action for defamation this constitutional right is not given the attention it requires. The stereotyped defences such as truth and public benefit, fair comment and qualified privilege do not provide appropriate protection for the freedom of the press. Secondly, the Court stressed that the media has an essential function to inform the public about every aspect of public, political, social and economic incidents. Thus, the press contributes to the formation of the public opinion on the basis of their duty to inform and the public's right to

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[72] *Pakendorf v. De Flamingh* (1982) (3) SA (AD) p.146 at p.157
[73] *Pakendorf v. De Flamingh* supra p.156
[74] *National Media Ltd. v. Bogoshi* (1998) (4) SA (SCA) p.1196 at p.1211
[75] *National Media Ltd. v. Bogoshi* supra p.1202
[76] *National Media Ltd. v. Bogoshi* supra p.1207

gather information.[77] In providing useful and sometimes vital information about the daily affairs of the nation to citizens, the press often takes on the role of the voice of the people. Due to this crucial role of the media it is clear that strict liability cannot be defended any longer and should therefore be rejected.[78]

In sum, it can be said that the principle of strict liability for the press, according to the Supreme Court in *National Media Ltd v. Bogoshi,* is no longer valid. The element of fault is required not only for ordinary individuals but also for the media.

4.3 The fault element in the German legal system

The law of defamation under German law is not a strict liability tort. In this way, the German law is similar to the South African law and different from the Canadian law. Par. 823, subsection 1 of the BGB expressly protects the personality right against wilful or negligent violations. Intention encompass the forms of dolus directus, dolus indirectus and dolus eventualis. Negligence is defined as the failure to act according to the diligence which is required by the special situation.[79] In the majority of cases the acts will be intentional or at least reckless. In other cases, especially those in which the plaintiff is placed in a false light in the public eye as by incorrect statements in a newspaper report, the defendant's conduct is regarded as negligent.[80]

The special personality rights such as par. 824 and 826 BGB, par. 22 ff of the Act on Artistic Creations and par. 12 to 14 of the Copyright Act also require a fault element. Par. 823, subsection 2 BGB applies to statutory provisions, which intend to protect others. These protective laws contain the provisions of the German Criminal Code, which also require a wilful or negligent action. Even if the protective law itself allows a violation of the statutes without fault, par. 823, subsection 2 BGB makes clear that "the duty to make compensation only arises if some fault can be imputed to the wrongdoer."

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[77] *National Media Ltd. v. Bogoshi* supra p.1209
[78] *National Media Ltd. v. Bogoshi* supra p.1208
[79] Palandt supra par. 823 Rz. 197
[80] Handford 'Moral Damage in Germany' (1978) ICLQ Vol.27, p.849 at p.866

The German legal system also acknowledges a fault element in cases where the media is involved in a defamation action.[81] The editor, for instance, has the legal duty to examine critical articles written by his employees for possible violations of personality rights of third persons.[82] If he fails to do so, he acts negligently and will be held liable. Another example is the famous case of *Caterina Valente* in which the actress claimed for damages in respect to an advertisement for a preparation for a false teeth fixing preparation which mentioned her name. The court reasoned that mentioning the plaintiff's name without her consent was at least grossly negligent because the defendant should have undertaken inquiries as to whether permission had been given.[83] Therefore, liability for the press follows the same fault principle as is required for defamatory actions committed by "ordinary" people other than members of the media.

4.4 Comparative Conclusion and Discussion

Both the South African as well as the German legal systems require a fault element in order to hold the publisher liable for defamatory imputations. In contrast to these legal systems, the Canadian law of defamation is a strict liability tort. However, as it has already been stated, some Canadian courts occasionally departed from the strict liability rule and these judgements have their justifications.

Strict liability in a defamation action means that the defendant is liable for defamatory remarks, which he could not reasonably anticipate. Even if he did not know the person who he defamed he will be held liable under Canadian law. This rule is not in accordance with delict principles under German law which require at least negligent action in order to impose liability. In a case where the publisher is held strictly liable, the only possibility to defend himself is to raise defences. However, it is doubtful that the traditional defences given under the Canadian law provide a sufficient protection for the publisher. Therefore, the South African and the German solutions, namely to link liability to the element of fault, seem to provide a more appropriate protection for the publisher.

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[81] Palandt supra par. 823 Rz. 197
[82] BGH NJW 1980, 2810
[83] BGHZ 30, 7, 13

With regard to the liability of the press in a defamation action the South African law has undergone major changes. The Supreme Court of Appeal in the case of *National Media Ltd. v. Bogoshi* decided that the strict liability rule for the press was no longer effective. Like the German law the South African law now requires an element of fault when the press publishes a defamatory statement. Although it cannot be denied that the media, due to its sometimes powerful position, has the potential to seriously injure a person's reputation by spreading out defamatory remarks, this argument should not lead to the result that the media is strictly liable in a defamation action. There is no legal basis on which to treat the media differently than "ordinary" citizens in terms of liability. From a constitutional point of view the media enjoys the same protection concerning the freedom of expression or speech as "ordinary" citizens do. According to art. 5 of the German Basic Law the freedoms of expression and speech also include freedom of the press. S 16 of the South African Bill of Rights 1996 provides that everyone enjoys freedom of expression, which includes the freedom of the press and of the other media.

Strict liability for the press would further undermine the important role of the media in providing useful information to the public. In supplying important information the press contributes to a democratic system, which demands a free flow of information. Thus, the freedom of the press, constitutionally guaranteed, is essential for a democratic society. Strict liability would impose undesirable restrictions on the media and would therefore endanger the right of freedom of expression. Consequently, the decision in *National Media Ltd. v. Bogoshi* has its justification.

5.0 CRITERIA OF DEFAMATORY WORDS AND CONDUCT

This chapter about the criteria of defamatory words and conduct analyses the elements of defamation, those which the plaintiff has to allege and prove in order to have a successful claim under the three different legal systems.

5.1 The legal situation in the Canadian and the South African legal systems

5.1.1 The "various test" under Canadian law

The Canadian legal system does not have a universal test in order to decide whether words or conduct are defamatory. The Canadian courts rather provided several different definitions in order to establish defamatory conduct. One of the most frequently used definitions was introduced in the case *Paul v. van Hill*, decided in 1962. According to Judge Maybank defamation can be regarded as a "publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule".[84] This definition has sometimes been considered too narrow. Thus, the words must cause a person to be "shunned or avoided" were added.[85] In *Youssoupoff v. Metro-Goldwin-Mayer Pictures Ltd.*, Judge Scrutton also criticised the definition given in *Paul v. van Hill* as too narrow.[86] He preferred the definition which was also used in *Scott v. Sampson* which states that defamation is "a false statement about a man to his discredit."[87] Another formula which was first developed in the case *Sim v. Strech* described defamation as something that "tends to lower a person in the estimation of right-thinking members of society generally."[88]

5.1.2 The criterion of "unlawfulness" under South African law

Under South African law defamation is defined as the "unlawful publication, animo injuriandi, of a statement concerning another person which has the effect of injuring that person in his reputation."[89] Thus, the law of defamation is based on two major criteria: unlawfulness and animus injuriandi. The latter requirement – as it has been already pointed out – is different to the Canadian law in which the law of defamation is recognised as a strict liability tort.

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[84] Williams supra p.7; *Paul v. Van Hull* (1962), 36 D.L.R. (2d) reprinted in Solomon/Feldthusen/Mills 'Cases and Materials on the Law of Torts' (1982) Chapter 28: Defamation p.905
[85] Linden supra p.676
[86] *Youssoupoff v. Metro-Goldwin-Mayer Pictures Ltd.* (1934), 50 T.L.R. p. 584
[87] *Youssoupoff v. Metro-Goldwin-Mayer Pictures Ltd.* supra p. 584; *Scott v. Sampson* 8 Q.B.D. p.503
[88] *Sim v. Stretch* (1936), 52 T.L.R. p.669
[89] Kinghorn supra p.226

Unlawfulness can be defined as "impairment of reputation," that is the infringement of a legally protected right or interest.[90] The Canadian legal system does not recognise the term "unlawfulness" in the law of defamation. The criteria to be applied, however, are similar. Under both the Canadian and the South African law a person's reputation is injured if the statement tends to lower him in the estimation of right-thinking members of the society.[91]

In order to ascertain what constitutes a "lowering in estimation" the courts have decided that imputations against the "moral character or those that arouse hatred, contempt or ridicule" are defamatory.[92] Defamatory statements can be uttered in various situations and consequently there exists a substantial amount of case law in South Africa. The statements can affect the moral character of a person, imputing, for instance, dishonesty or the commission of a crime, immorality or unchastity.[93] Furthermore, defamatory remarks can be related to someone's office, profession or occupation[94] and they can also impute financial embarrassment.[95] The definition does not require that the statement be false.

In order to determine what a "right-thinking member of the society" thinks, the South African Bill of Rights provides guidelines for the society's behaviour and such norms and principles will influence the attitude of a 'right-thinking member'.[96]

5.1.3 The defamatory meaning

The definitions in the Canadian law, described in the preceding section, are abstract guidelines, which the courts use as a starting point. In applying these different definitions the courts will often address the issue of defamation by asking whether the publication has the tendency to injure, disgrace, prejudice or adversely affect the reputation or character of the plaintiff.[97] There are many different examples of defamatory words and conduct of which only a few can be given. It was held, for

[90] Burchell 'Defamation' supra p.59
[91] Kinghorn supra p.226
[92] Amerasinghe supra p.15; *Marruchi v. Harris* (1943) OPD p.15 at p.22
[93] *De Beer v. De Villiers* (1913) CPD p.543 (sexual immorality)
[94] *De Graaf and Viljoen v. Viljoen* (1916) AD p.539 (director of education)
[95] *Borkum v. Cline* (1959) (2) SA p.670
[96] Burchell 'Personality rights' supra p.195

instance, that it is actionable to call someone a "liar" or a "crook", a "drunk" or a "traitor."[98] To impute an unpopular political belief to a person, such as implying that he is a Communist, can be defamatory as well.[99] An implication of immoral conduct can also be classified as defamatory. Thus, when someone says that he knew "five fellows who took a woman behind the church and screwed her", liability was imposed.[100] To call a doctor a "quack" or a lawyer a "shyster" can also amount to defamation because it disparages a person's professional capacity.[101] All of these examples illustrate that there is no limit to the types of things people can say to each other, which can be classified as defamatory.

The problem which arises in defamation cases is that words might be understood by the reader or listener differently from the meaning intended by the speaker or author. Words will, in general, be given their natural and ordinary meaning unless they have some special, technical or colloquial meaning.[102] In order to be actionable, the court examines the defamatory meaning of words by reference to an ordinary, reasonable and right-thinking person. In determining the meaning which will be attributed to the words, the court will take into account all of the circumstances of the case, including any reasonable implication of the words and the context in which the words were spoken. It will also take into consideration the audience for whom the words were published and the manner in which they were presented.[103]

Under South African law the test of whether a particular statement is defamatory is, as in the Canadian law, an objective one. The court must determine whether a "reasonable man" would have understood the statement as defamatory.[104] In *God v. Smith* the reasonable man was defined as a person "of normal understanding and development with normal emotional reactions."[105]

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[97] Brown supra p.40
[98] Linden supra p.677
[99] *Dennison v. Sanderson* (1946) O.R. p.601 (C.A.)
[100] *French (Elizabeth) v. Smith* (1923) 3 D.L.R. p.906
[101] Linden supra p.678
[102] Brown supra p.124
[103] Brown supra p.124
[104] Kinghorn supra p.230
[105] *God v. Smith* (1964) (4) SA p.374 at p.376

Furthermore, the words must be interpreted in the context in which it appears. In order to interpret the meaning of the words in their context the court must take into consideration not only what the statement expressly means but also of what it implies.

5.1.4 Innuendo

A different situation might arise where the plaintiff claims that the words complained of are defamatory in a sense other than their ordinary meaning. In other words, he demonstrates that the words have an extended meaning. This concept of the extended meaning of a statement is in both the Canadian and the South African legal systems known as an "innuendo".[106]

The Canadian law of defamation distinguishes between "popular" or "false" innuendoes and "true" or "legal" innuendoes.[107] A "true" or "legal" innuendo arises from facts or circumstances, which give the words a special meaning other than their natural or ordinary meaning.[108] The special meaning may be deduced from the technical nature of the language, the "slang" meaning of the words or because of some special knowledge of those to whom the words were spoken. The plaintiff has to prove the underlying facts or circumstances and must show that reasonable persons, with the special knowledge, would have understood the words in a defamatory sense.[109] The court then decides whether the words are capable of bearing the meaning that the plaintiff ascribes to them.

"Popular" or "false" innuendoes are meanings attributed to the ordinary and natural meaning of words, which arise solely by inference or implication.[110] In contrast to the "true" or "legal" innuendoes, no facts or circumstances extrinsic to the words themselves are required to explain their meaning. Thus, in case of a "false" innuendo the plaintiff offers a version to the court of what he or she feels is an appropriate interpretation of the words.[111]

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[106] Amerasinghe supra p.32; Brown supra p.155
[107] Brown supra p.155
[108] Linden supra p.681
[109] Linden supra p.682
[110] Brown supra p.158
[111] Brown supra p.160

The South African law does not recognise the terminus technicus "true" or "false" innuendo. It rather distinguishes a primary and a secondary meaning of the defamatory statement. The primary or *per se* meaning is the ordinary meaning given to the statement by a reasonable man. If a statement is *per se* defamatory the plaintiff may rely on an extended meaning in order to point out the sting of the defamation. This attached meaning is often set out in the form of a paraphrase of the statement and is called the "quasi-innuendo".[112]

The secondary meaning derives other than the ordinary one from special circumstances or it can be described as an "unusual meaning" which could be attributed to the words by a person having knowledge of special circumstances.[113] When compared to the Canadian system the secondary meaning of a statement is similar to the "true" or "legal" innuendo. Like the Canadian law, the South African law requires that the plaintiff alleges and proves the secondary meaning of the statement. In other words, his pleadings must include an allegation of the special circumstances, which give the words that secondary meaning.[114] He then must show how a reasonable person would understand the words as defamatory in these special circumstances.

5.1.5 Reference to the plaintiff

Apart from the requirement that the words must have a defamatory meaning, the plaintiff must allege and prove that the defamatory statement complained of concerned him. Both the Canadian as well as the South African law apply this principle.[115] In order to be identifiable, it is not necessary for the plaintiff to prove that he was referred to by his or her proper name. It is sufficient to refer to some identifiable characteristics or features. In this latter situation the plaintiff has to indicate the facts upon which he relies in order to show that the words or conduct referred to him personally.

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[112] Kinghorn supra p.231
[113] *National Union of Distributive Workers v. Cleghorn & Harris Ltd* (1946) A.D. p.984 at p.997
[114] Amerasinghe supra p.32
[115] Williams in Klar 'Studies in Canadian Tort Law' (1977) Chapter 9: Decorum in Defamation p.276; Burchell 'Defamation' supra p.128;

In order to determine whether the plaintiff is the one who was referred to, both the Canadian and the South African legal system apply an objective test. The question is whether an ordinary reasonable man to whom the statement was published was likely to understand the words complained of as a reference to the plaintiff.[116]

The major difference between the Canadian and the South African legal systems is that the Canadian law does not require that the defendant intended to refer to the plaintiff.[117] Even if the defendant did not know of the existence of the plaintiff and therefore could not intend to defame him, he will be held liable.[118] The lack of the intention element is based on the fact that the Canadian law of defamation is a strict liability tort. Consequently, it is not necessary for the defendant to have intended to refer to the plaintiff. Under South African law, in contrast to the Canadian law, a fault element is required. The defendant must have acted intentionally which means that he must have been aware that it was the plaintiff who he referred to with his defamatory statement and he must have the knowledge that he acted unlawfully in publishing the defamatory remark.[119]

5.1.6 Publication

A further requirement in the Canadian law is that the defamatory remark complained of must be communicated to a third person, other than the defamed individual.[120] There are no limitations on the way in which defamatory words are published. The words may be communicated directly by the defendant, either orally or in some written form, by way of a symbolic act or by a poster, sign or cartoon.[121] Every participant in the publication is liable, regardless of the degree of his involvement. This includes not only those persons who participate in the composition of the defamation but also those who are responsible for its distribution and dissemination.[122] Furthermore, a person may be held liable for a defamatory

[116] Brown supra p.217
[117] Linden supra p.683
[118] *Ibid*
[119] Burchell 'Defamation' supra p.143
[120] Linden supra p.691
[121] Brown supra p.250
[122] Linden supra p.693

publication of another person where he has some control over the machinery that produces it or over the location of the publication.[123]

Under the South African legal system the element of publication of the defamatory statement is also required. This requirement distinguishes the action for defamation from the action for an impairment of dignity because in the latter action the element of publication is not required. As in the Canadian law, publication of defamatory words take place when the statement is made known to a third person other than the person defamed.[124] Where there is a legal duty to act, publication can also take place by an omission. This is the case where there is a need for the public to be informed about a specific topic.

Apart from the physical act of making the words known to a third person it is also required that there be a corresponding understanding of the meaning of the words by the recipient.[125] This criterion is quite flexible. In *Vermaak v. Van der Merwe* it was held that the immediate understanding of the meaning of the defamatory words is not necessary. It is sufficient if the reader or listener discovers the defamatory meaning or significance later, for example upon further reflection or by discussing the issue with other persons.[126]

As in the Canadian system, every person who is involved or participates in the publication of the defamatory statement such as the editor, proprietor or printer may be held liable for the defamatory words appearing in a newspaper or journal.[127] This is the case if the defendant knew or could have known that an outsider would have taken notice of the publication. However, the publication is presumed if the newspaper, book or other material containing the defamatory remarks has been sold or distributed to the public.[128]

Two further presumptions also arise from the publication of defamatory statements: the presumption of animus injuriandi and the presumption that the publication was

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[123] Brown supra p.251
[124] Kinghorn supra p.235
[125] Burchell 'Defamation' supra p.69
[126] *Vermaak v. Van der Merwe* (1981) (3) SA p.78 at p.80
[127] Kinghorn supra p.235

unlawful. As it was stated in *South African Broadcasting Corporation v. O'Malley* the "publication of defamatory words gives rise to a presumption that the words were intentionally published and that the publication was unlawful".[129] The burden of proof then shifts to the defendant to establish either that there was some justification for the defamatory statement or he must prove the absence of intention to defame.[130]

5.2 The content of the "general right of personality" under German law

The general right of personality protects an individual's inner personality, which alone serves as a basis for the free and responsible self-determination of a person.[131] This right of personality as an "other right" according to par. 823 BGB is not defined in the provision itself. It is an abstract term so its scope needs to be determined. Neither the BGB nor other statutes provide any guidelines or principles in order to determine the content of the right. Due to this statutory lacuna legal writers and German courts have developed requirements and guidelines to ascertain the ambit of the right.

First, a violation of the right of personality is required.[132] In order to provide guidelines for such a violation, the German law distinguishes between three areas of protection which are in various ways strongly protected against external attacks. These personal spheres are the intimate or secret sphere ("Intimsphaere"), the private sphere ("Privatsphaere") and the individual sphere ("Individualshpaere").[133]

The object of the intimate or secret sphere is the world of the inner thoughts and emotions of a person. These private thoughts and emotions can be written down in a diary or confidential letters, for instance. The intimate details about a human being's personality are not meant to be published unless the person agrees to their publication.[134] They are either completely secret or should be read only by a narrow circle of trusted friends. Thus, the intimate sphere enjoys absolute protection because

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[128] Kinghorn supra p.235
[129] *South African Broadcasting Corporation v. O'Malley* (1977) (3) SA (A.D.) p.606 at p.610
[130] Kinghorn supra p.226
[131] OLG NJW 1967, 2314, 2316
[132] Palandt supra par. 823 Rz.183
[133] Palandt supra par. 823 Rz. 178
[134] BGH NJW 1988, 1984, 1985

it concerns the most intimate thoughts or feelings of a person. No person should be allowed to publish these confidential and personal details. Any unauthorised publication would amount to an infringement of a person's right of personality.

The second sphere, or the private sphere, which is not as narrow as the first category, includes the family and other private life in the domestic circle[135] Words which are communicated within the family circle are not supposed to leave the confidential domestic field. The difference between the secret and the private sphere is that the first sphere concerns thoughts, which should not even be communicated to other family members. If a person, for instance, writes confidential thoughts into a diary, usually no other person is entitled to read these statements. Thus, the protection of this sphere enjoys stronger protection under par. 823, subsection 1 of the BGB than infringements of the private sphere.

The third category of possible violations of the personality is called the "individual sphere." This sphere preserves the personal individuality of man in his relationship with the environment around him.[136] The defamation occurs while the person is acting in his public, economical or professional life. Compared to the aforementioned spheres, words communicated within this sphere are not regarded as being as confidential or secret as in the secret or private sphere. The person acts in the public sphere and must therefore expect that his personality is more exposed to the public. Therefore, the protection of his personality is not as absolute as it is in the intimate sphere.

The classification of the three categories of personality under the German law is an attempt to provide guidelines in order to put the abstract right of one's own personality according to par. 823 of the BGB into a concret form. In some other cases, German courts have distinguished between the intimate sphere and injuries to honour.[137] However, this approach seems to be aimed in the same direction because violations in the individual sphere are injuries to one's honour and when a person is

[135] Schwerdtner supra par. 12 Rz. 231
[136] Palandt supra par. 823 Rz. 178
[137] BGHZ 36, 77; BGH NJW 1965, 1374

defamed in the general public it is his honour that is affected.[138] With either this latter classification or the first distinction between the three areas of protection the courts gain a first impression of which part of the personality is concerned and which "degree" of protection is required.

After finding that the right of personality has been violated, the following task for the courts is to determine the limitations of the personality right.[139] The general right of one's own personality is considered an "absolute" right under par. 823 BGB to the extent that it provides protection against everyone. However, that does not mean that a person who alleges a violation of his personality enjoys "absolute" protection. Not every violation amounts to a successful action for defamation. The right of personality is rather characterised as a general right and is classified under par. 823, subsection 1 BGB as a "general" or "open" clause ("Rahmenrecht").[140] So, a violation of the personality right does not automatically constitute "unlawful" behaviour. The courts have rather to determine whether the defendant acted unlawfully. In order to ascertain whether or not an action amounts to unlawful behaviour the courts have to undertake a general balancing of the mutual rights and interests of the parties involved. The process of balancing rights requires the courts to take into consideration the rights and interests of the defendant as well as of the plaintiff.[141] One of the most important rights that can be asserted by the defendant is the right of freedom of expression or speech guaranteed by art. 5, subsection 1 of the German Constitution.[142] This right often conflicts with the right of personality. Which right will to be favoured depends on the particular circumstances of each case. The general principle is that the scope of art. 5 of the GG encompass opinions or value judgements ("Werturteile"). If a person alleges an incorrect fact about another person and knows that the fact is false, art. 5 GG is not applicable.

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[138] Handford supra p.860
[139] Staudinger supra Vorbem zu par. 1 Rz. 27
[140] Staudinger supra Vorbem zu par. 1 Rz.27
[141] Gamm supra p.514
[142] Markesinis supra p.66

5.3 Comparative Conclusion

The chapter about the criteria of defamation illustrates the difficulties that all three legal systems have defining defamatory words and conduct. Defamation, which includes various aspects such as dignity, reputation and privacy, is a non-legal concept and thus difficult to define.

The Canadian and the South African legal systems provide some similar criteria in order to define defamatory words and conduct. Although the Canadian law does not define defamation as an "unlawful" publication like the South African law does the result is the same. Both legal systems understand defamation as a publication, which is calculated to injure the reputation of another and tends to lower him in the estimation of right-thinking members of the society. The general test is therefore whether a reasonable, objectively thinking person understood the words as defamatory. Both legal systems acknowledge that the defamatory words may have an extended meaning, which is known as innuendo. Another requirement that both legal systems have in common is that the defamatory statement must refer to the plaintiff and moreover must be communicated to a third person. The major difference between the Canadian and the South African law is that the South African law requires an additional element of fault. The defendant must have intended to refer to the plaintiff when making the defamatory statement otherwise the plaintiff will not have a successful action. Because the Canadian law is a strict liability tort, the defendant will be held liable even if he did not intend to refer his statement to the plaintiff.

In contrast to the Canadian and the South African legal systems, the German law provides a completely different angle. It does not try to give a definition of defamation but rather distinguishes between three different spheres of protection of the personality right. Because the right of personality according to par. 823 BGB is a general right, the courts have to undertake a general balancing of the rights and interests of both parties in order to determine whether the action of the defendant could be regarded as unlawful. Unlike the Canadian and the South African legal systems the German law does not require that the defamatory words be published to a third person, other than the defamed individual. The plaintiff can have a successful claim even if the words complained of are not communicated to a third person.

Because the German law of defamation aims at the protection of the personality right, this right can be violated even if a third person does not hear or read the defamatory statement. The only problem that arises in this instance is that a violation of the personality right is difficult to prove for the plaintiff because there are no other people who can bear witness to the defamatory action. In sum, it can be concluded, that the criteria for defamatory words or conduct in the German law are not comparable to the Canadian nor the South African law.

6.0 DEFENCES

Once the plaintiff has proved the elements that are required for an action of defamation, the defendant has the possibility to raise various defences.

In the Canadian law, several defences exist against an action of defamation. The most important defences are the defences of justification, absolute and qualified privileges, fair comment and consent.

These defences are recognised under South African law also. The difference to the Canadian legal system is that the South African law distinguishes between defences by excluding the element of unlawfulness and those defences relating to the element of animus injuriandi. The main defences, which exclude the requirement of unlawfulness, are that of the truth for the public benefit and the defences of absolute and qualified privilege, fair comment and consent all of which are recognised by the Canadian legal system.

In order to rebut the inference of animus injuriandi, the defendant may prove that the statement was published in rixa or jest or that, by reason of special circumstances, the statement was published without animus injuriandi.[143] Due to the fact that the Canadian law of defamation does not require the element of fault, the defences excluding the element of animus injuriandi are not used in this legal system.

[143] Kinghorn supra p.237

Some of the aforementioned defences are also recognised in the German legal system. Although the German law does not use the legal term "absolute" or "qualified" privilege, it acknowledges defences in a defamation action, which have similar legal requirements and effects. Other defences, such as the defence of justification, are not appropriate defences in the German legal system. Although the German law requires – as the South African system – an element of fault in an action for defamation, there do not exist special defences which exclude the element of fault.

6.1 The defence of justification

6.1.1 The legal situation in Canada and South Africa

Justification or "truth" is a complete defence to a civil action for defamation in both the South African and the Canadian legal systems.[144] The reason for this defence is that the law does not allow a person to recover damages for injury to a character, which he either does not or should not possess. The burden of proving the truth of the remark rests on the defendant, as falsity is presumed in favour of the plaintiff. The defendant must substantiate all facts included in an allegation.[145] However, it is sufficient if the defendant proves that the substance of the defamatory statement is true. In other words, he must show that the "sting of the charge" of the libel or the "gist of the defamation" is true.[146] Where the defamatory statement is a general charge, for instance of dishonesty, the defendant must prove that the general charge is substantially true. He does not need to prove the truth of every detail he has alleged.[147] Where the plaintiff has established an innuendo, the defendant must plead and prove that the words are true in the meaning attributed to them.[148]

The difference between the Canadian and the South African systems is that the South African law additionally requires that the publication of the statement, which is allegedly true, is for the public benefit. "Public benefit" requires that some advantage

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[144] Linden supra p.697; Kinghorn supra p.239
[145] Linden supra p.697; Kinghorn supra p.239
[146] Burchell 'Personality rights' supra p.272
[147] *Hare v. Better Business Bureau of Vancouver* (1948) 1 W.W.R. p.569 (B.C.S.C.) reprinted in Solomon/Feldthusen/Mills supra p.923; Amerasinghe supra p.86
[148] *Feldt v. Bailey* (1961) (4) SA p.545 at p.547

be conveyed to the public by the communication of the information.[149] The requirement of the public benefit depends on the subject matter of the statement and the time, manner and occasion of the publication. The general principle is that the truth about the character or conduct of individuals should be known.[150] The publication of true statements about public officials and figures is in general regarded as being for the public benefit.[151]

In *Zillie v. Johnson* the court held that – under special circumstances – the public benefit can be considered grounds of justification on its own without proving the truth of the defamatory statement.[152] However, this view was rejected by the Appellate Division in *Neethling v. Du Preez; Neethling v. The Weekly Mail*. In this case, the court decided that although the traditional defences did not constitute a closed list, that does not mean that a court is free to establish liability for the publication of a defamatory statement independently of the substantive requirements of the traditional defences. It pointed out that "our law does not recognise such a defence to an action of defamation."[153] The defence of "truth for the public benefit" is considered a complete defence containing both elements. Thus, a court is not competent to separate the element of truth from the element of public benefit and create a new defence by an abstract reference to a general principle of public policy.

6.1.2 The legal situation in Germany

A defence like justification or "truth" is not recognised in the German legal system. The reason for this lack is based on the fact that the law of defamation, unlike in the Canadian and the South African legal systems, not only encompasses the protection of the reputation but also provides a general protection of an individual's personality. The general right of personality protects a person's inner personality, which alone serves as a basis for his free and responsible self-determination.[154] This freedom to determine his own personality includes that the individual also has the right to determine which details of his personal life are exposed to the public. Even if these

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[149] Burchell 'Defamation' supra p.213
[150] Kinghorn supra p.239; Burchell supra p.214
[151] *De Beers v. De Villiers* (1913) CPD p.543 (member of parliament)
[152] *Zillie v. Johnson* (1984) (2) SA p.186
[153] *Neethling v. Du Preez; Neethling v. The Weekly Mail* (1994) (1) SA p.708 at p.777

details are based on true facts the individual is nevertheless free to decide whether information about his personal life should be exposed to the public. A good example is the Mephisto case in which the author Klaus Mann published details about the life and career of the director Gustav Gruendgens, which were basically based on true facts. However, the court did not consider the truth of the published information to be an appropriate defence. Even if the image of Gruendgens that was created in the novel was basically correct, the defamatory way the author presented Gruendgens' life affected the latter's reputation and dignity. Thus, justification or truth cannot be raised as a defence under the German legal system.

6.2 The defence of absolute privilege

6.2.1 The legal situation in Canada

On the grounds of public policy, the Canadian law grants an absolute protection to high executive officials acting in the performance of their official duties. Like the defence of justification, absolute privilege is a complete defence and cannot be defeated on any grounds including malice.[155] The doctrine of absolute privilege is based on the grounds that there are occasions in which society's interest is better served by the complete disclosure of information even though this may be at the expense of someone else's reputation.[156] Due to the risk of the abuse of this privilege, the Canadian law has interpreted the scope of this privilege narrowly. It is restricted to activities of governmental institutions such as the legislative, the executive and the judicial.[157]

With regard to the executive, the protection of the absolute privilege applies to high officials of the state, subordinate officials acting at request of high officials and military officials. All of these aforementioned persons must act within the scope of their official duties.[158] Furthermore, the Federal Court of Appeal for Canada pointed out in the case of *Dowson v. The Queen* that the protection extends only to statements

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[154] Handford supra p.860
[155] Solomon/Feldthusen/Mills supra p.945
[156] Linden supra p.698
[157] Brown supra p.401
[158] Brown supra p.402

made by one officer of state to another officer of state or to a subordinate authorised to carry out official duties. Moreover, the subject matter must relate to state matters.[159]

An absolute immunity is also recognised for any defamatory remarks made during parliamentary proceedings. In order to promote a frank and dynamic debate in the democratic institutions, the doctrine of absolute privilege applies to statements by members of the Parliament made in the House of Commons in the exercise of their duties.[160] Reports of the debates, however, enjoy only a qualified privilege.[161] The reason for this privilege rule is to be found in public policy in favour of democratic interest, which provides that legislators should not fear the liability of an action of defamation. They ought to speak freely without thinking about the possible consequences even though a third person's reputation might be injured. The protection of this absolute privilege only applies to parliament members during parliamentary proceedings. When a member speaks outside the Parliament in a defamatory sense, he does not enjoy immunity protection any longer.[162]

An absolute privilege to speak and write without fearing legal consequences also applies to judges, witnesses, advocates and other parties while participating in judicial proceedings.[163] The judicial privilege is based upon public policy considerations, which require that participants in a judicial proceeding should feel free to speak frankly and should not fear the disclosure of information, both of which are important for the judicial process.[164] The absolute privilege rule extends to three different categories of judicial proceedings, as it was stressed in the case of *Lincoln v. Daniels*. The first category covers "all matters that are done *coram judice*" extending to what is said "in the course of proceedings by judges, parties, counsel and witnesses" including "the contents of documents put in as evidence."[165] The second category contains pleadings and other documents initiating the judicial process.[166] In the third category fall matters done or said by counsel, parties and witnesses which are

[159] *Dowson v. The Queen* (1981), 124 D.L.R. (3d) p.260 (Fed.C.A.) reprinted in Brown supra p.403
[160] *Ex parte Wason* (1869), L.R. 4 Q.B. p.576
[161] Linden supra p.700
[162] Brown supra p.413
[163] Linden supra p.698-699
[164] Brown supra p.415
[165] *Lincoln v. Daniels* (1962) 1 Q.B. p.257-258 (C.A.)

preliminary but necessary to the institution of proceedings.[167] Conversations between a solicitor and his client are also given absolute privilege, as long as they are reasonably related to the preparation of a trial. A statutory board or tribunal, which possess similar functions to a court, is also included in the absolute privilege doctrine.[168]

6.2.2 The legal situation in South Africa

Under South African law the defence of absolute privilege is also recognised. However, compared to the Canadian legal system, the scope of this defence is limited to statutory provisions which allow the defence of absolute privilege.

According to the South African Constitution of 1996, s 58, subsection 1, cabinet members and members of the National Assembly enjoy the freedom of speech and debate in the Assembly and in its committees, subject to its rules and orders. They are not liable to civil or criminal proceedings, arrest, imprisonment or damages for "anything they have said in, produced before or submitted to the Assembly or any of its committees." Furthermore, they are not liable for "anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees."[169] Thus, the statements of any member in or before the parliament, any committee or the Assembly are considered matters of absolute privilege.

Apart from this absolute immunity defence for members of Parliament, the South African law does not recognise further absolute privileges.

6.2.3 The legal situation in Germany

The German law also recognises a defence of absolute privilege. Compared to the Canadian system, the ambit of this defence is restricted to an absolute immunity

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[166] *Lincoln v. Daniels* supra p.257-258
[167] Brown supra p.448
[168] Linden supra p.699
[169] s 58 (1) Constitution of South Africa 1996

granted to parliamentarians under special circumstances. In this way, the German law is closer to the South African system.

Art. 46, subsection 1 of the German Constitution provides that "a member may at no time be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a statement made in the Bundestag or any of its committees." However, the article continues to make clear that the immunity "shall not apply to defamatory insults."[170]

This shows that the German law – in contrast to both the Canadian and the South African legal systems - draws a distinction between ordinary statements and defamatory insults. Statements made during a political debate are covered by the protection of the immunity principle as long as the member of the parliament does not insult others in a defamatory sense. However, in a heated political discussion it is sometimes difficult to separate "ordinary" statements from defamatory insults. The practice in the German parliament shows that the line between ordinary political statements and insulting statements of a defamatory nature is difficult to draw. The Canadian and the South African systems do not make this distinction so these difficulties would not arise. Nevertheless, the German Constitution presents a basic guideline for immunity protection for parliamentarians. They should enjoy the political debate without fearing legal consequences as long as they do not insult other parliamentarians in a defamatory sense.

6.3 The defence of qualified privilege

6.3.1 The legal situation in Canada

In contrast to absolute privileges, qualified privileges are of a conditional nature. The privilege rule applies to certain occasions which are regarded as of lesser importance than those absolutely privileged. In this situation certain communications for specified purposes are exempt from liability for defamation, unless it is shown that the defendant made the statement with actual or express malice.[171] This privileged

[170] art. 46 of the German Basic Law
[171] Linden supra p.702; Williams in Klar supra p.280

occasion occurs if a person makes a statement either in the discharge of either a public or private duty, whether legal or moral. It also applies for the purpose of pursuing or protecting some private interest, provided that it is published to a person who has some corresponding interest in receiving it.[172] The test is whether the "common convenience and welfare of society" demands such a statement.[173] As the notion "qualified" indicates, the extent of the qualified privilege is limited. There exist four major categories where qualified privileges apply.

The first category is the right of an individual to defend and protect his own personal and private interests. It has been recognised in the context involving the protection or recovery of personal or real property, the defence of an individual's business interests or reputation, and the protection of personal interests or reputation.[174] The privilege is similar to self-defence. Thus, the response is limited to those utterances that are reasonably necessary to meet the original attack.[175]

The privilege will also apply to communications between parties on a subject in which both the speaker and the recipient have a common legitimate interest.[176] The privilege is based on public policy and is considered necessary for the general convenience, benefit and welfare or society.[177] The privilege has been granted to two different situations. The first group of cases applies to internal communications that take place within a family unit, a business, governmental or religious organisations or other social institutions such as schools, hospitals or trade unions. The second applies to external communications between individuals or organisations who promote or secure common interest, particularly of a pecuniary nature.[178] In such situations, people may discuss matters of mutual economic interest in a privileged setting. Shareholders and directors, for instance, are allowed to exchange information about customers without fearing liability.

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[172] Brown supra p.465
[173] *Halls v. Mitchell* (1928) 2 D.L.R. p.97 (S.C.C.)
[174] Brown supra p.509
[175] Linden supra p.704
[176] Brown supra p.537
[177] *Jones v. Bennett* (1969) S.C.R. p.277
[178] Brown supra p.538

The third category protects a person who makes a remark in the discharge of a public or private duty, whether legal, moral or social. The recipient of this statement must have a reciprocal interest in receiving it.[179] An example is when someone is acting on behalf of a family member to protect the interest of the family. The privilege applies also to an employer who releases information about the conduct or character of a former employee to a new employer. Information given to persons who are involved in business transactions with the plaintiff about the latter's character, credit or integrity is also protected. The trader has a legitimate interest to gather important information about the financial situation and credit of his business partner.[180] Finally, qualified privilege is also recognised where a person makes a statement in order to protect the well being of another.

The fourth category relates to communications by, to or between public officials, who may be expected to act officially.[181] The problem that arises in this context is whether the communication is protected by an absolute immunity or whether it enjoys qualified privilege. The general rule in this regard is that absolute privilege applies to utterances made by a public official acting within the scope of his official duties involving a high officer of the state. Public officials with a less powerful position such as a mayor or a town councillor are protected by the qualified privilege rule.[182] Similarly, the person who claims the protection of qualified privilege, must act in accordance with his official duties and the published matter must be of public interest.

6.3.2 The legal situation in South Africa

The South African law also recognises qualified privilege as a defence. Like in the Canadian law, qualified privilege or provisional immunity will be accorded to statements published by a person on certain occasions. The publication will be wrongful if the publisher acted with an improper motive or maliciously.[183] The onus

[179] Williams supra p.78
[180] Brown supra p.534
[181] Brown supra p.571
[182] Brown supra p.572-573
[183] Burchell 'Personality rights' supra p.286

rests on the defendant to prove the elements of the defence of privileged occasion on a preponderance of probabilities.[184]

Under South African law, three major categories of qualified privileges are recognised:

The first category can be compared to the category of "common interest or mutual concern" and the "duty to protect another's interest" in the Canadian law.
Under this category it is lawful to publish a defamatory statement in the discharge of a duty or in the exercise of a right recognised by law to a person who has a corresponding interest or a duty to receive the statement.[185] This reciprocity of duty or rights need not arise from any confidential relationship between the person making the statement and the person receiving it. It is sufficient if there is a legitimate mutual interest, for the publisher in publishing the defamatory statement and for the recipient in receiving the statement. [186] The duty or right may be legal, moral or social. The classic example of a statement made on a privileged occasion is where an employer writes a reference on behalf of an employee. The employer has a right to comment on the integrity and ability of his former employee provided that spite or other improper motive do not prompt him. The prospective employer of that person has a corresponding right to receive these remarks.

The second major category concerns statements made in the course of judicial or quasi-judicial proceedings. Quasi-judicial tribunals include rent boards, judicial commissions and other forms of investigating bodies.[187] The difference from the Canadian law is that this category is granted only on privileged occasions whereas the Canadian law recognises it as an absolute privilege.

It is generally accepted that the publication of defamatory statements, in the course of proceedings before a judicial or quasi-judicial tribunal, is lawful.[188] In *May v. Udwin*, the Appellate Division laid down the principles of judicial privilege. It held that

[184] Burchell 'Personality rights' supra p.298
[185] Kinghorn supra p.242
[186] Burchell 'Personality rights' supra p.287
[187] Kinghorn supra p.245
[188] Kinghorn supra p.244-245

judges, magistrates, witnesses, litigants, advocates and attorneys enjoy the protection of a qualified, not absolute, privilege concerning statements made in the course of judicial proceedings.[189] As far as judges and magistrates are concerned, there is a presumption that they have acted lawfully and within the scope of their authorities. The plaintiff can rebut this presumption if he proves that the judge or the magistrate was actuated by malice or improper motive. Witnesses, litigants, advocates and attorneys only enjoy the privilege if the defamatory words were relevant to the case and founded on some reasonable cause.[190]

As in the Canadian legal system, reports of the proceedings of the courts, the parliament or other public bodies are protected by the qualified privilege. The reason for this immunity is that persons who are unable to participate in court proceedings should be able to learn from the reports the manner in which justice is administered. The defence does not apply if the defendant fails to prove that the report is fair and accurate.[191] The immunity is not granted if the publisher acted with an improper motive. Similar considerations apply to the publication of reports of the proceedings of the parliament or of an authority or body entrusted with a public duty in relation to a matter of public interest.[192]

6.3.3 Exercising a legitimate interest under German law

The German law also accepts a defence, which is similar to that of qualified privilege.[193] This applies to cases where the defendant, in defaming another person, exercises a legitimate interest. This defence is based on par. 193 of the German Criminal Code, which states that the assertion and distribution of untrue facts can be justified if the defendant exercises a legitimate interest. The defence does not apply if the publisher knows that the facts are untrue. In other words, the defendant must believe that the statement complained of is based on true facts. Par. 193 of the German Criminal Code concerns those cases where the public has an interest in the disclosure of information and this public interest is a justification for the defendant.

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[189] *May v. Udwin* (1981) (1) SA p.1 at p.19
[190] *May v. Udwin* supra p.19
[191] Kinghorn supra p.246
[192] Kinghorn supra p.246
[193] Schwerdtner supra par. 12 Rz. 259

The typical case is one in which a journalist publishes details about a public figure about whom the public has an interest. The journalist must believe that the information, which he publishes, is true and he must also believe that the public has a legitimate interest in the revelation this information. This defence is similar to the "duty to protect another's interest" defence in the Canadian law or the defence of "exercising of a right or the furtherance of a legitimate interest" under South African law. What these three defences all have in common is the idea that the public has an interest in gathering important information and that this interest is the basis for the defendant's justification.

6.4 Fair comment

A fair comment also functions as a defence to a civil action for defamation under the Canadian law. The subject of the statement must be of genuine public interest and should not be based on scandalous or unworthy grounds.[194] There are two categories where this defence applies. The first category includes those things in which the public has a legitimate interest, such as governmental activities, political debate, and proposals by public figures. Second, works of art such as theatrical performances, music and literature fall within the scope of this defence.[195] In order to mount the defence of fair comment, it must be based on true facts.[196] The onus is on the defendant to prove that all of the facts published are true. Furthermore, in order for the comment to be privileged, it must be fair. This is the case if the comment is conceived in the "spirit of a fair discussion."[197] The view expressed must be honest and must be such that it can fairly be called criticism. Although the comment must be fair, it does not required to be reasonable. Individuals are entitled to express their unreasonable views as long as they are based on true facts. The defence of fair comment can be destroyed if it can be proved that the defendant acted with malice.[198]

The South African law also recognises the defence of fair comment and applies the same requirements to it as the Canadian law does. First, the allegation in question has

[194] Williams supra p.113
[195] Linden supra p.711
[196] Linden supra p.711
[197] Brown supra p.686
[198] Williams supra p.114

to be characterised as a comment. In other words, the ordinary reasonable man must be able to recognise the statement as an expression of an opinion and not as a statement of fact.[199] Furthermore, the factual allegation upon which the comment is made must be true. It is sufficient for the defendant to show that the facts upon which the comment was based are substantially true, he does not need to prove the truth of every detail.[200] As in the Canadian law, the comment must be fair. A comment is fair if it is an honest or genuine expression of the defendant's opinion, and it is relevant to and warranted by the facts commented upon even if it is exaggerated or prejudiced.[201] In order to establish the defence of fair comment, the defendant also has to prove that the comment is of public interest. Such matters not only apply to the conduct of public officials but also include matters submitted for public criticism, for example speeches made in public, public performances, works of art and literary works.[202]

The defendant bears the onus of proof of the requirements that constitute the defence of the fair comment. The plaintiff may defeat the defence by showing that the statement was published with an improper malice.[203]

The German law also recognises a defence similar to the defence of fair comment in the Canadian and the South African legal systems. Under German law, the defendant can assert his rights of freedom of expression and speech guaranteed under art. 5 of the German Constitution. Art. 5 of the GG covers the expression of opinions ("Werturteile") as opposed to false allegations of facts ("Tatsachenbehauptung") that are uttered in the consciousness of being wrong.[204] Opinions are expressions of subjective judgements about an issue or a person. A comment is also an expression of a subjective opinion. However, the right of freedom of expression under art. 5 GG is not considered a "defence" under German law. As it was described above, German courts have to undertake a general balancing of the different rights and interest of both the plaintiff and the defendant. This is the place in which the defendant can assert his right of freedom of expression and the courts have to judge which right, the right of personality or the right of freedom of expression, has to be favoured. On the basis of

[199] Kinghorn supra p.247
[200] Burchell 'Personality rights' supra p.278
[201] Burchell 'Personality rights' supra p.278
[202] Kinghorn supra p.247
[203] Kinghorn supra p.247

art.5 GG the defendant can then assert that his opinion on an issue was fair and of public interest.[205] However, art. 5 GG mandates that such a defence is not applicable if the privilege has been exceeded. In the *Mephisto* case, for instance, the court reasoned that art. 5 GG did not apply because the personal revenge of the author towards the protagonist came through in the novel and had resulted in serious distortions.[206] Thus, the description of the director Gustav Gruendgens by Klaus Mann could not be considered a "fair" opinion or comment.

6.5 Consent

In the Canadian, the South African and also the German law, consent is also a defence to a defamation action.[207] The defence applies cases where the plaintiff instigated, procured or invited the publication of the defamatory statement. The defence is only applicable to the words which the plaintiff expressly or impliedly agrees to.[208] The privilege is based on the doctrine of *volenti non fit injuria*.[209] In other words, a plaintiff who has consented to the defamatory remark cannot complain about the violation of his reputation caused by the publication. The consent has to be given either prior to or simultaneously with the publication. Due to the fact that this defence has a narrow scope of application the consent must be given for each publication separately. Therefore, if a person, for instance, consents to discuss on a radio programme certain information that might be defamatory of him, he does not thereby agree to defamatory comment on the programme afterwards.[210]

6.6 Defences excluding the fault element under South African law

Apart from the defences excluding the element of unlawfulness, the South African law also recognises defences that exclude the element of animus injuriandi, namely rixa and jest and certain kinds of mistakes.

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[204] Schwerdtner supra par.12 Rz.252,253
[205] Handford supra p.867
[206] BGH NJW 1968, 1773, 1777
[207] Amerasinghe supra p.161; Brown supra p.389; Palandt supra par. 823 Rz. 184
[208] Brown supra p.389
[209] Williams supra p.106; Williams in Klar supra p.280; Amerasinghe supra p.161-162
[210] Linden supra p.716

6.6.1 Rixa or jest

The presumption of animus injuriandi can be rebutted by proof of the fact that the statement was published in rixa, which means in great and sudden anger provoked by the person defamed.[211] The immunity afforded can be said to be similar to that provided in cases of self-defence. However, the basis of this defence is not yet clarified. The Supreme Court of Appeal has not yet decided whether provocation is definitely a defence to exclude the presumption of animus injuriandi or the presumption of unlawfulness.

Statements which are understood as good-natured fun or which simply cause amusement are not necessarily deemed defamatory.[212] The test for ascertaining the meaning of the words and whether the meaning can be regarded as defamatory is an objective one. In other words, the reasonable reader or bystander must have understood the words as a joke. In both situations – provocation and jest – the burden of proof rests on the defendant.

6.6.2 Mistake

Since consciousness is a substantial element of animus injuriandi, a mistaken belief in the lawfulness of a publication may enable the defendant to avoid liability. The kinds of mistakes that exclude the element of fault, however, are not clearly defined in South African law. Sometimes it is stated that the mistake should be an honest one.[213] The dominant view is, however, that the defendant may rely on a negligent mistake.[214]

6.7 Summary

It can be said that there are some defences in an action for defamation that are recognised in all three legal systems. These are the defences of fair comment, consent and absolute privilege. With regard to the latter defence both the South African as well as the German law only acknowledge absolute immunity for statements made by

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[211] Kinghorn supra p.250
[212] Burchell 'Defamation' supra p.285
[213] *Hassen v. Post Newspapers Ltd.* (1965) (3) SA p.562

members of the Parliament during parliamentary proceedings. The Canadian law provides a broader application of the absolute immunity defence. It applies the absolute privilege also to activities of high state officials and to statements made by judges, witnesses and advocates while attending judicial proceedings. In contrast, the South African law considers defamatory remarks made in the course of judicial proceedings to be a qualified privilege. The German law does not recognise statements published during judicial proceedings as a defence in an action for defamation either as an absolute or as a qualified privilege. It acknowledges the principle of independence for judges which grants that judges can act independently in court proceedings as long as they are neutral and do not have prejudices against the parties.[215] However, this principle of the independence of judges is not regarded as a defence in an action of defamation.

Another defence that all three legal systems have in common is the qualified privilege of exercising a legitimate interest. This defence is based on the grounds that the publication of a defamatory statement should be privileged if the disclosure of information is exercised in the discharge of a duty or right, and the recipient has a corresponding interest or duty to receive the information.

The defence of justification or truth is only known in the Canadian and the South African legal systems. The latter legal system requires furthermore that the facts must be true and for the public benefit. The German law of defamation provides a broad protection of a person's personality. This allows a person the freedom to determine which aspects of his personality should be exposed to the public. Therefore, the German law considers the assertion of true facts irrelevant as a defence in a defamation action.

7.0 COMPENSATION IN AN ACTION FOR DEFAMATION

Once the plaintiff has proved that the defendant has defamed his reputation or his personality the question that arises is what kind of compensation he can expect.

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[214] Kinghorn supra p.250
[215] see art. 97 of the German Basic Law

Apparently, there are major differences between the three legal systems in dealing with the problem of granting damages in defamation actions.

7.1 Libel and Slander in the Canadian legal system

The Canadian law provides two basic remedies for an action of defamation. The first allows the plaintiff to claim for an injunction in order to restrain the defamatory publication in advance. The court will grant an injunction only under special circumstances, namely where the words are clearly defamatory and the defendant either does not deny their falsity or, if the defendant does deny the falsity, it would be impossible for the defendant to succeed on a plea of justification.[216] In addition, an injunction will only be granted where there is a reasonable apprehension of a repetition of the tort.[217] Canadian courts are usually quite reluctant to grant such an injunction because, as it was stated in *Can. Metal Co. v. C.B.C.*, the restriction of a publication in advance may undermine the freedom of speech and expression.[218] Therefore, the second basic remedy provided by the Canadian law, namely the claim for damages, is more successful.

The damages which can be claimed by the plaintiff depend upon whether he brings an action for libel or and an action for slander. The Canadian law draws a distinction in the common law between libel and slander. The former concerns defamatory material contained in written publications and extends to material embodied in some permanent form which is visible to the human eye.[219] It is actionable without proof of special damages, the damages are rather presumed. In other words, libel is treated as actionable *per se*.[220] Slander, on the other hand, consists of defamatory statements in oral publications. In order to recover for slander, the plaintiff must prove special damages.[221]

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[216] Brown vol.2 supra p.1085
[217] Williams supra p.146
[218] *Can. Metal Co. v. C.B.C.* (1975) 7 O.R. (2d) p.261
[219] Linden supra p.687
[220] Brown supra p.289
[221] Waddams 'The Law of Defamation' Chapter 4: Loss of Reputation (1983) p.293; Linden supra p.691

However, there are four types of slander which are actionable *per se* so that special damages do not need to be specifically pleaded or proved. The first exception concerns defamatory remarks that impute the commission of a criminal offence. Guilt must be alleged and the crime must be of a serious nature. It is not necessary to specify a particular crime, a general accusation of having committed a serious crime is sufficient.[222] The reason for this exception is that the plaintiff might be placed in a position where another person initiates criminal proceedings against him.

Another exception where libel is actionable *per se* is the imputation of a loathsome or contagious disease.[223] The scope of this exception has been limited to venereal diseases and leprosy. The reason for this rule is that knowledge of society suggests that all prudent persons will avoid contact with a person suffering from such serious diseases.[224]

To accuse a woman of promiscuity is actionable *per se* as well. An accusation of lesbianism has been held to be actionable *per se* and the same view has been taken of an allegation that a man is homosexual.[225]

Defaming a person in relation to his business, trade, profession, office or other employment activities is also actionable *per se*. The reason for this exception is that the law presumes the possibility of pecuniary loss from such imputation.[226] This rule protects a person from defamatory statements no matter how lowly or base their occupation may be.

In an action for libel or for slander *per se*, damage to the reputation is presumed. This presumption may either flow from common law principles or may be the result of statutory provisions.[227] Where damages are presumed, general damages are consequently awarded. General damages include injury to reputation, mental suffering, distress and any actual or anticipated pecuniary loss or social disadvantage. In order to estimate the award of the damages the court may take into account a

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[222] Linden supra p.689
[223] Brown supra p.320
[224] Brown supra p.320
[225] Linden supra p.690
[226] Brown supra p.323

number of factors. These circumstances are basically the conduct and character of the person responsible for the publication of the defamatory matter, the conduct and character of the plaintiff and the nature, mode, scope and character of the defamatory publication.[228]

In an action for slander, the plaintiff has to prove the existence of special damages to his reputation. Special damages mean actual financial or material loss. It is not sufficient for the plaintiff to establish that his reputation has been damaged for that would open the door for general damages. Rather, he has to demonstrate further damages, for instance, loss of business profits.[229]

Apart from general or special damages, the court is free to award punitive damages. The purpose of a punitive damages award is to punish or deter and it may be granted in addition to compensatory damages.[230] These damages are limited to exceptional cases, namely to serious violations of the plaintiff's personality. The plaintiff has to show "malicious conduct" on the part of the defendant, "conscious, contumelious and calculated wrongdoing" or behaviour which can be described as "gross", "reckless" or "outrageous."[231]

7.2 Computation of damages under South African law

Unlike the Canadian legal system, the South African legal system does not draw a distinction between libel and slander. This was clearly stated in an early case in 1904 by the Natal Supreme Court in *Nicolson v. A Roberts*. In this case the court pointed out that unlike the English law which draws a distinction between written and oral defamation the South African law does not recognise this distinction.[232] Consequently, under South African law it is not necessary for the plaintiff to prove special damages in order to claim damages in an action for slander.

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[227] see examples in Williams supra p.144 fn.48
[228] Brown vol.2 supra p.1008-1009
[229] Waddams supra p.293
[230] Williams supra p.142
[231] Brown vol.2 supra p.1065
[232] *Nicolson v. A Roberts* (1904) 25 NLR 278 at p.282

The South African legal system recognises two basic civil remedies in defamation cases in order to compensate the plaintiff for his injured reputation: He can apply for an interdict restraining the violation of his personality right, or he can bring an action to recover damages for the impairment of his reputation.[233] With regard to the latter claim, the plaintiff is entitled to an award of general damages to compensate him for his injured reputation. The principles to be applied for the granting of general damages are the same as in the Canadian law. The court has a broad discretion in determining the award ex aequo et bono and may take into account the following circumstances:

First, the court may take into consideration the nature of the defamatory statement and the probable consequences of the defamation. Imputations of serious crimes may cause greater harm to an individual's reputation than imputations of private immorality and will therefore result in higher awards of damages.[234] The nature and extent of the publication also affects the award of damages. A defamatory remark in a serious newspaper with a broad circulation may harm a person's reputation more than a publication of a defamatory statement in a newspaper subscribed to only by a few people. The court may also take into account the character and the conduct of the plaintiff.[235] The conduct of the plaintiff, for instance, may have provoked the defamatory statement, which would reduce the award of damages. The motives and the conduct of the defendant also play a role in estimating the amount of the compensation. For example, expressions of regret or apology might be a mitigating factor.[236] In sum it can be said that all of these mentioned circumstances are by no means exhaustive. The court is entitled to take into account any factor that is relevant in assessment of damages.

Like the Canadian legal system the South African courts can also give effect to punitive damages if the plaintiff has suffered a serious infringement of his constitutionally protected rights. The Appellate Division in the leading case *Salzmann v. Holmes* recognised that in a defamation case punitive damages may be awarded if serious damages can be proved. The court based its decision on the fact

[233] Burchell 'Personality rights' supra p.435
[234] Kinghorn supra p.252
[235] *Muller v. SA Associated Newspapers Ltd and Others* (1972) (2) SA p.589 at p.595

that in Roman-Dutch law the actio injuriarum had a penal origin and therefore the sum awarded was originally in the nature of a penalty.[237]

7.3 Computation of damages under German law

As opposed to the Canadian legal system, the German legal system does not distinguish between damages awarded for the spoken word and those granted for the written word. Because the German law of defamation aims at the protection of an individual's personality, every aspect of this personality is protected. A person's picture is protected the same way as his spoken word. Thus, the recording of a person's spoken word by tape recorder without permission is actionable in the same way that the publication of a picture of a person without his consent is.[238] Therefore, the German law does not draw a distinction between libel and slander and is in so far comparable to the South African system.

With regard to compensation in money the German system is different from the Canadian and the South African legal systems. Monetary compensation is not regarded as the primary remedy for delict under the German law. The basic principle of compensation is laid down in par. 249 of the BGB. According to this provision restitution in kind is the primary remedy in a delict case. It states that "a person who is bound to make compensation shall bring about the condition which would exist if the circumstance making him liable to compensate had not occurred". Par. 249 BGB covers various orders of an injunctive nature, as also provided in the South African and Canadian legal systems as a possible remedy in a defamation action. Under par. 249 BGB the plaintiff also has the possibility to claim compensation in a so-called "Unterlassungsklage" restraining further harm if such harm is imminent.[239]

In cases where the aforementioned remedies are not sufficient, par. 251 BGB applies. This provision provides that in so far as restitution in kind is not possible or insufficient to compensate the injured person, the person who is liable shall

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[236] Kinghorn supra p.252
[237] *Salzmann v. Holmes* (1914) AD p.471 at p.480
[238] Handford supra p.862
[239] Gamm supra p.517; Erman 'Handkommentar zum BGB' 7th edition Band 1 (1981) Vor par.823 Rz.89 ff

compensate him in money. However, par. 253 BGB restricts the cases where monetary compensation may be obtained. For violations which are not those of property, compensation in money may be awarded only in the cases expressly mentioned by law. In a defamation action the most important provision which allows monetary compensation is par. 847 BGB. This provision states as follows:

> "In the case of injury to body or health, or in the case of deprivation of liberty, the injured party may also demand an equitable **compensation in money** for the damage which is not a pecuniary loss..."

The leading case in which the Bundesgerichtshof awarded damages for violations of the personality right was the *Herrenreiter* case. This case concerned the owner of a brewery who was famous as an amateur rider at horse shows. The defendant was a manufacturer of special pharmaceutical products for the increase of sexual potency. In order to advertise this product in Germany, the defendant dispersed a poster with the picture of the plaintiff without his permission. The plaintiff objected to this picture as being used for an advertisement for virility pills and claimed damages.[240] The court reasoned that the plaintiff had suffered an injury to his personality right guaranteed under par. 823, subsection 1 of the BGB because he had been completely exposed in a picture appearing in connection with virility pills and this widely disseminated picture thus humiliated him in his personality. Damages of this personality right are to be compensated in money. The court based this monetary compensation on an analogy of par. 847 BGB by referring to the term "deprivation of liberty" in this provision. According to the court the term "liberty" in par. 847 BGB referred not only to physical liberty but also to freedom of the will, especially the freedom to exercise his own determination over his own personality.[241] If such blameworthy depreciation of the personality right is in question, the legal protection can only be obtained by an inclusion in the violation mentioned in par. 847 BGB.

However, in another important case, the *Ginseng root* case, the Bundesgerichtshof based the award of monetary compensation on par. 253 BGB in conjunction with art.

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[240] BGHZ 26, 349, 350 ff
[241] BGHZ 26, 349, 362 ff

1 and 2 of the German Constitution.[242] In this case the plaintiff, a law professor, had given a ginseng root that he had brought from a stay in Korea to a friend, a professor for science for research. The latter mentioned in an article that he had obtained the ginseng root with the "kind assistance" of the plaintiff. This statement led to the plaintiff being described in a widely spread scientific journal as one of the best-known ginseng researchers of Europe. The defendant company, one that dealt in a tonic which contained ginseng, placed an advertisement for this tonic which represented the plaintiff as advocating the properties of ginseng as an aphrodisiac. The plaintiff claimed that this advertisement gave rise to the impression that he lent his name to advertise a doubtful product and thus had been the target of ridicule from the public and from his students.[243] The Court confirmed the decision of the *Herrenreiter* case in that according to par. 253 BGB monetary compensation can be claimed for non-pecuniary damage only in cases expressly mentioned by the law. However, it did not base its decision on par. 847 BGB as in the *Herrenreiter* case but rather referred to a direct application of art. 1 and 2 of the German Basic law as means of granting damages. The basis of this approach is that the legislators of the BGB did not foresee in 1900 that the personality would be a protected right and that the provisions of the BGB, in particular par. 847 BGB, would be limited accordingly. Due to the fact that the provisions of the BGB do not provide sufficient remedies in a defamation action, art. 1 and 2 of the German Basic Law themselves compelled the recognition of a right to damages without any reference to par. 847 BGB.[244]

In sum, these two important cases show that monetary compensation is awarded in an action of defamation even if the legal basis varies. Since the *Ginseng* case German courts have adhered to a settled practice in granting damages for invasions of the personality. However, the courts make clear that the granting of monetary compensation is limited to cases where the violation is serious and there is no other sufficient remedy.[245] This attitude shows that compensation in money is still regarded as a secondary remedy in a delict case and particularly in an action for defamation.

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[242] BGHZ 35, 363
[243] BGHZ 35, 363, 365 ff
[244] BGHZ 35, 363, 372
[245] Handford supra p.871

Punitive damages which are granted under the Canadian and the South African system are not acknowledged by the German law. The German law draws a clear distinction between the civil and the criminal law. In an action for defamation the plaintiff has the opportunity to claim damages before a civil court and simultaneously file a lawsuit before a criminal court because of defamatory insult according to par. 185 of the German Criminal Code. The monetary compensation awarded under par. 823 BGB in conjunction with 253, 847 BGB is of a purely civil nature and does not have – unlike the Canadian and the South African legal systems – a penal origin. The fact that is striking is that the requirement for granting punitive damages under both the Canadian and the South African legal systems, namely that the violation has to be of a serious nature, is the same as that for monetary compensation granted by the German law. Monetary compensation under the German law is only awarded if the violation of a personality right is serious and no other remedy is sufficient.

7.4 Comparative Conclusion

The comparison makes clear that the three legal systems provide different requirements and principles for compensation granted in an action for defamation.

The first major difference between the legal systems is that in the Canadian law the compensation depends upon the question of whether the plaintiff sues in an action for libel or in an action for slander. Both the South African and the German legal systems do not follow this approach which seems to be the preferable way. Apart from historical reasons there is no obvious reason why the award of damages in a defamation action must depend on the question of whether it is a spoken or a written word that defames the plaintiff in his personality. Apparently, it makes no difference for the plaintiff in which form the defamatory statement is published. The result, namely a violation of this reputation or his personality, is the same.

Another difference between the legal systems is structural. The German law grants compensation in money only as a secondary remedy. Unlike the Canadian and the South African legal systems, damages for non-pecuniary violations are the exception and are only awarded where the law itself expressly allows monetary compensation for infringements that are not of a pecuniary nature. Due to the fact that provisions of

the BGB such as par. 253 or 847 BGB do not expressly grant damages for non-pecuniary violations, German courts have obvious difficulties in interpreting the statutes in order to grant damages in a defamation action. The reason for these difficulties is that the legislator of the BGB did not foresee in 1900 that the personality would be a protected right and the provisions of the BGB, in particular par. 847 BGB, were limited accordingly. Both the Canadian and the South African legal systems do not confront these difficulties. Canadian and South African courts have wide discretion in granting monetary compensation in a defamation action without the need to interpret statutes.

Apart from these differences the chapter about compensation in the three different legal systems showed that the Canadian, the South African and the German legal systems have a remedy in common in an action for defamation. They all acknowledge the remedy of an injunction or interdict in order to restrain the defamatory publication. Furthermore the German law recognise a remedy which is called the "Unterlassungsklage" to restrain further harm if such harm is imminent.

8.0 FINAL CONCLUSION

In sum, it can be concluded that differences as well as similarities exist between the Canadian, the South African and the German legal systems in dealing with the law of defamation. Although the article has demonstrated that each legal system has its advantages and disadvantages, one cannot draw the conclusion that one legal system is preferable to the others. Also, it cannot be concluded that, although the Canadian and the South African legal systems are based on the common law and the German law reflects civil law principles, the different legal background is the reason for the existence of these differences. To a certain extent the German law is more similar to the South African law than it is to the Canadian law.

All three legal systems seek to provide a protection for possible violations of an individual's reputation. Compared to the Canadian and the South African legal systems the German law of defamation provides a broader protection by aiming at the protection of a person's personality with all its various aspects such as honour, dignity

and privacy. Another difference between the Canadian and the South African legal systems and the German legal system is in the protection of the personality of deceased persons. The German law acknowledges a personality right "postmortem" whereas both the Canadian and the South African legal systems only give the relatives of a deceased person a right to sue in an action for defamation if the defamatory words, which concern the deceased person, also reflect upon the living. Also, the criteria for defamatory words or conduct to be applied in order to have a successful claim in a defamation action are different. The Canadian law provides various definitions of defamation, the South African law requires the elements of "unlawfulness" and "animus injuriandi" for a successful claim and the German law distinguishes between three different spheres of protection. All of these different criteria illustrate how difficult it is for each legal system to deal with the vague term of defamation.

One of the major differences between the South African and the German legal systems on the one hand and the Canadian system on the other is the principle of liability in an action for defamation. Under German and South African law a fault element is required in an action for defamation whereas the Canadian law of defamation is regarded as a strict liability tort. The fact that the Canadian law does not require a fault element presumably means that it is easier for a Canadian plaintiff to have a successful action because the defendant will not be heard with the argument that he did not intend to defame the plaintiff. Another difference is the fact that the Canadian legal system, as opposed to the German and the South African legal systems, distinguishes between an action for libel and an action for slander. As a consequence of this distinction, damages are presumed in an action for libel or slander *per* se whereas in an action for slander the plaintiff has to prove special damages. Both the German as well as the South African legal systems do not recognise a difference between an action for libel and for slander.

Apart from these differences the article demonstrates that all three legal systems also have some similarities in dealing with the law of defamation. All three legal systems acknowledge a title to sue for legal entities. Furthermore, the defences of absolute privilege for parliamentarians, the qualified privilege of exercising a legitimate interest, the fair comment and the consent are recognised in all three legal systems.

Finally, the Canadian, the South African as well as the German legal system provide two basic remedies in a defamation action, the injunction or interdict to restrain the defamatory publication and the computation of damages.