

Chapter 36

Delict

‘... gross negligence, or culpable fault, consists of not bringing to the affairs of another the care that persons who are the least careful and the most stupid would not fail to bring to their own affairs.’

ROBERT JOSEPH POTHIER (1699–1772)

FRENCH JURIST

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WHY THIS CHAPTER IS IMPORTANT

The law of delict allows someone to sue another for compensation because of damage that was done to their person or property. On any given day in any court in South Africa, almost half the matters being heard involve insurance companies, and most of those cases typically involve motor vehicle collisions.

It is not only negligent drivers who are being sued for compensation for injuries – anyone who runs a business knows that customers can also sue them for injuries. Shoppers sue supermarkets for injuries sustained while slipping on a wet floor; pedestrians sue municipalities for injuries sustained due to falling on a broken pavement, and hungry members of the public sue restaurants for illnesses caused by serving contaminated food.

The law of delict is also used for compensation for an injury to personality – in other words, someone says something that injures your reputation or dignity. For this reason it is very important to be careful about what you say about people or post online.

DELICT

1 Introduction

A delict is a wrongful act committed against a person that causes the person to suffer harm. The harm entitles the injured party to claim compensation in a civil court.¹ For example, assaulting someone is a criminal offence that might result in the wrongdoer going to jail, but it is also a delict that might entitle the hurt person to compensation for their medical expenses, loss of income while medical treatment is obtained, loss of future earnings if there is permanent disability, and for the injury to their dignity.

The law of delict provides for two possible remedies to enable a victim to be compensated for the harm done to them:

- **Aquilian action:** This is a remedy for a wrong done to an interest of substance. The action relates to bodily harm or injury to a person (for example, injury sustained in a motor vehicle collision), or physical damage to property (for example, damage to a motor vehicle).
- **Actio injuriarum:** This is a remedy for a wrong done to an interest of personality. This action relates to an injury to a person's dignity, reputation or bodily integrity.

1.1 Delict distinguished from crime

Delicts must be distinguished from crimes. Not all crimes are delicts, and not all delicts are crimes. Both, however, are wrongful. Delicts are wrongs committed against the private interests of individuals; crimes are wrongs committed against the public interest. Delictual litigation is intended to compensate the victim; criminal prosecution is intended to punish the wrongdoer.

1.2 Delictual liability distinguished from contractual liability

Where a person enters into a contract with another, and is harmed as a result of the performance, it may be possible for that person to sue either in contract or in delict. It is important to understand how this can operate: poor performance under a contract may amount to a breach, which may be sued upon under the law of contract. However, unless the breach is also negligent or intentional, there can generally be no action in delict.

Where the breach is the fault of the defendant, and is the outcome of negligent or intentional conduct, a plaintiff may choose to sue either in delict, or in contract.² Our law acknowledges that one situation can give rise to two possible law actions: a claim for damages in delict and a claim for damages arising from the breach of the contract. The plaintiff in such a case must choose which of the two actions they wish to pursue.³ This is because our law does not allow the same person to be sued twice for the same cause of action.⁴

1.3 The capacity to commit a delict

Children under seven years of age are not regarded by the law as having the capacity to commit a wrong. Minors aged from 7 to 14 years are deemed to lack capacity until the

1 Boberg, P Q R, *The Law of Delict*, Vol 1, Cape Town: Juta 1984.

2 *FF Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA); *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

3 *Holtzhausen v Absa Bank Ltd* [2005] 2 All SA 560 (SCA).

4 *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

contrary was proved by the party alleging negligence or intention.⁵ Minors aged 14 and older are deemed to have the capacity to understand the wrongfulness of their conduct.⁶

2 Aquilian action

This is the name of the court action that may be brought against a wrongdoer where the victim has suffered financial loss as a result of harm to their body or property.

A court action in the law of delict proceeds in two stages. First, the plaintiff leads evidence to prove all the elements of liability. Then the defendant leads evidence to justify their conduct, or to challenge the claim of the plaintiff to full, or any, damages.

3 Essential elements of the aquilian action

A plaintiff has to prove four elements to succeed in a claim.⁷

3.1 Wrongful consequence of an act or omission

Not all acts that cause financial loss to another are wrongful. For example, vigorous competition between shopkeepers could lead to loss of profits and insolvency. This is not necessarily wrongful. It is only where there exists a duty of care to ensure that an act does not harm another, that such an act can be considered wrongful.⁸ The same act may be actionable in respect of harm caused to one person, and not to another.⁹

Minister of Safety and Security and another v Carmichele¹⁰

An accused on a charge of rape was released on bail after his bail application was not opposed. After his release he assaulted a woman. She argued at court that the police officers and the prosecutor should have realised that the accused was a danger to society and that they were duty bound to oppose his application for release pending his trial.

The court held that the police and the prosecutor had indeed had a public as well as a private law duty to oppose bail, and that they had failed in that duty.

The wrongfulness of an act is a quality relative to the consequence it produces. It is more accurate to refer to a wrongful consequence than a wrongful act.

Wrongfulness is the infringement of a person's legal right: the loss is important, not the act which caused it. For a court to find that a right existed implies that there was a duty not to infringe it.

Any act that results in damage to property or bodily injury is automatically considered by the law to be wrongful.¹¹

5 *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A).

6 *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA), *Eskom Holdings Ltd v H obo H* [2005] 3 All SA 415 (SCA).

7 Havenga, P, Havenga, M and Hurter, E, *General Principles of Commercial Law*, 7th edition, Cape Town: Juta 2010, 35–40.

8 *Donoghue v Stevenson* [1932] AC 562 (HL) (SC).

9 *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A).

10 *Minister of Safety and Security and another v Carmichele* [2003] 4 All SA 565 (SCA).

11 *Cape Town Municipality v Paine* 1923 AD 207.

***Stewart and another v Botha and another*¹²**

The court dealt with a case in which a child had been born with severe genetic defects. The father sued various doctors on behalf of the minor male child, alleging that their failure to detect any abnormalities in the foetus prevented the mother from choosing to have an abortion, which would have resulted in the child not being born, and he would not have suffered from any of the severe physical and mental handicaps.

Our courts have previously held that a mother has a claim against a medical practitioner for not having detected and informed her of the congenital defects in her foetus which she would have aborted had she known.¹³ But this case was very different. If the claim of the child was to succeed, the court would have to find that it was better for the child not to have been born at all, rather than to have been born the way he was.

The court held that this type of claim should not be recognised in our law. Making a choice in favour of non-existence would disregard the sanctity of life and the dignity of the child, and was an arbitrary, subjective preference for some policy considerations and the denial of others.

Whether an act or omission is wrongful will depend on the circumstances:

- **Pure economic loss caused negligently:** The law is more cautious about allowing a recovery for pure economic loss than for loss arising through physical injury. The law is concerned about the possibility of 'indeterminate liability'. This means that the economic consequences of an act may greatly exceed its physical effects. The court will look at the social desirability of imposing liability by considering whether the loss is finite and whether the number of potential plaintiffs is limited.¹⁴

As a result, a plaintiff who is only one of many indeterminate classes of potential victims may fail to establish wrongfulness, while a plaintiff whom the defendant specifically foresaw as a victim may succeed.¹⁵ For example, as Eskom struggles with load shedding and power outages, thousands of businesses have lost money due to electricity shortages. Frozen foods have spoiled, and customer records lost as computers and cash registers have lost power. The failure to plan for future power needs and to build sufficient power stations could be argued to found an action against the government in delict for their negligence, which has caused economic loss. Such an action is not likely to succeed because of the indeterminate number of potential plaintiffs. However, in a case where Eskom workers repairing a power cable to buildings accidentally caused a fire which destroys that building, an action by the owner of the building is likely to succeed. This is because the loss is finite and not an indefinite number of potential plaintiffs.

***Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security*¹⁶**

A building company hired a security company to guard one of its sites. A contracting company at the site had their truck stolen when people claiming to be mechanics gave the security guard a letter which said they could repair the truck and take it for a test drive. The truck was never seen again. The contracting company sued the building company for vicarious liability for the security guard's conduct.

12 *Stewart and another v Botha and another* 2008 (6) SA 310 (SCA).

13 *Friedman v Glicksman* 1996 (1) SA 134 (W).

14 *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N).

15 *Coronation Brick (Pty) Ltd v Strachan Construction Company (Pty) Ltd* 1982 (4) SA 371 (D); *Van Zyl NO and another v Kantey and Templar (Pty) Ltd and another* [2005] 4 All SA 225 (C).

16 *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA).

The court held that there was neither wrongfulness nor negligence on the part of the security guard. Further, because there was a possibility of an unlimited number of plaintiffs with unlimited liability, such a claim could not be allowed.

- **Unlawful competition:** Freedom of trade means that it is not automatically wrongful to harm a competitor simply by competing. There is no possibility of indeterminate liability because of the element of intention. The courts have not defined the limits of lawful competition, but have listed common forms of unlawful competition. For example, passing off.¹⁷
- **Nervous or emotional shock:** In South African law, claims in respect of negligently caused shock and emotional trauma resulting in a detectable psychiatric injury are actionable.¹⁸

Bester v Commercial Union Versekeringsmaatskappy van SA Ltd¹⁹

D (11 years old) was two metres ahead of W (6 years old) when running across a street. A vehicle insured by CU just missed D and drove into W, who died later that day from his injuries. D suffered shock requiring medical treatment due to his belief he had been in danger of also being run over, and from witnessing the fatal collision just behind him. CU was sued for the costs of W's funeral, D's medical treatment, and for D's shock.

CU denied that it should pay for the shock, because emotional shock or psychiatric injury could not lead to a physical injury.

The court held that courts regularly award damages for shock, pain and suffering, disfigurement, loss of amenities of life and shortening of life expectancy where this relates to a purely physical injury. The court decided there was no reason in our law why somebody who, as the result of the negligent act of another, has suffered shock or psychiatric injury with consequent indisposition, should not be entitled to compensation, provided the possible consequences of the negligent act should have been foreseen by the reasonable person who should find himself in the place of the wrongdoer.

Foresight of a mere possibility of harm will not suffice.²⁰ The general manner in which the harm will occur must be reasonably foreseeable, though not necessarily the precise or exact manner in which the harm will occur.

Road Accident Fund v Sauls²¹

A woman passenger watched her fiancé get run over by a truck. She was diagnosed with post-traumatic stress disorder, which became chronic and was unlikely to improve. She became withdrawn, did not want to see anyone, was deeply depressed, and suffered a pattern of sleep disturbance with intrusive and morbid dreams.

She claimed for compensation on the basis that as a consequence of her witnessing the injury, she suffered emotional shock and trauma which gave rise to a recognised and detectable psychiatric injury.

¹⁷ *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C).

¹⁸ *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A); *Clinton-Parker v Administrator, Transvaal*; *Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W); *Majiet v Santam Ltd* [1997] 4 All SA 555 (C); *Barnard v Santam Bpk* (1999) 1 SA 202 (SCA).

¹⁹ *Bester v Commercial Union Versekeringsmaatskappy van SA Ltd* 1973 (1) SA 769 (A).

²⁰ *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA).

²¹ *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA).

The question for the court to decide was whether a reasonable person in the truck driver's position should have foreseen that, by his careless driving, he would knock over the fiancé and that, as a consequence, someone close to the fiancé would witness the collision and would suffer severe shock, distress and emotional trauma resulting in a psychiatric disorder.

The court held, after evaluating all the relevant facts, that the harm suffered was foreseeable as a reasonable possibility.

Being told of a traumatic or horrific event may result in grief, but our courts have held it does not cause psychological shock or injury.²²

- **Products liability:** If a product is defective, the purchaser of the goods may suffer physical damage to their person or property, or financial loss. The law has always allowed the buyer to sue the seller, but what about the manufacturer? Academics suggest that the production of a defective article that causes economic or physical loss to any person is a wrongful act. A person can sue under the common law of delict, provided they prove that the damage was reasonably foreseeable and that the defendant was negligent in not guarding against it.²³
- **The situation has been changed by the Consumer Protection Act,**²⁴ which creates obligations in respect of certain transactions on retailers, suppliers and manufacturers so that consumers can buy and use products without incurring loss or damage. This means that because of the Act, retailers, suppliers and manufacturers can face greater liability for certain transactions than they may have faced under our common law of delict. Refer to chapter 29: '*Consumer protection*' to see which transactions are covered by the Act, and which are not.
- **Omissions:** An omission is as much conduct as a positive act. Generally no one is legally obliged to protect another from harm, even if they can easily do so and morally ought to do so. However, there may be a duty to act arising from the following circumstances:
 - ◆ If prior conduct, or control of certain property, creates a potentially dangerous situation.²⁵ For example, a builder who had control over a piece of property is required to take steps to protect the public against harm that could arise from building operations.

Minister van Polisie v Ewels²⁶

E claimed he was twice assaulted by B, a policeman; once at a café, and the second time in the lobby of a police station in front of the charge office where a sergeant and several constables were on duty at the time. He claimed they were all aware of the assault, that they allowed B who was off duty into the station, and that they had negligently failed to protect him. The attorney for the Minister argued there was no duty in terms of the Police Act²⁷ for policemen to protect E.

The court accepted that there is no general legal duty on a person to prevent harm to another, even if such person could easily prevent such harm, and even if one could expect, on purely moral grounds, that such person act positively to prevent damage. However, in certain circumstances there is a legal duty on a person to prevent harm to another. If he fails to comply with that duty,

22 *Barnard v Santam Ltd* (61/97) [1998] ZAENGTR 1 (25 September 1998).

23 *A Gibb and Son (Pty) Ltd v Taylor and Mitchell Timber Supply Company (Pty) Ltd* 1975 (2) SA 457 (W).

24 Consumer Protection Act 68 of 2008.

25 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); [1975] ZAENGTR 2 (23 May 1975).

26 *Ibid.*

27 Police Act 7 of 1958.

there is an unlawful omission which can give rise to a claim for damages. In this case the omission not only occasioned moral indignation but the legal convictions of the community require that the omission be regarded as unlawful. E had been assaulted in a police station under the control of the police and in the sight of a number of policemen, for whom it had been easy to prevent or stop the attack. Because the omission took place in the course of duty of the policemen, the Minister was liable.

- ◆ Statutory duty. For example, if the police fail to assist someone who is being assaulted while in jail, this could amount to a breach of their statutory duty to protect the public.
- ◆ Relationship of the parties. For example, if someone was a close relative then there is a greater duty to protect that person than if they were a stranger.
- ◆ Contractual assumption of responsibility for the safety of another person. For example, a lifeguard might have greater responsibility to give first aid to a person who collapsed at a guarded swimming pool than they might have to give to a person who collapsed on the street.

Hamilton v Minister of Safety and Security²⁸

The court had to decide whether a police officer owes the general public at large a duty of care to verify information when considering an application for a firearm licence.

The plaintiff sued the Minister of Safety and Security for various injuries sustained when someone shot him. A police officer had failed to verify information supplied to her when the shooter applied for a firearm licence.

The court held that at the time the shooter's licence application had been considered, the legal convictions of the community had required that the police should exercise reasonable care in the prevention of violent crimes. A telephone call to the shooter's next of kin or her employer would in all probability have revealed her unsuitability to possess a firearm. Further, the plaintiff had been a foreseeable plaintiff since he fell within the group against which the shooter's irrational anger and violent tendencies could be directed. The court found that the necessary causal link between the negligent issuing of the firearm licence to the shooter and the plaintiff's wounding by the shooter had been proved.

The court held that the Minister was liable to the plaintiff for the damages suffered as a result of being shot.

The common-law concept of wrongfulness has been developed and extended according to demands of the Bill of Rights as contained in the Constitution.²⁹

Carmichele v Minister of Safety and Security and another³⁰

When the matter was first heard the court had to decide whether omissions of the police and prosecutors were wrongful. They had failed to provide the presiding officer of a bail hearing with certain information about the accused, who was granted bail and then brutally assaulted the plaintiff in her home. As confirmed on appeal, the court held that the omissions of defendants were not wrongful as they did not owe the plaintiff a legal duty to take positive steps to prevent the harm she suffered.

²⁸ *Hamilton v Minister of Safety and Security* [2003] 1 All SA 678 (C).

²⁹ Constitution of the Republic of South Africa, 1996.

³⁰ *Carmichele v Minister of Safety and Security and another* 2003 (2) SA 656 (C).

The matter was referred to the Constitutional Court³¹ which confirmed that 'where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it by removing that deviation.'

The Constitutional Court held that the Supreme Court of Appeal and court of first instance had overlooked this requirement of the Constitution. The matter was then referred back to the court of first instance to decide whether the common law of delict should be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. On re-hearing, the court of first instance held that prosecutors must 'protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances irrespective of whether they are to the advantage or disadvantage of the suspect.' The State employees for whom the Minister was responsible owed Carmichele a legal duty to protect her against the risk of sexual violence perpetrated by the accused. The negligent failure to do so was unlawful. If the employees had performed their duties as they should have done, and disclosed certain facts about the accused's sexual urges to a 'reasonable court' such a court would have refused bail.

The court ordered that the defendants were jointly and severally liable to Carmichele in delict for the damage suffered as a result of the attack.

3.2 Fault

This is the element of a delict that induces the law to hold a person legally liable for wrongful conduct. In an aquilian action, fault is constituted by either intention or negligence.

3.2.1 Intention

The wrongdoer intended harm to occur as a result of their actions. The fault requirement will be satisfied if it is proved that the wrongdoer deliberately caused the harm. For example, assault.

3.2.2 Negligence

The fault requirement will be satisfied if all three of the following can be proved:

- A reasonable person in the position of the defendant would have foreseen the possibility of harm arising through their act.
- A reasonable person in the position of the defendant would have taken steps to prevent the occurrence of the harm.
- The defendant failed to take the steps that a reasonable person would have taken under the circumstances.³²

Intention is a state of mind; negligence is an attribute of conduct. Those who lack the capacity to make rational judgements because of their youth, mental deficiencies, intoxication, or use of drugs, are generally not capable of intention to cause harm. In some cases, however, a person who is not capable of intending to cause harm could be negligent in not foreseeing the possibility of harm arising through their conduct. For example, a reasonable person would foresee before starting to drink that they could be negligent if drunk and cause harm to another.

The court distinguishes between the kind of harm (which must have been foreseeable) and the extent of the harm (which need not have been foreseeable). The manner in which

³¹ *Carmichele v Minister of Safety and Security and another* 2003 (2) SA 656 (C).

³² *Kruger v Coetsee* 1966 (2) SA 428 (A).

the harm was caused also must have been foreseeable. For example, if someone drives negligently it is foreseeable that they could cause a collision causing injury to people and damage to property. It is not necessary for the driver to foresee exactly who would have been injured or the amount of damage caused.³³

Minister of Safety and Security v Van Duivenboden³⁴

The court held that a person may be liable for damages or loss that result from a negligent omission. A negligent omission is unlawful only if it occurs in circumstances the law regards as sufficient to give rise to a legal duty to avoid such negligent harm. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability; it will attract liability only if the omission was also culpable. The test for culpability will be whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.³⁵

The court was normally reluctant to impose liability for omissions because it recognised that individuals are entitled to 'mind their own business' even when they might reasonably be expected to avert harm. Also, it could sometimes be unfair to impose liability on one person who fails to act when there are others who might equally be faulted.

No general rule can be laid down for the precautions that a reasonable person would take under the circumstances. Some considerations would include:

- The degree of likelihood that the harm will occur.
- The seriousness if the harm does occur.³⁶
- The cost or difficulty of taking precautions.
- The social utility of the conduct.

Whether or not there is fault will depend on the circumstances:

- **Work requiring skill:** The ordinary reasonable person test cannot apply to an activity requiring expertise beyond that of the reasonable person. In that case, the standard of the reasonable expert is used, that is, the general level of skill and diligence possessed and exercised at the time by a member of that profession.³⁷
- **Danger to those unable to take care of themselves:** The reasonable person takes account of the ability of a potential victim to look after themselves. This means that conduct that may endanger children calls for the exercise of more care than would otherwise be required. The reasonable person would anticipate and guard against sudden, heedless, and sometimes irrational action from children, the disabled, the infirm, and the blind.
- **Motoring assumptions:** The reasonable driver blends optimism with caution. They assume other drivers will act lawfully and reasonably; yet they anticipate a degree of inattention and stupidity. Reasonable drivers expect, and guard against, reasonably foreseeable negligence.

³³ *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA).

³⁴ Ibid.

³⁵ *Kruger v Coetzee* 1966 (2) SA 428 (A).

³⁶ *Herschel v Marupe* 1954 (3) SA 464 (A).

³⁷ *Van Wyk v Lewis* 1924 AD 438.

Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n ander³⁸

Ciba-Geigy was the manufacturer of chemicals, including chemicals used as herbicides on various crops. The product was distributed via a distributor to Lushof, a large-scale fruit farm. The farmer claimed damages suffered as a result of physical damage to his fruit crop because the product had inhibited the growing of pears. The product was successful as a herbicide. The distributor held itself out as an expert having the necessary expertise in respect of the product sold.

The court held that when a manufacturer produces and markets a product without conclusive prior tests, and when using it in the recommended manner is potentially hazardous to the consumer, then the negligence on the part of the manufacturer may expose it to delictual liability to the consumer. There is no need for a contractual nexus between the manufacturer and the consumer.

In the case of a manufacturer who does not sell the defective product directly to the injured party, there is no contract between the manufacturer and injured party. This means that an injured person is not able to sue the manufacturer based on the common law of contract. Similarly, if liability is to be proved under the common law of delict, then all the requirements for aquilian liability, including fault, must be proved.³⁹ This has proved very difficult, and generally has resulted in manufacturers escaping liability for consequential damage caused by defective products.

Courts have historically been very reluctant to hold manufacturers liable without any fault being proved on their part.⁴⁰ However, the situation is now different with the Consumer Protection Act.⁴¹ Under this Act, retailers of goods are subject to additional duties regarding how they market and sell potentially hazardous goods to consumers. A 'hazard' is a characteristic that presents a significant risk of personal injury to any person or damage to property. Products could be 'unsafe' if, due to a characteristic, failure, defect or hazard, the goods present an extreme risk of personal injury or property damage to anyone.

Under the Act, retailers of potentially hazardous products must provide adequate warning labels (in plain and understandable language) on hazardous or unsafe products. Adequate instructions for their safe handling and use must also be provided to any buyer. They must also ensure that the warning labels and operating instructions relating to any unusual risk are specifically drawn to the attention of the consumer. The consumer must acknowledge that they have been made fully aware of these risks by behaving in a way that acknowledges the notice and that shows awareness of the risk. This may mean that consumers will be required to agree in writing to inherent risk, when purchasing a product from a retailer.

The Act creates a form of 'strict liability' for producers, importers, distributors or retailers in respect of transactions covered under the Act. They will be liable for any harm as a result of the supply of any unsafe goods or products, or inadequate instructions on warnings. They will have this liability even if they were not negligent. In other words, no fault needs to be proved. This is why it is called 'strict liability'. For example, if a company imports goods into South Africa, it may be liable for any harm caused as a result of the use of the goods. It may be liable even though it did not produce the goods, the packaging or label on the goods.⁴²

38 *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n ander* 2002 (2) SA 447 (SCA).

39 Matlala, D, *The Law Reports, De Rebus*, Pretoria: Law Society of South Africa August 2003.

40 *Wagner v Pharmicare Ltd; Cuttings v Pharmicare Ltd* [2003] 2 All SA 167 (SCA).

41 Consumer Protection Act 68 of 2008.

42 Levenstein, E, Hazardous obligations, *Consumer Law*, Vol 10, Issue 6, Johannesburg: Werksmans July 2010.

3.3 Causation

In some cases, the harm caused by a wrongful act may be so remote that it never could have been foreseen by anyone. There must be a close causal connection between the wrongful act and the harm suffered.⁴³ If the consequences are too remote, the wrongdoer will not be liable for the remote consequences of their wrongful act.⁴⁴

Shabalala v Metrorail⁴⁵

The plaintiff claimed damages for the physical injuries he sustained in an incident on board a train in which he was shot, robbed and injured by an unknown assailant. He alleged that Metrorail had a duty of care to ensure the safety of all fare-paying passengers on its trains, and it breached that duty by failing to employ sufficient security staff on platforms or trains to prevent the incident in which he was injured.

The court held that the element of causation had not been proved. It could not be said that the mere fact that there was not a security presence on the day in question had caused the plaintiff to be shot, robbed and injured. For that reason alone, Metrorail was not liable.

Liability in delict requires proof of both factual causation and legal causation:

- **Factual causation:** There must be a factual link between the act and the damage or harm. The act of the wrongdoer must have caused the damage or harm. The courts use the 'but for' test to determine whether there is a factual link. This test asks what would have happened if the defendant had engaged in other conduct instead. If the harm would still have occurred, then the defendant's conduct was not a factual cause of the harm. The court looks at all the evidence, and may also use statistics and percentages to determine probabilities as to whether the outcome would have been likely if the conduct of the defendant had been different.
- **Legal causation:** A single act can lead to several harmful events. The courts then have to determine whether the act should in law give rise to liability, as there could be some situations where it could be a massive burden for someone to make good all the harm caused by their wrongful conduct. In examining the 'remoteness of damage' the courts look to determine if there is a close enough relationship between the conduct and its consequences. By doing so, the courts limit the boundaries of legal liability. They try to strike a balance between the interests of the wrongdoer and those of the innocent victim. It is ultimately a moral judgment and application of common sense to determine whether the result can fairly be attributed to the defendant.

3.3.1 Vicarious liability

The principle of vicarious delictual liability is that where an employee acts in the course of their employment, and in so doing furthers the interests of their employer and damages the property of a third party, the employer should be liable to the third party for its damages.

Not every act or omission of an employee committed during their employment in the advancement of their own personal interests, or for the achievement of their own goals, necessarily falls outside the scope of their employment.

43 *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (SCA).

44 *Minister van Polisie v Skosana* 1977 (1) SA 31 (A).

45 *Shabalala v Metrorail* 2007 (3) SA 167 (W).

***Ess Kay Electronics PTE Ltd v First National Bank of Southern Africa Ltd*⁴⁶**

An employee of a bank took two blank drafts without authorisation and made them out in favour of the plaintiff. The plaintiff delivered goods on the strength of the forged drafts. When the bank declined to pay the drafts, the plaintiff sued the bank alleging that the bank was vicariously liable for its employee's actions.

The court found that the employee had committed the fraud solely for his own financial benefit. He had not at any stage intended to or in fact advanced the affairs and business of the bank. The question was always whether the acts were in fact authorised and whether they were in fact performed in the course of the employee's employment. The unlawful acts were the opposite of the employee's authorised functions. The act of stealing the bank's property and forging the signatures of others cannot logically have constituted the performance of work on behalf of the bank.

The court held that the bank was not vicariously liable for their employee's actions.

Things can become complex when deciding whether the employee was in fact acting in the course of their employment when the damage occurred, or whether they were pursuing their own objectives.

***Van der Spuy v Minister of Correctional Services*⁴⁷**

The plaintiff was a bystander who was shot during the course of a prison escape by escaping prisoners, one of whom the police knew from before who was considered dangerous.

The bystander sued the Minister for damages on the basis of vicarious liability for the negligence of members of the prison services who, acting within the course and scope of their employment with the defendant, failed to prevent the prisoners' escape. The Minister admitted negligence and factual causation but disputed his liability to the plaintiff, alleging that damage suffered by the plaintiff was too remote to attract liability.

The court said that the prison services was under a duty to protect individuals by taking active steps to prevent dangerous persons held in prison from escaping into the community if they were likely to commit acts of violence should they escape. The general nature of the harm suffered by the plaintiff was reasonably foreseeable, since persons locked up in prison often resort to the use of violence to overcome persons who resist their attempts to escape.

The court held that the defendant was liable.

The meaning of 'in the course of employment' has been interpreted widely by our courts. It has been applied to conduct that was authorised by an employer, as well as situations where an employee partially engages in the authorised work while also conducting activities that are not specifically part of their work.

3.3.2 The test for vicarious liability

There are three requirements to establish vicarious liability:

- An employer–employee relationship.
- A wrongful act must be done by an employee.
- The employee must have committed the wrongful act while acting within the course and scope of their employment.

⁴⁶ *Ess Kay Electronics PTE Ltd v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA).

⁴⁷ *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE).

Whether the employer is liable for the actions of the employee will depend on the nature and extent of any deviation from duties. Where the employee's conduct deviates from the course and scope of their employment, it is said that they engage in 'a frolic' of their own. An employer may in such circumstances still be held liable provided that there is a sufficiently close connection between the actions of the employee and the business of the employer.⁴⁸ This would apply no matter how bad, dishonest or negligent the employee's conduct was.⁴⁹

K v Minister of Safety and Security⁵⁰

A woman was gang-raped by three uniformed and on-duty policemen after she accepted a lift home from them early one morning. Both the High Court and the Supreme Court of Appeal dismissed her claim for delictual damages because in raping her, the policemen had deviated from their duties and were pursuing their own objectives rather than those of their employer.

The Constitutional Court set aside the two judgments and declared the Minister liable. When the policemen, on duty and in uniform, raped the woman, they were also failing to perform their duties to protect her. In committing the crime the policemen also infringed her rights to dignity and security of person. By doing so their employer's obligation to prevent crime was not met. There was therefore an intimate connection between the delict committed by the policemen and the purposes of their employer. That close connection rendered the Minister liable vicariously to the woman for the wrongful conduct of the policemen.

Minister of Safety and Security v Morudu and others⁵¹

D was an off-duty police investigator with the fingerprint unit. While dressed in civilian clothes, he drove an unmarked police car to a house. D called out a man whom he believed was having a relationship with his wife, and shot him dead. D used his own private firearm. D was later sent by the police to the same crime scene in the course of his employment to search for fingerprints. The man's wife recognised him and sued the State on the basis that the Minister was vicariously liable for D's conduct.

The court held that the respondents had not known that D was a police officer. He had used an unmarked vehicle and dressed in civilian clothing. He worked for a unit that was not viewed by the public as providing protection.

It held that there was no sufficiently close link between the conduct of D and the business of the employer. D had been on a frolic of his own as he believed that the deceased had been having an affair with his wife. This was viewed as a radical deviation from the tasks incidental to his employment.

The nature of vicarious liability is also discussed in chapter 23: 'Employment'.

3.4 Harm

Monetary compensation will be awarded by the court for a loss that is proved. The amount of damages awarded is meant to restore the plaintiff financially to the position they would have been in had the delict not been committed. The objective is to compensate the plaintiff, not to improve their position. It must be possible to calculate the diminution of the plaintiff's estate as a result of the delict.

48 *Minister of Police v Rabie* 1986 (1) SA 117 (A).

49 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

50 *Ibid.*

51 *Minister of Safety and Security v Morudu and others* 2016 (1) SACR 68 (SCA).

The delict may diminish the estate by reducing its value or by preventing its value from increasing.

- **Damage to property:** Damages awarded would reflect the difference between the value of the property prior to the delict and the value of the property after the delict had been committed. Sometimes, damages also may be awarded for the loss of use of the property: for income it would have produced had it not been damaged. The plaintiff has a duty to mitigate their damages. For example, if machinery is damaged, the plaintiff would be expected to hire substitute machinery to decrease the loss to income, and the defendant would be liable for the cost of hiring the machinery.⁵²
- **Personal injury:** Damages may be awarded to compensate a plaintiff for the following:
 - ♦ **Past medical expenses.**
 - ♦ **Future medical expenses:** These are estimated by medical experts.
 - ♦ **Past loss of earnings.**
 - ♦ **Future loss of earnings:** The courts may award an amount so that the plaintiff can buy an annuity equivalent to the calculation of lost future income. Inflation is taken into account.
 - ♦ **Pain and suffering:** Although money cannot really compensate for pain and suffering, the courts have a wide discretion to award an amount that they consider fair to both parties. Previous cases are used as a reference, on the basis that justice requires similar injuries to receive like compensation. The amount awarded is not influenced by the value of money to the plaintiff, or their race or social standing.⁵³

Seymour v Minister of Safety and Security⁵⁴

A 66-year old man claimed general damages of R10m due to his unlawful arrest without a warrant. The claim was for pain and suffering, emotional shock, deprivation of liberty, post-traumatic syndrome, invasion of privacy, intimidation and insult. While in detention he suffered from angina, an irregular heartbeat, high blood pressure and a high pulse rate, all of which were attributable to the stress experienced as a result of his detention.

The court awarded only R500 000 damages saying that the primary function of an award of damages under the *actio injuriarum* was to compensate the victim for his injuries, and not to be punitive.

4 Defences to an aquilian action

A defence is an attempt to escape, or diminish, liability on the basis that the defendant's conduct was not wrongful, or that their culpability was mitigated.⁵⁵ As a general principle, the defendant bears the onus of proving whether there was an excuse or justification to a claim.⁵⁶

Typical defences include:

- **Contributory negligence:** The defendant usually denies that they were negligent as alleged, or that they were negligent at all. However, as an alternative plea, the defendant admits some negligence, but also alleges that the plaintiff was negligent and that the negligence of the plaintiff contributed to the harm suffered.

⁵² *Erasmus v Davis* 1969 (2) SA 1 (A).

⁵³ *Radebe v Hough* 1949 (1) SA 380 (A).

⁵⁴ *Seymour v Minister of Safety and Security* [2005] 2 All SA 296 (W).

⁵⁵ Havenga et al., 2010, 36–38.

⁵⁶ *Mabaso v Felix* 1981 (3) SA 865 (A).

Where contributory negligence is proved, the Apportionment of Damages Act⁵⁷ directs the court to apportion fault between the parties. The court will make an award in proportion to the degree of deviation from the standard of the reasonable person, expressed as a percentage.⁵⁸ For example, if the plaintiff is found to have been 30% negligent, the plaintiff will only win 70% of their claim.

General Accident Versekeringsmaatskappy SA Bpk v Uijs NO⁵⁹

A front-seat passenger blatantly refused to wear his seat belt.

The court found this omission to be irrational and awarded a 33.3% deduction from the compensation awarded.

- **Self-defence:** The defendant may allege that the act that resulted in the harm was committed to prevent harm arising to themselves. The defendant must prove that the act was reasonable under the circumstances.
- **Consent:** This may take one of two forms, either: 1) consent to intentional infliction of harm, for example a boxing match; or 2) consent to unintentional infliction of harm (voluntary assumption of the risk). This defence may be raised where the plaintiff knowingly enters a situation where there is a possibility of harm coming to them, and is, in effect, consenting to the risk of being harmed.
- **Statutory authority:** Certain laws give certain persons the right to inflict harm to others, for example police officers trying to prevent the escape of a person arrested for committing certain crimes.
- **Contractual exemption or limitation of liability:** In commercial agreements, the parties may want to exclude or limit liability for negligence. Parties sometimes accept liability for their gross negligence, without a full appreciation of what the term means.

MV Stella Tingas: Transnet Limited t/a Portnet v Owners of The Mv Stella Tingas and another⁶⁰

A claim was based on the damages suffered during a collision with another ship while under compulsory pilotage in the Durban harbour. The owners of the ship claimed that the collision was caused by the gross negligence of the pilot. This was to avoid the exemption from liability afforded to both Transnet and the pilot in the First Schedule to the Legal Succession to the South African Transport Services Act,⁶¹ that provided that Transnet and the pilot would be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot.

The court held that in order to qualify as gross negligence, the conduct in question must involve a departure from the standard of the reasonable person to such an extent that it may be properly categorised as extreme. The conduct must demonstrate, where it is found to be conscious risk-taking, a complete obtuseness of mind; where there is not conscious risk-taking the act must demonstrate a total failure to take care.

The court held that the pilot was negligent to such a degree that his conduct constituted gross negligence.

It is still unclear whether an exemption for negligent conduct includes an exemption for grossly negligent conduct.

57 Apportionment of Damages Act 34 of 1956.

58 *South British Insurance Company Ltd v Smit* 1962 (3) SA 826 (A); *Jones NO v Santam Bpk* 1965 (2) SA 542 (A).

59 *General Accident Versekeringsmaatskappy SA Bpk v Uijs NO* 1993 (4) SA 228 (A).

60 *MV Stella Tingas: Transnet Limited t/a Portnet v Owners of The MV Stella Tingas and another* 2003 (2) SA 473 (SCA).

61 Legal Succession to the South African Transport Services Act 9 of 1989.

5 *Actio injuriarum*

Damages may be awarded where a person's feelings have been hurt or their personality interests have been injured in some way. Damages are awarded to compensate the wounded feelings or the damage done to the reputation of the plaintiff.

6 Essential elements of the *actio injuriarum*

A claim of *actio injuriarum* requires proof of the following four elements:⁶²

6.1 Wrongful act

The act must be one that affects the plaintiff's personality, that is, their dignity or reputation is lowered in the eyes of the community. Such an act is wrongful. The test for defamation is whether ordinary members of the community would think less of the plaintiff as a result of the defamatory statement, for example statements reflecting alleged dishonesty, immorality, incompetence, or criminality.

6.2 Fault

The interest of personality of the plaintiff must have been intentionally harmed.

6.3 Causation

The wrongful act must be seen to be referring to the plaintiff and must have caused harm.

6.4 Harm

The statement must be proved to have damaged and caused harm to an interest of personality.

7 Types of *actio injuriarum*

The following conduct falls under the *actio injuriarum*:

7.1 Invasion of bodily security

Assault is an example of such an invasion.

7.2 Detention or invasion of dignity

An example would be to hold someone against their will, or to insult someone where their self-esteem is injured.⁶³

⁶² Havenga et al., 40.

⁶³ *S v Tantele* 1975 (2) SA 772 (T); *Ciliz v Minister of Police and another* 1976 (4) SA 243 (N).

O’Keeffe v Argus Printing and Publishing Co Ltd⁶⁴

A photograph appeared without the subject’s consent in an advertisement for a gun shop. Permission had been obtained for the photograph to appear with an article in a newspaper, and not for an advertisement.

The court held this to be an invasion of dignity. Factors the court considered included the nature of the photograph, the personality of the plaintiff, and her profile in public life.

7.3 Invasion of privacy

This may include any of the following:⁶⁵

- Publication of private facts.

NM and others v Smith and others⁶⁶

The plaintiffs claimed damages of R200 000 each from a journalist who wrote a biography, a politician who disclosed their names and HIV status, and the publisher of the biography.

The court awarded damages of R15 000 against the publisher only. The first and second defendants were not liable as they relied on a report compiled by the ethics committee of a public institution, which they believed to be a public document which was not confidential, and they were entitled to assume that the disclosure of names and HIV status of the plaintiffs in the report was with their consent. The third defendant was liable for the continued sale of the book after receiving objection from the plaintiffs as to their names being mentioned and their HIV status.

- Placing a person in a false light.
- Unauthorised appropriation of a person’s name or likeness.⁶⁷

Mhlongu v Bailey and another⁶⁸

The publisher of a magazine illegally acquired photographs of the plaintiff. The editor knew the plaintiff objected to the use of the photographs and his name in the magazine. The plaintiff was well known and shied away from publicity.

The court held that the publication of the photographs constituted an invasion of privacy.

- Intrusion into a person’s sphere, for example spying or telephone tapping.
- The collection of personal data.

7.4 Defamation

Defamation is defined as the unlawful, intentional publication of words or conduct referring to the plaintiff, which tends to lower the esteem of the plaintiff in the minds of right-thinking persons (an application of the reasonable person test).⁶⁹

Once publication is proved, a presumption is created that the publication was unlawful and intentional, and caused damage.⁷⁰

Publication refers to the act of making known a defamatory statement to any person other than the plaintiff. It includes any means of communication, including graphic,

64 *O’Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C).

65 De Jager, C and Smith, E, *Advertising and the Law*, Durban: Butterworths 1995, 53–55.

66 *NM and others v Smith and others* [2005] 3 All SA 457 (W).

67 *Mhlongu v Bailey and another* 1958 (1) SA 370 (W).

68 *Ibid.*

69 De Jager and Smith, 1995, 47–53.

70 *Suid-Afrikaanse Uitsaaikorporasie v O’Malley* 1977 (3) SA 394 (A).

pictorial, or electronic representations, and even verbal statements. Every person participating in the publication is liable: the printer, editor, publisher, proprietor, broadcaster, and seller.

***Times Media Ltd and others v Niselow and another*⁷¹**

The *Sunday Times* newspaper was sued because it published an article and a cartoon suggesting that beef stew served by a catering firm to a group of 600 children at a public event had poisoned them and resulted in many of them becoming ill.

The court held the publishers and journalists were not liable because the allegation was substantially true. The requirement for the justification of defamatory matter alleged to be true was substantial truth, and not absolute truth. Furthermore, the publication was in the public interest. The court said the 'ordinary reader' was a reasonable, right-thinking person of average education and normal intelligence. He was not a man of morbid and suspicious mind nor was he super-critical or abnormally sensitive. He must be assumed to have read the article as articles in newspapers were usually read.

The words or conduct must explicitly or by implication refer to the plaintiff. Statements made in respect of a group will be defamatory if it can be shown that the reasonable hearer would think less of the plaintiff because of the statement.

It also is possible to defame a corporation. Despite the fact that juristic persons have no personality rights, and therefore no feelings that can be damaged, they do have rights to a business reputation as represented by the goodwill of the enterprise.

***Multiplan Insurance Brokers (Pty) Ltd v Van Blerk*⁷²**

An interdict was obtained by an insurance company to prevent a disgruntled insured from manufacturing T-shirts and painting her car with a message saying that the insurance company would not pay her claim, and questioning whether they would pay any other person's claim.

***A Neumann CC v Beauty Without Cruelty International*⁷³**

The court considered a poster depicting a woman dragging a fur coat behind her with a caption saying that although it took up to 40 dumb animals to make a fur coat, it took only one to wear one.

The court held that it was not defamatory of a particular store that sold fur coats, because the campaign was against a large and indeterminate body of persons and was not an attack on a particular shop. However, the court said the advertisement could possibly be defamatory to wearers of fur coats.

***Treatment Action Campaign v Rath and others*⁷⁴**

A doctor published statements alleging that the TAC was a front for pharmaceutical companies and the pharmaceutical industry and that it promoted the use of toxic drugs. The TAC considered the allegations defamatory. They were a non-profit organisation advocating access to affordable treatment for all people with HIV/Aids, and they supported campaigns for the prevention and elimination of all new HIV infections.

71 *Times Media Ltd and others v Niselow and another* [2005] 1 All SA 567 (SCA).

72 *Multiplan Insurance Brokers (Pty) Ltd v Van Blerk* 1985 (3) SA 164 (D).

73 *A Neumann CC v Beauty Without Cruelty International* 1986 (4) SA 675 (C).

74 *Treatment Action Campaign v Rath and others* 2007 (4) SA 563 (C).

The court said that the TAC did not have human dignity as it was not a human being and had no feeling of outrage or offence. However, the issue was not whether the TAC had a right to human dignity but whether the defamatory statements made concerning it impacted on human dignity. To allege that the TAC was a front for pharmaceutical companies could only mean that it served as a sinister cover for the activities of those companies, and that was defamatory. The defamation also impacted upon the dignity of the members, volunteers and staff of the TAC.

The law provides a remedy when business reputation is infringed. In some cases this may include a retraction of the comments, and a public apology.⁷⁵

There are four types of defamation recognised in South African law:

- An imputation against moral character, for example dishonest conduct, immoral conduct, cowardice, or spying.
- An imputation that tends to arouse hatred, contempt, or ridicule.
- A statement suggesting personal characteristics which expose the plaintiff to being shunned, for example insanity, illegitimacy, disease, poverty, abnormality, or insolvency.
- A statement reflecting on the plaintiff's business or professional reputation, for example financial embarrassment.

8 Defences to an action for defamation

An action for defamation may be defended by using any or all of the following arguments:

8.1 Truth for the public benefit

It must be proved that the statement was true and made for the benefit of the public.

Allie v Foodworld Stores Distribution Centre (Pty) Ltd and others⁷⁶

A former manager of one of a chain of supermarkets claimed damages from his employer because co-employees had defamed him on two occasions by calling him a thief in the presence of other employees, and also had accused him of theft at a meeting of company managers.

Because he had actually confessed to the theft and asked for forgiveness at the meeting, the employer raised the defence that the accusations were true and in the public interest.

The plaintiff argued that there could be no benefit in informing persons of something of which they were already aware and that he had been defamed.

The court dismissed the claim. The court held that each case has to be treated on its own merits, and that the time, manner and occasion of the publication of the defamatory statement must be carefully investigated to determine if it was in the public interest. The accusations were held to have been true and in the public interest, since the appellant's co-managers had an interest in the manner in which senior employees of the company conducted themselves and in the consequences flowing from theft of the company's property.

8.2 Fair comment on a matter of public interest

Society believes that it is in its best interests to learn the truth. Therefore, the making of a statement which is fair comment is seen as being justified, even if the statement appears defamatory. However, to escape liability for defamation, the defendant must prove that the

⁷⁵ *University of Pretoria v South Africans for the Abolition of Vivisection and another* 2007 (3) SA 395 (O).

⁷⁶ *Allie v Foodworld Stores Distribution Centre (Pty) Ltd and others* 2004 (2) SA 433 (SCA).

statement was made as a fair comment on a matter of public interest. The basis of this defence is the doctrine of freedom of speech, which allows everyone to have personal views and to feel free to remark on matters of public interest. However, if the comment is made with an improper motive, the defence is defeated.

There are four requirements that a defendant must show in order for a defamatory statement to be classified as fair comment:

- **The statement must be comment, rather than mere opinion:** The test is the reaction of the ordinary reasonable hearer and not the intention of the speaker. Would the reasonable hearer believe it to be a comment or a mere expression of opinion?

***Delta Motor Corporation (Pty) Ltd v Van der Merwe*⁷⁷**

The manufacturer of a motor vehicle refused to replace or repair a chassis that had bent while being driven on a gravel road during a camping holiday. The manufacturer thought it had bent due to overloading, bad driving, and owner abuse. The owner thought it was because of a manufacturer's defect, and sent e-mails with the heading 'Worst 4×4×Far' and attached photographs of the vehicle, with details of his dissatisfaction. He also displayed the vehicle, with an obviously bent chassis, in public places with the words 'Worst 4×4×Far; Gravel Road Bends Chassis' on the vehicle in large letters. Delta regarded this as the publication of defamatory statements; the owner claimed he was exercising his right of freedom of expression.

The court held that the e-mails were not defamatory, as nothing said might have induced a reasonable person to think less of Delta or its products. It was not defamatory for the owner to say in his opinion a vehicle made by Delta had a defect, a conclusion supported by a technical report with which Delta refused to agree.

The court also held that the slogan 'Worst 4×4×Far' was an exaggeration, but was not made with malice and was a genuine expression of opinion. It was not unfair to infer that similar problems could manifest in other vehicles of the same make.

- **The facts on which the statement is based must be true.**
- **The comment must be a personal view:** The comment must be the view of the person making it, as opposed to the view of someone else, a group of people or expressed on behalf of a corporate interest. This is the case, even if it is biased, uninformed, or petty.
- **It must be in the public interest:** This has a very wide meaning and will depend on the facts of each case.

***Sayed v Editor, Cape Times, and another*⁷⁸**

The plaintiff instituted action against the *Cape Times* and two of its reporters for the publication of two articles in which it was claimed that he was a bogus diplomat, a crook, and an impersonator and that he had masqueraded as the honorary consul for Malawi.

The court held that once a plaintiff had established that a defendant had published a defamatory statement, there arose a presumption that the publication had been both unlawful and intentional. The onus then rested on the defendant to raise a defence to rebut unlawfulness and intention.

Because the plaintiff held a public office, he enjoyed a diminished right to privacy, although the right continued. The two reporters had taken great care in compiling their reports: They had confirmed the authenticity of the documents in their possession, they had confirmed their information as to an attempted arrest of the plaintiff and had had repeated communication with

⁷⁷ *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA).

⁷⁸ *Sayed v Editor, Cape Times, and another* 2004 (1) SA 57 (C).

the plaintiff and offered him the right to reply. There was very little else the two reporters could have done to ensure the reasonableness of the two reports.

The court accordingly held that the newspaper and its two reporters had rebutted the presumption of unlawfulness and intent and that the plaintiff's claim was dismissed with costs.

H v W⁷⁹

H separated from his wife. She went to live with her friend, W, who then posted an open letter on Facebook about H: 'I wonder too what happened to the person who I counted as a best friend for 15 years, and how this behaviour is justified. ... Should we blame the alcohol, the drugs, the church ... ? But mostly I wonder whether, when you look in the mirror in your drunken testosterone haze, do you still see a man?'

H applied for a court order to have W remove the post on Facebook and other social media. In court, she argued that it represented freedom of speech, and that it was true and therefore a defence to defamation.

The court held that the words in the posting were indeed defamatory. However, it was in this case not a valid defence to defamation, nor a ground of justification, that the published words may be true. A distinction must always be made between 'what is interesting to the public', on the one hand, and 'what is in the public interest to make known', on the other. It was neither to the public benefit nor in the public interest that the words in question be published, even if it was accepted that they were true.

The defendant was ordered to remove all posting on social media in which she had referred to H, and ordered to pay his costs.

8.3 Privilege

In certain circumstances, statements that appear to be defamatory may be legally justified. The defendant will not be held liable if, in the absence of malice, they are under a legal, moral or social duty to publish defamatory material, and the recipient has a similar interest or duty in receiving it.

The law distinguishes between two types of privilege:

- **Absolute privilege:** Statements made in Parliament are privileged. Persons may not be sued for defamation for making privileged statements that result in wounded feelings. Newspaper reports of these statements are not privileged.
- **Qualified privilege:** Certain statements may be privileged, depending on the reason they were made:
 - ♦ **A statement made in discharge of a duty:** Did circumstances in the eyes of the reasonable person create a duty or interest, entitling the defendant to speak?
 - ♦ **A statement made in the course of judicial proceedings:** The witnesses and the legal representatives of the parties and the court officers have privilege, provided the statements are relevant and made without malice.⁸⁰

Hardaker v Phillips⁸¹

An affidavit was filed in which it was stated that because of the other party's friendship with a person who was arrested and convicted of drug dealing in New Zealand, the other party's 'supposed condemnation of and protestations against drugs should not be taken too seriously'.

⁷⁹ *H v W* [2013] 2 All SA 218 (GSJ).

⁸⁰ *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T).

⁸¹ *Hardaker v Phillips* 2005 (4) 515 (SCA).

The court held that the statement complained of fell within the scope of qualified privilege afforded to witnesses in judicial proceedings. In the interests of the proper administration of justice it was necessary not to restrict unduly the protection afforded to a litigant or witness; however, this protection should not be allowed where the defamatory statement had no connection whatsoever to an issue in the case.

***Tuch and others NNO v Myerson and others NNO*⁸²**

One of the parties in a court case alleged that someone had misappropriated funds in a partnership, and further that they would not admit him as a shareholder in their company as he was going to spend time and energy creating as much trouble, unpleasantness and as many problems as possible. When the party was later sued for defamation, the court held that the publication of defamatory statements gave rise to a presumption of unlawfulness. This could be rebutted by proving that the publication took place on an occasion of qualified privilege such as during the course of civil proceedings. This protection would be lost if the defamatory statement was published maliciously. In this case the party did not make the statements to advance his case, but just to smear the name and reputation of the other person.

- ◆ **A statement made as a result of provocation:** For example, if made in argument or jest.
- ◆ **A statement made by mistake:** Since an action in defamation is based on there being an intention to injure, the absence of that intention could be a valid defence.

However, a statement made with malice will never be privileged, because qualified privilege is defeated by malice. Malice is an abuse of rights.

9 Defamation and the media

Special considerations apply to the law of defamation in respect of the media. Originating from English law, our courts have held the view that companies who are in business to publish newspapers, and which employ individuals to publish those newspapers, are liable for any defamatory statements.⁸³ Before 1998, a media defendant was strictly liable for defamation. This meant that it was liable in the absence of fault and could not escape liability on the basis that it lacked the intention to defame the plaintiff. A media defendant could only rely on the traditional defences negating the presumption of unlawfulness.⁸⁴

After the Constitution became law, the Supreme Court of Appeal reconsidered the law regarding defamation actions against the media.

***National Media Ltd and others v Bogoshi*⁸⁵**

The court rejected the test of strict liability for the media. It held that the appropriate test for media liability is reasonableness. A media defendant will not be liable for defamation if, in light of all the circumstances, it was reasonable to publish the relevant material in the particular way and at the particular time.

⁸² *Tuch and others NNO v Myerson and others NNO* 2010 (2) SA 462 (SCA).

⁸³ *Wilson v Halle and others* 1903 TH 178; *Trimble v Central News Agency Ltd* 1934 AD 43.

⁸⁴ *South African Broadcasting Corporation v O'Malley* 1977 (3) SA 394 (A); *Pakendorf and others v De Flamingh* 1979 (3) SA 676 (T); [1982] ZAENGTR 1 (31 March 1982).

⁸⁵ *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA).

As a result of *Bogoshi*, the legal position in relation to defamation is that two legal regimes apply for defendants to escape liability for defamation:

- **Non-media defendant:** By relying on one of the traditional defences negating the unlawfulness presumption (truth, fair comment or qualified privilege), or by rebutting the presumption that the non-media defendant intended to defame the plaintiff.
- **Media defendant:** If it proves one of the traditional defences (truth, fair comment or qualified privilege) or that, in all the circumstances, the publication was reasonable. Also, the media defendant will probably escape liability on proof that the publication was not negligent.

***Mthembi-Mahanyele v Mail and Guardian Ltd and another*⁸⁶**

A 'report card' was written and published by a newspaper. The report graded and commented on the Minister of Housing. She was awarded an 'F' grade, which meant that she was 'pathetic, a failure and had to resign before being pushed to do so'. The report card went on to state that her awarding of a large housing contract to a non-existent company, whose sole director was her close friend, was improper.

The cabinet member sued the newspaper, claiming that the allegation of her awarding of the contract to a close friend was defamatory of her as it signified that she was a person of low moral standard, dishonest, incompetent and unable to deliver as a minister and not worthy of holding office.

The court held that reference to the awarding of a contract conveyed to the ordinary reader the impression that she was corrupt. Although defamatory the publication was justifiable because it was reasonable, and therefore not unlawful.

The court emphasised that freedom of expression in political discourse was necessary to hold members of government accountable to the public. Some latitude had to be allowed to make room for robust and frank comment in the interest of keeping members of society informed about what the government was doing. Errors of fact should be tolerated, provided that statements were published justifiably and reasonably, with reasonable belief that they were true. That did not mean, however, that there was a licence to publish untrue statements about politicians. They, too, had the right to protect their dignity and reputation.

In this case, because of the links between the cabinet member and the director of the company to whom the contract had been awarded, it was reasonable for the newspaper to believe that she had influenced the awarding of the contract to an unworthy company.

It should also be noted that defamation is not only a delict in South Africa, but can also be a crime. In the criminal context, the State must prove all the elements of the offence beyond a reasonable doubt, including the fact that the defendant acted unlawfully and with the intention to defame.

10 Liability of website operators for third party defamatory statements⁸⁷

Because e-mail messages can be posted anonymously or under aliases on numerous websites, internet users may not exercise caution with what they write online. Their remarks may be defamatory. Previously only the commercial press was able to publish third parties'

⁸⁶ *Mthembi-Mahanyele v Mail and Guardian Ltd and another* [2004] 3 All SA 511 (SCA).

⁸⁷ Ebersöhn, G, Online Defamation, *De Rebus*, Pretoria: Law Society of South Africa November 2003.

defamatory statements widely. However, website operators and internet users are now in a powerful position to publish comments through websites and chat-rooms.

The term 'cybersmearing' is used to describe the act of making anonymous, online communication of false, disparaging or defamatory information or remarks about an entity, its management, products or services, that causes harm to the entity. Online defamation and cybersmearing can cause harm to the target, who may wish to rebut unfounded accusations made by anonymous internet users.

10.1 An individual's right to a good reputation

The common law recognises an individual's right to a good reputation or *fama* as an independent personality right. *Fama* includes a person's good name, their business, professional and credit reputation, as well as their professional or business competence. In addition, section 10 of the Constitution⁸⁸ discusses the right to human dignity, and includes personality rights such as reputation.⁸⁹

Section 16 of the Constitution⁹⁰ deals with the right to freedom of expression, which includes the right to criticise. However, the Constitution does not grant internet users a blanket right to say what they want, as the right to freedom of expression is limited. The court will balance the right to freedom of speech with the right to dignity, which means that the plaintiff must prove that the alleged defamatory statement is not worthy of protection as an expression of free speech. Hate speech is not protected by the Constitution.

In deciding whether statements are defamatory, one must ask whether a reasonable-thinking person of average intellect and education and with normal feelings and emotions, reading the statements, will consider the words to lower the plaintiff's esteem in the eyes of the public and in the eyes of South African internet users. The statements must be read in their context and as a whole.

Although words in their natural and ordinary meaning may not be defamatory, the plaintiff may prove that the words have a secondary meaning, or an innuendo, that is understood as being defamatory in the context that the statements were published.

Generally, a statement that causes people to think less of the plaintiff constitutes a defamatory statement. Remember also, that 'the government' as a concept cannot be defamed, although it is possible to defame individual members of the government.

Also, meaningless abuse does not automatically constitute defamation. This includes language such as 'bitch', 'cow', and 'bastard'. The use of these terms in our modern society does not appear to create an imputation against the character of the target. However, the circumstances of each case must be considered.

Whenever the plaintiff proves that defamatory words or statements were published by the defendant, two presumptions arise, namely:

- The statements were published with the intention to defame.
- The statements were published unlawfully.⁹¹

⁸⁸ Constitution of the Republic of South Africa, 1996.

⁸⁹ *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC).

⁹⁰ Constitution of the Republic of South Africa, 1996.

⁹¹ *Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA); *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A).

10.2 Possible liability of website operators

It is not always necessary to prove that the defamatory statement was made with the intention to defame: in some circumstances negligence will be sufficient.⁹² The defendant will be deemed to have been the publisher where they are aware or can reasonably expect that a third party will take notice of the defamatory statements. An internet website or chat-room falls into this category.⁹³

Where the disparaging remarks are made by a competitor, the conduct may also constitute the delict of unlawful competition.

Defamation can also occur by means of defamatory sketches and cartoons. Posting a digital photograph of someone on a website where the photograph suggests a defamatory fact about the person depicted, may constitute defamation.

The repetition of defamatory statements also constitutes publication of defamatory statements.⁹⁴ Even drawing attention to a third party's defamatory statement may constitute a separate publication, whenever the reference is reasonably capable of being understood as republishing the statements.⁹⁵ This has implication for persons who forward defamatory e-mail messages, and website operators that transmit the messages.

Because of the difficulty in tracing the perpetrators of cybersmearing, targets of cybersmearing may sue the website operators responsible for hosting the websites where the defamatory statements were posted.

As a general principle, South African law recognises contributory liability where one person is liable for the delict committed by another, even though the first person did not commit the delict himself.⁹⁶ A delict can be committed not only by the actual perpetrator, but also by those who instigate, aid, abet, advise or authorise the commission of a delict. This principle applies to both passing-off and statutory trademark infringement instances.

Where a website operator refuses to remove third party defamatory remarks from the website after being informed of these statements, the conduct of the operator may constitute the assistance sufficient for contributory liability.

In the event of doubt it would seem prudent for website operators to remove the alleged defamatory statements.

Godfrey v Demon Internet Ltd⁹⁷

An anonymous internet user posted defamatory statements concerning the plaintiff on the defendant's internet service and further attributed the aforesaid statements to the plaintiff. The plaintiff contacted the defendant and informed it that it was not the author of the said statements and requested their removal from the site. The defendant refused to remove the alleged defamatory statements. The plaintiff thereafter instituted proceedings against the defendant for online defamation.

The court held that the defendant was not the publisher of the said statements. However, the court held that from the moment the defendant knew of the defamatory content of the posting, the defendant published the defamatory posting. The court further held that due to the fact that

92 *Marais v Groenewald en 'n ander* 2001 (1) SA 634 (T).

93 Ebersöhn, G, Online Defamation, *De Rebus*, Pretoria: Law Society of South Africa November 2003.

94 *Mograbi v Miller* 1956 (4) SA 239 (T).

95 *African Reality Trust Ltd v Robinson and Co Ltd and another* 1939 TPD 155.

96 *McKenzie v Van der Merwe* 1917 AD 41; *Esquire Electronics Ltd v Executive Video* 1986 (2) SA 576 (A); *Smith and Nephew Ltd v Medioplast Pharmaceutical Sales* CC 1999 (2) SA 646 (D).

97 *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342.

the defendant knew of the defamatory statements it contributed to publishing the defamatory statements.

It can be similarly argued that where the website operator provides a direct link to another website that hosts the defamatory statements, the operator also publishes the statements and is therefore directly liable for defamation.

Where a website operator controls the content posted online, for example, by stipulating that they reserve the right to remove third-party content which is offensive or that violates policy, it is the very control that may result in the website operator being deemed a publisher.⁹⁸

The issues of online delictual liability are discussed further in chapter 38: '*Cyber law*'.

11 The McLibel Trial: How the pursuit of a delictual court action can change the world⁹⁹

In the mid-1980s an environmental campaign group began a campaign using McDonald's as a high-profile organisation symbolising things they considered wrong with corporate mentality. In 1986 they produced a fact sheet called: '*What's Wrong With McDonald's? - Everything they don't want you to know*'. The leaflet attacked almost all aspects of the corporation's business, accusing them of exploiting children with advertising, promoting an unhealthy diet and exploiting their staff.

In 1990 McDonald's issued summons against some of the group's supporters for defamation for distributing the leaflet. Two of the activists, Helen Steel and Dave Morris, decided that they would stand up to the burger giants and represented themselves in court.

On 28 June 1994 the trial started in London. By 1 November 1996 (court day 292), McLibel became the longest trial of any kind in English history.

Later, TV news stated that the McLibel case was considered to be 'the biggest corporate PR disaster in history'. Here are some of the reasons why:

- A well-known publisher released a hardback book of the trial, *McLibel - Burger Culture on Trial*.
- A television channel broadcast 'McLibel!' a three-and-a-half hour reconstruction of the case.
- Over 50 media teams covered the trial, with worldwide publicity.
- Over 400 000 leaflets were distributed outside 500 of McDonald's 750 UK stores, and solidarity protests were held in over a dozen countries.
- *The Sunday Times* newspaper (UK) reported that the President of the McDonald's Corporation had, along with his staff, been removed as Chief Executive following falling US market share, promotional flops and franchisee discontent.

The judge ruled that Steel and Morris had not proved the allegations against McDonald's on rainforest destruction, heart disease and cancer, food poisoning, starvation in the Third World and bad working conditions. But they had proved that McDonald's 'exploit children' with their advertising, falsely advertised their food as nutritious, and risked the health of their most regular, long-term customers.

⁹⁸ *Stratton Oakmont Inc et al v Prodigy Services Company et al* 1995 WL 323710.

⁹⁹ Source: www.mcspotlight.org/case/index.html, accessed 19 January 2017.

Steel and Morris then appealed against the decision and again represented themselves. On 31 March 1999 the appeal court held that it was true that McDonald's regular customers faced an increased risk of heart disease and that it was fair comment to say McDonald's workers worldwide suffer poor pay and conditions.

In March 2002 a panel of eight public relations professionals brought together by UK marketing industry magazine *PR Week* declared that the McLibel case and campaign was ninth out of a Top Twenty of the most effective public relations consumer campaigns of all time.

By the end of 2002 McDonald's announced their first-ever loss in their fifty-year history and planned to close at least 175 stores. On 15 February 2005, the European Court of Human Rights in Strasbourg declared that the mammoth McLibel case was in breach of the right to a fair trial and right to freedom of expression.

The European Court ruled that UK laws had failed to protect the public's right to criticise massive corporations whose business practices can affect people's lives, health and the environment.

Steel and Morris are currently both actively involved in local community groups and campaigns in North London.

THIS CHAPTER IN ESSENCE

- 1 A delict is a wrongful act committed against a person that causes the person to suffer harm. The harm entitles the injured party to claim compensation in a civil court.
- 2 The law of delict provides for two possible remedies to enable a victim to be compensated for the harm done to them: aquilian action, and an *actio injuriarum*.
- 3 An aquilian action is a remedy for a wrong done to an interest of substance. The action relates to bodily harm or injury to a person.
- 4 An *actio injuriarum* is a remedy for a wrong done to an interest of personality, where the action relates to an injury to a person's dignity, reputation or bodily integrity.
- 5 Delictual liability must be distinguished from contractual or criminal liability.
- 6 The essential elements of either an aquilian action or an *actio injuriarum* are wrongfulness; fault; causation; and harm.
- 7 An omission is as much conduct as a positive act.
- 8 Defences to an aquilian action include contributory negligence; self-defence; consent; statutory authority; or contractual limitation of liability.
- 9 Defences to an action for defamation include truth for the public benefit; fair comment on a matter of public interest; or privilege.