



Liability for the Mass Publication of Private Information in South African Law: *NM and others v Smith and others (Freedom of Expression Institute as Amicus Curiae)*¹

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1. Liability for the mass publication of private information before *NM v Smith*

The action in respect of the mass publication of private information in South African law was first recognised by Watermeyer J in *O’Keeffe v Argus Printing and Publishing Co Ltd* in 1954.² Here a photograph of a female journalist firing a pistol had been published by the first defendant’s newspaper, the Argus, in the context of an advertisement for guns and ammunition placed by the second defendant: she had given her consent to the use of the image as an illustration for an article in the Argus newspaper, but she had not consented to its use for advertising purposes; neither had she consented to the publication of her name. O’Keeffe brought an *actio iniuriarum* against the first and second defendants. She alleged that in the circumstances the publication of her photograph and name had constituted a violation of her dignity. The defendants excepted to the plaintiff’s claim on the grounds that it disclosed no harm actionable under the *actio iniuriarum*.³ However, Watermeyer J dismissed the exception. The *actio iniuriarum* protected person, dignity and reputation, and the unauthorised publication of a person’s photograph and name for advertising purposes was capable of constituting an aggression upon that person’s dignity where this was understood to incorporate a wide range of personality interests, including her interest in privacy.⁴

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¹ 2007 (5) SA 250 (CC)

² 1954 (2) SA 244 (C)

³ “There was no indication...of any intention on the part of the defendants to insult the plaintiff.” *O’Keeffe v Argus Printing and Publishing*, 248.

⁴ As to whether a particular instance of publication would amount to an *iniuria*, “much must depend upon the circumstances of each particular case, the nature of the photograph, the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like.” *O’Keeffe v Argus Printing and Publishing*, 249.

The *O'Keefe* decision has often been applied in South African law.⁵ It is clear from that case and those following it that, in the absence of a defence, the intentional infringement of the plaintiff's privacy through the mass publication of objectively private information without her consent gives rise to an *actio iniuriarum*.⁶ Admittedly, there is room for debate concerning the scope of objectively private information: for example, it is unclear whether one's image is invariably private.⁷ Moreover, subsequent decisions have tended to place the evidentiary burden of proving absence of intention on the defendant: provided that the plaintiff could show that her privacy had been unlawfully infringed, *animus iniuriandi* will be presumed in her favour.⁸ However, there has been little doubt concerning the fault requirement itself. As an aspect of the *actio iniuriarum*, the action in respect of the mass publication of private information has been almost universally assumed to require *animus iniuriandi* on the part of the defendant.⁹ However, the decision of the Constitutional Court in *NM and others v Smith and others (Freedom of Expression Institute as Amicus Curiae)*¹⁰ in April 2007 has challenged this view.

2. *NM and others v Smith and others (Freedom of Expression Institute as Amicus Curiae)*

a. The facts

The facts are set out in the judgment of Justice Madala. The applicants in this matter were three HIV-positive women who lived in informal settlements near Atteridgeville, Pretoria. The respondents were a journalist, Charlene Smith, a Member of Parliament, Patricia de Lille, and a publisher, New Africa Books. Essentially, the applicants had participated in clinical trials run by the Medical Faculty at the University of Pretoria for a certain combination of HIV drugs. Along with other participants in the trials they had raised concerns about illnesses and fatalities among those involved. In April 2000 the Minister of Health made a statement to Parliament regarding the effects of the drugs, and called for a report from the Medicines Control Council. At the same time Patricia de Lille was contacted by a priest who ran a support group for people living with

⁵ See e.g. *Mhlongo v Bailey* 1958 (1) SA 370 (W) and more recently *National Media Ltd v Jooste* 1996 (2) SA 262 (A). See also the important observations made by Corbett CJ in *Financial Mail (Pty) Ltd and others v Sage Holdings Ltd and another* 1993 (2) SA 451 (A) 465-6, referred to with approval by Ackermann J in *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC) at 789.

⁶ See e.g. J Neethling, JM Potgieter and PJ Visser *Law of Personality* (2nd edn LexisNexis Butterworths Durban 2005) Ch 8 especially 231-236. It is unclear whether publication of private information to only a few people constitutes an *iniuria*. It seems that where a confidential relationship existed between plaintiff and defendant – in particular, where the defendant specifically agreed not to disclose the information in question – disclosure will be actionable even if it is made to only a few people: see *Jansen van Vuuren and another NNO v Kruger* 1993 (4) SA 842 (A). On the other hand, no such confidential relationship is required to render unlawful the mass publication of private facts. See generally Neethling et al *Personality*, 227-231.

⁷ See e.g. Neethling et al *Personality*, 231-232.

⁸ *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W); *Jansen van Vuuren and another NNO v Kruger* 1993 (4) SA 842 (A). It should be noted that neither of these cases concerned the mass publication of private information: the *Kidson* case concerned the publication of false allegations which were insulting to the plaintiff, although they were not understood as defamatory by the wider public; the *Jansen van Vuuren* case concerned the breach of doctor/patient confidentiality.

⁹ *Animus iniuriandi* appears to have been irrebutably presumed in *Kidson v SA Associated Newspapers* 1957 (3) SA 461 (W). However, it seems that the claim in that case was analysed as analogous to a defamation claim, and strict liability applied for that reason. See further Section 3 below.

¹⁰ 2007 (5) SA 250 (CC)

HIV/AIDS which had been attended by the applicants and asked to investigate their complaints. She subsequently met with some of the participants in the trials, including the applicants. In August the University commissioned an external inquiry into the conduct of the trials, headed by a Professor Strauss. He subsequently issued a report (the Strauss Report) which exonerated the Medical Faculty and the doctor in charge of the trials, a Dr Marietta Botes, of any misconduct. The report reproduced the applicants' names in full, together with their HIV-positive status. This report was sent to a number of interested parties, including de Lille. However, the copy sent to de Lille lacked certain annexures which appeared in the full version.

Charlene Smith was later commissioned by New Africa Books to write a biography of de Lille. The book contained an account of the events leading up to the publication of the Strauss report. It revealed the names and HIV-positive status of the applicants, as included in the report, which de Lille had sent on to Smith to assist her in her research. However, when the book was published, the applicants sought an urgent interdict to prevent the further circulation of these details, arguing that they had not consented to their mass publication. In fact, the applicants had explicitly consented to the publication of their details in the report, but this consent had extended only to the report itself, which was intended for and received only limited circulation: their consent had not embraced the mass publication of these details to the public at large. However, the limited terms of their consent appeared only from the annexures omitted from the version of the report sent to De Lille. The introductory section of the report itself simply stated that the applicants' names had been published in terms of consent forms received from them, copies of which were annexed to the report, but did not indicate that the consent given had been qualified in any way.¹¹ Smith had attempted to obtain the missing annexures from a Professor Grové, who had sent the Strauss Report to de Lille, but had eventually given up. She had also attempted to meet the three applicants, but here too she had been unsuccessful.

b. The decision of Schwartzman J in the High Court

Ultimately the applicants brought an *actio iniuriarum* against the respondents in the Johannesburg High Court for the violation of their rights to privacy, dignity and psychological integrity resulting from the publication of their names and HIV status without their consent. They sued the respondents for damages of R200 000 each, and also claimed a private apology and the removal or excision of their names from all unsold copies of the book. The High Court held the publishers of the book liable for R15 000, representing damages that the plaintiffs had suffered from after April 2002 when the third respondents became aware of they had not consented to the disclosure of their names and HIV status, but dismissed the actions against Smith and de Lille.¹² Schwartzman J held that, "The first and second defendants have, by their long-standing involvement with people infected with HIV, demonstrated that they are two of the most unlikely people to intentionally invade the privacy of a person infected with HIV."¹³ Moreover, he held that the first and second defendants had acted reasonably in doing so, and that for this reason they should escape liability.¹⁴ The applicants sought to appeal against this decision, but both the High

¹¹ Nor did the fact that the report was confidential appear from the covering letter of Dr Grové: see the decision of the trial court at [20]-[24]

¹² *NM and others v Smith and others* [2005] 3 All SA 457 (W)

¹³ *NM and others v Smith and others* [2005] 3 All SA 457 (W) at [40]

¹⁴ *NM and others v Smith and others* [2005] 3 All SA 457 (W) at [36]-[37]

Court and the Supreme Court of Appeal dismissed their application for leave to do so. Ultimately the applicants were permitted to appeal to the Constitutional Court.

c. The judgment of Madala J

When the matter came before the Constitutional Court, Justice Madala, with whom Deputy Chief Justice Moseneke and Justices Mokgoro, Skweyiya, Van der Westhuizen and Yacoob concurred, reversed the High Court's decision both in respect of the liability of Smith and de Lille and in respect of the damages awarded against New Africa Books. With respect to the first and second respondents, Madala J upheld the test for objectively private information adopted in *National Media Ltd and another v Jooste*: where disclosure would cause "mental injury or distress to anyone possessed of ordinary feelings and intelligence."¹⁵ According to Madala J, "Private and confidential medical information contains highly sensitive and personal information about individuals."¹⁶ Moreover, he held that the respondents had infringed the applicants' rights to privacy, dignity and psychological integrity through the mass publication of objectively private information pertaining to them.¹⁷ The applicants had argued that the respondents' invasion of their privacy had been negligent, and that "the common law of privacy ought to be developed in order to impose liability on those who negligently publish confidential medical information (in particular a person's HIV status) by not first obtaining the express informed consent of that person unless the public interest clearly demands otherwise."¹⁸ However, Madala J held that it was unnecessary to develop the common law in order to give effect to the applicants' constitutional rights, because Smith and de Lille could be held liable under the traditional Roman-Dutch *actio iniuriarum*.¹⁹ Madala J held that both Smith and De Lille "were certainly aware that the applicants had not given their consent to the publication of their HIV status, or at least foresaw the possibility that the consent had not been given to the disclosure. As seasoned campaigners in the field of HIV/AIDS the respondents knew well of the wrongfulness of their conduct...".²⁰ Thus the respondents had failed to rebut the presumption of *animus iniuriandi* arising from the disclosure of private facts. Accordingly, Madala J found that all the elements necessary for liability under the common-law *actio iniuriarum* were present. He awarded damages of R35 000 against each of the three appellants.

d. The judgments of Langa CJ, O'Regan J and Sachs J

Chief Justice Langa, along with Justices O'Regan and Sachs, took a different view of both the facts and the law. They upheld the finding of the trial court, that Smith and De Lille had not in fact intended to infringe the applicants' privacy by disclosing their HIV status without their consent, but took the view that the common law should be developed so as to impose liability even in the absence of *animus iniuriandi*. They held that insofar as the respondents were 'media defendants' – and the Chief Justice and Justice O'Regan thought that both Charlene Smith and New Africa Books were²¹ – they would be liable to the applicants unless they could establish that

¹⁵ 1996 (3) SA 262 (A) 270.

¹⁶ *NM v Smith*, [40]

¹⁷ *NM v Smith*, [34] to [54] These rights are enshrined in Sections 14, 10 and 12(2) of the Constitution of the Republic of South Africa of 1996.

¹⁸ *NM v Smith*, [56]

¹⁹ *NM v Smith*, [55]-[65]

²⁰ *NM v Smith*, [64]-[65]

²¹ *NM v Smith*, Langa CJ at [98]-[99]; O'Regan J at [182]

they had been reasonably mistaken in believing the applicants to have consented to the publication of their names.²² In other words, as a member of the press, Smith had to prove not only the absence of intention but also the absence of negligence. As for the source of this approach, like Schwartzman J in the High Court, all three justices relied on an analysis developed by the Supreme Court of Appeal in the context of the law of defamation in *National Media v Bogoshi* in 1998.²³ Applying this analysis to the facts, the Chief Justice found that both Charlene Smith and New African Books had indeed acted negligently in publishing the applicants' names and HIV-positive status without their consent, and that accordingly she should be held liable.²⁴ Sachs J wrote a separate concurring judgment. In a dissenting judgment, Justice O'Regan upheld the decision of the trial court with respect to the first and second applicants, holding that Charlene Smith had reasonably assumed that consent to publication had been generally given, and that the publication of the applicants' details without their consent had therefore been neither intentional nor negligent.²⁵ She would therefore have dismissed the appeal.

Setting aside the different conclusions reached by Justices Langa, O'Regan and Sachs, a fundamental question of principle arises: were they were correct to regard the applicants' claim as analogous to a claim in defamation? I shall begin my analysis of this approach by considering in more detail the law of defamation in South Africa: in particular, I shall consider the origins of strict liability and the extent to which strict liability has been ameliorated by the decision of the Supreme Court of Appeal in *National Media v Bogoshi*.²⁶ In Section 4 I shall evaluate the analogy between the mass publication of private information and the mass publication of defamatory allegations relied on by the three justices in the *Smith* case. In particular, I shall consider whether that analogy is analytically sound and, even if it is, whether it ignores important differences between the two claims. Finally, I shall compare the approach adopted in *NM v Smith* with the position in modern English law with respect to the equitable wrong of breach of confidence.

3. The South African law of defamation and the decision in *National Media v Bogoshi*²⁷

Unlike the law relating to invasion of privacy, the South African law of defamation has been profoundly influenced by the English torts of libel and slander. It follows that the modern law of defamation differs from the Roman-Dutch law in certain important respects. For example, as in English law, the plaintiff in a defamation action must demonstrate only the publication (i.e. to a third party) of a statement defamatory of him.²⁸ If he succeeds in doing so, it is for the defendant to show that he lacked the necessary *animus iniuriandi* or that the defamation was lawful.²⁹

²² *NM v Smith*, Langa CJ at [100]

²³ 1998 (4) SA 1196 (SCA). See *NM v Smith*, Langa J at [94], O'Regan J at [170]-[179] and Sachs J at [203]-[204]. See also *NM and others v Smith and others* [2005] 3 All SA 457 (W) at [36]. Admittedly O'Regan J expressed reservations about whether the *Bogoshi* analysis was appropriate here.

²⁴ *NM v Smith*, [100]-[112]

²⁵ *NM v Smith*, [183]-[189]

²⁶ 1998 (4) SA 1196 (SCA).

²⁷ 1998 (4) SA 1196 (SCA) at [41]

²⁸ On the history of these requirements in South African law see e.g. Jonathan Burchell *The Law of Defamation in South Africa* (Juta Wetton 1985) 13-14.

²⁹ In the case of wrongfulness at least, this is a full onus, rather than an evidentiary burden: see *Neethling v Du Preez*; *Neethling v The Weekly Mail* 1994 (1) SA 708 (A); *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA)

Moreover, several of the most important defences in modern South African law appear to have originated in English law, namely privileged occasion (absolute or qualified)³⁰ and fair comment.³¹ As in English law, truth constitutes a defence to a prima facie claim in South African law, although a defamatory allegation must be shown to be not only true but also in the public interest in order to exonerate the defendant.³² It is also possible to rebut the presumption of unlawfulness by showing consent.³³ However, the most significant divergence between modern South African law and Roman-Dutch law occurs in the realm of fault. Until recently, where the defendant was a member of the press, *animus iniuriandi* was irrebutably presumed.³⁴ In other words, the liability of the press was strict. There is nothing in the Roman-Dutch sources or in the early South African to suggest that the element of *animus iniuriandi* could be dispensed with entirely.³⁵ Rather, strict liability in the South African law of defamation appears to have come directly from English law.

In fact, it appears that liability for defamation in English law was originally founded directly on malice, as in Roman Dutch law.³⁶ However, during the course of the nineteenth century it came to be accepted that malice was presumed if the defamatory statement in question was untrue.³⁷ Unless the defendant could bring himself within the defences of privilege or fair comment, in which case it would be for the plaintiff to show actual malice if he could, there was no other way of introducing the absence of malice as a defence.³⁸ In David Ibbetson's phrase, "the fault element had ossified into two fixed defences."³⁹ By the early twentieth century, the presumption of malice had hardened further: liability was now said to be strict. Thus in 1910 in *E Hulton & Co v Jones*, the absence of intention was held to be irrelevant to liability.⁴⁰ Where the defendant had inadvertently defamed the plaintiff, called Artemus Jones, by writing a fictional account of the exploits of a clergyman of the same name, it was said to be no defence to the plaintiff's libel action that he had intended no harm.

Similarly, during the late nineteenth and early twentieth century the South African courts held on a number of occasions that absence of malice – or knowledge of unlawfulness – was not in itself a defence to a claim in defamation, but could be pleaded only within the context of privilege etc.⁴¹ For example, in *Jooste v Claassens*, Gregorowski J held that where the defendant had deliberately published the defamatory allegation, he "is not excused merely because he entertained no ill-will towards the plaintiff but he must establish the plea of privilege which

³⁰ e.g. *Johnson v Rand Daily Mail* 1928 AD 190. For the historical background of the defence of privileged occasion in South African law, see Burchell *Defamation*, Ch 18.

³¹ e.g. *Crawford v Albu* 1917 AD 102. For the historical background of the defence of fair comment in South African law, see Burchell *Defamation*, Ch 17.

³² e.g. *Independent Newspapers Holdings Ltd and others v Suliman* [2004] 3 All SA 137 (SCA)

³³ See e.g. Neethling et al *Personality*, 161.

³⁴ 'Press' was understood to include editors, publishers, the owners of newspapers and even printers.

³⁵ The position in nineteenth-century South African law is summarised by Burchell *Defamation*, 149-150. See further TW Price "Animus injuriandi in defamation" 66 SALJ (1949) 4, 6-13.

³⁶ David Ibbetson *A Historical Introduction to the Law of Obligations* (OUP 1999) 112-125.

³⁷ Ibbetson, 184-185.

³⁸ Ibid. See also Paul Mitchell "Malice in Defamation" (1998) 114 LQR 639.

³⁹ Ibbetson, 185.

⁴⁰ [1910] AC 20. See also *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331; *Newstead v London Express Newspaper Limited* [1940] 1 KB 377

⁴¹ See e.g. *Jooste v Claassens* 1916 TPD 723; *Laloe Janoe v Bronkhorst* 1918 TPD 165; *Tothill v Foster* 1925 TPD 857; *Mankowitz v Geyser* 1928 OPD 138; *Kleinhans v Usmar* 1929 AD 121. This tendency is extensively discussed by Price, 13-20.

would justify the circulation of defamatory matter.”⁴² Moreover, in *Tohill v Foster* Curlewis JP went further, holding that it was no defence to a defamation claim that the allegation had been published by mistake.⁴³ Ultimately, however, the principles of the Roman Dutch law were strongly reaffirmed, at least in certain contexts.⁴⁴ For example, in *Maisel v Van Naeren*⁴⁵ in 1960 the defendant escaped liability by proving that he had mistakenly believed the defamation to be lawful because it fell within the scope of privilege. Thus it was accepted that the defendant in a defamation action could plead absence of *animus iniuriandi* per se, outside the context of the defences of privilege and fair comment, and that *animus iniuriandi* comprised not only the intention to publish the defamatory statement but also consciousness of wrongfulness. However, this resurgence of Roman-Dutch principle was limited to defendants who were private individuals, rather than members of the press. In the latter case, the stricter approach of the early law persisted. This appears particularly clearly from the decisions of Rumpff JA in *SAUK v O'Malley*⁴⁶ and *Pakendorf v De Flamingh*⁴⁷ in which he emphasised the English roots of the doctrine, as well as the policy justifications for retaining it:

Die koord waaruit ons lasterreg bestaan, het baie drade. Hierdie drade is ineengevleg en bestaan uit drade wat kom uit die Romeins-Hollandse reg en die Engelse reg. Die erkenning van die animus injuriandi is 'n draad wat vanuit die Romeins-Hollandse reg kom. Die draad van strikte aanspreeklikheid van die pers kom uit die Engelse reg.⁴⁸

More recently, the strict liability of the press has been substantially ameliorated by the decision in *National Media v Bogoshi* in 1998. *Pakendorf v De Flamingh* has been overruled.⁴⁹ As the law now stands, even where the defendant in a defamation claim is unable to prove that the allegation in question was true, he may nevertheless escape liability by showing that publication was reasonable in all the circumstances. In particular, the defendant will have a defence as long as he can show that he was reasonably mistaken as to the truth of the defamatory allegation. Also relevant to reasonableness in this context is the nature, extent and tone of the allegations, the nature of the information on which the allegations were based and the reliability of their source, and the steps taken to verify the information.⁵⁰ Reasonable publication in this sense is a defence which serves to rebut the presumption of wrongfulness generated by the

⁴² *Jooste v Claassens*, 235. See also the judgment of Mason J at p 232. De Villiers JP was however at pains to point out, in *Laloe Janoe v Bronkhorst* at p 168-169, that “under our law clearly the case of *Artemus Jones*, as decided in the English Courts, would not be followed.”

⁴³ The defendant had published the statement to a third party by handing her an envelope, on the outside of which the defamatory statement was written, to give to a fourth person, in respect of whom the communication was privileged. Publication was held to be grossly negligent rather than intentional, and the defendant was held liable despite the absence of intention to publish the statement to the third party.

⁴⁴ Burchell *Defamation*, 152-157.

⁴⁵ 1960 (4) SA 836 (C)

⁴⁶ 1977 (3) SA 394 (A)

⁴⁷ 1982 (3) SA 146 (A)

⁴⁸ *Pakendorf v De Flamingh*, 156. Some of the authorities relied on by Rumpff JA in the *O'Malley* and *Pakendorf* cases as support for the strict liability of the press in early South African law are not convincing: see *O'Malley* 403-405 and *Pakendorf* 156-157.

⁴⁹ *National Media v Bogoshi*, 1211.

⁵⁰ *National Media v Bogoshi*, 1212.

publication of the defamatory statement itself.⁵¹ Thus it is similar to the modified defence of qualified privilege adopted by the House of Lords in the case of *Reynolds v Times Newspapers* in 1999, which likewise seeks to ameliorate the impact of strict liability with respect to the media through the introduction of a defence of reasonable or responsible publication.⁵²

However, there is no unanimity among commentators or courts as to the wider implications of the *Bogoshi* decision. In particular, there is no unanimity as to the extent to which it has altered the pre-existing position concerning fault. On the one hand, the unanimous judgment of Hefer JA in the *Bogoshi* case has been interpreted – both in the courts and by academics – to mean that negligence is now the appropriate fault requirement throughout the law of defamation, at least in cases involving media defendants.⁵³ In the words of Lewis JA in *Mthembi-Mahanyele v Mail & Guardian Ltd and another*,

The press will thus not be held liable for the publication of defamatory material where it can show that it has been reasonable in publishing the material. Accordingly, the form of fault in defamation actions against the press is negligence rather than intention to harm.⁵⁴

If this view is correct, this means that even mistakes which preclude the intention to defame entirely – such as the mistake at issue in *Hulton v Jones* – must be free of negligence or reasonable in order to exonerate the defendant from liability. However, the preferable view of the *Bogoshi* decision is that the defendant in a defamation claim need show reasonable mistake only where the mistake in question concerns the unlawfulness of his conduct.⁵⁵ To the extent that the decision in *Bogoshi* has introduced a negligence standard into the law of defamation, it is confined to this context.⁵⁶ As for mistakes which preclude the intention to defame itself, here the

⁵¹ See e.g. the description of the defence at p 1212 of the judgment: “the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.” Similarly at p 1214: “The indicated approach is intended to cater for ignorance and mistake at the level of lawfulness.” On the meaning of unlawfulness in this context, see Anton Fagan “Rethinking wrongfulness in the law of delict” 122 SALJ (2005) 90, 101-106.

⁵² [1999] 4 All ER 609. According to Lord Nicholls, who gave the majority speech in this case, a media defendant can demonstrate qualified privilege and thus escape liability if he can show that the allegation in question concerned a matter of public interest and that the defendant acted responsibly in publishing the allegation under the circumstances, even if it subsequently turned out to be untrue. As an instance of qualified privilege, the *Reynolds* defence can be displaced by proof of malice on the part of the defendant.

⁵³ See e.g. Neethling et al *Personality*, 166-168 and J Neethling, JM Potgieter and PJ Visser *Law of Delict* (5th edn LexisNexis Butterworths Durban 2006) 317-318. The adoption of a negligence standard in defamation actions against the press is urged by Jonathan Burchell, but he does not interpret the *Bogoshi* judgment as having conclusively introduced such a standard: see Burchell “*Media freedom of expression scores as strict liability receives the red card: National Media Ltd v Bogoshi*” 116 SALJ (1999) 1.

⁵⁴ *Mthembi-Mahanyele v Mail & Guardian Ltd and another* 2004 (6) SA 329 (SCA) at [46].

⁵⁵ This appears to have been the view taken by O’Regan J in *Khumalo v Holomisa* 2002 (5) SA 401 (CC) [20]

⁵⁶ “Against this background, it is necessary to raise the question left open in *Pakendorf* (at 155A), namely whether absence of knowledge of wrongfulness can be relied upon as a defence if the lack of knowledge was due to the negligence of the defendant. If media defendants were to be permitted to do so, it would obviously make nonsense of the approach which I have indicated to the lawfulness of the publication of defamatory untruths.” See *National Media v Bogoshi*, 1214. Fagan argues that consciousness of wrongfulness is not a necessary element of intention at all. In other words, if A publishes a statement defamatory of B in the mistaken belief that they are justified, he intends to defame B. If this is correct, then the reasonable publication defence introduced in *National Media v Bogoshi* necessarily goes exclusively to unlawfulness. See Fagan 101-106 and 117-122.

position is unclear. One possibility is that liability remains strict in principle, subject to the new defence of reasonable publication.⁵⁷ If this is right, mistakes precluding the intention to defame still provide no defence at all. However, it is more likely that the effect of *Bogoshi* decision has been to reinstate the *animus iniuriandi* requirement of the Roman-Dutch common law, subject to the qualification that where the defendant seeks to escape liability by raising a mistake about the truth of a defamatory allegation, that mistake must be not only genuine but also reasonable.⁵⁸ It follows that a mistake which precludes the intention to defame is sufficient to exonerate the defendant even if it is negligent.

4. The application of *National Media v Bogoshi* to the mass publication of private information

At this point it is necessary to return to the fundamental question of principle posed earlier, namely, were the Chief Justice, Justice O'Regan and Justice Sachs correct to regard the applicants' claim in *NM v Smith* as analogous to a claim in defamation? There are clear parallels between claims in respect of the publication of defamatory allegations and claims in respect of the publication of private information. The context of such publications tends to be similar: both delicts typically involve mass publication. Moreover, in both cases there is clear scope for a defence of public interest. Of course the publication of a true private fact gives rise to a different type of harm from that generated by a false defamatory allegation, namely harm to dignity rather than reputation. Yet the placing of the onus of proving truth on the defendant in defamation claims tends to obscure that distinction. Thus the analogy between the two claims is easy to understand.

However, questions arise concerning the analytical significance of consent on the part of the plaintiff in each case. It seems that Justices Langa, O'Regan and Sachs regarded consent to the mass publication of private information as a defence to a prima facie claim, just as it constitutes a defence to a prima facie claim in defamation. In other words, they saw it as a means of rebutting a presumption of unlawfulness arising from proof of the publication of private information.⁵⁹ It was this view of the analytical significance of consent that seemed to justify the application of the *Bogoshi* analysis to the facts at issue in the *Smith* case. The implicit reasoning of the three justices went as follows: consent and truth are both defences capable of rebutting the presumption of unlawfulness; mistake about consent to the publication of private information is therefore closely analogous to a mistake about truth in the context of defamation; accordingly, it is appropriate to apply the *Bogoshi* analysis to facts such as those at issue in the *Smith* case.

But in fact this reasoning is flawed. This is because the absence of consent to the publication of private information by their subject is really an ingredient of the harm itself: it is part of the very gist of the delict.⁶⁰ One's HIV status is undoubtedly an inherently private fact, as is one's sexual orientation. Yet many South Africans choose to be entirely open these matters.

⁵⁷ The statements of Hefer JA at p 1210-1211 – “It must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*” and “*Pakendorf* must be overruled” and is “clearly wrong” – suggest that strict liability no longer applies at all. On the other hand, Hefer JA's remarks are also consistent with the first possibility, namely, that *Pakendorf* has been overruled to the extent that it conflicts with the defence of reasonable publication.

⁵⁸ See JR Midgley “Media Liability for Defamation” 116 SALJ (1999) 211, 214-215 and Fagan, 101-106, but see note 73 above.

⁵⁹ See *NM v Smith*, Langa CJ at [96]

⁶⁰ cf Neethling et al *Privacy*, 231-232.

Indeed, one of best reasons for the law to protect privacy is simply to reserve to subjects the decision as to how and to whom they publicise private information.⁶¹ To argue that consent occupies the same niche in the analysis of the publication of private information as it does in defamation – in other words, as a defence to a prima facie claim – is to argue that each time a newspaper refers to someone’s HIV-positive status, such a reference is prima facie wrongful. As a matter of common sense, that cannot be right. However, it is not necessary to rely on common sense only in this respect, because the South African law on this point was correctly stated in *O’Keeffe v Argus Printing and Publishing*.⁶² It appears clearly from the judgment of Watermeyer AJ that he considered the absence of consent to publication on the part of the plaintiff as an aspect of the actionable harm itself: “it seems to me that to use a person’s photograph and name, without his consent, for advertising purposes may reasonably constitute offensive conduct on the part of the user.”⁶³

It follows that a mistake about consent to publication in the context of a privacy claim is more significant or fundamental than a mistake about the truth of allegations in the context of a defamation claim, such as the mistake at issue in the *Bogoshi* case. It is not just a mistake about the wrongfulness of the conduct in question; rather, it is a mistake which precludes the defendant’s intention to inflict the actionable harm itself. To put it more simply, if the defendant is mistaken about consent, then she does not mean to infringe the plaintiff’s privacy at all: the harm suffered has been unintentionally inflicted. Accordingly, in applying the *Bogoshi* analysis to the mistake before it, the Constitutional Court directly addressed the question of the wider implications of the *Bogoshi* decision. In other words, it addressed the issue of the extent to which the *Bogoshi* decision has altered the pre-existing position concerning fault.

As we have seen, the decision in *National Media v Bogoshi* can be interpreted in two ways. If the requirement of non-negligent mistake is just an aspect of the defence of reasonable publication, a defence which goes to unlawfulness, then the fault element of defamation is in principle unaffected by this defence. In fact, it seems that after the *Bogoshi* decision the liability of the press is once again intent-based, as in the Roman-Dutch common law. If this view of the *Bogoshi* case is correct, then the application of the *Bogoshi* analysis in the *Smith* case was profoundly mistaken. The negligence or reasonableness requirement applied to mistakes about truth in *Bogoshi* is simply not transferable to mistakes which preclude the very intention to harm itself. It follows that the negligence standard applied to the mistake at issue in the *Smith* case, a mistake about consent, cannot be justified with reference to the analysis adopted in the *Bogoshi* decision. Indeed, had the *Bogoshi* defence have been construed in this way by Justices Langa, O’Regan and Sachs it would have been inapplicable to the facts of *NM v Smith*, since it was not in the public interest to publish the claims.

On the other hand, if the *Bogoshi* decision is correctly understood as having introduced negligence as the appropriate fault requirement throughout the law of defamation, then the negligence standard applied to mistakes about truth in that case applies to all other mistakes too, even mistakes which preclude the intention to defame entirely. Thus in a case such as *Hulton v Jones*, the defendant would now be able to escape liability by showing that his mistaken

⁶¹ This point is made by Justice O’Regan at [132].

⁶² 1954 (3) SA 244 (C) See also *National Media Ltd v Jooste* 1996 (2) SA 262 (A) 271-272.

⁶³ cf the misleading decision in *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 261 (W), where consent appears to have been treated as a defence to prima facie wrongfulness only (see the citation of *Kidson* by O’Regan in [153] and [155]). But as we have seen, the claim in the *Kidson* case was treated throughout as wholly analogous to a defamation claim. See note 9 above.

defamation of the real Artemus Jones was not negligent. This appears to have been the analysis of the *Bogoshi* decision adopted by Justices Langa and O'Regan.⁶⁴ If this analysis is right – and it is not clear that it is – then the application of this standard to Charlene Smith's mistake about consent was at least analytically sound.⁶⁵ If indeed the *Bogoshi* decision establishes negligence as the appropriate fault requirement throughout the law of defamation, and if the *Bogoshi* analysis is correctly applied in privacy cases, it follows that negligence is the appropriate fault requirement to apply to mistakes about consent. However, that does not mean that the approach adopted in the *Smith* case is immune to criticism. I advance three main arguments against it.

Both Justice O'Regan and Justice Sachs explicitly justified their approach in the *Smith* case with reference to the balancing of the rights to freedom of expression and dignity achieved in *National Media v Bogoshi* and *Khumalo v Holomisa* in the context of the law of defamation: in other words, they assumed that by applying a negligence standard in the *Smith* case, an appropriate balance between these rights would be achieved in the context of privacy also.⁶⁶ But whereas in the context of defamation the defence of reasonable publication in cases involving the media means extending much greater protection to freedom of speech than was previously the case, when applied to the publication of private information the adoption of a negligence requirement in place of the requirement of *animus iniuriandi* means significantly limiting that freedom. It does not appear to have been fully acknowledged by Justices Langa, O'Regan and Sachs in *NM v Smith* that they were restricting rather than vindicating the right to freedom of expression as previously embodied in the common law.

Secondly, the adoption of a negligence requirement in favour of the requirement of *animus iniuriandi* derived ultimately from Roman and Roman-Dutch law in the context of privacy claims surely requires more compelling justification than that advanced in *NM v Smith*. The requirement that in order to be liable for *iniuria* the defendant must have intended the harmful consequence in question – whether that is an infringement of bodily integrity, dignity or reputation – originates in classical Roman law.⁶⁷ This is one of the fundamental distinctions between *iniuria* and *damnum iniuria datum*, in the context of which liability may arise in respect of unintended consequences also. One of the arguments made by academic commentators against the view that the *Bogoshi* decision has introduced negligence as the appropriate fault requirement throughout the law of defamation is the fact that this radical adjustment to the common-law position was not sufficiently justified by Hefer JA in the *Bogoshi* case itself: in fact, the arguments of Hefer JA in the *Bogoshi* case went exclusively to the new defence of reasonable publication, a defence to unlawfulness.⁶⁸ But this argument is equally forceful with respect to privacy. To the extent that

⁶⁴ *NM v Smith*, Langa CJ at [96]-[97]; O'Regan J [170]-[173]

⁶⁵ Prior to the decision in *NM v Smith*, David McQuoid-Mason and Neethling et al took the view that *National Media v Bogoshi* ought to be extended to the mass publication of private information, so as to make negligence the appropriate fault standard in that context also, at least with respect to media defendants: see McQuoid-Mason "Invasion of privacy: common law v constitutional delict – does it make a difference?" [2000] *Acta Juridica* 227, 233-234; Neethling et al *Personality*, 253 n 280.

⁶⁶ See O'Regan J [177]-[179], Sachs J [203]-[204] For the balancing of the rights to freedom of expression and dignity enshrined in the Interim Constitution of the Republic of South Africa of 1993, see *National Media v Bogoshi*, 1217: "The ultimate question is whether what I hold to be the common law achieves a proper balance between the right to protect one's reputation and the freedom of the press, viewing these interests as constitutional values. I believe it does." The soundness of the decision in light of the Final Constitution of the Republic of South Africa of 1996 was confirmed in *Khumalo v Holomisa* 2002 [5] SA 401 (CC) para [43]

⁶⁷ D.9.2.5.3 (Ulpian Book 18 *Ad Edictum*)

⁶⁸ Midgley, 214; Fagan, 103-104.

the Langa, O'Regan and Sachs J merely restated Hefer's reasons for introducing the defence of reasonable publication, they failed to justify sufficiently the fundamental shift in the character of the *actio iniuriarum* which is implied by their analysis.

Finally, even accepting that negligence is the appropriate fault requirement in privacy cases, the standard applied by Justices Langa and Sachs appears to have been a rather stringent one. The fact that Smith had relied on a report from a reputable source which on its face suggested that the applicants had consented was not enough to render her mistake a reasonable one.⁶⁹ In the context of defamation itself, it seems that the defence of reasonable publication requires that the defendant took active steps to verify the truth of defamatory allegations.⁷⁰ However, it is unclear whether in the context of the mass publication of private information it is necessary that the defendant took active steps to establish consent. Whereas the publication of a defamatory statement is per se wrongful, the publication of private information is not: as argued earlier in this section, the absence of consent to the publication of private information by their subject is part of the very gist of the delict. Thus in the words of O'Regan J, "To hold that in the circumstances as outlined above they were under a further duty to contact either the University or the applicants to ensure that they had in fact consented to publication of their names would impose a significant burden on freedom of expression."⁷¹ This point is explored further in the next section.

5. The meaning of negligent mistake: parallels with breach of confidence in English law

As we have seen, the new species of qualified privilege introduced by the House of Lords in *Reynolds v Times Newspapers Ltd and others*⁷² is very similar to the defence of reasonable publication recognised in *National Media v Bogoshi*. Indeed, the decision of the Court of Appeal in *Reynolds v Times Newspapers* was cited with approval by Hefer JA.⁷³ However, crucially, English law does not apply the *Reynolds* privilege or anything resembling it to cases involving the mass publication of private information. Rather, facts akin to those at issue in the *Smith* case are dealt with in English law under the aegis of the equitable wrong of breach of confidence, which is wholly distinct from the tort of libel.

The traditional action for breach of confidence depends on the existence of a confidential relationship between the person who imparted the information and the person who received it, rather than on the personal nature of the information or the extent of publication. As for the appropriate fault standard in such traditional cases, in the words of Lord Hoffmann in *Campbell v MGN Ltd*,

Breach of confidence was an equitable remedy and equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other.... Equity imposed an obligation of confidentiality upon the latter and (by a

⁶⁹ *NM v Smith*, Langa CJ at [102], [110]

⁷⁰ *National Media v Bogoshi*, 1212.

⁷¹ *NM v Smith*, [185]-[189]

⁷² [2001] 2 AC 127.

⁷³ [1998] 3 WLR 862.

familiar process of extension) upon anyone who received the information with actual or constructive knowledge of the duty of confidence.⁷⁴

More recently the law of confidence has developed so as to impose liability for the mass publication of personal information even in the absence of any pre-existing relationship of confidence between the parties.⁷⁵ Whereas previously breach of confidence was concerned with protecting information which had in fact been confided – secret information – it has been extended in such a way that it protects also information which is confidential in the sense of inherently private, provided of course that the claimant does not consent to its disclosure. This development is generally associated with the speech of Lord Goff of Chieveley in *A-G v Guardian Newspapers Ltd (No 2)*.⁷⁶ Here he held that there might be liability even in cases where,

an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by.⁷⁷

Thus in the *Campbell* case itself, a majority of the House of Lords held that Naomi Campbell could recover damages from the Mirror in respect of the publication of certain images taken of her emerging from a Narcotics Anonymous meeting, as well as the publication of certain details of her treatment for drug addiction, despite the fact that there was no relationship of confidence between her and the photographer or the Mirror itself.⁷⁸

However, even in such extended cases of breach of confidence, it seems that the defendant can be held liable on the basis of constructive as well as actual knowledge that the information was confidential, i.e. that it was private information which the claimant did not wish to be widely disclosed. This appears clearly from Lord Goff's statement of the extended doctrine of breach of confidence in *A-G v Guardian*, quoted with approval by Lord Hoffmann in the *Campbell* case:

A duty of confidence arises when confidential information comes to the knowledge of a person ... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word 'notice' advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary, though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious.⁷⁹

⁷⁴ [2004] 2 AC 457 (HL) at [44]

⁷⁵ *Campbell v MGN*, 46-49.

⁷⁶ [1990] 1 AC 109.

⁷⁷ *A-G v Guardian Newspapers Ltd (No 2)*, 281.

⁷⁸ The Lords held that she could not succeed purely on the basis of the publication of the fact that she was recovering from drug addiction, but this was because she had herself previously denied that this was the case, not because this was not a private fact.

⁷⁹ See *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281, quoted in *Campbell v MGN*, [47]. Lord Nicholls, Lord Hope and Baroness Hale preferred to formulate the test in terms of whether the defendant knew or ought to have known that the material it was publishing violated the claimant's reasonable expectation of privacy: See *Campbell v MGN*, [14], [85] and [134].

The issue of constructive knowledge will not usually arise in respect of a defendant who actually seeks out the private information or takes the picture, because almost inevitably he is aware of the absence of consent on the part of the claimant. However, the precise scope of constructive knowledge is important to determining the range of liability of remote recipients of the information, such as newspapers.

Returning to the *Smith* case, it is arguable that the negligence standard applied by Justices Langa and Sachs was essentially the same as the constructive knowledge standard articulated in the *Campbell* case. *Smith* was held to have had notice that the information in question was confidential, in the sense that the applicants had placed certain limits on its disclosure, because the introduction to the report referred to the ‘terms’ of the applicants’ consent.⁸⁰ Thus the analysis of the two justices in the *Smith* case appears to have been in step with that of at least one major common-law jurisdiction. Moreover, since the modern English doctrine of breach of confidence has been developed specifically with reference to Art 8 of the European Convention on Human Rights, which enshrines the right to respect for private life, the adoption of a negligence standard in cases involving the mass publication of private information does after all seem to constitute an acceptable limit on the right to freedom of expression.⁸¹

However, it seems that the test for fault applied by the two justices in the *Smith* case may after all have been more stringent than that applied by the English courts in the context of the extended doctrine of breach of confidence. In *A-G v Guardian* Lord Goff had in mind a case where the confidential nature of the information in question appears from its context, i.e. from the form in which the information is presented. This is the force of his ‘fan’ example. Similarly, in the recent *Douglas v Hello!* litigation, *Hello!* magazine could hardly have been unaware that the claimants Douglas and Zeta-Jones did not wish them to publish unauthorised photographs of their wedding, given that they were deliberately ‘scooping’ *OK!* magazine, with whom Douglas and Zeta-Jones had an exclusive deal.⁸² Thus in each case the defendants were shown to have knowledge of the facts from which the inference of absence of consent could be drawn. In the *Smith* case, on the other hand, as we have seen, Charlene Smith was required by Langa CJ to take active steps in order to verify that the applicants’ consent to publication had been obtained. The reference to the ‘terms’ of consent in the introduction to the report was not in fact enough to alert her to the fact that the applicants had not consented to mass publication: indeed, the context in which the facts were presented, namely the Strauss report, seemed to suggest the opposite, that they were not confidential.⁸³ Thus it appears that the negligence standard applied by Justices Langa and Sachs in the *Smith* case is not the same as constructive knowledge after all.

One answer to this criticism might be to point to the fundamental right to human dignity recognised in the South African Constitution:⁸⁴ it may be that this right explains the rather stringent approach to fault in the context of privacy claims adopted by Justices Langa and Sachs. However, this argument does not meet the charge that the application of the South African defamation regime to the invasion of privacy is inappropriate. It may be correct for South African law to protect privacy – as an aspect of the paramount right to human dignity – more aggressively than it used to, and more aggressively than that right is protected in other jurisdictions, but that

⁸⁰ *NM v Smith*, Langa CJ at para [105]

⁸¹ See especially *Campbell v MGN* in this respect.

⁸² See *Douglas and others v Hello! Ltd and others (No 3)* [2005] EWCA Civ 595.

⁸³ See the judgment of the trial court at [24]; O’Regan J at [183]

⁸⁴ See Sections 1 and 10 of the Constitution of the Republic of South Africa, 1996, as well as the remarks of Madala J at [48] to [54]

does not mean that it is correct for South African law to protect reputation and privacy – although both expressions of the right to dignity – in the same way. As was admitted at the start of the previous section, there are clear parallels between claims in respect of the publication of defamatory allegations and claims in respect of the publication of private information. In particular, the context of such publications tends to be similar: both delicts typically involve mass publication by the media. However, the fact remains that the publication of a true private fact gives rise to a different type of harm from that generated by a false defamatory allegation, namely harm to dignity rather than reputation. It is at least unclear whether the case for negligence-based liability is equally strong in each case. Certainly it cannot be assumed without more that this is the case.

6. Conclusion

In conclusion, the analysis adopted by Justices Langa, O'Regan and Sachs in *NM v Smith* relies on an analogy between defamation and invasion of privacy through, first, the rejection of *animus iniuriandi* as the appropriate fault requirement and, second, the parallel treatment of consent to publication. In both respects the analysis adopted by the minority in the *Smith* case represents a departure from the previous common-law analysis of privacy claims. Whereas the South African law of defamation has long been influenced by English law, until recently the action for invasion of privacy had seemed to follow closely the principles of the Roman-Dutch law, as applied in the *O'Keeffe* decision in the 1950s. However, after *NM v Smith* it seems that this is may no longer be the case. Privacy, too, now shows signs of the influence – albeit indirect – of the English law of libel. Yet the analogy between defamation and privacy on which the approach of Justices Langa, O'Regan and Sachs rests appears to be analytically unsound. Even if this is not the case, their approach is vulnerable to several criticisms: on the one hand, the view that negligence is the appropriate fault requirement in privacy cases is inadequately substantiated; on the other hand, the negligence standard applied by Justices Langa and Sachs in particular appears overly stringent. Moreover, it does not seem that this standard derives support from comparison with recent developments in breach of confidence in English law. It appears that English law is more lenient in its approach to fault.

In fact, it seems that the harm suffered by the plaintiffs was primarily a harm to reputation, rather than a harm to dignity: according to the judgment of Madala J, the applicants testified that they had suffered ostracisation from the communities in which they lived; the first applicant was left homeless when her house was burnt down; in the fullest sense the publicisation of the plaintiffs' HIV-positive status caused them to be 'shunned and avoided'⁸⁵ by the communities in which they lived.⁸⁶ Nor was the fact that the allegations were true necessarily an obstacle to a defamation claim: the claims were clearly not in the public interest, and so would have failed on the second leg of the defence as it exists in modern South African law.⁸⁷ But Justices Langa, O'Regan and Sachs were precluded from classifying the wrong done to the plaintiffs as an instance of defamation, because this would have implied that an allegation of HIV-positive status

⁸⁵ For the origins of this aspect of the test for defamatory meaning in South African law, see Burchell (1985) 103.

⁸⁶ *NM v Smith*, [63]

⁸⁷ Section 3 above.

is such as to lower the reputation of the plaintiffs in the minds of ‘right-thinking people’.⁸⁸ Unsurprisingly, the Court was unwilling to enforce the stigma which attaches to HIV positive status in many South African communities in this way. Thus it appears that the decision of the three justices in *NM v Smith* was really generated by the conflict at the heart of the concept of defamatory meaning between the factual – what people really think of those who are HIV positive – and the normative – what they should think. It is unfortunate that the three justices did not address this conflict directly, but chose rather to alter the law of privacy in order to come to the assistance of the plaintiffs and give effect to their constitutional rights. The outcome in *NM v Smith* itself may be correct, but the analysis of Justices Langa, O’Regan and Sachs may yet lead to indefensible results in future cases.

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⁸⁸ *NM v Smith*, Langa CJ at [92], O’Regan J at [138]-[141] See also the statements to this effect made by Madala J at [48] According to O’Regan J, this suggestion – that the publication was defamatory – was expressly disavowed by counsel for the applicants.