THE PLEA OF TRUTH AND PUBLIC BENEFIT AS A DEFENCE TO AN ACTION FOR DEFAMATION IN SOUTH AFRICAN LAW

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O magna vis veritatis, quae contra hominum ingenium, calliditatem, sollertiam, contraque fictas omnium insidias, facile se per se ipsam defendat! - O, mighty power of truth, which can easily defend itself by itself against the skill, the craft, the ingenuity of man, and against all treacherous inventions!

Cicero. Pro M. Coelio, 26 .

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1. Objective of the work

The pursuit of truth is an enduring concern of man. Yet its expression is not always welcomed by those whose character or conduct is thown into an unflattering light by its publication. Most individuals would prefer to prevent disclosure of certain details of their lives to the wider public, and reputations are often formed on the basis of a partial picture of the complete man.

It is the function of the law of defamation to strike a balance between the interest of each individual in that intangible yet highly valued possession, reputation, and the interest of the wider public in such more general democratic values as freedom of speech and the unfettered circulation of information through society. How that balance is struck by a particular legal system has important implications.

This study considers through a detailed examination of the case law the degree to which the South African private law protects individuals against the disclosure of true but damaging information concerning their actions or, conversely, the degree to which legal subjects are protected in their right to speak the truth. In England, the truth of the imputation is a complete defence to a civil action for libel or slander. But South African law, under the influence of its Continental origins, has curtailed the circumstances in which the truth can serve to exonerate the defendant in a defamation action.

De Villiers CJ well expressed the attitude of the contemporary South African courts when he said said in the Cape Supreme Court

during the last century:

> As a general principle, I take it for the public benefit that the truth as to the character or conduct of individuals should be known. But...(1)

The pages that follow will outline the exceptions to the general rule, and how they came to form part of the contemporary South African law of defamation.

2. The scope of the work

When the plaintiff in a defamation action proves that the defendant published words that were prima facie defamatory of him, two presumptions of liability - one of fault and one of wrongfulness - arise against the latter[2]. The defendant can raise certain defences aimed at rebutting either of these presumptions. Although the courts have ruled that a defendant in a defamation action is not limited in the manner in which he may seek to discharge the onus ('weerleggingslas') of rebutting the presumptions of fault or wrongfulness[3], certain categories of defences, each with their own rules, have crystalised in practice. Of these, the principal are fair comment, privilege, and the somewhat cumbersomely named plea of 'truth and public benefit'. By adopting one or other of these pleas, the defendant seeks to show that although the published words were

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1) Graham v Ker (1892) 9 SC 185 at 187.

2) May v Udwin 1981 (1) SA (A) 1 at 10 C-G.

3) See, eg., Borgin v De Villiers 1980 (3) SA 556 (A) at 577 E-F.

damaging to the plaintiff's reputation, they were published in circumstances, or were of such a nature, or were directed at an object which was such as to render their publication excusable by law or 'justified'.[1]

Yet as clearcut as the plea of 'truth and public benefit' may appear to be from the cursory outlines devoted to it in most modern texts, it is perhaps the most perilous and least predictable of all those available to a defendant in an action for defamation. The concept 'truth' is philosophically intractable and that of 'public benefit' equally difficult to pin down with precision. Yet few attempts have been made to systemise the body of existing rules relating to the defence, or to examine its requirements in detail. This is the task which the present study addresses.

3. Outline and approach

The study begins with a detailed examination of the origins of the defence in Roman law, and traces the dispute over the role of the *veritas convicii* through the writings of the Roman-Dutch

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1) As Jansen JA put it in *May v Udwin* 1081 (1) AD 1 (A) at 10 E-F:

> The presumption of *animus injuriandi* may be rebutted by proving a defence (a so-called 'skulduitsluitingsgrond') which negatives the inference of *animus injuriandi*. A defendant may rebut the presumption of unlawfulness by proving a defence (a so-called 'regverdiginsgsgrond' or justification ground) which is directed at establishing that the publication of defamatory matter was lawful.

In this work the defence will be referred to as 'truth and public benefit' in preference to the English law term 'justification', since the latter is correctly speaking a generic term for all the defences excluding unlawfulness.

jurists and the decisions of the pre-Union colonial courts in South Africa. The gradual absorption of the requirement of public benefit into the contemporary law is examined. Subsequent sections attempt to extract from the case law and to systematise the rules relating to the requirements of the defence of truth and public benefit, with a view to setting forth the circumstances in which the truth may lawfully be published. Section 2 deals with problems relating to proof of the truth of the imputation; Section 3 with the problem of when publication can be said to serve the public benefit. The final section seeks to examine the juridical basis of the defence and to relate it to recent developments in the law of defamation as a whole. Brief conclusions are then drawn and recommendations made.

4. A note on sources and methodology.

As little has been written on the defence examined in this work, the main source drawn upon was the decisions of the courts themselves. Perhaps because many of the problems raised by the defence of truth and public benefit are regarded as settled law, cases in which it is at issue appear with decreasing frequency in the modern reports. Hence old authorities are frequently relied on, and foreign decisions and writers have been consulted where these may be considered of persuasive value. Points on which the law may be regarded as settled are indicated, but those which are not are discussed in some detail. The facts of the respective cases are outlined where necessary for the purposes of illustration, and in such detail as the constraints of space permit.

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Chapter 1

HISTORICAL DEVELOPMENT OF THE DEFENCE

INTRODUCTION

It is now accepted that in South Africa a defendant in an action for defamation cannot in all circumstances escape liability simply by proving the truth of the imputation. Yet until the present century the courts were still expressing doubt on what role the veritas convicii should play in determing liability. On the one hand, the courts were confronted with the English civil law rules, which raised the truth alone to the status of a complete defence; on the other, they were influenced by a strong current of thinking among Roman-Dutch authorities, who favoured limiting the circumstances in which the truth could be pleaded in an action for defamation to those in which some demonstrable public benefit could be said to have flowed from publication.

This chapter will examine the rules contained in Justinian's Digest and Code, which form the foundations of the modern law of defamation, their interpretation by the Roman-Dutch jurists, and the manner of their incorporation into the modern South African law via the colonial courts.

ROMAN LAW

Whether in Roman Law the truth alone of an imputation which lowered another in the esteem of his fellows was enough to exculpate its publisher from liability under the actio injuriarum remains a matter of some controversy. Texts bearing the matter are few and unsystematised, and there is room for disagreement on their translation.

Some modern writers[1] refer to an 'exceptio veritatis' in the Roman law, but there is no mention of such a defence by name in the texts.

The main authority bearing on the the role of the truth in an action for defamation is Paul's statement in D 47.10.18 pr, which reads:

> Eum qui nocentium infamavit, non esse bonum aequum ob eam rem condemnari; pecatta enim nocentium nota esse et oportere et expedire. - It is neither proper nor just for anyone to be condemned for speaking ill of the guilty, for it is both necessary and expedient for the offences of guilty persons to be known.(2)

This section clearly deprived a certain category of individuals of an action for satisfaction under the actio injuriarum. But there is some uncertainty over the degree of protection it afforded those who had 'spoken ill of the guilty'. The word 'nocentium' could refer equally to those who were guilty of acts which were indictable under the criminal law, or those which were morally opprobrious but not punishable by law.[3]

As will be seen, many commentators have cited this section of the Digest to support the argument that the Romans did not accept that the truth of the imputation afforded an exemption from liability under the actio injuriarum in all circumstances.

Is this view correct? Several modern writers favour the view that

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1) Bliss, Belediging, 75; Van der Merwe and Olivier, Onregmatige Daad, 400.

2) Scott's translation. Nathan, Defamation, 205, translates pecatta nocentium more widely as 'the misdeeds of delinquents'.

3) Nocentia is translated in the Oxford Latin dictionary as 'guilt or transgression (post Class.) and pecatum as a 'fault, error, mistake, transgression or sin'. (Lewis C T and Short, C, A Latin Dictionary, Oxford, 1975.)

Paul envisaged the section as affording absolute protection to the truth. Bliss [1] regards the passage as creating a general right to speak the truth and that, in consequence, 'die uiting van die waarheid altyd regverdig'. CF Amerasinghe[2] cites the passage as authority for the proposition that in Roman law '...truth by itself was recognised as a defence...the basis (of which) seems to be that it was in the interest of public welfare that the truth be revealed'. De Villiers[3] argues that the second part of the passage was not intended by Paul to limit the defence of truth only to imputations which exposed offences, but that such disclosures were merely intended as examples of those that were in conformity with propriety and the public interest, '...which explanation would be quite in accordance with the principle that the truth of a statement is a sufficient justification for its utterance or publication', except in specific instances, as stated in the texts, where utterance of the truth is opposed to public policy.[4]

Nathan, on the other hand, regards D47.10.18pr as support for the interpretation, contended for by a number of Roman-Dutch jurists[5] that the Roman law allowed the truth of a statement to be raised as a defence only in the case of imputations from which, like those

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1) Belediging, 281.

2) Aspects, 340.

3) Injuries, 104.

4) The examples cited by De Villiers of statements the publication of which would be against public policy are the disclosure by witnesses of the contents of a will, and any indiscretion by those bound to secrecy by virtue of their profession.

5) Infra, 15 et. seq.

cited by Paul, some public advantage could be said to flow.[1]

Which view is to be preferred? If 'nocens' is limited to the technical term of criminal wrongdoer and 'pecatta' to indictable offences, Nathan's interpretation appears to be the more persuasive. There seems no special reason, however, for excluding the possibility that Paul used both terms in their wider meanings. If this is the case, D 47.10.18pr affords protection to the disclosure of any form of wrongdoing - criminal or merely moral - and irrespective of the motive with which the disclosure was made. 'Oportere et expidire' would refer then to the juridical basis for the grant of exemption to the publishers of such disclosures - the public benefit that flowed from disclosure of the truth - and could not be seen as limiting exemption to those statements from which some specific public advantage could be said to accrue, such as the disclosure of unprosecuted criminal wrongs.

Support for this interpretation of the Roman Law can be found elsewhere in the texts. C 9.35.10 reads:

> Si quidam aviam tuam ancillam infamandi cause rei publicae civitatis Comanensium dixit Zenadorus ac recessit, injuriarum actioni statim conviniri potest. Nam si perseveret in causa facultatem habens agendi, super hac deferri querellam ac tunc demum, si non esse serva fuerit pronuntiata, postulari convenit - If Zenadorus (for the purposes of defaming her) said that your grandmother was a female slave, belonging to the City of Comensians, and did nothing more, an action for injury committed can immediately be brought against him. If, however, he persists in his assertion, you have the right to defend yourself in court, and then, if your grandmother should not be decided to be a slave, it is settled that you can bring your suit.(2)

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1) Nathan, Defamation, 205-6.

2) Scott's translation. Emphasis added.

Liability for this particular imputation therefore hinged solely on its truth.

C 9.35.3 also suggests that the truth of the imputation was the sole test for liability:

> Si non es nuntiator, vereri no debes, ne ea propter, quod injuriae faciendae gratia quidam te veluti delatorem esse dixerunt, opinio tua maculata sit quin immo adversus eos, quos nuniendae opinionis tuae causa aliquid confecisse comperietur, more solito iniuriarum iudicio experiri potes. - If you did not denounce anyone, you should have no fear that your reputation has been damaged, because certain persons, with the intention of injuring you, have called you an informer; and, furthermore, you can bring an action for injury in the usual way against those who are ascertained to have done anything for the purpose of reflecting on you character.(1)

In other words, the person who was in truth an informer would have no action.[2] The only criterion for determining whether an action arising from this particular class of imputation was its truth.

The same applied to prostitutes, practising or reformed, in terms of D 23.2.43.4, which laid down that

> Non solum autem ea, quae facit, verum ea quoque, quae fecit, et si facere desiit, lege nolatur, neque enim aboletur turpitudo, quae postea intermissa est - The law brands with infamy not only a woman who practices prostitution, but also one who has formerly done so, even though she has ceased to act in this manner, for the disgrace is not removed even if the practice is subsequently discontinued.(3)

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1) Scott's translation.

2) Van der Keessel, Praelectiones..., discussed infra at 27-9.

3) Scott's translation. But see C 12.36.3, which declares that reformed actresses should be regarded as no different from those who have not similarly 'sinned': Neque vocabulum inhonestum eis inhaerere de cetero volumus neque differentiam aliquam eas habere cum his, quae nihil simile peccaverunt.

Apart from the uncertainty as to the scope of the protection afforded by D 47.10.18pr, its juridical basis is also unclear. De Villiers suggests[1] that a defendant could in the circumstances cited by Paulus not succeed because the action for injury was one in aequum bonum concepta. This would that where the misdeed of a person who had committed it was exposed by another, the guilty person had in fairness and equity no cause of action. To allow such a party an action would be 'neither proper nor just' because a guilty person should not be allowed to claim damages when he himself brought about the circumstances upon which the injurious publication was based.

Alternatively, it is arguable that the plaintiff in these circumstances was denied his action because the defendant had exercised a right recognised by law: a general right to speak the truth flowing from the advantage which the public derived from learning of it.[2] If there was such a general right, the defendant was exempted from liability because 'nullus videtur dolo facere qui suo jure utitur'.[3] Bliss[4] agrees that the basis of the defence afforded by D 47.10.18pr was the exclusion of wrongfulness, and claims that the publication of the truth was a general right in Roman law. CF Amerasinghe, on the other hand, regards the defence afforded by the section as arising from a general interest of the

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1) Injuries, 104, citing D 47.10.11: Injuriarum actio ex bono et aequo est...Aequitas actionis omnem metum ejus abolere videtur, ubicumque contra aequum quis venit.

2) For variations of this view see Bliss, Belediging, 28, C F Amerasinghe, Defamation and Other Injuries, 340, De Villiers, Injuries, 105.

3) D 50.17.55.

4) Belediging, 28.

public in the circulation of the truth.[1]

If these interpretations of the juridical basis of D 47.10.18pr and the other texts cited above are correct, it would seem that proof of the truth of the imputation at issue would have afforded an absolute defence in Roman law. Since the defendant had performed an act deemed worthy of protection by law, he had not acted wrongfully. Thus the defence would hold irrespective of the motive that inspired publication.

There are, however, certain texts which are not readilly reconcilable with this view. C 9.35.5, for example, appears to have placed an additional onus on the defendant who wished to raise the truth of the imputation against an action for injury:

> Si non convicio te aliquid injuriosum dixisse probare potes, fides veri a calumnia defendit.

Whether or not this section affects the interpretations of Roman law set out above depends on the way it is translated. Scott renders the passage as follows:

> If you can prove that you did not intentionally make use of any abusive expression, the truth of this fact will protect you from an accusation of slander.

Ranchod, on the other hand, interprets the Latin in this way:

> If you can prove that you have made a defamatory statement without any design to defame, the truth of the allegation

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1) Defamation and Other Injuries, 340.

will be a defence against an action for defamation.(1)

The crucial difference between these translations centres round the meaning of the term fides veri. Both Nathan[2] and De Villiers[3] render this phrase as 'the truth of the matter', but differ on whether 'the matter' refers to the denial of intention to defame or to the subject matter of the imputation. Scott's translation is unambiguous. 'This fact' can refer only to the denial that the statement was made intentionally. Nathan rejects De Villiers' contention that in Roman law fides veri had a technical meaning which rendered it impossible that the phrase could have referred to the truth of the statement.[4] Ranchod agrees with Nathan, seeing C 9.35.5 as authority for the principle that, unless the defendant could show that he had no design to defame, he would liable for any defamatory statement that he had made, irrespective of its truth.[5]

If this view is correct, it means that in terms of C 9.35.5 the defendant had to satisfy the court that he lacked the intent necessary to found liability. The text, however, provides no guidance on the nature of the mental element to be disproved. Scott translates non convicio as 'without intention', De Villiers as 'without injurious intention' and Nathan uses the expression 'without malicious intention'. If modern terminology is to be read

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1) Foundations; emphasis added. For a similar translation see Nathan Defamation, 206.

2) Nathan, ibid.

3) Injuries, 118.

4) Nathan, op. cit.

5) Ranchod (1972) 18-19.

back into the text, there is an important difference between these translations. In terms of the versions of Scott and De Villiers, the onus rested on the defendant to disprove animus injuriandi - i.e. intention to defame in the narrow sense of publishing a statement knowing it to be wrongful and knowing that it would infringe the personality rights of the defendant.[1] On Nathan's view, however, the defendant would have to disprove malice - i.e. that in publishing he did not have some secondary objective disallowed by law. It seems, however, that there was no clear distinction between malice and intention in the Roman law rules governing the actio injuriarum.

Whatever the nature of the mental element, however, the texts as translated by Nathan and Ranchod would mean that the defendant would have to satisfy the court that it was lacking in spite of the truth of the imputation at issue.[2] The truth, therefore, would not provide a complete defence. On Scott's translation, the passage can be viewed as providing a defence of absence of animus injuriandi simpliciter, which simply means a denial by the defendant of intention to defame - the truth or otherwise of the imputation being immaterial.

It would seem that the intended meaning cannot be finally determined by reference to the passage itself. Fides veri means lit-

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1) See Jordaan v Van Biljon 1962 1 SA 286(A); Craig v Voortrekkerpers Bpk 1963 1 SA 149 (A); Naidoo v Vengtas 1965 1 SA 1(A).

2) Bliss implicitly agrees with this view. See Belediging, 29-30.

erally 'confidence in the truth', and there is nothing in the rules of Latin grammar to indicate conclusively whether such confidence is in the truth of the assertion or the truth of the denial of intent.[1] C 9.35.5 therefore needs to be read together with other sections of the text.

C 9.35.9 could have some bearing on the question whether in Roman law abuse of purpose served to vitiate the defence of truth:

> Qui liberos infamandi gratia dixerunt servos, injuriarum conveniri posse non ambigitur - There can be no doubt that persons who, for the purposes of rendering them infamous, have stated that the children of a certain individual were slaves, can be sued in an action for injury.(2)

It is possible that this passage was simply intended to indicate that a defamatory imputation directed at his children entitled a father to an action. On the other hand, the term infamandi gratia could refer to a specific requirement of an action brought for such an imputation - that it had to be shown that the defendant had as his primary purpose the object of defaming. If this were not the case, and the defendant was able to show that his primary purpose was simply to disclose the truth, no action would lie against him.[3]

The only other passage from the Code which has been cited as authority against the view that in Roman law the truth afforded an

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1) Discussions with Dr Ken Mathier of the Department of Classics, Rhodes University.

2) Scott's translation; emphasis added.

3) C F Amerasinghe favours this view, arguing that 'abuse of purpose' vitiated the defence of truth in a Roman law action for injuria; see Aspects, 316.

absolute defence[1] is C 9.36.2, which reads:

> Sane si quis devotionis suae ac salutis publicae custodiam gerit, nomen suum profiteatur et ea, quaeper famosum persequenda putavit, ore proprio edicat,ita ut absque ulla trepidatione accedat, sciens, quod si adsertionibus veri fuerit opitulata, laudem maximam ac premium a nostra clementia consequetur - Where anyone having a view to his own duty or the public safety mentions the name of the culprit, and states with his own mouth what he thought reprehensible in the libel aforesaid, let him be under no apprehensions, for if the truth should be established by his assertions, he will be entitled to the greatest praise, as well as a reward from Us.(2)

Nathan[3] argues that the first clause of the passage limits the protection afforded by this passage to statements made for religious purposes or the safety of the public. With respect, however, C 9.36.2 provides no authority for limiting the protection of true statements only to those which served or were directed towards the ends specified. The context of C 9.36.2 makes it clear that it refers only to a particular class of statements - viz., those that disclosed the identity of one who had published a libellus famosis, that is, a libel left anonymously in a house or public place.[4] C

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1) Defamation, 206.

2) Scott's translation.

3) Defamation, ibid.

4) The remainder of the passage reads as follows: If anyone should find a defamatory libel in a house, in a public place, or anywhere else, without knowing who placed it there, he must either tear it up before anyone else finds it, or not mention to anyone that he has done so. If, however, he should not immediately tear it up, or burn the paper, but should show it to others, he is notified that he will be liable for the punishment of death as the author. For the background to famosus libellus, see Scott (ed.), The Civil Law, vol 7, 62, n.1.

9.36.2 states explicitly that the disclosure of the name of the writer of a libellus famosis would, if proved, not constitute an injury: ...huiusmodi autem libellus alterius opinionem non laedat. This exemption is certainly grounded on the public benefit that accrued from the identification of those who indulged in the practice of anonymous libel. On the other hand, the person who accused another of being the perpetrator of an anonymous libel and failed to prove the charge faced capital punishment - sine vero minime haec vera ostenderit, capitali poena plectetur. From this it is clear that libella famosa were regarded as a special case, and no general rule applicable to ordinary defamation actions can be extracted from the sections dealing with them. All that can be said is that the the truth provided an absolute defence to disclosures of the identity of the perpetrators of that particular form of libel.

The conclusion drawn by some modern writers[1] that in Roman law proof of the imputation at issue provided an absolute defence to an action for defamation, is not supported with certainty by the texts. Paul may have intended D 47.10.18pr to protect only the disclosure of crimes strictu sensu, and it can be argued that those[2] who wish to read from it a general principle that the truth of any statement was sufficient to justify its publication have erred by reading too much into a passage that was intended to apply only to a specific

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1) Bliss, Belediging, 28ff; Van der Merwe and Olivier, Onregmatige Daad, 400; De Villiers, Injuries, 103-5.

2) Eg., De Villiers, 104.

class of injurious imputations[1].

If the phrase peccata enim nocentium nota esse is taken to refer to indictable offences, it is not possible to attribute to Paul the view, favoured by De Villiers, that '...it is desirable that everyone should be known to the world in their true character'.[2]

Notwithstanding his conclusion that the utterance of the truth was an absolute right in Roman law, Bliss raises the possibility that the reason set forth in the second part of D 47.10.18pr may have contained a limitation - that publication of the truth could not, as he puts it, be in conflict with the public interest.[3] In any event, even if the passage is given the widest possible interpretation, there is nothing in it to suggest that it was envisaged to extend protection to injurious utterances that imputed mere character defects, for example.

What is clear, however, is that D47.10.18pr makes no provision for the plaintiff to defeat the defence by proof that the defendant was acting with malice. This is also the case with C9.35.3 and 10. On one reading, however, C9.35.5, appears to place an additional onus on the defendant: in addition to proving the truth of the statement, he had to show that he had published it without animus injuriandi.

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1) De Villiers himself notes that D 47.10.18pr was '...the statement of the law relative to a specific case'. See his judgment in Preller v Schultz, reprinted in Injuries, 115, at 117.

2) Ibid.

3) Bliss, Belediging, 28.

But if this passage is seen as merely creating a general defence of absence of animus injuriandi, the apparent conflict between it and the other passage disappears. D 47.10.18pr and C9.35.5 may also be reconcilable if they are regarded as creating exemptions based on different elements of the injuria. The former passage may be regarded as granting a right to publish imputations of the class therein described, and it is laid down clearly in the texts that where a person had a right to do an act the presence of dolus or evil intent could not render that act unlawful. In other words, the act was not wrongful - and wrongfulness had to be proved before the presence of animus injuriandi was considered.[1] This does not mean, however, that the lawfulness of the act could never be affected by the state of mind of the defendant; the texts cite several instances of acts that would otherwise be deemed lawful being rendered wrongful because of the accompanying circumstances or because of the presence of malice.[2] The phrasing of D47.10.18pr does not, however, suggest that Paul necessarily envisaged the exemption granted by the section as being vitiated by abuse of purpose.

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1) D 47.10.13.4 and 50.17.55; cf. also C F Amerasinghe, Aspects, 341, De Villiers, Injuries, 105, citing Matthaeus, De Crim 47.4.17.

2) For instances of such abuses of rights, see eg. C9.2.45.4 and 9.35.3; also CF Amerasinghe, 342.

ROMAN-DUTCH LAW

Given the paucity of Roman law rules relating to the role of the truth of the imputation in an action for defamation, it is not suprising that there should have been considerable dispute among later interpretations as to where the line should be drawn between upholding the individual's right to reputation and the freedom of others to disclose the truth.

Grotius interpreted the Roman law in the strictest manner. He wrote:

> All persons are liable for defamation who by word of mouth or in writing, in a person's presence or absence, secretly or openly, make known anything which impairs another's honour, though what he says be true, except where information is given to the authorities with a view to the punishment of crime.(1)

It can be seen that Grotius limited the circumstances in which the truth could be pleaded in defence to an action for defamation to one instance: where the information was published in order to secure the arrest, trial and conviction of a offender under the criminal law. In support of this view, he cited D 47.10.18pr, which even on the most rigorous interpretation does not limit the defence to one who has published damaging information to 'the authorities', as Grotius would have it. He also cited C 9.36.7 (sic. C 9.36.2), which as we have seen[2] deals with the special case of libelli famosi, and which even in that case does not stipulate that the original libeller's name need be dislosed to an authority.

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1) Intro, 3.36.2.

2) Supra, 11-17.

Grotius, by necessary implication, also limits the defence to a charge relating to a crime as yet unpunished, although it would seem that he envisaged protection also for those whose imputation was subsequently found to be false, provided that the requisite intention (the punishment of the suspected wrongdoer) was present. It would seem that Grotius envisaged protection even for one who disclosed the criminal activities of another, knowing that prosecution would follow, but in order to satisfy some secondary objective inspired by malice or the desire to further some personal end. Yet in a later section[1], Grotius writes of a true statement 'improperly made', suggesting that he may have regarded the defence as being vitiated by abuse of purpose, even where the subject matter disclosed was covered by the exception contained in his S. 3.36.2. In the the case of a true statement 'improperly made', the slanderer had to admit that he had done wrong, but did not have to pay damages. [2]

Philip Wielant is said to have shared the view that the truth would only serve as a defence where the statement was made in court or to a judicial officer. In the 17th Century, Perezius wrote that where a crime was dislosed, the defendant would be presumed to have acted without animus injuriandi, suggesting that in such cases the plaintiff's case would fail irrespective of the

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1) Intro., 3.36.3.

2) Ranchod, Foundations, citing Wieland's Practijke Crim., which was not available to me.

defendant's motive.[1] In case of other true but defamatory disclosures, the truth would not provide a defence because it was presumed that the publisher had acted with the intention of injuring,and not for some purpose recognised by law. Where the statement was uttered during an argument, for example, the speaker would be liable even though the truth of the statement could be proved, presumably because the circumstances went to show that he had acted with a bad motive.[2]

Some writers were, however, prepared to recognise the truth of the imputation as a defence where actions other than crimes were disclosed. Andreas Gail, for example, is said to have attributed to the Roman jurists the common view that, in judging whether the truth should exempt from liability, it was necessary to decide whether the statement was made in the public interest. The public interest could be served not only by the disclosure of information relating to criminal wrongs, but also by those which disclosed any information which it was desirable for the public to know, for example that a person had a contagious disease or was disqualified from public office because of illegitimate birth. Where the statement served no public benefit, the publisher was liable because

> ...in de Acte van Injurien, met so seer werd gesien op de Waarheyd der Lasteringe, als op het quaed voornemen om yemand to mogen injuriereen en lasteren.

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1) Perezius, Praelectiones, cited Ranchod, Foundations, 84.

2) Ibid.

Thus, although the action for injury was based on the mental state of the speaker, nobody was permitted to bring another into disrepute unless the purpose was protected by law:

> Daarenboven soo en is niemand geoorloorloft eens anders schande en infamie sonder oorsake te ontdekken.(1)

'Cause' was present only where some public interest was served by publication.

Van Leeuwen states in clear terms that the truth alone will not excuse the speaker from liability in an action for injury:

> Si sceleratum aliquem dicti factive veritate infamati, vel accuset delicti aut criminis, quod patefieri reipublicae interest, injuriarum actione non tenebitur...quod probe distinguendum, quum alias convitii, veritas injuriantem a poena non excuset...Quod et mores servant, per ea quae de Hollandiae, et vicinis moribus...(2)

It is to be noted that Van Leeuwen says explicitly that he was not attempting to interpret the Roman law but stating what he conceived to be the law of Holland, citing Grotius, Sande and Christianus as authorities. On his interpretation of the local law, the truth would only serve as a defence where some public interest was served by its disclosure. Again, a statement need not necessarily disclose a crime in order to be deemed in the public interest. But the defendant had to prove the truth of the allegation itself, and could not merely rely on common report:

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1) Gail, Obs., cited Ranchod, Foundations, 85.

2) Censura Forensis, 5.25.1 and 2, cited Ranchod, op. cit., 85.

> Multominus injuriantem juvat, quod ab alio injurias per famam se audivisse probet, qui nihilominus injuriarum judico tenetur, qoud injuriam ab alio dictam propalasse convincatur.(1)

Vinnius regarded D 47.10.18pr as authority for his view that the Roman law protected true but damaging statements only when some clear public advantage was served, ...veluti si quis latro, homicida, adulter, sacrelegus appelletur.[2]

The examples of disclosures cited in the above passage indicate that Vinnius viewed D 47.10.18pr as protecting punishable crimes. This is further supported by his description of the manner in which the truth needed to be published: ...hoc autem vel maxime procedit si infamaverit apud magistratum. Thus the charge had not only to be made to a magistrate, but also for the purposes of setting an inquiry in motion. Furthermore, it had to be capable of proof:

> Quoniam tum omnino praesumitur fecisse ut super objecto crimine, quod tamen utique probare debet, inquisitio instituetur.(3)

Even though he based this principle of law on Paul, who as was pointed out was silent on the relevance of the defendant's state of mind,[4] Vinnius regarded the publication of statements disclosing matter which it is in the public interest to be made known as exempt from liability because the defendant would be presumed to have acted

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1) Censura Forensis, 5.25.1 and 2.

2) Institutionem, 4.41.

3) Ibid.

4) Supra, 13.

without animus injuriandi. '...Alias si quis circumstantiis animus injuriandi adfuisse arguatur' - i.e. liability would follow where the circumstances indicated that the statement was published animo injuriandi, and among the circumstances that would indicate the presence of the necessary fault was where the publication of the statement served no public interest.

Voet shared the view that the truth of the statement was no defence unless it was published in the public interest:

> But if it is clear that what was imputed is true, not even then is he who makes the imputation always excused from the commission of a wrong.(1)

An action would not lie, however, against one who had 'reproached another with something such that the revealing of it is to the interest of the commonwealth', such as the disclosure of a crime that had not yet been punished. On the other hand,

> ...If, as they say, "there is neither seed nor grain"(2) for the commonwealth in the imputation made...an action on wrongs applies notwithstanding the truth of the taunt.(3)

The juridical basis on which Voet grounds the exemption of true but damaging statements that serve the common weal is not altogether clear. In one breath, echoing the words of Paul [4], he

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1) Commentary, 46.10.9(a).Gane's translation.

2) Literally 'there is neither sowing nor reaping' for the commonwealth, which Gane explains as meaning that the commonwealth has no interest in the matter.

3) Ibid.

4) D 47.10.18pr.

wrote that it was 'neither right nor fair' that one who had disclosed a truth that was in the public interest to be made known would have judgment against him, adding that it was 'fitting and advantageous' that the offences of the guilty should be made known. On the strength of these words, it would seem that Voet based exemption from liability on the bonum et aequum principle of the Roman law action for injuria, as well as on the advantages which, objectively speaking, could be said to flow from disclosure. Yet Voet, like Vinnius, also explained the exemption afforded the publisher of true statements which were in the public interest in terms of the fiction that, in such cases, 'evil intent' would not be presumed.[1] For Voet, intent was the central element in this form of injuria - 'state of mind distinguishes this wrong just as much as it does other evil deeds'.[2] Where the defendant had disclosed information which was true and for the public benefit

> It is not to be presumed that he who does something which he could have done without meaning well and without the good intention of safeguarding the commonwealth meant to do it with the evil purpose of doing a wrong, since every person is in doubt regarded as a good man until the contrary has been proved.(3)

Voet is not entirely clear on whether it was open to the plaintiff to prove that the defendant had in fact acted without such good intention, even though, objectively considered, publication was considered for the public benefit. He

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1) Commentary, 46.10.9(a).

2) Ibid.

3) Ibid.

acknowledged that private information about crimes could proceed not only from a desire to serve the public interest, but also from 'the hostile and unfriendly intentions of the informant'.[1] Nor is it clear whether, when Voet refers in the next paragraph to the need for a penalty to be imposed for a wrong of this type, he was referring to a charge incompletely proven or one laid with hostile and unfriendly intent.[2] In a later paragraph concerning written defamation, however, Voet suggests that proof of truth of a statement which was for the public public benefit raised an irrebuttable presumption against animus injuriandi only in the case of verbal injuries:

> Such a view was taken with verbal abuse, since it appears that one who in sudden heat, and because the tongue often outstrips the mind, has imputed things the uncovering of which is to the interest of the commonwealth, ought to be pardoned if he later proves them. (3)

In the case of written defamation, however, the presumption of unlawful intention would arise even where the statement was both true and for the public benefit:

> The truth of a crime imputed by a defamatory screed cannot relieve the author of it from a penalty, at any rate from a discretionary penalty.(4)

This was because, unlike the case of slander, statements committed to paper 'require a stretch of time for their composition, and they

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1) Commentary, 46.10.9(a).

2) Op. cit. 47.10.10.

3) Ibid.

4) Ibid.

proceed rather from a settled and persistent purpose to do harm'. The distinction drawn by Voet between written and verbal injuries is, however, not in accord with Roman law. As has been noted[1], C 9.36.2, which Voet cites as authority for the distinction, deals with a specific form of injuria, the libellus famosis, and was not intended to lay down general principles for all forms of defamatory publications. Moreover, that text does not specifically enjoin the party disclosing the name of the author of a libellus famosis to make his claim verbally.[2]

In the case of slander, publication of a true statement which was not for the public benefit also gave rise to an irrebutable presumption of animus, for

> ...In such a case no inference of good purpose can be drawn, so that there remains no other presumption than that of wreaking a wrong.(3)

Although Voet is in agreement with those of his predecessors who argued that truth in itself should not in all circumstances provide an absolute defence, he was also concerned that the limitation of the right to publish the truth should not be unduly restrictive. He therefore rejected the view of a series of writers who he interpreted as having held that

> ...in the case in which the uncovering of a crime is to the interest of the commonwealth the truth of the abusive matter is only an excuse if some such things has been

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1) Supra, 11.

2) On this points see also De Villiers, Injuries, 121-22.

3) Commentary, 46.10.9(a)

imputed before a judge, and this by way of some accusation or information. [1]

Voet did not, however, contest this view by adopting the stance that a person may serve the public benefit by disclosing punishable crime to someone other than a judicial officer. His objection to the limitation attributed to the authors cited was rather that

> ...the result (of such a limitation) would be that all those who had brought a crime to the notice of a judge would be held liable in the action on wrongs, if nevertheless the crime cannot in the long run be fully proved, albeit that they had laid the information without evil intent, and because they slipped owing to a very reasonable mistake of fact such as misleads even the wisest.(2)

Why Voet should have concluded that a reasonable mistake should have defeated the defence only in cases where the matter was reported to a judge is not explained. In the event, however, Voet rejects the view that a reasonable mistake of fact should not afford a defence in these circumstances, since 'state of mind distinguishes this wrong just as much as it does other evil deeds'.

As regards the question of proof, Voet's only stipulation is that it was not enough to point to a rumour concerning the plaintiff, but that the defendant must prove the truth of the rumour itself.[3]

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1) Commentary, 46.10.9(a). The writers to whom Voet attributes this view are Fachineus, Contraversies, Bk.9,Ch.10; Andreas Gail, Observationes, Bk.2, obs.99; Farinacius, Qu., 105, n.228; Gomezius, Various Solutiones, Vol. 3, Ch. 6, no. 1; Julius Clarus, Injuria, n. 15. The above works were unavailable to me.

2) Commentary, ibid.

3) Ibid.

Huber also regarded intention as the central element of the delict, and was accordingly of the view that animus injuriandi could be held present even where the defendant had imputed a crime, and the charge had been proved true.[1] Where, however, '...the crime imputed was such that the public interest was concerned in the detection of it...', or where there were 'other circumstances of persons or things (which) could justify the class of imputation', no action for injury would lie.

Thus, for Huber, not all imputations of criminal activity were necessarily in the public interest, and the disclosure of matters not related to crimes could also be deemed to be for the public benefit. As it was the intent of the publisher, not the result of the disclosure, which mattered, the judge should have a discretion, depending on the circumstances and merits of the case, to hold the defendant liable under the actio injuriarum wherever he considered the matter disclosed to be 'trivial'.[2]

Three conclusions can be drawn from Huber's writing on the subject. First, he did not regard the fact that the imputation alleged to be defamatory disclosed a punishable crime as necessarily providing an absolute defence. Unfortunately, his examples give no clear indication of the classes of crimes he regarded disclosure of as necessarily being in the public interest. Second, it would seem that Huber would reserve the defence to disclosures of undetected

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1) Jurisprudence, 47.10.3. The following passages from Huber are from Gane's translation, 405 et. seq.

2) Jurisprudence, 47.10.8. An example of such a non-actionable imputation would be for a creditor to say of his debtor, even if truly, that, when people came to get money from him, he ran away and hid in the pantry. (See 47.10.9)

serious crimes. Third, it seems plain that he regarded the class of statements deserving of protection as extending beyond those relating to crimes strictu sensu.

Matthaeus is said to have been prepared to grant exemption to the publication of the details of any crime, detected or undetected, punished or unpunished, on the ground that such disclosures were always in the public interest. This was because a guilty person '...is est, quem admissum crimen legibus obnoxium facit'.[1]

Matthaeus refused to accept the argument that true statements should only be protected where they were in the public interest because he regarded this view as based on a misinterpretation of D 47.10.18pr.[2] Matthaeus argued that Paul limited protection of true statements to those that disclosed crimes. He could not see, therefore, how one could fit other classes of statements which were manifestly in the public interest - for example, the exposure of a case of leprosy - into the scope of D 47.10.18pr. Liability was based, according to Matthaeus, not on the presence of animus injuriandi, but because the publication of damaging words from which no public interest could be said to have flowed, such as the exposure of the physical defects of another, was simply contra bonos mores and therefore unlawful. This was because Matthaeus defined an injuria as 'a wrong inflicted contrary to good morals'.[3]

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1) Matthaeus De Crim., 47.4.8.1.8.

2) See Ranchod, Foundations, 87.

3) Injuria hoc titulo nihil est aliquid quam contumelia contra bonos mores alicui illata. De Criminibus 47.4.1.1.

Matthaeus therefore based exemption from liability on an assessment of the consequences of the statement at issue - it was not unlawful if it disclosed matter which was in the public interest to be known, and the disclosure of matter which was in the public interest was always in accordance with the boni mores, and hence lawful.

Yet Matthaeus had some difficulty in reconciling this view with C 9.35.5, the text which forms the basis for the subjective theory of liability for injuria[1], and of which he took the widest view:

> Fides veri, non sunt referenda ad veritatem criminis objecti, tanquam et ille qui rerum crimen objecit, teneatur injuriarum, si id fecerit convicii consilio.(2)

This statement is broad enough to render punishable statements, which though true and in the public interest, were published with an intention to injure. As Bliss comments, 'die grenslyn getrek tussen die reg om die waarheid te openbaar, en die animus, is nie altyd die billikste nie'.[3] It is also not always the clearest.

Writing some 150 years after Matthaeus, Van der Keessel contibuted the most comprehensive discussion yet to the vexed question of whether the truth of a damaging statement was sufficient to exonerate a person from the penalties for an injuria.[4] Van

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1) See Ranchod, Foundations, and above

2) De Crim, 47.4.1.1, cited by Bliss, Belediging, 82.

3) Bliss, ibid.

4) The discussion appears in his Praelectiones, but it is clear that Van der Keessel was concerned to lay down the principles governing both an action for of both criminal injuria and an action under the private law.

der Keessel cites Matthaeus[1] and Gothefredus[2] as subscribing to the view that the truth exonerated in all circumstances, and approves of this view against those who would restrict the instances in which the truth would serve as a defence to disclosures of unpunished offences. Strangely, however, Van der Keessel was not prepared to take to its logical conclusion the view that the truth of the imuptation was an absolute defence . He agreed, for example, that condemnation of another for some 'natural defect' should not be classed among those imputations that are deserving of protection by the law, even if true.[3] What Van der Keessel meant by 'natural defect' is not explained. Elsewhere, he writes of 'physical defect or something similar'[4], but it seems unlikely that he would have included in this category disclosures of contagious diseases, which some earlier writers were prepared to exempt from liability on the ground of public interest.

After approving the exclusion of statements disclosing 'natural defects' from the class of imputations the truth of which would serve as a defence, Van der Keesel cites the words qui nocentium infamavit from D 47.10.18pr - which he accepts as the principal authority on the issue - as proof that Paul envisaged limiting the defence to those who had disclosed offences. Van der Keessel's interpretation of D 47.10.18pr leaves no doubt on this point.[5]

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1) De Crim. 47.4.1.7.

2) Ad. C. Th. 9.34.3.

3) Praelectiones, translated by Beinhart and Van Warmelo, 269-71.

4) Op. cit.,269

5) Nam de objeciendo crimine tantum cogitavit. Emphasis in original, 270.

In the case of statements imputing criminal offences, the intention to injure was, according to Van der Keessel, irrelevant, for no injuria had been committed: 'The word to defame (infamandi) is never used in respect of such a lawful act.'[1] The actio injuriarum, wrote Van der Keessel, was based on what was right and fair 'and accordingly ought not to be granted when the public interest and natural equity direct that someone be absolved'.[2]

Van der Keessel argued that his interpretation of Paul was supported by the latter's use of the word 'expedient', which showed that Paul regarded it as for the public benefit that the transgressions of guilty persons be made known 'so that persons who are unworthy be not admitted to posts and honours'. He who had defamed (sic) a guilty person had acted correctly, because he had placed the welfare of the public ('the supreme law') above the interests of the 'guilty' person.

Hence it appeared that Paul was of the opinion that he who has defamed a guilty person did so in accordance with the law, and this offers a new argument as proof that the actio injuriarum ought not to be granted, since the said action is not available against a person who acted in the exercise of a public right: D 47.10.13.1.(3) Thus, at least in the case of imputations which disclosed a proven offence, proof of animus injuriandi could not vitiate the defence. This was because no wrong had been committed; the injury was not an injuria.[1]

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1) Praelectiones, 271.

2) Ibid.

3) Praelectiones, 273.

4) Ibid.

By the end of the 18th Century the Roman-Dutch jurists had thus left unresolved a number of important issues relating to the role of the veritas convicii in a defence to an action for defamation. One strand of thinking was in favour of exempting true statements only where they served some public benefit, another was disposed to regard the disclosure of truth as in itself always lawful. Even the latter school, however, was hesitant to accept the implications of its view without qualification.

The Roman-Dutch writers were, moreover, not agreed on the juridical basis of the defence. Some sought to explain the exemption afforded true statements which were in the public interest in terms of a presumption against animus injuriandi: where public advantage was held to have accrued from publication, the defendant was presumed to have acted without the necessary fault. The uncertainty over whether it was in turn open to the plaintiff to prove that, notwithstanding the public interest served by publication, the defendant had nevertheless acted with malice and so unlawfully, arose essentially from the failure by most of the writers to define animus injuriandi in clear terms.[1]

The Roman-Dutch authorities also failed to agree on what factors that were to be taken into account in determining whether a statement was for the public benefit. Some sought to seek it in the circumstances of publication (was the statement disclosed to a state official empowered to take action to rectify the wrong disclosed?),

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1) Confusion between the concepts animus injuriandi, in the strict sense of intention to defame, and malice, which refers to the defendant's motive, persisted in South African law until well into the present century. See for example Basner v Trigger 1946 AD 83.

others in the objective of the publisher (was publication intended to serve some end acknowledged as legitimate by law?), still others in the nature of the subject matter disclosed (was it of such a nature - such as an unpunished crime -that it could be said the public benefit would automatically be served by disclosure?), yet others in the objective consequences of publication (can it be said that, taking all the circumstances into account, publication can be held to have served some demonstrable public advantage?) In addition, apart from providing scattered examples of statements which they regarded as being for the public benefit, none of the Roman-Dutch authorities attempted a systematic exposition of what they meant when they used the term 'public interest'.

The explanation for the lack of clarity of the Roman and Roman-Dutch law on this point probably lies in the fact that the rules in relation to the role of the truth of the imputation in an action for defamation were developed either by a priori reasoning or through the process of interpretation of earlier rules which were not themselves models of precision or comprehensiveness. This aspect of the law plainly left considerable scope for casuistic development. The task of applying the incomplete rules bequethed by the Roman and Roman-Dutch authorities was left to the colonial courts in South Africa. How the rules were altered and developed in the early stages of the development of the South African law will be considered in the following section.

SOUTH AFRICAN LAW BEFORE UNION

The Cape Colony

The Supreme Court

The old Cape Supreme Court played a formative role in the development of the defence in South African law. Its decisions also reflect the difficulties faced by the courts in interpreting the *a priori* rules of Roman and Roman-Dutch law and applying them to concrete cases. Uncertainty therefore persisted over the content, basis and scope of the defence of what, under the influence of English law, became known as 'justification'.

The earliest reported case in point, heard in 1830, involved a charge of official misconduct levelled by a missionary against a government official.[1] The court appeared to accept that the truth alone of the charge was a sufficient defence. Menzies J reasoned that the publication of a defamatory statement gave rise to a presumption that it was published *animo injuriandi*, and that the defendant would be liable '...unless he shall be able to prove some special circumstances sufficient to negative the presumption of (its) existence'.[2] One such circumstance was proof of the *veritas convicii* because, according to Menzies J, the truth of the statement '...does, according to every principle of law, completely justify the defendant in having published them'.[3] The circumstances of the case, however, indicate that the learned judge may not have

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1) *Mackay v Philip*, 1830 1 M 455

2) At 463.

3) *Ibid*.

intended to lay down a general rule that the truth should in all circumstances provide an absolute defence. This is apparent from the following important passage of the judgment, in which the reasons for exempting the defendant were clearly set out:

> ...the plaintiff was a public officer, the acts imputed to him were acts committed while in the execution of his office, and they were of such a nature as to make it the right, nay the duty, of every honest man to publish the official misconduct...and, through the powerful medium of the press, to rouse the public voice to convey to the ears of the government...that...information which would be sufficient to cause the plaintiff to be deprived of powers which he had abused, and to procure an end to be put to that system which afforded opportunity for the existence of such abuses.(1)

Had Menzies J envisaged the truth of the imputation alone as sufficient grounds for a defence, it would clearly not have been necessary for him to adduce additional factors, such as the nature of the misconduct disclosed, the duty of the defendant to disclose it, or the beneficial consequences that were likely to flow from disclosure, in order to find for the defendant. Mackay v Philip therefore provides clear authority only for a rule protecting truthful disclosures of official misconduct, although it would seem that the the judge would have been prepared to countenance a plea of truth in certain other, unspecified, circumstances.

Three years later, in Sparks v Hart[2], a full bench of the Supreme Court (Wylde CJ, Menzies J and Kekewich J) rejected a plea of 'justification' on the ground that the veritas convicii could not be pleaded in defence to an action for defamation where the plaintiff

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1) (1833) 3 M 3

2) At 5

had been accused of 'mere immodesty'.[1] The charge was that the plaintiff was 'keeping criminal intercourse with a certain gentleman in the town, and she is in consequence of such intercourse at this moment in a state of pregnancy'. The plaintiff was also accused of 'infamous and immodest conduct',and in support of his plea of justification, the defendant had, according to the court, cited various 'indecent and immodest acts performed between the plaintiff and one DP'. Given the moral standards prevailing in the 19th Century, it is therefore clear that the court envisaged the disclosure not only of trifling moral transgressions, but also of more serious moral scandals, as being outside the scope of the protection afforded to truth. This was because the law presumed an absence of animus injuriandi only where the plaintiff was accused of an act which by law was punishable as a crime and when the accusation had been made 'for the ends of public justice'.[2] Indecency and immodesty committed in the manner charged in the declaration was not a crime punishable by law. In casu, no presumption against animus injuriandi arose. The defendant could, however, adduce circumstances other than the truth of the imputation to negative the presumption of animus injuriandi. Where the imputation disclosed a crime, however, Menzies J apparently regarded the presumption against animus injuriandi is irrebutable.

There followed through the mid-19th Century a series of cases in which truth was pleaded in justification without an allegation of

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1) Sparks v Hart, (1833) 3 M 3 at 5.

2) Per Menzies J at 5.

public benefit[1]. But in some of these cases the competency of the plea was not investigated because the truth was not proved[2] or because the pleadings were held defective on technical grounds.[3]

In Botha v Brink[4], the court was again squarely confronted with the problem of deciding what latitude should be afforded by the law to those who had published true but damaging information about another. The facts of this case were as follows. Defendant had appeared before a land beacons' commission at which the plaintiff was also an interested party. One of the plaintiff's attorneys had asked a witness whether he had once been indicted for perjury. When the witness admitted that he had been defendant had - on plaintiff's version of the events - said in a stage whisper to his attorney: 'He (the plaintiff) has been brought up not only for perjury, but for rape also.' The defendant pleaded inter alia that as regards the words 'he has been brought up for rape', plaintiff had appeared before a resident magistrate some 20 years before and had been committed for trial on the same charge.[5] It appears from the judgment that the then attorney-general had withdrawn the charge. Plaintiff excepted to the defendant's plea of justification on the

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1) See eg. Sutherland v McDonald, (1833) 3 M 6; Hill v Curlewis and Brand, (1841) 3 M 520; Hart v Constatt and Norden, (1846) 3 M 548; Muller v Buchanan, (1552) 1 Searle 260; Vigors v Campbell, (1868) 1 Buch 120; Sturrock v Birt, (1891) SC 121.

2) For example, Sutherland v McDonald, supra; Hart v Constatt and Norden, supra; Vigors v Campbell, supra.

3) For example Hill v Curlewis and Brand, supra. See also Scarr v McGarr, (1883) 3 EDC 235.

4) (1878) 1 Buch 118.

5) At 119-20.

ground that truth was not a good defence without an averment of public benefit.

De Villiers CJ described the question whether the truth of the words at issue was by itself sufficient justification for uttering them as 'one which has seldom seen an unqualified answer'.[1] The learned Chief Justice made the following important declaration on the law of defamation as he interpretted it:

> In an action for defamation the law presumes the existence of the animus injuriandi, or, as I would rather call it, of malice, from the mere fact that the defamatory words were published. If he (the defendant) shows that the words were used on a privileged occasion, he so far rebuts the presumption of malice as to throw on the plaintiff the burden of proving express malice. If he proves that the words were true he does not completely rebut the presumption of malice unless it appears from the pleadings, or unless the defendant avers and shows that some public benefit was to be derived from the publication.(2)

But it was not enough for the defendant merely to aver that public interest was served by disclosure. In addition, his declaration had to disclose some circumstances which served to show that 'advantage' was to be derived from the charge.[3] It was on this ground that De Villiers CJ sought to distinguish Mackay v Philip[4] and Sparks v Hart[5]. In the former case, he said, 'the declaration itself

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1) Botha v Brink (1878) 1 Buch 118 at 121.

2) At 123-4.

3) Ibid.

4) Supra.

5) Supra.

disclosed that the plaintiff was a public functionary entrusted with a public duty of importance'. In the latter case, on the other hand, 'there was nothing in the declaration to show that any good could be derived from a publication of the plaintiff's immodesty'.

In this judgment the learned Chief Justice implicitly rejected the ruling in Sparks v Hart that the public interest could never be served by disclosure of morally opprobrious, as distinct from criminally punishable, acts. His reasoning appears to have been that, had the plaintiff made the necessary averment of public interest, it would have been open to him to lead evidence that supported it, even though the imputation did not disclose a punishable offence. In the circumstances of the case, De Villiers CJ was plainly prepared to accept in principle that the defendant could have proved circumstances to show that some public advantage could be served by a disclosure of a past charge of rape, even though he had not been prosecuted. The exception was only granted because of the absence of the necessary averment in the defendant's pleadings. In addition, De Villiers CJ indicated that he regarded proof of both truth and public benefit as a conclusive defence; unlike the defence of privilege, it was not open for the plaintiff subsequently to prove the presence of express malice.[1]

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1) It is perhaps of interest to note that when the matter was again brought to trial after the necessary amendment of the plaintiff's declaration, the court found that the defendant had not in fact put the accusation of rape in the form of a declarative statement, as the plaintiff had claimed, but had in fact instructed his attorney to ASK the plaintiff whether he had been 'brought up on a charge of rape'. In the trial, the court held for the defendant on the ground that the question had been asked on a privileged occasion, without malice. (Botha v Brink, (1878) 2 Buch 128 at 129-31.)

De Villiers CJ held in Dippenaar v Haumann,[1] decided a few days after Botha v Brink, that one of the circumstances to which the court would have regard in an investigation into the presence of animus injuriandi was whether 'the truth of the charge originally made has been pleaded and proved'. But the learned Chief Justice stressed that the veritas convicii was only one of the circumstances; the presumption of 'malice', as he put it, would only be rebutted if in addition the publication could be considered for the public benefit.

These cases had the salutary effect of placing the requirements of the defence on a clearer footing. What was required was a two-staged inquiry whenever a defendant attempted to justify the publication of the imputation by pleading its truth. The first was to be aimed at establishing the truth of the allegation; the second at whether it was for the public benefit. If, as in Dippenaar v Haumann, in which the statement at issue alleged the birth of an illegitimate child and subsequent concealment of birth and infanticide, the first inquiry was answered in the negative, the need for the second simply fell away; no public benefit could conceivably be served by publication of a false claim, even if the defendant had genuinely believed that it was true and that he was acting in the public interest by disclosing it.[2] In these circumstances, however, the defendant could plead the defence of privilege.

It is interesting to note, however, that a few years after laying down this approach in the Dippenaar case, De Villiers CJ ruled in

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1) (1878) Buch 135.

2) At 139.

Meurant v Raubenheimer,[1] without reference to the public interest requirement, that

> ...If he (defendant) shows the truth of the words spoken,then by that proof he rebuts the presumption of malice.(2)

The learned Chief Justice cited Botha v Brink, the case most frequently relied on for the rule that in South African law the truth alone was not a complete defence, as authority for the contrary rule that 'the truth might be proved for the purposes of rebutting malice'.[3] It is, however, possible that in this case De Villiers CJ regarded the presence of public interest as self-evident, since the allegation at issue was that a magistrate was influenced in his decisions by improper motives.[4]

Four years later, however, the Chief Justice once more vigorously asserted the rule that, in addition to truth, public benefit must be proved or apparent to make good a plea of justification. In Michaelis v Braun[5], he also rejected the view that public benefit could only flow from statements uttered by way of notification to the authorities for the purposes of securing the punishment of an offender against the criminal law. This limitation, he said, was not supported by D 47.10.18pr. In the Michaelis case, the learned Chief Justice accordingly accepted a plea of justification to a charge

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1) (1882) Buch 87.

2) At 93.

3) At 93-4.

4) This would be consistent with his judgment in Botha v Brink (1878) Buch 118. Discussed supra, 35-6.

arising out of the imputation of dishonest conduct by one member of a private club of another because

> ...It is a good defence that it was for the public benefit that the words should be...published in the manner in which and at the time when they were published.(1)

Thus the question whether or not the publication was in the public interest was one of fact, to be determined not only from the subject matter of the disclosure, but also from the circumstances surrounding publication.

This view of the concept of 'public benefit' opened the way to an expansion of the defence beyond the narrow confines to which some of the Roman-Dutch jurists had sought to confine it. In a series of later cases, De Villiers CJ applied the more flexible approach advocated in Meurant's case to extend the scope of the defence. In Sturrock v Birt[2], he accepted that a plea of justification was appropriate to a libel action arising out of the publication of allegations of drunkenness against a school teacher, and in Bloem v Zietsman[3] he expressed doubt, obiter, on whether Sparks v Hart[4] was correctly in holding that the public interest was not served by the publication of the truth about acts of 'mere immodesty' falling short of crimes. 'The decisions of the present day,' he held,

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1) Michaelis v Braun (1886) 4 SC 205 at 208.

2) (1891) SC 121.

3) (1897 SC 361 at 365.

4) Discussed supra at 33-4.

without citing authority, 'tend to widen the concept of public benefit.'[1]

In Bloem's case the defendant had said to a friend: 'I am surprised that Mr M did not tell me that my child Maria was in the family way, because she is in the family way by Z (the plaintiff).' Although this was a less serious aspertion than that cast in Sparks v Hart, the Chief Justice was prepared to regard it as being in the public interest. Maasdorp J felt, however, that a communication of this nature could not be regarded as serving any public utility. But in Clarke and Co v St Leger[2] De Villiers CJ again applied his wider view of public interest by upholding a plea of justification in the case of statement imputing 'considerable negligence', though not amounting to fraud, in a financial matter.

Yet the Chief Justice was aware that the concept public benefit should not be rendered so flexible that it would allow the veritas convicii to be reintroduced as an absolute defence by the backdoor, as it were. It had to serve to limit the general principle, which he accepted as part of the law in Graham v Ker, that '...the truth as to the character and conduct of individuals should be known'.[3] One of the considerations that should be used to limit the scope of the defence was the time that had elapsed between the publication of the defamatory imputation and the actions which it disclosed. The public interest, the Chief Justice said, '...would suffer rather than benefit from the unnecessary reviving of forgotten scandals'.

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1) Bloem v Zietsman (1897) SC 361 at 365.

2) (1896) 13 SC 101.

3) (1892) 9 SC 185 at 187.

Disclosures of recent offences against the law, however, stood on a different footing, since it was for the public benefit '...that others who might have dealings with the guilty party should be informed of his true character'.[1]

These dicta have been cited as authority for a rule that disclosure of offences committed in the remote past should not be included in the category of those deemed for the public benefit.[2] It may be noted, however, that there is nothing in Graham v Ker which warrants the inference that De Villiers CJ regarded such disclosures as axiomatically 'unnecessary'.

The Eastern Districts Court

After some uncertainty, the Court of the Eastern Districts accepted the approach that had gradually crystalised in the Supreme Court rulings just considered.

In 1883, without reference to Botha v Brink,[3] we find Barry JP declaring that the truth would provide a defence only in certain circumstances:

> A plea of justification,though proved to have been prompted by animus, would be a defence in law if the truth of the imputations, in the circumstances of the case, is an answer to the action. (4)

And in the following year, Buchanan J summed up the law of the Cape

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1) (1892) 9 SC 185 at187.

2) See discussion at 188 infra, and the authorities cited there.

3) Discussed supra, 35-6.

4) (1883) EDC 235 at 237.

Colony as he saw it in the case of Williams v Shaw:[1]

> It must not be assumed that the law of the colony justifies every publication of defamatory language merely because it may be true...Malicious slander cannot escape with impunity by a mere defence of truth.(2)

Proof of the veritas convicii did not in itself rebut the presumption of malice that arose on proof of the publication of words that were on the face of them defamatory; what was needed in addition to rebut that presumption was proof that 'public benefit was to be derived from the publication of truth'.[3]

The full bench of the Eastern Districts Court also indicated, in the Shaw case, that it favoured De Villiers CJ's recommendation that whether public benefit flowed from publication should not be determined exclusively from the subject matter of the statement at issue; in casu,they were all prepared to accept that charges, inter alia, of atheism and immorality against a bishop would, if proved, be for the public benefit.

In Roux v Lombard,[4] the court accepted that the circumstances which justified a true but damaging imputation need not be confined to those from which some public benefit could be inferred. In that case Barry JP accepted that an allegation of private immorality was justified even though no public benefit could be said to have flowed from publication, because the plaintiff had herself brought the

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1) Williams v Shaw (1884) EDC 105.

2) At 161-2.

3) Ibid.

4) (1895) EDC 47.

facts before the public (in casu, by way of a parternity suit). The learned judge added, however, that the defence of justification could not be pleaded where such facts were repeated years later with the sole object of injuring the plaintiff.[1]

The Orange Free State High Court

The movement of the South African law, encouraged by the Supreme Court of the Cape Colony, towards limiting the role of the truth of the imputation as a defence to an action for defamation to certain if as yet ill-defined circumstances was vigorously resisted by Melius de Villiers during his tenure as Chief Justice of the Orange Free State in the 1890s.

In Preller v Schultz[2], he took issue with those Roman-Dutch authorities and decisions of the Cape courts which required proof of public benefit in addition to truth before a defamatory statement could be held justified. The learned Chief Justice of the Orange Free State argued that D 10.47.10pr, which afforded immunity to a true statement when it related to a criminal offence, did not thereby provide authority for limiting the defence only to true statements of that nature. According to his interpretation of the Roman law, the truth of the statement provided a completely justified its publication in all circumstances.[3] The general

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1) Roux v Lombard (1895) EDC 47 at 51.

2) (1892) 10 Cape LJ, 83 and 175, reprinted in De Villiers, Injuries, 115 et. seq., to which these notes refer.

3) This argument is expanded in his extra-curial writings - see Injuries 103 et. seq.

principle endorsed by some writers that it was contra bonos mores to speak the truth whenever it happened to be disparaging of another, except where the nature of the matter disclosed related to unpunished crimes, rested in De Villiers CJ's view on the 'merest assumption', and was 'utterly immoral and indefensible' when applied to the imputation of past crimes, even where the person defamed had already been punished.[1]

> I can never admit that the utterance of the truth in such cases is contra bonos mores huijus civitates. Public policy, it seems to me, does not require that a man should be thought to be otherwise than he really is, and the public in every individual case should know what sort of person it has to do with.'(2)

De Villiers CJ then proceeded to support this view with illustrations of hypothetical cases intended to illustrate how the public advantage to be gained from generally upholding the public's right to knowledge of the truth of every detail of the past of individuals outweighed the isolated cases of hardship that such a rule might cause those who had led 'outwardly decent lives' after their conviction and punishment.[3] A father, for instance, had every right to know that his daughter's suitor was a convicted rapist, just as a householder had a right to know that the man found loitering about his house had been convicted of burglary.[4]

The learned Chief Justice of the Orange Free State was therefore trying to meet his opponents on their own ground. While he agreed

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1) Preller v Schultz, supra, 117-20.

2) At 122.

3) At 125-6.

4) At 123.

that the public benefit to be derived from publication provided the juridical basis of the defence of justification, he intended to show that the only way to guarantee the interest that the public would derive in some instances from learning the truth was to afford all true statements an absolute immunity, including those that disclosed facts from which the public could not possibly derive any advantage. Thus he invoked the concept of public benefit to challenge the view of those who regarded it as a factor which limited the right of individuals to disclose the truth.

The argument of De Villiers CJ, had it been accepted, would have tipped the scales against the individual's need for protection against gratuitous disclosures of every fact about his private life in favour of a general public right to learn the truth, irrespective of the advantage derived. It is doubtful, however, whether the Cape judges, who by that stage had adopted a more flexible approach towards the concept of public benefit,[1] would necessarily have found against the defendant in cases of the nature of those mentioned by the learned Chief Justice of the Orange Free State. It is to be noted, moreover, that De Villiers CJ was himself not prepared to acknowledge the truth as an absolute defence under all circumstances. A witness to a will, for example, or a person professionally or otherwise under an obligation to keep a confidence, could not plead the truth of the disclosure. This was because the special circumstances demonstrated that the disclosure

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1) Supra, 38-40.

was contra bonos mores or an abuse of privilege.[1] It would thus appear that the learned Chief Justice of the Orange Free State was utilising the concept of the boni mores both to expand and to limit the circumstances in which the truth of a damaging statement could be pleaded in an action for defamation. The theoretical implications of his view are something less than satisfactory.

Apart from reawakening the controversy over the role of the veritas convicii in an action for defamation, the views of the learned Chief Justice of the Orange Free State, as set out in Preller v Schultz[2] had no tangible affect on the development of the defence of justification in the South African law. In 1908, for example, the High Court of the Orange River Colony found for the defendant newspaper in a case involving an allegation that a candidate for Parliament had been the victim of an extortion attempt by the plaintiff on the ground that the allegation was true, and that its publication was for the public benefit.[3] The court expressly indicated that it would not have held for the defendant on the basis of the veritas convicii alone.

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1) See Injuries, 98 and 201; the tension between this view and the advocacy by De Villiers CJ of an absolute right to publish the truth under all circumstances was noted in Dunning v Quin and others (1905) THC 35 at 39.

2) (1892) 9 CLJ 268.

3) Bosch v Friend Publishing Co, (1908) ORC 30.

The Transvaal High Court

In the Transvaal, the bounds of the defence of justification were still regarded as unsettled by as late as 1905.

Kotze CJ had intimated in his extracurial writings that he favoured the view, which he attributed to Van der Keessel, that the truth alone ought always to provide a defence.[1] But in Dunning v Quin and others[2] Mason J expressed his concern at the practical implications of such a view:

> I confess that to me personally it seems contrary to the public interest that anyone should without any call of legal,moral or social duty or interest be entitled to publish to the whole world any facts about another person's career which he may have become acquainted with.(3)

The learned judge referred with approval to the English rule that the truth alone was not a sufficient defence to a charge of criminal defamation[4]. Mason J also expressed doubt about the need for a separate defence of justification in the South African law: 'The law of privilege seems to me to apply to all reasonable occasions where a public interest is to be served or an individual warned or protected.'[5] Were Grotius's strict view of the defence to be followed[6], there would be some substance to this view. But in terms

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1) See Kotze, Van Leeuwen, 300-301, note b.

2) 1905 TS 35.

3) At 39.

4) For the English law on this point see Infra.

5) Dunning v Quin and others, supra, 39.

6) Supra, 15-16.

of the more lenient approach which had by that stage long been advocated by the Cape courts, the proposition seems overstated. In terms of the latter view, the circumstances in which publication of the truth would be deemed lawful would by no means always conform to the requirements of the defence of relative privilege.[1] But he made it clear, at the same time, that his preference for recognising the truth as a defence only in certain circumstances was grounded on what he deemed to be a compelling consideration of public policy: 'The contrary doctrine would in my mind afford a most undesirable encouragement and protection to the blackmailer.'[2] The learned judge added, however, that he was not aware of any decision by the Transvaal courts on the question whether truth alone was a sufficient defence to an action for libel.[3]

Two years after Quin's case, the Transvaal High Court accepted in an action arising out of an allegation that the plaintiff was a 'blackmailing scoundrel' that truth and public benefit could be pleaded in the circumstances.[4] Without reference to authority, Innes CJ defined the defence of justification as amounting to a plea 'that the words were true in substance and in fact, and were published for the public benefit.'[5] Again, in South African Mails Syndicate v Hocking[6], the learned Chief Justice of the Transvaal ruled without

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1) For a discussion of the requirements of this defence see Stuart, Guide, 54.

2) Dunning v Quin and others, (1905) TS 35 at 39.

3) At 38.

4) Kernick v Fitzpatrick (1907) TS 389.

5) At 391.

6) (1909) TS 946.

discussion that both truth and public benefit must be proved to make good a defence of justification.

The Natal High Court

In Natal, where the English law appears to have had the strongest influence, the requirements of the defence of what was then known as justification took some time to crystalise. In the earliest reported case in which the defence was at issue, Lotter v Pannewitz,[1] the court intimated that it was prepared to accept the truth as a sufficient defence to a charge of defamation. In Grey v Solomon,[2] the Chief Justice explicitly instructed a jury that if the truth of the charge was proved the finding should be for the defendant, even though the circumstances in which the communication was made were not privileged. This case arose from an allegation that a bishop 'was picked up the other day in the streets...drunk...and was taken home in that state...', but if public interest was presumed, the court did not say.

In 1897 the Natal Court , per Mason J, noted that the question whether the truth of a libellous statement was a sufficient defence had not been settled in the colony.[3] He cited the Orange Free State case of Preller v Schultz[4] as an indication of 'the great difference of opinion...that existed on the question'. The learned judge ruled, however, that he was prepared to take the truth of the imputation into account only in mitigation of damages.

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1) (1896) NLR 29.

2) (1871) NLR 48.

3) (1897) NLR 125.

4) Discussed supra, 44-7.

Nine years later, in Weil v Hardy,[1] two judges of the full bench, hearing an application for an interdict to prevent publication of an alleged defamatory statement, explicitly laid down that the Natal court would henceforth follow what they understood to be the rule laid down by the Roman-Dutch authorities and the Cape Courts. Bale CJ accepted the Cape Supreme Court judgments of Graham v Ker,[2] Botha v Brink[3] and Michaelis v Braun[4], holding that '...even if the words complained of were true, their publication could only be justified if the court was satisfied that it was for the public benefit that the words...should be published'. Dove Wilson J ruled that unless he could be persuaded on the facts that '...any benefit to the public of Natal...could reasonably be expected to ensue from the publication now of this long-forgotten scandal...', he would not grant the interdict.[6] In casu, the principal reasons adduced for agreeing to an interdict were that the plaintiff held no public position in the colony, was not resident there at the time of publication, and that the allegation related to acts of theft and immorality committed a long time before in other parts of the continent.[7] The court was thus not prepared to accept the truth of the imputation as a complete defence, even in the case of imputations of crime, without taking into consideration the circumstances surrounding publication.

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1) (1906) NLR 192.

2) (1892) 9 SC 185, discussed supra, 41-2.

3) (1878) Buch 118, discussed supra, 35-7.

4) (1886) 4 SC 205, discussed supra, 39-40.

6) Weil v Hardy, supra, at 204-5.

7) See also the judgment of Bale CJ at 8.

THE MODERN LAW

Acceptance of the requirement of public benefit

As was seen in the previous section, the various colonial courts were in general not prepared to accept the English law rule[1] that the truth of a statement alleged to be defamatory was sufficient in all circumstances to exonerate the defendant from a charge of defamation. The view expressed by the Supreme Court of the Cape Colony that the truth could afford a defence only in certain circumstances was gradually accepted by the courts of the Transvaal, Orange Free State and Natal. The Supreme Court of the Union of South Africa was, therefore, faced with a considerable body of precedent which favoured a limitation of the defence in favour of the individual's right to protect certain details of his private life from public disclosure.

Pending Appellate Division authority on the point, the various provincial divisions began by endorsing this tendency of the colonial courts in a number of decisions. The Free State Provincial Division rejected Preller v Schultz[2] and relied on Botha v Brink[3] in 1911, when Ward J held that criticism of a tradesman's competence was justified on the ground that it was true and 'for the public benefit that the fact of his competence should be known'.[4] Two years

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1) On which see infra, 59-62.

2) (1892) 9 CLJ 268.

3) (1878) Buch 118, discussed above at 35-7.

4) Amdur v Haddad 1911 TPD 9 at 11.

later, the Transvaal Provincial Division began by following Graham v Ker[1] in accepting that 'our laws lays it down that it is not sufficient for a person to plead the truth of the defamatory matter, but must also show that it is in the public interest'.[2] In the same year, the Cape Provincial Division instructed a jury:

> If a person has spoken defamatory words and is called to account for them...and his defence is that the words are true and that he spoke them in the public interest, then, if the Court...is satisfied that the words were spoken in the public interest,the plea of justification is a complete answer to the action.

In casu, Kotze J could think of nothing more in the public interest than that the moral character of a member of the Union Parliament should be known.[3]

The requirement that some public interest should be served by disclosure of the truth was also accepted by the Eastern Districts Local Division[4], the High Court of South West Africa[5], and the Griqualand West Local Division[6].

Notwithstanding these signs of a general acceptance of the limitation suggested by the Cape courts in the 19th Century,

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1) (1892) 9 SC 185; supra, 41-2.

2) Per De Villiers JP. Although this was a private prosection for criminal defamation, the learned Judge President did not distinguish between the requirements of the defence in criminal and civil suits.

3)De Beer v De Villiers 1913 CPD 543 at 548.

4) Goosen v Scheepers 1914 EDL 248 at 250

5) Barry v Bayer

6) Robinson v Bosman 1932 GWL 28 at 34.

scattered judgments are nevertheless to be found which indicate that some judges still considered the law on the point to be far from settled. Just after Union, for example, the Transvaal court expressed tentative approval of the view of the Cape court, and that which they attributed to Voet, but acknowledged that the question whether the law required in addition to proof some evidence of public benefit was 'a matter of great dispute'.[1] De Villiers JP was, however, prepared to accept that the truth alone of the imputation was a factor to be taken into account in mitigation of damages.[2] In Van Wyk v Steyn,[3] the Free State division noted that the question was still a moot point[4]. This uncertainty was also expressed by the Appellate Division. In 1917, Innes CJ, noting the importance of distinguishing between the requirements for the defences of fair comment and 'justification', added, obiter:

> ...And if public benefit is by our law an element of justification, then the importance of this distinction becomes accentuated.(5)

Again, in 1926, the learned Chief Justice expressed doubt on the status of the rule that public benefit must accompany the publication of a true statement in order to justify it. Noting that under English law 'proof that the whole of such matter was

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1) Leibenguth v Van Straten 1910 TPD 1203, at 1207.

2) Ibid.

3) Van Wyk v Steyn 1924 OPD 68.

4) At 70.

5) Crawford v Albu, 1917 AD 102, at 117. Emphasis added.

true...put an end to the action', he added that, by South African law,

> ...assuming that truth apart from the element of public benefit is not in itself a complete defence, it has been held that it may be pleaded in mitigation of damages.(1)

Two years later, in Johnson v Rand Daily Mails[2], the Appellate Division was again confronted with a case in which the point could have been settled. Stratford JA, who delivered the main judgment, found for respondent after a lengthy inquiry into whether it had proved the truth of an allegation contained in the letters column of its newspaper. There was no inquiry in his judgment into whether respondent had proved that a published description of catering facilities at an agricultural show as 'indescribably filthy' was in the public interest. But in the brief concurring judgment of Wessels JA we find the first indication of an unqualified acceptance by the Appellate Division of an additional requirement of public benefit. Without referring to authority, the learned Judge of Appeal noted:

> If...the words are proved to be substantially true, and for the public benefit, no damages can be awarded and the plaintiff must fail.(3)

Wessels JA added that his view admitted of no doubt that criticism of a public caterer at an agricultural show was in the public interest. But no evidence from the trial record was considered with

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1) Sutter v Brown 1926 AD 155 at 172. Emphasis added.

2) 1928 AD 190.

3) At 204.

a view to establishing whether the circumstances of publication warranted this conclusion.

In the following year, De Villiers ACJ added obiter in a case that turned on the defence of relative privilege:

> ...the presumption of animus injuriandi which arises from the use of the defamatory language is conclusively rebutted by proving jutsification, i.e. that the charge was true and for the public benefit.(1)

In spite of these judgments, the Natal Provincial Division again expressed the courts' uncertainty on this point. In Erasmus v Scott and Prigge v Scott, the court held that to establish a plea of justification it was necessary for the defendant to prove that the facts he had alleged were true, but added that

> ...IF the defendant must, in addition, to succeed on the plea of justification, prove that the publication was for the public benefit or in the public interest...(2)

defendant had in casu fulfilled the additional requirement.

It was not until 1948 that the Appellate Division was again seized of a case involving a plea of truth and public benefit. But Stewart Printing Co (Pty) Ltd v Conroy[3] did not provide the highest court with an opportunity of settling the law on this point as the allegation at issue was found not to have been proved. Whether

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1) Kleinhans v Usmar 1929 AD 121 at 126.

2) Erasmus v Scott and Prigge v Scott 1933 NPD 271 at 283.Emphasis added.

3) 1948 (2) SA 707 (A)

public interest needed to be proved, pleaded or assumed was therefore not canvassed.

The Provincial divisions, meanwhile, showed a clear preference for the additional requirement of public benefit in a series of decisions from the 1950s. In Coetzee v Central News Agency and Others[1], Claydon J refused to grant an interdict against a magazine because, although in his view it was clear that respondent was not actuated by a desire to benefit the public, but to benefit itself, it had not been proved in argument that this motive would necessarily bear on the question whether or not there was public benefit in fact.[2]

The Cape Provincial Division dismissed a defence of truth and public benefit in 1960 because it 'failed to see what public interest could have been involved' in the publication of an allegation that the defendant's conduct constituted a nuisance to his neighbours.[3] Again, in 1964, that court required a defendant to prove both truth and public benefit in a case involving an allegation of fraud, and these requirements were repeated by the Transvaal court in 1966.[4]

The approach advocated by the Chief Justice of the Cape Colony in the 19th Century again received unambiguous Appellate Division approval in 1969. In South African Associated Newspapers v Yutar[5],

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1) Coetzee v Central News Agency and others 1953 (1) SA 449 (T).

2) At 453-4.

3) Maisel v Van Naeren 1960 (4) SA 449 (W).

4) See Channing v SA Financial Gazette and others 1966 (3) SA 470(W) at 477.

5) 1969 (2) SA 442 (A).

in which the imputation at issue was that an attorney-general had 'misled the court', Steyn CJ required that the appellants had to show, on a balance of probability, that the respondent had made the statement in question with the intention of misleading the court. He added, without citing authority:

> That, then, apart from public interest, which is not disputed, is what applicants had to prove.'(1)

Since the learned Chief Justice then found that the appellants had failed to prove the truth of their allegation, the dictum quoted may be regarded as obiter. Yet the requirement of public benefit has been subsequently been accepted without hesitation in at least one reported provincial division judgment[2] and by the Rhodesian Appeal Court[3]. Finally, in 1981, the Appellate Division referred in the course of an inquiry into the juridical basis of what it referred to as the 'regverdigingsgronde' in an action for defamation to the defence of 'waarheid en openbare belang'.[4]

Whether in South African law the truth alone is sufficient to exonerate a defendant in a defamation action may thus strictly speaking still be regarded as a moot point.[5] But the weight of authority favouring a limitation of the right to publish true but damaging matter to circumstances in which some public advantage can

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1) South African Associated Newspapers v Yutar, supra, at 452.

2) Fayd'herbe v Zammit 1977 (3) SA 711 (D) at 719.

3) Mohammed v Kassim 1973 (2) SA 1 (RAD).

4) Marais v Richards en 'n ander 1981 (1) SA 1 1157 (A).

5) In all editions of his word on delict, including the last published in 1971, McKerron describes the question whether the truth alone provides a complete defence as 'technically still open'. See Delict, 186, n.28.

be said to have flowed from publication is so overwhelming that the additional requirement of public benefit can now be regarded as settled law. Why the courts are prepared to exempt from liability the defendant who satisfies the dual requirements of the defence, and what he must plead and prove in order to do so, will be considered in the following sections. What remains for purposes of this section is for comparative purposes briefly to consider the law on the role of the truth in an action for defamation in English and American law, both of which have been regarded as of potential persuasive value by the South African courts.

ENGLISH LAW

By the beginning of the 19th Century the English courts had accepted unequivocally that the truth of a defamatory statement was sufficient to justify its publication[1]. The ground on which liability was excluded for the publication of true but damaging statements was different from that which underlay the defence in Roman-Dutch law, and was concisely summarised by Littledale J in 1829:

> The truth is an answer to an action not because it negatives the charge of malice, but because it shows that the plaintiff is not entitled to recover damages.(2)

Thus the truth rendered the statement lawful because no personality right of the plaintiff was infringed. That the statement should be in the public interest was not required because the defence was not

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1) See Salmond on Torts, 157; Winfield and Jolowitz, 266-67.

2) McPherson v Daniels (1829) 10 B and C 263, at 272.

grounded on a notional right of the public to learn of the truth or a general right of individuals to speak it. The truth about others could be spoken with impunity simply because a person had no cause to complain if the truth about his past conduct or character was such that it would damage his current reputation if made public:

> The common law will not permit a man to recover damages in respect of injury to character which he other does not or ought not to possess.(1)

This means that the plaintiff was denied satisfaction because no wrong had in fact been committed by the publication of true matter, irrespective of the motive behind publication:

> The common law affords no protection to the man who has led a blameless and worthy life for many years but finds his youthful follies published to the world at large in gloating and accurate detail by some malicious enemy.(2)

An act which does not amount to a legal injury cannot be rendered actionable because it was performed with bad intent[3]. Whether the defendant could prove the truth of the imputation is therefore the sole test for liability.

The effect of this approach was to create a potential threat to the individual's reputation which most of the Roman-Dutch writers and the South African courts considered undesirable. It is interesting to note, however, that as late as 1974 the British legislature responded to persistent calls to limit the scope of this immunity by considering a Bill which, in the case of defamatory

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1) McPherson v Daniels, supra, at 272.

2) Salmond on Torts, 157.

statements disclosing past offences, required the defendant to prove that publication was in the public interest and allowed the plaintiff in turn the opportunity to prove that the defendant had acted maliciously. In the event, the former requirement was not incorporated into the Rehabilitation of Offenders Act[1], but the plaintiff's right to prove malice in these circumstances has been given statutory recognition[2].

The truth of the statement was, however, regarded in a wholly different light in the English law of criminal defamation, in terms of which no weight was given to the truth of the allegation in defence to an indictment. This apparent anomaly arose from considerations of public policy: i.e. that the more truthful the defamatory statement, the more likely was the person defamed to commit a breach of the peace[3]. The truth of the statement was, however, given qualified recognition as a defence by the Libel Act of 1843, which laid down that the publication of true statements was not a criminal offence provided that the jury was satisfied that publication was for the public benefit[4].

Periodical suggestions[5] that the requirement of public benefit be extended to civil proceedings were never adopted, and the

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1) C. 53 of 1974.

2) S. 8(5).

3) Salmond on Torts, 158, n.80., cites Burns, 'The Reproof', in explanation of this rule: 'Dost know that old Mansfield who writes like the Bible, says the more 'tis truth, sir, the more 'tis a libel.'

4) S.6

5) C.f. The Faulks Committee on the Law of Defamation - Cmd. 5909 (1975).

development just described in the law of criminal libel had no influence on the English civil law.

THE UNITED STATES OF AMERICA

The same distinction between the criminal and civil law of defamation was drawn in American law, where the truth of the allegation provided no defence in the former case and a complete defence in the latter. The common law of criminal defamation was, however, amended by statute in most States, usually to recognise the truth as an adequate defence to criminal indictments, provided that it was published with good motives and for justifiable ends[1]. In civil proceedings, the truth provided a complete defence, even if the defendant had made it public for no good reason, for the worst possible motives, or even if he did not believe at the time that they were true.[2]

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1) Prosser, Torts, 797.

2) Ibid, and references cited at n.3 and n.4.

Chapter 2

TRUTH

INTRODUCTION

It has been shown above how it came to be accepted that the truth of a damaging imputation is not in itself sufficient to provide a complete defence; the court must in addition be satisfied that the imputation was of such a nature that its publication can be said to be for the public benefit. The circumstances that may be held to justify publication of a true statement will be investigated in the following chapter. Of present concern is the preliminary requirement that the defendant must, in seeking exemption on the ground that publication of the imputation was in the public interest, first prove that his statement is true. Such proof is a necessary if not sufficient requirement for the successful raising of the plea.

In an action for defamation, the truth of the imputation is only at issue where the defendant seeks to justify. A defendant cannot plead the general issue and later lead evidence to prove the defamatory imputation.[1]

The inhibitions imposed by the law of defamation on freedom of speech, and conversely the degree of protection it affords to individual reputations, will clearly depend to a considerable degree on the stringency of the burden ('weerleggingslas') which a

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1) Ehmke v Grunewald 1921 AD 575 at 577; Black and others v Joseph 1931 AD at 146. See also Hairman v Wessels 1949 (1) SA 431 (O). The truth or otherwise of the charge becomes relevant only where the defendant has pleaded the defences of fair comment or truth and public benefit, or seeks to lead evidence in mitigation of damages. Where fair comment is pleaded, one of the requirements is that the comment must be based on facts which are stated and proved - Crawford v Albu 1917 AD 102 at 125; Marais en 'n Ander v Richards en 'n Ander 1979 (1) SA 83 (T) at 89. An incorrect statement may still be privileged - Ehmke v Grunewald, supra, at 577.

defendant must discharge in order to satisfy the standard of 'truth'. Insistence by the courts on a meticulous standard of accuracy could have the effect of inhibiting public disclosure of matters in a form which may be said to be, if not true, at least uncomfortably close to it, by individuals or institutions which do not have the time or capacity to subject what they publish to the rigorous scrutiny of a court of law. The caution that may be imposed by such stringency on the press, for example, could lead to self-censorship with unfortunate results for the the public right to information which may be in its interest to know.[1] Conversely, too lax a standard of truth could afford to the unscrupulous or irresponsible undesirable protection for the publication of damaging statements which are mere half-truths.

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1) The judicial interpretation of S.44(f) of the Prisons Act (8 of 1959) in S v South African Associated Newspapers and Others, 1970 (1) SA 469 (W), has, for example, been criticised for imposing too strict a standard on newspapers to prove that they took 'reasonable steps' to establish the truth of an allegation concerning prisoners or the administration of prisons which subsequently turned out to be false. (See, eg, Stuart, Guide, at 85 et. seq.) Although the burden created by S.44(f) is not entirely in point, since the accused need prove only that the steps he took to satisfy himself of the veracity of the statement were 'reasonable', the case of S v South African Associated Newspapers is of interest because it sets out a judge's view of the lengths to which a newpaper should go to establish the veracity of the charge before publication.

On the other hand, a more tolerant view of the difficulties faced by newspapers was expressed by Milne J in S v Gibson NO and others, 1979 (4) SA 115 (D) at 126 A-B: 'I think it may fairly be said that the ordinary reasonable reader is conscious of the fact that a newspaper is not, and cannot purport to be, a learned journal setting out in meticulous fashion with 100 per cent accuracy the matter in question. The news, in order to sell, must be fairly readily digestible by the ordinary man, and inevitably an precis or summary is going to depart from precision and exactness on almost any subject one cares to think about. As John Donne says - "On a huge hill/cragged and steep. truth stands and he that will/reach her, about must, and about must go."

Important considerations of public policy therefore hinge on the stringency of the law's insistance that private citizens and the press be ready and able to prove the accuracy of what they have said or written about others if they wish to justify the damaging imputation by pleading the defence of truth and public benefit.

The object of this chapter is to investigate what the courts mean when the speak of the 'truth' of an injurious imputation, what aspect or aspects of the statement at issue the defendant must prove, the burden of proof he must satisfy when seeking to justify, and certain evidential problems peculiar to the defence. Finally, the relevance to the assessment of damages of partial proof or proof of truth without public benefit will be discussed.

THE CONCEPT OF 'TRUTH'

What, then, do the courts mean when they speak of the 'truth' of an imputation or statement? Professional philosophers have with some justification described the various theories that have been advanced to distinguish truth from falsehood as 'embarrasingly numerous'.[1] Perhaps understandably the courts, as practical tribunals, have refrained from attempting to define, in abstract terms, the qualities of that elusive concept 'truth'. But since they have recognised a defence which places a burden on defendants in a defamation action to show that the imputation at issue enjoys that quality, certain philosophical issues relating to the nature of a true statement cannot be avoided.

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1) For a summary of these theories, see Haack, Logics.

The first distinction that needs to be drawn is between theories that aim at providing a definition of truth (i.e. which attempt to give the meaning of the concept) and those which try to set out the criteria for truth (i.e. set out the means of establishing whether a particular sentence or imputation is true or false.[1]

Of course, the two exercises are to an extent mutually interdependent, since one cannot formulate criteria by which to test whether a statement exhibits a particular quality unless one begins with a clear idea of what that quality is. But it is possible to argue that the qualities attributed to truth by theories which provide criteria for establishing its presence emerge by implication from those criteria. So if I say that the statement 'X is insane' is true because that condition is demonstrably observable in his behaviour, I am adhering to a theory that 'truth' consists in a correspondence between the meaning denoted by a statement and certain observable 'facts' in the real world - as one philosopher puts it, in a 'structural isomorphism' between verbal complexes and factual events, conditions or relationships.[2] At the same time, however, I am proposing a criterion for establishing the truth or falsity of any proposition - i.e. a correspondence between verbal complexes, called statements, and things extrinsic to the statement itself which we call 'facts'.

In the nature of things, the definition of truth to which the courts adhere must be inferred in this way from the criteria which they use to establish whether a statement alleged to be defamatory

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1) Rescher, Coherence Theory, intro.

2) Russell, Problems, Chap. 5.

is true or false. Confronted with such a statement - for example, 'X is a crook' - the law in effect demands of the defendant: If you wish to prove that the imputation was not wrongful your first task is to adduce evidence ('facts' extrinsic to the statement itself) which will lead the court to agree that the imputation is justified - i.e. that the facts proved are of such a nature as to warrant the conclusion that the plaintiff's behaviour conformed to the meaning denoted by the words at issue.

On the face of it, this may appear a relatively clearcut matter. But a moment's reflection will produce a number of examples of statements the 'truth value' of which is not readily determinable by simple correspondence.

First, some statements may be true in one context, but false in another. 'X is wearing an overcoat' may be true at one moment but false at another, just as 'Louis the XIV is dead' is now true but was once false. These examples create few problems, and may easily be resolved by building into the test for truth an identity in time between statement and referent. But, even so, some statements still present problems. If X once performed statements that warranted the appellation 'immoral', and has since refrained from these actions, does the statement 'X is an immoral man' cease being true at any particular moment?

The last example gives rise to a second problem. Two persons can reasonably disagree that a particular statement is a justifiable inference from a given fact complex. What is 'immoral' to one may not necessarily be 'immoral' to another. To any particular person, the 'truth' of the proposition 'X is immoral' will depend not only on the meaning he attaches to the term 'immoral, but also on the

values he applies to set the boundaries between what he considers to be immoral and morally acceptable behaviour.

Thirdly, it has often been said that a statement of fact, even if accurate when taken in isolation, is not necessarily coextensive with the whole truth. To use a popular example from the law, if I quote Mr Y as saying 'X is a thief' I may be rendering his words accurately. But it may be that I have ommitted to add the crucial information that he was speaking of a lady friend, and meant the words in the metaphorical sense of having stolen his heart. Thus the truth value of the proposition is derived not only from its correspondence with a given 'fact', but from the entire context within which it was uttered.

Fourth, it may be asked whether truth is an absolute quality, or whether it admits of gradations which allow one to say of a statement that it is 'almost true', or 'true, if false in some respects'? Our courts, in speaking of the 'partial truth' of an imputation, and by requiring a defendant to prove that the statement at issue is 'substantially true' [1], appear to adopt the latter view. This raises the further problem of establishing the point at which a statement ceases to possess the attribute of 'truth'.

A further problem is whether certain sentences, or classes of sentences, are capable of being designated 'true' or 'false'. Some philosophers have sought to show that it is improper, or even meaningless, to speak of any sentence being true or false.[2] For practical purposes, there seems little point in paying much heed to

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1) See eg. Verwoerd v Paver 1943 WLD 153 at 193.

2) Pitcher, Truth, Intro.

this view.[1] It can, however, be noted that certain forms of statement present peculiar difficulties of evidence and logic when it comes to establishing their truth. Some examples are: Sentences which take the form of a question; those that make make no truth claim about what has been or what is, but predict what is to be; those that take the form of 'I believe that X is...' or 'I am convinced that Y is the case...', for they make no truth claim about X or Y, but merely about the state of the speaker's subjective belief about X or Y; and those that refer to conditions measurable by degree ('X is drunk/incompetent').

These and other problems which arise when seeking to decide when a statement is true or false are not merely academic. What must now be established is how the courts resolve them when they occur in disputes in which the plaintiff seeks redress for an allegedly defamatory statement, and the defendant seeks to avoid liability with a plea of truth and public benefit.

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1) The argument for which other philosophers (eg. Haack, Logics, 80) have in any event dismissed as inconclusive.

OF WHAT THE TRUTH MUST BE PROVED

If the courts can be said to adhere to any particular 'theory' of truth, it is the view that the meaning of a statement must correspond to 'facts' in the observable world. If I say that X is a 'crook', the word denotes a character disposition which I believe is manifest, or has been manifest, in particular behavioural traits which, in common understanding, warrant that appellation. The statement is true only if there is evidence - observable data - extrinsic to the words which go to prove that the inference implicit in the designation is that which reasonable people, using the same language, would draw when confronted with the same evidence. Where this is the case, the statement is said to be 'true'.

The meaning of the statement at issue

The first task in inquiring into the truth of a statement is, therefore, to establish its meaning. As the Appellate Division has said:

> Before we can inquire into the truth of a statement we must be clear as to its meaning, or, in other words, the sense in which it would be understood.(1)

The meaning of the words may be relevant also to the issue of whether they are prima facie defamatory. But the object of an inquiry into meaning conducted for the purposes of a plea of justification differs from that which may arise when the defendant pleads that the words are not defamatory. In the latter case, the

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1) Crawford v Albu 1917 AD 102 at 126.

court is concerned with whether the words convey a meaning calculated to do violence to the reputation of the plaintiff in the eyes of the 'reasonable man'. Even where the defamatory connotation of the words is established, however, it may still be necessary to clarify meaning with greater precision for the purpose of establishing what evidence is required to prove its truth.

The meaning of verbal or written symbols is not always clearcut. It is possible that one who publishes a statement does not intend it to be understood in the sense which the recipient attaches to it, or that two members of the same audience may attach different significations to the same statement.

In establishing the meaning of a statement alleged to be defamatory for the purposes of a plea of truth and public benefit, the courts have two possible standards - the literal or etymological meaning of the words in their context, which is essentially a matter of semantics, or the way in which the words were understood by the particular audience in the circumstances in which they were published.

The courts have in practice expressed some uncertainty on the standard to be applied in establishing the meaning of a statement alleged to be defamatory. On the one hand, we find dicta which suggest that the literal standard should be applied where the defendant seeks to justify: 'The slanderer is justly required to prove...that what he said was literally true.'[1] And again: '...It is assumed that those to whom (the statement) is addressed...will have

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1) Williams v Shaw (1884) 4 EDC 105 at 149.

understood the statement in its proper sense.'[1]

The overwhelming weight of authority, howevever, favours the second test - how the statement was understood by the audience to which it was addressed, disregarding how the defendant intended the words to be understood:

> ...The court cannot dive into the mind of the defendant; it can only interpret his language as it would be understood by reasonable men; and he is assumed to have meant what his language thus interpreted would convey.(2)

The test is thus 'objective', in the sense that the court is not concerned with the defendant's subjective assessment of the meaning of the statement,[3] but with how 'reasonable men' would have understood it in the context in which the words were uttered. Reasonable men are assumed to have appreciated the effect of the context of the words on their meaning:

> Now what did the defendant mean, or rather what would the reasonable man in the audience have understood him to mean when he described the deportees as "criminals in the fullest sense of the word"?(4)

The circumstances include the time and place of publication:

> The only question is whether, when published to persons of

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1) Sutter v Brown 1926 AD 155 at 163. The court did not explain what it meant by 'proper sense'.

2) Per Innes CJ, Sutter v Brown, supra, at 163.

3) See Williams v Shaw, supra, at 149; De Graaff v Viljoen 1916 AD 539 at 542-3; Muller v Nel 1942 CPD 337 at 347-8.

4) Crawford v Albu 1917 AD 102 at 129. Emphasis added.

> ordinary intelligence and experience in the Transvaal, they would convey the imputation complained of.(1)

The literal meaning is only relevant insofar as the audience was likely to have read it into the statement at issue. This is true even of statements that have a relatively clearcut technical meaning. As was said by Solomon JA in Crawford v Albu:

> It is important to bear in mind that the word "criminal" is popularly used in a sense wider than its strict etymological meaning of one who is guilty of or has been convicted of an offence punishable by law.(2)

After citing the dictionary definition, the learned Judge of Appeal continued:

> It can scarcely be questioned that the word "criminal" is often applied in popular language to conduct which though not criminal in the strict sense of the term, is regarded by the speaker as highly reprehensible and wicked. And in my opinion this is the sense in which it was used on this occasion, and in which it must be (sic: have been?) understood by those whom the defendant was addressing.(3)

Thus in order to make good the defence of justification, the defendant would have been permitted to adduce evidence which proved that the plaintiff had committed acts which were not strictly criminal, but sufficiently reprehensible to be designated by the particular audience as 'criminal' in the wider sense.[4]

The defendant must therefore justify the imputation according to the court's assesment of the sense likely to have been attached to

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1) Sutter v Brown, supra, at 163.

2) Crawford v Albu, supra, at 129.

3) Ibid.

4) In casu, the defence at issue was fair comment, but Solomon JA said expressly that the defence of truth and public benefit would have been more appropriate.

it by the particular audience in the context, time and circumstances in which the statement was published.

It is for the court to determine the meaning of the imputation at issue.[1] Of course, this can only be said to be an 'objective' procedure in a qualified sense. For when the court discharges the responsibility of determining the meaning of the imputation, the judge is essentially asking how in his opinion the audience would have understood the words at issue. To do this, he must assume the attributes of the reasonable man and place himself in the circumstances in which the imputation was received. The process of deciding what the fictional reasonable man would think undeniably involves a subjective judgment. This is because the standard by which meaning is assessed is by no means as 'objective' as the courts have on occasion tended to suggest.[2]

Who is this reasonable man, ultimate arbiter of the meaning to be attached to the imputation? The Appellate Division has described him as follows:

> The court is concerned only with the fair and natural meaning which would be given to the article in this respect by the reasonable person of ordinary intelligence and not through what might be inferred from it by the morbid or suspicious mind, or with what the ingenuity of the astute lawyer might take it to mean.(3)

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1) Sutter v Brown, supra, at 163.

2) See Demmers v Wyllie and others 1980 (1) SA 835 (A) for an illuminating discussion of the attributes of the 'ordinary newspaper reader'.

3) Michael Klisser v South African Associated Newspapers and others 1965 (2) PH J22 (A). See also Coulson v Rapport Uitgewers (Edms) Bpk 1979 (3) SA 286 (A) and S v Gibson NO and others 1979 (4) SA 115 (D).

The special characteristics of a particular audience will, however, be taken into account in establishing the meaning of a statement alleged to be defamatory. In Channing v South African Financial Gazette[1], for example, it was held that a 'somewhat higher standard of education and intelligence and a greater interest in and understanding of financial matters' could be attributed to readers of a financial journal than could be attributed to newspapers readers in general.

The last-mentioned group - 'ordinary newspaper readers in general' - has always presented the courts with a major problem. This is because such a group is particularly amorphous and lacking any identifiable common attributes. The difficulties faced by the courts in resorting to the test of the 'ordinary newspaper reader' is well illustrated in Demmers v Wyllie and others[2], in which Diemont JA described him as

> ...An immigrant...imported from the English law where he has stood high in judicial favour particularly when juries are instructed to resolve problems in the sphere of negligence.'(3)

The learned judge then added:

> But whether the case be one of negligence or defamation, this "complex creature", as he has been called, does not always provide a ready solution to the question before the court.(4)

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1) 1966 (3) SA 470 (W).

2) 1980 (1) SA 835 (A).

3) At 848 A-B.

4) Ibid.

Diemont JA expressed doubt on whether 'that paragon, the reasonable man' could in fact be equated with the average newspaper reader, whose shortcomings included

> ...The fact that he does not concentrate but skims over his newspaper, the fact that he has a capacity for implication and is prone to draw derogatory inferences, the fact that he is guilty of loose thinking and will jump to a conclusion more readily than a man trained in the caution of law.(1)

The learned Judge of Appeal cited with approval a number of English cases[2] in which it was accepted that average newspaper readers were inclined to read derogatory implications more readily into a statement than a trained lawyer, that they did not scrutinise an article with special care, and that they did not necessarily have the 'charitable decency of gentlemen' when drawing inferences from facts which suggested, not fire, but merely smoke.

The meaning is to be determined from the overall impression left by the article in dispute, and and not by meticulous analysis of the text itself. As Holmes JA suggested in Dorfman v Afrikaanse Pers Publikasies (Eiendoms) Bpk en ander[3]:

> It seems to me that a (judge) would be better able to gauge the impressions of the ordinary reader if at the end of the case he were to come to his conclusion without having the report before him, and relying merely on his recollection or impression of its contents. In this way he would avoid the unrealistic approach of citing or referring to a series of passages from the report, with

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1) At 848 H.

2) Newstead v London Express Newspaper (1940) 1 KB 377; Lewis v Daily Telegraph Ltd (1963) 2 All ER 151; Morgan v Odhams Press Ltd and Ano (1971) 2 All ER 1156.

3) 1966 (1) PH J9 (A).

> their attendant implications and then, with those etched and uppermost in his mind, endevouring to gauge the impression of the humble ordinary reader.(1)

Sutter v Brown[2] illustrates the practical consequences of using the notional 'ordinary man' in the test for meaning. Defendant had alleged that plaintiff was 'nothing but a damned illicit liquor seller'. Read literally (and ignoring the epithets, which do not alter the literal meaning - see below), this statement means that plaintiff had traded in liquor in contravention of the law governing the sale thereof. Plaintiff, however, argued that the meaning to be assigned to the words was that he had 'committed the crime of selling liquor to coloured persons against the law' - a practice then not only illegal in the Transvaal, but also regarded in a particularly poor light. It was common cause that the words were prima facie defamatory in either of these significations. But the court rejected the defendant's plea that the words were true in their natural and ordinary signification and accepted that the ordinary and reasonable man would have understood the words in the signification suggested by the innuendo because 'that is the meaning that leaps to the mind of the ordinary hearer at once'. To make good

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1) 1966 (1) PH J9 (A).

Whatever method is adopted to guage the way in which an ordinary reader would be likely to understand a particular statement or series of statements, the test of the average reader confronts journalists in particular with a special problem when drafting reports that may have derogatory implications. They cannot plead that the defamatory sting of a passage is nullified or altered by some subtle disclaimer or qualification which, though discernable to the trained legal eye, would not be recognised by the notional ordinary reader who, in the eyes of the courts, is neither imbued with great analytical acumen nor predisposed to look for an innocent meaning when a derogatory one has leapt to his mind.

2) 1926 (AD) 155.

his plea of truth and public benefit, defendant had therefore to lead evidence proving that plaintiff had sold liquor to blacks, which he was unable to do.

The fact that there is some exaggeration or overstatement in the language used will not affect the meaning, provided that it does not leave 'a wrong impression in the reader's mind to the detriment of the plaintiff'.[1] In Johnson v Rand Daily Mails defendant had accused the plaintiff of keeping a catering facility that was 'indescribably filthy'. The court held that 'indescribably filthy' meant the same as 'filthy', which in turn meant the same as 'dirty'.[2]

Likewise, it has been held that a humorous style or picturesque language need not affect the essential meaning.[3]

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1) Johnson v Rand Daily Mails 1928 AD 190 at 207.

2) At 200.

3) For example, in SA Mails Syndicate v Hocking (1909 TS 946), the appellant newspaper had written the following description of the plaintiff's unfortunate experiences:

> Ben Hocking of Grahamstown Street, Johannesburg, may perhaps never lay claim to have been a hero of the late war, but he can certainly say with every degree of truth say that he is the first person in Johannesburg who has been removed to a police station in a police patrol wagon...Shortly after 10.30 last evening Constable A.164 Van Niekerk found Ben Hocking in a peculiar state, and at once hauled him off to Gainewell Alarm Box No. 13 - an unlucky number for Ben - and phoned to Marshall Square for the wagon...For the next 20 minutes Constable Van Niekerk stood holding Ben, whilst the off-side horse in the hurry-up cart cavorted about Marshall Street and placed its forfeet upon the chest of Constable Duggan's new overcoat...Eventually Box 13 was reached, where Van Niekerk was found humming as he held Ben, "Wait for the wagon and we'll all have a ride". Ben at length went to the station in fine style, but it was unfair to keep him hanging about in the cold for so long.' (At 946-947.)

The court found that the account was true, notwithstanding the humorous tone in which it was couched.

The putative understanding of the 'reasonable man' in the circumstances in which the words were published is also used to determine the meaning of words which expressed the defendant's subjective judgment, for example, when it was said of the plaintiff that he was 'immoral'[1], 'incompetent'[2], or a 'verdomde skelm'[3]. Again, the courts will ask what the ordinary, reasonable man would have understood by the term given the context in which it was uttered. The meaning of the imputation is therefore a question of fact.

Although it is the task of the court to view the allegedly defamatory statement through the eyes of the ordinary reasonable reader or hearer, witnesses may not, except in circumstances, be brought forward to testify how they actually understood the words at issue.[4] One such exception is where one of the parties assigns a secondary sense to the words at issue.[5]

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1) De Beer v De Villiers 1913 CPD 543.

2) Middler v Hamilton 1923 TPD 441.

3) Muller v Nel 1942 CPD 337.

4) Sutter v Brown 1926 AD 155 at 163. Also Die Middelandse Nasionale Pers v Stahl 1917 AD 630; Kidson v South African Associated Newspapers Ltd 1957 (3) SA 461 (W).

5) This rule is more comprehensible if one bears in mind the distinction between the inquiry into the 'primary' and 'secondary' meanings of statements alleged to be defamatory - See National Union of Distibutive Workers v Cleghorn and Harris Ltd, 1946 AD 984 at 992, 997, and Demmers v Wyllie and Others 1978 (4) SA 619 (A) at 622 C-E. A search for the primary meaning is confined to establishing the normal connotation of the words and seeks the libellous connotations contained in the words per se. The secondary meaning, on the other hand, seeks the meaning not from how the 'ordinary reader' would have understood the words themselves, but from the audience's knowledge of special circumstances, extrinsic to the words themselves, that may have imbued them with a defamatory significance they would otherwise have lacked. In the latter case the parties are allowed to call witnesses to testify how they/

Where there is a difference between the parties over the meaning of the words, the onus is on the defendant to persuade the court that the words do not bear the meaning contended for by the plaintiff. The defendant may not simply set up his own version of the words and plead that they are true in that signification. Once the court has assigned a meaning to the words, the defendant must justify according to the sense determined.[1] But should the defendant attempt in his replication to justify the words according to the meaning that plaintiff has set out in his plea, he is bound to justify according to the sense assigned to the words by the plaintiff, even where the court has doubts on the reasonableness of the construction placed on the words by the plaintiff. For example, in South African Associated Newspapers v Yutar[2], respondent had contended at the trial that the words 'How Dr Yutar misled the

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actually understood the imputation. An example of where such evidence is admissible is where it is claimed that '...the statement made no impression on the mind of the person addressed, because he was deaf or ignorant of the language used' - Sutter v Brown, supra, at 164. Another is where one of the parties assigns a secondary sense to the language used - ibid. Where this is the case, it permissible to call witnesses to show that publication took place in special circumstances which gave to words innocent in themselves a defamatory significance appreciated by the audience, or vice versa. Even where witnesses are called, however, the courts will not abandon the general rule - that it is for the judge finally to decide the meaning of the imputation - to the extent of transferring to the witness the final responsibility of determining the meaning. In Middelandse Nasionale Pers v Stahl, 1917 AD 630, the Appellate Division endorsed the English law rule that it was for the judge to define defamation and for the jury to decide whether the words bore a defamatory meaning. 'It (the jury) is not permitted to ask the opinion of others as to the construction of the alleged defamatory matter.' (Per Innes CJ at 636, relying on Davis v Bradlock and Hartley, 3 Exch 200, and the Privy Council case of Simmons v Mitchell, 6 AC at 163. For the question which the courts will ask is not 'what did you understand?', but 'was there anything to prevent the words bearing the ordinary meaning which the court has assigned to them in accordance with the normal rules of interpretation? - Sutter v Brown, 164.

1) South African Associated Newspapers v Yutar 1969 (4) SA 442 (A).

2) Op. cit.

Court' meant inter alia, that he was unfit to occupy the office of prosecutor in a court of law. He alleged further that the words conveyed in a general sense that he was a dishonest person. Steyn CJ ruled:

> The correctness of the equation of these words with a meaning of such general import may be open to question, but it is the signification into which the plaintiff himself has translated them, and that is the meaning to be justified by defendants in substantiation of their defence (of truth and public benefit). (1)

This rule, however, cuts both ways. Where the plaintiff places a certain interpretation on words alleged to be defamatory, the defendant is '...entitled to justify the words in that particular meaning ascribed to them by the plaintiff, irrespective of the original words themselves'[2]. A plaintiff would thus be ill-advised to plead so generalised an innuendo as to facilitate proof by the defendant.

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1) South African Associated Newspapers v Yutar 1969 (4) SA 442 (A) at 447.

2) Sutter v Brown 1926 AD 155 at 164. The rule is expressed thus in HRH King Zwelilhini of Kwazulu v Mervis (1978 (2) SA 521 (W) at 524 G-M):

> Once a plaintiff has selected a meaning of the offending words upon which he relies, he is bound to that selection and, if he should fail to establish that the words bore or bear such meaning or meanings, he cannot then fall back on any other defamatory meaning or meanings which he contends that the words bear per se, unless he has pleaded the selected meanings as an alternative allegation that the words are defamatory per se.

- per McEwan J, relying on Sacks v Werkerspers Uitgewersmaatskappy (Edms) Bpk 1952 (2) SA 261 (W) at 272 G -273 B; Gayre v South African Associated Newspapers Ltd 1963 (3) SA 367 (T) at 378 E-379 A; Marais v Steyn en 'n Ander 1975 (3) SA 479 (T) at 486 A-D. This rule was accepted by the Appellate Division in Demmers v Whyllie and Others at 845 F-G. See also Feldt v Bailey and others 1961 (4) SA 545 (W) at 549 C-D.

The object of establishing the meaning of the statement at issue for the purposes of the plea of truth and public benefit is to ascertain what evidence the defendant must adduce in order to verify the words. But defamatory statements are frequently couched in language that cannot be said to be a model of precision. The charge may be lavishly embellished with superlatives, or it may be cast in vague or generalised terms, or it may be mixed together in some other way with non-defamatory detail. In these cases, it is the task of the court to decide what aspects of the imputation at issue need to be proved in order to make good a plea of justification.

The South African courts, following English precedent, have repeatedly held that in order successfully to raise a plea of justification, a defendant need prove the truth only of the 'substance', 'gravamen' or 'sting' of the imputation.

> As much must be justified as meets the sting of the charge and if anything be contained in a charge which does not add to the sting of it, that need not be justified.(1)

This means that the defendant need not prove every detail of the defamatory allegation; he will succeed even if he 'does not establish every item of the allegation made, provided that the gist of the libel is proved to be true'.[2] As Hickson and Carter-Buck state the English law, so it has been said that in South African law

> In order that the defence be successful it is not necessary that every "t" should be crossed and every "i"

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1) Edwards v Bell (1924) 1 Bing 403 at 404, cited with approval in Johnson v Rand Daily Mails 1928 AD 190 at 206.

2) Yusaf v Bailey and others 1964 (4) SA 117 (W) at 125-6.

should be dotted; it is sufficient that the substance of the defamatory statement be justified.(1)

The purpose of the above-mentioned rule is clearly to prevent the defence from failing on some minor and irrelevant point of detail. Thus our courts have accepted that they will not regard as fatal '...mistakes here and there in what has been said which makes no substantial difference to the quality of the alleged libel or in the justification pleaded for it'.[2]

What, then, is meant by the 'sting', 'gist' or 'gravamen' of a defamatory imputation? No attempt has been made in the case law or by modern writers to formulate a definition of what is meant by these terms. McKerron, for example, writes that statement must be 'substantially true as a whole and in every material part thereof'[3]. With respect, this begs the questions: What is meant by 'substantial truth', and how does one distinguish between the 'material' and non-material parts of a defamatory statement?

The relevant judgments suggest that when the courts talk of the 'sting' of a defamatory imputation, they have in mind only that part of it which, taken on its own, is sufficient to lower the plaintiff in the eyes of his fellows. Behind every specific imputation lurks a

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1) Law of Libel and Slander, 108, cited with approval in Smit v OVS Afrikaanse Pers Bpk 1956 (1) SA 768 (O) at 773 D.

2) Sutherland v Stopes (1925) AC, cited Smit v OVS Afrikaanse Pers Bpk, supra, at 773 B.

3) Delict, 176. Van der Merwe and Olivier cite the phrase without discussion (Onregmatige Daad, 401); Strauss, Strydom and Van der Walt merely illustrate the rule with the judgments of Johnson v Rand Daily Mails and Smit v OVS Afrikaanse Pers (Persreg, 265); CF Amerasingh does not explain the term and ARB Amerasingh does not mention it.

generalised charge, and it is this charge which forms the essence, or 'sting' of the imputation. If, for example, I say that X stole R100, the essence of the charge is that X stole money. On the test just outlined, it would therefore not be fatal to the defence if I could prove only that X stole a lesser amount.

The problem is, however, that there must come a point at which it can be said that the lesser amount proved fails to justify the words in which the original imputation was expressed. If, to use the same example, I manage to prove that X merely purloined a few cents, I am still justifying the allegation that X stole money. But it is more serious to allege of a person that he stole a substantial amount than a paltry one. Where, then, lies the 'sting' of the charge?

It is perhaps understandable that the courts have refrained from laying down any rigid rules for establishing when particular words should be regarded as forming part of the gist of the defamatory imputation. As was said in Weichardt v Argus Printing and Publishing Ltd:

> ...There is no hard and fast rule for determining the accuracy and relevancy of a plea of justification; each case should be decided on its own particular facts.'(1)

Certain rough guidelines have, however, been suggested in the case law.

The words of an English judgment[2] were quoted with approval in Smit v OVS Afrikaanse Pers:

> If the defendant succeeds in proving that the main charge

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1) 1941 CPD 133 at 141.

2) Clarke v Taylor (1836) 3 Scott 95.

> or gist of the libel is true, he need not justify those statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable.(1)

The courts generally ask themselves whether the particular words at issue form an integral part of the main charge, in the sense that they affect the primary meaning of the charge.

The application of this test is well illustrated by the facts in Schourie v Afrikaanse Pers Publikasies and Others[2]. At issue in this case was a newspaper article which contained two distinct defamatory allegations: 1) that the plaintiff was in financial difficulties and had, after the attachment of his farm implements and with a view to evading his creditors, fled the Republic; 2) that before doing so he had failed to make adequate provision for the fowls on his poultry farm, as a result of which 7000 of them had died, creating a stench which pervaded the neighbourhood. In fact, the plaintiff had not left the country at the time the article appeared, although the court was satisfied that he had formed a definite intention of so doing. The plaintiff's farm implements had not been attached, as had been claimed. The defendant newspaper was also unable to prove that 7 000 chickens had died, or that the stench of those that had succumbed had created as general a nuisance as was claimed.

On the first imputation, the court found that evidence that went to prove an intention to leave the country was not sufficient to justify the sting of the charge. The court held that there was a '...substantial difference between the conduct of a man who in order

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1) Cited in Smit v OVS Afrikaanse Pers, supra, at 773.

2) 1966 (1) PH J1.

to evade his creditors leaves South Africa and one who has the intention of so doing'. It added:

> To say that the plaintiff left the country and so evaded his creditors is something different from saying he had every intention of taking that step. This is not merely an exaggeration of the truth. It is not merely a detail which is not germane to the gravamen of the charge made. It is part and parcel of the charge laid at the plaintiff's door.

In the case of the first imputation, therefore, the defendant failed because it had charged the plaintiff with an act different in kind to the one proved.

Strangely, however, the court found the incorrect allegation that the plaintiff's goods had been attached did not form part of the sting of the charge, and accordingly the defendant was not required to prove it. On the second allegation - that the plaintiff had allowed 7 000 fowls to die and thus created a nuisance to his neighbours - the court ruled that the exaggerated language in which the report was written and the inaccurate account of the number of dead fowls and of the intensity of the stench did not form part of the sting of the charge, which was that plaintiff had been a person 'guilty of inhumane conduct'.

With respect, it seems difficult to reconcile these two parts of the judgment. If a general imputation such as 'inhumane conduct' could be read into the words of the part of the article which inaccurately described conditions on the farm after the plaintiff's departure, it is hard to see why the court was loth to read a similar generalised imputation - i.e. that the plaintiff was guilty of 'dishonest conduct' - into the claim that he had left the country. A claim that a man had left the country when he had merely

formulated the intention of so doing may be factually inaccurate. But it cannot be said that, in terms of standards generally prevailing in the community, the conduct of a man who had formulated a plan to leave the country and evade his creditors was substantially less dishonest than of one who had actually carried out the scheme.

The courts have on other occasions been prepared to read generalised imputations of this type into specific claim. For example, in Smit v OVS Pers Bpk[1], the respondent newspaper had reported that appellant had paid admission of guilt in respect of certain main charges under the Rents Act, whereas he had in fact acknowledged guilt only to a number of alternative charges. The appellant had in fact been convicted on the main charges. On appeal, the court accepted respondent's argument that 'the real and only sting conveyed by the newspaper report is the imputation that the excipient was guilty of dishonest conduct'. It was thus not fatal to the defence that respondent could not prove the truth of the imputation that the appellant had paid admission of guilt fines '...in die sin dat hy skuldig bevind en beboet is op sy eie erkenning'[2].

Again, in Watson v Lyons,[3] defendant had alleged that plaintiff, an employee of his, had stolen 300 pounds sterling from his shop. Defendant was held to have proved the substance of the charge even

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1) 1956 (1) SA 768 (0).

2) At 774.

3) 1916 CPD 389.

though he was able to prove only that 40 pounds had been involved. The ground adduced was that the amount proved was still a 'substantial sum' and that

> ..where a person placed in charge...of a branch store robs (sic) his employer of a substantial sum the effect must be the same to the hearer whether no sum is mentioned or a substantial sum or 300 pounds.(1)

In Watson's case, the judge was essentially asking whether the opinion in which the plaintiff was held by ordinary people would have been effected by the discrepency between the amount mentioned in the imputation and the amount proved. Since both were 'substantial', the discrepency was irrelevant; nobody would think the more of the plaintiff for the defendant's failure to prove that the sum was the original amount claimed. The impression that remained formed the essence of the charge - that plaintiff had been guilty of stealing a substantial sum of money.

The same conclusion would probably be reached were this reasoning to be applied to the principal imputation in the Schourie case. The opinion formed by ordinary people on the basis of the original claim that plaintiff had left the country in order to evade his creditors would certainly have been that he was guilty of dishonest conduct. Proof that he had not left the country but had merely formed the intention of so doing would have been unlikely substantially to have altered that opinion.

At the same time, the latitude allowed in Watson's case could have undesirable consequences if taken too far. There are in fact

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1) Watson v Lyons, supra, at 392.

few conceivable cases in which some generalised imputation, such as dishonest or immoral conduct, cannot be read into a libellous claim. To permit defendants in all cases to justify claims by evidence which falls far short of the original imputation could in some cases lead to injustice. The law is entitled to demand some degree of accuracy from those who are prepared to risk maligning their fellows.

It is perhaps not surprising, therefore, that the rule requiring a defendant raising the plea of truth and public benefit to lead sufficient evidence only to prove the 'sting' or gist of the charge is not in fact of general application. Whether failure to prove certain details will prove fatal to the defence depends to a great extent on the form in which the allegedly defamatory statement is couched. In Kennedy v Dalisile[1], the court ruled that it was only in those cases where the charge was laid in 'general' terms that it was sufficient to prove its substance:

> ...Where the charge is in general terms, although the defendant in a plea of justification must state some specific instances of the misconduct imputed to the plaintiff, it will be sufficient if the substance of the charge is justified.(2)

Where, however, the imputation at issue consists of one or more specific charges, he must prove that

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1) 1919 EDL 1.

2) At 8-9.

they are 'true in substance and in fact'[1].

In Johnson v Rand Daily Mails[2], the Appellate Division explicitly laid down that the rule requiring proof only of the substance or sting of the charge was a modification of the general rule, viz. '...that the plea of justification must not only be as broad as the literal language of the libel but as broad as the inferences of fact necessarily flowing from the literal language.[3] In this case, Wessels JA agreed that no more than the sting of the charge need be proved in the case of a charge couched in general terms. But he added two further criteria, both relating to the subject-matter of the imputation, by which to decide whether the strict or relaxed rule should apply. It would be enough to prove the gist of the imputation, he said, '...where matter is described which will not necessarily appear the same to two different persons', such as a charge of incompetence.[4] On the other hand, the strict rule should be applied in cases '...where a man is charged with fraud or dishonesty or where criminal acts are attributed to him'.[5]

Kennedy v Dalisile and Johnson v Rand Daily Mails thus present us with conflicting criteria by which to decide whether the strict or modified rule should be applied. In Kennedy's case, the decision turned on the degree of particularity of the charge. Where a

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1) Kennedy v Dalisile, supra, at 19.

2) 1928 AD 190.

3) At 205-6.

4) At 205.

5) Ibid.

defendant had imputed specific acts to the plaintiff, and had published details of those acts, he had to prove the truth of each and every one of those details. Where the charge was made in general terms - i.e. where the defendant had refrained from publishing particular detailed claims - it was enough to prove only the substance of the charge. In Johnson's case, on the other hand, Wessels JA suggested that the strict rule should be applied wherever the gravity of the charge warranted it, and irrespective of its form.

With respect, it would seem that the test proposed in Kennedy v Dalisile is to be preferred. In terms of that judgment, the rule may be stated as follows: where the allegation is made in particular terms (eg. X has stolen R300) the defendant must justify the precise imputation. Gatley demonstrates how strictly this rule is applied in the English law:

> If the words impute a specific offence, e.g. stealing a watch, it is not enough that the plaintiff was guilty of another offence, though of the same character, e.g. stealing a clock.(1)

On the other hand, in the case of an imputation couched in general terms, a defendant

> ...is bound to give particular instances he proposes to prove in support of the general charge; but it does not follow that he must prove every particular that he has alleged. The question is always whether he has proved so many as substantially justify the general charge he has made.(2)

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1) Gatley on Libel and Slander, 254.

2) Johnson v Rand Daily Mails 1928 AD 190.

The question then arises: how does one distinguish between particular and general charges? There is no recorded attempt in the case law to explain the criteria that distinguish between the two forms of imputation. The only method of gauging what the courts mean by the terms is therefore to seek the common characteristics of imputations which have been placed in the respective categories.

Imputations which have been accepted as 'general', and of which the defendant needed only prove the 'sting' or gist, are either inferences cast in the form of general descriptions, summaries of courses of action, or words which denote character dispositions. Examples of imputations which the courts have accepted as 'general' in this sense include claims that plaintiff was 'connected with a grand swindling concern'[1], that plaintiff was an 'unmitigated scoundrel'[2], a 'thief'[3], or 'incompetent'[4].

All such charges are clearly general in the sense that they are descriptions of character or disposition inferred from a particular action or actions.

The courts have also accepted as general imputations those which have charged the plaintiff with engaging in particular courses of action. For example, in Verwoerd v Paver[5], the court accepted as a general imputation the charge that a newspaper editor condoned or ordered 'the process of falsification which it (his newspaper)

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1) Clarke v Taylor (1836) 3 Scott 95.

2) Rojesky v Ross (1887) GHC 128 at 129.

3) Van Wyk v Steyn 1924 OPD 68.

4) Middler v Hamilton 1923 TPD 441.

5) 1943 WLD 152.

applies to current news in support of Nazi propaganda'.[1] Also accepted as a general imputation was the charge that plaintiff allowed his catering service to fall into a 'positively disgraceful condition' which was 'worse than anything I have ever seen' and a 'clever scheme to make money'[2], that an attorney-general had 'misled the court'[3], and that

> Jininda (meaning the plaintiff) is eating up (meaning robbing) the people. He says a person who owes two pounds should pay two pounds more, saying that he has been sent by the court. He is doing this in my location and in Tyelenzima's and in the locality around us. He attaches cattle, pretending to be sent by the court.(4)

Particular imputations, on the other hand, are those which refer to specific acts allegedly committed by the plaintiff. The allegation in Schourie v Afrikaanse Pers Bpk[5] that plaintiff had left the country in order to evade his creditors was an example of such an imputation. So too was that in Watson v Lyons[6], in which plaintiff was charged with stealing a specific sum of money.

The difficulty of distinguishing particular from general imputations arises from the fact that it is hard to imagine examples of the former into which some broader insinuation cannot be read. If I say that X stole R100, the sting of the charge is that he is a dishonest person. My inability to prove that the sum was the exact

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1) At 155.

2) Johnson v Rand Daily Mails 1928 AD 190.

3) South African Associated Newspapers v Yutar 1969 (4) SA 442 (A).

4) Kennedy v Dalisile 1919 EDC 1 at 8.

5) 1966 (1) PH J1 (W).

6) 1916 CPD 389.

amount claimed therefore does not materially alter the gist or gravaman of the charge. On the other hand, the statement cannot then be said to be 'true ' in a literal sense. The real problem confronting the courts - and the reason for the introduction of the rule requiring proof only of the 'sting' of the charge - is to strike some kind of balance between extremes: on the one hand, it would be undesirable to allow minor errors of detail to be fatal to the defence; on the other, the law should not be seen to condone any mistake or exaggeration made at the expense of individual reputations.

For practical purposes, the distinction between general and particular charges is worth bearing in mind for two reasons. First, unless a person who intends publishing a statement damaging to the reputation of another is sure that he can produce sufficient evidence to prove every detail of the claim precisely, he would be advised to draft it in general terms. Second, the plaintiff would be unwise to plead that a general meaning should be read into a specific imputation, so extending the scope of the evidence which the defendant may lead in justification.

PROOF OF THE IMPUTATION

When the plea of justification is raised, it is for the defendant to prove the truth of the imputation. This means that he must adduce sufficient evidence to satisfy the court that the 'facts' convey substantially the same impression as that which would have been made by the words upon the average reader in the circumstances in which they were published. This burden has been described in several recent Appellate Division cases as a 'weerleggingslas'[1] - a term which has been interpretted to mean that the defendant who seeks to rebut the presumptions of wrongfulness or fault bears only a burden of adducing evidence, not an onus of proof[2]. This means that the raising of the plea does not shift from the plaintiff the substantive burden of proving all the elements of the delict. The defendant merely assumes an evidential burden, which means that it is for him to satisfy the court of the truth of the statement.

What degree of conviction do the Courts require themselves to feel before accepting that a defendant has discharged this evidential burden?

The general standard of proof in civil actions is that the parties must prove their respective cases on a balance of probabilities. The question is whether the plea of truth and public

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1) See Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977 (3) SA 394 (A), Borgin v De Villiers 1980 (3) SA 556 (A) at 571; May v Udwin 1981 (1) SA 1 (A) at 10, Ramsay v Minister van Polisie 1981 (4) SA 802 (A) at 807.

2) See Boberg 'More on Defamation' (1983) 12 Businessman's Law 112 and 114.

benefit imposes on the defendant in an action for defamation the standard generally required of the State in an action at criminal law - viz. proof beyond reasonable doubt.

There have been dicta which suggest that the standard of proof is affected by the gravity and subject-matter of the imputation. For example, in Williams v Shaw[1], Shippard J suggested that where criminal conduct was alleged the standard of proof should be as strict as that required of the State in a criminal trial[2], while in the same case Buchanan J was prepared to go even further:

> 'It may, indeed, happen that more precise evidence may be necessary to support such a justification than would be sufficient to sustain an indictment.(3)

There is also Appellate Division authority for this view. In Johnson v Rand Daily Mails[4], Wessels JA also drew a distinction between one category of damaging imputations and others:

> In cases where a man is charged with fraud or dishonesty or where criminal acts are attributed to him, the court will no doubt exact from the defendant strict proof of every charge.(5)

The reasoning behind these dicta seems to be that the degree of care required of one prepared to disclose material damaging of another increases according to the gravity of the charge; indeed,

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1) (1884) 4 EDC 105.

2) At 148.

3) At 163.

4) 1928 AD 190.

5) At 206.

where a person charges another with a criminal offence, he should be prepared to go at least to the lengths required of the State before it presses criminal charges.

Thus in Thurtel v Ford[1], the defence failed because the defendant could not prove beyond reasonable doubt his charge that the plaintiff had criminally assaulted his ten-year-old daughter.[2]

The language of the courts has also suggested that the criminal standard should be applied in cases arising out of imputations of non-criminal conduct. In De Beer v De Villiers[3], for example, it was held that an allegation of immoral sexual conduct must be proved 'with certainty'.[4] In Stanley v Central News Agency,[5] the court made it clear that it accepted the defence only because the evidence left no room 'for any reasonable inference' other than that the plaintiff, an attorney, had touted for clients.[6] But in South African Associated Newspapers v Yutar[7], the Appellate Division accepted that the defence of truth and public benefit did not place on the defendant in a defamation action a burden of proof more onerous than the civil standard.[8] In that case, the defendant

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1) 1930 SR 270.

2) At 272.

3) 1913 CPD 543.

4) At 548.

5) 1909 TS 488.

6) At 493.

7) 1969 (2) SA 442 (A).

8) i.e. The defendant's claim must '...carry a reasonable degree of probability but not so high as required in a criminal case' - Miller v Ministry of Pensions (1947) 2 All ER 327.

newspaper had to show '...on a balance of probability that the respondent had made the statement in question with the intention of misleading the court'.[1] It is respectfully submitted that this should be the case, irrespective of the subject-matter of the imputation.

The following sections will deal with problems relating to the proof of various forms of imputation.

1. Particular Imputations

In the case of specific allegations, the English and American courts have in the past been charged with imposing absurdly precise standards of proof.[2]

Our courts, too, have insisted on a rigorous standard of proof in certain cases where the imputation could be classed as 'particular', in the sense outlined above.[3]

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1) Per Steyn CJ in South African Associated Newspapers v Yutar 1967 (3) SA 454 (A). Emphasis added.

2) Prosser, Torts, 798. Also Courtney, 'Absurdities of the Law of Libel and Slander' (1902) 36 Am L Rev 552 at 561-4. Examples cited by Prosser of cases in which the defence failed because specific imputations were not proved exactly are Swann v Rary (1833) 3. Blackf. Ind. (charge of stealing three hogs and theft of only one proved) and Sharpe v Stephenson (1851, 12 Ired., NC, 348 (charge incorrect as to time and place.

3) Supra, 92.

In Sutherland v MacDonald,[1] for example, the imputation was as follows:

> I was obliged to get rid of Mr X (plaintiff) in consequence of frauds and delinquency....These Sutherlands have been trading on my capital for twelve years to their own benefit.

This statement was held to mean that plaintiff had been guilty of fraud and criminal acts in trade. Defendant's evidence proved that plaintiff had in fact been been guilty of defrauding the customs. The case went against the defendant, on the principle that an allegation of fraud against Y was not justified by proof of fraud against Z.

In Fyne v Lee[2], defendant had said that plaintiff '...thought nothing of walking up the street with the biggest prostitute in town'. The plea that the words were in substance true was rejected although the court accepted that the evidence went to show that plaintiff was 'an immoral man'. [3]

Thus, as was said in Verwoerd v Paver[4] '...the evidence must be directed towards the precise imputations made, and no other....' The evidence, moreover, must verify the imputation to its full extent:

> The particulars of justification must be relevant to the issues; they must justify the precise charge made in the

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1) (1833) 3 Menz 6.

2) (1900) CTR 335.

3) 1913 CPD 543 at 544.

4) 1943 WLD 153 at 157.

libel, and not some charge which falls short of it.(1)

It is difficult, however, to reconcile such demands for precision with the rule requiring that only the substance of the charge be proved. The theft of two horses may incur a more serious penalty under the criminal law than the theft of one, but ordinary people are unlikely to think the better of the plaintiff who stole only one. As was said in Watson v Lyons[2] in the case of an accusation of theft, the effect on the ordinary hearer would be 'much the same whether no sum is mentioned of a substantial sum or £300'. A minor error of detail, such as one relating to the time or place at which the alleged misconduct occurred, should not defeat the defence. There is no compelling reason why the defendant who couches his charge in general terms should have a lighter evidential burden to meet than one who seeks to detail the charge.[3]

2. Imputations Conveying Several Charges

Where the defamatory imputation consists of several distinct

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1) Weichardt v Argus Printing and Publishing Co Ltd 1941 CPD 133 at 141, citing Gatley (3rd ed.), 528-9.

2) 1916 CPD at 392.

3) This has now become generally accepted in the United States - see Prosser 798-799, citing Fort Worth Press Co v Davis Tex. Civ. App. 1936, 96 SW 2d 416 (proof that Mayor wasted $17 500 justifies charge that he wasted $80 000) and Smith v Byrd 1955, 225 Miss 331, 83 So. 2d 172 (statement that sheriff shot a man justified by proof that sheriff was acting in concert with deputy who fired the shot). For English law on this point see Gatley at 336, citing Alexander v N E Ry (1836) 3 Scott 109 (statement that plaintiff was sentenced to a fine of £1 or three weeks' imprisonment justified by proof that he was sentenced to £1 or 14 days' imprisonment).

charges, each of them must be proved individually.[1] This is the case, too, where a single charge consists of severable elements. In both cases, the evidence is evaluated in respect of each charge in the same way as it would be in the case of a single specific charge.

In South African law, as in the English common law, the position is therefore that for a defence of justification to succeed, it is necessary to prove that the substance of each separate charge is true.

In England, the law on this point has been altered by S. 5 of the Defamation Act, 1952[2], which provides:

> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, the defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

The effect of this section would presumably be that in the case of a charge such as that laid in De Beer v De Villiers[3] - viz. that plaintiff had committed immoral acts on separate occasions with four women - proof that the plaintiff had committed fewer acts with fewer women would not have defeated the defence. In that case, however, Kotze J ruled:

> A plea of justification cannot be partly established, it must be proved as a whole. The defendant's duty is to make good to the full his plea of justification. There are four

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1) De Beer v De Villiers 1913 CPD 543 at 561.

2) 15 & 16 Geo. 6 & 1 Eliz. 2,c.

3) De Beer v De Villiers, supra, at 561.

> charges against the plaintiff. If all these charges are proved...there is an end to the case...(1)

Plaintiff was awarded substantial damages even though the jury accepted as true the claim that he had kept one of the women named in the charge in Cape Town for the purposes of immoral relations.

In Williams v Shaw[2], defendant had lodged detailed particulars in support of his claims that plaintiff, a clergyman, was a liar, a thief, and had been unfaithful to his wife. Shippard J instructed the jury:

> ...the defendant must prove every one of the three charges to the hilt; if he fail in one, if he fail in proving any single charge in any material respect, nay, if the scale of justice weigh but the smallest fraction of a grain, if it turn but on the estimation of a hair, the plaintiff shall have judgement.(3)

Judgment went against the plaintiff even though all three judges agreed that plaintiff's behaviour towards women was 'improper and unbecoming', that had frequently uttered untruths, that the manner in which trust funds were applied in plaintiff's church was 'irregular', and that in one instance the charge of theft was technically justified.[4]

But where the allegations are divisible there is nothing to prevent a plea of justification with respect to one or more of the charges, in combination with some other plea. So in Botha v Brink [5],

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1) De Beer v De Villiers, supra, at 548. Emphasis added.

2) (1884) 4 EDC 105.

3) At 148.

4) See esp. the judgments of Shippard J at 155 et seq. and Buchanan J at 176 et seq.

5) (1878) Buch 128.

where the statement at issue was that the plaintiff had '...been brought up not only for perjury, but for rape also', it was held that inasmuch as the part relating to the charge of rape was distinct from that relating to the charge of perjury, the allegations were divisible so as to admit of a plea of justification in respect of the former alone.

But where the defendant seeks to justify the whole of an imputation divisible into discreet elements, each in themselves defamatory, he must justify evey element.

3. General Imputations

This is true, too, where the statement takes a general form which implies that the defendant was guilty of several acts. Where the form of the imputation suggests that the plaintiff was in the habit of performing the action charged, it will not be sufficient to prove that he has committed such an action on one occasion. This point is illustrated by the facts in Meurant v Raubenheimer.[1] In that case defendant had alleged that plaintiff, a magistrate, 'introduces personal feelings into his public prosecutions, as notably instanced in the charge now pending against X'. The court accepted that the plaintiff had in fact been influenced by personal considerations in the case referred to. But the question was raised as to whether what it saw was accepted as the clear inference that the plaintiff was in

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1) (1882) Buch 87.

the habit of being so influenced was justified:

> Now, although it is quite true that the truth of a libellous statement might be proved in justification, yet it might (sic: must?) be shown that the speaker has not gone further than the truth absolutely required.(1)

The rule regarding proof of a general charge is most clearly laid down in Verwoerd v Paver[2]:

> Where a general charge is made and the defendant seeks to justify he is bound to give particulars of the instances he proposes to prove in support of the general charge; but it does not follow that he must prove every particular that he has alleged. The question always is whether he has proved so many as substantially justify the general charge he has made.(3)

It may happen that the publication at issue included details intended to provide the reader with evidence to support the general charge. In this case, it is submitted that the defendant is not confined to these details alone when seeking to justify the main charge, but may cite additional instances, whether or not these were known to him at the time of publication. The defence will not fail by reason only that the details originally cited are shown to be inaccurate, provided the particulars subsequently pleaded and proved are sufficient to justify the main imputation. There is no rule, as in the defence of fair comment[4], that the facts from which the main

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1) Meurant v Raubenheimer (1882) Buch 87 at 93.

2) 1943 WLD 153.

3) 1943 WLD 153 at 205. See also Kennedy v Dalisile, 1919 EDL 1 at 9, Williams v Shaw (1884) 4 EDC 105 at 163, Rojesky v Ross. (1887) GHC 128. For the English law see Hickenbotham v Leach (10 M & W 361), Lambri v Labouchere (14 Cox CC 419), Edwards v Bell (1 Bing 403).

4) See, inter alia, Vorster v Strydpers Bpk an andere 1973 (3) SA 482 (T).

charge is inferred must be cited in the original publication.

The general charge is in its usual form an inference drawn from one or more particular instances. The question arises: how many particular instances need be proved before a general charge will be regarded as 'substantially justified'? One English writer has attempted to answer this question quantitatively,[1] arguing that where a charge is made in general terms it is enough to prove more than two specific instances of the behaviour alleged. Thus in Lambri v Labouchere[2], for example, the allegation that plaintiff was a 'card sharp' was held to be justified by proof that on two occasions he had conspired with others to cheat at cards. Similarly, proof that the vendors of plaintiff's pills had been convicted of manslaughter in respect of two persons who had taken the pills was sufficient to establish the general charge that plaintiffs were 'scamps and rascals pursuing a system of wholesale poisoning'.[3] Three instances of proven misconduct were also held sufficient to justify a general charge of disgraceful conduct against a solicitor.[4]

In South African case law, a defendant was held to have justified a general charge of corruption by proving 11 of the 16 charges of misconduct he had alleged in his particulars, and the court suggested that the defence would have succeeded had fewer been

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1) Odgers at 569 and 605.

2) 14 Cox 419.

3) Morrison and another v Harmer and another 3 Bing 759.

4) Moore v Terrel 4 B and D Ad 870.

proved.[1] In Verwoerd v Paver[2], the defence to an action arising out of a charge that a newspaper editor had falsified news was allowed, even though the defendants failed to prove all the particulars relied on in support of their plea.[3]

An attempt by counsel to argue that a general rule can be deduced from these cases that only two or three specific instances need be proved to support a general charge has, however, been rejected as 'too wide'a view:

> No general rule is to be deduced from cases in which it happened that proof of two or three instances was held to be sufficient, except the general rule that the defendant need prove no more than what may be held to justify the general charge in the circumstances of the case, and every case depends on its own circumstances.(4)

Thus in Hauptfleisch v Die Nasionale Pers[5], it was held that there was no justification for saying of a medical practitioner that he was a 'negligent doctor' simply because on one occasion he had committed a negligent act in attending a patient. Similarly, it has been tacitly accepted that a general allegation that plaintiff was a criminal would not be justified by proving the commission of one offence committed in the distant past.[6] Where the past conviction was relevant to an attempt to expose current misconduct, however,

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1) Kennedy v Dalisile 1919 EDL 1 at 9.

2) Verwoerd v Paver 1943 WLD 153.

3) At 205.

4) Kennedy v Dalisile, supra, at 9.

5) 7th June 1939, unreported. Cited in Weichardt v Argus Printing and Publishing Ltd 1941 CPD 133.

6) Weichardt v Argus Printing and Publishing Ltd, supra, at 140.

such publication was permissible.

On the recorded case law, it is therefore impossible to lay down a general rule relating to the question when in any particular case sufficient evidence is available to raise a plea of truth and public benefit in a case arising out of a general charge. In each case, the court must determine whether the evidence adduced conveys substantially the same sense as the words in which the statement was couched.

Where conditions are described in general terms, the defendant need not prove that they are universal, in the sense of being everywhere and invariably present in the place referred to, but only that there was a 'substantial possibility' that a member of the public would have encountered conditions there at the time which would have justified a similar description.[1] Where, however, the charge takes the form of a description of a personal experience of the defendant, it will be enough to prove that the defendant personally experienced the conditions decribed.

But where an inference that others had shared the defendant's experience can be read into the charge - as, for example, where it is expressed in the first person plural - the defendant must be able to show that a 'substantial number, though not necessarilly the majority' of the people present were subjected to the conditions described in the charge[2].

It may be that the plaintiff is able to produce credible

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1) Johnson v Rand Daily Mails 1928 AD 190 at 198.

2) At 190.

witnesses who give favourable evidence and judgments as to the conditions in the place referred to in the charge. In this case, the evidence for the defendant will not necessarily be rejected, for the evidence must be weighed as a whole:

> If, then, the witnesses (for the defendant) give as their individual experience the state of things described...the defendant has justified...and not the less because others...were more fortunate in not experiencing these conditions.(1)

4.Evaluative statements

Charges couched in evaluative terms present special evidential problems. These are typically expressed in words that can be measured in degree, for example, 'drunk', 'immoral' or 'incompetent'. Statements of such a nature present a two-fold problem: first, it must be established when a particular state is such that it can be described by the term in question; second, whether a particular state of being or behaviour pattern warrants the description may be open to debate.

What kind of evidence is required to satisfy the court that the use of such a term was justified? In most of the cases in which imputations of this class were at issue, the courts have fallen back on the aphorism that the defendant need prove only the 'substance' or 'gravaman' of the charge:

> Where incompetency is alleged of a caterer or where matters are described which will not necessarily appear the same to two different persons, the defendant is not

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1) Per Stratford JA, Johnson v Rand Daily Mails 1928 AD 190 at 199.

> required to justify every detail when in fact the gravaman of the charge has been amply justified.(1)

With respect, however, this dictum begs the crucial question: how does one decide when the gravaman of the charge has been justified in the case of a statement expressed in evaluative terms which reflects an essentially subjective view?

Philosophers would, no doubt, deny the existence of an absolute criterion for the truth of such statements. But the courts have perforce to adopt a more practical approach. Thus in Amdur v Haddad[2], for example, the court simply ruled that the evidence was sufficient to justify a charge of incompetence against a tailor even though he conceeded that there was evidence to show the plaintiff's competence.[3]

In most cases, however, 'reasonable persons' will differ on the question of degree rather than draw totally contradictory conclusions from a given set of facts. Where this is the case, the courts will themselves decide on the relevant criteria for verification in terms of the probable judgment of the average person who observed the action or condition cited in justification. Thus in Course v Household[4], the court acknowledged that it was 'difficult to give an exact description of when a man is drunk,' but rejected the argument that a charge of drunkenness could be justified only in

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1) Johnson v Rand Daily Mails 1928 AD 190 at 205-6.

2) 1911 OPD 9.

3) At 11.

4) 1909 NLR 188.

the case of absolute insobriety.[1]

It was accepted that evidence of the plaintiff's 'prolonged, loud and incoherent speech' at the meeting in question justified the inference that he was in a state of intoxication, 'or what is called the worse for liquor'. In other words, the court said, the plaintiff's condition at the public meeting gave every justification for the deduction by the members present, including the defendant, that he (the plaintiff) was 'what is commonly called "drunk"'[2].

Again, the charge that catering facilities at a restaurant were 'indescribably filthy' was accepted as proven because, although the charge described the personal experiences and deductions of the defendant, the evidence went to show that 'a substantial number of customers (not necessarily a majority) were subjected to the conditions depicted in the letter'[3].

The inference drawn from the evidence must conform to the meaning communicated by the words used in the imputation. This means that it would be insufficient for the evidence to demonstrate a condition so different in degree from the condition alleged that it warrants a wholly different designation. Thus it has been held insufficient to lead evidence showing that plaintiff was merely slow, unsuccessful or negligent to justify a charge that she was 'incompetent'.[4]

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1) Plaintiff's councel advanced the following poetic definition of the word: 'Not drunk is he who from the floor/Can rise again and still drink more;/But drunk is he who helpless lies,/ Without the power to drink, or rise.

2) Course v Household, supra, at 197-8.

3) Johnson v Rand Daily Mails 1928 AD 190 at 199.

4) Middler v Hamilton 1923 TPD 441 at 450. See also Urquhart v Mackenzie Bros 1904 N 143 at 146.

5. Expressions of opinion

The question of proof becomes still more intractable when the charge takes the form of an expression of personal opinion. Such statements make no factual claim about circumstances existing outside the mental convictions of the publisher. Thus the statement 'I think/ believe/am convinced that/suspect that X is a thief' does not logically or necessarily imply that there is evidence, external to the speaker's cognitive processes, that can be adduced to verify the allegation. It simply says that there is something about the state of my mental convictions that convince me that X is a thief.

In spite of the incorporation into the South African law of the English law defence of fair comment, our courts have accepted that truth and public benefit may be pleaded in an action arising out of a statement couched in the form of an expression of opinion.[1] The reverse, however, does not apply; the defence of fair comment will not protect 'mere allegations of fact'.[2]

In Johnson v Rand Daily Mails,[3] for example, the defence of truth and public benefit (referred to by the court as justification) was allowed even though the allegation took this form: 'As for the arrangements for the refreshment of visitors, I consider them positively disgraceful.' Defendant had to lead evidence that the conditions in the restaurant were such as to satisfy the court that, objectively speaking, they could be labelled as such.

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1) Crawford v Albu 1917 AD 102 at 114. See also Marais en 'n ander v Richards en 'n ander 1979 (1) SA 83 (T) at 89-90.

2) Crawford v Albu, supra, at 114.

3) 1928 AD 190.

Thus the courts will not accept that the defendant's subjective beliefs are relevant to the plea; to justify the comment, the defendant must prove that opinion was a justifiable inference from the facts:

> The slanderer is justly required to prove not merely that he had reasonable and probable cause to believe what he said but that what he said was literally true...(1)

A comment may take the form of a statement of fact where the fact so stated appears to be a deduction from other facts.[2] Where this is the case

> ...The defence that a matter of opinion or inference is true is not that the defendant truly made that inference or truly held that opinion, but that the opinion or inference or both of them are true.(3)

Thus

> ...The plea of justification must not only be as broad as the literal language of the libel, but as broad as the inferences of fact necessarily flowing from the literal language.(4)

The courts will therefore read into imputations couched in the form of comment a necessary inference that factual evidence exists to back the assertion. Not only must the factual evidence be adduced

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1) Williams v Shaw (1884) 4 EDC 105 at 149.

2) Crawford v Albu 1917 AD 102. This case demonstrates the difficulties the courts may have in distinguishing between statements of fact and comments.

3) Sutherland v Stopes (1925) AC 47 at 75.

4) Johnson v Rand Daily Mails 1928 AD 190 at 205.

in justification, but the defendant must show that the inference drawn from the evidence is correct.[1]

It is submitted further that where the comment is such that it can be said to arise inevitably out of the facts, proof of the facts amounts to a justification of the comment. But where the comment goes further than the facts asserted, and asserts by implication further facts, the additional facts must also be proved. Thus where the factual statement discloses a particular act (eg. that plaintiff had on one occasion performed an immoral or dishonest act) and the comment upon it makes a further general claim about the plaintiff's character (eg. that he 'thought nothing of walking down the street with the biggest prostitute in town', is an inveterate drunkard, etc.) the further claim contained in the comment must be proved independently.

On the other hand, where the comment merely reinforces the factual claim, proof of the latter will be sufficient. So, for example, where the plaintiff was charged with fraudulent conduct with respect to a certain memorandum and the defendant had added that there was 'nothing too base for him to be guilty of' proof that plaintiff had fraudulently denied his signature to the memorandum was held to be sufficient justification of the words cited because the comment simply meant that the plaintiff had acted very basely, which was not a new imputation but a different way of putting the factual assertion.[2]

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1) Contra the defence of fair comment, in which the defendant need not show that the comment is true, but merely that it was a bona fide expression of his opinion - Crawford v Albu 1917 AD 102.

2) Tighe v Cooper (1857 7 E and B 639). For further discussion of English law on this point, see Clarke and Lindsell on Torts at 1722.

Where, however, the imputation contains a generalised comment which is not a necessary inference from the facts proved, it will not be justified. So the claim in a newspaper headline that was plaintiff was a 'horse stealer' was held not to be justified by proof of circumstances which tended to throw suspicion on the plaintiff of the theft of a horse, since the word 'horse stealer' imputed actual guilt, which was not a necessary inference from the truth of the rest of the libel.[1]

6. Anterior Conduct

In many cases, the acts imputed to the plaintiff will coincide in time with publication of the charge. In others, however, there is some discrepancy in time between publication and the performance of the act or acts upon which the charge is based. Where this is the case, proof of the charge requires the leading of evidence relating to facts performed at some stage before publication. In cases where the proven charge is precise - e.g.' X did Y 15 years ago' - the problem is whether publication can be said to be in the public interest.[2] The problem of evidence arises in the case of general imputations which imply that the character of the plaintiff is still tainted by actions performed at some time in the past. To what extent, for example, can I rely on evidence that X stole something in the past to justify the statement 'X is a thief'?

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1) Mountney v Watton (1831) 2 B and Ad. 673, cited Clarke and Lindsell on Tort, 1 722.

2) On which see infra, 188-90.

Our courts are loth to accept that a person can never purge himself of the taint of criminal or other misconduct. Protection, as we shall see[1], is accorded the reformed transgressor by the rule that it is not in certain circumstances considered to be in the public interest to disclose past misdemeanors. There is, however, a further rule that statements implying on the basis of past evidence that a plaintiff is still engaged in or has a predisposition to engage in wrongful or delinquent behaviour will in certain circumstances not be accepted as 'true'. Thus where the sense conveyed by the imputation is that the plaintiff is still guilty of the conduct charged, or that his character is still of a nature such as to predispose him to activities similar to those in which he indulged in his past, it will not necessarily be enough to lead evidence of his earlier conduct. It has been held, for example, that a charge of theft or negligence cannot be proved by leading evidence showing that the plaintiff committed an offence or was negligent sometime in the past.[2]

This rule cannot, however, be applied inflexibly. There is, as was pointed out, frequently some lapse of time between publication of a charge and the performance by plaintiff of the act or acts from which the charge was inferred. The admissibility or probative value of anterior conduct must depend on (a) the meaning of the words at issue, as determined from their context, and (b) the extent to which

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1) See infra, 150-55.

2) Weichardt v Argus Printing and Publishing Ltd 1941 CPD 133 at 141, citing the unreported case of Hauptfleisch v Die Nasionale Pers; see also A.R.B. Amerasinghe, Defamation, 469.

the conduct proved can be said to form part of an enduring condition, pattern of behaviour or personality trait.

With regard to (a), a special problem arises. Once a person has engaged in certain forms of misconduct, he acquires a designation which from a linguistic point of view becomes permanently applicable. Once X has been convicted of murder, for example, he remains, for purposes of ordinary discourse, a 'murderer'. Semantically-speaking, I am therefore correct in calling X a murderer if I can prove that he was convicted of murder at any stage in his past.

The courts will in certain circumstances accept evidence of anterior conduct. For example, in Weichardt v Argus Printing and Publishing Co and others[1], proof of an offence committed 26 years before publication was admitted in justification. The defendant published details of plaintiff's treasonable activities during World War I, for which he had been convicted but subsequently pardoned. The court found that the disclosure justified on the ground that at the time of its publication - 1940 - South Africa was again at war with Germany. It was held:

> ...All these publications which the plaintiff complains of are concerned with the plaintiff's conduct both prior to, and during, the (present) war, and the alleged subversive activities on his part under the influence of, and at the instigation, of German agents. Under these circumstances, it does not seem...irrelevant to inquire into the plaintiff's conduct during the last war, when the alleged unfaithfulness and hostility of his conduct during the present war was made the subject of inquiry.'(2)

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1) 1941 CPD 133.

2) At 141.

Thus because the defendant's objective was to expose present misconduct, publication of a past conviction was deemed justifiable. The disclosure of past actions could not be taken on its own, but had to be seen as forming 'a chain of attacks' aimed at exposing current subversive activities, of which the exposure of a specific detail of the plaintiff's past was merely a link.[1]

Evidence has also been admitted of acts of fraud committed 30 years before publication in support of a charge that was determined to mean that plaintiff '...is an imposter...(and) a dishonest, fraudulent person'. The evidence of the past act of fraud was accepted because the rest of the defendant's evidence showed that the plaintiff had persisted in claiming the false identity that had enabled him to commit it[2].

The courts are prepared to accepts that certain categories of acts are manifestations or reflections of enduring character traits. For example, in Yutar v South African Associated Newspapers and others[3], Steyn CJ noted, in respect of an allegation of unfitness for public office, that such unfitness could arise from qualities of the individual which were

> ...inherent in his mental equipment, make-up, disposition or turn of mind...Their presence or absence is not a fugitive feature which is there at one moment and gone the next.(4)

Although the case turned on the admissibility of evidence discovered

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1) Weichardt v Argus Printing and Publishing Ltd, supra, at 140-41.

2) Yusaf v Bailey 1964 (4) SA 117 (W) at 127.

3) 1967 (3) SA 454 (A).

4) At 458.

after publication of the allegedly defamatory statement, the learned Chief Justice added obiter that the charge was also 'an invitation to survey his (plaintiff's) past performance up to the date of the statement'.[1]

7. Evidence of acts committed after publication

Occasions may arise where a person makes a derogatory imputation about another on the basis of a well-founded suspicion but lacks at the time sufficient evidence to satisfy the requirements of the defence. In this case, he may be forced to adduce evidence of acts committed or conditions prevailing after publication as proof that the imputation was true at the time of publication. Under what circumstances are the courts prepared to allow such ex post facto evidence?

With the exceptions of predictions, the truth of a statement depends on its relationship to facts that existed before or at the time of publication. The statement 'X is a thief' cannot be rendered true ex post facto, that is, if X steals for the first time after its publication. Because the imputation was untrue at the time of publication, it remains untrue forever after.

It has, in fact, been frequently laid down that to justify a statement the defendant must confine himself to evidence relating to facts which were already in existence at the time of publication.

In Williams v Shaw[2], for example, one of the charges was that

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1) South African Associated Newspapers v Yutar 1967 (3) SA 454 (A) at 458.

2) (1884) 4 EDC 105.

plaintiff was a liar. The defendant attempted to prove various instances of untruths told by plaintiff subsequent to the publication of the defamatory statement. More than 20 instances of alleged falsehoods were attributed to the plaintiff in the defendant's particulars, but those allegedly perpetrated after publication of the charge were dismissed by the court as irrelevant and therefore inadmissible. The court refused to accept the argument by the defendant that proof of later untruths supported a general imputation of want of character on the part of the plaintiff.[1]

Similarly, in Kennedy v Dalisile[2], the court ruled inadmissible proven acts of dishonesty committed by plaintiff after publication of the charge.

Neither case is, however, authority for a general rule that evidence of acts committed after publication is always inadmissible. In fact, such a rule has been expressly rejected. In Kennedy's case, the court pointed out that the question of admissibility of evidence depended on the meaning of the statement. Hutton J noted that neither in the summons before him, nor on the facts of Williams v Shaw, had it been suggested that the words spoken '...meant that plaintiff was likely to do the acts attributed to him, but that he was doing them'.[3]

It can therefore be assumed that where the statement at issue suggested that the plaintiff was possessed of a character such that

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1) Williams v Shaw, supra, at 163.

2) 1919 EDC 1.

3) At 10.

he was likely to perform the acts at the time of publication, ex post facto evidence of acts committed a reasonable time after publication will be admissible.

Thus Steyn CJ said of the judgment in the Williams case:

> It may be that the statement (that plaintiff was a liar) related to past utterances only. (But) if it meant that the plaintiff was a liar by disposition, I can see no escape from the conclusion that the evidence was wrongly be held to be irrelevant.(1)

The Appellate Division has accepted the English judgment of Maisel v Financial Times Ltd[2], in which evidence was led of dishonest acts performed by plaintiff after publication of the charge. Plaintiff had himself alleged the words to mean that his character was such that he was likely to misappropriate the funds of companies with which he was connected. It was held by the English Court of Appeal, confirming the decision of the court a quo, that in a case of libel on character and reputation, evidence of acts which occurred a reasonable time after publication was admissible if it went to show the existence of an alleged tendency.

The courts have extended this principle to cases where allegations were made regarding more or less enduring attributes of character, such as incompetency or unfitness for a particular position, which are inherent in the mental equipment, disposition or character of the plaintiff. In South African Associated Newspapers v Yutar[3], Steyn CJ held that the presence or absence of

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1) South African Associated Newspapers v Yutar 1967 (3) SA 454 (A) at 458 G.

2) (1915) 3 KBD 336.

3) Supra.

these characteristics was not a '...fugitive feature which is here one moment and gone the next'. They could accordingly not be held to be confined to a particular date.

> To say of a man that he is unfit for office is not merely an invitation to survey his past performance up to the date of the statement. It inevitably raises the prospect of significant behaviour in the future.(1)

If the unfitness were a fact it would be proved not only by conduct performed prior to publication of the charge. Subsequent conduct would be as relevant to demonstrate the presence of disabling qualities as anterior conduct. The only limit set by the Appellate Division is that the conduct should not be so remote from the date of the charge as to be of no probative value.[2]

Similarly, in cases where the alledged defamatory statement takes the form of an explicit assertion that the plaintiff was of a character that predisposed him to act in a particular manner:

> ...It is possible that evidence might be relevant of acts of the plaintiff done within a reasonable time after the date of publication.(3)

Evidence of facts existing after publication of the charge has also been ruled admissible in cases involving statements alluding to physical conditions. In Feldt v Bailey and Others[4], the court accepted that ex post facto evidence was always admissible where relevant, and that evidence was always relevant where it was of some

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1) South African Associated Newspapers v Yutar, supra, 458 C-D.

2) At 458 E.

3) Erasmus v Scott, Prigge v Scott 1933 Natal 271 at 278.

probative value. In the case of ex post facto evidence led in justification, probative value was to be determined according to whether an inference could be drawn from the evidence about the state of affairs existing at the time of publication.

Thus where the substance of the charge was that living conditions for labourers on a farm were inhumane, evidence demonstrating the state of those conditions soon after publication of the statement was admissible because

> The evidence of the living conditions existing on the 17th May (a week after the date of publication)...may well have enabled the defendants (and the Court) to draw the inference therefrom that a similar state of affairs existed a week previously and therefore it is relevant to the issue in the case, namely, the living conditions prior to publication of the article.(1)

In Erasmus v Scott[2], the court was prepared to allow evidence of construction work done after the charge that a hotel was 'jerry built' only if defendant could prove that the subsequent work was 'inseparably connected' with those parts of the building completed at the time of publication. Evidence relating to all later work was inadmissible, except by way of cross-examination to discredit witnesses.[3]

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1) Feldt v Bailey and others 1961 (4) SA 545 (W).

2) 1933 NPD 271.

3) A good example from the English law of why ex post facto evidence should be admissible is provided the facts in McGrath v Black (1926) 95 LJKB 951, in which proof that plaintiff was suffering from delirium tremens the day after publication was held to justify the charge that he was addicted to drink.

8. Evidence of facts of which defendant was unaware at the time of publication

May the defendant adduce evidence of which he had no knowledge at the time of publication?

In this respect, the Appellate Division has drawn a distinction between evidence led in support of the plea of fair comment and that led to sustain a plea of truth and public benefit. Comment based on facts of which the defendant was unaware cannot be said to be 'fair'. In the case of a plea of truth and public benefit, however,

> ...The defendant is entitled to found upon any facts available, whether known to him at the time or not. The issue is simply whether the statement made was true.(1)

Thus in Middler v Hamilton[2] a doctor was allowed to lead evidence of facts existing at the time of publication, but only discovered by him later, in his attempt to justify a charge of incompetence against the plaintiff[3].

The effect of proof of the truth of the imputation on damages

In English and American law, in which the defence of truth is based on the view that a defendant who has no reputation to lose cannot complain where the facts about his character are made public, the question whether the truth of a defamatory statement should

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1) Crawford v Albu 1917 AD 102 at 120.

2) 1923 TPD 441.

3) At 283.

mitigate damage does not arise - proof that the defamatory charge is true simply puts an end to the plaintiff's case. Where, however, the defence is raised but fails, the courts are likely to regard this as an exacerbating factor; as Prosser notes, the defence can be a perilous one.[1]

On the other hand, where the defendant succeeds in partially proving the facts alleged - for example, when the evidence goes to show that the plaintiff had stolen a smaller amount than that claimed - partial proof will be taken into account in mitigation of damages.

In South African law, evidence which merely shows that the imputation is partially true in this sense will not necessarily be sufficient to render the defamatory allegation lawful, but will affect the assessment of damages[2].

Thus in Sutter v Brown[3] the allegation involved the disclosure of an indictable offence, but the defence of truth and public benefit failed because the statement was held to have conveyed by innuendo the commission of a more serious offence than that proved by the evidence. Proof of the less serious offence was, however, held to mitigate damages. Similarly, in Williams v Shaw, the court found that the defendant had failed to prove his charge 'to the hilt', but allowed the plaintiff only nominal damages because the evidence was

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1) Prosser, Torts, 277-8. For the position on the point in English law, see Clerk and Lindsell, 1 727.

2) Martheze v Van Reenen (1836) 3 Menz 3 at 14.

3) 1946 AD 155.

sufficient to show that the plaintiff had not come to court as 'an entirely blameless party'[1].

Where the defendant succeeds in establishing the truth alone of the imputation, but not the element of public interest, the truth will be taken into account in mitigation of damages. Initially, the courts would not allow evidence to establish the truth of the imputation unless the defences of fair comment or truth and public benefit had been pleaded. Thus, after pleading the general issue, evidence to establish the truth of the imputation could not be led even for purposes of mitigating damages.[2] Later, however, nominal damages were awarded a plaintiff where the defendant had in connection with his general plea proved such impropriety on the part of the plaintiff '...as to reduce damages thereon to a nominal amount'.[3] The Appellate Division has authoritatively laid down, however, that the truth may be pleaded in mitigation of damages whatever the defence initially set up by the plaintiff.[4] In Hayton v Hayton,[5] the truth of an allegation of adultery was taken into account for purposes of the assessment of damages even though it had not been specifically pleaded in mitigation.

It would appear that the courts have allowed proof of the truth alone to mitigate damages as a via media between the English law

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1) (1884) 4 EDC 165 at 176-77.

2) Martheze v Van Reenen (1836) 3 Menz 14.

3) Hart v Constatt and Norden (1846) 3 Menz 548.

4) Per Innes CJ, Sutter v Brown 1926 AD 155 at 172.

5) 1936 SALJ 503.

rule that the truth will exonerate a defendant completely and the South African rule that truth will never provide a defence unless its publication can be shown to have been in the public interest. In several cases, the courts have in fact explained why they are prepared to take the truth into account in mitigation of damages in terms of the same reasoning by which the English and American courts have evolved the rule that the truth will exculpate completely. Thus it was said in Leibengruth v Van Staden[1]:

> When the truth is pleaded in mitigation of damages, the question which the court has to consider is, what is the character of the person who asks the court to vindicate his character?....If a person comes to court and asks it to vindicate his character, and there is anything against his character which can be brought up in mitigation of damages, the defendant is clearly entitled to do so. Otherwise, a person might be able to obtain damages to which, having regard to his character, he was not entitled...(2)

This view is clearly an application to the law of defamation of a form of 'unclean hands' doctrine - the courts will not protect those who come to them for relief unless they can show themselves to be deserving of protection. The reasonableness of the defendant's belief in the truth of the imputation has also been held to mitigate damages.[3]

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1) 1910 TPD 1 203.

2) Per De Villiers JP at 1 208. See also Daniel v Denoon (1897) NLR 125 and Van der Berg v Van der Watt (1897) EDC 55 at 61.

3) See Subramaini v Mohideen (1945 NPD 296 at 297), in which the proven facts were held to have mitigated damages because the conduct of the plaintiff was seen to have been such as to give rise to a reasonable suspicion in the mind of the plaintiff, even though the evidence adduced did not go so far as to justify the gravaman of the imputation.

Where, however, the defence has been raised unsuccessfully, the courts may regard this as an aggravating factor when it comes to the assessment of damages. Scholtz v Stoffberg[1], in which the court regarded the fact that the plaintiff did not seek to justify as a mitigating factor, gives an indication of the degree to which the courts have been inclined on occasion to frown on an unsuccessful plea of truth and public benefit.[2]

In Buthelezi v Poorter and Others[3], it was laid down that an unsuccessful plea of justification 'seriously aggravates damages'[4]. Lest a defendant should be unfairly prejudiced for raising a recognised defence, however, this rule should be treated with caution. The circumstances of Buthelezi's case were unusual. Defendants had pursued the defence of justification both on affidavit and in the pleadings until the very afternoon preceeding the trial, whereupon the defendants had without explanation withdrawn the defence and in place thereof admitted that the defamatory article in question was false, malicious and written with the intention of injuring the plaintiff's good name and reputation.[5] It is respectfully submitted that the court rightly regarded this volte face as an aggravating factor. As Williamson AJ said:

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1) (1908) 18 CTR 417.

2) See also Williams v Shaw (1884) 4 EDC 105.

3) 1975 (4) SA 608 (W).

4) At 616 A.

5) See also at 610 et seq., esp. at 612 D-F.

> The damages must be even heavier where the defendants, instead of attempting in good faith to prove their plea, abandon it at the last moment without apology.(1)

In the English law, a failed defence of justification is regarded as an aggravating factor because it is a form of repetition of and persistence in the charge[2]. The position is the same in some American jurisdictions, where it has been held that a plea of justification, if not proved, is evidence of continuing malice which may be taken into account in the assessment of damages. According to Prosser, however, the modern American cases have tended quite properly to recognise that the defendant is entitled to present an honest defence without being penalised, and have limited such aggravation to cases where it appears that the defence was entered in bad faith, without evidence to support it.[3]

It would seem that the position is the same in South African law. None of the Appellate Division cases cited in Buthelezi's case provide unqualified support for a rule that the mere attempt to raise a plea of truth and public benefit should, if unsuccessful, necessarilly aggravate damages.

In South African Associated Newspapers v Yutar[4], Steyn CJ regarded as an aggravating factor appellant's repetition of the charge, and persistance in claiming its truth, in one of its newspapers. He said:

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1) Buthelezi v Poorter and others, supra, at 616 A-B.

2) Warwick v Foulkes (1844) 12 M and W 507. See also Gatley at 1206.

3) Prosser at 719, citing inter alia as evidence for the more modern approach Webb v Grey 181 Ala. 408 and Las Vegas Sun Inc v Franklin 1958 74 Nev. 282.

4) 1969 (2) SA 442 (A).

> Added to this there is is the further fact that the appellants have throughout persisted in the attitude that the accusation directed at the respondent is justified.(1)

The plea of justification was therefore but one of the factors taken into account in assessing damages, and had to be seen in relation to the plaintiff's conduct outside the court.

In Gelb v Hawkins[2], the defence was also taken into account in conjunction with other circumstances:

> ...The respondent's unrepentant attitude prior to publication is shown by the facts that he sought to appeal against the whole of the judgment of (the court a quo), and thereafter he pleaded a bona fide belief in the truth of the accusation, and he expressly refused to pay any costs and had to be compelled to do so by execution. In addition to the factors which I have mentioned, in my view the court a quo did not sufficiently take into account the fact that it is a grave and ugly thing falsely to say of an attorney that he...was a party to the leading of perjured testimony.(3)

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1) South African Associated Newspapers v Yutar, supra, at 455 G-H. Emphasis added.

2) 1960 (3) SA 687 (A).

3) Per Holmes AJA (as he then was), at 693 E-G. Emphasis added.

Chapter 3

PUBLIC BENEFIT

INTRODUCTION

The law in England and most of the United States of America accepts the truth of a disclosure that causes injury to personality as a sufficient defence to a civil action for libel or slander.[1] The Roman-Dutch civil law authorities were, however, not prepared to accept the implications of a rule that allowed individuals publicly to disclose details relating to the private lives of others with complete impunity. In spite of dispute over the circumstances in which the truth should afford a defence to an action for defamation, the courts of the Cape, Transvaal, Orange Free State and Natal had generally accepted by the end of the 19th Century that proof of the truth alone of the imputation at issue would not necessarily serve to exonerate the defendant who had maligned another. Although some uncertainty was expressed on the point by the Appellate and Provincial Divisions of the Supreme Court of South Africa, the additional requirement of public interest was accepted by the Appellate Division by the 1960s.[2]

The words of Lord De Villiers, who as Chief Justice of the Cape played a leading role in elevating the requirement of public benefit to the status of a necessary element in the defence, still effectively summarise the current law:

> The truth is an ingredient and a very important ingredient in the defence, but unless the declaration discloses some circumstances showing that advantage was to be derived from publicity of the charge, the defendant cannot rely

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1) On which see supra, 59-62.

2) South African Associated Newspapers v Yutar 1969 (2) SA 442 (W). The incorporation of the requirement of public benefit into the South African law is outlined in Chapter I supra.

> for his defence upon the truth alone, but must, in his plea of justification, disclose some circumstances, or, at all events, aver that public benefit was to be derived from publication of the truth.(1)

In South African law, as was the case in Ceylon[2], there are therefore two distinct elements to the this form of justification.[3] In the first place, the defendant must prove that his charge is true[4]. If the statement is found to be true, the court must then be satisfied that its publication was for the public benefit.

The South African courts have thus chosen to limit the individual's right to freedom of speech to the extent that he cannot with impunity under all circumstances disclose true details about the conduct, past or present, of his fellow citizens. Commensurately, they have extended to the individual a wider degree of protection for details of his private life which he may not wish to be disclosed publicly.

The law on this point in England and the United States rests on the principle that, since defamation is an injury to a man's reputation,

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1) Botha v Brink (1878) Buch 118 at 124.

2) On which see ARB Amerasinghe, Defamation, and CF Amerasingh, Injuries.

3) See, inter alia, Van der Merwe and Olivier, Onregmatige Daad, 369-71; ARB Amerasinghe, supra, 502; Strauss, Strydom and Van der Walt, Persreg, 264-67; Nathan, Defamation, 199-204; Ranchod, Foundations, 158; CF Amerasingh, supra, 87-92.

4) Subject to the possible exception of cases of 'newspaper privilege' - see Zillie v Johnson and another 1984 (2) SA 186 (W), discussed below at 203-7.

> ...if people think the worse of him when they hear the truth about him that merely shows that his reputation has been reduced to its proper level.(1)

Both for reasons of social policy and considerations of legal principle, the South African courts have rejected this view as excessively harsh. The requirement of public benefit has entered our law essentially as the product of an attempt to balance the individual's right to reputation and privacy against the interest of the general public to know the truth about the actions and characters of some of its members in certain circumstances. The meaning attached to the term 'public benefit' or 'interest' will therefore be a crucial determinant of where that balance is struck.

WHY PUBLIC BENEFIT?

On the one hand, there is the view that publication of the truth is always for the public benefit. As was said in Preller v Jordaan[2], the one South African judgment in which a judge argued at length for this view:

> It is of infinitely less consequence that one person should suffer for the consequences of his own misconduct through the existence of a certain rule than that the public should be made to suffer through the establishment of a hard and fast rule to the contrary.(3)

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1) Winfield on Tort, 321.

2) (1892) 9 CLJ, reprinted in De Villiers, Injuries, from which the following extract is taken.

3) Per Melius De Villiers CJ at 124.

On this view, the public benefit derived from a rule upholding the right to publish the truth in all circumstances outweighs the hardship that it might cause individuals in some cases.

On the other hand, there is the view, now firmly entrenched in our case law, that the law should acknowledge only as a general principle that the truth as to the character and activities of individuals should be free to be made known.[1] But circumstances had to be recognised which justified a limitation of the general rule, because certain categories of harmful and embarrassing disclosures, while true, may serve no public interest at all. The existence of a rule protecting all damaging imputations may in itself be said to be contrary to the public interest.

The reasons cited for the the rule limiting protection for true statements to those that can be said to be in the public interest are in fact invariably based on utilitarian principles.

Some judgments have denied protection to defendants in actions arising out of the publication of true but damaging statements out of consideration for the plaintiff's right to reputation established over time. For example, it has been held that publication of the details of long-forgotten misconduct was unfair because 'the worst characters sometimes reform'[2] and 'no man should go on crucifying another for the rest of his life'[3].

The gratuitous publication of unflattering details of an individual's past has also been said to be contrary to the public

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1) Per De Villiers CJ in Graham v Ker (1892) 9 SC 185 at 187.

2) Ibid.

3) Patterson v Engelenberg and Wallach's Printing 1917 TPD 350 at 361.

interest because 'some of the inducement to reformation would be removed if stories as to past transgressions could with impunity be raked up after a long lapse of time'[1]

Again, it has been argued that an absolute right to publish the truth might encourage undesirable practices. To condone the publication of the truth in all circumstances could 'afford undesirable encouragement and protection to the blackmailer'[2].

The dicta cited above do no more than adduce reasons why publication of the truth should not be protected in all circumstances. They do not, however, provide a juridical answer to the question why one who has published a true statement which is in the public interest should be protected from an action for defamation. The courts have now decided that publication of such a statement cannot give rise to an action because the publisher did not act wrongfully[3]. Absence of wrongfulness can in turn be explained in terms of any one of three factors.

In the first place, it may be argued that the defendant's right to personality is curtailed to the extent that his opprobrious conduct is such that the public needs to be informed of it. The general interest served by publication of such details simply outweighs the plaintiff's right to reputation, and the courts will protect the greater interest. Second, wrongfulness may be excluded because the public has a general right to information that can be said to be in its interest, and one cannot be said to have acted wrongfully if one has satisfied a public right. Third, the existence of a public right

1) Graham v Ker, supra, at 187.

2) Dunning v Quin and others 1905 TPD 35 at 39.

3) Infra, 211 et seq.

to certain information places a duty on the individual to disclose it in certain circumstances. By doing so he does not act wrongfully. Thus it has been held that the plaintiff's actions were of such a nature '...as to make it the right, nay the duty, of every honest man to publish the official misconduct'.[1]

In terms of this line of reasoning, the lawfulness of the statement alleged to be defamatory is to be assessed in terms of its consequences for the public, either actual or potential. But when can the consequences of a statement be said to be such that they are for the public benefit? And who or what is this public, the interest of which must be served if a statement is to be deemed lawful? These questions fall to be considered in the next section.

THE TERM 'PUBLIC BENEFIT'.

How do the courts define the concept 'public', for whose benefit or in whose interest the true statement must be if it is to be regarded as lawful? In the present section, both terms will be analysed.

1. Public

The Roman-Dutch authorities generally spoke of the interests of the rei publica, which some translators render as 'State' and others as 'the community'. Voet also regarded as inactionable statements which disclosed 'matters of public concern.[2]

Although some writers would excuse only those damaging

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1) Mackay v Philip (1830) 1 Menz 455 at 463.

2) Voet, Commentary, 47.10.9.

statements which were disclosed to state officials, there is no reason to believe that they were prepared to exonerate only those who had published statements in the interests of the State per se.

The tendency of the law is to equate the interests of the State with the interests of the social collectivity of which it is the institutional expression. From an early stage, the South African courts rejected the argument that the Roman-Dutch authorities should be interpretted as limiting the class of those statements deemed to be in the public interest to those made formally to the State authorities.[1] In Patterson v Englenberg and Wallach's Ltd[2], Wessels J put the question this way:

> Is it for the benefit of the large public - quod manifestum fieri reipublicae interest - to rake up an old story of what took place in a war seventeen years ago? If it were a crime for which (the plaintiff) had been punished, it could clearly not be resuscitated, unless in the interests of the State the occasion demanded it. A fortiori, a scandal cannot be raked up unless it is done for the public benefit...(3)

The 'public' for whose benefit the injurious statement must be published is thus construed in general terms. It has frequently been laid down that for an interest to be deemed public it must serve the advantage of the wider public, rather than of some sectional group. For example:

> It is not enough to show that the subject matter (of the defamatory statement) is of interest only to a small section of the public, or to the public in a limited district.(4)

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1) Michaelis v Braun (1886) 4 SC 205 at 208-9.

2) 1917 TPD 350.

3) At 361. Emphasis added.

4) Ibid.

One cannot, however, elevate this and similar dicta to the status of an absolute rule. There are in fact a number of cases in which the statement at issue was deemed to be in the public interest even though the actions disclosed concerned only a limited number of people within a particular locality. In Kennedy v Dalisile[1], for example, the corrupt acts of the plaintiff magistrate affected the residents of three locations. So, too, in Van Wyk v Steyn[2], the disclosure that plaintiff was a convicted receiver of stolen sheep was held to be for the public benefit because there had been an epidemic of stock theft in the area in which he had been trading in sheep. In another case, a magistrate had found, apparently on the authority of Sparks v Hart[3] that a disclosure that a man had committed adultery was not in the public interest, and had awarded nominal damages to the plaintiff. On appeal, the Transvaal Provincial Division ruled:

> The phrase public interest has been taken somewhat too narrowly by the magistrate. If it were the interests of that little community which the defendant proposed to defend, I think it was sufficient justification for his use of the words, seeing that they were admittedly true.(4)

The concept 'public' cannot therefore be delimited numerically or geographically. Indeed, it is rarely that a statement can disclose information which can be said to be of actual benefit to the entire population, or to society in the abstract. In practice, many

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1) 1919 EDL 1.

2) 1924 OPD 68.

3) (1833) 3 Menz 3.

4) At 83. See also Amdur v Haddad, 1911 OPD 9 at 11.

disclosures have been protected even though they have served the interests only of limited groups.

Were the defence of truth and public benefit restricted only to those statements which served the interests of the public in the general sense, it would lose much of its utility.

Thus whether the subject-matter of a particular disclosure is in the public interest must be decided in principle. Publication of an injurious statement may be said to be in the public interest when it discloses information which, though in the particular case it is of immediate concern only to a few people, is of such a nature that knowledge of it would be of benefit to disinterested members of the public in general had they a personal interest in the matter at hand.

2. Interest

The nature of the interest that must be served to render lawful a statement alleged to be defamatory is impossible to define with precision. No distinction is drawn by the courts between the terms 'public benefit' and 'public interest'; they are often used interchangeably.[1]

Attempts have been made to delimit the concept of 'public interest' in terms of what it is not. Thus it has been held to involve the satisfaction of more than a mere passing interest or sense of inquisitiveness in discomforting, embarrassing or salacious

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1) See, eg., Patterson v Engelenberg and Wallach's Ltd 1917 TPD 350. and Lyon v Steyn 1931 TPD 247 at 252-3.

information on the part of members of the public:

> I need not discuss the phrase 'public benefit' as indicating that some members of the public may be interested in what may be published, because obviously that does not make the matter published a matter of public interest.(1)

It has also been held that a publication aimed merely at 'satisfying the salacious appetite of readers cannot be justified'[2].

Whether or not the requisite interest is served by the statement at issue appears to be established in terms if its effect, actual or potential, on the persons to whom it is published. If that effect is or might be merely the satisfaction of a passing or prurient interest in embarrassing information by some members of the public about others, the requirement will not be satisfied.

Thus the interest served by the allegedly injurious statement is assessed in causal terms. This test is clearly illustrated by the early judgment in Mackay v Philip. In that case, the disclosure of the unlawful acts of the plaintiff, a public official, was held to be for the public benefit because it

> ...roused the public voice to convey to the Government...that complaint and information respecting the conduct of the plaintiff, which would be sufficient to cause the plaintiff to be deprived of those powers which he had abused, and to procure an end to be put to that system which afforded opportunity for the existence of such abuses.(4)

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1) Per Clayden J in Coetzee v Central News Agency and another 1953 (1) SA 449 (W) at 452.

2) Yusaf v Bailey and others 1964 ($) SA 117 (W).

3) (1830) 1 Menz 455.

4) At 463.

In Kernick v Fitzpatrick[1], the court similarly described the interest served by publication of the allegedly defamatory statement in practical terms:

> When attempt are made to (blackmail) men who are entering public life, the sooner such men expose the attempts, and so deter others from indulging in similar practices, the better.(2)

These dicta represent the reasoning underlying most of the cases in which the defence of truth and public benefit was upheld because the statement at issue exposed criminal misconduct. Such disclosures clearly serve an end to which all members of society can be said to share a common interest: that of eliminating crime.

But the extension of the defence to statements disclosing misconduct falling short of crime strictu sensu can also be explained in terms of such causal reasoning. So, as we have seen, an allegation of adultery was held justified because the conduct of the plaintiff had an unsettling effect on the community in which it was carried on.[3] On the other hand, strictly private immorality committed by an individual alone or between consenting adults cannot be said to affect the wider society, unless it is of such a nature as to constitute a criminal offence or reveals an attribute of the character of the perpetrators which render them unfit for the exercise of some public capacity.

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1) 1907 TS 389.

2) Kernick v Fitzpatrick, supra, per Innes CJ at 393.

3) Groenewald v Homsby 1917 TPD 81.

3. 'Public Benefit' and Public Policy

The common element to be found in all judgments in which the public interest was held to be served by publication of statements which were damaging to the plaintiff's reputation is that some tangible and beneficial social end was found to have been served. These ends may take a variety of forms, and may benefit greater or fewer numbers of people. Whether the actual effect of publication renders the disclosure for the public benefit and hence lawful is guaged against the broad standard of what is desirable for the society at large. In short, the defendant must disclose circumstances which persuade the court 'that advantage is to be derived from publicity'.[1] 'Advantage' is not to be equated with the transient satisfaction of public curiosity, as this would make the defence so broad 'as to justify many a cruel libel'.[2] The term 'public benefit' seems more accurately to convey this sense than 'public interest'.

In deciding whether a particular injurious imputation is for the public benefit, the courts essentially weigh the balance between the advantage served and the disadvantage caused.[3] The social benefit must be of such a nature that it can be said to have outweighed the damage that may have been caused by its publication to the reputation of the individual referred to. Where the balance is

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1) (1878) Buch 118 1t 124.

2) Weil v Hardy (1906) Natal 192 at 199.

3) 'The extent of the defence involves in each case the resolution of two conflicting interests; the interest of the individual in his own good reputation and the interest of society in hearing of a matter of public concern' - Zillie v Johnson and another 1984 (2) SA 186 (W) at 195 D.

struck in any particular case is determined by reference to considerations of social policy, as is commonly the case in various branches of the law of delict.

4. 'Public Benefit' a Question of Fact

To preserve the discretion necessary if the law is to be used as an instrument of social policy, the courts have assiduously refrained from laying down any strict definition of the term 'public benefit'. Whether a disclosure is of sufficient advantage to the public to render it lawful is therefore, within the broadest ground rules, considered to be a question of fact to be determined according to the circumstances of each particular case.

The flexibility of the concept is well illustrated by the following dictum:

> The question of whether a thing is in the public interest is not a question of law but one of fact - it falls to be determined by reference to conditions which may vary from century to century and from country to country.(1)

What may deemed to be for the public benefit at one place and one time may therefore by judged otherwise at a later stage or in another place. Whether some public benefit was served by publication of an injurious statement depends on a number of surrounding circumstances; its presence or otherwise is not to be determined a priori. As was said in a recent case:

> All the circumstances must be examined to see whether the actual publication was of advantage to the public.(2)

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1) Per De Villiers JP in Van Wyk v Steyn 1924 OPD 68 at 71.

2) Per Beadle CJ in Mohammed v Kassim 1973 (2) SA 1 (RAD) at 10.

This means that whether a particular statement is for the public benefit

> ...is not a question of law but a question of fact which can hardly be determined by reference to Voet or any other authority.(1)

As was said in Stanley v Robinson[2]:

> It would be impossible to give an exhaustive statement of the subjects which a court would hold to be of public interest, and it is not desirable to endevour to do so. Obviously such a list must change from time to time, according to the changing conditions of society and the circumstances which surround a particular transaction....A matter may not be of public interest one year, but it may be of such interest at another time, owing to a change of circumstances. We must consider each case in the light of its own surrounding facts.(3)

We may agree, with respect, that it would be undesirable were the courts' discretion in this area to be fettered by too rigid a definition of the term 'public benefit'. But in a judicial system operating by precedent, the legal subject requires some rules, however broad, for predicting under what circumstances the courts will accept that the publication of an injurious statement enjoyed that quality.

Given the absence of an exhaustive statement by the courts of what matters and under what circumstances the publication of a damaging statement will be considered to be for the public benefit, we cannot proceed by definition. The body of precedent must be examined to determine the kinds of circumstances that have been held to justify the publication of such imputations against character.

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1) Per De Villiers JP in Van Wyk v Steyn 1924 OPD 68 at 71.

2) 1913 TPD 202.

3) Per De Villiers JP at 207.

DETERMINING THE PRESENCE OF PUBLIC BENEFIT

Factors which the courts take into account in determining whether a statement is for the public benefit can be classified under two broad heads:

1) those relating to the subject-matter of the disclosure;

2) the circumstances surrounding publication.

These will be examined in turn.

1. The Subject Matter of the Disclosure

The first matter to be considered in deciding whether a particular disclosure is for the public benefit is its content - i.e. the nature of the information disclosed. Statements which are injurious to personality may take an infinite variety of forms. An examination of the case law, however, indicates that they may be classified into various categories, some of which are, ceteris paribus, generally accepted as being in the public interest.

1.1. Disclosures of Criminal Activities

A class of statements which, with two exceptions[1], have been generally held to be for the public benefit are those which disclose

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1) See infra, 150-55.

indictable criminal misconduct by the plaintiff. Such statements were frequently cited by Roman, Roman-Dutch and Medieval jurists to illustrate the circumstances in which the truth should provide a defence to an action for defamation[1].

If the action disclosed constitutes an offence punishable by the State, it would seem that, subject to the exceptions discussed below, no attendant circumstances can render it actionable. Thus it has been held to matter not whether the disclosure was made to serve some selfish and private end of the publisher[2], or whether the misconduct was perpetrated by a private or a public figure[3].

This rule has frequently been laid down without qualification. So, for example, in Sparks v Hart, it was held as a general rule that the imputation was not actionable where it 'accused the plaintiff of an act which by law was punishable as a crime'.[4]

A number of reasons have been advanced for regarding disclosures of criminal misconduct as invariably in the public interest, irrespective of the circumstances of publication or the motive of the defendant.

One is that in such cases the presumption of animus injuriandi which arises on proof of the publication of a defamatory statement is automatically rebutted where the disclosure relates to unpunished offences. This explanation is advanced in a number of early South

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1) Supra, 2, 15-16, 25, 26.

2) On which see infra, 195-202.

3) For the distinction between private and public figures, see infra 161-75.

4) (1833) 3 Menz 3, per Menzies J at 5.

African cases in point, including the earliest, which accepts that an irrebutable presumption against animus injuriandi arises wherever injurious disclosures are made 'for the ends of public justice'[1]. The same reasoning is reflected in many of the writings of the Roman-Dutch authorities, including Voet[2].

One cannot, however, explain why a class of statements is to be considered in the public interest in terms of the state of mind of the publisher. As Voet rightly noted

> ...in many cases private informations of crimes are originally due not to regard for the well-being of the commonwealth, but to the hostile and resentful disposition of the informer...(3)

Indeed, were the publisher's motive the sole determinant of whether a statement is for the public benefit, the presumption that arises in favour of the defendant on account of his possibly fictional blameless state of mind would to some extent undermine the reason cited in other cases for why the truth alone should not be accepted as a sufficient defence in an action for defamation. An irrebutable presumption against animus injuriandi would, for example, in such cases provide the degree of protection to the blackmailer about which concern was expressed by Mason J in Dunning v Quin[4].

Another explanation needs therefore to be provided for protecting disclosures of crime from actions for defamation. This is that the public advantage served by such disclosures in principle outweighs

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1) Sparks v Hart, supra, at 5.

2) Commentary, 47.10.1.

3) Ibid.

4) 1905 TPD 35 at 39.

what individual hardship might result from them: the plaintiff's personality rights are limited by the greater social good of discouraging crime.[1]

Several judgments have in fact avoided resorting to the fictional presumption against animus injuriandi in cases arising from imputations of criminal misconduct by founding exemption on the social benefit to be derived from protecting statements of that class. The public interest in the prevention of crime, on this line of reasoning, will be most effectively served by granting a general immunity under the civil law to any individual who wishes to expose criminal activity, whatever his personal reasons may be for so doing.

These advantages may be cited in specific terms. For example, the granting of such an immunity would have a deterrent effect on would-be wrongdoers:

> When attempts are made to obtain money (by blackmail) the sooner (the victims) expose the attempts, and so deter others from indulging in similar practices, the better.(2)

The courts have applied the deterrence principle to disclosures of all forms of offence, however petty. For example, in SA Mails Syndicate v Hocking[3], where a newspaper had described in bantering terms how respondent had been arrested for being drunk in a public street, the court said:

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1) For an elaboration of this argument see the judgment of Melius de Villiers CJ in Preller v Schultz (1892) 9 CLJ 268.

2) Per Innes CJ in Kernick v Fitzpatrick 1907 TS 389 at 391 and 393.

3) 1909 TS 946.

> It is in the public interest that when people commit offences in public, attention should be drawn to the fact so as to deter others from being guilty of similar conduct.(1)

Why disclosures of criminal activities are generally regarded as being for the public benefit has also been explained in terms of the opportunity they afford the authorities to act upon them. So it has been held to be a right and a duty of every individual to publish official misconduct to the public at large

> ...and, through the powerful medium of the press, to raise the public voice to convey to the ears of the Government...information...which would be sufficient to cause the plaintiff to be deprived of those powers which he had abused, and to procure an end to be put to that system which afforded the opportunity for the existence of such abuses.(2)

Such disclosures have also been held for the public benefit because they facilitate the administration of justice[3], and because private individuals should have a right to to expose crime[4]. As Innes CJ put it:

> It is in the public interest that disturbances of the peace, crimes or any contravention of the law, whether serious or not, should be published in the press so that the public may have an opportunity of judging how the law is administered, and what steps are being taken to suppress such disorders as do occur from time to time.(5)

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1) 1909 TS 946 at 949.

2) Mackay v Philip (1830) 1 Menz 455, per Innes CJ at 463.

3) SA Mails Syndicate v Hocking 1909 TS 946 at 949.

4) Mackay v Philip, supra, at 455.

5) SA Mails Syndicate v Hocking, supra, at 949.

It can thus be seen that as a general rule exemption from liability in actions for defamation is extended in principle to disclosures of all forms of conduct that can be described as technically criminal.

1.1(a) Exceptions

To this rule, however, there are two broad exceptions. The disclosure of criminal activitities for which the plaintiff had already been prosecuted has been held not to serve the public interest, and the courts have on occasion refused to allow the defence of truth and public benefit in cases where the matter disclosed related to offences for which the plaintiff was never prosecuted and which were committed in the remote past.

Voet cites as an example of communications that cannot be justified those that disclose '...a misdeed in respect of which the delinquent had undergone punishment and has no further punishment to undergo'[1]. This has been followed by the South African courts. Thus in Leibenguth v Van Straaten[2], where the action arose from the disclosure of the plaintiff's past conviction for smuggling, it was held not to be in the public interest

> ...that, because a man has once been guilty of a crime, for which he has been punished, it should be brought up against him forever afterwards.(3)

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1) Commentary 47.10.1.

2) 1910 TPD 1 203.

3) Per De Villiers J P at 1 207. See also Patterson v Engelenberg and Wallach's Ltd 1917 TPD 350, in which the court, dealing with an/

This was because the plaintiff had 'paid the penalty...and therefore, as a matter of law, had wiped out the offence'[1].

This judgment is based primarilly on the desirability of protecting the individual's right to live down an offence for which he has been punished.[2] There is, however, another line of reasoning more consonant with the notion of public interest as expounded by the courts for refusing protection to the kind of disclosure as that at issue in Leibenguth's case. This is that no tangible public advantage, such as the exposure of crime, can be said to flow from such a disclosure - provided that the plaintiff is a reformed character and that his past misconduct does not throw any significant light on his capacity to perform the duties of public office.

The provisos indicate that the authority of Voet will not be followed invariably on this point by the South African courts. In Van Wyk v Steyn[3], for example, the fact that the plaintiff had already been convicted and punished for the offence disclosed was held not necessarily to be the determining factor. In casu, plaintiff had been convicted for receiving stolen sheep six months before, and was at the time of publication trading in sheep in an area plagued with sheep stealing. Yussaf v Bailey and Others[4]

/allegation that the plaintiff had committed acts amounting to treason seventeen years previously, ruled obiter that if he had been punished for the crime, it could clearly not be resuscitated.

1) Per Bristowe J, Leibenguth v Van Straaten, supra, 1 210.

2) In South Africa convicted offenders are granted legislative protection in this respect while serving their sentences by S. 44(1)g of the Prisons Act, No. 8 of 1959.

3) 1924 OPD 68.

4) 1964 (4) SA 117 (W).

also illustrates how additional circumstances will be taken into account in deciding whether public disclosure of a past conviction is for the public benefit. The facts of this case were as follows: Plaintiff had some 20 years before raised money from the public in the form of subscriptions to a voluntary association by fraudulently representing himself as an Ethopian prince. Although he was subsequently convicted for fraud, he persisted in claiming the false identity that had enabled him to commit the offence. Although there is nothing in the recorded judgment to suggest that plaintiff was still committing fraud at the time of disclosure, defendants' popular magazine had carried an article disclosing his past conviction and questioning his bogus royal lineage. Finding for the defendants, the court noted:

> Here we have a man who in the past has succeeded in acquiring big sums of money to which he was not entitled, by means of pretending to a gullible public that he was someone other than he really is, and who continues to make claims to an identity which has been established as untrue. It is not, then, the case of a man who has ceased to make false representations. He persists and has persisted in this court in so doing.(1)

The behaviour of the plaintiff subsequent to the past conviction was thus the determining factor. Although the court did not make its reasoning explicit, it would seem that the lawfulness of the publication in question arose from the fact that the information relating to the past conviction formed part and parcel of the disclosure of current facts relating to the plaintiff. Indeed, the court intimated that had the plaintiff not persisted in his claims

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1) Per Vieyra J, Yusaf v Bailey and others, supra, at 127 B-C.

to a false lineage and identity, the rule against the disclosure of past convictions would have been invoked in his favour. Were that the case, no public interest could be said to have been served by the disclosure of a fraudulent scheme perpetrated a long time before publication, and for which the plaintiff had been convicted and punished. The plaintiff's current behaviour, however, made exposure of his past and current false claims more than a matter of publishing 'old scandals for the sake of satisfying the salacious appetite of readers'.[1]

It has also been accepted that an action for injury will lie for the disclosure of undetected criminal activities where there has been a lapse of time between the alleged misconduct and the publication of the allegation.

Thus in Lyon v Steyn[2], the court argued that if in the criminal law a crime prescribed in 20 years, it would not make sense to allow private individuals in effect to punish individuals for misdeeds committed earlier than that by allowing them to rake up past

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1) At English common law a defendant is at liberty to plead the defence of justification to the disclosure of a past conviction, however distant, of whatever nature, and irrespective of the motive behind publication. But the Rehabilition of Offenders Act now provides that after a specified period certain rehabilitated persons must be treated in law as persons who have not committed or been convicted of the offence that was the subject of the spent conviction. The Act provides, however, that should such a rehabilitated person bring an action for libel or slander against one who had disclosed the past conviction, the plaintiff may still rely on the defence of justification and will not be restricted in the matters he may establish in support of such defence. The plaintiff may, however, defeat the defence by proof of malice on the defendant's part.

2) 1931 TPD 247.

offences in which the State no longer had an interest. The criminal law permitted prescription of crimes for two reasons, both in the opinion of the court relevant to the law of defamation. The first was that evidence may have been lost or rendered unreliable with the lapse of time, and the second that the plaintiff

> ...may in the intervening period have led an honourable life and become a man of good reputation in society, and therefore it would not be to the benefit of the public or in the interest of the State to rake up the ashes of the dead past.(1)

Embedded in this dictum are two of the reasons for the courts' reluctance to grant a general immunity to the disclosure of offences committed in the remote past. The first is that such protection might remove inducement to reform[2]; the second that it could lead to injustice to the individual who had led a blameless life after the past transgression.

> It would be a sorry day if any busy-body who discovered anything about a man's past, could come along years afterwards and rake it up against him notwithstanding the fact that he has lived down that past and has acquired a good and honourable reputation.(3)

Such latitude, another court added, would afford 'undesirable encouragement to the blackmailer'[4].

The courts have, however, distinguished between recent and remote offences with regard to the application of the rule against

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1) Per Krause J in Lyon v Steyn, supra, 252-3.

2) See also Graham v Ker (1892) 9 SC 185 at 187.

3) Patterson v Engelenberg and Wallach's Ltd 1917 TPD 350 at 361.

4) Dunning v Quin 1905 TS 35 at 39.

disclosure of past transgresssion. In Graham v Ker,[1] the court accepted the authority of Voet when it came to 'the raking up of transgressions after a long lapse of time'. But the judge added:

> The commission of recent offences against the law stands on a different footing. It is generally for the public interest that others who might have dealings with the guilty individual should be informed of his true character.(2)

The crucial question in this context is what the courts mean by 'recent'. It appears from the judgment in Graham's case that the plaintiff was indulging in the imputed misconduct at the time of publication. However, it would seem that the determining factor is whether the information disclosed about the plaintiff's past misconduct could be said to be of contemporary relevance to the public, in the sense that it indicated a likelihood of a repetition of the offence, or threw light on the the suitability of the plaintiff's character for the exercise of public office.

The most that can be said is that where the plaintiff has plainly lived down his past misconduct, and where the State no longer has an interest in prosecuting him for his transgressions, the publication of information relating to them is unlikely to be accepted as justified.[3]

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1) (1892) 9 SC 185.

2) Per De Villiers CJ at 187.

3) The relevance of the lapse of time between conduct imputed and publication of the charge is discussed further infra at 188-90.

1.2.Charges of immorality

In the earliest case in point, Sparks v Hart,[1] it was held that the truth of a damaging statement could not be raised as a defence where the plaintiff was charged with acts of 'mere immodesty'[2]. In casu, the plaintiff was proved to have been pregnant as a result of extramarital intercourse. The court refused the defence, not because disclosures of the immoral but non-criminal acts of private individuals were not for the public benefit, but because absence of animus injuriandi was not to be presumed in such cases.

But in a later case, Graham v Ker[3], the Cape Supreme Court took a wider view, laying down as a general principle that it was 'for the public benefit that the truth as to the character and conduct of individuals should be known', and accepting that disclosure of the plaintiff's immoral conduct was in the public interest.

The facts of the two cases are, however, distinguishable. In the Sparks case, the plaintiff was a private individual, and the conduct charged could not be said to have affected the well-being of the community, except in the wider sense that it constituted a breach of what was at that stage a widely held view that extra-marital intercourse was a serious moral transgression. In Graham v Ker, however, the evidence was that the plaintiff was abusing his official position to take advantage of uneducated women, and that his behaviour, though not strictly criminal, was affecting, or

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1) (1833) 3 Menz 3.

2) At 5.

3) (1892) 9 SC 185 at 187.

likely to affect, the maintenance of stability in the area in which he was stationed as a soldier.

Even so, in the later case of Bloem v Zietsman[1], in which the conduct imputed could be described as private immorality akin to that at issue in Sparks v Hart, De Villiers CJ threw doubt on the judgment in the latter case and noted, without citing authority, that recent decisions had tended to widen the concept of public interest.[2] Maasdorp J was, however, not prepared to agree that the allegation by the defendant that plaintiff had put a young woman 'in the family way' was for the public benefit[2].

Although De Villiers CJ probably had principally in mind when citing 'recent cases' his judgment in Graham v Ker, it is to be noted that Graham's case does not offer direct authority for the finding in that of Bloem's. A careful reading of the former judgment indicates that the overwhelming reason for allowing the defence was the position of the plaintiff and the likely effects of his conduct. There is nothing in the judgment to indicate that the court wished to extend a general indemnity to the public disclosure of acts of immoral conduct under all circumstances.

In Graham v Ker[4] the disclosure was regarded as being in the public interest not because of the nature of the plaintiff's conduct per se, or because the law always sanctioned the disclosure of acts of private immorality, but because the circumstances surrounding his conduct rendered it a matter of public concern.

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1) (1897) 14 SC 361.

2) At 363 3) At 365.

4) (1892) 9 SC 185.

The ratio decidendi is to be found in the following passage:

> ...He was a private in the Cape Mounted Rifles and as such received his pay out of the public purse. He was stationed in a district which is densely populated by Natives, and intercourse with native women under the circumstances disclosed would if true be very properly exposed.(1)

Although decisions on the point are few, they form a pattern sufficiently discernable to extract from them the general rule that allegations of immoral non-criminal conduct by private individuals are not for the public benefit, even if they are proved. Thus in Hayton v Hayton[2] the defence was rejected in a case arising out of a proven charge that the plaintiff had 'made every attempt to seduce his (plaintiff's) brother's wife'. And in Groenewald v Homsby[3], the court was '...not prepared to assent to the doctrine that the interest of the community is such that it is entitled to know everybody who has committed adultery, or is living in adultery'[4].

There are, however, several cases in which special circumstances have been held to justify the disclosure of facts about an individual's private immoral acts.

One such circumstance is where the plaintiff himself voluntarily placed such information before the public eye.

In Roux v Lombard[5] it was acknowledged that the law '...protects from criticism private conduct, sometimes even private

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1) Graham v Ker, supra, at 188. Emphasis added.

2) 1936 SALJ, 502-3.

3) 1917 TPD 81.

4) Per Mason J in Groenewald v Homsby, supra, at 83.

5) (1895) 10 EDC 47.

misconduct...', but it was nevertheless held that the defendant was justified in disclosing information on the plaintiff's immorality which she had herself made public by instituting an action for seduction and maintenance. The judge added the caveat, however, that disclosure would in these circumstances be justified only if publication took place 'within a reasonable time' of the plaintiff's own public diclosure.[1] It is clear that in this case the allegation at issue was of no public interest, disclosing as it did purely private immoral behaviour. The defence of privilege would also have been inapposite, because the disclosure took the form of comment on the plaintiff's behaviour which went further than the court record, and because the information relating to the plaintiff's misconduct went further than that which she had chosen publicly to disclose.

It has also been held that disclosure of acts of adultery is justifiable where such acts threaten the well-being of the community in which they were being committed at the time of publication[2]. The flagrancy and degree of deception of the plaintiff's conduct, and the fact that his activities were notorious in the community to which they were published, have also been regarded as circumstances justifying publication.[3] Another factor which has been held to justify the disclosure of private acts of immorality is the position in society held by the plaintiff - i.e. whether the role of the plaintiff is such that his character may be said to be of

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1) Roux v Lombard, supra, at 51.

2) Groenewald v Homsby 1917 TPD 81 at 85.

3) A husband's disclosure to his wife's employer that she and another employee had committed adultery on the employer's premises has also been held to be justified - Graham v Walsh 1967 (2) PH J29 (W). For further discussion on these factors, see infra 193-4.

concern to the wider public. As has been noted, the plaintiff's public position was one of the determining factors in Graham V Ker.[1] Abuse of public position was also the determining consideration in Adkins v Potts[2], in which a plea of truth and public benefit was upheld in a case arising out of a charge of adultery against a district surgeon who was also the family doctor of the person to whom the words were spoken, and the defendant the person with whom the adultery was committed.

In De Beer v De Villiers, the court attached such public import to the position of the plaintiff as virtually to sweep away all protection against the disclosure of details of the private immorality of Members of Parliament.[3]

Although there is no Appellate Division authority on the point, it would seem that the conclusion to be drawn from the case law is that the disclosure of private acts of immoral but non-criminal conduct will be actionable unless the surrounding circumstances render it a matter of public concern. What these circumstances are will be examined in later sections. For present purposes, it is sufficient to note that a private individual may have recourse also to an action for invasion of privacy by disclosure against a person who has publicly divulged private information about him.[4]

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1) (1892) 9 SC 185.

2) (1896) 6 CLJ 105.

3) 1913 CPD 543, at 548. See further infra, at 163.

4) See McQuiod-Mason, Privacy, 173 et seq., and Bletcher, M.D., 'Raking up the Past', (1976) 93 SALJ, 465-9. In the United States, where the truth provides an absolute defence to an action for defamation, several invasion of privacy suits have been sucessfully pressed for public disclosure of private facts. See, eg., Melvin v Reid (1931) 112 Cal. App. 285.

1.3. The activities of public figures

For the purposes of actions for injuria under the civil law, our courts tend to draw a distinction between the realms of private and public life. It has frequently been held that those who place themselves voluntarilly before the public eye and those who assume positions of a public character cannot complain if facts indicating either that their publicly projected image does not accord with their true character, or the unfitness of their character for the exercise of public office, are made known[1].

Does this mean that details concerning the lives of 'public figures' can be disclosed with impunity under all circumstances?

The clear rule to be derived from the cases is that publication of the details of misconduct by public officers in the execution of their official duties will invariably be regarded as a matter of public benefit. Thus, as we have seen, among the considerations cited in Graham v Ker[2] for deciding that disclosure of the plaintiff's immoral conduct was in the public interest was that it took place while he was stationed in a particular area as a soldier paid from the public purse. Similarly, a disclosure of corruption by a magistrate was held to be for the public benefit because the plaintiff had taken advantage of inadequate control procedures to abuse his official position.[3]

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1) See, eg., Pelser and another v South African Associated Newspapers Ltd and Another 1975 (1) SA 34 (N) and Pienaar and Another v Argus Printing and Publishing Co Ltd 1956 (4) SA 310 (W).

2) (1892) 9 SC 185.

3) Mackay v Philip (1830) 1 Menz 455.

To disclose facts showing that a magistrate was generally influenced by improper motives in the discharge of his duties was held to be in the public interest[1], as was a disclosure that a detective in the police force had committed bribery and perjury[2], and an allegation that a government agricultural inspector had acted improperly and illegally in carrying out his duties[3]. It has also been tactitly accepted that an allegation that an attorney-general had intentionally misled a court would have been for the public benefit had it been proved[4].

In all these cases publication was held to be in the public interest because the conduct disclosed constituted an offence, and not specifically because the plaintiff received his pay from public funds. There have been cases, however, in which the plaintiff's public position was regarded as the determining factor. Thus it has been held that, since a clergyman's office is a public one, proof of a his tendency to lie habitually was justified because it was '...for the public benefit that none but men of good character should exercise the functions of priests or ministers of the Gospel'[5]. This was also held to apply when a priest was charged with

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1) Meurant v Raubenheimer (1882) Buch AC 87.

2) Rojesky v Ross (1886) GH 128.

3) Van der Berg v Van der Walt (1897) EDC 55.

4) South African Associated Newspapers and another v Yutar 1969 (2) SA 442 (W).

5) Queen v Shaw and Fennel (1884) EDC 323 at 325.

'gross immorality'[1] or habitual drunkenness. [2]

Any facts relating to a 'public figure' which go to show his incapacity for office may lawfully be disclosed. So a propensity to lie, drink excessively, or to indulge in debauched behaviour has been held to show that a clergyman is unfit for his calling as a minister of the Gospel.[3]

The behaviour of the public figure need not relate directly to the manner in which he discharges the functions of office. So disclosure of the adulterous affairs of a Member of Parliament have been held to be for the public benefit.[4]

The rules relating to those in public office apply equally to those aspiring to such positions. Voet bases the right to disclose damaging information about candidates for public office on a general duty owed to society by those who publish them. The public interest, he writes, requires that persons who are appraised of facts that disqualify a candidate for public office should come forward and communicate their knowledge so as to prevent the candidate's appointment or election.[5]

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1) Williams v Shaw, approving the English cases of Highmore v Earl and Countess of Harrington 3 CBNS 142 and Gallwey v Marshall 9 Exch 294.

2) Dod v Robinson (1648) Aleyn 63.

3) Williams v Shaw (1884) 4 EDC 105; Gray v Solomon (1871) NLR 48.

4) De Beer v De Villiers 1913 CPD 543 at 548.

5) Voet's example is where a person of illegitimate or ignoble birth aspires to a position reserved for persons of legitimate birth or noble lineage. (47.10.20. See also Matthaeus De Crim. 47.4.1.7.) His example is archaic, but the principle underlying it would still apply, for instance, in the case of an unrehabilitated insolvent who seeks election to Parliament.

What class of persons, then, can be classified as 'public figures'? In Graham v Ker[1], one of the considerations which weighed with the court was that the plaintiff received his pay from public funds. The source of a person's wages or salary cannot, however, be the sole factor to distinguish private individuals from 'public figures'. While a clergyman can, in a broad sense, be deemed to receive his remuneration from public funds, other occupations have been judged public even though their source of income is strictly private. So disclosure of acts of touting by an attorney has been held to be for the public benefit because

> An attorney is an officer of the court. He plays an important role in the administration of justice...It must be a matter of interest to the public that his work should be conducted on lines not liable to grave abuse. (2)

Similarly, a doctor in private practice has been deemed to be a public figure[3], as has a person who promotes a company to which he invites the public to subscribe.[4]

In these cases, it is plainly the nature of the plaintiff's occupation, and not the source of his income, which qualifies him as a public figure. It may therefore be said that any person who deals with the public in a position of trust may be deemed to be a public figure for the purposes of the law of defamation.

A private individual may make himself a public figure by his own

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1) (1892) 9 SC 185.

2) Stanley v Central News Agency 1909 TS 488 at 491.

3) Adkins v Potts (1896) 6 CLJ 105.

4) 1903 TS 202 at 208.

volition. Thus one who thrusts himself before the public eye is deemed to invite closer scrutiny from the public than one who seeks to avoid publicity[1].

Prosser defines a public figure somewhat circuitously as

> ...a person who by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs and his character, has become a 'public personage'(2).

A difficulty arises over the position of a person who has been catapulted involuntarily into the news. It is suggested that such persons should not be regarded as public figures in the sense of those outlined above for the purposes of the defence, but are only legitimate objects of public interest while the event that has sprung them into the news remains current[3].

Does this mean that a persons who occupy public positions enjoy no protection against the disclosure of true but damaging information relating to their characters?

As far as such facts may be said to be relevant to his capacity to perform, or the manner of his performance of his office, this may be

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1) Roux v Lombard (1895) 10 EDC 47.

2) Prosser, Torts, 823.

3) In connection with the plea of public interest in an action for invasion of privacy, Prosser suggests that the 'public figure' '...must have achieved that stature before there can be any privilege arising out of it, and that the defendant, by directing attention to one who is obscure and unknown, cannot himself create a public figure, or make him news'. This should apply equally in an action for defamation, or the news media could be granted the power to limit the personality rights of chosen targets simply by giving them prominence.

said to be the case. But there are limits to the right to disclose what may be said to be private information about the lives of public figures.

1.3.a. Conduct performed before entering public life

The first limitation relates to information about the conduct of such a person before he entered public life. Thus in Patterson v Engelenberg and Wallach's Ltd[1] the court drew the line at granting a blanket indemnity to defamatory charges relating to acts performed by public officials in the distant past. The plaintiff was alleged to have communicated with the enemy while in the employ of the telegraphic department of the Transvaal Republic during the Anglo-Boer war. At the time of publication of the charge, 17 years later, he had risen to the position of postmaster of Pretoria. The defendant contended that everything that went to show the character of a person in a public position was in the public interest - '...if a person draws public money, no length of time can take away the right to show that he is not a fit person'[2]. Although it was not necessary to decide the point, Wessels J cited in response the words of Lord Justice Brett in the English case of Laymen v Latimer[3]:

> I think that no man should go on crucifying another for the rest of his life....Where people will rake up the past misdoings of others their conduct is as wicked and malignant and perhaps worse than (sic: that of) those they condemn.(4)

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1) 1917 TPD 350.

2)At 353.

3) 47 LJQB 470.

4) Patterson v Engelenberg and Wallach's Ltd, supra, 361.

The learned judge conceded, however, that there might be occasions when to disclose details of an individual's past life could well be in the public interest.[1]

Such was the case in Watkins v Ewing[2], where the court allowed the defence of truth and public benefit in a case arising out of a damaging imputation against the character of a former member of a public body. It was held that where defamatory words were used by a person interested in the transactions of a public body, he had a right to speak of the conduct of that body or of its members - and this included former members - 'strongly and even offensively'[3].

In Lyon v Steyn[4], in which the rule against the disclosure of details of a person's remote past was endorsed in the most emphatic terms[5], the court nevertheless acknowledged that it may have been prepared to accept the plea of justification were the plaintiff still chairman of a certain political party, a position from which he had resigned two years previously.

> The defendant admitted that while he was a member of the party, to which plaintiff also belonged, he knew that plaintiff was alleged to have been a National Scout(6), and that nevertheless he never took any steps to have the plaintiff removed from the position of honour he was occupying at the time, nor did he say anything about it.(7)

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1) Patterson v Engelenberg and Wallach's Ltd, supra, 361.

2) Watkins v Ewing (1883) 3 EDC 155.

3) At 158.

4) 1931 TPD 247.

5) At 254.

6) A member of a contingent of Boers who volunteered to fight with the British forces in the Anglo-Boer War, 1899-1902.

7) At 253-54.

In his concurring judgment, Maritz J was more cautious on this point, expressly reserving opinion on the question whether to say after the lapse of a period of 30 years of '...for example, a man seeking Parliamentary honours "he is (sic) a National Scout"' could be said to be for the public benefit. He added, however:

> ..Anyone with a knowledge of the history of our country would deplore the publication of such a statement, even on the occasion in the example given.(1)

This dictum suggests how the Courts may well be influenced by such factors as the political sensitivity of the charge. In Paterson v Engelenberg[2], the learned judge also seemed to have been influenced, perhaps subconsciously, by the undesirability of the charge at a time when efforts were being made to heal the divisions caused by the war.

In Stanley v Robinson[3], however, the court intimated that it might relax the rule against the raking up past scandals in the case of a public figure:

> If the complainant (4) had come forward in some public capacity, and that had been the occasion upon which the letter had been written...there might be some reason for suggesting that the public should be put in possession of his past.(5)

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1) Lyon v Steyn, supra, at 256.

2) 1917 TPD 350.

3) 1913 TS 202.

4) This was a private prosecution for criminal defamation.

5) Stanley v Robinson, supra, at 208.

1.3.b.Subsequent disclosure of acts performed in a public position

Does a person, once having occupied a public position, enjoy any protection against the subsequent disclosure of acts performed in his public capacity, since renounced?

Such a problem might arise, for example, in the case of a retired politician who had been guilty of corruption during his period in public office.

Watkins v Lyons[1] provides authority for a negative answer where the defendant can prove an interest in the activities of the public body of which the plaintiff had been a member. By the same reasoning, it may be arguable that every individual has a sufficient interest in the integrity of Parliament to justify the disclosure of the past wrongdoing in office of any of its members.[2]

Prosser takes a wider view of the right to disclose details about the lives of public figures who have since retired into anonymity:

> There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of public figures, the revival of past events that were once news, can properly be a matter of public interest.(3)

The writers of the American Restatement, on the other hand, take a somewhat more restrictive view. They state that persons

> ...thrust into the public limelight are the object of legitimate public interest during a period of time after their conduct or misfortune has brought them to public

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1) (1883) 3 EDC 155, discussed supra,

2) See De Beer v De Villiers 1913 CPD 543.

3) Prosser, Torts, 827.

> attention; until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privilege which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims.(1)

But it is questionable whether a person who, having once occupied a public position, should be denied the right to claim protection afforded ordinary private citizens against disclosure of private actions performed while he was still a public figure. It would seem anomolous that a person in such a position should be refused the right, accorded even to those who have committed criminal acts, to live down their past. Any disclosures relating to the past actions of former holders of public office should be subject to the proviso that the activities of the plaintiff can be said to have affected, or at least had a significant bearing on, the functioning of the institution of which he was a member.

1.3.c.The private conduct of public figures

This is not to argue that those who occupy public positions enjoy no protection against the disclosure of information relating to their public lives. The courts' problem is to decide where the line demarcating the boundaries between public and private lives is to be located.

In the case of Members of Parliament, it has been held that details of their moral conduct and character are of legitimate

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1) Restatement of Torts (1939) S.867 Comment F.

public concern, even to the extent of exempting disclosures of such details from the general rule declaring publication of details of private immoral conduct not considered to be for the public benefit. As has been noted, the court in De Beer v De Villiers[1] could conceive of '...nothing more in the public benefit than the moral character of the Union Parliament'. There are similar rulings in the case of clerics.[2]

The modern courts are, however, unlikely to extend the same degree of protection to disclosures of damaging details about the private affairs of practitioners of every occupation deemed 'public' in the sense outlined above. If this were the case, such 'public figures' as doctors, teachers or the promoters of public companies would lose all right to protection against disclosure of details of their private lives wholly irrelevant to the practice of their public occupations - a consequence which would not only be startling, but which would serve significantly to undermine the purpose of the incorporation of the requirement of public interest into our law.

The same may be said of public representatives or candidates for public office. A cleric or other person who sets himself up as a moral example to the community ought to be made to accept the consequences if his private life is shown to fall short of his publicly professed principles.[3] But there would seem to be no

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1) 1913 CPD 543.

2) See, eg., Williams V Shaw (1884) 4 EDC 105 and Gray v Solomon (1871) NLR 48.

3) See Geoffrey Robinson, 'Law for the Press' in Curran, J. (ed.), The British Press: A Manifesto, 221.

compelling reason to consider publication of every detail of the private lives of the holders of, or candidates for, every public office as necessarily in the public interest. Willingness to assume public office should not entail any greater loss of personality rights than is necessary to allow the public fully and fairly to appraise an individual's capacity and fitness to perform the duties attached to the particular position. This is more clearly so in the case of occupations which are deemed public in the sense only that those who perform them render a service or stand in a position of trust to the public. Why should a doctor, for instance, whose sole task it is to cure illness, be expected to tolerate that his private life be exposed to public scrutiny?

There is nothing in the case law or in principle which warrants the inference of a general rule that details of every aspect of the private lives of public figures can be disclosed with impunity. This is still more the case where the distinction between private and public figures is drawn in terms of the source of the individual's remuneration. Were individuals to be deemed 'public figures' simply because, as has been inferred from the judgment in Graham v Ker[1] they happen to draw their wages from some public authority, the courts would find themselves in the anomolous position of having to protect the publication of details about the private life of, say, a salesman, whereas, ceteris paribus, they would have to regard

1) (1892) 9 SC 185.

publication of similar details about the activities of a postman as justified.

What, then, is the juridical basis on which the limitation of a public figure's right of reputation is founded? Clearly, exemption from liability for publication of details which in the case of private citizens would be actionable must be founded on some basis other than the source of the plaintiff's income. An examination of the judgements shows that this indeed the case.

Although the judgment in Graham v Ker[1] is rather sketchy, it would seem that what weighed with the judge more than the public capacity per se of the plaintiff was that the effect that his conduct had or could have had, first, on the discharge of his public duties as a soldier, second, on the stability of the area in which he was stationed, and, third, on the image of the public authority in the eyes of the populace. These considerations were plainly what the court had in mind when it considered the relevance of the circumstances in which publication of the allegedly defamatory charge took place.

It is also probable that considerations other than that of upholding a public right to know of the private conduct of Members of Parliament played a major part in the finding in De Beer v De Villiers[2]. Principal among these considerations was probably the effect that public disclosure of the immoral acts of Members would have on the reputation of the Parliamentary system of which they are representative. In this case the defendant was not required to

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1) (1892) 9 SC 185.

2) 1913 CPD 543.

prove, nor did the court mero metu inquire into, how the plaintiff's private activities effected the exercise of his duties as a Member of Parliament. There was also nothing to show that he had in any way misused the status or powers of his public position to secure the ends disclosed.

Clearly, therefore, such cases as De Beer v De Villiers[1] are distinguishable from those, like Graham v Ker[2], in which the plaintiff's amorous successes were secured as a result of the abuse of official powers attached to his position, and others, like Williams v Shaw[3], in which the truth of the activities disclosed would have demonstrated the plaintiff's unfitness for his public calling. Still less it is comparable to those cases, like Kennedy v Dalisile[4] and others, in which the plaintiff had abused his public position for criminal ends.

In short, there seems no overwhelming reason for the existence of an inflexible rule discriminating between the degree of protection afforded the private lives of 'private' individuals and those of people in public roles. While the courts have tended to operate on the assumption that acts of immorality by public figures will have a more deleterious affect on society generally, this consideration cannot be held to apply in all circumstances. Nor can the argument be sustained that the distincton is aimed at discouraging

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1) 1913 CPD 543.

2) (1892) 9 SC 185.

3) (1884) 4 EDC 105.

4) 1919 EDL 1.

immorality[1], for surely deterrence would be more effectively ensured if a general liberty were granted to disclose immoral acts by any individual, regardless of his position in society.

It is regrettable that the courts have not spelled out the reason for the distinction in more detail, or at least required the defendant in cases like De Beer v De Villiers[2] to prove how the disclosure of the alleged acts of immorality affected a concrete public interest such as, for example, a security interest[3], the reputation of some public institution, or the performance by the plaintiff of his public duties.

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1) See ARB Amerasingh, Defamation at 507.

2) 1913 CPD 543.

3) Such an interest was at stake, for example, in the British Profumo Scandal in the 1960s. Publication of immoral acts such as those indulged in by Ministers and Members of Parliament during that affair would undoubtedly be held to be in the public interest by the South African courts.

1.4.Services to the Public

Those who offer goods and services to the public for money's worth cannot complain if damaging facts relating to their quality are disclosed. Such disclosures may relate, for example, to the general competency of the public trader[1], irregularities by the managers of a public company[2], the quality of the services offerred or the product manufactured[3], or the lack of required qualifications of the plaintiff[4].

The principle underlying cases of this nature is well summarised in Amdur v Haddad[5], in which the charge at issue was that plaintiff, a tailor, 'could not make a suit'. Noting that the term public benefit was 'vague', the court found the statement to be lawful on the ground that

> ...When a man holds himself out as carrying on a trade...he submits himself more or less to public criticism....A man who gives out that he is able to exercise any public calling and invites the public to patronise him, must be considered as submitting his competency to the public.(6)

Furthermore

> ...When a tailor carries on his trade in a small town, where the customer has to supply his own cloth, it is for

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1) Amdur v Haddad 1911 OPD 9.

2) Michaelis v Braun (1886) 4 SC 205.

3) Erasmus v Scott, Prigge v Scott 1933 NPD 271.

4) Saunders v Mackay (1894) 9 EDC 20.

5) Supra.

6) At 11.

> the public benefit that the fact of his incompetence should be made known.(1)

This rule clearly applies also to those in the employ of public services. Thus it was accepted that a charge of incompetence against a matron of a public hospital would, if proved, have been in the public interest[2].

As far as the quality of services is concerned, a claim that a caterer's premises were 'indescribably filthy' and by innuendo that because of the poor services offerred a cover charge was a 'clever scheme to make money' was held by the Appellate Division, with some hesitation[3], to be justified.

A charge that a hotel under construction was 'jerry built' was also held to be in the public interest

> ...for if the hotel was in a dangerously unstable condition, it was for the benefit or interest of the people of Margate that this should be known.(4)

A newspaper editor likewise tacitly guarantees the truth of what appears in his newspaper, and if he should wilfully alter news service dispatches with the purpose of falsifying them, it is in the public interest to disclose this fact.[5]

So, too, is it for the public benefit to correct a false claim to

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1) Amdur v Haddad, supra, at 11.

2) Middler v Hamilton 1923 TPD 441.

3) See the judgments of Stratford JA and De Villiers JA.

4) Erasmus v Scott, Prigge v Scott1933 NPD 271 at 283.

5) Verwoerd v Paver 1943 WLD 153.

professional qualification which the claimant does not possess. In Saunders v Mackay[1], for example, the defendant newspaper had corrected a misrepresentation by the plaintiff that he was a degreed medical practitioner by pointing out that he was only a licentiate. The court commented:

> In the circumstances, I can hardly think that the plaintiff can complain of the defendant having pointed out that he (plaintiff) was not a doctor of medicine, or having asserted that he had a degree when he had not.(2)

This was because

> Any apparent attempt to induce the public or individuals to assume the existence of a degree in a medical man which he did not possess, would meet with resentment and just condemnation, and any fair and bona fide criticism made by an individual upon the conduct of a professional man, who chose to lead the public astray, or to allow the public to be led astray upon a matter of this kind, would be protected.(3)

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1) (1894) 9 EDC 20.

2) At 36.

3) Ibid.

2.The Circumstances Surrounding Publication

In deciding what is and what is not for the public benefit, the courts will look not only to the subject matter of the statement alleged to be defamatory, but also at the circumstances surrounding its publication, which have been said to include, inter alia, the time the manner and the occasion of the disclosure.[1] Thus even though the matter disclosed may on the face of it appear to be for the public benefit, its publication may yet be rendered unlawful by the surrounding circumstances, or vice versa.

What circumstances do the courts deem relevant to determining whether a particular disclosure is for the public benefit? The circumstances surrounding the publication of a damaging statement are as varied as those which chance and human ingenuity can produce. In the nature of things, the question just posed can never be answered exhaustively.

The object of this and the following sections is to analyse what factors extraneous to the disclosure itself are typically taken into account when a defence of truth and public benefit is assessed. For purposes of clarity, these will be divided into groups pertaining to: 1)the characteristics of the audience to which the disclosure is made; 2) the time and place of publication; 3) the manner of publication; 4) the plaintiff's conduct prior to publication; 5) the defendant's motive for publication.

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1) Patterson v Engelenberg and Wallach's Ltd 1917 TPD 350 at 361.

2.1.The Audience

2.1.a. Interest in learning of the information disclosed.

Some Roman-Dutch authorities, as we have seen[1], regarded as justified only those statements made to the authorities, by which were presumably meant State officials, for the purposes of punishing crime.

This narrow view of the scope of the defence was rejected at an early stage in the development of the South African law on the point. Thus in Michaelis v Braun[2], De Villiers CJ preferred to rely on the authority of Groenewegen, who wrote that the truth alone of the imputation would not exculpate the defendant 'unless a person has mentioned to a judge or in some other suitable place an offence which ought in the public interest to be made known and punished'.[4] On his interpretation of Groenewegen, De Villiers CJ pronounced himself satisfied that ...in an action for defamation, it is a good defence that

> it was for the public benefit that the words should be uttered or published in the manner in which and at the time they were published.(5)

This dictum does not, however, resolve the question whether for the 'manner of publication' to be deemed in the public interest it is

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1) Chapter 1 supra.

2) (1886) 4 SC 205.

3) Michaelis v Braun, supra, 208.

4) Ibid.

required that the audience should have a particular interest in receiving, or a duty to receive, the information disclosed. In some cases this has been held to be so.

For example, in Dippenaar v Hauman[1], a case arising out of charge of criminal concealment of birth and infanticide by a priest against one of his parishioners, the plea of justification was rejected because:

> ...The object in making the charge to the Magistrate was not to have any criminal proceedings set in motion, but merely to have an extra-judicial inquiry to establish the truth of the allegation.(2)

Thus even though the receiver of the information was a judicial officer, the publisher's intention to institute a mere informal inquiry into the truth of the charge was sufficient to nullify the defence.

In Stanley v Robinson[3], the defence failed inter alia because the defamatory publication was disclosed to a single individual who had no particular interest in receiving information relating to past criminal dealings by the complainant:

> It (the defamatory letter) was written a propos of nothing, as a private communication to Dr Mathews...It is clear that no public interest can be subserved (sic) by such a communication.(4)

With respect, these dicta make curious reading. The disclosure in

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1) (1878) Buch 136.

2) Per De Villiers CJ at 141.

3) 1913 TPD 202.

4) Per De Villiers JP at 208.

Dippenaar's case would, if true, clearly have been in the public interest because it disclosed a serious offence. That the receiver of the information should not have been specifically requested to set in motion a formal inquiry should not effect the issue. Similarly, in Stanley v Robinson[1] the court erred in assuming that because the letter was addressed to a private individual this was material to the question whether its publication could be deemed for the public benefit.

There are in fact a large number of cases in which publication was deemed justified even though the communication was addressed in the first instance to a single person.[2] The cases decided otherwise seem to have confused the requirements of the defence of truth and public benefit with those of qualified privilege. Were the courts to follow their reasoning, the defence of truth and public benefit would be denied those defendants who could not prove that those to whom the information was published had a direct interest in or duty to receive the information disclosed. This could have serious implications for the mass media. At most, the personal or professional interest which the audience has in receiving the information can possibly serve to indicate something about the defendant's motive for publication. The relevance of this factor will be discussed below.[3]

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1) 1913 TS 202.

2) See, eg., Graham v Ker (1892) 9 SC 185.

3) Infra, 195-201.

2.1.b.The audience's prior knowledge of the subject matter of the disclosure

If the audience already knew at the time of publication of the information disclosed, will this affect the validity of the defence?

This question arose in Mohammed v Kassim [1], in which the defendant had told members of a welfare society that the plaintiff had dealt improperly with a loan to the society. The court accepted the evidence that everybody in the limited audience 'knew exactly the improper and dishonourable part the plaintiff had played in borrowing the money'[2]. Beadle CJ, however, decided that

> ...public interest lies in telling the public something of which they were ignorant, but something of which it lies in their interest to know.(3)

In coming to this conclusion, the learned Chief Justice relied on certain well-known dicta in Graham v Ker[4], viz.:

> I take it for the public benefit that the truth as to the character or individuals should be known....It is generally for the public interest that others who might have any dealings with the guilty individual should be informed of his true character....In the present case, it certainly was for the public interest that the conduct of the plaintiff should be known.(5)

In Mohammed's case, the court found implicit in the words

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1) 1973 (1) SA 1 (RAD).

2) At 9.

3) Ibid.

4) (1892) 9 SC 185.

5) Graham v Ker, supra, at 185, cited in Mohammed v Kassim, supra, 9. The emphasis is that of Beadle CJ.

emphasised that public benefit flowed from making the misbehaviour 'known' to the public:

> It seems to follow from this that that which has been said must be something of which the public are (sic) ignorant.(1)

Beadle CJ argued that it was not correct to speak of 'informing' people of that which they were already aware. Therefore

> The public interest lies in telling the public something of which are ignorant but something which is in their interest to know. If they already knew it, it hardly seems that mere repetition is of any value.(2)

By way of example the learned Chief Justice cited the hypothetical example of X telling Y that the latter's employee was a thief. If Y was unaware of the fact, it would be to his advantage to be informed of it.

> But if he engaged the employee after having been informed of the full facts of a theft of which the employee had been convicted, it does not seem to me to be of much benefit to him if someone repeated to him what he already knew about the theft.(3)

It was therefore held that the defence of justification failed because of the prior knowledge of the audience, and that the truth of an allegation with which the audience was already familiar at most affected the assessment of damages.

With respect, however, it is difficult to appreciate how the state of knowledge of the audience to which a damaging statement is

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1) Mohammed v Kassim, supra, 9.

2) At 10.

3) At 10-11.

published can be regarded as relevant to the question whether it serves any public benefit. It may well be to the advantage of the public to repeat a damaging allegation for the purposes of emphasis. Moreover, a person who comes by information the disclosure of which is of undoubted public importance can hardly be expected to ensure that his intended audience is ignorant of the facts prior to publishing it.

Surely the real issue raised by Mohammed's case was not whether the audience's prior knowledge of the subject matter of the imputation disqualified it from being regarded as of public benefit, but whether, given such prior knowledge, the disclosure could be regarded as being defamatory at all. To disclose damaging information about somebody to persons who are already appraised of it can hardly be said to reduce his reputation in their eyes.

In any event, there is precedent which goes against the finding in Mohammed v Kassim. In Groenewald v Homsby, for example, the court accepted as among the reasons for regarding publication of details of the plaintiff's adulterous behaviour as for the public benefit the fact that it was notorious in the small community in which it took place.[1]

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1) 1917 TPD 81; see judgments of Mason J at 83, Curlewis J at 84, and Gregorowski J at 85.

2.2.The Place of Publication

In determining whether the imputation is for the public benefit, the courts may also take into account - usually in conjunction with other circumstances - where publication took place.

The relationship between the place where the actions disclosed were performed and the place of publication of the imputation has in some cases been held to be a critical factor. Thus the defence has been rejected because publication of the damaging information took place in an area geographically removed from that in which the misdeeds charged had been committed. In Weil v Hardy,[1] for example, the court dismissed as not for the benefit of one colony the disclosure of offences committed in another.[2]

On the other hand, the relevance of the information disclosed to the people of the particular locality in which it was published has been held to supercede the rule that publication of misdeeds committed in the past is not generally for the public benefit. Regional relevance explains the finding in Van Wyk v Steyn[3], in which the disclosure at issue was that the plaintiff, a sheep trader, had been convicted and fined for stealing sheep about a year before. Pointing out that the efflux of time between the misdeed charged and publication was but one of the factors to be considered in determining whether a statement was for the public benefit, the court added:

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1) Weil v Hardy 1906 Natal 192.

2) At 199-200.

3) 1924 OPD 68.

> Many other elements enter into the problem; the local circumstances, for instance....There had been an epidemic of stock-lifting in (sic) a large scale. Hundreds, or even thousands of sheep had unaccountably disappeared from farms in the Smithfield district and neighbouring districts. The plaintiff was, at the time when the statements were made, a speculator travelling about in these districts, buying and selling sheep. It is, therefore, obvious that the circumstances tend strongly to establish public interest in regard to the statements.(1)

The circumstances prevailing in the particular area in which the damaging statement was published was also clearly among the overriding factors in Graham v Ker[2] and Groenewald v Homsby[3]. In the latter case, the court was prepared to relax the general rule against the disclosure of private acts of immorality because of the relevance of knowledge of plaintiff's adulterous behaviour to the small settlement in which it took place:

> I think it was his (defendant's) duty, and it was his right...as regards this little community of settlers, to do what he did - i.e. to disclose that plaintiff was living in adultery with the wife of one of the members of the community, who was away on active military service.(4)

The place of disclosure can, however, never in itself determine the presence or absence of public benefit. At most, it can merely help to establish whether the information disclosed can be said to be of beneficial interest to the people to whom it was addressed. Mere physical distance between the place of the conduct disclosed and the place of disclosure need not in itself mean that the

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1) Van Wyk v Steyn 1924 OPD 68 at 71.

2) (1892) 9 SC 185.

3) 1917 TPD81.

4) At 85.

information is axiomatically irrelevant; the conduct may indicate, for example, an enduring personality trait which the plaintiff carries about with him from place to place and of which it is in the interest of the people with whom he is currently living to know.

The venue of publication may also serve to indicate the motive behind publication. Thus in Lyon v Steyn[1] the court found among the factors which rendered the imputation not in the public interest the fact that it was 'blurted out' in a public bar.[2]

2.3. The lapse of time between disclosure and performance of the acts disclosed

One of the reasons most frequently adduced for the incorporation of the requirement of public interest into the defence of justification is that to allow persons gratuitously to rake up old and forgotten scandals could lead to injustice. It has often been argued that every person should have the right to live down his past.[3]

How the courts handle the plea of truth and public benefit in cases of disclosures of past misconduct has already been discussed in relation to imputations of indictable offences.[4] In this section, some further issues arising from the relationship in time between publication and the performance of the act or acts disclosed will be discussed.

In the nature of things, there will often be some lapse of time

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1) 1931 TPD 247.

2) At 253.

3) Lyon v Steyn, supra, at 252-53.

4) Supra, 150-55.

between the act or acts on which an imputation against character is based and publication thereof. As a general rule, it may be said that, ceteris paribus, the greater the lapse of time between alleged conduct and publication, the more reluctant the courts will be to accept that disclosure was in the public interest; information relating to the more remote event is less likely to serve a demonstrable public interest than that regarding the more proximate.

There are only two recorded judgments in which this proposition has been contested in principle. In Preller v Schultz[1], the then Chief Justice of the Orange Free State, Mellius de Villiers, strove to resist the drift of the South African law towards a limitation of the right to disclose the truth about others by arguing that the the public benefit was best served by granting a general protection to the disclosure of truth, irrepective of the injustice that may be suffered by those who had genuinely lived down past offences.

Although this judgment had no tangible effect on the development of the defence, the reasoning behind it was echoed a quarter of a century later in Van Wyk v Steyn[2], in which De Villiers JP reasoned:

> The whole theory of criminal punishment is in modern times largely based on the principle that the penalty imposed on the offender found guilty of an offence will deter the public in general from committing that particular offence...But how can that deterrent effect follow unless the fact of the offence and punishment become notorious? And how can the facts become notorious if the members of the public are not allowed to speak of them?(3)

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1) (1892) 9 CLJ 268.

2) 1924 OPD 68.

3) At 70-71.

As we have seen, however, the courts tend to draw a distinction between recent and remote offences against the law.[1] The more remote in time the conduct disclosed, the less likely is it to be considered of public benefit.

But the crucial question in this context is what the courts mean by 'recent'. The defence of truth and public benefit has been upheld in cases in which the imputation related to conduct performed up to 20 years prior to publication. Yet in other cases, the defence has been rejected where the acts disclosed were far more recent. Thus in Leibenguth v Van Staaten[2] it was held that a disclosure of acts of smuggling engaged in three years prior to publication could 'serve no good purpose'.

Once again, the lapse of time between publication of the imputation and the performance of the conduct on which it was based cannot in itself be regarded as a determining factor. The courts have accepted that past misconduct, however remote, may lawfully be resuscitated 'where in the interest of the State the occasion demands it'.[3] The disclosure of past misconduct may be deemed to be in the public interest where, for example, the act disclosed is relevant to the plaintiff's capacity to perform a public service[4], where it illustrates an enduring character trait of an individual which is in the public interest to be made known, where the

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1) See supra, 150-55.

2) 1910 TPD 1 203.

3) 1917 TPD 350 at 361.

4) Lyon v Steyn 1931 TPD 247.

plaintiff has persisted in assuming a false public identity[1], or because of the circumstances prevailing in the area in which the imputation was published[2].

It is thus not possible to extract from the cases any general principle relating to the degree of protection which the lapse of time alone affords an individual's past.

2.4.The'manner'of publication

The courts have said that whether a disclosure shall be deemed to have been for the public benefit depends not only on the time and place of publication, but also on its 'manner'[3]. But what precisely is meant by the 'manner' of publication is difficult to determine.

One possibility is that the expression refers to the tone of the communication in which the damaging information was imparted. In Lyon v Steyn[4], for example, account was taken of the fact that the defamatory imputation was 'blurted out' in a public bar.[5]

On the other hand, the fact that the imputation was couched in a light, bantering or jocular tone, or even in exaggerated terms, need not indicate that its content is not for the public benefit. So in South African Mails Syndicate v Hocking[6] the fact that the

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1) Yusaf v Bailey 1964 (4) SA 117 (W).

2) Van Wyk v Steyn 1924 OPD 68.

3) Patterson v Engelenberg and Wallach's Ltd 1917 TPD at 350 at 361.

4) 1931 TPD 247.

5) At 253.

6) 1909 TS 946.

disclosure was plainly aimed as much as poking fun at the plaintiff as at informing the public of a matter of public importance did not prevent the court from concluding that the overriding effect of the publication was to serve the public interest.

The tone of voice or style in which the communication was couched should not in fact be numbered among the circumstances to be taken into account in determining whether a particular statement is for the public benefit. It is true that the tone can affect meaning by conveying an innuendo which alters the signification of the message. But in this case the determination of meaning is relevant to the anterior question of its truth[1], and not to that of whether the statement is for the public benefit. Whether a communication is in the public interest surely depends on the information it contains, and not to the tone of voice in which it is conveyed.

It may be, however, that when the courts use the expression 'manner of publication' they are concerned with the light that the tone casts on the defendant's motive for publication. Thus Voet, for example, cites as examples of imputations which should not be regarded as for the public benefit those made simply for the purposes of revenge[2]. The vexed question whether the law protects only imputations made for a lawful object is considered below[3].

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1) As to which, see supra, 71 et seq.

2) Commentary, 47.10.1, discussed supra, 20-24.

3) See infra, 195 et seq.

2.5 The plaintiff's conduct

The conduct of the plaintiff prior to publication may in certain circumstances be taken into account in assessing a plea of justification. Thus in Roux v Lombard[1], where a woman was charged with immoral conduct, her attempt to dissuade the court from accepting the defendant's plea of truth and public benefit on the grounds that the accusation was one of 'mere immodesty' was rejected because, by instituting an action for seduction, she had herself laid the facts before the public. The court ruled that

> ...the plaintiff made these facts public, and having done so cannot be heard to say that they cannot be repeated.(2)

With respect, this judgment seems to have been founded on the wrong principle. The correct defence in circumstances such as those in Roux's case is that plaintiff, by voluntarily placing the information at issue before the public, had to that extent limited her right to reputation and to privacy with regard to those facts.

The same principle should have been applied in Coetzee v Central News Agency and Another[3], in which the facts were that the plaintiff had sold the details of a murder committed by him to a popular magazine 17 years after he had been convicted and sentenced to life imprisonment. In rejecting an application for an interdict against publication, however, Claydon J held that the protection against

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1) Roux v Lombard 1895 (10) EDC 47.

2) At 51.

3)1953 (1) SA 449 (W).

subsequent disclosure that the plaintiff would normally have derived from the passage of time '...may well, in my view, not be available to him when he has made old news new again'. A trial court, the learned judge ruled

> ...might well decide that the best warning against crime of this sort is the truth as seen by the outsider, and might well decide that...the true facts of the trial should be made public...(1)

Pleas of truth and public benefit have also been upheld because of the plaintiff's negligence or failure to correct a public misrepresentation for which he was not originally responsible. Thus in Clarke and Co v St. Leger[2], the court found that the plaintiff's own negligence had rendered for the public benefit a notice to the effect that he was not allowed to collect money on the defendant's behalf.[3] And in Saunders v Mackay[4], the plaintiff's failure to correct a laudatory paragraph about himself in a newspaper, which attributed to him higher qualifications than he possessed, justified the defendant journalist's disclosure that the plaintiff had falsely claimed these qualifications.[5] Where the plaintiff had falsely accused a secretary of having squandered the funds of a society, the distribution of a notice to the effect that the plaintiff's charge was 'malicious, false and without foundation', and that he had

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1) Per Clayden J at 453 H. The matter did not come to trial.

2) (1896) 13 SC 101.

3) At 104.

4) (1894) 9 EDC 20.

5) At 34-6.

accordingly been expelled from the society, was also held to have been justified.[1]

It is to be noted, however, that the courts will not grant absolute protection to the repetition of damaging information first made public by the plaintiff himself. The limitation is that

> ...if years afterwards these facts were to be repeated with the object of injuring the plaintiff that repetition might be made the subject of a successful action.(2)

While it is true that such repetition may well not be in the public interest, the limitation cited by the judge may also be explained in terms of the principles of the defence of consent in any delictual action. The plaintiff in these circumstances may be deemed to have consented to the disclosure of damaging information relating to himself within a reasonable time. Publication after the lapse of a reasonable time may be regarded as having occurred outside the limits of such consent.

2.6.Defendant's state of mind at time of publication and the motive behind publication

Is the defendant's state of mind at the time of publication of the statement alleged to be defamatory, or the particular motive underlying his decision to publish, among the factors that will be taken into account in deciding whether the disclosure was for the public benefit? This is an unsettled question.

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1) Pieterson v October and others (1894) 11 SC 137.

2) Roux v Lombard (1895) 10 EDC 47 at 51.

There are scattered dicta to be found in the case law and in the writings of the old authorities which suggest that an evil motive or an improper purpose could vitiate the defence.

Vinnius, for example, was of the opinion that the truth of the imputation, even where it resulted in the exposure of crime, would not exonerate where animus injuriandi was present[1].

It is, however, unclear whether many of the Roman-Dutch writers used the term animus injuriandi to refer to intention in the narrow sense, or to the wider concept of 'malice', which in the modern law refers to the defendant's motive. This confusion continues to arise in South African court decisions until relatively recent times.

To argue that the defence of truth and public benefit ought to be vitiated by the presence of animus injuriandi in the narrower sense of intention to publish coupled with the knowledge that publication would result in injury to the plaintiff's personality[2] would, however, be virtually to render it nugatory. Moreover, it would not square with the Appellate Division's current and, it is respectfully submitted, correct view that animus injuriandi and unlawfulness are distinct requirements of the delictual action for defamation, and that the defences of justification are directed at excluding the latter[3].

Malice - or an improper motive underlying publication - is, however, another matter. The question is whether a statement can be

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1) Supra, 19-20.

2) As animus injuriandi has been defined by the Appellate Division. See, inter alia, Craig v Voortrekkerpers Bpk, 1963 (1) SA 149 (A).

3) See infra, 211-12 and references cited there.

said to serve the public benefit, irrespective of its content and consequence, where the defendant's motive was solely to attack and injure the plaintiff. In an early case, the Transvaal High Court gave a negative answer[1]. Innes CJ, after pointing out that a secondary motive such as a desire to amuse and entertain the readers of the damaging communication need not affect the defence, added obiter

> There may of course be cases where the treatment of the subject is so clearly intended to attack the person referred to by way of defamatory ridicule, that the court would hold that the publication was not in the public interest - that it had not been published to draw attention to any matter of public interest, but as an attack on the person referred to.(2)

The circumstances of publication also suggested to the court in Lyon v Steyn[3] that the plaintiff had merely seized on a flimsy pretext to defame the plaintiff. It was found that the manner of publication tended to show that the defendant had been actuated not by a desire to inform the public of a matter of which it was to its advantage to know, but by 'personal spite or some other improper motive'. In casu, this was held to have destroyed the defence. So, too, in Dippenaar v Hauman[4], it was suggested that the motive of the defendant should be to serve the public benefit if publication of a damaging statement is to be considered justified. In that case, it was decided that a defamatory letter was not justified because,

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1) South African Mails Syndicate v Hocking 1909 TS 946.

2)At 950.

3) 1931 TPD 247.

4) (1878) Buch 136.

inter alia, it had been written 'a propos of nothing'[1].

The court also indicated that it might be prepared to take the plaintiff's motive into account in the more recent case of Yusaf v Bailey and Others[2], in which it was laid down that '...merely to publish old scandals for the sake of satisfying the salacious appetite of readers cannot be justified'[3].

On the other hand, there are cases which favour a completely objective view of the defence - i.e. to regard the lawfulness of the damaging statement as flowing, not from the defendant's state of mind, but from the actual or potential consequences of publication. The earliest case in which this position was adopted was Williams v Shaw[4], in which it was laid down that once the words were proved to be 'true in substance and in fact' (and, although Shippard J did not mention the additional requirement, presumably for the public benefit)

> ...the defendant is entitled to his judgment, however spiteful and malicious he may have been, or however base his motives.(5)

This dictum was endorsed obiter in Schoerie v Afrikaanse Pers Publikasies and Others[6], although the plaintiff's motive was not at issue.

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1) Dippenaar v Hauman, supra, at141.

2) 1964 (4) SA 117 (W).

3) At 127. Emphasis added.

4) (1884) 4 EDC 105.

5) At 148.

6) 1966 (1) PH J1 (W).

Academic writers are equally divided on the point. CF Amerasinghe argues that there will be 'an absence of lawful purpose', and hence no defence, if the defendant does not have the object of stating the truth with the object of benefitting the public.[1] Nathan, on the other hand, argues that the defendant fully establishes his plea of justification if he proves that the statement alleged to be defamatory was true and for the public benefit and that 'it does not matter what was his motive for the publication'[2].

The somewhat confused position on this point of law is most starkly reflected, however, by Kelsey Stuart's exposition[3], which includes the following passage

> In deciding what is and what is not in the public interest, the courts will look at the subject matter of the statement, the circumstances surrounding publication, and 'the time, the manner and the occasion of the publication' and if it is proved that the defendant, while purporting to inform the public truthfully upon a matter of public benefit actually had the intention to injure and insult, the defence of justification will fail.(4)

In the next two sentences, however, he adds

> Conversely, where the statement is true and the publication for the public benefit the publication cannot be unlawful and the defendant can have no wrongful intent. The defence will have been established no matter how spiteful and malicious the plaintiff may have been or however base his motives may have been.(5)

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1) Injuries, 92.

2) Defamation, 201. See also Kinghorn in LAWSA, 8, 206. See also McKerron, Delict, 188.

3) Guide, 51.

4) Ibid. Emphasis added. The reference cited in support of this proposition is Coetzee v Nel en 'n Ander 1972 (1) SA 353 (A), which does not provide clear authority for it.

5) Ibid. Emphasis added.

Kinghorn's writing on this point is also not a model of clarity. He notes[2] that the way in which the defence may be reconciled with the currently accepted concept of animus injuriandi has not yet been determined by the courts, and suggests that

> ...where the defendant establishes prima facie that the statement was true and published for the public benefit and consequently lawful, the plaintiff may nevertheless defeat the defence by proving that the publication was animo injuriandi in the sense of publication with conscious intention wrongfully to defame. Where, however, the statement is true and the publication for the public benefit, it is submitted that the publication cannot be unlawful and the defendant can have no wrongful intent.(2)

The Appellate Division has not yet resolved this point. It may be, however, that its ruling that all the defences of justification are directed at the wrongfulness element[3] can be seen as implicit endorsement for the view that the defence of truth and public benefit is not vitiated by abuse of purpose. This line of reasoning could be elaborated as follows: If, objectively considered, the true statement can be said to have disclosed information of which the public ought to know, its publication is worthy of protection and therefore lawful. Proof of truth and public benefit will therefore serve to exclude one of the two necessary elements of the delict - wrongfullness - and therefore the plaintiff's action must fail, irrespective of the presence of animus injuriandi or of malice.

Before this argument is accepted, however, two points need to be considered. The first is that animus injuriandi and malice are

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1) LAWSA, 8, 207.

2) Ibid., n.9.

3) On which see infra,211-12, and references cited there.

distinct concepts. The second is that malice or improper motive has been held relevant, not to the requirement of animus injuriandi, but to that of lawfulness in other areas of the law of defamation. Thus malice vitiates the other 'established' defences - fair comment[1] and relative privilege[2] - which are directed at the unlawfulness element, not because it shows the presence of animus injuriandi, but because it shows that the defendant had in fact overstepped the bounds of the defence and hence acted wrongfully.

If 'malice' should exclude the lawfulness of the defence in the case of the defences of privilege and fair comment, it is difficult to understand why it should not be regarded as so doing in the case of the defence of truth and public benefit, which merely delimits a set of the possible circumstances which may be raised to exclude unlawfulness in an action for defamation.[3]

There is thus no established legal principle to prevent the courts from deciding that statements should not be regarded as for the public benefit where they are published to serve some selfish end. The real question is one of policy. Newspapers, for example, always or nearly always have the ulterior purpose of striving to attract readers and so boost circulation , and disclosures by them

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1) See, eg., Merivale v Carson (1887) 20 QBD 275 at 285.

2) McKerron, Delict, 189, 196; Basner v Trigger 1946 AD 83 at 95.

3) Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977 (3) SA 394 (A).

of matters which are of undoubted public benefit often serve this end.[1] And, as Voet has pointed out, statements of the most manifest public interest, such as the disclosure of crimes, are often brought into public circulation for the worst possible motives[2].

The question to decide is whether the law should protect the right of the general public to learn of matters which are in its interest to the extent of possibly unfairly benefitting those who would bring such matters into the open for selfish reasons. One solution would possibly be to allow the plaintiff an opportunity to prove malice after the defendant has established the requirements of the defence, and to take it into account as one of the factors which go to show whether the particular imputation is for the public benefit. Any inflexible rule which results in the nullification of the defence wherever a motive other than serving the public benefit is shown could have deliterious consequences for the free flow of important information in society.

2.7. Defendant's bona fide belief that the statement was true and for the public benefit.

In Schourie v Afrikaanse Pers Publikasies and others[3] Vieyra J held that where the words at issue are found to be false, judgment will go against the defendant who has raised the defence of truth

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1) On the other hand, sometimes they do not. The circulations of the Washington Post and the Rand Daily Mail actually dropped during their coverage of the Watergate and Information scandals.

2) Commentary 47.10.1.

3) 1966 (1) PH J1 (W).

and public benefit even though the court be satisfied that he 'bona fide and reasonably believed the words to be true at the time he uttered them'.[1] Although there is no reported case in point, it is submitted that the same should apply where the court finds that the words, though true, were not in the public interest, although the defendant bona fide believed them to be so. The test for both elements of the defence is objective, and, should the plaintiff fail to establish either, judgment should go against him, notwithstanding his bona fide belief that the statement was for the public benefit.[2]

2.8. Public benefit irrespective of truth

Another point to be considered is whether a publication may be deemed to be in the public interest, irrespective of its truth. As has been indicated[3], the defence of truth and public benefit will fail if the statement is found not to be true. In Zillie v Johnson and another[4], the possibility was raised that a publication may be lawful irrespective of the truth of the imputation[5]. The facts of this case were as follows: plaintiff was a reporter who on the eve of a general election attributed to and published in her

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1) Schourie v Afrikaanse Pers Publikasies, ibid.

2) It would appear, however, that in these circumstances the defendant other that a representative of a newspaper or other mass medium could still plead absence of animus injuriandi simpliciter, at any rate where the mistake is not one of law - see Jordaan v Van Biljon 1962 (2) SA 286 (A) at 296; Boberg, (1966) Annual Survey at 183 and (1971) SALJ 57; McKerron, (1931) SALJ 154 at 163; Van der Merwe (1966) THRHR 76; Van der Vyver (1967) THRHR 370 at 375-6.

3) Supra, 64.

4) 1984 (2) SA 186 (W).

5) See esp. 196 F-H.

newspaper a controversial statement by the then Minister of Health that elderly people could maintain a healthy diet on R20 a month. Publication sparked a heated public controversy, to which the Minister responded inter alia by denying that he had been quoted in in context. He sent a telegram to a sitting commission on the mass media, describing defendant's report as a 'flagrant and total distortion of the facts and a malicious misrepresentation of my intentions'. Defendants had caused this statement to be published in their newspaper. Coetzee J found it unnecessary to inquire into the correctness of the plaintiff's report as the defendant had entered a plea only that publication of the Minister's comments were in the public interest, and had not relied on any of the 'established' defences[1]. He decided that the sole question was whether publication was unlawful[2]. In approaching this question, the learned judge, relying on the Appellate Division cases of Suid-Afrikaanse Uitsaaikorporasie v O'Malley[3], Borgin v De Villiers[4], May v Udwin[5], and Marais v Richards en 'n ander[6], accepted the view that the well-known defences of privilege, fair comment and justification are mere examples of lawful publication[7] and accepted the existence of a

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1) Zillie v Johnson, supra, at 194 B.

2) At 194 H.

3) 1977 (3) SA 394 (A).

4) 1980 (3) SA 556 (A).

5) 1981 (1) SA 1 (A).

6) 1979 (1) SA 83 (T).

7) Zillie v Johnson, supra, at 195 B-C.

general plea of absence of unlawfulness, which was determined by balancing the interest of the individual in his own good reputation and the interest of society in hearing of a matter of public concern[1]. Where this balance was tipped in favour of the public interest, the court suggested that newspapers which published damaging matter could be regarded as acting under privileged and hence lawful circumstances. Indeed, the learned judge spoke in the regard of cases of 'newspaper privilege'[2], which consisted in the publication of news which served 'the common weal' of society and which created for the press both a right and a duty to publish. He added that a bona fide belief in the truth of the statement, while applicable to some of the defences excluding unlawfulness, was inapposite to a general plea of absence of unlawfulness. The lawfulness or otherwise of the publication in such cases was determined solely by the criterion of 'reasonableness':

> The average right-thinking person would have felt justifiably annoyed if the public media had suppressed the existence of this telegram or its contents only became public knowledge subsequently. He would have felt deprived of knowledge to which he was entitled....What the reading public was entitled to know was what the Minister said regardless of a particular newspaper's views.(3)

Although the learned judge did not canvass the point, it seems to follow from the judgment that the mass media can, under a general plea of absence of unlawfulness, be protected even where the statement repeated was demonstrably false, provided that it was part

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1) Zillie v Johnson, supra, at 195 E-F.

2) At 196 F-G.

3) Ibid, H.

of a public debate in which the public had a legitimate interest. Coetzee J added, however, that exemption from liability for the republication of damaging statements would not be afforded in circumstances where the original statement had exceeded the bounds of reasonableness, as determined by the relevance of the imputation to some issue of public importance. For example, republication of the Minister's statement would in casu not have been deemed lawful had the Minister said that the report to which he took exception had been written by a Communist agent[1].

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1) Zillie's case, it is submitted, opens the way to a potentially healthy development in the law of defamation. Burdening the public media in all instances with the task of proving the truth of reported views and allegations by the participants in public debates can severely curtail the circulation of information regarding the conduct of public affairs. In such cases, those aggrieved by things said in the heat of public debate are not without recourse, as the originator of the imputation would, if sued, still be liable to prove that the imputation, in addition to being in the public interest, is true.

Chapter 4

THE JURIDICAL BASIS OF THE DEFENCE

The foregoing chapters have attempted to set out the requirements that must be met if the defence of truth and public benefit is successfully to be raised in an action for defamation under the South African law. This section inquires into the juridical basis of the defence by relating it to certain recent developments in the law of defamation.

It was long supposed that the sole basis for liability for defamation in the South African law was to be sought in the defendant's intention. This view received its clearest expression in various judgments of the 19th Century Colonial courts, of which the following may be taken as representative:

> In an action for defamation the law presumes the existence of animus injuriandi, or, as I would rather call it, of malice, from the fact that defamatory words were published. If he (the defendant) shows that the words were published on a privileged occasion, he so far rebuts the presumption of malice as to throw on the plaintiff the burden of proving express malice. If he proves that the words were true, he does not completely rebut the presumption of malice unless it appears from the pleadings, or unless the defendant avers and shows that some public benefit was to be derived from publication.(1)

And in 1929 the Appellate Division ruled as follows with regard to the plea of what it termed 'justification:

> ...the presumption of animus injuriandi which arises from the use of defamatory language is conclusively rebutted by proving justification, i.e. that the charge was true and that its publication was in the public interest.(2)

Proof of publication of a statement which was prima facie defamatory

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1) Per De Villiers CJ, Botha v Brink (1878) Buch 118 at 123-4.

2) Per Innes CJ, Johnson v Rand Daily Mails 1928 AD 190 at

was therefore regarded as sufficient to give rise to a presumption that the defendant had acted with the requisite form of fault. The defendant could only escape liability if he could prove that animus injuriandi was in fact lacking - i.e. that his mind was directed at some object other than injuring the plaintiff's reputation, and which was recognised as justified in law.

Thus it came to be accepted by the South African courts that all the 'stereotyped' defences to an action for defamation were to be regarded as rebutting the presumption of fault. So, for example, it was held by the Appellate Division in Basner v Trigger:

> In the course of time there have become crystalised in our law certain set or stereotyped defences whereby the law recognises that the inference of animus injuriandi following from the use of defamatory words can be rebutted and the plaintiff's claim, provisionally, be met.(1)

Ironically, the idea that all the 'stereotyped' defences were aimed at rebutting the mental element gave rise to calls for the elimination of animus injuriandi as a requirement for liability for the publication of defamatory matter. McKerron popularised the view that the defences available to the defendant in a defamation action were in fact restricted to certain 'stereotyped' defences and were thus numerus clausus. Liability could therefore only be avoided by showing that publication took place 'with lawful justification or excuse' and there was lawful justification or excuse only if the requirements of one of the stereotyped defences could be proved.[2]

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1) 1946 AD 83 at 94.

2) McKerron, 'Fact and Fiction in the Law of Defamation', (1931) SALJ 154. See also the various editions of his Delict.

In a succession of cases in the 1960s[1], however, the Appellate Division sought to restore animus injuriandi to the central place it had hitherto enjoyed as a requirement for liability in an action for defamation. These judgments created a logical difficulty, however, for they tended to suggest that the presence or absence of the crucial subjective element could be determined by examining either the defendant's state of mind at the time of publication or by asking whether the publication conformed to the objective requirements of the so-called stereotyped defences[2]. As was noted by several academic writers[3], however, this position was theoretically untenable. If animus injuriandi is construed, it is submitted correctly, as simply an equivalent of the term used for intent (dolus) in an action instituted for injury to personality[4], then quite clearly statements which conform to the requirements of the stereotyped defences can and often are published with full knowledge by the publisher of their injurious consequences for the plaintiff. The view that proof of one of the 'stereotyped' defences serves to rebut the presumption of animus injuriandi is therefore no more than a fiction. A more realistic approach will take into account the fact

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1) The ball was set rolling by the judgment in Maisel v Naeren 1960 (4) SA 836 (C) and carried further by the Appellate Division in Jordaan v Van Biljon 1962 (1) SA 286 (A), Craig v Voortrekkerpers Bpk 1963 (1) SA 149 (A) and Naidoo v Vengtas 1965 (1) SA 1 (A).

2) Boberg, 'Defamation in the Eighties' (1982) 12 Businessman's Law, 81 at 83.

3) See eg. Naidoo v Vengtas 1965 (1) SA 1 (A).

4) See, inter alia, RW Parsons (1951) THRHR 192 at 196; Boberg (1961) 78 SALJ 171 at 186; Strauss, Strydom and Van der Walt, Die Perswese en die Reg at 137; Van der Merwe and Olivier, Onregmatige Daad, 230 et seq.

that the law is prepared to exempt a defendant from liability in an action for defamation even though he was fully aware that publication would have the effect of harming the plaintiff's reputation. As in other areas of the law of delict, the act can be deemed lawful even though intention to injure was present. This is because there are, not one, but two necessary requirements for liability under the actio injuriarum: first, the defendant must have had the necessary form of intent; second, the act must have been wrongful. A defendant in an action for defamation can escape liability by showing the absence of either of these requirements. Some of the stereotyped defences are aimed at rebutting the mental element, others at defeating the wrongfulness element.

This view has now been accepted by the courts. In Suid-Afrikaanse Uitsaaikorporasie v O'Malley[1], Rumpff CJ accepted the distinction between the wrongfulness and fault requirements in an action for defamation, and pointed out that to negative the presumption of wrongfulness the defendant had to show that the statement at issue was made in circumstances which satisfied the court that

> ...sover dit to gemene reg betref of publieke beleid verg dat die publikasie geregverdig is en dus as regmatig bevind moet word.(2)

In May v Udwin[3], Joubert JA summarised the current law on this point

> When the publication of defamatory matter by a defendant is proved or admitted, two rebuttable presumptions of fact arise, viz., a presumption of intent, i.e. that the

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1) 1977 (3) SA 394 (A).

2) At 403.

3) 1981 (1) SA 1 (AD).

> defendant intentionally published with the knowledge of its defamatory meaning, as well as a presumption of wrongfulness, i.e. that the publication of defamatory matter was unlawful.(1)

The learned Judge of Appeal continued:

> The presumption of animus injuriandi may be rebutted by proving a defence (a so-called 'skulduitsluitingsgrond') which negatives the inference of animus injuriandi. A defendant may rebut the presumption of unlawfulness by proving a defence (a so-called 'regverdigingsgrond' or justification ground) which is directed at establishing that the publication of defamatory matter was lawful.(2)

In Marais v Richard and another[3] the Appellate Division left no doubt that the defence of truth and public benefit served to exclude the wrongfulness element:

> Daar kan weinig tweifel bestaan dat, soos in die geval van die sg.'privileges'...die verweer van billike kommentaar (asook die beweer van 'waarheid en openbare belang') alleen op die onregmatigheidselement van die injuria en as regsverdigingsgronde beskou moet word.(4)

The learned Judge of Appeal added that to regard the established defences at this stage as rebutting the presumption of animus injuriandi would lead to 'onnodige verwarring'[5].

With respect, this view is to be welcomed. The distinction between defences excluding animus injuriandi and those directed at negativing the wrongfulness element becomes the more crucial in the light of another recent development in the law of defamation. In

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1) May v Udwin, supra, at 10 C-G.

2) At 10 E-F.

3) 1981 (1) SA 1 157 (AD).

4) At 1 166.

5) At 1 166-67.

Suid-Afrikaanse Uitsaaikorporasie v O'Malley[1], Rumpff CJ suggested obiter that a form of strict liability be imposed in cases of defamation where the defendant was a newspaper or other mass medium, and this view was confirmed in Pakendorf v De Flamingh[2]. In view of this development, had the distinction between defences excluding animus injuriandi and those excluding unlawfulness not been clearly drawn, the imposition of 'no fault' liability could have resulted in the mass media being technically deprived of the stereotyped defences. As it is, however, the media now find themselves in a position similar to that which McKerron had earlier suggested applied to all defendants in a defamation action - viz., liability will follow unless they can raise a defence which satisfies the court that publication took place in circumstances, or served an end which the law regards as justified. Ordinary citizens, on the other hand, whose words do not ordinarilly cause damages as extensive as those disseminated by the mass media, can avoid liability by raising defences that serve to rebut the presumptions of either animus injuriandi or the element of wrongfulness.

The juridical basis of the defence of truth and public benefit is, therefore, that it serves to rebut the wrongfulness element of the delict of defamation. But the further question arises: by what standard is wrongfulness determined? The English law takes the view that publication of a true but injurious statement is not wrongful

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1) 1977 (3) SA 394 (A).

2) 1982 (3) SA 146 (A).

because no personality right of the plaintiff has been infringed: a person has no right to a reputation based on concealment of the full truth about his character. The South African courts, however, explain the absence of wrongfulness of words which are true and for the public benefit in terms of the object served by their publication: the public's right to learn of matters which are in its interest to know simply outweighs the plaintiff's right to reputation. The defence therefore points to a form of privilege or 'justification', and when the publication of defamatory words is justified is determined by the criteria of 'public policy' and 'reasonableness'. As Rumpff CJ put it in Suid-Afrikaanse Uitsaai Korporasie v O'Malley[1]

> Wanneer die vraag ontstaan of die publikasie van die lasterlike woorde regmatig of onregmatig was, is dit die taak van die Hof om vas te stel, vir sover dit die gemene reg betref of publieke beleid verg, dat die publikasie geregverdig is en dus as regmatig beskou moet word.(2)

And in May v Udwin[3] Jansen JA explained in similar terms why proof that publication took place in circumstances which the law regarded as privileged excluded wrongfulness

> One of the ways in which the defendant may rebut the presumption of unlawfulness is by proving that the publication of defamatory matter was made on an occasion of qualified privilege. The publication of the defamatory matter is then regarded as being in the interests of public policy and, therefore, as being lawful.(4)

'Public policy' is therefore the broad criterion by which the

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1) 1977 (3) SA 394 (A).

2) At 402-3.

3) 1981 (1) SA 1 (A).

4) At 10 F-G.

incorporation of the requirement of public benefit into the defence of truth can be explained. In South African law, public policy decrees that those who have an interest or a duty to publish damaging imputations, or those who do so for ends regarded as justifiable, should be protected. Such duty, interest or circumstances exist when reasonable men would consider publication in accordance with the boni mores and hence worthy of protection.[1]

The tendency to designate the defence of 'truth and public benefit' by the English law term 'justification' is therefore technically incorrect. The other stereotyped defences - fair comment and privilege - are also methods of justifying the publication of words which are prima facie defamatory. Each of these defences merely point to common sets of circumstances which the law accepts as rebutting the presumption of wrongfulness which arises on proof by the plaintiff that defendant published words damaging to his reputation.

The flexible approach advocated by the Appellate Division in the judgments just cited allows for the possibility that new and

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1) As Corbett JA put it in Borgin v De Villiers 1980 (3) SA 556 (A):

> The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did? And in answering this question the Court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be a lawful one. (At 557 E-F)

In deciding when public policy justifies publication

> ...the court must judge the situation by the standard of the ordinary reasonable man, having regard to the relationship between the parties and the surrounding circumstances.(Ibid.)

distinct grounds of justification may become recognised, or that the limits of the present defences may be extended, as was demonstrated in the recent judgment of Zillie v Johnson and another[1]. Meanwhile, it may be said that at the present stage of development of the South African law of defamation, among the factors that are held to justify publication of matter which is on the face of it defamatory are the truth of the imputation and the public advantage derived from its publication. Where the defendant in a defamation action succeeds in satisfying a court on both these points, no liability follows because the action was not wrongful. The law decrees that members of the general public have a right to be informed of matters which are in their interest to know, but the courts have reserved the right to decide when the publication of damaging information can be said to serve an acceptable public interest. The advantage to the public that may be served by the publication of defamatory matter outweighs the individual's right to reputation in certain circumstances. No hard and fast rules can be extracted from the case law that will determine where the scale will fall in every particular case. The most that can be said is that the South African courts have recognised the right of individuals and the public media to make available information that will help create a public opinion informed on matters of public, political, and socio-economic activities of relevance to the community. Legal recognition of this right at once guarantees freedom of speech and defines its limits.

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1) 1984 (2) SA 186 (W), disussed supra, 203-6.

CONCLUSIONS

In the light of the above analysis of the defence of truth and public benefit in an action for defamation in the South African law, it is submitted that the following conclusions can be drawn. As most of these points have received detail treatment in the text, the points will only be mentioned in summary form here.

1) When the plaintiff in a defamation action succeeds in proving that words which were on the face of them defamatory were published concerning him, two presumptions arise against the defendant: a) that the words were published animo injuriandi or intentionally; b) that publication was unlawful, i.e. without grounds of justification.

2) Defendants other that the mass media or their representatives can evade liability by proving defences that rebut either of these two presumptions. The mass media, however, are confined to defences that negative the presumption of unlawfulness, because in their case fault is not an element of the delict.

3) The defence of truth and public benefit is one of the means open to a defendant in a defamation action to rebut the presumption that he acted unlawfully. Together with the other 'stereotyped' defences of fair comment and privilege, it sets out one of the circumstances in which publication of injurious matter will not give rise to civil liability because the defendant is presumed to have served an end which outweighs the harm done to an individual reputation, and accordingly deserves to be protected by law.

4) The South African courts are not prepared to accept that the publication of true imputations concerning the character or conduct of individuals is invariably lawful. The publication of such statements will only be deemed lawful where, in addition to being true, some demonstrable public advantage can be said to have flowed from it.

5) Whether publication can be said to have served the public interest is a question of fact, to be determined by examing all the circumstances of the case in the light of the boni mores. It is not possible to lay down general rules from which it can be determined a priori when publication can be said to have served the public benefit. The essential question is whether the reasonable man would consider that the defendant had acted in furtherance of an objective which outweighed the plaintiff's right of reputation.

6) Factors extraneous to the subject-matter of the imputation at issue that will be considered by the courts in establishing the presence or absence of public benefit include the interests of the particular audience to which the words were published, the relationship in time and space between publication and the commission by the plaintiff of the acts disclosed, the plaintiff's position in society and his conduct prior to publication. All these factors must be weighed against the intrinsic value of the information disclosed in deciding whether the publication was justified. In some cases, the value to society of the information disclosed may be such as to outweigh other factors; in others,

factors extraneous to the subject-matter disclosed may be conclusive.

7) Notwithstanding decisions to the contrary, it is submitted that malice - the presence of improper motive - should be taken into account as one of the factors in deciding whether the publication of a true but injurious statement, although conforming to the other requirements of the defence, is to be deemed lawful. No principle exists in the South African law that compels the courts to accept that disclosure of an injurious statement for the purposes of, say, blackmail should be protected from an action by the injured party because disclosure conforms in other respects to the requirements of one of the 'stereotyped' defences. On the other hand, proof of a secondary objective other than serving the public benefit should not conclusively defeat the defence. The public media, for example, are frequently motivated by a secondary desire to increase profit when publishing matter of public interest and importance. There may, however, be circumstances in which the nature of the matter disclosed is of such burning importance that even the presence of malice should yield to the benefit of making it known. Like the factors enumerated above, the subjective intention of the defendant should be one of the factors taken into account in determining whether publication is to be deemed worthy of protection. As in the case of the defences of fair comment and relative privilege, the plaintiff should at least be given the opportunity of answering the defendant's case by proving, if he can, that the latter was actuated by malice.

8) The 'stereotyped' defences aimed at rebutting the presumption of unlawfulness in a defamation action are each jurisprudentially grounded on a recognition by the law that general values exist which outweigh the individual's right to reputation. The defence of fair comment protects a general right to express views on matters of public interest and importance; that of privilege upholds the interest of society generally in protecting damaging statements published by those under a duty to publish, or to those who have an interest in learning of the matter disclosed, or in circumstances in which it is desirable that people should feel free to speak without fear of incurring liability. The lawfulness of an injurious statement which is true and for the public benefit flows from a recognition that society has a general right to learn the truth as to the character and conduct of individuals. Like all legal rights, however, that of the public to information damaging to the reputation of an individual is limited. The major policy issue to be resolved by the courts is when the public advantage derived from making information available is such that it outweighs the need to discourage discreditable practices that may be contrary to the public interest or public policy. Truth is not necessarily an indication that he who utters it is actuated by the highest motives.

9) The requirement that the truth of an injurious statement will exonerate its publisher from an action for defamation only where it served the public benefit undoubtedly curtails in some measure the free flow of information in society. But this writer could find no instance in the reported case law of the limitation being used to penalise a defendant who had published information of any great

social value, taken even in the broadest sense. The limitations are therefore narrow enough to ensure that the right to publish the truth about others is not significantly impaired, but wide enough to safeguard the individual's interest in protecting details of his past which he has lived down or which are his private concern.
