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**ONLINE DEFAMATION: BALANCING REPUTATIONAL HARM AND THE  
FREEDOM OF EXPRESSION AND THE MEDIA**

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## **LIST OF ABBREVIATIONS**

**BAKE-** Bloggers Association of Kenya

**CBK-** Central Bank of Kenya

**CKRC-** Constitution of Kenya Review Commission

**COFEK-** Consumer Federation of Kenya

**ECtHR-** European Court of Human Rights

**MP-** Member of Parliament

**UAE-** United Arab Emirates

**UK-** United Kingdom

**US-** United States

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## **LIST OF CASES**

*Ames & Anor v The Spamhaus Project Ltd and Anor* (2015) The United Kingdom Queens Bench.

*Arthur Papa Odera v Peter Ekisa* (2016) eKLR.

*CFC Stanbic Bank of Kenya v Consumer Federation of Kenya (COFEK) & 2 others* (2014) eKLR.

*Christopher Ndarathi Murungaru v Standard Limited & 2 others* (2012) eKLR.

*Cooke & Anor v MGN Ltd & Anor* (2014) The United Kingdom Queens Bench.

*CORD v The Republic* (2014) eKLR.

*De Libellis Famosis* (1606) The United Kingdom Star Chamber.

*Francis Ole Kaparo v Standard Media Ltd* (2010) eKLR.

*Handyside v United Kingdom* ECtHR Judgment of 7 December 1976.

*Hulton v Jones* (1910) The United Kingdom House of Lords.

*Jacqueline Okuta & another v Attorney General & 2 others* (2017) eKLR.

*Jameel v Dow Jones and Co Inc* (2005) The United Kingdom Court of Appeal.

*Johnson Evan Gicheru v Andrew Morton* (2010) eKLR.

*Jones v Jones* (1916) United Kingdom House of Lords.

*Joseph Kudwoli v Eureka Educational and Teaching Consultants & 2 Others* (1990) eKLR.

*Lachaux v Independent Print Ltd* (2015) The United Kingdom Queens Bench.

*Lachaux v Independent Print Ltd* (2017) The United Kingdom Court of Appeal.

*Lachaux v Independent Print Ltd* (2019) The United Kingdom Supreme Court.

*Mahfouz v Ehrenfeld* (2015) The United Kingdom Queens Bench.

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*Media Council of Kenya v Eric Orina* (2013) eKLR.

*Nelson Havi v Headlink Publishers* (2018) eKLR.

*Newstead v London Express Newspaper Ltd* (1940), Court of Appeal of England and Wales.

*Oyaro v Alwaka T/A Weekly Citizen & 2 others* (2003) KLR 571.

*Reynolds v Times Newspapers* (1999) The United Kingdom House of Lords.

*Sim v Stretch* (1936) The United Kingdom House of Lords.

*South Hetton Coal Co v NE News Association* (1894) The United Kingdom Queens Bench.

*Star Publication Ltd & Another v Ahmednassir Abdullahi & 5 others* (2015) eKLR.

*The Duke of Brunswick v Harmer* (1849) The United Kingdom Queens Bench.

*Thornton v Telegraph Media Group* (2010) The United Kingdom Queens Bench.

*Wieman v Updegraff* (1952) The Supreme Court of the United States.

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## **LIST OF STATUTES**

*Constitution of Kenya* (2010).

*Constitution of Kenya* (1963) (Repealed).

*Defamation Act* (Act No 10 of 1970).

*Defamation Act* (United Kingdom).

*Judicature Act* (Act No. 16 of 1967).

## CHAPTER ONE

### INTRODUCTION

#### **1.1 Background**

Legal remedies for reputational injury have come a long way since the slicing of one's tongue.<sup>1</sup> Reputational damage finds in the law a single refuge: Defamation. Black's Law Dictionary defines defamation as 'the offense of injuring a person's character, fame, or reputation by false and malicious statements.'<sup>2</sup> This common law tort may manifest in the form of spoken words (slander) or written statements (libel).<sup>3</sup>

Much of libel laws' evolution has been through common law. Although this has allowed for flexibility in doctrinal development, it has also resulted in multiple inconsistencies that have not evaded criticism despite the benefit of age. Consequently, defamation law has been described as one laced with 'anomalies and absurdities' for which no legal writer has ever had a kind word.<sup>4</sup>

While long standing principles have been easy to apply in libel suits involving print media, recent developments bring new concerns. One of these developments is the increasing recognition of the State's responsibility to respect human rights. Concerning the freedoms of expression and media, this obligation is heavily guarded in a free democracy, important enough to be explicitly recognized under Kenya's 2010 Constitution.<sup>5</sup>

Another development is that the proliferation of social media has arisen as a new frontier for publication. Its relative ease of publication, potential far reaching audience and disregard for fact-checking among users has created a new hub for just about anyone to publish explicit statements from the comfort of their home. This ease translates to an increase in the frequency of explicit

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<sup>1</sup> Gorman D, 'Mutilation and spectacle in Anglo-Saxon legislation' in Gates J and Marafioti N (eds) *Capital and corporal punishment in Anglo-Saxon England*, Boydell & Brewer, United Kingdom 2014, 150.

<sup>2</sup> *Black's Law Dictionary* 2 ed.

<sup>3</sup> In this paper, however, defamation will henceforth be used interchangeably with libel.

<sup>4</sup> Prosser W and Keeton P, *Prosser and Keeton on the law of torts*, 5 ed, West Group, 1984, 771.

<sup>5</sup> Article 33 and 34, *Constitution of Kenya* (2010).

statements published, sending the number of libel suits surging.<sup>6</sup> These are factors to consider especially as social media personalities<sup>7</sup> are becoming the subjects of libel suits, especially bloggers.<sup>8</sup> There is definitely a need to reconsider existing laws in our legal system, bringing them up-to-date with current realities and ensuring better protection for expression rights.<sup>9</sup>

Certain jurisdictions such as the United Kingdom (UK), have adopted a ‘serious harm’ test of deducing harm suffered in defamation suits.<sup>10</sup> This threshold requires that reputational damage must be serious enough to be actionable. It is in response to the rising number of online defamation claims. In light of the rising number of online libel claims in Kenya, the courts may have to revisit the balancing of reputational rights and expression rights. This may have an impact on traditional defamation law.

## **1.2 Statement of the Problem**

The problem arising is whether the current laws on libel need to be updated in order to be in line with current realities within the online sphere. Moreover, how the libel law in the course of its development can adequately address the intricate balance between reputational rights on the one hand and freedoms of expression on the other. This balance is needed to prevent a ‘chilling effect’ on the ability of citizens to express themselves through online media.

## **1.3 Statement of Objectives**

This paper achieves the following objectives:

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<sup>6</sup> Mputhia C, ‘Defamation cases rising fast in the age of Internet’ Business Daily-<<https://www.businessdailyafrica.com/lifestyle/pfinance/Defamation-cases-rising-fast-Internet/4258410-4571172-14ftkb2z/index.html>> on 2 February 2019.

<sup>7</sup> Social media personalities, or internet celebrities, are individuals who have gained a significant following on social media websites.

<sup>8</sup> Karanja F, ‘Court orders blogger Nyakundi to pull down defamatory articles against politician’ The Standard -<<https://www.standardmedia.co.ke/article/2001306978/court-orders-blogger-nyakundi-to-pull-down-defamatory-articles-against-politician>> on 2 February 2019.

<sup>9</sup> Maina H, ‘Time to change defamation laws’ The Standard, 8 September 2016-<<https://www.standardmedia.co.ke/article/2000215113/time-to-change-defamation-laws>> on 2 February 2019.

<sup>10</sup> Section 1(1), *Defamation Act* (United Kingdom).

1. Appraise how libel and its elements been applied in common law and Kenya.
2. Examining the interaction of libel with the freedoms of expression and media in Kenya.
3. Examining the balancing tests in relation to constitutional freedoms and reputational rights.
4. Investigating how the balancing tests are influenced in the online sphere and developments from other common law systems.

#### **1.4 Research Questions**

This paper seeks to answer the following questions:

1. How has libel and its elements been applied in common law and Kenya?
2. How does libel interact with freedom of expression and media in Kenya?
3. What are the balancing tests in relation to constitutional freedoms and reputational rights?
4. How are these balancing tests influenced in the online sphere?

#### **1.5 Hypothesis**

There is a gap in existing libel laws in Kenya, particularly due to the rising cases of defamation within the online sphere. If this gap is addressed, there will be positive step in balancing competing rights of reputation and expression.

#### **1.6 Literature Review**

Lord Atkin's famous definition of libel is one that is still in use today. A defamatory statement is one which exposes the claimant to hatred, contempt and ridicule or tends to lower the plaintiff in the estimation of the right thinking members of society generally.<sup>11</sup> It acts as a limitation to the

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<sup>11</sup> *Sim v Stretch* (1936) The United Kingdom House of Lords.

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freedom of expression in as much as civil liability attaches if that expression affects another's reputation.

Three elements must be proved by a claimant for a defamation suit to generally succeed. First, the statement must be false. Second, the statement must refer to the claimant. Third, it must be published.

There are defences that exist for a Defendant in a libel suit. Much of them have evolved from the age of printing press and include qualified privilege, truth and fair comment.

For a long time, all a claimant had to prove was that the Defendant published a defamatory statement concerning them.<sup>12</sup> The statement may even refer to the claimant indirectly; as long as the statement was communicated to a third party the Defendant would more likely face liability in damages. Where the reach of the published statements is wider, the amount of damages awarded will be higher.<sup>13</sup> Unlike negligence, the falsity of the statement as well as harm inflicted was already presumed.<sup>14</sup>

The extent of defamation law from its inception has been limited by the increasing scope of constitutional freedoms, particularly freedoms of speech and the media.<sup>15</sup> This has resulted in novel ways to analyse the extent of actionable reputational damage, an endeavour taken up by jurisdictions such as the United Kingdom. In response to the rise of potentially trivial suits brought with social media's rise,<sup>16</sup> England's Parliament passed the 2013 Defamation Act, which introduced the 'serious harm' threshold.<sup>17</sup> This meant that for a published statement to qualify as libel, it must have caused serious harm to the claimant. This is the centrality of the Act's purpose: to better achieve an appropriate balance between the freedom of expression and reputation rights.<sup>18</sup>

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<sup>12</sup> *Newstead v London Express Newspaper Ltd* (1940), Court of Appeal of England and Wales.

<sup>13</sup> *Oyaro v Alwaka T/A Weekly Citizen & 2 others* (2003) KLR 571.

<sup>14</sup> *Jones v Jones* (1916) United Kingdom House of Lords.

<sup>15</sup> Witting C, *Street on Torts*, 14 ed, Oxford University Press, Oxford, 2015, 520

<sup>16</sup> Press Association, 'Libel: new Defamation Act will reverse 'chilling effect', ministers claim' *The Guardian*, 31 Dec 2013-<<https://www.theguardian.com/law/2013/dec/31/trivial-libel-claims-targeted-new-law>> on 2 February 2019.

<sup>17</sup> Section 1(1), *Defamation Act* (United Kingdom).

<sup>18</sup> Groppo M, 'Serious harm: A case law retrospective and early assessment' 8 *Journal of Media Law* 1, 2016, 1.

The UK Supreme Court's recent judgment in *Lachaux v Independent Print* sheds new light on this standard. It interpreted the 'serious harm' as an affirmation of Parliament's intent to amend the law of defamation. The courts would have to go into an actual investigation as to whether serious harm has been caused. A claimant, therefore, has a tougher hurdle in proving not just the tendency to cause harm but serious harm in fact.<sup>19</sup>

Defamation law in Kenya operates as a limitation on the freedom of expression.<sup>20</sup> Kenya's 1970 Defamation Act is the most recent attempt at codifying libel law from established common law principles.<sup>21</sup> Quite unsurprisingly, a significant amount of its content is largely transplanted from its counterpart act in United Kingdom.<sup>22</sup> Kenya's courts are guided by common law doctrine, requiring a similar three-step test for the claimant to prove.<sup>23</sup>

In Kenya, however, the application of older common law principles persists. The threshold of 'likelihood' or 'tendency' to cause harm still remains.<sup>24</sup> Certain court practices have been inconsistent with guidelines on protecting speech and media freedoms.<sup>25</sup> There exists a persisting trend of awarding exemplary damages in cases involving public officials.<sup>26</sup> Worse still, judges have rationalized overbearing pecuniary awards on punishing the Defendant rather than solely protecting the claimant's reputation.<sup>27</sup>

There is development, however, as some courts have expressed a need for a balancing test that has been expressed in emerging cases.<sup>28</sup> Some judges have rightly expressed caution in utilizing interim injunctions as a remedy due to its impediment on free speech, even in an online forum. It

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<sup>19</sup> *Lachaux v Independent Print Ltd* (2019), Supreme Court of the United Kingdom.

<sup>20</sup> Article 33(2), *Constitution of Kenya* (2010).

<sup>21</sup> *Defamation Act* (Act No 10 of 1970).

<sup>22</sup> *Defamation Act* (1957) United Kingdom.

<sup>23</sup> *Joseph Kudwoli v Eureka Educational and Teaching Consultants & 2 Others* (1990) eKLR.

<sup>24</sup> *CFC Stanbic Bank of Kenya v Consumer Federation of Kenya (COFEK) & 2 others* (2014) eKLR.

<sup>25</sup> Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* 2017.

<sup>26</sup> Muthoni K, 'Nicholas Biwott set record in libel claims' *The Standard*, 12 July 2017 -

<<https://www.standardmedia.co.ke/article/2001247208/nicholas-biwott-set-record-in-libel-claims>> on 1 February 2019.

<sup>27</sup> *Nelson Havi v Headlink Publishers* (2018) eKLR.

<sup>28</sup> *Media Council of Kenya v Eric Orina* (2013) eKLR.

will only be granted in cases of manifest defamation.<sup>29</sup> Thus, if a Defendant pleads a legitimate defence, the need for an injunction is defeated as the claim is no longer manifestly unfounded.<sup>30</sup>

These new developments and considerations in the field of libel law forms the background of this paper's analysis. There is already a foundation for changes in traditional principles with the evolving times; much more will need to be considered to better protect expression rights.

## **1.7 Theoretical Framework**

In the course of this study, two key theories will be used. These are Hohfeld's Jural Correlatives and the chilling effect principle.

### *1. Wesley Hohfeld's Jural Correlatives*

In analysing this topic, the very conception of rights/claims, duties and liberties will be of much relevance. To understand the nature and bounds of limitation, a point of reference would be the very definition of what a right is and how it corresponds with duties on the other end.

One of the theories most relevant in this regard would be the Hohfeldian incidents, as espoused by the esteemed legal theorist Wesley Hohfeld Newcomb.<sup>31</sup>

What is the central point of analysis in this theory is the conception of a 'right'. These rights have a complex structure, with four main components that interact much like the constitutive elements of an entity to create what is known as a legal right. These components include privilege, power and immunity. Hohfeld noted that the orthodox idea at the time was to conflate these terms and propose them as synonymous with rights, to which he disagreed with.<sup>32</sup>

Power and privilege are known as 'active' rights. Claim and immunity are known as 'passive' rights. To further elucidate the legal significance of these terms, there needs to be an understanding of their corresponding elements. These were what Hohfeld termed as correlatives. When one has

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<sup>29</sup> *Media Council of Kenya v Eric Orina* (2013) eKLR.

<sup>30</sup> *Star Publication Ltd & Another v Ahmednassir Abdullahi & 5 others* (2015) eKLR.

<sup>31</sup> Hohfeld W, 'Fundamental Legal Conceptions Applied in Judicial Reasoning' 26 *Yale Law Journal* 8, 1917, 30.

<sup>32</sup> Hohfeld W, 'Fundamental Legal Conceptions Applied in Judicial Reasoning' 28-29.

a privilege, others have no-right. When one has a power, others have a liability. When one has an immunity, others have a disability.<sup>33</sup>

Reputational rights are recognized as a right that individuals enjoy. They compete with other rights such as the freedoms of expression and the media.<sup>34</sup> Therefore, those exercising the latter rights are imposed with a corresponding duty against interference. One of the possible avenues of interference is libel. Those bestowed with reputational rights enforceable against expression rights of other have the privilege of exercising their right. Conversely, those with expression rights, as far as they encroach upon the former's reputation, cannot have a claim.<sup>35</sup>

This changes, however within the realm of defences to libel. When one's publication falls within statutory defences, they exercise a privilege against a claimant's reputational rights. The claimant cannot, therefore, enforce their reputational rights against a Defendant.<sup>36</sup> The increased scope of defences likewise increases the scope of privilege for expression rights.

The freedom of expression can also be an active immunity as the State is barred from enacting any legislative policy that limits the freedom within the limits of constitutional enjoyment.<sup>37</sup> The protected areas of this freedom cannot be taken away.

However, outside this freedom is the subject may move into encroaching upon the claims of another. Defamation would be considered extra-legal in that it encroaches upon the rights of another- either the right to privacy, right to dignity or both. Once the subject is in this space, they are not fulfilling their duty towards another subject who enjoys these claims. Similarly, they no longer enjoy the immunity granted and hence the State is well within their power to limit it.

## 2. *Chilling effect principle.*

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<sup>33</sup> Hohfeld W, 'Fundamental Legal Conceptions Applied in Judicial Reasoning' 30.

<sup>34</sup> Article 34, 35 (3), *Constitution of Kenya* (2010).

<sup>35</sup> Hohfeld W, 'Fundamental Legal Conceptions Applied in Judicial Reasoning' 32.

<sup>36</sup> Hohfeld W, 'Fundamental Legal Conceptions Applied in Judicial Reasoning' 33.

<sup>37</sup> Lyons D, 'The correlativity of rights and duties' 4 *Nous* 1, 1970, 50.

Another theory that is relevant especially in the context of free expression is the chilling effect. The centrality of this principle is the deterrence of participating in an activity.<sup>38</sup> It may be due to various reasons but most notably it is the fear of legal repercussions.

It occurs when individuals seeking to engage in activity protected by free speech are deterred from so doing by governmental regulation not specifically directed at that protected activity.<sup>39</sup> One of the avenues of manifestation is the unpredictability of the relevant laws. Complex legal concepts increase the probability of error. In the context of free speech rights, the limiting laws or principles tend to be vague, shifting and largely discretionary.<sup>40</sup>

In balancing these rights, it will be the cases bordering the line between protected and unprotected speech that will be likely judged as erroneously unlawful. Those who enjoy speech falling on these borderline cases will be most deterred.<sup>41</sup>

## **1.8 Research Design and Methodology**

This in-depth study is carried out by desk research. Sources to be used include case-law, journals, articles, books and reports.

## **1.9 Limitations of the Study**

There is a shortage of legal studies related to the topic in the Kenyan context. Additionally, access to a wide array of books is limited to the readily available sources.

## **2.0 Chapter Breakdown**

The first chapter shall be introductory. Second chapter shall delve into the detailed theoretical frameworks. The third chapter shall be an analysis into the tort of defamation, its interaction with related rights and its application in the online context. The fourth chapter shall be an incorporated

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<sup>38</sup> Schauer F, 'Fear, Risk and the First Amendment: Unravelling the Chilling Effect' 58 *Boston University Law Review* 5, 1978, 689.

<sup>39</sup> Schauer F, 'Fear, Risk and the First Amendment: Unravelling the Chilling Effect' 693.

<sup>40</sup> Schauer F, 'Fear, Risk and the First Amendment: Unravelling the Chilling Effect' 695.

<sup>41</sup> Schauer F, 'Fear, Risk and the First Amendment: Unravelling the Chilling Effect' 696.

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comparative analysis. Subsequently, a chapter shall be dedicated to findings and conclusions from the analysis with a review of these findings in line with the theoretical framework.

## CHAPTER 2

### THEORETICAL FRAMEWORK

#### **2.1 Introduction**

Defamation must be analysed as limitation of constitutional freedoms. This analysis must be based on a theoretical understanding of the legal conceptions constituting these freedoms. It must also be understood from the angle of the implications of such a limitation. To these ends, this research is underpinned by two major theories: *chilling effect doctrine* and *Hohfeld's jural correlatives*.

#### **2.2 Chilling Effect Doctrine**

This theory underpins the proposition that regulation may have a deterrence effect on certain forms of legally protected activity. It applies to a wide range of constitutional rights but its ordinary connotation is primarily related to the exercise of expression rights. The doctrine first originated in a decision of Supreme Court of the United States (US) known as *Wieman v Updegraff*.<sup>42</sup> It refers to the deterrence of exercising expression for fear of attracting liability.<sup>43</sup> In ordinary parlance, the doctrine seems to warn against any form of free speech regulation. This generous construal would be mistaken. However, there is merit in the use of the doctrine to discourage overly-restrictive regulations on expression rights.

The chilling effect doctrine is based on two fundamental propositions. First, that litigation –and the legal system as a whole- is characterised by a level of uncertainty. Legislation is as general as it is vague which is further muddled by the indeterminacy and erroneous nature of court decisions. A person whose conduct may qualify as protected speech would nonetheless be alive to a possibility that the court will not decide in their favour.<sup>44</sup> Second, that due to this characteristic uncertainty in legal rules must be developed in a manner that favours expression rights rather than deterring it. The academic Frederick Schauer terms it such: it is better for a court to render an

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<sup>42</sup> (1952) The Supreme Court of the United States.

<sup>43</sup> Schauer F, 'Fear, risk and the first amendment: Unravelling the chilling effect' 58 *Boston University Law Review* 1, 1978, 689.

<sup>44</sup> Schauer F, 'Fear, risk and the first amendment: Unravelling the chilling effect,' 687.

erroneous determination in favour of a wide margin of free speech than it is for a court to render an erroneous decision based on an overly-restrictive idea of free speech.<sup>45</sup>

What sort of deterrence is the doctrine concerned with? Schauer distinguishes *benign* deterrence from *invidious* deterrence, the latter being the subject of this doctrine. Benign deterrence is the discouragement of conduct that is unprotected by constitutional rights.<sup>46</sup> Incitement to violence is one such example; there is no ambiguity that it falls outside the scope of constitutional protection (whether under expression rights or any other constitutional right).<sup>47</sup> In other words, this form of deterrence is legitimate in any society. Invidious deterrence is the discouragement of expression that otherwise is or ought to be permitted as the activity being ‘chilled’ falls under constitutionally protected activity.<sup>48</sup>

This can be detrimental because people can be deterred from activity that is not proscribed by the law. The danger thus lies in inhibiting important forms of speech on the fear of liability, even though such conduct falls outside of sanctions. This fear stems from a legal system pegged by error. The deterrence is even more amplified in activity that is not so obviously proscribed; activity that falls in the grey area between protected and unprotected speech.<sup>49</sup>

### 2.3 Hohfeld’s Jural Correlatives

All legal relations, according to Wesley Hohfeld, could be reduced to eight elements. These are right, duty, privilege, no-right, power, disability, immunity and liability. All these elements interact either as opposites or correlatives.<sup>50</sup>

A right, simply put, is a legal claim against another that is enforceable by law. A person subject to this right has the corresponding duty not to interfere with that right or assist in X’s exercise of their

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<sup>45</sup> Schauer F, ‘Fear, risk and the first amendment: Unravelling the chilling effect,’ 688.

<sup>46</sup> Schauer F, ‘Fear, risk and the first amendment: Unravelling the chilling effect,’ 690.

<sup>47</sup> Article 33, *Constitution of Kenya* (2010).

<sup>48</sup> Schauer F, ‘Fear, risk and the first amendment: Unravelling the chilling effect,’ 692.

<sup>49</sup> Schauer F, ‘Fear, risk and the first amendment: Unravelling the chilling effect,’ 696.

<sup>50</sup> Hohfeld W, ‘Some fundamental legal conceptions as applied in judicial reasoning’ 23 *Yale Law Journal* 1, 1913, 30.

right.<sup>51</sup> Rights and duties are termed correlatives in defining relations between two associated persons since the very existence of a right is dependent upon someone else having a duty. A duty may encompass a negative or positive act from its bearer towards a right-holder.<sup>52</sup>

The opposite of such a duty is a privilege. Privilege exists where there is an absence of duty,<sup>53</sup> which makes its correlative no-right. An individual has the prerogative to act or not act without breaching a duty to another. In the absence of such a duty, the action or inaction of the privilege-holder is not legally enforceable.<sup>54</sup> Privileges and duties cannot co-exist since it is only the latter that attaches liability to an act or omission.<sup>55</sup> Many negative freedoms would qualify as privileges. X can choose to exercise their freedom of expression in a given context. Whether or not X exercises this right cannot be a choice that attracts liability from another person.

Power is the ability to alter legal relations, upon the fulfilment of certain operative facts.<sup>56</sup> Two persons who previously had no legal relationship can become legally bound upon the action of either individual. The power of Y to accept X's contractual offer transforms their legal relations. Indeed, the essence of such a contract is that it is legally enforceable; thus binding the X and Y henceforth.

On the other end of power is its correlative liability. Once a power to change relations has been exercised and legally ascertained, the object of that power holds a liability.<sup>57</sup> Failure to act or omit to act could attract legal liability as opposed to a privilege-no right relation where no such liability exists. In essence, a power-liability relationship transforms a privilege- no right relationship to that of a right-duty.<sup>58</sup>

The opposite of a power is a disability. If a power is not exercised by one individual, then the other person cannot change that legal relationship through an action.<sup>59</sup> One cannot accept a contract

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<sup>51</sup> Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning,' 32.

<sup>52</sup> Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning,' 33.

<sup>53</sup> Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning,' 39.

<sup>54</sup> Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning,' 36.

<sup>55</sup> Cullis A, 'A review of Hohfeld's fundamental legal concepts' 16 *Cleveland-Marshall Law Review* 3, 1967, 565.

<sup>56</sup> Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning,' 44.

<sup>57</sup> Cullis A, 'A review of Hohfeld's fundamental legal concepts,' 569.

<sup>58</sup> Cullis A, 'A review of Hohfeld's fundamental legal concepts,' 569.

<sup>59</sup> Cullis A, 'A review of Hohfeld's fundamental legal concepts,' 569.

without a prior offer by another individual. In absence of such an offer, the other party is disabled from creating a contractual relation. X may publish certain statements that concern Y in a manner that Y deems offensive. If the Y however fails to prove the existence of defamatory elements before a court, then they cannot change legal relations with X to one attracting liability. Y is disabled from creating such legal relations; hence X has an immunity.

Such power-liability relations can be altered, based on the existence of operative facts.<sup>60</sup> Taking the example of defamation, if it is proven that Y actually published a factual statement concerning X then it would fall under the defence of truth. Effectively, this would absolutely extinguish Y's liability towards X, changing their relations to one of privilege-no right.

## **2.4 Conclusion**

Developing principles delineating online defamation will necessitate an analysis of what this tort means especially in relation to freedoms of expression and media. Hohfeld's analysis is key in this regard as it details the conception of legal entitlements that is highly persuasive in judicial reasoning. Online defamation as a limitation on freedom is also connected to the chilling effect doctrine. Drawing that line between justified regulation and overly-restrictive regulation is what would encourage or deter people from exercising their expression rights. A balanced limitation, what will be detailed later on in this paper, can be beneficial in facilitating reasonable limitation while ensuring that protected speech is not 'chilled'.

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<sup>60</sup> Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning,' 25-26.

## CHAPTER THREE

### THE TORT OF DEFAMATION

#### **3.1 Introduction**

It is crucial to set out the important principles of defamation as a tort under common law. What this chapter endeavours is to relate those principles with the evolving interaction with expression and media rights; highlighting how those interactions have been influenced by the shift towards online media. The goal is to show that these common law principles though long standing are not infallible, placing considerations as to the pertinent areas necessitating reform.

#### **3.2 The tort of defamation under common law**

The tort of defamation seeks to protect reputations of individuals. It allows a person -whether natural or artificial<sup>61</sup>- to claim monetary damages stemming from reputational harm.<sup>62</sup> Defamation can take the form of slander or libel. Libel concerns statements made in some permanent form, for instance a published written statement. *Sim v Stretch* famously classified it as statements that ‘tend to lower the person in the estimation of right-thinking members of society.’<sup>63</sup>

The tort of defamation traces its history to the case of *De Libellis Famosis*, the first case dealing with seditious libel.<sup>64</sup> Since then, its principles have largely been expounded under common law, thus forming part of Kenyan law by virtue of the codified Defamation Act<sup>65</sup> and the Judicature Act:

“The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with... the substance of *the common law*, the doctrines of equity

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<sup>61</sup> *South Hetton Coal Co v NE News Association* (1894) The United Kingdom Queens Bench.

<sup>62</sup> Elliott C and Quinn F, *Tort law*, 8 ed, Pearson Education, Essex, 2011, 215.

<sup>63</sup> (1936) The United Kingdom House of Lords.

<sup>64</sup> (1606) The United Kingdom Star Chamber.

<sup>65</sup> (Act No. 10 of 1970).

and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date”<sup>66</sup>

There are three elements of defamation. First that the statement was published. Second, that it referred to the claimant. Third, that the statement was defamatory. If these three elements are fulfilled, then liability attaches automatically to the Defendant; unless a defence justifies extinguishing liability.<sup>67</sup>

Six defences exist that justify otherwise libellous publications: justification<sup>68</sup>, fair comment<sup>69</sup>, publication without malice<sup>70</sup>, unintentional defamation<sup>71</sup> and privilege (absolute<sup>72</sup> and qualified<sup>73</sup>). Kenya’s own defamation act lists specific forms of publications that are covered under qualified privilege.<sup>74</sup> Once libel is established then remedies applied can be monetary damages or an injunction. Damages tend to be more common as the standard of applying for an injunction is higher. Only in the clearest of cases that the courts will apply an injunction prohibiting a publication, requiring the claimant to prove that the piece is obviously false and that any defence put forth will fail.<sup>75</sup>

### **3.3 Defamation in relation to expression and media rights**

Defamation often comes into conflict with protected human rights. Two of such rights are the freedom of expression and the media. It is thus important to expound on how defamation operates as limiting these rights. Before analysing the limitation however, it is crucial to highlight what these rights entail.

The freedom of expression -or speech in some jurisdictions- is a widely recognised as a protected right by various legal systems. It is the cornerstone of any democracy, applicable not only to

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<sup>66</sup> Section 3(c), *Judicature Act* (Act No. 16 of 1967).

<sup>67</sup> Elliott C and Quinn F, *Tort law*, 215.

<sup>68</sup> Section 14, *Defamation Act* (Act No. 10 of 1970).

<sup>69</sup> Section 15, *Defamation Act* (Act No. 10 of 1970).

<sup>70</sup> Section 12, *Defamation Act* (Act No. 10 of 1970).

<sup>71</sup> Section 13, *Defamation Act* (Act No. 10 of 1970).

<sup>72</sup> Section 6, *Defamation Act* (Act No. 10 of 1970).

<sup>73</sup> Section 7, *Defamation Act* (Act No. 10 of 1970).

<sup>74</sup> First Schedule, *Defamation Act* (Act No. 10 of 1970).

<sup>75</sup> *Media Council of Kenya v Eric Orena* (2013) eKLR.

“information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.<sup>76</sup>

Kenya’s constitution explicitly protects expression under Article 33, this particular right borne out of a tumultuous history. Before the 2010 Constitution, expression rights proved weak especially when opposed with political commentary. Publications that were less than favourable to the political elite -even if legitimate- attracted harsh penalties that risked even life.<sup>77</sup> It is this history that has informed the sanctity with which courts interpret this right. Restrictions on this right should not come easily and as such fall under heightened judicial scrutiny.<sup>78</sup> The constitutionally sanctioned restrictions are now covered in unambiguous terms as per Article 33(2) and 33(3).<sup>79</sup> This is supplemented by the more general stipulations under Article 24.<sup>80</sup>

Defamation does not however operate as a limitation under Article 24. As noted in the *Jacqueline Okuta* decision, the constitutionally sanctioned instances apply to limitations by the State and not individuals.<sup>81</sup> It can hence be concluded that libel, in particular, operates as a limitation as per Article 33(3), which protects the rights and reputation of other individuals. This relates with other constitutionally protected rights such as the right to human dignity<sup>82</sup> and privacy.<sup>83</sup>

The freedom of the press is supportive to the freedom of expression. Nonetheless, it also operates as a self-standing right that specifically applies to the press.<sup>84</sup> This right was not protected under the Repealed Constitution and hence is a deliberate addition to the Bill of Rights.<sup>85</sup> According to

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<sup>76</sup> *Handyside v United Kingdom* ECtHR Judgment of 7 December 1976, para 49.

<sup>77</sup> The Conversation, ‘Media freedom in Kenya: Analogies being drawn with Moi’s repressive era’ The Star, 12 February 2018 - <<https://www.the-star.co.ke/news/the-conversation/2018-02-12-media-freedom-in-kenya-analogies-being-drawn-with-mois-repressive-era/>>on 21 November 2019.

<sup>78</sup> *CORD v The Republic* (2014) eKLR.

<sup>79</sup> *Constitution of Kenya* (2010).

<sup>80</sup> *Constitution of Kenya* (2010).

<sup>81</sup> *Jacqueline Okuta & another v Attorney General & 2 others* (2017) eKLR.

<sup>82</sup> Article 28, *Constitution of Kenya* (2010).

<sup>83</sup> Article 31, *Constitution of Kenya* (2010).

<sup>84</sup> Article 34, *Constitution of Kenya* (2010).

<sup>85</sup> Its protection was subsumed under the freedom of expression- Section 79(2), *Constitution of Kenya* (1963) (Repealed).

the Constitution of Kenya Review Commission (CKRC), press freedoms deserved an autonomous right capable of protection.<sup>86</sup>

Courts have also recognised the special status of this right. Judge Odunga elaborated on press freedoms as encompassing the right of the press of to impart information of general interest to the public and the right of the public to receive it. It is one of the most important rights in a democratic society, owing to its contribution to free and open debate.<sup>87</sup> However, it is also not absolute as the same limitations on expression apply to press freedoms as well.<sup>88</sup> Defamation would generally also apply as one such restriction by dint of the related rights of dignity.

Acknowledging defamation as a restriction upon the interrelated freedoms of expression and press does not conclude the analysis. Just as the content of these freedoms are ever evolving, so is the scope of their restrictions. This has resulted in issues relating to the shortcomings of the tort especially in encroaching upon freedoms of expression and the media.

### **3.4 Critical aspects of common law defamation**

In perusing through common law definitions of this tort, one cannot help but recognise its subjective nature. It tends to focus on the claimants' perception in society; essentially protecting what people think about them. In certain instances, the courts may even resort to the claimant's feelings as a contributing factor.<sup>89</sup> Contemporary definitions have tried to evolve from this subjective definition towards one that focuses on the objective 'reasonable person' standard.<sup>90</sup> This appeal to objectivity remains tainted since a 'reasonable person' assessment is subject to change along with the ever-evolving norms of society.<sup>91</sup>

Perhaps due to libel's aspect of permanency, the effects of its liability tend to be felt stronger than slander. Certain elements of libel are demonstrative of this. First is that common law does not

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<sup>86</sup> Constitution of Kenya Review Commission Report, *Final Draft*, 2005, 307.

<sup>87</sup> *Christopher Ndarathi Murungaru v Standard Limited & 2 others* (2012) eKLR.

<sup>88</sup> Article 34(1), *Constitution of Kenya* (2010).

<sup>89</sup> Lord Radcliffe's opinion in *Associated Newspapers v Dingle* (1967) The United Kingdom House of Lords.

<sup>90</sup> McBride N and Bagshaw R, *Tort law*, Longman Law Series, 2008, 135.

<sup>91</sup> *Joseph Kudwoli & another v Eureka Educational and Training Consultants & 2 others* (1993) eKLR.

require evidence of harm for a libel suit to succeed.<sup>92</sup> Distinguished with other torts such as negligence of which proof of damage is essential for a claim to succeed. This is primarily because defamation has at its core the presumption of falsity. The burden is hence placed on the Defendant to restore the assurance of veracity of the statement.<sup>93</sup>

Additionally, there is the presumption of malice that persists under common law. In *Hulton v Jones*, the publisher of the statement referred to a fictional character. They neither knew the claimant much less intended for the statement to harm the claimant. Nonetheless, it was held that ‘unintentional defamation’ cannot preclude liability.<sup>94</sup>

Also critical is the high amount of monetary damages upon establishing liability. Libel actions against the press have been notorious in the sums of money recovered by claimants; amounting to millions. The award of exemplary damages has at times been justified by the fact that the claimant holds public office.<sup>95</sup> This practice unfortunately has seeped to cases of libel in the online context as well.<sup>96</sup> The awarding of ‘exemplary damages’ has been subject to criticism under domestic law<sup>97</sup> and Human Rights Law. Such high awards are a strong contributor to the chilling effect on the freedom of expression.<sup>98</sup>

### 3.5 Defamation in print versus online media

By far libel’s most pertinent attribute is its intrinsic relationship to printed media. All of libel’s principles under common law have been developed within the context of printed media such as newspapers, pamphlets, journals and periodicals among others. This is evident in certain characteristics of the tort that hinder its adaptability to online contexts.

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<sup>92</sup> Elliott C and Quinn F, *Tort law*, 221.

<sup>93</sup> The defence of ‘justification’ was established for this very purpose.

<sup>94</sup> (1910) The United Kingdom House of Lords.

<sup>95</sup> *Francis Ole Kaparo v Standard Media Ltd* (2010) eKLR.

<sup>96</sup> *Arthur Papa Odera v Peter Ekisa* (2016) eKLR.

<sup>97</sup> *Johnson Evan Gicheru v Andrew Morton* (2010) eKLR.

<sup>98</sup> Article 19, *Principles of Defamation*, 2017, 23.

The first characteristic lies in the expectations of the Defendant. In *Reynolds* the test to establish the defence of qualified privilege is largely informed by the paradigm of journalistic integrity.<sup>99</sup> Journalists have a professional duty to cite and cross-check their sources, communicate with the subject of an article and provide sufficient context.<sup>100</sup> These same expectations are not required from online publishers such as bloggers and owners of social media accounts, hence placing in doubt whether the same standards of conduct should apply to them.<sup>101</sup>

Secondly is the subject matter. It is also difficult to draw the line between matters of public and private concern in the online context. With the exception of private accounts, social media accounts and blogs tend to be open to public view. It begs the question whether a widely viewed blog post constitutes a matter of public interest, or whether a social media post with several comments fulfils the public interest threshold. Establishing public interest from these posts would greatly influence conclusions such as a finding of a ‘fair comment’ defence or disproving malice.<sup>102</sup>

The characteristics of online fora also poses issues of suitability of defamation on the whole as a remedy. Instituting libel suits may have been appropriate in relation to print media publications since the claimant had limited alternatives of correcting falsehoods. In the case of newspapers, retractions tend to be deliberately placed in an inconspicuous area, which reduces the number of persons who interact with them.<sup>103</sup> However, with online posts it becomes much easier for a claimant to resolve falsehoods. Commenting on a controversial blog post or replying to an online post may prove more efficient as it has the benefit of directly addressing the audience which initially interacted with the contested publication.<sup>104</sup>

Another issue relates to the unsuitability of certain principles. Common law advocates for the multiple publication rule which creates a new cause of action for every republication.<sup>105</sup> While this rule might resonate with printed publications, it conflicts with the practicalities of social media,

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<sup>99</sup> *Reynolds v Times Newspapers* (1999) The United Kingdom House of Lords.

<sup>100</sup> Second Schedule, *Media Act* (Act No. 3 of 2007).

<sup>101</sup> Article 19, *Defining Defamation Principles*, 2016, 15.

<sup>102</sup> If a publication is determined to be in the public interest then malice will not be fulfilled- Elliott C and Quinn F, *Tort law*, 227.

<sup>103</sup> Ardia D, ‘Reputation in a networked world: Revisiting the social foundations of defamation law’ 45 *Harvard Civil Rights-Civil Liberties Law Review* 1, 2010, 319.

<sup>104</sup> Ardia D, ‘Reputation in a networked world: Revisiting the social foundations of defamation law’ 318.

<sup>105</sup> *The Duke of Brunswick v Harmer* (1849) The United Kingdom Queens Bench.

where posts are rapidly rehashed via ‘retweets’<sup>106</sup> and ‘reblogs’<sup>107</sup>. Would every person who engages in such actions be attached to a libel suit? Would they attract the same level of liability? Such questions are ones that courts would have to grapple with.

### 3.6 Conclusion

Although there is much to be said in defamation’s ability to protect reputations, there is much to be said about its harsh application as well. Since this tort limits the freedom of expression then its shortcomings must be addressed especially regarding its inefficient application in the online context. This recommendation is not merely academic as it has severe implications on ‘chilling’ the exercise of expression rights. It is within these online contexts that certain principles of defamation must be challenged and refined.

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<sup>106</sup> Retweet is reposting or forwarding a message posted by another Twitter user-  
<<https://www.lexico.com/en/definition/retweet>> on 23 November 2019.

<sup>107</sup> Reblog is the reposting of content that has previously been posted on another blog-  
<<https://www.lexico.com/en/definition/reblog>> on 23 November 2019.

## **CHAPTER 4**

### **ONLINE DEFAMATION AND SERIOUS HARM**

#### **4.1 Introduction**

What this chapter sets out to do is a comparative analysis between two interrelated legal systems: Kenya and the UK. The subject of the comparison will be the respective countries' treatment of defamation in online sphere, incorporating any legal developments thereof. This comparison's telos will be an illustration of the differing considerations of the need for reforming the tort of defamation.

#### **4.2 Online defamation in the UK**

This section seeks to analyse the current legal framework applicable to online defamation, particularly libel. To that end, it will delve into appraising the legislation and the recent case law interpreting its provisions.

##### **4.2.1 Legislation**

The need for reforms in the law of defamation had become a pressing concern for the UK government. For reasons set out in the previous chapter and more, it was an evident truth that the tort's operation stifled expression rights in a manner that drew criticism. One such criticism concerned its characteristic claimant-friendly application and awarding of high damages; factors that drew foreigners to institute libel actions before UK courts despite having little to no connection with the territory.<sup>108</sup> Another criticism touched on the high number of trivial libel claims flooding the court, most of which occurred in online media.<sup>109</sup>

On 25<sup>th</sup> April 2013, the UK Parliament passed a new Act touching on the subject of Defamation. The 2013 Act has several additions and deletions, particularly relevant for libel in the online

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<sup>108</sup> A phenomenon known as 'libel tourism' that facilitated cases such as *Mahfouz v Ehrenfeld* (2015) The United Kingdom Queens Bench.

<sup>109</sup> Press Association, 'Libel: new Defamation Act will reverse 'chilling effect', ministers claim' The Guardian, 31 December 2013 -<<https://www.theguardian.com/law/2013/dec/31/trivial-libel-claims-targeted-new-law>> on 2 December 2019.

context. It amends existing common law defences in both content and name: the defence of ‘justification’ to become ‘truth’;<sup>110</sup> ‘qualified privilege’ or the ‘Reynolds defence’ has become ‘publication on a matter of public interest.’<sup>111</sup> It further adds new defences tailored for the online context. One such addition is the defence for website operators that operates similarly to the ‘safe harbour doctrine.’<sup>112</sup> Another specialized defence is the ‘single publication rule’ that prevents multiple causes of action concerning the same publication -even in different formats- in an effort to reduce repetitive claims.<sup>113</sup>

The subject of this chapter, however, is the most notable of the additions: the inclusion of Section 1. This provision articulates a novel threshold for defamation claims: the ‘serious harm’ threshold. It states in clause (1):

“A statement is not defamatory *unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.*”<sup>114</sup>

Clause (2) addresses the threshold fulfillable for artificial persons:

“For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” *unless it has caused or is likely to cause the body serious financial loss.*”<sup>115</sup>

This was no accidental addition or a play at wordsmanship; it was a deliberate addition to the common law standard that aligned with the legislators’ intention of weeding out trivial claims. If the substantive provision does not sufficiently convince one of this, then the Explanatory Note to the section evidently does so:

“...There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake...The section raises the bar for bringing a claim so that only cases involving serious harm to the claimant’s reputation can be brought.”<sup>116</sup>

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<sup>110</sup> Section 2, *Defamation Act* (United Kingdom).

<sup>111</sup> Section 4, *Defamation Act* (United Kingdom).

<sup>112</sup> Section 5, *Defamation Act* (United Kingdom).

<sup>113</sup> Section 8, *Defamation Act* (United Kingdom).

<sup>114</sup> Section 1(1), *Defamation Act* (United Kingdom).

<sup>115</sup> Section 1(2), *Defamation Act* (United Kingdom).

<sup>116</sup> Explanatory Notes, *Defamation Act* (United Kingdom).

The objective of limiting the scope of claims is not a concern unheard of prior to the Act's enactment. Such controversies were articulated by judges in cases such as *Thornton*<sup>117</sup> and *Jameel*,<sup>118</sup> both of which highlighted that libel claims needed to relate to some form of 'substantial tort'. It seems, therefore, that the inclusion of a higher threshold was not altogether unsurprising; in fact, it seemed inevitable in hindsight.

The section however does not define what statement is defamatory. That has been presumably to the determination of the courts. It is perhaps more beneficial to leave the definition as open ended considering defamation's fact-sensitive nature. What is not left to doubt however is that the standard does change defamation's application, especially the scope of actionable claims. The extent however, has been taken up by courts dealing with the provision.

#### **4.2.2 Judicial Decisions**

As noted above, the interpretative role of the threshold has been left to judicial determination. Since the Act's enactment, there have been three decisions rendered by the English courts at various levels. These decisions are *Cooke v MGN*<sup>119</sup>, *Ames v Spamhaus*<sup>120</sup> and *Lachaux v Independent Print Ltd*<sup>121</sup> all of which are the subject of further discussion below.

##### **a. *Cooke v MGN***

This was the first case mandating the interpretation of Section 1(1) of the 2013 Act. It came before the Queen's Bench, generally concerning allegations of libel against the newspaper Sunday Mirror.

The facts simply put are thus: The Claimants were the managers of a charity housing and care organisation that focused on inner city areas. The Defendants published an article about landlords who take advantage of low-income tenants in which the Claimants were casually mentioned against prior assurances. In particular, the article imputed that one of the Claimants, the Chief Executive of the organisation, earns £179, 000 annually and lives in an upscale neighbourhood. The Defendants apologised for adding the Claimants' names and stated that it was an honest

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<sup>117</sup> *Thornton v Telegraph Media Group* (2010) The United Kingdom Queens Bench.

<sup>118</sup> *Jameel v Dow Jones and Co Inc* (2005) The United Kingdom Court of Appeal.

<sup>119</sup> *Cooke & Anor v MGN Ltd & Anor* (2014) The United Kingdom Queens Bench.

<sup>120</sup> *Ames & Anor v The Spamhaus Project Ltd and Anor* (2015) The United Kingdom Queens Bench.

<sup>121</sup> *Lachaux v Independent Print Ltd* (2015) The United Kingdom Queens Bench; (2017) The United Kingdom Court of Appeal; (2019) The United Kingdom Supreme Court.

mistake. The Claimants did not accept the apology however, and proceeded to institute a libel action against them.

The court had to determine whether the words and their meaning fulfilled the statutory threshold. As per the judge, this threshold was deliberately higher than the one applicable before, as envisaged by both the preparatory documents predating the Act and the Explanatory Note.<sup>122</sup> The judge added that the threshold of seriousness was even higher than that of ‘substantial harm’ proposed in prior decisions.<sup>123</sup> It would not be enough for a Claimant to show that publication has caused distress to their feelings, no matter how serious.<sup>124</sup>

Another matter addressed concerned the evidentiary threshold. Whereas the Claimants argued against mandatory evidentiary requirements, the Defendants proposed that the high threshold required correlatively stronger evidence. The judge reached the conclusion that evidence of harm will not always be required as in the cases where the damage caused or will be caused will obviously be great. Such an instance would be where the Claimant is accused of being a paedophile or a terrorist.<sup>125</sup> Of course, this imputes that allegations not falling within this class of extremities would require evidence to succeed.<sup>126</sup>

The judge held that the allegations were not of such extreme character and thus the Claimants failed to show that the published article had caused serious harm. As to the question of the ‘likelihood to cause harm’ the judge also held that this had not been shown. A key reason for the latter lay in the apology tendered by the Defendants soon after the article was published. It was reasoned that since the apology was posted online, it had a wider reach of readers than the original publication, offsetting any unfavourable impressions created by the latter.<sup>127</sup>

### ***b. Ames v Spamhaus***

The Claimants in this dispute were both businessmen based in California. The Defendants operated a website that collected information on companies that send ‘spam’ emails. The Defendants put

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<sup>122</sup> *Cooke v MGN*, para 36-37.

<sup>123</sup> *Thornton v Telegraph Media Group* (2010) The United Kingdom Queens Bench.

<sup>124</sup> *Cooke v MGN*, para 30.

<sup>125</sup> *Cooke v MGN*, para 43.

<sup>126</sup> Groppo M, ‘Serious harm: A case law retrospective and early assessment’ 8.

<sup>127</sup> *Cooke v MGN*, para 44.

up a list on this site of the Top 10 worst spammers that included the Claimants. Along with their names was one of the Claimants' pictures and both of their addresses.<sup>128</sup>

The Claimants alleged that the publications caused serious damage to their reputations which was likely to grow with possible republications on the internet.<sup>129</sup> Conversely, the Defendants lodged an application to strike the out the suit vas an abuse of process as well as summary judgment that the provisions of section 1(1) had not been fulfilled.<sup>130</sup>

For the second time, the court was seized with delineating the meaning of section 1 (1) of the 2013 Defamation Act. A large part of this decision reinforced the findings reached in *Cooke v MGN*. The judge once again noted that the threshold of 'seriousness' is distinct from the previous common law standard, 'raising the bar over which the Claimant must jump'.<sup>131</sup> The serious harm test however was placed as an additional threshold, over and above the threshold of 'real and substantial tort,' such that failure to the former leads to an analysis of the latter.<sup>132</sup>

As to the question of 'likely' to cause serious harm, the judge interpreted it as more probable than not in its adverse effects.<sup>133</sup> This burden of proving actual or likelihood of causing serious harm is bestowed on the Claimant; effectively eliminating the common law presumption of harm. This burden will only be placed on the Claimant if the adverse effect is required to be proved by evidence, a requirement otherwise unnecessary when the inference of the words already offset the 'serious' threshold.<sup>134</sup>

***c. Lachaux v Independent Print Ltd***

This case is more complex than its predecessors for the simple reason that it has been appealed twice by the parties and each stage of the proceedings tenders differing interpretations of Section 1(1).

The facts before the court were as follows: The Claimant married a woman in the United Arab Emirates (UAE), a marriage that thereafter ended in a caustic divorce. There were subsequent

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<sup>128</sup> *Ames v Spamhaus*, para 7-15.

<sup>129</sup> *Ames v Spamhaus*, para 21.

<sup>130</sup> *Ames v Spamhaus*, para 23-24.

<sup>131</sup> *Ames v Spamhaus*, para 49.

<sup>132</sup> *Ames v Spamhaus*, para 50.

<sup>133</sup> *Ames v Spamhaus*, para 54.

<sup>134</sup> *Ames v Spamhaus*, para 55.

custody proceedings regarding their son. The Claimant was awarded custody but his former wife escaped with the son. Soon after, articles were published both online and in print by the Huffington Post, the Independent and their associate i. They alleged violent and abusive behaviour by the Claimant towards his wife, asserted that the Claimant took advantage of female-unfriendly laws of the UAE to gain custody and that the Claimant abducted his son. Based on these articles, the Claimant sued for libel under Section 1(1).<sup>135</sup>

This is really the first appeal that departs from the reasoning in prior rulings. In several instances, the appellate judges express dissatisfaction or disagreement with the prior interpretations of Section 1(1). Their decision is based on the premise that this provision did not seek to limit the scope of actionability; merely act as a bar to trivial claims.<sup>136</sup>

Unlike *Ames*, the appellate court did not deduce a difference in meaning between ‘likely to cause’ and ‘tendency to cause’ that exists under common law. The phrase ‘likely to cause’ definitely did not connote a stronger meaning. Instead it was reasoned that ‘likely to cause’ only referred to the threatened publication and thus to the granting of a quia timet injunction; as distinguished from ‘has caused’ which relates to the actual publication.<sup>137</sup>

The lower court asserted that Claimants now need to show more than a ‘tendency’ to harm reputation. The new threshold was interpreted by the lower court to mean that the standard of proof was now on a balance of probabilities, thereby abolishing the presumption of reputational harm.<sup>138</sup> This reasoning was rejected by the appellate court which reinstated this presumption as central to the tort and found not in any way inconsistent with the ‘serious harm’ threshold.<sup>139</sup> What was not presumed, however, was serious harm which could be deduced from words that are first established as seriously defamatory.<sup>140</sup>

Another departure concerned the place of inferences in the evidentiary standard. In *Cooke*, inferences were deemed only necessary in the most extreme of meanings, otherwise leaving lesser imputations to evidentiary proof. The court of appeal held instead that inferences can apply to a

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<sup>135</sup> *Lachaux v Independent Print Ltd* (2017) para 5-16.

<sup>136</sup> *Lachaux v Independent Print Ltd* (2017) para 43.

<sup>137</sup> *Lachaux v Independent Print Ltd* (2017) para 52

<sup>138</sup> *Lachaux v Independent Print Ltd* (2015) para 60

<sup>139</sup> *Lachaux v Independent Print Ltd* (2017) para 49-50.

<sup>140</sup> *Lachaux v Independent Print Ltd* (2017) para 72.

wider class of meanings since it is an accommodation of the fact that Claimants will find it difficult to produce tangible evidence of reputational harm. It also rejected as acceptable evidence of reactions of individual readers or social media users.<sup>141</sup>

Overall, the appellate decision seemed to have changed little to the common law defamation. Most of the common law principles were reinstated by the appellate court. The decision was appealed yet again to the Supreme Court which went against the court of appeal's reasoning on the following aspects.

First, serious harm is not to be determined by reference to the meaning of the words but to the actual facts evidencing their impact.<sup>142</sup> In that sense the inherent tendency of the words to cause harm is not sufficient to fulfil Section 1(1)'s threshold; that can only be done by reference to actual facts about its damage.<sup>143</sup> This means that defamation's presumption of harm is once again abolished.<sup>144</sup>

Secondly, the meaning of 'likely' was taken to mean probable future harm. This reinstated the standard of balance of probabilities. The Supreme Court disagreed with the appellate court's analysis that likelihood posed a referral to a *quia temet* injunction. On a plain reading of the provision, it was held, Section 1(1) was not envisaged to address matters of applicable remedies.<sup>145</sup>

The Supreme Court agreed with Queens Bench determination of libel, wherein the judge focused on certain facts evidencing harm such as the scale of the publications, the communication to another person other than the Claimant, their possibility of the publication being known to others and the gravity of the statements themselves.<sup>146</sup> Therefore, the Supreme Court dismissed the Defendant's appeal but for altogether different reasons than the Court of Appeal.

The UK Supreme Court decision remains the authoritative interpretation of Section 1(1) thus far. It has largely reinstated the stringent interpretation posed by the first two decisions. The decision's

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<sup>141</sup> *Lachaux v Independent Print Ltd* (2017) para 70.

<sup>142</sup> *Lachaux v Independent Print Ltd* (2019) para 12.

<sup>143</sup> *Lachaux v Independent Print Ltd* (2019) para 14.

<sup>144</sup> *Lachaux v Independent Print Ltd* (2019) para 20.

<sup>145</sup> *Lachaux v Independent Print Ltd* (2019) para 14.

<sup>146</sup> *Lachaux v Independent Print Ltd* (2019) para 21.

pertinent features are: abolishing of presumption of harm, the removal of ‘tendency to cause harm’ and mandating actual facts from a Claimant that evidences serious harm.

### **4.3 Online defamation in Kenya**

Kenya has reported an increasing number of online users<sup>147</sup> as well as an increased reliance on online media.<sup>148</sup> Due to these factors, it is becoming more evident that certain aspects of Kenyan legal principles need to be adapted to the online context. Defamation is not exempted from this. Having shown how the legal framework of the UK has dealt with this issue, it remains to be determined how Kenya’s legal system can build on her own law of defamation. This improvement is necessitated by the need to better protect freedom of expression and media.

#### **4.3.1 Legislation**

Codification of defamation is in a single Act: the 1970 Defamation Act. For such a large branch of law, the content of the Act is relatively minimal. It can be said to be a codification of some common law principles. Generally, it outlines permitted defences and remedies. What is notably absent, however, is any definition or guideline as to what defamation constitutes.

The Act elaborates on possible defences which are justification<sup>149</sup>, absolute privilege<sup>150</sup>, qualified privilege<sup>151</sup>, fair comment<sup>152</sup>, publication without malice and offer of amends.<sup>153</sup> Whereas the single publication rule is a mandatory provision in the UK legislation, the 1970 Defamation Act only provides for this possibility through a successful application by related Defendants.<sup>154</sup>

The contents of the Act are evidently tailored for the context of print or tangible media. In the interpretation section, the only form of media subject to definition are newspapers.<sup>155</sup> The context

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<sup>147</sup> Bloggers Association of Kenya (BAKE), *The state of blogging and social media in Kenya*, June 2015, 2-3.

<sup>148</sup> BAKE, *The state of blogging and social media in Kenya*, 6.

<sup>149</sup> Section 14, *Defamation Act* (Act No 10 of 1970).

<sup>150</sup> Section 9-11, *Defamation Act* (Act No 10 of 1970).

<sup>151</sup> Section 7, *Defamation Act* (Act No 10 of 1970).

<sup>152</sup> Section 15, *Defamation Act* (Act No 10 of 1970).

<sup>153</sup> Section 13, *Defamation Act* (Act No 10 of 1970).

<sup>154</sup> Section 17, *Defamation Act* (Act No 10 of 1970).

<sup>155</sup> Section 2, *Defamation Act* (Act No 10 of 1970).

of the defences is also articulated as published in newspapers.<sup>156</sup> This is severely limiting as there are other forms of media, notably online media.

#### **4.3.2 Judicial decisions**

There have been fewer cases before the courts touching on online defamation. There is a gaping opportunity for development in this field. Three principle cases have arisen concerning libel in the online context. The reason why these cases were selected is that they are the only cases so far that dealt with libel in a fully concluded hearing. These cases are *Nelson Havi v Headlink Publishers*,<sup>157</sup> *CFC Stanbic v COFEK*<sup>158</sup> and *Arthur Odera v Peta Ekisa*.<sup>159</sup>

##### **a) *Nelson Havi v Headlink Publishers***

This dispute centred on the Defendant's publications on, *inter alia*, social media websites.<sup>160</sup> The publications allegedly painted the claimant as an advocate of questionable character who accepts bribery and wins cases on dubious grounds.<sup>161</sup> The hearing proceeded *ex parte* as Defendant did not appear at trial to refute these allegations.

The Claimant alleged that he had suffered damage from these publications based as well as causing him serious emotional distress.<sup>162</sup> As evidence, the Claimant proffered a single witness to testify as to his good nature. There was no evidence tendered on the actual serious harm caused to his reputation as a result; in fact, the single witness admitted that she did not even believe the allegations of the article.<sup>163</sup> Judgment was entered for the Claimant nonetheless, along with an additional award of exemplary damages.<sup>164</sup>

##### **b) *Arthur Papa Odera v Peter Ekisa*<sup>165</sup>**

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<sup>156</sup> Section 6, 7, 12 and Schedule, *Defamation Act* (Act No 10 of 1970).

<sup>157</sup> *Nelson Havi v Headlink Publishers* (2018) eKLR.

<sup>158</sup> *CFC Stanbic Ltd v Consumer Federation of Kenya (COFEK) Being sued through its officials namely Stephen Mutoro & 2 others* (2014) eKLR.

<sup>159</sup> *Arthur Papa Odera v Peter Ekisa* (2016) eKLR.

<sup>160</sup> *Nelson Havi v Headlink Publishers*, para 13.

<sup>161</sup> *Nelson Havi v Headlink Publishers*, para 9.

<sup>162</sup> *Nelson Havi v Headlink Publishers*, para 12.

<sup>163</sup> *Nelson Havi v Headlink Publishers*, para 14.

<sup>164</sup> *Nelson Havi v Headlink Publishers*, para 23.

<sup>165</sup> This decision's report does not contain any paragraph numbers hence the absence of further citations.

The Defendant had published statements concerning the claimant, a Member of Parliament (MP), on Facebook. The contents of these statements are not provided in the decision but the Claimant alleged that they could cause economic and social damage. According to the Claimant, the ordinary meaning of the words falsely imputed that he was morally bankrupt and corrupt. Notifications to the Defendant to take down the publications went unanswered. The hearing was conducted *ex parte* due to the Defendant's absence.

There were certain factors taken to the court's consideration. First was the Defendant's refusal to take down the material. Second was the Claimant's honorary status. Third was the evidence of actual reach of these statements, indicating that there was an overwhelming number of people who commented on the online publication. All these factors taken together with the ordinary meaning of the words led the court to a finding for the Claimant.

***c) CFC Stanbic v COFEK***

The Claimant in this dispute was a corporate entity. The Defendant had caused to be published an article with various allegations: that the Claimants lacked integrity in the dealings, breaching consumer rights and breach of regulations. These articles were put up on the Defendant's website as well as their Twitter and Facebook accounts.<sup>166</sup>

The basis of the libel action lay in the Claimant's status as a reputable bank in Africa. Such allegations would surely cause immense reputational damage. Also, the republication to the Central Bank of Kenya (CBK) as a regulator constituted malice on the Defendant's part.<sup>167</sup> In response to the Claimant's allegations of immense damage, the Defendant countered that its publication was covered by fair comment on matters public interest. Additionally, that it had expressed their intention to, *inter alia*, the Claimants on its intent to investigate the allegations in the article.<sup>168</sup>

The court agreed with the Claimant's contention on immense damage. It reasoned that the subject allegations would discourage other banks from dealing with them. This conclusion was reached from the inferred meaning of the words in the article and their tendency to cause harm.<sup>169</sup> The

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<sup>166</sup> *CFC Stanbic Ltd v COFEK*, para 1.

<sup>167</sup> *CFC Stanbic Ltd v COFEK*, para 5.

<sup>168</sup> *CFC Stanbic Ltd v COFEK*, para 9.

<sup>169</sup> *CFC Stanbic Ltd v COFEK*, para 15.

court disagreed with the Defendant's contention that it had merely reposted the content from an anonymous user's letter, holding that republication also constitutes libel.<sup>170</sup> Furthermore, the Defendant's failure to investigate as it had promised was an aggravating factor.<sup>171</sup> The harm caused was serious enough for the court to grant a mandatory interlocutory injunction.<sup>172</sup>

The common thread of these cases is their application of the common law principles of defamation. All three judgments based their award of damages or injunctions on a tendency of the words to cause harm. All three also applied a presumption of harm as each Claimant was only required to show publication, falsity and reference to the Claimant. In the *Headlink Publishers* and *COFEK* decisions, there were no material facts adduced to evidence damage to reputation.

#### **4.4 Conclusion**

This chapter has compared the treatment of libel in online contexts within two jurisdictions. One salient factor is the absence of detailed individual cases dealing with online libel in Kenya. This is supplemented by gaps and outdated provisions in legislation. All these inadequacies are in need of improvement.

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<sup>170</sup> *CFC Stanbic Ltd v COFEK*, para 22.

<sup>171</sup> *CFC Stanbic Ltd v COFEK*, para 17.

<sup>172</sup> *CFC Stanbic Ltd v COFEK*, para 31.

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Introduction**

This chapter endeavours to set out the findings from the cases discussed previously and the recommendations to the inadequacies noted. It seeks to recommend solutions to fix the gaps noted in legislation.

#### **5.2 Definitional aspects under Kenya's Defamation Act**

As noted above, Kenya's current Defamation Act does not proffer a meaning of defamation. Neither does it offer any indications of what it is not. This paper recommends that such definition would be useful especially against a background of the changing landscape of libel. In this regard, Kenya's Defamation Act could borrow a lot from the UK's specificity in this field. Particularly, an adoption of a threshold is needed in order to weed out trivial claims. Since the number of internet users in Kenya is growing, it is not much of a stretch to predict that the number of libel suits in the online context will similarly grow. To avoid the rise of trivial claims that countries such as the UK have experienced, Kenya would do well to adopt a 'serious harm' threshold.

Additionally, this raising of the bar should be applied stringently for artificial entities trading for profit. The UK 2013 Defamation Act requires evidence of financial loss for a defamation claim to succeed. This is a stricter standard to fulfil compared to that of natural persons. The paper recommends that such stricter standard should also be applied in the Kenyan context. That would mean that in decisions such as *COFEK* cited above, the Claimant would have to demonstrate actual or highly probable financial loss resulting from the publication.

Moreover, any amendments to the 1970s Act should incorporate a definition of who a 'publisher' is. It should be wide enough to cover any form of media both in the print as well as the digital realm. Such determinations should even go further in considering the financial advantages that institutional print publishers enjoy over online publishers, who tend to be individual bloggers or social media users, and provide guidelines on the assessment of damages therefrom. This would

go a long way towards mitigating otherwise high costs of a libel suit that would potentially be placed on the publishers as Defendants.

### **5.3 Stricter judicial standards to be applied by Kenya's courts**

As the judicial decisions cited above have revealed, there is no nuanced application of libel's principles in the online context. In all three cases, judges have merely transplanted the common law tests of defamation into their reasoning. What this paper proposes is that stricter principles should be applied for online cases so as to prevent the success of otherwise trivial claims.

The courts should also deviate from finding defamation based on a mere tendency to cause harm. Instead, a more stringent standard of actual harm should be prioritized; based on a balance of probabilities. In cases however where the ordinary meaning of the words already imputes a serious effect of reputational damage, an inference of likelihood to cause harm can be concluded. This should also take into account factors such as the context of the publication as well as the scope of its reach.

Another revision should concern the common law presumption of harm. The Claimant who alleges serious reputational harm should be able to provide material facts pointing towards this claim. In *Arthur Odera v Peter Ekisa*, the Claimant actually provided evidence of the reach of the statements shown by the high number of people who had commented on the post; a factor that the judge took into account. This would fall squarely in line with what the UK Supreme Court envisioned as serious harm.

In line with a more serious threshold of liability, courts should begin to consider otherwise mitigating facts as excluding liability altogether. If the Defendant apologises to the Claimant for their publication and issues an offer of amends, then the courts should be slow in finding liability nonetheless as the seriousness of the damage has been reduced. This could help in incentivising out-of-court dispute settlement and preventing the high costs of a libel suit.

Another recommendation falls on the matter of remedies. A successful libel suit leads to either an award of a high amount of damages or an injunction. Both these remedies can be severely chill expression and press freedoms. Alternative remedies that are less restrictive can be granted such

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as a declaration of falsity. A Defendant can be mandated, either by the Claimant or the court, to publish a declaration that the publication at issue was false or exaggerated. This would serve the role of vindicating the Claimant for people who would have otherwise thought lower of them.

#### **5.4 Conclusion**

The tort of defamation is in need of reform if there is to be a proper balance with human rights. This can be brought about by reconsidering the application of its principles in the online context. What this paper has recommended is an application of a stricter threshold of liability; as guided by the UK's jurisdiction. These recommendations would be suitable for legislators and judges alike to consider when tailoring this tort's principles to emerging cases.

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