Striking a balance between media freedom and protection of reputation: the defence of reasonable publication in Botswana

Badala Tachilisa Balule[*]

Abstract

The fear that material intended for publication by the media might contain falsehoods that may damage the reputation of others, has a chilling effect on media freedom. The resulting climate impacts negatively on investigative journalism, which constitutes one of the most potent mechanisms for ensuring accountability in a representative democracy. The position of the media was not helped by the traditional common law of defamation which does not recognise a general media privilege based on information in the public interest. The last two decades have, however, witnessed developments in the law of defamation where protection has been extended to the media where they disseminate information to the public on a matter of public interest provided the defendant is not at fault. This paper examines the defence of reasonable publication to a defamation suit that has been adopted by the courts of Botswana which is aimed at giving the media greater protection when disseminating information on matters of public interest that is honest, albeit erroneous.

INTRODUCTION

The Botswana Court of Appeal has held that the Constitution of the country places great value on human dignity and reputation while at the same time emphasising the right to freedom of expression.[1] The court further observed that these two rights must be balanced, which is 'a somewhat delicate and difficult exercise'.[2] In democratic societies, reputation is an integral and

[*] LLB (UB); LLM; PhD (Edinburgh). Senior Lecturer in Law: Department of Law, University of Botswana.

[1] *Tsodilo Services (Pty) Ltd t/a Sunday Standard and Others v Tibone* civ app no CACLB-071-09 (unreported, Botswana High Court, delivered on 29 July 2011) at par 11.

[2] *Ibid.*

important part of the dignity of the individual.[3] Modern plural democratic societies are also committed to the principle that debate on matters of public interest should be uninhibited, robust and open.[4] The media are the primary agents for the dissemination of information and ideas and this is essential to the development of a democratic culture.[5] In the performance of this mandate, the media must act with vigour, courage, integrity and responsibility.[6] Conflict between the protection of reputation and media freedom will frequently arise where the media, in performing their function of disseminating information and ideas, make false statements about individuals that injure their reputations.

It has been argued on the one hand, that the protection of reputation may undermine media freedom where the media are held liable 'even for the slightest error' when disseminating information on matters that are in the public interest.[7] This argument is premised on the understanding that it is not possible for the media, whose public role puts them under some obligation to publish information which is in the public interest in a timely fashion, to verify in advance each and every factual allegation.[8] Erroneous statements of fact are inevitable in free debate. On the other hand, an absolutist approach to the protection of media freedom would expose individuals to unwarranted attacks on their reputation. There is no public interest served by deliberately disseminating false statements of fact.[9] One of the fundamental principles of journalism is that the media should have carried out an adequate and diligent investigation prior to the publication of an offending statement. Unfortunately, while the media have a vital public interest role, they are also profit-driven enterprises in an environment where the commercial marketplace in sensationalism often assumes greater importance than the intellectual marketplace in ideas.[10] The critical question that arises is how to strike a delicate balance between these two important interests.

---

3 See Barendt 'What is the point of libel law?' (1999) 52 *Current Legal Problems* 110, and Post 'The social foundations of defamation law: reputation and the constitution' (1986) 74 *California Law Review* 691.

4 See *Reynolds v Times Newspapers Ltd* [1999] 4 ALL ER 609 at 619.

5 *Khumalo and Others v Holomisa* 2002 5 SA 401 at 417.

6 *Ibid.*

7 *National Media Limited and Others v Bogoshi* 1998 4 SA 1196 at 1210.

8 See *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 at 318.

9 See *Gertz v Robert Welch Inc* 418 US 323 (1974) at 339 –40.

10 Tierney 'Press freedom and public interest: the developing jurisprudence of the European Court of Human Rights' (1998) 3 *European Human Rights Law Review* 419 at 420.

In common law jurisdictions, the law of defamation not only protects a person's reputation from unjustified attacks, but also plays a balancing role between the protection of reputation and media freedom. The traditional common law of defamation, however, does not provide adequate protection to media freedom. A publisher who diligently attempts to verify a story on a matter of public interest before publication, may still be held liable for defamation if he fails to prove to the court that the substance of the story was true, or to bring it within one of the privileged categories exempted from the need to prove truth. A defamatory statement that cannot be proved, cannot be disseminated to the public simply because it concerns a matter of public interest under the traditional common law of defamation.[11] The defence of fair comment in a defamatory suit also demands that a defendant show the factual basis of the comment to be true. And the defence of qualified privilege, while not dependent on proof of truth, does not recognise a general media privilege based on information on a matter of public interest.[12] The traditional common law of defamation thus denies protection for dissemination of information on matters of public interest that is erroneous, albeit honest.

A free media that is able to comment on public issues without censorship or restraint constitutes one of the cornerstones of a democratic society. The important role played by the media in democratic societies requires that they be allowed space for factual error if their role is not to be unduly inhibited. The last two decades have thus witnessed developments in many common law jurisdictions that have resulted in the law of defamation giving more protection to the media. These changes have generally resulted in the protection of communication by the media to the public that is in the public interest provided the defendant is not at fault.[13] Each legal system, however, approaches this issue in the light of its constitution, constitutional tradition, and its own culture and law.

Botswana, like many other common law jurisdictions, has developed her law of defamation by adopting a defence of reasonable publication to protect the media from liability for disseminating false information in circumstances where it was reasonable to do so. While this is a welcome development, it

---

11 Williams 'Defaming politicians: the not so common law' (2000) 63 *Modern Law Review* 748.

12 *Ibid.*

13 Forsyth 'The protection of political discourse: pragmatism or incoherence?' in Beatson & Cripps (eds) *Freedom of expression and freedom of information: essays in honour of Sir David Williams* (2000) 87–99.

will be argued that the development of the law is not clearly articulated. In addition, the elements of the defence are yet to be clearly defined. This paper explores the adoption of the defence of reasonable publication in Botswana, and also looks at similar defences in other common law jurisdictions which can be used to develop the defence in Botswana.

THE COMMON LAW OF DEFAMATION AND THE DEFENCE OF REASONABLE PUBLICATION IN BOTSWANA

The common law of Botswana is Roman-Dutch law.[14] It is, however, not pure Roman-Dutch law as it has been influenced by English law and the South African courts' interpretation of the common law.[15] The law of defamation in Botswana is based on the *actio injuriarum*, a remedy originating in Roman law, which afforded the right to claim damages to a person whose personality rights had been impaired intentionally by the unlawful act of another.[16] Reputation is one of these personality rights and is protected by the law of defamation. At common law, once a complainant establishes that a defendant has published a defamatory statement concerning him, it is presumed that the publication was both unlawful and intentional.[17] A defendant may then raise a defence which rebuts unlawfulness or intention. The traditional defences that can be raised to rebut the presumption of unlawfulness are that the publication was true and in the public interest, the publication constituted fair comment, and, the publication was made on a privileged occasion.[18]

It has been noted that Roman-Dutch law is a vigorous system of law, ever seeking, as every such system must, to adapt its inherent basic principles to deal effectively with increasing complexities of modern organised society.[19] In their application of the principles of Roman-Dutch law, the Botswana courts thus strive to adapt these principles to modern requirements. Consistent with this approach, the High Court of Botswana, after an analysis of the development of the common law in other jurisdictions such as South Africa, England and Australia, adopted the defence of reasonable publication to rebut unlawfulness in a defamation suit involving media defendants in

---

14 See *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* [1996] BLR 190 at 194.

15 Fombad & Quansah *The Botswana legal system* (2006) 70–71.

16 Neethling, Potgieter & Visser *Neethling's law of personality* (2005) 35.

17 *National Media Limited and others v Bogoshi* n 7 above at 1202.

18 See *Ocaya v The Francistowner (Pty) Ltd t/a The Voice Newspaper* civ case no 2464 of 2004, (unreported, Botswana High Court, delivered on 21 August 2008) at par 75.

19 *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* n 14 above at 195.

August 2008.[20] The defence of reasonable publication essentially absolves the media from liability for defamation where they have published false or untrue defamatory matter in situations where such publication was reasonable in the circumstances of the case. The adoption of this defence was subsequently endorsed by the Court of Appeal in *Tsodilo Services (Pty) Ltd t/a Sunday Standard and others v Tibone*.[21]

While the development of the common law of Botswana to embrace the defence of reasonable publication is welcome, it is argued that it was not done satisfactorily as it offers no clarity. Earlier case law that has held the mass media to be strictly liable in a defamation suit, are not mentioned or expressly reversed in the cases that have embraced the defence of reasonable publication. There must be certainty and predictability in the operation of the law. Before the *Ocaya* case, the mass media was held to be strictly liable for publication of defamatory statements.[22] According to the doctrine of strict liability, the mass media are held liable without fault for publication of defamatory matter. One of the elements that a plaintiff had to establish in a defamation suit under the classical Roman-Dutch common law of defamation, was that the offending matter was published intentionally (*animus injuriandi*). The South African Supreme Court altered this position in the cases of *Suid-Afrikaanse Uitsaaikorporasie v O'Mally*[23] and *Pakendorf & others v De Flamingh*.[24] The court in both cases held that the owner, publisher, printer and editor of a newspaper will be liable for defamatory statements published in the media even in the absence of fault (intent or negligence). Two policy reasons were advanced for this position: the difficulty of proving intent on the part of persons involved in the publication of the defamatory material; and the protection of the defenceless individual who finds himself in a vulnerable position *vis-à-vis* the all-powerful mass media. The incorporation of strict liability into Botswana's common law of defamation was influenced by the then South African common law on the subject. The High Court of Botswana in *Attorney General v Ghanzi Hotel*, followed the two South African decisions by adopting strict liability for the media. In justifying this approach, the court observed that:

---

20 *Ocaya v The Francistowner (Pty) Ltd t/a The Voice Newspaper* n 18 above.
21 *Tsodilo Services (Pty) Ltd t/a Sunday Standard and others v Tibone* n 1 above at par 8.
22 *Attorney General v Ghanzi Hotel* [1985] BLR 452.
23 1977 3 SA 394.
24 1982 3 SA 147.

> No argument has been addressed to me why O'Mally's case and De Flamingh's case, both authoritative decisions of the Appellate Division of the Supreme Court of South Africa, should not be followed by the courts of Botswana and I respectfully accept them as correctly stating the law on the point in question.[25]

The decision of the High Court was endorsed on appeal by the Court of Appeal.[26]

South African courts have since overruled *Pakendorf & others v De Flamingh*.[27] The decision in *Attorney General v Ghanzi Hotel* in Botswana is yet to be expressly overruled. The High Court of Botswana and the Court of Appeal are yet to clarify the status of this case in the law of Botswana. The common law of Botswana includes judicial precedent or *stare decisis*.[28] This doctrine is premised on the view that a judge does not make law, but merely declares and applies the existing law to the facts of a particular case.[29] In terms of this doctrine, a court is bound by the decisions of a court above it in the hierarchy, and decisions of a court of equal standing are of persuasive authority. This promotes consistency and legal certainty. While it is generally accepted that in terms of the doctrine of judicial precedent a judge does not make law, the common law recognises that in applying the law, a judge may sometimes extend a rule of law or devise a rule by analogy with existing rules, or even create an entirely new principle.[30] This position is in consonance with the view expressed by the Botswana Court of Appeal in *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* that the common law should adapt to the requirements of modern society. In recognising the defence of reasonable publication, the courts in Botswana were clearly creating a new principle of the law of defamation. The courts should, however, have engaged in a detailed analysis of the existing law and made a clear pronouncement on the status of existing case law on the point. In creating the defence of reasonable publication in the *Ocaya* and *Tsodilo Services (Pty) Ltd* cases respectively, both the High Court and the Court of Appeal failed to reconcile this with the earlier principle established in *Attorney General v Ghanzi Hotel*, which holds the mass media strictly liable

---

25 *Attorney General v Ghanzi Hotel* n 22 above at 457.

26 *Attorney General v Ghanzi Hotel* CA no 4/85 (unreported, Court of Appeal, delivered in August 1986).

27 *National Media Limited and others v Bogoshi* n 7 above.

28 Fombad & Quansah *The Botswana legal system* n 15 above 71.

29 *Id* at 72.

30 *Ibid.*

for publication of defamatory matter. The result is that Botswana remains with two decisions of the High Court, both endorsed by the Court of Appeal, that are at variance with one another.

In embracing the defence of reasonable publication, both the Botswana High Court and Court of Appeal referred to the decision of the South African Supreme Court of Appeal in *National Media Limited and others v Bogoshi*, which introduced the defence in South Africa. It is important to note that in developing its common law of defamation by adopting this defence, the court emphasised that it was not revising the common law to conform with constitutional values, but was merely correcting a common law principle wrongly stated in *Pakendorf & others v De Flamingh*.[31] It is submitted that the development of the common law of defamation in Botswana to incorporate the defence of reasonable publication was correct given that the notion of strict liability had been erroneously incorporated into the law. Decisions of South African superior courts are not binding on the courts of Botswana but are highly persuasive and are often resorted to in situations where there are no available decisions on a point before the court.[32] It is in this light that I am of the view that the doctrine of strict liability was correctly rejected in Botswana as its adoption was based on an erroneous South African decision which has now been overruled. What is now needed is a clear authoritative statement indicating that *Attorney General v Ghanzi Hotel* is no longer good law in order to create certainty in the law.

The defence of reasonable publication has now been confirmed as forming part of the common law of defamation in Botswana. The question that arises is whether the elements of this defence are clearly articulated in local case law so as to enable the media to anticipate what kind of conduct would satisfy the criteria for reasonable publication. The standard of reasonable publication is objective, and certainty in its application can be achieved in two ways: through a body of illustrative case law; and through extra-statutory codes of behaviour adopted by the media to regulate their conduct.[33]

---

31 *National Media Limited and others v Bogoshi* n 7 above at 1217.

32 See *Seretse v CBET (Pty) Ltd and others* civ case 2055–02 (unreported, Botswana High Court, delivered on 8 December 2011) at par 60.

33 *Per* Lord Hoffman in *Jameel and Others v Wall Street Journal Europe* [2006] UKHL 44 at par 55.

The *Ocaya* case was the first decision to embrace the defence of reasonable publication in Botswana. The court here observed that emerging jurisprudence indicates that in addition to traditional grounds of justification in defamation cases, new grounds of justification may be developed in accordance with the *boni mores* of the community.[34] In developing the common law of defamation, the court referred to the South African Supreme Court of Appeal decision in *National Media Limited and others v Bogoshi.* Unfortunately, the court did not discuss the status of this South African case in the law of Botswana, nor did it justify why reliance was placed on the decision. In defining the ambit of the new defence of reasonable publication, the court relied on what it referred to as the 'tests to determine the reasonableness of the decision to publish' adopted by the House of Lords in the English case of *Reynolds v Times Newspapers Ltd*.[35] Even though the judge referred to the 'tests', the House of Lords in actual fact only gave a list of considerations that can be taken into account in determining whether a publication is covered by the defence of responsible journalism.[36] In the two other cases that have since come before the High Court in which the defence of reasonable publication has been raised, the court also did not clearly define the elements of the defence. In dealing with the nature of this defence, the court in both cases said only 'in considering the reasonableness of the publication the court is enjoined to take into account the nature, extent and tone of the publication'.[37] In both these cases, the defence of reasonable publication failed as the complainants were not afforded an opportunity to respond before publication of the offending matter. In endorsing the defence of reasonable publication in *Tsodilo Services (Pty) Ltd,* the Court of Appeal also failed to set out the elements of the defence.

The current Botswana case law on the defence of reasonable publication fails to articulate the elements of the defence clearly. The best attempt at defining this defence has been in the *Ocaya* case where the court relied on the *Reynolds* considerations. It must, however, be noted that the *Reynolds* considerations themselves were not without difficulties in their application in the English courts. Some trial judges have taken these considerations as hurdles that should be cleared by the media in order to succeed and a

---

34 *Ocaya v The Francistowner (Pty) Ltd t/a The Voice Newspaper* n 18 above at par 103.

35 *Id* at par 105.

36 *Reynolds v Times Newspapers Ltd* n 4 above at 626.

37 *Seretse v CBET (Pty) Ltd and Others* n 32 above and *Makgalemele v Ya Rona FM (Pty) Ltd and another*, CVHLB – 001317–08 (unreported, Botswana High Court, delivered on 26 March 2012).

stumble in proving any of these could prove fatal to the defence.[38] In practical terms, the *Reynolds* considerations proved difficult to apply because some courts saw them as an illustrative list of possible considerations, while others viewed them as a complete code for what constitutes responsible journalism.[39] This has made it difficult for journalists and publishers to anticipate what kind of conduct would satisfy the *Reynolds* criteria which were applied with the benefit of judicial hindsight. The uncertainty surrounding the application of the *Reynolds* criteria in England was addressed in the *Jameel* case.[40]

The defence of reasonable publication remains uncertain in Botswana. It is the responsibility of the courts to promote certainty in its application and this can be done through building a body of illustrative case law. The Botswana courts are yet to articulate the ambit and elements of this defence.

The next section of this paper looks briefly at the development of the defence of reasonable publication or its equivalent in other common law jurisdictions and what lessons Botswana courts may learn in the consolidation of the defence to clarify its application.

DEFENCE OF REASONABLE PUBLICATION AND SIMILAR DEFENCES IN OTHER JURISDICTIONS

A number of common law jurisdictions have modified their law of defamation to give more protection to the media by adopting a defence of reasonable publication or similar defences. This section briefly looks at defences created in South Africa, Namibia, England and Canada which, in my view, can provide valuable lessons to the courts in Botswana in consolidating the defence of reasonable publication in the country.

South Africa

The Supreme Court of Appeal developed the common law by adopting the defence of reasonable publication in the case of *National Media Limited and others v Bogoshi*. In formulating this defence, the court held that:

> … the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if upon a consideration of all the circumstances of

---

38 Robertson & Nicol *Media law* (2001) 160.
39 Hooper 'The importance of the Jameel Case' [2007] *Entertainment Law Review* 62.
40 See *Jameel and Others v Wall Street Journal Europe* n 33 above.

> the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.[41]

The court established two essential requirements for this new defence of reasonable publication. First, the defence applies where the publication is of material that is in the public interest, ie, material which it is in the public interest to make known, as opposed to material that is merely interesting to the public.[42] The court specifically recognised that greater latitude should be allowed in respect of political discussion.[43] This is in recognition of the special role played by the media in fostering an open and transparent democracy.

The second requirement set by the court for the defence of reasonable publication is that the publication must have been reasonable in the circumstances of the case. The court cautioned that the adoption of the defence should not give members of the press the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published by the media. A number of considerations were identified which should be used to determine the reasonableness of the publication. These considerations include the tone in which a newspaper article is written or the way in which it is presented. What will also feature prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information.[44]

Namibia

Namibia, which shares a Roman-Dutch common law tradition with both Botswana and South Africa, has also developed its common law of defamation to incorporate the defence of reasonable publication. In the case of *Trusto Group International Ltd and others v Shikongo,* the Supreme Court adopted the defence and went on to elaborate on its elements.[45] The court held that:

> In order to raise this defence, the appellants must establish that the publication was in the public interest; and that, even though they cannot

---

41 *Per* Hefer JA at 1212.
42 *National Media Limited and Others v Bogoshi* n 7 above at 1212.
43 *Ibid.*
44 *Ibid.*
45 Case no SA 8/2009 (unreported, delivered on 7 July 2010).

> prove the truth of the facts in the publication, it was nevertheless in the public interest to publish.[46]

The Namibian Supreme Court, like the South African Supreme Court of Appeal, also set two elements for the defence of reasonable publication, namely, that the publication must be in the public interest, and that it must have been reasonable. In determining whether the publication is reasonable, the court held that one of the important considerations will be whether the journalist concerned acted, in the main, in accordance with generally accepted good journalistic practice.[47] The court further stated that there is no constitutional interest in poor quality or inaccurate reporting. Codes of ethics that promote accuracy affirm the right to freedom of expression and freedom of the media.[48] Good practice will enhance the quality and accuracy of reporting and at the same time protect the legitimate interests of those who are the subject matter of reporting. It, however, cautioned that courts should not hold journalists to a standard of perfection, but must take account of the pressured circumstances in which journalists work.

Canada

The Supreme Court of Canada has modified the common law to recognise a defence of responsible communication on matters of public interest.[49] In developing the common law to create this defence, the court acknowledged that the traditional common law, which required a publisher to be certain that it could prove the statement to be true in a court of law, before publication, had a chilling effect on the media. The court held that to insist on court-established certainty in the reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable, and which are relevant and important to public debate.[50] The defence of responsible communication has two elements: public interest, and responsibility. The Supreme Court formulated a two-part test for the application of the defence. The first part of the test is whether the publication involved a matter of public interest. The determination of this question is a matter for the judge to decide and is primarily a question of law. In deciding whether a publication involves a matter of public interest, a judge will be required to consider the subject

---

46
47 *Id* at par 73.
48 *Id* at par 75.
Id at par 77.
49 *Grant v Torstar Corp* [2009] 3 SCR 640.
50 *Id* at par 53.

matter of the communication as a whole. The Supreme Court went a step further to give guidance on what would be in the public interest:

> To be of public interest, the subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of the citizens, or one to which considerable public notoriety or controversy has attached.[51]

The court highlighted that public interest is not confined to publications on government and political matters, nor is it necessary that the plaintiff be a public figure. It held that the public has a genuine stake in knowing about many matters, ranging from science and arts, to the environment, religion and morality.

The second part of the test is aimed at ensuring the maintenance of responsible journalism. The question to be asked is, was the publication of the defamatory communication responsible? The court gave a list of some relevant factors that would assist in the determination of whether a defamatory communication on a matter of public interest was responsibly made. These factors include:

- The seriousness of the publication. The logic of proportionality dictates that the degree of diligence required in verifying the allegation should increase in proportion to the seriousness of its effects on the person defamed.
- The public importance of the matter. Inherent in the logic of proportionality is the degree of the public importance of the communication's subject matter.
- The urgency of the matter. News is often a perishable commodity. The legal requirement to verify accuracy should not unduly hamstring the timely reporting of important news, nor should a journalist's desire to get a scoop provide an excuse for irresponsible reporting of defamatory matter.
- The status and reliability of the source. Some sources of information are more worthy of belief than others. The less trustworthy the source, the greater the need to use other sources to verify the allegations.
- Whether the plaintiff's side of the story was sought and accurately reported. In most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond.

---

[51] *Id* at par 105.

- Whether the inclusion of the defamatory statement was justifiable. It is for the court to determine whether the inclusion of a defamatory statement was necessary in communicating on a matter of public interest.
- Whether the defamatory statement's public interest lay in the fact that it was made rather than in its truth. This rule reflects the law's concern that one should not be able freely to publish a scurrilous libel simply by purporting to attribute the allegation to someone else.[52]

The above factors are not exhaustive, but merely illustrative guidelines. The court will still be required to take into account all other relevant factors in determining whether the publication of defamatory matter was responsible in the circumstances of the case. In creating the defence of responsible communication, the Supreme Court warned that freedom does not negate responsibility, and that it is important that the media act responsibly in reporting on facts on matters of public concern, and must hold themselves to the highest journalistic standards.

England

English courts have developed the common law of defamation by adopting a defence of public interest, also known as the *Reynolds* privilege, in order to accord greater protection to freedom of expression. This defence was first developed by the House of Lords in the *Reynolds* case and was refined in the *Jameel* case. The defence is built on the traditional foundations of qualified privilege. There are divergent views among judges whether this defence is a new category of qualified privilege or not. Some judges have recognised the defence as 'a different jurisprudential creature from the traditional form of privilege from which it sprang'.[53] The *Reynolds* case and a majority of the judges in the *Jameel* case, held that the defence was no different from the traditional form of privilege, but rather an expansion of the common law privilege, which reinstates the traditional flexibility of the common law. Although there is a divergence of opinion on whether or not the defence of public interest is new, what is clear is that in its application, it is the material that is privileged and not the occasion on which it is published. This differs from the application of the traditional defence of qualified privilege. The defence of reasonable publication protects publication of defamatory matter

---

[52] *Id* at par 120.

[53] Lord Hoffman and Baroness Hale of Richmond in *Jameel and Others v Wall Street Journal Europe* n 33 above and more recently, Lord Phillips in *Flood v Times Newspapers Limited* [2012] UKSC 11 at par 38.

to the world at large, provided: it was in the public interest that the information should be published; and the publisher has acted responsibly in publishing the information.[54]

The public interest defence, like reasonable publication in South Africa and Namibia and responsible communication in Canada, also has two elements. First, it must be shown that the publication was in the public interest, and secondly, that the publication of the matter represents responsible journalism. The determination of whether the publication was in the public interest is a question of law decided by the judge who must look at the published material as a whole without isolating the defamatory statement.[55] The judge must also decide whether the publication was reasonable. A test of responsible journalism has been formulated to assist in the determination of this issue. The House of Lords in the *Reynolds* case provided a list of factors that a court must take into account in assessing whether a publisher was responsible in publishing a defamatory matter. These factors are:

- The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed.
- The nature of the information, and the extent to which the subject matter is of a matter of public concern.
- The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
- The steps taken to verify the information.
- The status of the information. The allegation may have already been the subject of an investigation which commands respect.
- The urgency of the matter. News is often a perishable commodity.
- Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed.
- Whether the article contained the gist of the plaintiff's side of the story.
- The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
- The circumstances of the publication, including the timing.[56]

The test for assessing responsible journalism was refined by the House of Lords in the *Jameel* case. The court held that the *Reynolds* factors should not

---

54 *Flood v Times Newspapers Limited* n 53 above at par 2.

55 *Jameel and Others v Wall Street Journal Europe* n 33 above, per Lord Hoffman at pars 48–49.

56 *Reynolds v Times Newspapers Ltd* n 4 above at 626.

be applied as a series of hurdles to be negotiated by a publisher, but as an illustrative guide to what might constitute responsible journalism on the facts of a given case.[57] The court went further to caution that the assessment of responsible journalism is not an invitation for courts to micro-manage the editorial practices of media organisations. A degree of deference should be shown to the editorial judgment of professional editors and journalists.[58] The fact that a judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. Journalistic ethics and relevant codes of practice would also play an important role in assisting the court to determine whether it was responsible for a media defendant to publish defamatory matter in a given case.

EVALUATION AND CONCLUSION

I have examined the development of the common law of defamation in Botswana resulting from the adoption of the defence of reasonable publication to afford greater protection to the media when disseminating information on matters of public interest. This development has clearly been influenced by similar developments in other jurisdictions where it was felt that the traditional common law of defamation failed to strike an appropriate balance between the protection of reputation and media freedom. This article concludes that the defence of reasonable publication in Botswana, while a welcome development, needs further articulation by the courts to enable the media fully to appreciate its nature and application.

In South Africa, Namibia, and Canada, the defence rests on two legs: the communication must be in the public interest; and publication must have been reasonable. These countries introduced the defence via a modification of their traditional common law of defamation which did not protect freedom of expression adequately. The defence protects content that is published by the media and which turns out to be false but was published in circumstances that were reasonable. Protection demands that the content must be in the public interest and the publisher must have acted responsibly. The defence of public interest, or the *Reynolds* privilege developed in England, is essentially the same as the defence in the other countries examined. Although the majority appear to regard it as an extension of qualified privilege, closer examination reveals that this is not sustainable in that it protects the material that is published rather than the occasion when it is published.

---

[57] *Id per* Lord Bingham at par 33.
[58] *Id per* Lord Hoffman at par 51.

The defence of reasonable publication and its equivalent, responsible communication and public interest, seem to offer the perfect solution to striking a balance between the protection of reputation and the exercise of media freedom. Both these values are important in our modern democratic societies and the challenge has always between how to strike an appropriate balance between the two. The traditional common law of qualified privilege offers no protection in respect of publications to the world at large. It does not recognise a general media privilege based on information on a matter of public interest, albeit erroneous. The traditional common law of defamation thus tilts the scales in favour of the protection of reputation. It was the concern that the traditional common law favours the protection of reputation over media freedom, that triggered the modification of the law of defamation in many countries around the world. In the United States of America, the Supreme Court, relying on the First Amendment, held in the celebrated case of *New York Times Co v Sullivan,*[59] that when allegations which would ordinarily be defamatory are made about a public official in relation to his official conduct, he would not succeed in an action unless he could prove that the defamatory statement was false, and further could prove with convincing clarity that it was made by the defendant with the knowledge of its falsity or reckless disregard as to whether it was false or not. The *Sullivan* case, although a welcome development in freedom of expression circles, has been criticised for its failure to give sufficient weight to an individual's right of reputation. A person who enters public life must expect robust and often unfair criticism. Although this may be part of the price, it does not follow that he may be deprived of any right to reputation.[60] The case also sets a difficult standard for the plaintiff to satisfy. A plaintiff must obtain detailed information about what the defendant actually knew – or can be presumed to have known – through investigation to prove that he published the statement knowing it to be false, or at least with reckless disregard for the truth. This rigorous standard provides little protection for the reputation of the plaintiff in that it imposes a difficult standard of proof on the plaintiff but does not require the defendant to act reasonably to verify the truth of the statement before publication.[61] Many jurisdictions have declined to adopt the *Sullivan* case, opting instead for a fault-based regime.

---

59 376 US 254 (1964).

60 Kentridge 'Freedom of speech: is it the primary right?' (1996) 45 *International Comparative Law Quarterly* 261–267.

61 Schaffner 'Protection of reputation versus freedom of expression: striking a manageable compromise in the tort of defamation' (1999) 63 *Southern California Law Review* 435–444.

Unlike the US approach, it is argued that the defence of reasonable publication and its equivalents offer balanced protection for the media and individuals whose reputations are at stake. On the one hand, the defence recognises the special role played by the media in democratic societies by facilitating freedom of expression and robust public debate. On the other hand, it also protects reputation by holding publishers liable who fail to take appropriate steps to ensure the accuracy of what is published. Freedom does not negate responsibility and it is thus important for the media to act responsibly in reporting facts on matters of public concern by holding themselves to the highest journalistic standards. The defences of reasonable publication, responsible communication, and public interest also recognise that insistence on court-established certainty on the part of the media before reporting on matters of public interest, may inhibit public debate. The defences also recognise the peculiar environment from which the media operates, which at times obliges them to publish news under time constraints which render advance verification of each and every factual allegation impossible. The defences afford protection to the media for disseminating false facts where they can establish that they were responsible in doing so in the circumstances of the case.

Botswana, like most common law jurisdictions, has also developed her common law by adopting the defence of reasonable publication. In developing this defence, the courts have unfortunately failed to articulate the essential elements of the defence. It is important that the elements of this defence be made clear so that the media and other publishers of information are able to anticipate what conduct would satisfy the criteria for the defence. The English House of Lords in the *Reynolds* and *Jamee*l cases, and the Canadian Supreme Court in *Grant v Torstar Corp,* have done ground-breaking work in their attempts to define the ambits of the new defences created in their respective jurisdictions. They have provided clear tests and guidelines for determining both the issues of public interest, and of responsible journalism. The South African and Namibian courts have not been as detailed. It is submitted that Botswana courts can learn a lot from the approaches of both the English and Canadian courts. It will obviously take a body of illustrative case law to crystallise the defence and enable publishers to have a full appreciation of the nature of the defence.

In articulating the defence of reasonable publication in Botswana, the courts should make it clear that the defence embodies a standard of responsible

journalism by which to judge whether a publisher took adequate steps to ascertain the accuracy of the material published. Adherence to good journalistic practice should play an important role in the application of the defence. Media codes of ethics are critical to this application. The Botswana Press Council's 'Media Code of Ethics', provides, under the section on good practice, that:

> i. When compiling reports, media practitioners must check their facts properly, and the editors and publishers of newspapers and other media must take proper care not to publish inaccurate material. Before a media institution publishes a report, the reporter and editor must ensure that all reasonable steps have been taken to check its accuracy. The facts should not be distorted by reporting them out of the context in which they occurred.
> ii. Special care must be taken to check stories that may cause harm to individuals, organizations or the public interest. Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to ascertain and include the response from the individual or organization.[62]

Similarly, the Society of Professional Journalists' Code of Ethics provides, *inter alia*, that journalists should:

- test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
- diligently seek out subject of the news stories to give them the opportunity to respond to allegations of wrongdoing.
- make certain that headlines, news teases and promotional material, photos, video, audio, graphics, sound bites and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.[63]

The ethical obligations imposed on the media by the above two codes of ethics are important for the application of the defence of reasonable publication or responsible journalism. A close scrutiny of the obligation imposed on the media by the two codes of ethics, shows that they overlap with the considerations that have been identified by the courts in Canada, Namibia and UK as to what is relevant in the determination of the reasonableness of a publication. It is submitted that in articulating the

[62]Botswana Press Council Media Code of Ethics, par 2. www.pcbotswana.org (last accessed 27 August 2012).

[63]The SPJ Code of Ethics is voluntarily embraced by thousands of journalists, regardless of place or platform, and is widely used in newsrooms and classrooms as a guide for ethical behaviour. www.spj.org (last accessed 27 August 2012) .

elements of the defence of reasonable publication in Botswana, the courts should make a habit of referring to the relevant provisions of the applicable media codes of ethics. In all the cases in which the defence has served before the Botswana courts, there has been no reference to the applicable codes of journalist ethics. In all the cases, the media were clearly in breach of good journalistic ethics as they had failed to afford the complainants an opportunity to respond to the offending publications before publication. Reference to breaches of the relevant provisions of the codes of ethics by the courts in these cases would have gone a long way in establishing the necessary body of illustrative case law that would enable the media to have a full appreciation of the defence.