

# Let false light (publicity) shine forth in South African law

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## OPSOMMING

### Laat Valse Lig (Privaatheidskending) Voortskyn in die Suid-Afrikaanse Reg

Die reg aangaande privaateheidskending het die afgelope aantal jare drastiese ontwikkeling ondergaan in alle opsigte, behalwe met betrekking tot vals lig publikasie. Die onlangse saak van *Le Roux v Dey* 2011 3 SA 274 (CC) het egter 'n hewige debat ontketen oor die vraag of 'n gemanipuleerde foto wat 'n skoolhoof en adjunk-skoolhoof in 'n seksueel-suggestiewe posisie uitbeeld, sou neerkom op laster. Die Konstitusionele Hof het in 'n meerderheidsuitspraak bevind dat dit inderdaad lasterlik was. Twee aparte minderheidsuitsprake het egter bevind dat die foto nóg belasterend was, nóg die menswaardigheid van die betrokke individue geskend het. Die standpunte van die minderheid was hoofsaaklik gegrond op omsigtigheid om in stryd met artikel 9 van die Grondwet, wat diskriminasie op grond van seksuele oriëntasie verbied, op te tree. Meeste van die kritiek wat op die meerderheidsuitspraak gelewer is, deel hierdie sentiment. Dit is glad nie vergesog nie dat die howe uiteindelik in die toekoms kan weier om hulp te verleen waar moontlike skending van artikel 9 ter sprake mag kom. Dit laat egter die vraag ontstaan of die tyd nie ryp is om die reg aangaande vals lig privaateheidskending te ontwikkel nie, om in sodanige gevalle inderdaad 'n remedie te verleen.

## 1 Introduction

A common law right to privacy under the *actio iniuriarum* has been recognised in South Africa as an independent right for many years. It was first recognised in the case of *O'Keefe v Argus Printing and Publishing Co Ltd*,<sup>1</sup> and it is now accorded protection in section 14 of the Constitution.<sup>2</sup> Though privacy is protected under *dignitas*, it is regarded as a separate right from dignity, as the Constitution specifically protects dignity in section 10.<sup>3</sup> In common law, there are four forms of invasion of privacy: (1) intrusions; (2) publication of private facts; (3) appropriation; and (4) placing someone in a false light.<sup>4</sup> Intrusions and

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1 1954 3 SA 244 C. See also Neethling, Potgieter & Visser *Neethling's Law of Personality* (2004) 217.

2 Constitution of the Republic of South Africa, 1996. See also McQuoid-Mason "Invasion of privacy: common law v constitutional delict – does it make a difference?" 2000 *Acta Juridica* 227 227-228.

3 See also McQuoid-Mason 2000 *Acta Juridica* 227 229; Neethling *et al* 218-219.

4 McQuoid-Mason 2000 *Acta Juridica* 227 229-231.

publication of private facts are common forms of invasion of privacy in South Africa, whereas appropriation has only gained popularity in recent years.<sup>5</sup> On the other hand, the false light form of invasion of privacy has remained under-developed. This article only considers whether there is a place for the law of false light invasion of privacy in South Africa, and hence its development in the light of *Le Roux v Dey*.<sup>6</sup> The article commences by considering the general nature of an action for false light privacy under South African Law and the law of the United States of America (US). Before concluding, the article considers why protection of privacy through an action for false light may be ideal for South Africa.

## 2 The Nature of False Light

Generally, false light action for invasion of privacy can be defined as a liability for spreading information about the plaintiff that is false and offensive.<sup>7</sup> It may also refer to the making of statements that create unreasonable and highly-objectionable publicity, by attributing to the plaintiff characteristics, conduct or beliefs that are false – such that the defendant presented these statements to the public.<sup>8</sup> Examples include an engaged or married nurse “needing” a boyfriend,<sup>9</sup> publishing a photograph of a couple in an article critical of love at first sight,<sup>10</sup> or the police keeping a photo of a man in their “rouges” gallery despite his acquittal for charges of committing a crime.<sup>11</sup> This is distinguishable from, for example, where a court held that publication of a book on the life and work of a photographer did not violate the rights of a group of Navajo whose photos appeared in the book,<sup>12</sup> and where publishing a photo of a student with a history of drug abuse next to a report on drug use on local university campuses was held not to be unlawful.<sup>13</sup>

As with the violation of a person’s right to identity, under false light the violation lies in the publication or use of attributes of a person without their permission in a way which cannot be reconciled with the true image

5 *Grütter v Lombard* [2007] ZASCA 2; *Kumalo v Cycle Lab (Pty) Ltd* [2011] ZAGPJHC 56. In the two cases, the SCA and High Court recognised the right of identity as worthy of protection. The plaintiff needs to prove that appropriation of his name by another for personal advantage has occurred. He must satisfy three requisites to succeed with action: a factual violation of one’s identity that was wrongful and intentional.

6 *Le Roux v Dey* 2011 3 SA 274 (CC).

7 McQuoid-Mason 2000 *Acta Juridica* 227 229-231.

8 McQuoid-Mason 2000 *Acta Juridica* 227 229-231.

9 *Kidson v South African Associated Newspapers Ltd* 1957 3 SA 461 (W).

10 *Gill v Curtis Publishing Co* 239 P 2d 630.

11 *Mavity v Tyndall* 66 NE 2d 755.

12 *Banally v Hundred Arrows Press Inc* 614 F Supp 969.

13 *Martinez v Democrat-Herald Publishing Co* 669 P 2d 818; Cornelius “Image rights” in *Research Handbook on International Sports Law* (eds Nafziger & Ross) (2011) 506.

of that person.<sup>14</sup> Misrepresentation concerning the individual is also inherent in this type of infringement.<sup>15</sup>

## 2 1 False Light in South Africa

Invasion of privacy, in the form of false light, has lagged behind in South Africa. *Kidson v South African Associated Newspapers Ltd*<sup>16</sup> is the only case law authority that is widely quoted as supporting the proposition that an action for invasion of privacy, in the form of false light, exists under South African law. It seems to be the only known case that deals with false light in South Africa. The case is therefore examined briefly below. The *Kidson*<sup>17</sup> case dealt with the publication of pictures of three female nurses under the heading “97 Lonely Nurses Want Boyfriends”.<sup>18</sup> One of the three nurses in the pictures, Calitz, was engaged to be married and subsequently got married before the article was published.<sup>19</sup> Kuper J had to determine whether the article published “constituted an intentional infringement of the right of [Calitz] to personal privacy and was an unjustified aggression upon her dignity”.<sup>20</sup> While Kuper sought to decide the matter in the light of invasion of privacy, he does not seem to have separated privacy from dignity. He held:

I have come to the conclusion that the publication of the alleged desire to meet persons of the opposite sex (and this was stressed in the headlines) because she was lonely when off duty, was an insult or *contumelia* to the young married plaintiff. It would not only cause her embarrassment, but the happiness of her married life would be thrown into doubt.

What is apparent from this quotation is that there was very little distinction drawn by the court between the two causes of action. This is understandable, as this area of law was at its developmental stage. However, it is now settled that invasion of privacy is distinct from *iniuria* (impairment of dignity) and that *contumelia* or insult is not a requirement for invasion of privacy.<sup>21</sup> Clearly, *contumelia* or insult should not be a requisite for invasion of privacy given that only natural persons can feel insulted.<sup>22</sup> Nevertheless, the *Kidson* case – which is largely associated with invasion of privacy – was decided on the basis of *iniuria*.<sup>23</sup> I submit that the only inference linking it to placing someone in a false light in this case, are the facts of the case and not the reasoning of the court. It was implied that Calitz was “lonely and wanted a boyfriend”. This was false, as Calitz was engaged at the time of the interview and a married person at the time of publication of the picture and the story. However, from the

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14 Cornelius 506.

15 *Ibid.*

16 *Kidson v South African Associated Newspapers Ltd* 1957 3 SA 461 (W).

17 *Ibid.*

18 *Idem* 461H.

19 *Idem* 467F-H.

20 *Idem* 468H-469A.

21 Neethling *et al* 218-219.

22 *Ibid.*

23 *Ibid.*

court's reasoning and conclusion, the defendants were liable for *iniuria* and not for false light invasion of privacy. It is also of particular interest that Neethling and others do not classify this area of law (together with appropriation) as other forms of invasion of privacy.<sup>24</sup> Instead, they categorise these under the right to identity.<sup>25</sup> On the other hand, McQuoid-Mason regards false light and appropriation as forms of violation of the right to privacy.<sup>26</sup> Undoubtedly, this false light privacy is still in its infancy in South African law. Moreover, it is somehow confusing, as it does not clearly distinguish itself from impairment of dignity (or *iniuria*). Hence, it needs further development – especially given the changing *boni mores* (legal convictions) of South African society, which have increased with the advent of the constitutional era with emphasis on the value of human dignity. Vital lessons on how this development could be done can be learned from US jurisprudence on false light invasion of privacy. The following section therefore considers the legal position in the US.

## 2 2 False Light in the United States

The tort of false light is well developed in the US – although it is somehow controversial. False light differs from defamation primarily in being intended “to protect the plaintiff’s mental or emotional well-being”, rather than protecting a plaintiff’s reputation and also in being about the impression created – rather than about being true or false.<sup>27</sup> In that respect, false light has a narrower scope than defamation. Despite some notable overlap between the elements of the two torts, certain elements differ. For example – on the publication element – the communication need not necessarily be technically false for false light, but it is sufficient if it is misleading. This is where the tort of false light specifically applies. Another difference is the damage or harm required for an action. False light privacy claims often arise under the same facts as defamation cases. However, as stated above, false light cases are about damage to a person’s personal feelings or dignity, whereas defamation is about damage to a person’s reputation. The principal element of actual damages for false light claims is typically mental anguish.<sup>28</sup> At some point physical illness and harm to the plaintiff’s commercial interests have also been recognised.<sup>29</sup> This is unlike defamation, where the harm manifests in damage to reputation – that is, exposure to contempt, ridicule, impugned character or standing. The harm or wrong done to the plaintiff under false light does not necessarily have to involve injured feelings. Instead, the feeling or embarrassment associated with wrongful portrayal (placing in false light) is sufficient. In the contemporary world,

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24 *Idem* 33, 221.

25 *Idem* 255-256.

26 McQuoid-Mason 229-231.

27 Martin “False Light” available at <http://netlaw.samford.edu/Martin/AdvancedTorts/falselight.htm> (accessed 2013-02-13).

28 *Cain v Hearst Corp* 878 SW 2d 577.

29 *Ibid.*

one's image is a personality right, and thus placing the personality in false light is a violation of that right, and a legal remedy is warranted.

False light action in the US and the extent of protection varies from state to state. States that recognise false light tort include California, the District of Columbia, Florida, Georgia, Alabama, Ohio and Pennsylvania.<sup>30</sup> States such as New York and Texas do not recognise false light claims, for reasons of free speech protection.<sup>31</sup> The common law position of the tort of invasion of privacy was succinctly summarised by Judge Kravitch of the Federal Appeals Court for the Eleventh Circuit in *Allison v Vintage Sports Plaques*,<sup>32</sup> who held that the tort of invasion of privacy can be committed in any one of four ways: (1) through access to the plaintiff's physical and intimate secludedness, (2) through publication in conflict with generally accepted norms of decency, (3) through publication which places the plaintiff in a false light, and (4) through unauthorised use of the plaintiff's image for commercial gain. The third category is also known as the "tort of false light publicity".<sup>33</sup> Interestingly, most states that allow action based on false light and those that do not recognise it, regard the action as similar to a tort for defamation.<sup>34</sup> Only a few states such as Ohio and Florida are the exception, since they regard false light as an invasion of privacy.<sup>35</sup> The privacy laws in the US include a non-public person's right to privacy from publicity which puts them in a false light to the public – which is balanced against the First Amendment right of free speech.<sup>36</sup> Insight into the nature of this tort can be gained by examining some of the states that recognise false light.<sup>37</sup>

In California, false light is different from defamation, in that it is about false implications, while defamation concerns statements that are actually false. The leading case that established false light in this state is *Gill v Curtis Publishing Co.*<sup>38</sup> In *Gill*, a couple succeeded in the action by proving that a magazine created a false impression of them through an article featuring a photo of the couple – with the caption criticising "love at first sight" as being based on nothing more than sexual attraction. California has well-established elements of false light. These are: falsehood, offensiveness, identification of plaintiff, public disclosure and fault. Offensiveness means that the statement must not just create a false impression, but such impression must also be "highly offensive to a reasonable person".<sup>39</sup> It must be reasonable to take offense. It is not

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30 Digital Media Law Project "False Light" available at <http://www.dmlp.org/legal-guide/state-law-false-light> (accessed 2013-02-10).

31 *Ibid.*

32 *Allison v Vintage Sports Plaques* 136 F 3d 1443.

33 *Cornelius* 504.

34 *Ibid.*

35 *Ibid.*

36 Digital Media Law Project *op cit.*

37 *Ibid.*

38 *Gill v Curtis Publishing Co* 239 P 2d 630.

39 *Fellow v National Enquirer Inc* 32 Cal 3d 234 238 (quoting Restatement 2d of Torts § 652E).

necessarily a requirement in this state that the plaintiff be identified by name. Cases such as *Gill*<sup>40</sup> have shown that photographs of plaintiffs are sufficient for identifying them. Public disclosure refers to publication, but the courts are not clear on how many people must receive the information for it to be “publicly disclosed”.<sup>41</sup> Lastly, the plaintiff must also show that the false implication was the defendant’s fault. If the defendant is a public figure, then the plaintiff must show that the defendant acted with actual malice.<sup>42</sup> In response to a claim, the defendant can raise the defences of opinion and parody. A false light claim must be based on the implication of a false *fact* and *opinions* are constitutionally protected. Thus one cannot be held liable under a false light claim for a negative opinion, nor for casting a plaintiff in a false light if the false statement of fact in question is in a context the average reader would understand is a parody.<sup>43</sup>

Arizona is another state that recognises the tort of false light, and plaintiffs can sue for false light when offensive and false information or innuendo about them is spread publicly. Although the false light law in Arizona is somewhat similar to defamation, there are several differences. These include that statements need to be publicised more widely for false light than defamation; that defamation requires harm to reputation or other social consequences, while false light does not; and false light in Arizona protects against not only false statements, but also false implications and innuendo. The material must also be offensive for false light, while it need not be for defamation. The Supreme Court of Arizona has specified that “there can be no false light invasion of privacy action for matters involving official acts or duties of public officers” – because of public officials’ more limited privacy rights.<sup>44</sup> As a result, a plaintiff cannot sue for false light invasion of privacy if he or she is a public official and the publication relates to performance of his or her public life or duties.<sup>45</sup> Unlike in some other states, Arizona has not limited this protection to only media defendants.

In the District of Columbia, the false light publicity action overlaps significantly with defamation.<sup>46</sup> Here, defamation and false light both protect against the same wrongs – offensive false statements. The key difference between defamation and false light is that they protect against different harms flowing from such statements. “The false light ... action

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40 *Gill v Curtis Publishing Co* 239 P 2d 630.

41 Digital Media Law Project *op cit*.

42 *Readers's Digest Association v Superior Court* 37 Cal 3d 244 265; *Solano v Playgirl Inc* 292 F 3d 1078; California lower courts require that plaintiffs must show that defendants acted “negligently” (see eg *MG v Time Warner Inc* 89 Cal App 4th 623 636).

43 See *San Francisco Bay Guardian Inc v Superior Court* 17 Cal App 4th 655.

44 *Godbehere v Phoenix Newspapers* 162 Ariz 335 783 P 2d 781.

45 For South Africa’s position in this regard, compare with *Tshabalala-Msimang v Makhanya* [2007] ZAGPHC 161 par 30, 31, 39, 45 – where it was held that public figures surrender a measure of privacy when they enter public life.

46 Digital Media Law Project “Defamation” <http://www.dmlp.org/legal-guide/defamation> (accessed 2013-03-12).

differs from an action for defamation because a defamation tort redresses damage to reputation while a false light privacy tort redresses mental distress from having been exposed to public view.”<sup>47</sup> In other words, defamation protects a person’s public reputation, while false light protects a person’s internal mental tranquillity. False light in the District of Columbia compensates the plaintiff for mental distress and anguish. One federal district court in the District held that because corporations cannot be offended, they cannot sue for false light.<sup>48</sup> The defences, privileges and burdens of proof that protect defendants in defamation cases – such as opinion and fair comment – are equally applicable to false light publicity cases.<sup>49</sup>

In Illinois, false light is applied in essentially the same way as in the District of Columbia. It overlaps significantly with defamation, and the key difference between defamation and false light is that they protect against different harms flowing from such statements. However, false light in Illinois is broader than defamation. While everything that is defamation is also false light, false light reaches some things that defamation does not. For instance, in *Douglass*, a woman who had posed nude in Playboy sued Hustler because it published nude photos of her without her consent.<sup>50</sup> The court held that she had a right to sue for false light because Hustler insinuated that she was willing to appear nude in a “degrading setting”.<sup>51</sup> Despite their overlap, a plaintiff can sue for both false light and defamation, and potentially recover damages based on both claims. In some states, this is not the case.

As in the District of Columbia, and to some extent Illinois, false light in New Jersey is similar to defamation. Both protect against the same wrongs – offensive false statements. The key difference between defamation and false light in this state is that they protect against different harms flowing from such statements. Defamation protects a person’s public reputation, while false light protects a person’s internal mental tranquillity.<sup>52</sup> In order to satisfy the element of fault, the plaintiff must show that the defendant acted with actual malice, if the defendant is a public figure. However, New Jersey courts have not made a ruling on what level of fault must be shown when the plaintiff is a private figure. They could either require the plaintiff to show that the defendant acted with actual malice, as for public figures, or could require the plaintiff to show that the defendant acted negligently.

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47 *White v Fraternal Order of Police* 909 F 2d 512 518.

48 *Southern Air Transport Inc v American Broadcasting Companies Inc* 670 F Supp 38 42.

49 Digital Media Law Project *op cit*.

50 *Douglass v Hustler Magazine Inc* 769 F 2d 1128; For this case see also projectposner at <http://www.projectposner.org/case/1985/769F2d1128>.

51 *Douglass v Hustler Magazine Inc* 769 F 2d 1128.

52 *Romaine v Kallinger* 537 A 2d 284 290.

In Georgia, false light is essentially the same as defamation.<sup>53</sup> No reported decision in Georgia state courts has found a defendant liable for false light, without also finding the defendant liable for defamation.<sup>54</sup> Georgia courts readily acknowledge that “[t]he interest protected [by the tort of false light] is clearly that of reputation, with the same overtones of mental distress as in defamation”.<sup>55</sup> What the overlap means is that if one were sued for false light, one will also probably be sued for defamation (and *vice versa*). Notably, absolute privileges that completely shield someone from liability for defamation also apply to claims for false light. Georgia courts have held that you cannot be sued for false light when you comment on an issue of public interest.

The State of Indiana also recognises the tort of false light publicity. The case that established false light in the state is *Mavity v Tyndall*.<sup>56</sup> In this case, the police took a mug shot of a man they were investigating for a crime. Charges against him were eventually dropped. However, the police maintained a photo of the man in their “rouges gallery”. The man sued and was able to have his photo removed because the police were casting him in a false light – thereby implying that he was guilty of a crime. However, it is unclear when exactly someone can sue for false light, because Indiana courts have not heard many false light cases. Moreover, the exact elements of a false light claim have not been authoritatively established in the state.

In Michigan, false light is similar to defamation.<sup>57</sup> Both involve false statements that harm someone's public image.<sup>58</sup> One can be sued for both defamation and false light for the same statements.<sup>59</sup> However, a plaintiff can only obtain money for one or the other violation based on the same statements.<sup>60</sup> The plaintiff thus has a choice to raise either of the two possible actions.<sup>61</sup>

Meanwhile, the Ohio Supreme Court has only as recently as June 2007 recognised the tort of false light publicity in Ohio, in the case of *Welling*.<sup>62</sup> In this case, the Supreme Court held that

[i]n Ohio, one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had

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53 Digital Media Law Project *op cit*.

54 *Ibid*.

55 *Association Services v Smith* 549 SE 2d 454 459.

56 *Mavity v Tyndall* 66 NE 2d 755.

57 Digital Media Law Project *op cit*.

58 *Ibid*.

59 *Ibid*.

60 *Ibid*.

61 *Ibid*.

62 *Welling v Weinfeld* 866 NE 2d 1051; see also <http://www.sconet.state.oh.us/rod/docs/pdf/0/2007/2007-ohio-2451.pdf>.



knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.<sup>63</sup>

In Pennsylvania, false light is similar to defamation, but there are several differences.<sup>64</sup> Firstly, statements need to be publicised more widely for false light than defamation. Secondly, defamation requires harm to reputation or other social consequences, while false light does not. Thirdly, material must be offensive for false light, while it need not be so for defamation. It is also noteworthy that as a defence, the media is insulated from liability for false light when they report on issues of public concern related to public officials.<sup>65</sup> The courts deem public officials as having “relinquish[ed] ... insulation of scrutiny of [their] public affairs.”<sup>66</sup> For example, in *Masson v New Yorker Magazine Inc.*,<sup>67</sup> the court ruled that a public figure cannot recover for a false light claim, unless he proves by clear and convincing evidence that the defendant published the false portrayal with actual malice – that is, with “knowledge that it was false or with reckless disregard of whether it was false or not”. Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author “in fact entertained serious doubts as to the truth of his publication” or acted with a “high degree of awareness of ... [its] falsity”.<sup>68</sup> Most significantly, the US Federal Supreme Court has, to a considerable extent, made it difficult for plaintiffs to recover damages through the tort of false light, by incorporating constitutional defences and limitations.<sup>69</sup> The Federal Supreme Court places a high premium of freedom of expression, which militates against unrestrained use of the existing defences such as parody.<sup>70</sup>

There are, however, states that do not recognise the false light tort. These are Virginia, Texas, Massachusetts, New York, Florida and North Carolina.<sup>71</sup> Florida failed to recognise the tort of false light invasion of privacy in the judgment of *Jews for Jesus Inc.*<sup>72</sup> The Florida Supreme Court held that this tort has a chilling effect on protected speech, which outweighed its potential to create a new remedy for a narrow class of wrongs.<sup>73</sup> It concluded that false light largely duplicates existing torts. Instead, the court decided to develop the law of defamation and

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63 *Welling v Weinfeld* 866 NE 2d 1051.

64 Digital Media Law Project *op cit*.

65 *Neish v Beaver Newspapers Inc* 581 A 2d 619 624-625.

66 *Ibid.* South Africa has a similar position in the area of defamation where public officials can only sue if the defamatory material related to their individual capacity (see in this regard *Mthembi-Mahanyele v Mail & Guardian* [2004] 3 All SA 511 (SCA) par 34-43)

67 *Masson v New Yorker Magazine Inc* 501 US 496 510.

68 See also *Seale v Gramercy Pictures* 964 F Supp 918 924.

69 See Page “American Tort Law and the Right to Privacy” in *Personality Rights in European Tort Law* (eds Brüggemeier, Colombi, Ciacchi & O’Callaghan) (2010) 68-69.

70 Cornelius 506.

71 The list of states dealt with here is not exhaustive. There are likely others that do not recognise the tort.

72 *Jews for Jesus Inc v Edith Rapp* sc06-2491 (Fla Oct 23, 2008).

73 *Ibid.*

recognised a cause of action for defamation by implication. It also held that a communication can be considered defamatory if it “prejudices” the plaintiff in the eyes of a “substantial and respectable minority of the community,” as set forth in the Restatement (Second) of Torts comment.<sup>74</sup> They regarded it as a duplication of actions, as false light somehow overlaps with defamation. On the other hand, Washington courts have not explicitly recognised the tort of false light. However, Washington has also not explicitly rejected the tort of false light either. In one case, the Washington Supreme Court appeared sceptical about whether allowing false light claims would be a good idea, due to its similarity to defamation.<sup>75</sup>

Notwithstanding divergence with regard to the nature and practice among different states that recognise the tort of false light invasion of privacy in the US, its elements are essentially settled. They are: publication, the information must be highly offensive, false information (on conduct, beliefs, practices or utterings); attributing falsity to the plaintiff; and malice. As in any delictual action, unlawfulness is a requirement.<sup>76</sup> These are discussed in detail below.

### **2 2 1 Publication**

Publication involves spreading or disseminating information about the plaintiff. This is the conduct element of the action, and the defendant must have communicated the false information to at least one other person other than the plaintiff. The publicised information must reach third parties, for the act of publication to be fulfilled for the purposes of this action.

### **2 2 2 The Information must be Highly Offensive**

The information is highly offensive if it is embarrassing and causes emotional or mental distress to reasonable persons. The damage/harm element of this action constitutes mental anguish. On some occasions, however, physical illness and harm to the plaintiff’s commercial interests have also been recognised. The threshold of offensiveness here is that of the reasonable person. Particular sensitivities are not used as the measure of offensiveness. It must be such that the reasonable person would take offence under the circumstances.

### **2 2 3 False Information on Conduct, Beliefs, Practices or Utterings**

There must be information that has no truth in it. The information need not necessarily be technically false, but it must be misleading. Such information must be such that its divulgence places the plaintiff in false light – that is, deviant from the actual state of affairs.

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74 *Restatement (Second) of Torts* § 559 (1972).

75 *Eastwood v Cascade Broad Co* 722 P 2d 1295 1298-1299.

76 *Cornelius* 509.

#### **2 2 4 *Attributing to the Plaintiff***

The publication must attribute a falsity to a particular plaintiff. This establishes the causal link between the words of the defendant and the harm suffered by the plaintiff. One can therefore not raise the action when there is nothing specifically or impliedly linking him or her to the publication in question.

#### **2 2 5 *Malice***

The publication of the material must be actuated by ill-will or malice. This will in part satisfy the intention element of the enquiry. It requires that the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed.<sup>77</sup>

With any action due to infringement of a subjective right, a variety of conflicting interests must be weighed against each other. In this context, it means that the publication and use of a person's attributes must be weighed against the user's right to freedom of expression.<sup>78</sup> This means that the protection afforded by the false light tort is not absolute and is susceptible to acceptable defences, among them consent, truth and public interest, fair comment, jest and parody, as has been discussed under the various states above.

### **3 Substantiation for False Light in South Africa**

Primarily there are four main reasons why an action for false light publicity is necessary in South African and why it needs further development – notwithstanding some controversies in the US.

Firstly, dignity is a right and a foundational principle in South Africa. It is submitted that a call for developing the false light tort in South Africa has constitutional backing. Dignity is a highly-prized right in the Constitution. It is not only a right provided for in section 10, but it is also a foundational principle provided for in section 1(a). This provides the philosophical backing to the protection of a person's character and personality, from being placed in false light in the public eye. Allowing people to unrestrainedly publicise otherwise undesired information about a person because the information does not damage the person's reputation, is to take too narrow a view and interpretation of the all-important right to dignity in the Constitution. A false light action would thus apply not as a remedy to violation of dignity directly (this is covered by the action for dignity) – but as a separate action, albeit meant to

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<sup>77</sup> The element explained in *Cain v Hearst Corp* 878 SW 2d 577 does not, however, recognise false light torts. See also s 652E (Publicity Placing Person in False Light) of the Restatement (Second) of Torts).

<sup>78</sup> Cornelius 509.

achieve the protection of the plaintiff's dignity on the basis of it being a constitutional principle.

Secondly, there is a constitutional imperative to protect and promote personality rights in our law. Whereas appropriation as a form of invasion of privacy, protect control over the use of one's name and image, false light, on the other hand, is warranted by the need to protect a person's individual image and character. Personal image and character are also important personality rights. Whilst the portrayal of a person in false light may not necessarily be defamatory, it may cause embarrassment to the plaintiff, and that may cause emotional hurt. This is a sound legal basis to allow for an action on false light.

Thirdly, the net of individual protection of privacy has to be widened in order to bridge a gap that may exist in the protection of fundamental rights. There is then the need to bridge the gap of legal protection between the defamed (protected through the defamation action) and the injured in feeling (protected through the dignity action), and the one whose portrayal causes harm that is not necessarily defamatory and is not protected by the dignity action. The person in this last scenario may most appropriately be protected under invasion of privacy through the false light action.

Perhaps no South African case best illustrates the need for the development of false light privacy than *Le Roux v Dey*.<sup>79</sup> The *Le Roux v Dey*<sup>80</sup> judgment followed publication of a computer-manipulated image by three learners, aged 15½ to 17 years at the time.<sup>81</sup> The image that had been created by one of the three learners, Le Roux, was circulated among a circle of peers using cell phones, and eventually an A4 size of the image was placed on the school notice board.<sup>82</sup> It had been made by electronically superimposing the facial images of the school principal and of his deputy, Dey, on the bodies of two naked men. The two naked bodybuilders were seated close each other on a couch. In a sexually suggestive manner (apparently masturbating), the legs were apart and their hands were in the genital areas. However, the learners had strategically covered both the hands and the genitals with the school crest. Dey sued the three learners in the High Court for defamation and injured feelings or *iniuria*,<sup>83</sup> and also pressed criminal charges against them.<sup>84</sup> The High Court upheld both of Dey's claims and awarded a composite award of R45,000 in damages.<sup>85</sup> The three learners unsuccessfully appealed to the SCA. By majority, the SCA held that the learners were liable for defamation for publication of a defamatory image bearing Dey's face. However, the SCA held that awarding the damages

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79 *Le Roux v Dey* 2011 3 SA 274 (CC).

80 *Ibid.*

81 Par 12.

82 Par 17.

83 Par 4.

84 Parr 18, 19.

85 Par 4.

for the impairment of dignity claim was “an impermissible accumulation of actions on the part of the High Court”.<sup>86</sup> Nonetheless, it upheld the amount of the damages that the High Court awarded Dey.<sup>87</sup> The learners then successfully applied to the Constitutional Court for leave to appeal against the decision of the SCA. However, their overall appeal was unsuccessful.

The Constitutional Court (by a six-member majority as per Brand AJ) affirmed the finding of the SCA that the image was defamatory of Dey. Nevertheless, Froneman J and Cameron J (in a joint minority judgement) held that the image was not defamatory of Dey, but that it amounted to an *iniuria* (an injury to his feelings).<sup>88</sup> The majority were also acquiescent to the view that the image amounted to an injury to his feelings (impairment of dignity) even if it were not defamatory of him.<sup>89</sup> However, in two separate, dissenting minority judgements, Yacoob J and Skweyiya J held that the image was neither defamatory nor did it amount to an injury to Dey’s feelings.<sup>90</sup> Therefore, *Le Roux v Dey*<sup>91</sup> was one of a kind and had several outcomes. Not only did it divide the High Court and the SCA, but it also left the Constitutional Court ranging between three options. Even legal minds were left confused regarding the appropriate cause of action that Dey ought to have pursued under the circumstances. As mentioned earlier, his claim was based on defamation of character and impairment of his dignity. However, it is not implausible to argue that he could well have sued for invasion of privacy in the form of false light, in addition to defamation and *iniuria*.

Neither Dey nor any of the three courts entertained invasion of privacy as a possible cause of action for Dey. While most critics of the CC judgement felt that it was insensible to the rights of children, some considered that the court’s finding that the superimposed image was defamatory would offend the constitutional guarantee of equality and non-discrimination based on, *inter alia*, sexual orientation.<sup>92</sup> The critics regarded the judgement as a perpetuation of the stigma associated with the gay and lesbian community.<sup>93</sup> I do not necessarily agree with this view. The court did not find the image defamatory because of the gender of the body-builders.<sup>94</sup> The finding was based on the obscene nature of the image.<sup>95</sup> Moreover, objectively viewed, the ruling does not propagate stigmatisation of gay people. Be that as it may, the concerns raised by

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86 Par 4.

87 Par 4.

88 Par 6.

89 Par 5.

90 Par 6.

91 *Le Roux v Dey* 2011 3SA 274 (CC).

92 Barnard-Naude & de Vos “The heteronormative observer: The constitutional Court’s decision in *Le Roux v Dey*” 2011 *SALJ* 407.

93 *Idem* 407-410.

94 See parr 103, 107; Buthelezi “In Dissent: A critical Review of the Minority Judgment of Yacoob J – *Le Roux v Dey* 2011 3 SA 274 (CC)” 2012 *Obiter* 719 720-722.

95 *Ibid.*

authors, such as Barnard-Naude and de Vos,<sup>96</sup> and other advocates of gay rights, are not to be ignored. They add to the controversy and confusion that perplexed the three levels of our judiciary.

There may, however, be genuine issues of sexual orientation in an action for defamation, especially in the context of ever-changing morality. The court will be faced with a difficult task of balancing the interests of individual human dignity<sup>97</sup> (inherent in privacy) and equality and non-discrimination on the basis of sexual orientation.<sup>98</sup> Even if one were to accept the minority judgements of Yacoob J and Skweyiya J that the image was neither defamatory nor did it cause any injury to the Dey – clearly he was affected by embarrassment and an altered public view of himself, owing to his presentation in false light. However, this liberal view may leave the plaintiff without any remedy in law.<sup>99</sup> It is then when the action for false light may come to the aid of the court, and afford relief to the plaintiff who may be aggrieved for being labelled ‘gay’. Essentially, where the dissemination of false information causes damage to reputation, the defamation action would be pursued. Where the errant publication does not harm reputation, the false light action would be applicable. Where the overlap is more pronounced in specific cases such that a case of false light and of defamation can be made based on the same set of facts, one would then not be allowed to make concurrent claims – but will have a choice between the two. Thus, in view of the foregoing, it is conceded that whilst the material in *Le Roux v Dey* may not have been defamatory, by portraying the appellant as gay there are merits for concluding that the superimposed picture placed Dey in a false light. The matter remains that he was placed in false light and that fact constitutes the harm suffered by the appellant that calls for compensation. It is a matter of wrongful, undesirable and undesired depiction, as opposed to *prima facie* harmful depiction.

Finally, there is a pressing need to maintain the balance between freedom of expression and privacy, in the same way that actions for defamation and dignity keep freedom of expression under control. Constitutionally-protected freedom of speech does not imply unrestrained licence to hurt the interests of other people. It does not qualify one to falsely place others in positions or situations that misrepresent them. Thus, the freedom of speech cannot single-handedly be used to counter the introduction of a false light tort. Instead, the pressing need to keep freedom of expression in check, especially in a highly-sensitive society such as South Africa, in the light of its historical legacy, informs the rationality of an action for false light. Freedom of expression is relatively strong in South Africa. This justifies the need to ensure that people do not portray others in ways they want to – with impunity.

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96 S10 Constitution of the Republic of South Africa, 1996.

97 S10 Constitution.

98 S 9 Constitution.

99 Par 6.

## 4 Concluding Remarks

The time for the development of false light invasion of privacy in South Africa has come, notwithstanding the controversy associated with it in the US. This area of law has lagged behind, even though there is a great need for it in South African Law. It must be noted that the South African environment differs in many respects from the American one in terms of history and constitutional fundamentals. The arguments furthered in some US states against the false light tort, thus do not necessarily apply in South Africa. For instance, America's history has no fresh legacy of sensitivity, as is currently the case in South Africa. The dimension of free speech is thus somewhat different from that in South Africa. The US Constitution primarily promotes free speech, while the South African Constitution is founded on the value of human dignity.<sup>100</sup> This is more than a human right – it is a pillar of South African constitutional democracy. Dignity in the American Constitution does not carry the same weight that it does in the South African constitution. Thus, whilst in the US the sole argument advanced against false light tort by some states is that it has a chilling effect on freedom of expression, the argument in South Africa in favour of it has a philosophical backing founded on constitutional principles. Primarily, it is necessary given the outcry about the decision of the court in *Le Roux v Dey*.<sup>101</sup> There is a marked need for the development of privacy protection in the form of false light. Moreover, as has been indicated above, the action will not amount to a duplication of a defamation action (nor will it be a duplication of an action for *iniuria*), as the interests protected are different. Defamation protects reputation, whereas false light action protects privacy and individual dignity.

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100 *Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] 3 All SA 511 (SCA) par 41.

101 *Le Roux v Dey* 2011 3 SA 274 (CC).