Defamation and Social Media: How the law has Changed?¹
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By definition, Social Media is said to be “[i]nternet-based platforms which allow for interactions between individuals or the broadcast of content to the wider world and which are far more interactive than traditional broadcast media.”³ The extent of interaction permitted via internet-based platforms has transformed several aspects of the world including but not limited to the way in which business is sourced and conducted, how facts are shared, how opinions are shared, how life on a whole is displayed and operates. Internet-based platforms are numerous with well-known platforms such as Facebook, YouTube, Instagram, Twitter, Reddit, Tumblr, Pinterest, and LinkedIn ranked as having the most active monthly users⁴, dominating the markets, alongside, traditional media outlets such as the New York Times, Financial Times, BBC, our local SKNVibes, Nevis Pages, St. Kitts Nevis Observer then there are independent bloggers and personal websites.⁵ Unlike prior forms of technological advancement such as print media or radio broadcasting which facilitated the sharing of information, print media and radio broadcasting had a fact-checking mandate, which one submits is not imposed on Internet-based platforms. Internet-based platforms encourage and incentivise the sharing of information and opinions without fact checking and or regulations on a whole.

Brief Personal History of Social Media, that is, Internet-based platforms

Some of you may recall as I do, a mere 18 years ago, the layout and design of internet-based platforms in comparison to what we now use as internet-based platforms for social

¹The common law is primarily applicable to defamation in St. Christopher and Nevis
²Special thank you to Brianna Brantley, Jomokie Phillips, Michelle Slack and all others who contributed to the preparation of this presentation.
³Source: LexisNavigator Last accessed 19th March 2018
⁴Kallas, Pritt, Top 15 Most Popular Social Networking Sites and Apps [February 2018], www.dreamgrow.com/top-15-most-popular-social-networking-sites, last accessed 22nd March 2018
⁵This is by no means an exhaustive list of internet based platforms.
interaction. There were bulletin boards and individuals appointed as moderators of those boards which individuals may have been from the owners of the website, or frequent users of those websites. There was a stage in my life where I moderated some four websites daily from my bedroom in Grenada, which websites had users from all over the globe. I was responsible for checking site content, giving feedback on posts made, and keeping my forums active – all for free. Today, as a Learned individual, I will be most reluctant to assume such responsibilities, with the care-free disposition that I did as a youngster in her teens. In 2003, myspace.com and hi5.com in my opinion flipped the script on internet-based platforms as their design allowed you to create your own niche on the world wide web. On those platforms, you chose your own layout, added pictures, videos and just presented your personality to the world - amazing as it was, in hindsight, in my opinion it was not particularly user friendly. Fast-forward to current day, we have extremely user-friendly platforms, with more open default privacy settings that makes what you do on your personal page, easily accessible to your friends, and friends of your friends, and friends of those friends. There is a theory of six degrees of separation which is that only six or fewer steps separate each of us from the other. Platforms like Instagram, Facebook and twitter, make those six steps seem as too many steps – the world gets smaller daily.

With Social Media having such a grand impact on the world, it is not surprising that the law, the primary media which governs society has been impacted by Social Media, and changes to the law, one assumes are therefore inevitable. In 2013 in Re J (a child), Sir P James Munby states “[t]he law must develop and adapt, as it always has done down the years in response to other revolutionary technologies. We must not simply throw up our hands in despair and moan that the internet is uncontrollable. Nor can we simply abandon basic legal principles.” In fact, according to Halsbury Laws of England “so far as the law of defamation is concerned, the internet raises no novel issues of principle.” That surely takes the novelty of Social Media down several notches. Social Media raises

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6 Frigyes Karinthy, The Chains (Lanczemek) Short Story, 1929
7 2013 EWHC 2694 – Do note that this statement was not made in the context of libel.
practical questions, jurisdictional questions which can be tackled from different angels but that is nothing novel – Social Media has not changed the law.

**Brief History on Defamation and its future as a go-to Tort**

Defamation was historically the primary tort used in the common law to protect individuals in the minds of right thinking members of society from disparaging remarks which are published or broadcast which are not based in truth. In the Federation of St. Christopher and Nevis, the Libel and Slander Act Chapter 4:18 as amended governs defamation insofar as there continue to be categories of criminal libel and slander, however, it is really common law principles that have developed the law in this jurisdiction as it relates to private law issues in Defamation. Additionally, the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 as amended sets out the procedure for dealing with defamatory claims. Though the development of the law of defamation has fallen to the judiciary, the judiciary is not meant to be the creator of law. Development of the law is still the responsibility of the legislature and that means, Parliament’s mandate continues as the creator of the law – that is why Social Media has not changed our law as one will illustrate. Despite the separate roles that should rightfully be performed by the judiciary and by the legislature, several of the Defences known to the law of Defamation come from the common law. The Defences known to the law are for example, justification, fair comment, matters of public interest, absolute privilege, qualified privileged, consent. The fundamental rule of the common law is that the defendant’s liability in a defamation suit is strict: he is liable even though he did not intend to refer to the claimant and had no reason to know that his words would be so understood in a defamatory manner.

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9 That legislation was originally introduced in 1876 to St. Christopher and Nevis.
10 If a defamatory statement is made in writing or printing or some other permanent form, the tort of libel is committed and the law presumes damage: Halsbury’s Laws of England > Defamation (Volume 32 (2012)) > 1. The Causes of Action > (1) Introduction > (i) General Provisions > 501. Libel and slander claims.
11 If the defamation is oral, or in some other transient form, it constitutes the tort of slander which is not actionable at common law without proof of actual damage, except where the statement is one of a particular character: Halsbury’s Laws of England > Defamation (Volume 32 (2012)) > 1. The Causes of Action > (1) Introduction > (i) General Provisions > 501. Libel and slander claims.
12 See Republic of Trinidad and Tobago Claim NO. CV 2016-02974 DRA, SA, Child A, Child B and Jennelle Burke paragraphs 21-47 Judgement delivered 5th February 2018 by Justice Frank Seepersaud
Though Defamation continues as a tort to protect individuals, other torts available in the common law or the constitution as a result of Social Media are being pursued by litigants. According to the UK Law Society Gazette in 2016 “the statistics on defamation appear bad news for lawyers. The number of cases fell by almost a third in the year to the end of 2015, with the number brought by businesses registering its sharpest decline (45%).” That decline in defamation claims is due to the focus changing from suing persons for disparaging one’s character to instead the pursuit of actions for breach of data protection (in particular, unfair and unlawful processing of data), harassment or misuse of private information – or a combination of such claims.

St. Kitts and Nevis and islands like Trinidad have seen the start of that movement towards other forms of remedies where breaches occur on social media platforms as litigants are for example, pursuing claims for breach of constitutional rights when there has been the misuse of private information. In the Nevis High Court Case Jovil Williams, Jason Campbell and the Attorney General of St. Christopher and Nevis and Chief of Police, the Court examined the misuse of information by Police Officers, in violation of constitutional privacy rights, who shared a sexually explicit video obtained from an illegal search of an individual’s mobile phone, which video was shared via social media. The Government was held vicariously liable for the acts of those Police Officers which led to a damages award sum of collectively, EC$500,094.00 dollars. In the Trinidadian case Therese Ho v Lendl Simmons, the Court there examined a claim for breach of confidence (a common law concept) and injunctive relief, wherein nude pictures produced by the Claimant and Defendant as a couple was shared by the Defendant with other individuals without the permission of the Claimant. The Claimant sent the nude pictures to the Defendant via WhatsApp for his private use which pictures after the breakdown of the relationship were shared to embarrass and shame her. The Claimant said as a consequence she was subjected to public ridicule and embarrassment and she suffered from suicidal thoughts and became frustrated as she had to live in shame. For there to be breach of confidence at common law, the information must have had the

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13Marialuisa Taddia, Law Society Gazette > 2016 > Issue 14, April > Articles > Feature: Defamation: Libel and liability - (2016) LS Gaz, 18 Apr, 16
necessary quality of confidence, that is, it must not be something which is public property and public knowledge. Additionally, there must have been an obligation of confidence in the circumstances under which the information was imparted and there must have been an unauthorised use of that information by the party communicating it to the detriment of the confider. This tort focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.\textsuperscript{15} The Court found the Defendant to have breached the Claimant’s confidentiality with a desire to cause her upset, embarrassment and distress.

One does not view Social Media as causing a move away from Defamation claims in our jurisdiction, but it surely has given way to other less popular claims for breaches of privacy and confidence as stated previously emerging with great strength. Multiple causes of action can now successfully be pursued using incidents that have occurred on Social Media and case law from our own Caribbean jurisprudence analysing and considering those areas of law in our Caribbean context. However, the decline in defamation claims in other jurisdictions, one submits is in response to common law rulings on issues in defamation claims arising from Social Media and the law not viewing Social Media as some special creature which must be coupled with the introduction of defamation and data protection legislation attempting to temper Internet-Based platforms – our circumstances are different, we have the common law and it is disparate.

In this presentation, one will focus on three general issues in the law of defamation, issues neither new nor novel to the law of defamation, but, issues that are peculiar in some instances to Social Media and, issues that have greater impact or should have greater impact on defamation rulings because of a Social Media element:

1. Social Media and Publication in Defamation claims
2. Social Media and Jurisdiction in Defamation claims
3. Social Media and Damages in Defamation claims

\textsuperscript{15} Campbell \textit{v.} Mirror Group Newspapers Limited [2004] 2 AC 457 (HL) at paragraph 51
Social Media and Publication in Defamation claims

Noting the indication that the internet raises no novel issues of principle for the law of defamation, it means that publication must be proved as a matter of fact as in all other defamatory claims. Publication on internet-based platforms is not established by mere inference for the purposes of proving defamation.

Publication must be looked at from two angles, the act of publication and the fact of publication. Posting to Instagram may be an act of publication, but that only is not a fact of publication in defamation. To be considered publication for the purposes of a defamation claim, the publication must be communicated to a third party. The Claimant whether on an internet-based platform or not bears the burden of proof of publication. There is no rebuttable presumption of law that an article placed on an Internet website that is open to general access has been published, or has been published to a substantial number of people.

To prove publication as a fact, a Claimant is required to establish that a third party who is capable of understanding the Instagram post, has displayed and seen that message or a webpage with an article forming the subject matter of the defamatory claim on a computer screen, or mobile phone, or tablet or gaming controller or such device. The material forming the subject matter of the defamation claim must have been accessed and downloaded for it to be deemed published. One acknowledges, that having to prove publication in a social media context, takes the law back to the early days of defamatory claims involving for example, publication of newspapers or a book where there were complaints about publication being to the world at large, which law eventually evolved to present day where a Claimant is not expected to plead or prove publication to individual publishees for that type of media – but for social media, you need to prove publication.

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16 So jurisdictions Defamation legislation sets out is deemed as publication – that is not the case in St. Kitts and Nevis.
17 Crookes v Newton 2012 1 LRC 237 at paragraph 55
18 Dow Jones & Co Inc v Gutnick [2003] 1 LRC 368 at paragraph 11
19 Al Amoudi v Brisard and another - [2007] 1 WLR 113 per Justice Gray
20 Fullam v Newcastle Chronicle and Journal Ltd [1977] 1 WLR 651
It is evident that Social Media is not the first type of revolutionary technology that the common law has encountered. The common law is familiar with how to deal with technology and issues arising out of technology. A defamatory publication requires comprehension by the reader, the listener or observer, otherwise, no harm or damage can be said to have occurred.\(^{21}\) If, however, the matter is not ex facie defamatory, or does not refer by name to a person alleged to be defamed, and the defamatory character which is attributed to the matter, or the identity of the person defamed, would be apparent only to persons who had knowledge of special circumstances, it is necessary, in order to prove publication, to prove that it was published to a person or persons who had knowledge of those circumstances.\(^{22}\)

Once a Claimant has established publication as a fact, the principles of defamation law continue to apply as in any other case. In the context of Social Media, let’s consider how republication may be taken to occur:

1. On Facebook, one shares or likes a post which is alleged to be defamatory and it shows up in a newsfeed or your newsfeed that you liked that post.

2. On Twitter, one retweets a post, which is alleged to be defamatory.

3. On Instagram, one comments on a post which is alleged to be defamatory.

All those actions, sharing, liking, retweeting and or commenting may be taken as a republication of defamatory content - the act of republishing from social media is so simple that users give little thought to the serious consequences which may result. Litigants have always been sued for republication of defamatory content. One takes a moment here to point out that the defence for instance, of innocent distribution as may occur with individuals who may sell innocently a stack of newspapers with no idea of its content\(^{23}\) in

\(^{21}\) Dow Jones & Co Inc v Gutnick - [2003] 1 LRC 368

\(^{22}\) Consolidated Trust Co v Browne Jordan CJ (1948) 49 SRNSW 86 at 89

my opinion should not afforded to individuals who share, like, retweet and or comment on a publication alleged or found to be defamatory.

Some individuals have the mistaken assumption that deleting the defamatory content is sufficient as a counteractive measure. But, there is more likely permanence in things done on the internet that on other media platforms. Someone unknowingly to you may have screenshot the alleged defamatory content putting it beyond the original publisher’s control, the content may have only been deleted from your webpage, but it may still be on the internet-based platform’s server and therefore, the alleged defamatory content continues to be accessible at large but without the analytics for it being accessed being tracked. In fact, it is not wise for a Defendant to delete a post, as deleting such a post on some internet-platforms removes the analytics associated with the post. Those analytics may be essential in establishing that there was no publication, or that publication had been limited to so small a number of individuals which information should be weighty in assessing and reducing potential damages awards, if an individual is held to have defamed another.24

**Social Media and Jurisdiction**

Where did the publication occur? The place, where the publication occurred is essential, as the law of the place where the tort was committed is what governs the determination of a defamatory claim. Every communication of defamatory material creates a separate cause of action, which arises in the country in which the communication is read or heard irrespective of the location of the server on which it is stored. This moves one straight to Social Media and Jurisdiction.

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24Monroe v Hopkins - [2017] 4 WLR 68 – Defendant in this case innocently deleted twitter post; Further, expert evidence will be needed to analyse analytics and confirm what that information illustrates.
Social Media has created the potential for forum shopping in Defamation claims more so than print media or radio broadcast. One starts by contemplating why a litigant may be interested in forum shopping:\(^{25}\):

1. A litigant may wish to file her claim in a jurisdiction which has potential for awarding a high sum in damages in defamation claims;
2. A jurisdiction is probably praised for having an impartial judiciary and a litigant thinks he is more likely to obtain a fair trial there;
3. It may be more reputable to obtain judgment in one jurisdiction over the other to clear one’s name, based on the standing and influence of an individual in for instance, the jurisdiction where he resides;
4. It may be one of several jurisdictions where a claim is being brought because of the international reputation of the injured individual;
5. The laws in that jurisdiction may be more favourable to a potential litigant and he or she wants to capitalise on that advantageous position.

The English Courts have taken the position that “\(\text{It is… not legitimate for the claimant to seek to justify the pursuit of… proceedings by praying in aid the effect that they may have in vindicating him in relation to the wider publication.}\)\(^{26}\)

In Defamation cases, the Court may determine as a preliminary issue whether or not St. Kitts and Nevis is the appropriate forum for the hearing of that claim based on the subject matter and evidence relating to the claim. Our Courts assume jurisdiction as of right over its citizens and entities incorporated in this jurisdiction.\(^{27}\) The test for establishing forum in a defamation claim arising out of a defamatory publication or broadcast on social media is the same as a forum dispute in any other contract or tortious claim. The Eastern Caribbean follows the principles in **Spiliada Maritime Corporation and Cansulex Limited, The Spiliada**\(^{28}\) when considering what is the prima facie more appropriate forum

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26 Jameel (Yousef) v Dow Jones & Co Inc - [2005] QB 946: The statements in this case related to the litigant providing funding to terrorist organisations.
28 [1986] 3 All ER 843
and the connecting factors that makes one forum more appropriate than the other. Litigants do have to illustrate that a real and substantial defamation claim arises in relation to them within the jurisdiction. Does one have a reputation in the jurisdiction he or she wants to have a defamatory claim adjudicated in?

Social Media does permit individuals to gain international popularity and earn a living from as little as one viral video. One’s popularity on Social Media, may find an individual having a large following in a jurisdiction afar to his or her place of residence, for example Kenya, Israel, Singapore, New Zealand, Japan. Japan has a large soca music following. So, imagine, Ricardo Dhru originally from Antigua but now resident in Trinidad with a massive following in Japan and not a person of significance or popular in Trinidad has an encounter on his twitter page where a Trinidadian based in Trinidad, tweets what is alleged to be defamatory remarks which, Mr. Dhru says has injured his reputation – the publication is retweeted by several persons in Japan to his large fan base. Should he commence a defamatory claim in Trinidad against the publisher or in Japan against the re-publishers or against everyone? The answer to this requires a litigant to conduct a cost benefit analysis, confirm if defamation is known to the law of that jurisdiction, identify where the offender has assets, confirm if a foreign judgment is enforceable. Where widely disseminated publications could give rise to actions for publication for defamatory material in a number of places, the question whether the forum chosen by the Claimant was appropriate might arise and, if more than one action is brought, questions of vexation which may arise may be resolved either by an application for a stay of proceedings or an application for an anti-suit injunction.  

Additionally, one may not know who the publisher is of defamatory material in that afar jurisdiction or right here in St. Kitts and Nevis. If the provider of the Internet-based platform is not prepared to willingly disclose that information to a potential Claimant, that means, an order for disclosure is needed from the High Court to ascertain who is the offender beyond the username on the Internet-based platform. In the Eastern Caribbean,  

29 This was stated per curiam by Per Gleeson CJ, McHugh, Gummow and Hayne JJ in Dow Jones & Co Inc v Gutnick [2003] 1 LRC 368
disclosure of that nature is sought by seeking a Norwich Pharmacal Order. To obtain a Norwich Pharmacal Order, there must have been a wrong and an alleged Defendant must have become mixed up in that wrong and disclosure of information on that Defendant is necessary and proportionate in all circumstances for a Claimant to vindicate herself.\textsuperscript{30} If the Court finds it necessary and proportionate to grant Norwich Pharmacal relief, it must consider whether there are any other straightforward or available means of finding out the information that the Claimant seeks.\textsuperscript{31} Without an order for disclosure, it would certainly not be possible to identify those responsible for the arguable wrongs of which a potential claimant complains of from a social media platform.\textsuperscript{32}

Protection of information even where defamatory material is present, does not warrant automatic disclosure of information that may lead to an individual behind that material being exposed. Individuals continue to have a right for their private life not to be unjustifiably invaded on. In \textit{Totalise Ltd v Motley Food Ltd}\textsuperscript{33}, the English Court of Appeal notes says "it [must] first considered whether the disclosure is warranted having regard to the rights and freedoms or the legitimate interests of the data subject". The editors of the Gatley on Libel and Slander put forward the proposition that "[t]he reality is that such applications are almost invariably consented to by the respondent internet service provider or web host, which usually does not even appear before the court (safe in the knowledge that its costs of complying with the order will be borne by the applicant in any event), but instead contents itself with maintaining a position of neutrality and indicating that it will abide by any order that the court thinks it right to make."\textsuperscript{34}

If the editors of Gatley on Libel and Slander are correct, this warrants a brief look at the Terms of Service of a social media site. One has opted to reference Facebook whose

\begin{itemize}
  \item JSC BTA Bank v Fidelity Corporate Services Limited and others [2011] ECSCJ No. 40 at paragraphs 18-28
  \item Al-Rushaid Petroleum Investment Company et al and TSJ Engineering Consulting Company Ltd [2010] ECSCJ No. 110 at paragraph 43
  \item Especially in relation to fake profiles. The difficulty in identifying the personas behind these profiles may have implications for enforcement of judgment or even the bringing of a claim.
  \item [2003] 2 All ER 872
  \item The Common Law Library Gatley on Libel and Slander 12th Edition Sweet& Maxwell and Thomson Reuters, 2013 at paragraph 31.5
\end{itemize}
terms were last revised on 30\textsuperscript{th} January 2015.\footnote{Facebook.com, Statement of Rights and Responsibilities, https://www.facebook.com/legal/terms, last accessed 23\textsuperscript{rd} March 2018} Facebook’s terms of service is what governs its relationship with users and others who interact with Facebook, as well as Facebook brands, products and services. Under the heading Registration and Account Security, Facebook states that its users must provide their real names and information, that users will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission, and that you will keep your contact information accurate and up-to-date. Facebook’s Data Policy\footnote{Facebook.com, Data Policy, https://www.facebook.com/about/privacy/, last accessed 23\textsuperscript{rd} March 2018} states that in response to a legal request or to prevent harm (1) it may access, preserve and share your information in response to a legal request if it has a good faith belief that the law requires them to do so, (2) it may retain information from accounts disabled for violations of its terms for at least a year to prevent repeat abuse or other violations of its terms. The question then is, what does Facebook do to ensure that an individual has used his or her actual name on its platform. In St. Kitts and Nevis fake Facebook profiles particularly relating to political commentary is dare I say a norm and at present, there are no peculiar steps taken by Facebook to ensure compliance with its terms of service, so that means, when you seek that Norwich Pharmacal Order, you may be doing so in vain, because even with a Court Order, Facebook may not have (and probably never had) the information you needed to start the process for restoration of your reputation.

In \textbf{Patel v Unite}\footnote{[2012] EWHC 92}, a Norwich Pharmacal order was made which required Unite to carry out a reasonable search to locate the information sought on an Internet-based platform, and to make and serve on the claimant a witness statement stating whether the information was in its control, and to the extent that information had been but was no longer in its control, what had happened to it. The order also required Unite to provide for inspection, by way of electronic copies, the identities, home addresses and IP addresses of listed user names. The Court noted that it was relevant to take into account that the terms of conditions of the website warned members that the website reserved the right to disclose their true identity and other information, if requested by a third party, albeit
subject to their rights of privacy and of data protection. Oddly, the forum was deleted by the Defendant who said the data was therefore, not available. The Claimant, not being satisfied, requested and the Court thought it fit, to appoint an independent expert to be given access to all available copies of the forum database and for that expert to be permitted to make an image of the database and/or such other electronic copy of the data on the database as the expert might consider necessary in order to prepare a report limited to the identification of the information sought. Even with fake profiles, that IP address may be the key to finding the offender.

Social Media and Damages

There is publication of defamatory content, you identify an individual and decide where to sue that individual, now you have to get to the crux of a defamation claim and illustrate that you were injured. Claimants must establish that his or her reputation was harmed and what he wants in turn. Usually a Claimant may seek damages, but our laws continue to allow for charges to be laid for criminal libel and slander. Noting that defamation still attracts a criminal sanction, one looks at social media and damages, not particularly in relation to the quantum of damages, but the penalty or consequences it can attract.

That takes one to consideration of how 140 characters can change your life. In Jack Monroe v Katie Hopkins38 - Monroe, a non-binary transgender was a food blogger and writer and the Defendant was an online journalist.39 Monroe complained that Hopkins’ tweets accused her of vandalising a war memorial and desecrating the memory of those who fought for her freedom, or of approving or condoning such behaviour.40 Monroe was subjected to a torrent of abusive and vile comment as a result of Hopkins’ tweets, and requested the tweets be deleted by Hopkins, and then she sought an apology through

38 Monroe v Hopkins [2017] 4 WLR 68 – Please note at the date of preparation of this document, an application for leave to appeal is said to be pending.
39 Monroe v Hopkins [2017] 4 WLR 68 by consent Monroe permitted the Court to use feminine pronouns and I therefore do the same herein.
40 Monroe v Hopkins - [2017] 4 WLR 68 at paragraph 12 “On Thursday 7 May 2015 there was a general election. On 8 May the Conservative Party formed a Government. On Saturday 9 May, there was an “anti-austerity” demonstration in London. It turned violent, and the Memorial to the women of WWII in Whitehall was vandalised. The words “Fuck tory scum” were spray painted on it. This act was widely reported in the news and elsewhere, with photographs of those words sprayed on the plinth. The act caused public outrage and widespread public condemnation.”
her Solicitors from Hopkins with specific wording for the apology tweets. Hopkins did not respond to the Solicitors though on her own volition she tweeted part of the requested apology and had already deleted the defamatory tweet in the heat of the spat as per Monroe’s request, which became salient in the matter. When the Court assessed damages, Justice Warby firstly confirmed as with all defamation cases the damages sum:

“…sum must [1] compensate [her] for the damage to[her] reputation; [2] vindicate [her] good name; and [3] take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is [a] the gravity of the libel … [b] The extent of publication … [c] A successful plaintiff may properly look to an award of damages to vindicate his reputation … [and] [d] compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way.”

Notably, Justice Warby states that where something is not a matter of common knowledge a judge is not entitled to bring his or her own knowledge to bear.\(^\text{41}\) The Judge made that statement insofar as it relates to discharging one’s evidential burden. The law does not take the position that twitter is a dynamic platform accessed by millions so of course your reputation was damaged if defamatory content was posted there. The Judge made her observations of no assumptions even in the context where Monroe had 70-75,000 followers and, Ms. Hopkin had 570,000 followers with 5.7 million visits to her tweeter page between April and May 2015.\(^\text{42}\) The Judge instead noted that in the context of twitter, a litigant has a responsibility to retain and preserve material that may become disclosable, and that a solicitor has a responsibility to take reasonable steps to ensure that the client appreciates this responsibility and performs it.\(^\text{43}\) Requesting the deletion of a post, prior to a claim, removes evidence that may prove essential is establishing for

\(^{41}\) Monroe v Hopkins [2017] 4 WLR 68 at paragraph 5

\(^{42}\) That time period was material to subject matter of the claim.

\(^{43}\) Monroe v Hopkins [2017] 4 WLR 68 at paragraph 84
example the extent of harm caused by publication. Justice Warby awarded £24,000 and said that the awards are higher than they would have been, if damages had been assessed at or shortly after the time of publication, because they took account of the fact that harm to reputation had continued, and injury to feelings had been increased by the defendant’s behaviour. Ms. Hopkins tweet, made its way to articles published in Huffington Post, The Mirror, The Metro, The Independent amongst others. Monroe’s injury as a result of the published defamatory material continued and had to be considered at the date of the assessment and not back when it was initially done. That means one must with alacrity, try to bring defamatory claims to conclusion.

Apart from damages, a penalty for defamation may be imprisonment. A criminal libel charge is still a real possibility in our jurisdiction and arose in recent times in Bermuda. In Bermuda, the Supreme Court in **Richardson v Raynor (Police Sergeant)**, considered the interaction between statutory criminal defamation provisions enacted in Bermuda at the beginning of the 20th century and communications with 'friends' through the medium of a global internet-based social network known as Facebook, which was established at the beginning of the 21st century and the right to freedom of expression. The Applicant, a lawyer in Bermuda, was charged in the Magistrates' Court on an information laid by the Respondent with the summary offence of unlawfully publishing defamatory matter concerning police inspector C. The issue raised for the Bermuda Supreme Court’s consideration was does criminal libel interfere with the right to freedom of expression and when is a criminal charge justified. The facts of the case are useful to paint a picture of how the law and social media interacted. The Applicant published the statements on his Facebook page the security settings of which were such that only his friends could read them. A Detective Sergeant who could not read the statements called a Police Constable who was one of the Applicant's Facebook friends at around 4.30 pm and asked her to access the comments and to forward them to him. The Detective Sergeant upon receipt forwarded the Applicant's comments and related comments from the Applicant's

44 (2011) 78 WIR 159
45 As paraphrased by this Author.
Facebook friends on to the police inspector. The offending remarks were 'He is racist. Met up with him a few years ago … Needs to get his a** outta Bermuda … b*st*r*rd.'.

The Applicant as in any other constitutional right claim had to establish a prima facie case that his right to free speech had been infringed and once that was established, the Defendant, the Crown had to show that the interference fell within a permitted (local or national) public interest exception\(^46\), that is, the Defendant had to demonstrate that the interference with the right to free speech was reasonably required. The Bermuda Court said that a criminal defamation prosecution for intentional defamation would only be constitutionally permissible where some compelling public interest (over and above reputational interests of the individual defamed) was relied upon.\(^47\) The need to ensure that civil servants enjoy public confidence in such conditions can justify an interference with the freedom of expression only where there is a real threat in that respect. The Court viewed the criminal libel charge as being disproportionate as the Applicant’s remark obviously did not pose such a threat and did not hinder the Police Constable in the performance of his official duties. The Court noted, that bearing in mind the fact that the Applicant was simply writing to his Facebook friends expressing a personal gripe, it was difficult to see what public harm was caused by his remarks (as hurtful as they no doubt were to the police inspector personally) which would justify deploying the criminal law to sanction the Applicant. The Applicant was clearly charged with the offence in question in relation to statements which involved his imparting ideas and opinions by means of a modern electronic form of correspondence having vented on Facebook for moral support from his friends. Being disproportionate, the Court noted that “Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. It is applicable not only to “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. Such are the

\(^{46}\) Attride-Sterling v A-G [1995] Bda LR 6, [1995] 1 LRC 234; In Worme v Comr of Police [2004] UKPC 8, (2004) 63 WIR 79: It is, as already explained, common ground that the crime of intentional libel constitutes a hindrance to citizens’ enjoyment of their freedom of expression under s 10(1) of the Constitution. It is therefore necessary for the respondent to show that the provisions of the Code are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons. If that is established, the burden shifts to the appellants to show, in terms of the last limb of s 10(2), that the provisions are not reasonably justifiable in a democratic society

\(^{47}\) Richardson v Raynor (Police Sergeant) (2011) 78 WIR 159 at paragraph 29
demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.48

Conclusion

As people of the Western world, we have fought vigorously to preserve freedoms, one of which is our freedom of expression. Social Media is an ideal illustration of that freedom in action. Our law has taken the position that though many may be able to express themselves without restriction or regulation on Social Media, there is nothing about Social Media that warrants it being treated in a peculiar manner in relation to the tort of defamation. Maybe Parliament may one day endeavour to create legislation to curtail Social Media, which may very well be unfortunate, because Social Media is now a way of life, and with all other things, you have freedoms to but not freedom from the consequences of your action. When one has acted improperly one should accept or face those consequences for we all know, no one is above the law and all are equal in the eyes of the law. Social Media raises no novel issues of principle in the law of defamation and it has not changed that area of our law.