

Tortious liability of mass media for the invasion of personal rights: A comparative study between English law and Kuwaiti law

Thafar Alhajri*

Saad Al-Abdullah Academy for Security Sciences, Department of Law, Kuwait
*Email: alhajri-11@hotmail.com

ABSTRACT

The importance of this research is attributed to the significant role of the media in our lives, since it is considered to be one of the most important sources of knowledge in all cultural, educational, political, economic and social fields. Media is also used by people in attempts to uphold their freedoms and safeguard their rights. The honest expression of democracy is a salient feature of its existence, and it is also the main means by which the people's participation in decision-making and oversight is achieved. Therefore, the media cannot perform its role in a perfect manner without living in a climate based on freedom of opinion and expression.

In return, such freedoms are restricted by legal conditions in order to avoid excesses by the media, and for which, according to the rules of Tort, it is accountable for any encroachment. The rules of Tort state that damage caused to a third party places an obligation on the perpetrator of that damage to compensate for it.

The freedom of the media and the right to expression of opinions and criticism on one hand, should be balanced against attempts to maintain the sacredness of private life on the other. This research is a comparative study between English and Kuwaiti law in the protection of personal rights and freedom of expression, and the rules and cases of Tort by the media.

Keywords: Kuwait, privacy law, freedom and expression, mass media, tortious liability

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1. INTRODUCTION

It is difficult to talk about mass media liability, as media work is a deep and entrenched specialty. This specialty comes from the media widely being considered as an authority, even if it is not laid down in the Constitution or law. In addition, there is inseparability between the media and freedoms, (including the freedom of speech, writing and expression) enshrined in international conventions.

The media has power, therefore it has liability. This research will examine the Tortious liability of mass media for the invasion of personal rights in English and Kuwaiti law. The protection of personal rights and freedom of expression will be examined first, and Tortious liability second.

2. THE PROTECTION OF PERSONAL RIGHTS AND FREEDOM OF EXPRESSION

In general, common law has no notion of a general “personal right.”¹ The term “personal rights” is simply terminology, which is not determined in provisions of law and would be worthless to lawyers in general. The reason being, that each sense of these interests is protected by different legal systems. So, common law grants protection to a person’s reputation, honour, privacy, and the right to control his image, in different ways.² These rights were emphasised in Article 8 of the European Convention on Human Rights which provides that:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

As English law is party to the European Convention on Human Rights Act 1998,³ it is illegal in English law for a public authority to act in a way which is inconsistent with a human right in accordance with the Convention.⁴ Therefore, a public authority must respect private and family life otherwise it will be actionable in the English courts.

According to the European Convention on Human Rights and Fundamental Freedoms, Article 10:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by the law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

As the United Kingdom is a member of the European Convention on Human Rights, it has been incorporated into UK law, which came into force in October 2000. The importance of article 10 for the mass media was made clear in the *Sunday Times case*.⁵ In this case, the House of Lords asked a newspaper to stop talking about the liability of the drugs company for the deformities caused by its Thalidomide drug. The plurality of the European Court of Human Rights held that this control could not

¹Personality rights are the rights of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one’s identity. They are generally considered property rights as opposed to personal rights. Personality rights are a concept rooted in the idea of subjective rights, whereas the common law perspective on protection of personal interests is typically torts-based.

²W.V.H. Rogers, *The Protection of Personality Rights Against Invasion by Mass Media in England*, in 13 THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY THE MASS MEDIA: SUMMARY AND OUTLOOK 59 (Helmut Koziol & Alexander Warzilek eds., 2005).

³The Act came into force in October 2000.

⁴See § 6(1).

⁵*Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, 280–81 (1979).

be acceptable as “are prescribed by law and are necessary in a democratic society . . . for maintaining the authority and impartiality of the judiciary.”⁶

Freedom of the media has been perceived by mankind on the basis of the principle of a human being’s right to express his opinion, ideas and position towards any event or decision, whether it was at a level that affects the individual or a level that affects the interests of the group.⁷ Freedom of expression is invoked when a lowering of the barriers that prevent an individual from expressing himself and his society to achieve the finest outcome as well as happiness occurs. Freedom of expression and speech are the natural result of the freedom of belief. Freedom of belief means the freedom of thought and belief that people see as the truth. This freedom does not make people adopt opinions that they think are incorrect. Freedom of belief is the first freedom because it sets out the context for the other freedoms.⁸ However, freedom of expression in the legal view is not the same in terms of concept and practice in all countries of the world. It is related to three theories of media: the theory of authority, freedom theory and the theory of social accountability. Theory of authority means that all powers are in the hands of the government, including the media. Freedom theory gives the human the absolute right to express himself. Theory of social accountability depends on the objective criteria and the responsibility towards society not to publish anything which could harm the interests of society even if it is true.⁹

Although Kuwait was a late starter in this area in comparison to the United Kingdom, it is nevertheless considered an informational, cultural, literary and intellectual centre, both in the Gulf region and a number of neighbouring Arab countries.

Media in Kuwait is more private than official; Newspapers emerged via a Kuwaiti citizen in 1928, and not via the government. Radio also spread to Kuwait via a citizen, Mubarak Al Mai and Murad Behbehani is credited with the early introduction of television. Therefore, a strong relationship developed between the Kuwaiti people and media, which appeared evident in the laying down of the Constitution in 1962, in which freedom of expression is guaranteed. In return, Kuwaiti society is a conservative one which enjoys the right to privacy and freedom from monitoring by inquisitive people, as well as the right to keep one’s thoughts, intimate relationships and connections with one’s family behind the veil of secrecy. In light of this, the Kuwaiti Constitution found a balance between the right of expression and the right to protect the privacy of the community.

Kuwaiti Law, as with English law, has no notion of a general “personal right.” It grants protection to a person’s reputation, honour, privacy, and the right to control his image, in different ways. Freedom of expression is granted by the Kuwaiti Constitution, which stipulates that freedom of expression and scientific research is guaranteed and that everyone has the right to express and publish his opinion in writing, verbally, or otherwise, in accordance with the conditions prescribed by law.¹⁰ It also stipulates that personal freedom is guaranteed.¹¹ Further, it considers freedom to be the main pillar of society.¹²

The freedom of the media is granted by the Kuwaiti Constitution, which stipulates that freedom of the press, printing and publishing is guaranteed in accordance with the conditions prescribed by law.¹³ The Kuwaiti legislator was keen to mention these freedoms in the Constitution as key principles and pillars of society. Freedom of the press, printing and publishing was again emphasised in the Press and Publications Act 2006.¹⁴

3. MASS MEDIA ETHICS

There are principles and ethics which are widely adopted from the Society of Professional Journalists, the Radio Television Digital News Association and Public Relations Society of America; The workers in mass media should seek truth, report it and be fair, honest and courageous in reporting, gathering and interpreting information. They should act independently and be free of obligation to any interest other

⁶*Id.*

⁷Osama Kobara, *Journalistic Responsibility and Ethics*, in THE GROUP SPECIALISED IN THE LEGAL RESPONSIBILITY OF PROFESSIONALS 51 (2d ed. 2004).

⁸Khaleel Sabat, *The Press is Message, Preparation, Art and Science* 270 (2d ed. 1967).

⁹Asaad Alnadri, *The Media Between the Liability and Freedom*, in THE GROUP SPECIALISED IN THE LEGAL RESPONSIBILITY OF PROFESSIONALS 20–21 (2d ed. 2004).

¹⁰Art. 36.

¹¹Art. 30.

¹²Art. 7.

¹³Art. 37.

¹⁴Art. 1.

than the public's right to know. They are accountable to their viewers, listeners and readers to admit mistakes and correct them promptly, clarify and explain news coverage, discover unethical practices of journalists and the news media and encourage the public to express complaints against news media.¹⁵

In the United Kingdom, all newspapers and magazines are restricted by the code of practice of the Press Complaints Commission (PCC).¹⁶ This includes practices associated with respecting people's privacy and ensuring accuracy. It stipulates that the press must take care not to publish inaccurate, misleading or distorted information (including pictures and misleading statements) and that distortion, once recognized, must be promptly corrected. It also stipulates that everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions made without consent into any individual's private life. Account will be taken of the complainant's own public disclosures of information. It is unacceptable to photograph individuals in private places without their consent. It also covers points on the right to reply, not to engage in harassment, children's rights, patient privacy and protection of confidential sources of information.

4. TORTIOUS LIABILITY

The media are generally held responsible for invasions of personal rights under Tort law where they infringe upon a person's reputation, honour, privacy and the right to control his image. Such liability, in Kuwaiti Law, can be civil or criminal.

A legal action for negligence is the plaintiff's claim for compensation for losses caused by the media. The claimant must prove three things to succeed in a negligence action:¹⁷

1. The duty of care imposed on the mass media
2. That the mass media were in breach of that duty
3. That the claimant suffered damage caused by the breach of duty.

These elements will be examined in more detail.

4.1 The duty of care

The duty of the media is to simplify scientific knowledge and then deliver it to different segments and levels of the public. The core role of mass media is to affect mental, political and social life by clarifying the truth to the public. Therefore, the mass media have a duty of care when they perform their job. This will be examined below.

4.1.1 The duty of confidence

English and Kuwaiti law have, until now, not determined an independent Tort of privacy. The media have, therefore, been able to expose details of, or speak about, a politician's or entertainer's private life, especially his present or previous sexual relationships. However, the disclosure of confidential information may be protected by the courts.

4.1.1.1 The equitable duty of confidence: There are cases where there is no contractual relationship of any type between parties, but it would be shocking if the recipient of obviously confidential information were found to have no duty to maintain its confidentiality, and to not exploit it other than for the aim for which it was discovered. Personal information may be given in an express way to someone without a non-contractual condition of confidence. In equity, a duty of confidence will be imposed by express notice. A duty of confidence may arise where the special obligation of a fiduciary is imposed on one party to the other. However, from case to case the fiduciaries' duties are not the same. A duty of confidence often arises in the course of a specific fiduciary relationship such as in the case of employer and employee.¹⁸ On the other hand, the fact that a duty of confidence is

¹⁵FRED BROWN, *JOURNALISM ETHICS: A CASEBOOK OF PROFESSIONAL CONDUCT FOR NEWS MEDIA* 8–11 (4th ed. 2011). See also ROY L. MOORE & MICHAEL D. MURRAY, *MEDIA LAW AND ETHICS* 733–35 (3rd ed. 2008).

¹⁶The Press Complaints Commission is charged with enforcing the following Code of Practice which was framed by the newspaper and periodical industry and was ratified by the PCC in December 2011 to include changes taking effect from 1 January 2012.

¹⁷W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORT 132 (17th ed. 2006). See also JOHN COOKE, *LAW OF TORT* 31 (8th ed. 2007).

¹⁸*Bristol and West Build. Soc'y v. Mothew*, [1998] Ch. 1; *Attorney Gen. v. Blake*, [1998] H.L. 439 at 434.

imposed on an individual does not itself form a duty of loyalty, a duty which can be more than a duty of confidence and that can affect the use to which information can legally be placed.¹⁹ A duty of confidence, with respect to personal information, can include the relationship of husband and wife,²⁰ lovers, family relations,²¹ or commercial relations. Therefore, the duty arises by virtue of a relationship between the confider and the confidant.

A duty of confidence with respect to personal information may arise between two parties who have no pre-existing relationship. Unauthorised photography is one such case where the duty may be found absent a pre-existing relationship.²² It is presumed that a photographer must act furtively in order to take unauthorised photographs.²³ In *Douglas v. Hello! Ltd.*, it was held that the claimant's rights to confidentiality and privacy are fundamentally the same.²⁴ In *Shepherd v. News Grp. Newspapers Ltd.*, the court held²⁵ that the director of Newcastle United Football Club (who had shown off the team's sexual exploits to secret News of the World reporters in public bars), was not able to claim that the revelations were shared in circumstances bringing about an obligation of confidence. Therefore, his claims failed.

In equity, it has been held that the publication of confidential statements inappropriately or secretly given, or of information conveyed in confidence, ought not to be revealed.²⁶ It is possible that the recipient who has received information through improper or surreptitious conduct will be considered as having obtained sufficient notice of the secrecy of the information.²⁷ The acquisition of confidential information by surreptitious or secret means is sometimes inconsistent with innocent acquisition. However, the gathering of information might be innocent; the reader of the purport would be liable to a duty of confidence.²⁸ It is also not necessary for a person who tries to decrypt program code to be considered as having confidential information.²⁹

The distinction between overhearing and eavesdropping was shown in *Malone v. Comm'r of Police for the Metropolis*.³⁰ This case held that the tapping of the claimant's phone by police was not unlawful as a person who uses a public medium (such as a telephone) must take into consideration the risk of being overheard. However, this approach was rejected by *Francome v. Mirror Grp. Newspapers Ltd.*³¹, which held that the phone tapping of the claimant was not done on behalf of the police, and the phone tapping gave rise to a duty of confidence which would constitute a criminal offence under section 5 of the Wireless Telegraphy Act 1949. Telephone tapping was previously governed by the Interception of Communications Act 1985 and is now regulated by the Regulation of Investigatory Power Act 2000 (RIPA 2000). Therefore, eavesdropping, which constitutes the committing of an offence, may give rise to a duty of confidence by virtue either of RIPA 2000 or of section 5 of the Wireless Telegraphy Act 1949.³²

A person should be protected from any trespass that would exploit his confidential information. A guest in a hotel may be exposed to trespass when photographs of him or her sunbathing topless are taken within the hotel grounds. Therefore, the trespasser will be subject to a duty of confidence.³³

4.1.1.2 Equitable obligations of the media: There is a general rule imposed on a third party to comply with the duty of confidence if he was in a position to know that the information was confidential. According to the circumstances of the case, the position of a third party may differ broadly, depending on the facts of the case and the judge's decision as to whether injunctive protection is

¹⁹*Arklow Inv.'s Ltd. v. Maclean*, [2000] 1 W.L.R. 594.

²⁰*Argyll v. Argyll*, [1967] Ch. 302.

²¹*Malone v. United Kingdom*, 7 Eur. Ct. H.R. 14 (1984).

²²*Shelley Films Ltd. v. Rex Features Ltd.*, [1994] EMLR 134; *Creation Records Ltd. v. News Grp. Newspapers Ltd.*, [1997] EMLR 444.

²³*Creation Records Ltd. v. News Grp. Newspapers Ltd.*, [1997] EMLR 444.

²⁴*Douglas v. Hello! Ltd.*, [2001] Q.B. 967 at 996, C.A.

²⁵[1998] Ch. D (Lindsay J.).

²⁶*Ashburton v. Pape*, [1913] 2 Ch. 469 at 475.

²⁷R.G. TOULSON & C.M. PHIPPS, CONFIDENTIALITY 143 (1996).

²⁸*English and Am. Ins. Ltd. v. Herbert Smith*, [1988] FSR 232.

²⁹*Mars UK Ltd v. Tecknowledge Ltd.*, [2000] F.S.R. 138.

³⁰[1979] Ch. 344.

³¹[1984] 1 W.L.R. 892.

³²As amended by RIPA 2000 § 73(1).

³³*Shelley Films Ltd. v. Rex Features Ltd.*, [1994] EMLR 134.

practical and whether the third party should be restrained as a matter of fair dealing.³⁴ A person who acquires secret information that has been revealed in breach of an equitable duty of confidence will himself be imposed with a duty of confidence in association with the initial confider.³⁵ Lord Griffiths in *Spycatcher* clearly justified this and stated that, “[i]f this was not the law the right would be of little practical value: there would be no point in imposing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner in the marriage.”³⁶

There are two forms of acquisition of confidential information:

4.1.1.1.1 OBTAINING THE INFORMATION FROM THE PERSON OWING THE OBLIGATION

The attitude of the third party in this situation, after discovery or use of the information, may dictate whether an injunction is required or some financial compensation is due. An injunction may be obtained in advance. However, the defendant has to act dishonestly for the injured party to obtain financial compensation.³⁷ Until recently, when considering a case related to personal information and the media, the court did not require a showing that the defendant was acting dishonestly on receiving the confidential information.³⁸ This was emphasised by Morland J when he stated, “the defendants were clothed in conscience with the duty of confidentiality when they received the information.”³⁹

Most allegations against the media will relate to third party responsibility.⁴⁰ The court will be obliged, in order to establish dishonesty, to ask the following question in this regard: “What [would] the honest agent (editor, director or journalist) do in these circumstances?”⁴¹ Whilst the plaintiff may prefer to believe that privacy was not breached dishonestly, the media might ask to apply the objective tests invoked by the defamation defences of qualified privilege and fair comment. Therefore, the media might argue that appropriate protection for freedom of speech requires a test by which responsibility would be considered only if the performance was one which an honest journalist or broadcaster would not have adopted.⁴²

4.1.1.1.2 OBTAINING INFORMATION FROM THE PERSON TO WHOM THE OBLIGATION IS OWED

The person on whom the obligation is imposed will usually have the chance to protect the confidentiality of the information, as a result of his duty to inform the third party on notice of that confidentiality.⁴³ These cases highlight the importance of where the third party first obtains the information with innocent awareness. However, the duty should establish “after-obtained” notice and the subsequent use or publication would be an infringement of confidence.⁴⁴ It is possible that a defence will generally apply where the third party obtained the information innocently and altered his situation in a material method before he received notice of the confidentiality of the information, in the wrong belief that he was open to use or publish the information.⁴⁵

4.1.1.3 Explicit obligations imposed on the media: The courts, in particular circumstances, impose an obligation of confidence on the mass media even where a confidant or third party did not infringe that confidence. The application of a direct duty of confidence on to the defendant newspaper groups and the third party (not the party to litigation) was required for the law of confidence to evolve appropriately.⁴⁶ The justification for applying direct duty is to protect the claimant’s right to have appropriate effects set out in accordance with the European Convention on Human Rights.⁴⁷ Lawrence Collins J, in *Mills v. News Grp. Newspapers Ltd.* stated that it would be improper to prohibit newspapers

³⁴*Attorney Gen. v. Guardian Newspapers Ltd (No 2)*, [1990] 1 A.C. 109 at 272.

³⁵*Id.* at 281.

³⁶*Id.* at 268.

³⁷*Royal Brunei Airlines v. Tan*, [1995] 2 A.C. 378.

³⁸MICHAEL TUGENDHAT & IAIN CHRISTIE, *THE LAW OF PRIVACY AND THE MEDIA* 259 (1st ed. 2002).

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Thomas v. Pearce*, [2000] F.S.R. 718.

⁴²TUGENDHAT & CHRISTIE, *supra* note 39; W.V.H. ROGERS, *supra* note 2, at 69–72.

⁴³TUGENDHAT & CHRISTIE, *supra* note 39.

⁴⁴*Printers and Finishers Ltd. v. Holloway*, [1965] R.P.C. 239 at 253.

⁴⁵*Morison v. Moatt*, (1851) 68 Eng. Rep. 492, 9 HARE 241 at 263–4.

⁴⁶*Venables v. News Grp. Newspapers Ltd.*, [2001] Fam. 430 (Butler-Sloss P.).

⁴⁷Articles 2 and 3 protect the right of every person to life and prohibits torture, and inhuman or degrading treatment or punishment.

from publishing the home address of a celebrity by temporary injunction.⁴⁸ He stated that, in light of the circumstances, no injunction should be given without deciding whether or not the direct duty of confidence was established on the defendant reporters. The Court of Appeal in *A v. B plc*⁴⁹ has restated the broad guidelines given by Lord Goff in *Attorney Gen. v. Guardian Newspapers* identifying the development of direct duty imposed on media organisations.

Kuwaiti law is extremely keen to protect confidence, as evidenced by Kuwaiti legislature's choice to include it in the Constitution. The Constitution stipulates that freedom of postal, telegraphic and telephone calls shall be guaranteed; confidentiality is guaranteed; and authority to control or divulge messages will not be assumed as granted, except in conditions and procedures set forth in the law.⁵⁰ Homes have sanctity and cannot be entered without permission from the owner or within the conditions specified by the law.⁵¹ It is prohibited to reveal official and secret communication and to publish agreements and treaties concluded by the Government of Kuwait before they are published in the official press, except with special permission from the ministry concerned.⁵² It is prohibited to reveal what is going on in any meeting or what is written in documents, decrees, papers or publications that the Constitution or the law decides must not be published or is confidential, even if it was published from true and sole information that comes from official data.⁵³

Therefore, it can be noted that although freedom of expression is guaranteed in English and Kuwaiti law, privacy and confidential information must be protected from any invasion by the media. The media has a duty to protect the privacy of people.

4.1.2 The Data Protection Act 1998 and mass media

The first act in the United Kingdom concerning data protection was in 1984 in compliance with the provisions of the European Convention for the Protection of the Individual, with regard to the Automatic Processing of Personal Data. This act was replaced by The Data Protection Act 1998 in order to comply with the European Union's Directive 95/46 on the protection of individuals in relation to the processing of personal data and the free movement of such data. It includes not only personal data processed by computer but also manual records held within a relevant filing system.⁵⁴ All data users are obliged to register and give full details of their operations. Banks, other companies and the media, as data users, must not maintain personal data unless there is access in respect of a person in the register kept by the data protection registrar.⁵⁵

4.1.2.1 The data protection principles: The main duty on the data controller is to ensure that processing is fair and lawful. In addition, there are eight data protection principles:

1. Personal data shall be processed fairly and lawfully,⁵⁶
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes;
3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which it is processed;
4. Personal data shall be accurate and, where necessary, kept up-to-date;
5. Personal data processed for any purpose shall not be kept for longer than is necessary for that purpose or those purposes;
6. Personal data shall be processed in accordance with the rights of data subjects under the act;
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss, destruction or damage to personal data; and

⁴⁸[2001] EMLR 957.

⁴⁹[2002] 3 W.L.R. 542 at 11(ix)-(x).

⁵⁰Article 39.

⁵¹Article 38.

⁵²Kuwait Press and Publications Act 2006 § 21(7); Kuwaiti Audio-Visual Media Act 2007 § 11(7).

⁵³Kuwait Press and Publications Act 2006 § 21(6); Kuwaiti Audio-Visual Media Act 2007 § 11(9).

⁵⁴§ 1(1).

⁵⁵*R. v. Brown*, [1996] 1 All E.R. 545.

⁵⁶In particular, personal data shall not be processed unless at least one of the conditions in Schedule 2 is met or, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

8. Personal data shall not be transferred outside the EEA, unless that country ensures an adequate level of protection of the data subjects in relation to the processing of the data.

With regard to Kuwait, the Kuwaiti Electronic Transactions law 2014⁵⁷ laid down; that in cases other than those permitted by the law, government authorities, institutions, public establishments, partnerships, non-government authorities or their personnel, may not access illegally, disclose or disseminate any personal data or information recorded in their electronic information records or systems in connection with employment affairs, social status, health condition or the financial liability elements of persons or other personal information recorded with any of the authorities set forth under this article, or their personnel by virtue of their jobs, unless this is with the consent of the person concerned with such data or information, or his legal representative, or based on permission from the court or public prosecution.

It also laid down that; without prejudice to the provisions of the above articles, government entities, private concerned persons and individuals may obtain from the entities set forth under Article 35, the data or information they require, which is recorded in their systems, provided the authority approves the same, after verifying the need of the applicant for such data or information, the feasibility and objectives or any other conditions it deems as necessary.⁵⁸

This law also aimed to protect personal data by stating that that the entities set forth under article (35) are prohibited to do the following:

- a. Collect, register or process any personal information or data set forth under article (35) by illegitimate methods or means or without the consent of the person or his representative; or
- b. Use the said personal information or data, registered in their records or information system, in objectives other than those for which they have been collected.⁵⁹

The entities set forth under article (35) of this law shall:

- a. Verify the accuracy of the personal data or information recorded in their information systems in connection with persons, complete and update them regularly; and
- b. take suitable measures to protect the personal information and data against everything which may expose them to loss, damage, disclosure or replacement by other incorrect data or introducing information to them which is contrary to the truth.⁶⁰

4.1.2.2 Careless falsehood: The data controller must take reasonable steps to keep the data safe, and to protect against illegal procurement, adjustment or other processing, accidental harm or demolition of the data. The degree of care depends on the nature of the data and the damage made if protection is infringed. The Tort here can be established in two basic ways:

First, as named falsity; second, by showing that the data controller has not taken reasonable care to comply with the Act.⁶¹ Although it is not hard to notice if a media organisation has published or written something about a data subject that is false, it may be difficult to prove that this was not as a result of some deficiency in its attempts to comply with the Act.⁶² It is possible to ignore innocent errors, but a failure of systems or pattern of practice may, in many situations, raise responsibility.⁶³

It can be shown that this new statutory Tort passed with a number of obstacles for a claimant in the common law Torts of defamation and wicked falsehood;

A claimant under section 13 has more chance than a defamation claim that only needs to be imprecise, and so no implication of meaning or defamation needs to have arisen in what has been broadcast or reported.⁶⁴

The requirement of the claimant in a malicious falsehood claim is clearly, that malice need not be established. The claimant only needs to show that the media defendant has failed to take reasonable steps of care to meet with the Act's requirements.⁶⁵

⁵⁷Article 35.

⁵⁸Kuwaiti Electronic Transactions Law 2014 art. 37.

⁵⁹Kuwaiti Electronic Transactions Law 2014 art. 38.

⁶⁰Kuwaiti Electronic Transactions Law 2014 art. 39.

⁶¹TUGENDHAT & CHRISTIE, *supra* note 39, at 179.

⁶²*Id.*

⁶³*Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127.

⁶⁴TUGENDHAT & CHRISTIE, *supra* note 39, at 179.

⁶⁵*Id.* at 180.

Here, compensation for real losses will always be granted, and compensation for distress will also be granted if the claim relates to the particular reasons, whether or not real loss has also been suffered.⁶⁶ There is no set level of damages that can be awarded to a claimant under this new statutory tort. Defamation damages are often determined by a jury, but damages under this new statutory tort will be determined by the judge.⁶⁷

With regard to Kuwait, there is no act expressly covering data protection. There is a draft act relating to data protection, which has been discussed by the Kuwaiti Parliament and has not been issued yet. Therefore, the Kuwaiti legislator has not yet addressed this legislative gap concerning data protection.

4.1.3 Defamation

The law of defamation protects the reputation of a person from defamatory statements made about him to a third party without legal justification. It is a Tort to publish words or issue statements which reflect badly upon the plaintiff's reputation, unless the defendant proves that the statement was true or was fair comment on a matter of public interest or made upon a privileged case.

4.1.3.1 Libel and slander: Defamation takes two categories, libel and slander. The former is the more common and more serious. Libel is defamation by publishing words or some other permanent category, such as a tape or video recording.⁶⁸ The statute defines radio and television broadcasts and computer-generated transmissions as libel. Slander is spoken defamation or defamation in some other transient form. Therefore, libel is written, slander is oral. Although the writers or broadcasters are rarely held accountable for slander, they should always be conscious of the risk of making a slanderous statement, especially the investigative journalist who is examining claims of unlawful activity, or confronting the wrongdoer in person.⁶⁹ The writer or broadcaster may be sued for slander if he creates defamatory statements about the wrongdoer to, or within hearing of, a third party.

The distinction between libel and slander is related only to the matter of compensation. Damages are assumed in cases of libel (without proof of actual damage). However, in cases of slander the claimant must prove actual damage, except when:

1. The offence alleged must be punishable by imprisonment;
2. It is alleged that the claimant is currently suffering from a contagious or infectious disease;
3. A violation of chastity or adultery is imputed to any women or girl; or
4. The allegation could damage the claimant's business or profession.

4.1.3.2 The construction and meaning of words: The most commonly accepted definition of a defamatory statement is that given by Professor Winfield, "Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally or which tends to make them shun or avoid that person."⁷⁰ This definition makes it clear that the statements must harm the individual's reputation from the view of reasonable members of society, rather than a specific group. However, in other respects, this definition is exceedingly unclear. For example, it is vague as to whether it would be defamatory to say that someone is gay, has committed a minor motoring offence, or is actually unwell with disease. Unjust treatment in an article or broadcast, or common abuse in a newspaper headline, does not generally give rise to defamation, but there is always a chance that a particularly unfavourable allegation will be considered as defamatory.⁷¹ Therefore, the law of libel recognises two distinct kinds of meaning: the natural and ordinary meaning; and the meaning by innuendo.

The natural and ordinary meaning contains both the textual meaning and any clear inference that could be brought from the statement. It is a question of fact, to be determined by the jury, whether the ordinary, reasonable person would actually know the meaning of the statement. It is a

⁶⁶*Id.*

⁶⁷*Campbell v. MGN Ltd.*, [2002] EWHC 499.

⁶⁸*Manson v. Tussauds Ltd.*, [1894] 1 Q.B. 671, C.A.

⁶⁹Tom Crone, *Law and the Media* 4 (4th ed. 2002).

⁷⁰*Sim v. Stretch*, [1936] 2 All E.R. 1237 at 1240.

⁷¹Eric Barendt et al., *Libel and the Media: the Chilling Effect* 3 (1997).

question of law, to be decided by a judge, whether the statement is competent to produce a specific defamatory meaning.⁷²

The natural and ordinary meaning is the meaning of the publication from the perspective of the ordinary, reasonable, and fair minded reader.⁷³ If the statement has several meanings, the meaning understood by the reasonable and ordinary reader, according to general rules, will be the most harmful meaning attributable to the words.⁷⁴

The courts have determined the ordinary reader as;

Someone who is not unusually suspicious or keen for scandal, but not unusually simple.⁷⁵

Someone who may not read a publication cautiously or significantly;⁷⁶

Whose first impression of reading may affect his decision.⁷⁷

It is assumed that the ordinary reader has a simple knowledge and experience of global affairs, and he knows the meanings of slang and informal terms.⁷⁸

The law recognises that in particular situations, a report will interpret ideas or presumptions over and above their natural and ordinary meaning. This may be because a word or expression has a scientific or informal meaning, or because of extrinsic realities recognized by some of the people to whom the publication has been released.

The claimant can allege innuendo if the statement or publication has a defamatory meaning that is not clear to all readers. Therefore, the claimant must show that at least one reader of the statement had the essential particular information to understand the innuendo.⁷⁹ The ordinary, reasonable reader with particular knowledge that would understand the publication will be determined by the court.⁸⁰

4.1.3.3 Non-defamatory damaging untrue statements

4.1.3.3.1 MALICIOUS FALSEHOOD: The statement which is broadcast or published must be an accurate account of an incident and cannot be changed by being removed from the truth. The statement may not be fraudulent or false and must not aim to libel any person. Malicious falsehood consists of the publication or broadcasting of disparaging remarks about a person's service or goods. An untrue statement about the plaintiff may be harmful even though it is not defamatory. For instance, it would not essentially reflect on a company's reputation if a broadly distributed statement claimed that the company has ceased to do business, but it could have serious effect on potential future dealing.⁸¹ The main reason for requiring special accountability here is to prevent malicious falsehood.

Malicious falsehood entails the making of a false statement with malice to someone other than the plaintiff through which the plaintiff suffers harm. The claimant must demonstrate that publication or broadcasting took place, that there was malice on the part of the defendant and that he has suffered real damage as a consequence.⁸²

Unlike defamation, it is possible to sue the estate of a deceased person for malicious falsehood. The distinction from defamation is that, in defamation the person's reputation is mainly attacked. It is essential for the claimant to demonstrate that the statement is untrue and there is no indication of his interest. The defendant would be required to defend himself against malicious falsehood if he knew that the statement was false. He will be found responsible if his aim was to harm the claimant rather than improve his own business or inform the public, even if he was indifferent to its truth or according to his belief.⁸³

Malicious falsehood is a Tort committed when someone causes loss to another by making a false imputation. The damage considered here relates to the loss to business interests not to reputation. To be actionable, the necessary elements of malicious falsehood must be met: firstly, that the

⁷²CRONE, *supra* note 76, at 8.

⁷³*Charleston v. News Grp. Newspapers*, [1995] 2 A.C. 65 at 71 (Lord Bridge).

⁷⁴*Lewis v. Daily Telegraph*, [1964] A.C. 234 (Lord Reid).

⁷⁵*Id.*

⁷⁶*Morgan v. Odhams Press Ltd.*, [1971] 1 W.L.R 1239.

⁷⁷*Hayward v. Thompson*, [1982] Q.B. 47.

⁷⁸*Winyard v. Tatler Publ'g Co. Ltd.*, [1991] INDEPENDENT.

⁷⁹*Fulham v. Newcastle Chronicle & Journal Ltd.*, [1977] 1. W.L.R. 651.

⁸⁰*Cassidy v. Daily Mirror Newspapers Ltd.*, [1929] 2 K.B. 331; *Tolley v. JS Fry & Sons Ltd.*, [1931] A.C. 333.

⁸¹*Ratcliffe v. Evans*, [1892] 2 Q.B. 524, C.A.

⁸²In *Allason v. Campbell* (1996) the claimant could not prove monetary loss and the action for malicious falsehood failed.

⁸³Rogers, *supra* note 2, at 85.

statement is false; secondly, there is malice which aims to injure the claimant; and thirdly, that it intends to make others act on the statement to the claimant's detriment.⁸⁴

Loss of reputation alone will not be covered by malicious falsehood without evidence of pecuniary loss. However, the claimant has two methods to demonstrate such loss. First, it is sufficient to prove general loss of trade where the falsehood is, in its very nature, planned to create this in the normal course of things, for it would be unlikely in many situations to prove that individual customers have forsaken the claimant because of the statement.⁸⁵ According to section 3(1) of the Defamation Act 1952 it is no longer necessary to allege or show special damage: (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff, and are published in writing or other permanent form; or (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication. If the essential pecuniary loss can be shown by the claimant, the damages for injury to feelings may be restored in the same method as the action for defamation.⁸⁶

With regard to Kuwaiti law, it is noted that neither the Kuwaiti Press and Publications Act 2006 or the Kuwaiti Audio-Visual Media Act 2007 contain any provision that deals directly with this issue. It only includes that the licensee is prohibited to broadcast or rebroadcast something which might prejudice the dignity of persons or their own lives or the community. However, the Kuwaiti Criminal Law contains provisions that deal directly with malicious falsehood. Any person, whether working in media or not, is prohibited from attributing to another person, in a public place or within the hearing or sight of someone other than the victim, an incident which might hurt the victim's reputation.⁸⁷ This attribution shall be punished by imprisonment for a term not exceeding two years and/or a fine not exceeding two thousand dinars.⁸⁸ Any person is also prohibited from insulting another person in a manner that offends the honour or account of this person. Punishment for this insult is a term of imprisonment not exceeding one year and/or a fine not exceeding one thousand dinars. Kuwaiti Civil Law deals with the compensation for the damage for the illegal act, even if it is mental distress. This includes in particular the mental distress caused to the person of sensory or psychological harm as a result of prejudice to his life, body, freedom, honour, reputation, social or financial status.

4.1.3.3.2 PASSING OFF

Passing off is the misuse of a brand or trade name of goods. It also covers imitation of the composition or presentation of the goods concerned, which can include the container, the labelling and often the packaging. This may happen when the product is packed in a misleading package, which alleges it is a famous brand, and it is sold based on this misunderstanding.⁸⁹ The claimant may sue for compensation for loss of trade if:

- (a) The trade name or appearance is associated with his or her goods in the public mind; and
- (b) The acts objected to have interfered with or are calculated to interfere with the conduct of business or sale of goods in the sense that there is confusion in the public mind.

The Tort of passing off is chiefly focussed on a situation in which the defendant distorts to the public that his goods are those of the claimant and thereby inappropriately uses the goodwill obtained by the claimant, effectively creating a type of unjust rivalry.⁹⁰

Commonly, personal rights have been invaded by media interference and it is generally a "back up" claim to one for breach of a trademark.⁹¹ Therefore, it is actionable to mistakenly ascribe the effort to a writer, or to exploit a doctor's name to market a fraudulent medicine or treatment.⁹² It has now been held that it is a type of passing off to falsely claim the endorsement of goods or services by famous people, where they have a valuable reputation to use in such activities.⁹³

⁸⁴D.L.A. Barker & C. Padfield, *Law Made Simple* 228 (11th ed. 2002).

⁸⁵Rogers, *supra* note 2, at 86.

⁸⁶*Khodaparasi v. Shad*, [2000] 1 W.L.R. 618, C.A.

⁸⁷Kuwaiti Criminal Law § 209.

⁸⁸Kuwaiti Criminal Law § 210.

⁸⁹FRANK JEFKINS, *ADVERTISING* 310 (4th ed. 2000); PHILIP HENSLÖWE, *PUBLIC RELATIONS: A PRACTICAL GUIDE TO THE BASICS* 115 (2d ed. 2003).

⁹⁰*Erwen Warnink BV v. J Townend & Sons (Hull) Ltd.*, [1979] A.C. 731.

⁹¹Rogers, *supra* note 2, at 88.

⁹²*Dockrell v. Douglas*, (1899) 80 L.T. 556 at 557, 558; *Walter v. Ashton*, [1902] 2 Ch. 282 at 293.

⁹³*Irvine v. Talksport Ltd.*, [2002] EWHC (Ch) 367, [2002] 1 W.L.R. 2355 at [39].

Passing off has become considered a misrepresentation in a number of developing countries such as Kuwait, where impersonations of well-known branded products have been presented in such a manner that persons have been misled by the similar-looking packaging.

Kuwaiti law has also placed some restrictions on the mass media in order to protect personal rights. It is prohibited to prejudice the dignity of people, their lives or their religious beliefs, and to cause incitement to hatred or contempt for any group in society, or to disseminate information about their financial situation, or disclose a secret that would hurt their reputation or the wealth in their name or that of their trade name.⁹⁴ The mass media have a duty to not expose the privacy of an employee or someone designated in a public service or address him in words which contain the insult of libel.⁹⁵

4.2 Mass media where in breach of that duty

Just as a claimant needs to show that the media owed a duty of care, it is also necessary to demonstrate that breach on the part of the media.⁹⁶ The most difficult task may be required of the claimant who must prove that the media were negligent. The claimant may not know precisely what had occurred, and ascertaining the facts could be both difficult and costly. In practice, the failure or success of most negligence actions rest on the claimant's ability to demonstrate negligence.⁹⁷ In negligence liability, damage is an essential element of the cause of action for negligence, whereas it is not an essential element of the cause of action for breach of contract.

There are several aspects by which the media can be shown to be in breach of the duty of care. These situations will be examined in the following section.

4.2.1 Breach of confidence

Breach of duty may be established from the provisions of an express or implicit contract or arise from a relationship (fiduciary, professional or intimate) between the confider and the recipient. In *Kaye v. Robertson*,⁹⁸ the journalist from a notoriously low tabloid newspaper obtained unauthorized access to the hospital room of a famous television actor after he had an accident and was in a comatose state. The journalist planned to publish an imaginary exclusive interview. However, such a publication would deprive the actor of the opportunity to earn money from other newspapers for his story. Therefore, the claim for an injunction succeeded on the basis that the release was a malicious falsehood. The Tort of the journalist, as he had committed trespass, was against the hospital, not the claimant. However, the claimant did not pass information to the journalist so the law of confidence could not be established.

Breach of confidence was held in *Venable v. Newspapers Ltd.*,⁹⁹ when the media started to publish stories about two notoriously well-known children who had been convicted after they were freed. The claim for an injunction succeeded on the basis of the publication of details which had not been obtained from the claimants and therefore could not have come to the media except through an illegal act.

Claims for confidentiality in personal information may affect the mass media. Most often the mass media will be the target of claims that they owe equitable obligations of confidence as third party recipients. The media as a third party, as a general rule, has a duty of confidence as he or she possesses information which the media know is subject to a duty of confidence. Therefore, this prohibits the media from revealing information received from one of the parties under a duty of confidence. The breach of confidence can be shown where a person's former spouse provides unpublished information about that person's sex life¹⁰⁰ or a formal personal helper of a famous person supplies information about the celebrity's family life, private papers and correspondence,¹⁰¹ health¹⁰² or financial affairs.¹⁰³ The media can be considered as persons directly acquiring personal details or information which is held to be confidential.¹⁰⁴

⁹⁴Kuwaiti Press and Publications Act 2006 art. 21(7); Kuwaiti Audio-Visual Media Act 2007 art. 10; Kuwaiti Audio-Visual Media Act 2007 art. 11.

⁹⁵Kuwaiti Press and Publications Act 2006 art. 21(8); Kuwaiti Audio-Visual Media Act 2007 art. 12.

⁹⁶COOKE, *supra* note 17, at 128.

⁹⁷*Id.*

⁹⁸[1991] F.S.R. 62, C.A.

⁹⁹[2001] Fam. 430.

¹⁰⁰*Stephens v. Avery*, [1988] Ch. 499.

¹⁰¹*Thompson v. Stanhope*, (1774) AMBLER'S REPORTS 737.

¹⁰²*Argyll v. Argyll*, [1967] Ch. 302.

¹⁰³*John Reid Enter's Ltd. v. Pell*, [1999] EMLR 675.

¹⁰⁴TUGENDHAT & CHRISTIE, *supra* note 39, at 204.

Therefore, the media may breach confidence when they deal with people who provide stories where details or information is supplied on an exclusive basis, with a plan for publication for a fee. The media may also be in breach of confidence where details are taken by acquiring it through films, photographs,¹⁰⁵ interviews, or questionnaires without consent or authority.¹⁰⁶ In *A v. B plc*¹⁰⁷ the claimant applied for an injunction to hold back the publication in a newspaper, of information about an extra-marital affair he had with a woman who was not a defendant to the proceedings. The claimant brought actions in breach of confidence, privacy and copyright. The court held that there was a breach of confidence.

With regard to Kuwait, any access to any personal information or entry into people's homes without legal permission will lead to a breach of confidence. Therefore, if the mass media exceeded the freedom of expression and criticism guaranteed by constitution and law, to breach the privacy of people¹⁰⁸ and published their personal information, it would be liable for breach of confidence. Society would not benefit from publishing personal information related to a person and also the publication should not seek public interest.¹⁰⁹

4.2.2 Breach of duty under the Data Protection Act 1998

If the media breaches the principles of the Data Protection Act 1998, it will be liable to compensate the claimant for any resulting loss. At common law, anyone who participates in, secures, or authorises the publication is liable. The media may be liable when journalists or broadcasters mislead a source, information or data subject, in order to acquire precise information that would otherwise not be available to them at all.¹¹⁰ This can be justified only in the public interest and the sources cannot be acquired by other means.¹¹¹

The media may be in breach of obligation if it obtains or discloses personal data or the information included in personal data, without the permission or the consent of the data controller.¹¹² The media may be liable if it sells personal data acquired in an illegal manner,¹¹³ which the media committed knowingly or carelessly.¹¹⁴

4.2.3 Media in breach of duty related to defamation

It is not defamatory to mention that someone is in debt, but it is defamatory to mention that someone cannot or will not meet his obligations.¹¹⁵ It is not defamatory to talk about a person's service or goods but it is defamatory to mention that someone is unqualified for his job or unskilled in his trade. To prove actual defamation, the claimant must prove the elements discussed in the following section.

4.2.3.1 Reference to the claimant: The words must be published and the claimant has to show that the reasonable person would understand that the defamatory publication referred to the claimant. It is not required that the claimant is named in the section, but that he can be recognized by a description or photograph. However, in some cases the matter of reference is not so obvious. In this kind of case the matter for the jury is objective. So, they must take into account whether the ordinary, reasonable person would recognise or understand that the defamatory information identifies the claimant. In order to avoid the threat of legal action being taken, the publisher, broadcaster or writer may delete the name of the claimant from a piece but provide broad references as to who is being described.

Referring to an offender can be problematic where another programme, magazine or newspaper shows the same story and releases the name and photo of the offender. This was shown in *Hayward v. Thompson*,¹¹⁶ where the court agreed with the claimant, that the reference to him in the *Sunday*

¹⁰⁵*Shelley Films Ltd. v. Rex Features Ltd.*, [1994] EMLR 134; *Creation Records Ltd. v. News Grp. Newspapers Ltd.*, [1997] EMLR 444.

¹⁰⁶*Shepherd v. News Grp. Newspapers Ltd.*, [1998] Ch. D (Lindsay J.).

¹⁰⁷[2001] 1 W.L.R. 2341.

¹⁰⁸Kuwaiti Supreme Court, No. 10/1994, May 11, 1994.

¹⁰⁹Kuwaiti Supreme Court, No. 452/1999, May 3, 2000.

¹¹⁰*R. v. Thwaites*, [2000] EWCA (Crim), C.A.

¹¹¹Press Complaints Commission's Code of Practice [11].

¹¹²Data Protection Act 1998 § 55(1).

¹¹³*Id.* at § 55(4); *Id.* at § (5).

¹¹⁴*Id.* at 55(1).

¹¹⁵*Winstanley v. Bampton*, [1943] K.B. 319.

¹¹⁶*Supra* note 84.

Telegraph was integrated with a report following this, in the same newspaper one week later, naming him particularly. This was sufficient to create identification.

Mass media will be responsible even in situations of unintentional reference, if the statement was planned to refer to someone other than the claimant but who bears the same name.¹¹⁷ The law does not permit a person to take legal action for defamation of a group of people unless the reasonable, ordinary person would understand that a specific person was mentioned within that group.¹¹⁸ In *Riches v. News Grp. Newspapers*,¹¹⁹ the newspaper published a report about a man who was attacked and his wife raped by ten members of Banbury police force. Even though the ten officers weren't specifically named, they recovered damages.

4.2.3.2 Publication: Publication means dissemination or distribution of offending information to one or more third parties. A defamatory statement may be supposed, written or spoken. It must communicate to a third party to be actionable. The Tort is not an offence, but is based on harm to a claimant's reputation. Without publication, there is little risk that the offending information will harm the claimant's reputation or his financial position. Therefore, if there was no damage, there can be no grounds for a defamation case.

The liability of libel is joint and several for any person who plays a role in the publication. Therefore, the television channel and the presenter disseminating the offending information are both liable. Similarly, the journalist, editor and the newspaper disseminating offending information, are all responsible. The liability of the newspaper lies in the act of publishing the libel. However, the newspaper would be vicariously liable along with the journalist, if he was motivated by malice, whereas the editor would escape his personal liability if he was not persuaded by malice. In fact, the newspaper will bear the cost of compensation on behalf of itself, the journalist and the editor's mistake unless it becomes insolvent.¹²⁰

4.2.3.3 Repetition: Re-publication and repetition are contentious elements which involve potential risk. Therefore, every repetition of a defamatory statement or publication of that statement is a new publication and causes a new action against each sequential publisher, journalist, broadcaster, editor or author. The rule on repetition is based on several publication precedents, as shown in *Duke of Brunswick v. Harmer*.¹²¹ It can be asserted in the English courts even if the publication is international. It is only necessary to show that the story which was harmful to someone's reputation had a substantial circulation and was connected to the UK.

Repetition is closely related to the press where a textbook or newspaper statement is defamatory; the printer, publisher, author and editor are liable as well. Subsidiaries and distributors, such as booksellers and newsvendors, will be liable unless they prove that they didn't know that the statement was libellous and that their lack of knowledge was not due to carelessness.

4.2.3.4 Defences: Once evidence is produced that the defamatory statement referred to the claimant and was released or published to a third party, the burden of proof reverts to the defendant to set up one or more defences on the balance of possibilities. These will be considered below.

4.2.3.4.1 JUSTIFICATION

The defendant in a libel case who says a statement is true, does not need to show that every part of the charge is accurate, but must prove that the statement charged as being defamatory is significantly factual.¹²² Therefore, if the defendant shows that the defamatory statement is true the action will fail. The Defamation Act 1952 provides that the defendant can succeed in a justification defence; even if he had failed to show one or more suggestions against the claimant, if the suggestion is minor in relation to the allegation or allegations which have been shown to be true.¹²³ The defendant will be

¹¹⁷*Hulton v. Jones*, [2010] All E.R. 29.

¹¹⁸*Eastwood v. Holmes*, (1858) 1 F. & F. 347.

¹¹⁹[1986] 1 Q.B. 265.

¹²⁰*Rogers*, *supra* note 2, at 65.

¹²¹[1949] Q.B. 154.

¹²²*Sutherland v. Stopes*, [1925] A.C. 47.

¹²³Defamation Act 1952 § 5.

required to declare in his defence, the accurate meaning of the words that he is looking to justify.¹²⁴ However, it is not sufficient for the defendant to say that a rumour was simply being repeated; he must prove the sting of the defamation itself.

4.2.3.4.2 FAIR COMMENT

A person is allowed, under the defence of fair comment, to publish a statement of opinion or comment on an issue of public interest, given it is performed without malice. If he proves that the statement is to be considered appropriately as a note, and that the issue was in the public interest, then he will succeed, unless the claimant in his turn proves that the defendant was not expressing his honest opinion.¹²⁵

There is a difference however, between issues that the public find interesting and issues of public interest. Lord Denning suggested a magnanimous approach in determining the legitimate fields of public interest: "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment."¹²⁶

4.2.3.4.3 PRIVILEGE

It is a defence to prove that allegations were published in a privileged situation.

There are two forms of privilege; absolute and qualified;

Absolute privilege gives the author or journalist complete autonomy in the content of views and details. The claimant will be unable to bring an action for defamation even if it can be proved that the person who made the report was aware that it was untrue, or that the defendant was motivated by malice. In contrast, proof of malice defeats qualified privilege. But unlike fair comment, the defence is obtainable even if statements were untrue and the defendant made them negligently.¹²⁷

The defence of absolute privilege is of no advantage to the media. MPs are protected from liability for anything stated or written during the term of parliamentary proceedings. Absolute privilege is also given under the Defamation Act 1996¹²⁸ for fair and precise contemporaneous statements of judicial proceedings, and this can clearly be used for the press and broadcasters.

Qualified privilege protects the publications of statements of public meetings and a diversity of bodies, companies and officials.¹²⁹ The privileges¹³⁰ are restricted, in that newspapers, broadcasters and other publishers have no protection if they have been sued by the claimant for neglecting to print a reasonable report to clarify or contradict the allegation.¹³¹ However, it is necessary to take into account that there is no universal fair reporting defence for the media. They would state at their risk, any defamatory allegations made by a politician or a trade union official in a meeting or at a press symposium. More significantly, in England the media is not always protected by general privilege in publishing matters of interest to the public.¹³²

4.2.3.4.4 OFFER TO AMEND

This defence is provided by the Defamation Act 1996¹³³ and is another defence open to a defendant who has made an innocent error and does not wish to rely on a defence of justification, fair comment or qualified privilege. An offer to amend must be in writing¹³⁴ and made before a defence is served.¹³⁵ The offer may be in relation to the statement generally or in relation to a specific defamatory meaning, which the person making the offer accepts. This is referred to as a qualified offer.¹³⁶ An offer must make a suitable correction of the statement complained of and include a sufficient apology and promise to

¹²⁴*Lucas-Box v. News Grp. Newspapers*, [1986] 1 W.L.R. 147; *Prager v. Times Newspapers*, [1988] 1 W.L.R. 77.

¹²⁵Rogers, *supra* note 2, at 69.

¹²⁶*London Artists Ltd. v. Littler*, [1969] 2 Q.B. 375.

¹²⁷*Spring v. Guardian Assurance*, [1995] 2 A.C. 296.

¹²⁸§ 14.

¹²⁹Defamation Act 1996 Sched. I ¶ 2.

¹³⁰As stated in Part II of Defamation Act 1996.

¹³¹Defamation Act 1996 § 15(2).

¹³²*Blackshaw v. Lord*, [1984] Q.B. 1.

¹³³§ 2.

¹³⁴§ 2 (3).

¹³⁵§ 2 (5).

¹³⁶§ 2 (2).

pay to the aggrieved party such *compensation* (if any), and such costs, as may be agreed or determined as payable.¹³⁷

The defamation action is concluded if the offer to make amends is accepted by the claimant. However, if the offer to make amends was refused by the claimant, the defendant can rely on the terms of the offer as a defence. The defendant may seek to reduce the compensation by relying on the offer.¹³⁸

With regard to Kuwaiti law, freedom of expression is emphasised by the Constitution, which stipulates that freedom of expression and scientific research is guaranteed; and everyone has the right to express and publish his opinion verbally, in writing or otherwise, in accordance with the conditions prescribed by law.¹³⁹ It also stipulates that personal freedom is guaranteed.¹⁴⁰ It is also included in the Press and Publications Act 2006.¹⁴¹ However, it is not permitted to violate or incite anyone to breach public morals or breach laws or commit crimes, even if a crime does not occur.¹⁴² Therefore, the right of publication and criticism is guaranteed by the Constitution and law as long as the writer was in good faith and sought the public interest, even if his terms were severe.¹⁴³ The constitutional origin of this right is the freedom of thought and freedom to express opinions, including the right of criticism; an exception also restricts these rights. Hence, it is not widely accepted that this exception disrupts the constitutional principle, which lays down the freedom of expression. However, if the publication and criticism exceeded the limitations of freedom of expression and criticism, the writer or broadcaster would have committed defamation, as acceptable publication and criticism do not breach public morals or personal freedoms, which are guaranteed by the Constitution and law.¹⁴⁴

Freedom of expression, including freedom of the press, aims to create a free environment for growth of the community by providing updated knowledge, which meets the interests of the public and the State. However, the legislator organised this freedom by establishing some restrictions to be required, in order to protect the personal freedom and dignities of people from offence and insults, which may occur by the mass media.

There are four restrictions on the freedom of publication or broadcast;

First, the statement must be true. The truth of the statement is a condition designed to meet the public interest, as people will not benefit from untrue statements which cause harm to them.

Second, the statement must have a social nature, as people will not benefit from publishing something about a person that relates to his personal life.

Third, the statement must be published in true size and not have any exaggeration or use of terms leading the people to interpret it in a different way.

Fourth, the writer or broadcaster must seek to meet the public interest in good faith.¹⁴⁵ However, Members of Parliament have absolute privilege as they are free to express opinions and ideas in Council or committees and may not be liable in any way concerning those ideas and opinions.¹⁴⁶ Therefore, the claimant will be unable to bring an action for defamation even if it can be shown that the person who made the statement was well aware that it was untrue or that the defendant was motivated by malice.¹⁴⁷

4.3 The claimant suffered damage caused by the breach of duty

The third element in the claimant's case for negligence is causation. The existence of a duty of care, and its breach is not sufficient to establish the mass media's liability. Rather, the causation between the duty of care and the breach of such duty must be proven. The claimant must prove that the damage was caused by the mass media's breach of duty.¹⁴⁸

¹³⁷§ 2 (4).

¹³⁸§ 4 (5).

¹³⁹§ 36.

¹⁴⁰§ 30.

¹⁴¹Press and Publications Act 2006 § 1.

¹⁴²Press and Publications Act 2006 § 20(3); Kuwaiti Audio-Visual Media Act 2007 § 11(6).

¹⁴³Kuwaiti Supreme Court, No. 21/2000, May 6, 2000.

¹⁴⁴*Id.*

¹⁴⁵Kuwaiti Supreme Court, No. 553/2004, Dec. 3, 2005.

¹⁴⁶Kuwaiti Constitution § 100.

¹⁴⁷Kuwaiti Supreme Court, No. 210/2000, Oct. 4, 2000.

¹⁴⁸COOKE, *supra* note 17, at 143.

Causation is divided into causation in fact and causation in law;

Causation in fact deals with the question of whether, as a matter of fact, the damage was caused by the breach of duty.¹⁴⁹ The “but for” test is the starting stage for assessing whether the mass media’s breach of duty is a factual cause of the claimant’s damage. The central test is that the damage would not have happened but for the breach of duty.¹⁵⁰

Damages may be refused even where the claimant is able to demonstrate a factual tie between the breach of duty and the damage. This would be on the grounds that breach of duty needs to be the legal cause of the damage.¹⁵¹

In Kuwaiti law, negligent liability will not be established if the person does not perform his duty; a causal relationship must exist between the damage and non-performance.¹⁵² If a causal relationship is absent, negligent liability does not exist.¹⁵³ Thus, the damage must occur as a result of error.¹⁵⁴

4.4 The burden of proof

To establish the mass media’s liability for negligence, the claimant must show the following elements of such liability: Negligence, Damage and Causation. The court will evaluate the incidence of damage and the causation by examining the evidence given by the claimant and questioning the mass media.¹⁵⁵

If damage to the claimant would not have happened “but for” the mass media’s negligence, then the negligence is a cause of the damage. It is not essentially the sole cause because there may well be other cases which are causally related.¹⁵⁶

A *res ipsa loquitur* defence will be available to the claimant to assist in verifying that the mass media have breached a duty of care imposed on them if;¹⁵⁷

1. The thing causing the damage was under the exclusive control of the mass media.
2. This means that the damage which the claimant suffers from, could not happen without the negligence of the mass media. The courts have been free in their interpretation of the mass media’s control.¹⁵⁸
3. The damage is of the sort that does not happen in the absence of negligence. The damage which the claimant suffers from cannot occur in normal events without the negligence of the mass media.¹⁵⁹
4. There is no other explanation for the damage. Only where there is no other explanation for the damage can the *res ipsa loquitur* be available. If all the details of the damage were known, the court could infer whether or not there was negligence on the part of the mass media.¹⁶⁰

The evidential burden of proof reverts to the mass media as soon as the claimant has successfully used *res ipsa loquitur*. The mass media must then disprove the inference of negligence by proving that it was not negligent.¹⁶¹

The claimant must commence legal action against the mass media that negligently caused damage to him within the period of limitation, which is one year.¹⁶² Similarly, in Kuwaiti law,¹⁶³ the legal action for compensation must be commenced by the claimant within the period of limitation, which is one year from the first day of publishing or from the date of the end of criminal action, which must be commenced within three months.

¹⁴⁹COOKE, *supra* note 17, at 143.

¹⁵⁰*Barnett v. Chelsea and Kensington Hosp. Mgmt. Comm.*, [1969] 1 Q.B. 428.

¹⁵¹COOKE, *supra* note 17, at 160.

¹⁵²ABDULRASOL ABDULREDA & GAMAL ELNAKAS, GENERAL THEORY OF OBLIGATIONS, CONTRACTS AND TORTS 250 (3d ed. 2009–2010); SOLIMAN MORQOS, THEORY OF THE CONTRACT AND INDIVIDUAL INTENTION 559 (4th ed. 1987); IZZEDINE ALDNASOURI & ABDULHAMID ALSHAWARBI, CIVIL LIABILITY IN THE LIGHT OF DOCTRINE AND JURISPRUDENCE 599 (2004); HUSSEIN AMER & ABDULRAHEEM AMER, CIVIL LIABILITY, CONTRACTUAL AND NEGLIGENCE LIABILITY 352 (2d ed. 1979); IBRAHIM ALDOSOKI, THE CONTRACT AND INDIVIDUAL INTENTION 308 (1st ed. 1995).

¹⁵³ALDOSOKI, *supra* note 165.

¹⁵⁴ABDULREDA & ELNAKAS, *supra* note 165, at 250.

¹⁵⁵IBRAHIM ALDOSOKI, CIVIL LIABILITY 131 (1995).

¹⁵⁶*Barnett v. Chelsea and Kensington Hosp. Mgmt. Comm.*, [1968] 1 All E.R. 1068.

¹⁵⁷COOKE, *supra* note 17, at 138; Nicholas J. McBride & Roderick Bagshaw, Tort Law 240 (3d ed. 2008).

¹⁵⁸*Gee v. Metro. Ry.*, (1873) L.R. 8 Q.B. 161; *Easson v. London & North Eastern Ry.*, [1944] 1 K.B. 421.

¹⁵⁹*Mahon v. Osborne*, [1939] 2 K.B. 14.

¹⁶⁰*Barkway v. South Wales Transp. Co. Ltd.*, [1950] 1 All E.R. 392.

¹⁶¹*Henderson v. H E Jenkins & Sons*, [1970] A.C. 282; COOKE, *supra* note 17, at 140–41.

¹⁶²Defamation Act 1996 § 5.

¹⁶³Press and Publications Act 2006 § 25.

In Kuwaiti law, the causal relationship between fault and damage is assumed. The claimant is not obliged to prove it, but the defendant is obliged to prove that the causal relationship does not exist. Therefore, the burden of proof of the causal relationship rests with the mass media, which cannot avoid liability unless it proves that the non-performance or delay in performance is due to an external cause beyond its control.¹⁶⁴

5. CONCLUSION

It can be noted that although English and Kuwaiti law are concerned with the freedom of speech, (including the freedom of the media), they do put some restrictions on this freedom, in an attempt to make sure that it cannot deviate from unintentional targets. Therefore, they try to strike a balance between freedom of the media and personal rights by making some conditions which can show whether the media have breached personal rights or not. Hence, the mass media must publish a true statement; the statement must be a matter of public concern or debate or a social problem, and the statement must be published in good faith, seeking to meet the public interest. In English law, the mass media can only be sued for compensation. However, in Kuwaiti law it can be sued under civil or criminal liability.

¹⁶⁴Kuwaiti Civil Law art. 293; Adnan Amkhan, *The Concept of Fault in the Arab Law of Contract*, 9 ARAB L. Q. 171, 175–76 (1994).