

Defamation and The Public's Right to Know: A Fair Game or A Dilemma

Suria Fadhillah Bt Md Pauzi

Faculty of Law

University Teknologi MARA Pahang, Raub Campus,
27600, Raub, Malaysia
suriapauzi@pahang.uitm.edu.my

Hazlin Hasan, Musramaini Mustapha, Mohd Samsuri
Ghazali

Faculty of Business Management
University Teknologi MARA Pahang, Raub Campus,
27600, Raub, Malaysia
{hazlin665, musra_08, mohdsamsuri}
@pahang.uitm.edu.my

Abstract— The right to protect the dignity and reputation of others is seen as among the key features in many legal systems in the world. Defamation is a strict liability tort in which a defendant could be held liable for publishing a false and defamatory statement that has a tendency to harm plaintiff's reputation in the eyes of the plaintiff's community. The law of defamation addressed both oral defamatory statement (slander) and written defamatory statement (libel) and seen by some as a tool to suppress the right of the public to receive information. With the recent case of Pandan MP Mohd Rafizi Ramli, it raised a debate on whether the law of defamation is used as a device to subdue the essence of democracy. This article examines the elements and nature of law of defamation in Malaysia with special reference to a few cases of defamation in Malaysia. This paper concludes that although public has the right to know and to receive information but the person who disseminate it must exercise self-regulation and thus be socially responsible for his action. A well balance code of ethic should be upheld to balance the conflicting rights of the interested parties.

Keywords: Defamation, reputation, dignity, defamatory statement, published.

I. INTRODUCTION

Defamation is a type of crime in this twentieth century. In Malaysia, defamation actions are governed by Defamation Act 1957. Although the statute has not given a single definition of what constitutes defamation, the court in the landmark case of *Sim v Stretch* [1936] 2 All ER 1237 (HL), per Lord Atkin has held that “a defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt or ridicule, or which tends to lower him in the estimation of right-thinking members of society”. Thus, from the above decision, we can conclude that the law on defamation provides an avenue for a defamed person to vindicate his reputation and good name and eventually to put right to what was wronged [1].

The law of defamation in Malaysia and in other common law jurisdiction generally has long faced the issue on how to balance the protection conferred by defamation law in protecting the reputation of oneself and the dissemination of information for public awareness and interest [2]. It is undisputed fact that the law of defamation sometimes fails to give sufficient weight to the right of freedom of speech and

expression. This is due to the fact that the law can at times be abused and mismanaged by those in power.

On the other hand, the defamation laws are much needed to protect dignity and reputation as every so often media does not always exercise social responsibility in reporting and publishing articles or statements. The advent growth of internet provides an avenue and facilitates the exercise of the right of freedom of speech and expression in one hand, but on the other hand it also creates big challenges for the law maker to draw a delicate line between the right of dignity and protection of reputation and the conflicting interest to express oneself.

II. THE SCOPE AND CONCEPT OF DEFAMATION IN THE MALAYSIAN LAW

The law of defamation in Malaysia is governed by Defamation Act 1957. This act is in *pari materia* with the English Defamation Act 1952 and governs civil defamation whereas Sections 499 and 500 of the Malaysian Penal Code deal with criminal libel. Although no definition is given in the respective statute, the court in the case of *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* ([2010] 2 MLJ 492), ruled that: “*In my assessment, therefore, an imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of community, to hatred, ridicule or contempt or to lower him or her in their estimation or to cause him or her to be shunned and avoided by them. This is to be judged by ordinary, right-thinking members of the community or an appreciable and reputable section of the community.*” Thus, it can be safely adduced here that, if a statement exposes a person to hatred, contempt or ridicule, or tend to lower him in the estimation of right-thinking members of society generally, or causes him to be shunned or avoided, such statement will be deemed defamatory. Any living person may be defamed (*Broom v Ritchie* (1904) 6 F.942) but such defamation action cannot be made against the dead person even though it caused distress and distraught to the families or friends of the deceased. A defamatory statement may either be a libel or slander. Libel is defamation in a permanent form usually visible to the eye. For instance, defamatory statement posted in e-mail [3]. Thus, it is actionable per se. In other words, for libel action; there is no need for the plaintiff to

prove that he has suffered any loss or injury as a result of the published statement. Interestingly, section 3 of the Malaysian Defamation Act 1957 provides that, *'for the purpose of the law of libel and slander the broadcasting of words by means of radio communication shall be treated as publication in a permanent form'*. Moreover, Section 13 (1) of the same Act provides that reports or matters broadcasted by radio are regarded as equal to publications in newspapers. This principle is upheld by the court in the case of Mohamed Azwan bin Haji Ali v Sistem Televisyen (M) Bhd & Ors [2000] 4 MLJ 120 and YB Dato' Dr Hasan bin Mohamed Ali v YB Mulia Tengku Putra bin Tengku Awang [2010] 8 MLJ 269. On the other hand, slander is defamation in a temporary form [4]. It is not actionable per se since it is made in the form of spoken words or gesture. For this kind of defamation suit, the proof of actual damage is required. However, it should be noted that, merely causing anger or upset was not enough for defamation. The words used must lower the claimant in the estimation of the public and make him an object of ridicule.

It is interesting to note that a true statement which can be proven cannot be defamatory. In this respect, it is not necessary to prove that every single details of the statement is true, so long as taken as a whole, it is accurate (Alexander v North Eastern Railway Co (1865) 6 B & s 34).

In order to prove a defamatory statement on the basis that it is libelous, the plaintiff must establish the element of this tort, which are: (i) the words are defamatory, and (ii) the words refer to the plaintiff, and (iii) the words have been published (Kian Lup Construction v Hong Kong Malaysia Bhd [2002] 7 CLJ 32). The words may be defamatory in three ways namely, in its natural and ordinary meaning, or by way of innuendo or by juxtaposition. In this respect, the test which is to be applied, lie in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motives or a lack of integrity on his part? If the question invites affirmatives response, then the words complained are defamatory. (J.B. Jeyaratnam v. Goh Chok Tong [1985] 3 MLJ 334.)". In addition, Mohamed Azmi J in Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 at p 58 said: *the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true.* Therefore the court upheld another test namely "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? Thus, if the words have tendency to lower the reputation of the plaintiff in the face of society generally, it can be considered as defamation even though it might not really lower a plaintiff in the estimation of those to whom they were published.

For the second element, the plaintiff must show that the statements are referring to him. It should be noted that even if such defamatory statement does not mention the name of the plaintiff specifically but if he would be capable of being identified by the reasonable person, defamation action can be ensue. Hence, the court in case of Sandison v Malayan Times Ltd & Ors (1964) MLJ 332 held although the executive was not named, the date of dismissal was mentioned and

indeed that was the date the plaintiff ceased holding that position and the defamatory words clearly indicated the plaintiff as the corrupt executive. However, it should be noted that if a class of people is defamed, a defamation suit will only available to individual members of that class if they are identifiable as individuals. (per Willes J in Eastwood v Holmes (1858) 1 F7F 347 at 349). This principle is upheld by the court in Atip bin Ali v. Josephine Doris Nunis & Anor [1987] 1 MLJ 82 where one woman filed a suit against a former chief minister in Malaysia for breaching of promise to marry. The UMNO members of Alai Melaka claimed that as a result of the publication, the members of PAS, and Wanita UMNO avoided them on the basis that the plaintiffs supported an adulterer. The court in this case held that as the word "UMNO" did not appear on the writ, the defamation suit can only be made against the minister concerned and not to the UMNO members generally.

To be defamatory, a statement must be published. A statement is considered to have been published when the defendant communicates it to anyone other than the claimant, or the defendant's spouse. It is interesting to note that each communication of the defamatory statement constitutes a separate publication and gives rise to a distinct cause of action. Thus, in Theaker v. Richardson (1962) 1 All ER 229, the court held that, sending something via telegram or postcard that could be read by others can be claimed as publication.

III. DEFAMATION CASES IN MALAYSIA

As defamation focuses on the effect of damaged reputations of a person in the eyes of the society, high profile people tend to be more wary when their private lives are being invaded by unknown people. Generally, reputation is what other people think of a man and defamation is an injury to one's reputation.

In Malaysia, defamation cases do not only linger around the life of politicians but also the celebrities and royalties. A famous defamation case that involved a high profile politician, Tan Sri Rais Yatim, former Minister of Information, Communication and Culture, and a blogger, Amizudin Ahmat, who is also known by the pen name of Din Banjai was filed on January 31, 2011. In his claim, Rais said the Malay language article posted on sharpshooterblogger.blogspot.com on or around December 28, 2010 was malicious and defamatory and portrayed him as someone who committed the serious offence of rape and that he was capable of murdering his Indonesian maid. The court held that the allegation made was very serious and that if one was to believe it to be true, it would not only destroyed plaintiff's reputation nationally and internationally, but also affect plaintiff's personal life and his family. The allegation was not healthy in terms of diplomatic ties and it was described as "the most gross of allegation one could make against an individual". Rais won the suit and Amizuddin was ordered to pay RM300 000 in compensatory, aggravated and exemplary damages and RM100 000 in cost [5].

In another case of Datuk Seri Mohammad Nizar Jamaluddin, the former Menteri Besar of Perak against Utusan Melayu (M) Bhd, the tweets that he made regarding the

vehicle's registration number WWW1 bid that was clinched by the Sultan of Johor was being published by Utusan and it was made to imply that Nizar was a traitor to the Sultan of Johor and tried to incite the people to hate the Sultan of Johor. The plaintiff claimed that the statement published meant that he had alleged the Johor's ruler misusing the public's fund to pay RM520, 000 for the car registration number. The court held that the defense of justification, fair comment and qualified privilege did not apply for Utusan in the case. There was malice on the part of the defendant as evidence showed that the reporter knew that the words reported were not true and he was reckless in his reporting. The Court of Appeal upheld a High Court decision to award plaintiff RM250 000 damages in his suit against Utusan Melayu [6]. The recent ruling of defamation case on March 2016 between Menteri Besar Pahang Adnan Yakob and Utusan Melayu has raised a new debate on the limit for criticism by the media. In this case, a defamation action was brought by Adnan Yaakob over the articles in *Mingguan Malaysia* entitled "Hebat Sangatkah Adnan" which was published on November 9, 2014. However, on March 2016 the Court of Appeal held that politicians cannot take legal action against the media for defamation suit for criticizing person in their capacity as public figures [7]. The court's opinion is that the article referred Adnan as "Menteri Besar" and not as an individual. Thus, by allowing the defamation suit to ensue, it was tantamount to curb criticism.

IV. CONCLUSION AND RECOMMENDATION

Defamatory materials published shall be subjected to defamation laws if they fulfil all of the prescribed criteria. The law of defamation contemplates the clash of two fundamental rights namely right to freedom of expression and speech and right to protect one's dignity and reputation. With the rise of social media in which defamatory materials can be easily uttered and disseminated, a delicate line need to be drawn to balance these two rights. The media has a right to publish issues of public interest but the dignity and reputation of individual need to be protected. The rise of social media encouraged the public to speak their mind freely to the extent that it might hurt the dignity of others. On the other hand, the public has the right to know issues of public concerns. Thus, the defamation law can sometimes be used to threaten and

intimidate those who disseminated statements which they believe to be true and of public importance. Undeniably, sometimes defamation law is used to suppress legitimate comment posted by some segment of public who opined that their voices are not heard. As noted, social and political disagreement is a fundamental concept in democratic and free society. Thus, the government, public figures and high-ranking officers become easy target to be scrutinized by the public. Therefore, open and honest discourse such as public forum is suggested to be organized so that the public will receive the correct information pertaining to the issues of public importance. In addition, system for communication and advance screening system should be developed and set up so that the public would be more responsible for their published statements. As noted from various decided cases, even though a person has the right of freedom of speech and expression, the dignity and reputation of the defamed person are seen to be the paramount consideration taken by the court in coming to a decision. Thus, care must be taken before a statement is published and disseminated to the public. The facts of the statement should be confirmed and verified before such statement is published. The media codes of conduct should be framed, drawn up and observed. Being aware of legal rights and the general principles of laws can assist the public to make informed choices about what need to be published and disseminated.

REFERENCES

- [1] Shuaib.F.S, "General publication, public interest and common law qualified privilege:Where is the law heading?", *Malaysian Law Journal*, 2.clxiii-clxxci,1999.
- [2] Kenyon A.T & Ang H.L, "Reynold Privilege,Common Law Defamation and Malaysia.Singapore Journal of Legal Studies", pp 256-281 2016.
- [3] Talib,N, "Law of Torts in Malaysia.(3rd ed.)" Petaling Jaya: Sweet & Maxwell Asia, 2010.
- [4] Carey.P. "Media Law. London.Sweet & MaxwellK", 1996.
- [5] Bernama, "Zahida gagal batalkan saman bekas pemandu" Utusan, retrieved from http://ww1.utusan/Mahkamah/201404417/ma_01/Zahida-gagal-batalkan-saman-bekas-pemandu, 2014.
- [6] Maizatul Nazlina, "High Court grants Utusan stay of damages over Nizar defamation case", *The Star Online*. Retrieved from <http://www.Thestar.com.my/news/nation/2013/10/30/high-court-stay-nizar-utusan/>, 2013.
- [7] Bernama, "Kes Rahim Thamby Chik didakwa siar penerbitan menghasut disebut semula" Retrieved from <http://www.astroawani.com/berita-malaysia/kes-rahim-thamby-chik-didakwa-siar-penerbitan-menghasut-disebut-semula-1-mac-88137>, 2016.