

A Comparative Legal Analysis of Online Defamation in Malaysia, Singapore and the United Kingdom¹

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ABSTRACT

The rapid development and emergence of various forms of Internet based publications, which include social networking sites (Facebook, Twitter etc), web logs (blogs), chat groups, newsgroups and many others, have revolutionized the communication and of information in this modern era. Attributed with borderless nature and geographical independence, these online platforms have enabled Internet users to easily disseminate any kinds of information and news to the public at large. This is in stark contrast with the traditional print and broadcast media whereby their reach and influence are limited by territorial boundaries and localities. Unfortunately, the ability of these online channels to have a global reach has attracted a large number of unscrupulous users to disseminate defamatory materials in the cyber world. And since cases of online defamation are reportedly on the rise in Malaysia, the study attempts to examine the effectiveness of the existing laws in regulating such a threat to the society. In relation thereof, this study will analyze the provisions of the Malaysian Defamation Act 1957 and relevant decided cases on this matter. Further, a comparative analysis with the position in Singapore and the United Kingdom will be made since Malaysia is also a Commonwealth nation and the comparative method will enable this study to explore a range of alternative approaches that can be used as a basis for law reform in Malaysia.

KEYWORDS

Cyber defamation, law, Malaysia, United Kingdom

1 INTRODUCTION

The revolutionary growth of the Internet and the incessant evolution of vast arrays of web-based publications have greatly facilitated the exercise of the fundamental right to freedom of speech and expression. Nevertheless, the comfort and convenience of accessibility and publication in the electronic environment naturally come hand in hand with a number of potential perils as ruthless Internet users could easily exploit these online platforms in the name of freedom of speech. Any kind of online materials, including hate speech and defamatory publications, can be easily created and disseminated into the public domain via numerous forms of web-based applications, most notably social networking services (SNS) such as Facebook and Twitter as well as web logs (blogs). Consequently, it is pertinent that appropriate and perhaps similar legal safeguards are put in place for online and offline speech in order to protect the interests of the public and the state.

At present, wide ranges of legal measures have been formulated and readily available to govern online expression on the Internet. These include public order laws, specific laws for targeted communications and media law (Rowbottom, 2012). In addition, laws designed to regulate harmful messages to a specific individual or set of individuals have also been applied to offensive communications on the Internet. This could be best illustrated with the Malicious Communications Act 1998 which has been employed by the police to caution a man for making a false allegation about a TV show in his blog even though the law was initially enacted to tackle the problem of poison pen

letters in offline world. Apart from that, defamatory charges and actions for misuse of private information have also been initiated against offender in the cyber world.

Any discussion on general law or specific media rules involves a vast area and it is almost next to impossible to include such discussion in this study. Accordingly, this paper will limit its scope to defamation only. This is mainly due to the fact that defamation law constitutes one of the most common permitted restrictions on the exercise of the right to freedom of speech and expression. It is therefore imperative to see how online defamatory materials are dealt with in the United Kingdom, Singapore and Malaysia. In view of this, the paper offers a brief overview of defamatory statements, the status of defamatory materials in online publication, the application of multiple and single publication rules to Internet publications and the legal position of online intermediaries.

2 OVERVIEW OF DEFAMATORY STATEMENT

The law of defamation in the UK is governed by the Defamation Act 1996 and the Defamation Act 2013. Both statutes however do not provide explicit definition of what is meant by defamatory. In the leading case of *Sim v Stretch* [1936] 2 All ER 1237 (HL), Lord Atkin proposed 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’. It has been generally accepted since then that defamation refers to ‘the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him’ (Rogers, 2010).

The same decision was later referred by Tugendhat J in *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1

WLR 1985, in which it was ruled that ‘whatever definition of “defamatory” is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims’. This requirement of ‘threshold of seriousness’ seems to be parallel with the judgment in *Jameel v Dow Jones & Co* [2005] EWCA Civ 75, [2005] QB 946, where the commission of real and substantial tort in any defamation suit is regarded as a necessary element.

The new Defamation Act 2013 has then inserted an additional prerequisite under section 1(1) which requires the claimant to prove the publication of the alleged defamatory statement has caused or is likely to cause serious harm to his reputation before a defamation action can be initiated. As for bodies trading for profit, the ‘serious harm’ condition requires them to demonstrate that they have suffered or is likely to suffer from serious financial loss due to the publication of the allegedly defamatory statement. Section 1(2) of the Defamation Act 2013 provides that ‘For the purpose of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss’. It is argued that the requirement of serious harm has raised the bar for bringing a claim in the UK, making it more difficult to commence defamation proceedings as it.

In Malaysia, the law which governed defamation is the Malaysian Defamation Act 1957. This act is in pari materia with the English Defamation Act 1952 and governs civil defamation whilst sections 499 and 500 of the Malaysian Penal Code deal with criminal libel. Similar to the UK 1996 and 2013 Acts, the statute provides no single definition of what defamation is. This resulted in the courts in the country closely following the law in the UK. Nevertheless, there is still no uniform or comprehensive definition of what constitutes defamation. A number of cases have deliberated the interpretation of the word.

In *Syed Husin Ali v Syarikat Perchetakan Utusan Melayu Bhd & Anor* (1973) 2 MLJ 56, the defamatory test has been set out by Mohd Azmi J as follows:

‘Thus, 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. Another test is: would the words tend to lower the plaintiff in the estimation of right thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crimes, dishonesty, untruthfulness, ingratitude or cruelty.’

The subsequent case of *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors*, [1996] 1 MLJ 393 has concluded that the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, even though nobody believes in the truth of the statement. It was highlighted by Richard Malanjum J that:

‘As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right – thinking members of society generally.’

The issue has also been discussed by the Court of Appeal in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1991] 1 MLJ 37. In this case, Gopal Sri Ram JCA observed that:

‘In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative

response, then the words complained of are defamatory.’

And in *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor* [2002] 4 MLJ 371, it was highlighted by Kamalanathan Ratnam J that ‘as to whether the said meaning is defamatory, the test is to see if such words tend to make reasonable people think the worse of the plaintiff or whether such words would cause him to be shunned or avoided’.

In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492, the same judicial interpretations have been considered and Harmindar Singh JC accordingly observed 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.’

As to the requirement of ‘threshold of seriousness’ which was established in *Jameel v Dow Jones & Co* and is now incorporated in the UK Defamation Act 2013, the same requirement has yet to be required by the courts in Malaysia. In the absence of any reported decisions and express statutory provisions, the publication of any statement will be regarded as defamatory under the Malaysian law if such statement conforms to the criteria laid down by the courts. Thus, if an imputation exposes a person to hatred, contempt or ridicule, or tends 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. Therefore, it is submitted that a distinction should be made between the current position in the UK and Malaysia as to what constitutes defamation as the Malaysian

law does not require a serious harm threshold to be proved before the plaintiff can initiate defamation proceedings against the defendant.

3 LIBEL OR SLANDER

In both UK and Malaysia, a defamatory statement may either be a libel or slander. Generally, a libellous statement refers to defamation published in permanent form, whilst oral defamation or defamation published in transient form constitutes slanderous statement. Hence, the central distinction lies in the form of publication, either it is permanent (written or printed words) or transient (spoken words and gestures).

Apart from that, libel is actionable per se as damage is presumed and need not be proved whilst in an action for slander, the claimant needs to prove that some special damage (loss capable of assessment in monetary terms) has been suffered as a result of the slanderous statement (unless it falls within specified exceptions) (Milmo, Rogers and Gatley, 2008). Further, libellous statement has a greater capacity to cause harm and its damages could be much higher than slander (Ali Saeh, 2012). Therefore, it is important to classify defamatory publications as libel or slander as both give rise to different legal consequences.

Nonetheless, with the convergence of telecommunications, broadcasting and information technology industries and the rapid development of numerous forms of Internet based publications such as social networking sites like Facebook or Twitter, video sharing sites, blogs and many others, it is becoming more and more difficult to differentiate between the two. Thus, in order to determine the status of defamatory content published on the Internet-based platforms, reference must be made to the existing statutory provisions and relevant decided cases particularly blog postings under the law in the UK and Malaysia.

Section 166(1) of the Broadcasting Act 1990 treated broadcasting by radio and television as libel. The section provides that:

‘For the purposes of the law of libel and slander (including the law of criminal libel so far as it relates to the publication of defamatory matter) the publication of words in the course of any programme included in a programme service shall be treated as publication in permanent form.’

This Broadcasting Act 1990 is applicable to the whole of UK, except on the distinction between libel and slander in section 166(1), which is only applicable to England, Wales and Northern Island but not Scotland as all forms of defamation are actionable in Scots law without proof of special damage.

Nonetheless, the courts in the UK have yet to judicially scrutinise the application of this provision to online content. Materials transmitted via the Internet could be rendered as publications in permanent form and consequently constitute libel if such publications fall within the coverage of the phrase ‘publication of words in the course of any programme included in a programme service’. The word ‘programme’ has been defined in Section 202(1) of the Broadcasting Act 1990 as ‘an advertisement and, in relation to any service, includes any item included in that service’. Further, section 201(1) provides that the term ‘programme service’ refers to:

‘[A]ny of the following services (whether or not it is, or it requires to be, licensed under this Act), namely—

(aa) any service which is a programme service within the meaning of the Communications Act 2003;

(c) any other service which consists in the sending, by means of an electronic communications network (within the meaning of the Communications Act 2003), of sounds or visual images or both either –

- (i) for reception at two or more places in the United Kingdom (whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service); or
- (ii) for reception at a place in the United Kingdom for the purpose of being presented there to members of the public or to any group of persons.'

It is aptly clear from the aforesaid provisions that Internet publications such as blogs, Wiki, YouTube, Podcast and many others are most likely to be included within the statutory interpretations of the phrase 'programme services' in section 201(1) (c), and these transmitted materials either in the form of text, image, audio or video are to fall within the meaning of 'programme' in section 202(1) of the Broadcasting Act 1990. Thus, it is more likely that libel, rather than slander, is the dominant tort in the context of Internet-based publications.

On the contrary, it may be argued that Internet content would not fulfil the statutory requirement of 'sending' in section 201(1)(c) on the ground that such content is not actually being 'sent' but 'pulled' on demand by Internet users. However, section 201(1)(c)(i) which expressly states that 'whether they are so sent for simultaneous reception or at different times in response to request made by different users of the service' makes this argument difficult to sustain. Therefore, defamatory materials published via a wide range of Internet publications including blogs (either text-based blogs or video blogs) will be deemed as publications in permanent form and constitute libel under section 166(1) of the Defamation Act 1996.

It has been suggested by Reynolds (2007) that court should treat online defamatory materials, especially postings in blogs as slander rather than libel regardless of the conflicting argument on the application of the aforesaid provisions.

Blog entries have been said to have more in common with the spoken words than newspaper publications. This is because they exist in a 'low-trust culture' and are unlikely to be viewed as authoritative. Aside from that, errors in blog entries can be corrected within minutes, and those who have been defamed by blogs have a greater ability to reply to such accusations. Nonetheless, Ciolli (2006) criticised this assertion as wanting to represent the entire blogosphere and is unfounded. The important role of search engines in establishing authority and the devastating impact of defamatory posts on blogs which are frequently linked with traditional websites, discussion boards and other blogs have not been taken into account. Further, it has been observed that not all bloggers are active in correcting errors and the victims may also not be immediately aware of the defamatory posts after they have been published in the electronic environment. As a consequence, it is submitted that we should preserve the status quo of defamatory statement in blogs as libel.

Apart from that, cases involving defamatory posts by bloggers in the UK have also been commenced and tried under the law of libel rather than slander. Consequently, there is little doubt that entries by bloggers are not to be regarded as libel. Nevertheless, even though defamatory words which are written in a permanent form are almost certainly libel in technical sense, there is still uncertainty with regard to comments by blog readers. This is due to the rulings in *Smith v ADVFN Plc* [2008] EWHC 1797 (QB), 2008 WL 2872559 whereby the court ruled that it is more susceptible to equate bulletin board exchanges on the Internet with slander. Eady J observed that such comments resemble:

'[C]ontributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate

know this and expect a certain amount of repartee or 'give and take'.

Further, statements in bulletin boards were not meant to be taken seriously as 'it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment'. This ruling appears to be a bold departure from the earlier decision in *Godfrey v Demon Internet Ltd* [2001] QB 201, [2000] 3 WLR 1020 which ruled that defamatory articles posted on the Usenet as libel.

Sharp J in *Clift v Clarke* [2011] EWHC 1164 (QB), 2011 WL 441883 has subsequently quoted with approval the judgment by Eady J, when the court refused to grant an order for the disclosure of the identity of the persons who made comments on the Daily Mail website on the ground that such comments were mere 'pub talk' and it would be 'fanciful to suggest any reasonable sensible reader would construe them in any other way'. In relation to this, it is submitted that comments on blogs should be regarded as slander since it could be equated as 'pub talk' that are expressed in 'the heat of the moment'. Nonetheless, certain blog comments could not be regarded as slander because these statements are actionable per se under the law, particularly the ones imputing that a person has committed a criminal offence, or is suffering from a disease, or disparaging remarks on his professional or business reputation and statements relating to a woman's chastity (Milmo, Rogers and Gatley, 2008). To sum up, it is submitted that it is more likely to treat blog comments in general as slander, but comments by third parties on certain issues as mentioned above will be treated differently since they appear to be in the same legal position with defamatory entries by blog authors or editors.

As to the publication of defamatory content in Malaysia, it is provided in section 3 of the Malaysian Defamation Act 1957 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'. Section 13 (1) also plainly stated that reports or matters broadcast by radio are regarded as equal to publications in newspapers. Since legal suits relating to defamatory materials broadcast on television stations have been judicially tried and decided under the libel law, these provisions have been extended to cover publications on televisions as well. Among notable cases on these are *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. Therefore, it is an established principle in Malaysia that publications in printed materials and broadcasting through radio or television constitute libel rather than slander.

With regard to defamatory statements published on various types of Internet-based platforms including blogs, such materials will be subjected to libel law if they fall within the scope of 'the broadcasting of words by means of radio communication'. The term 'word' is defined in section 2 of the Malaysian Defamation Act 1957 to include 'pictures, visual images, gestures and other methods of signifying meaning'. Whilst the phrase 'broadcasting by means of radio communication' is provided in the same section as:

'Publication for general reception by means of a radio communication within the meaning of the Telecommunications Act 1950, and includes the transmission simultaneously by telecommunication line in accordance with a licence granted in that behalf under the Telecommunications Act of words broadcast by means of radio communication.'

By way of analogy with broadcast publications, it is to be expected that defamatory materials published via Internet platforms to be regarded

as libel since online content is also transmitted via telecommunication lines and is normally composed of a varied combination of written texts, visual images and sounds. The uncertainty of the issue is now resolved when cases involving defamation suits against bloggers have been tried and decided according to the law of libel, namely the cases of *The New Straits Times Press (M) Bhd & Ors v Ahirudin bin Attan* [2008] 1 MLJ 814, *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807, and *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301. Thus, it is an established principle that publication of defamatory statements in blogs and other online communications would be regarded as libel and such publication shall not be treated differently from printed materials and broadcasting through radio or television under the Malaysian Defamation Act 1957. The status of defamatory blog comments however appears to have attracted comparatively little attention of the judges. In the absence of reported cases and by applying the provisions of the Malaysian Defamation Act 1957, it is very much unlikely that courts in the country will make a distinction between defamatory postings by bloggers and defamatory comments by blog readers. Thus, Malaysian law will generally consider any publication of defamatory materials in the blogosphere as libel and not slander.

4 MULTIPLE AND SINGLE PUBLICATION RULE

Publication is the fundamental basis of defamation liability as no action can be maintained unless it can be shown that the allegedly defamatory materials have been published to a person other than the claimant or their spouse. In *Pullman v W. Hill & Co Ltd* [1891] 1 QB 524 at 527, publication has been defined by Lord Esher MR as ‘The making known of defamatory matter after it has been written to some person other than the person to whom it is written’. In *Wennhak v Morgan*

(1880) 20 QBD 637, another very old case, the court ruled that where the communication was made to the spouse of the defendant, there will be no publication.

Lord Esher MR highlighted this again in *Hebditch v MacIlwaine* [1894] 2 QB 54 that ‘The material part of the cause of action in libel is not the writing, but the publication of the libel’. Thus, publication is the gist of defamation, except for Scotland because defamation under the Scots Law is regarded as an injury to a person’s feelings and reputation.

Unfortunately, the fact that most of online content may remain accessible on the Internet for long periods or even for an indefinite period after it was first published has created a major issue for publishers and authors of online defamatory materials. Furthermore, publication of defamatory words on the Internet may occur in more than one place and the defamatory materials are potentially accessible anywhere in the world. This is by virtue of the multiple publication rule, which derived its origin in the case of *Duke of Brunswick v Harma* (1849) 14 QB 185, which held that each communication of the defamatory statement constitutes a separate publication and gives rise to a distinct cause of action. Hence, this could result in endless liability for publishers and authors of online defamatory statement since the statement is considered to have been published at the time when, and in the place where, it is received or accessed from the Internet.

The case of *Loutchansky v Times Newspapers Ltd (Nos 2 – 5)* [2001] EWCA Civ 1805 [2002] QB 78 invoked some arguments criticising the incongruity of the multiple publication rule with online publication. In this case, the claimant brought defamation suit against the defendants for articles that were published in a newspaper and online. After more than a year from the date of original publication, the plaintiff sued one of the defendants in respect of the same articles stored in the online archive.

The defendant argued that the publication of the articles should be deemed to take place just once when they were placed on the website for the first time and that a different rule (the single publication rule) should be rightly adapted to online materials. The Court of Appeal disagreed with the contention and ruled that 'It is a well-established principle of the English law of defamation that each individual publication of a libel gives rise to a separate cause of action, subject to its own limitation period'. For that reason, it was held that a fresh publication and a separate cause of action are constituted each time the articles were accessed.

The claimant argued that the Court of Appeal's judgment constituted an unjustifiable and disproportionate interference with its right to freedom of expression as it was exposed to ceaseless liability for libel, and brought an action against the UK in the ECtHR. Unfortunately, the Strasbourg court rejected the contention as it ruled that it was not necessary to consider the point in the circumstances of the case. Thus, the issue of 'ceaseless liability' has not been addressed by the ECtHR. In relation to this, it is suggested that the publishers are obliged to remove or attach qualifications to the alleged defamatory materials in order to avoid being exposed to the risk of liability in the future (Collins, 2010).

The incorporation of the single publication rule into the Defamation Act 2013 to replace the problematic multiple publication rule finally brought the enduring concern to an end. Nevertheless, the single publication rule was initially subjected to numerous criticisms as it was claimed that the rule was unsatisfactorily drafted (Grace, 2012).

Section 8(1)(3) of the Defamation Act 2013 stipulates that the first publication of the defamatory material to the public (including a section of the public) triggers the one year limitation period within which the claimant

must initiate his claim. This has made the single publication rule very crucial for online content, in particular Internet archives. By applying this rule, it can also effectively prevent an indefinite defamation action against the same person for publishing the same defamatory materials on the Internet. However, the single publication rule does not apply to subsequent publication which is 'materially different' from the manner of the first publication. The court may have regard to the level of prominence given to the statement and the extent of subsequent publication in deciding the issue.

Apart from that, the single publication rule also does not apply to second persons or third parties who repeat or republish the defamatory content as they are not the same person who published the first statement. Each republication or repetition of such materials is considered a fresh publication and will give rise to a distinct cause of action at common law (Akdenis and Rogers, 2000). As regard to the liability of the original author or publisher for the repetition of the disputed statements, it will thus depend on whether the republication is reasonably foreseeable (Rogers, 2010). The judgment in *Slipper v British Broadcasting Corp* [1991] 1 QB 283 discussed on the potential application of this principle to the Internet materials. In this case, the plaintiff claimed that he was defamed in a film by the defendants. The film was reviewed in national newspapers a few days after it was broadcast, and the plaintiff alleged that the reviews repeated the sting of defamatory references to him in the film. The issue to be determined by the court was whether the defendants could be held liable for the republication of the defamatory words in the subsequent reviews. The Court of Appeal held that the jury would be entitled to conclude that the defendants anticipated that there would be reviews and that the reviews would repeat the sting.

Another case which also considered republication of defamatory content on the

Internet was *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301. The plaintiff, an opposition MP for Shah Alam, sued the defendants (chief editor and a national daily newspaper) for libels arising out of their republication of an article defamatory of him which originally appeared on the official blog of another MP. The issue was whether the defendants could be held liable for an article which was already posted by another MP on his blog. The court found the defendants liable for defamation as they made no attempts to verify the veracity of the article and they failed to publish any disclaimer indicating that the views expressed in the article were those of the MP and not of the defendants.

5 ONLINE INTERMEDIARY LIABILITY

Online intermediaries generally perform one of the three important functions, namely as mere conduits, caches or hosts of information on the Internet. They have been categorically classified into connectivity intermediaries such as Internet service providers (ISPs), navigation intermediaries such as Google and commercial and social networking providers and other hosts such as Wikipedia, Facebook, Twitter, blogs and many others (Kohl, 2012). The intermediaries, including content hosts such as blogs, are easier to trace and become a target in legal proceedings since they are the gatekeepers over materials on the Internet. Further, most intermediaries also have deeper pocket and are more capable paying damages than individuals in defamation actions.

Under Section 10 (1) of the Defamation Act 2013, the liability of intermediaries for content created by others depends on their status. The section clearly states that a court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author,

editor or publisher. It is clear from the provision that defamation action shall be limited against those who are not the primary author, editor or publisher of the complained words. The terms ‘author’, ‘editor’ and ‘publisher’ carry the same meaning as the ones defined in Section 1 of the Defamation Act 1996. Clause (2) of the section defines ‘Author’ as ‘originator of the statement, but does not include a person who did not intend that his statement be published at all’; ‘editor’ as ‘a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it’; and ‘publisher’ refers to ‘a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.’

The orthodox approach prior to the coming into force of the Defamation Act 2013 was to treat online intermediaries as publishers at common law regardless of whether they have actual knowledge of the content or not. Their liability will turn on whether they manage to establish a defence to the defamation action or not. The case of *Bunt v Tilley* [2006] EWHC 407 (QB), [2007] 1 WLR 1233 however has established a bold departure from this old approach, where it was ruled by Eady J that ‘as a matter of law that an ISP which performs no more than a passive role in facilitating postings on the Internet cannot be deemed to be a publisher at common law’. Thus, it can be concluded that actual knowledge on the part of online intermediaries are required before any liability could be imposed against them for publishing defamatory materials. The principle has been applied in subsequent number of cases including the recent case of *Tamiz v Google Inc* [2013] EWCA Civ 68 (CA), [2013] WL 425761. In this case, the respondent (Google Inc.) was sued for providing Blogger.com, a blogger platform which had been used by one blogger to post defamatory comments of the appellant which was removed by the respondent

three days after it was notified by the appellant. Richard LJ observed that there was an arguable case that the respondent was a publisher after notification. Since the respondent allowed the defamatory postings to remain, 'it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of the material.' The appeal was however dismissed since the court decided that any damage to the appellant's reputation after notification by the appellant but before removal is only trivial.

As to the liability of blog owners for defamatory comments by third parties, Section 10 of the Defamation Act 2013 clearly stipulates that even though bloggers are not the author of such statement, they could still be held liable in defamation if it could be shown that they are to be regarded as editor or publisher of the disputed words. This can be seen in the case of *Kaschke v Gray* [2010] EWHC 690 (QB), 2010 WLR 903089, where the plaintiff brought libel action against the author of defamatory comments on *Labourhome* blog (the first defendant) and the blogger who had set up the blog (the second defendant). The second defendant applied to strike out the suit as he argued that he did not participate in the publication of the postings. The court granted the second defendant's application as an abuse of process. The decision of the case failed to establish a definite principle on the liability of bloggers for defamatory third party postings since it is still arguable that bloggers could be held liable for comments posted on their websites (Tumbridge, 2011). As such, it has been suggested that bloggers may avoid any liability by being wary of comments and remove them if they are advised that the comments are defamatory, or turning off the commentary section in blogs altogether (Tumbridge, 2009).

It is submitted that the uncertainty regarding the liability of bloggers for third party comments is now resolved with the enactment of the

Defamation Act 2013. By virtue of Section 10, and based on the interpretation in Section 1 of the Defamation Act 1996, it is unlikely that bloggers will be treated as the author or publisher of the third party content. However, they may still be liable if they exercise editorial control over blog reader's comments. Therefore, it is suggested that in order to escape liability, bloggers must not moderate any posting by third parties. Alternatively, they may moderate third party statements on their blogs but once they are notified of any existence of defamatory content, they must immediately remove it.

As to the position in Malaysia, the case of *Kho Whai Phaiaw v Chong Chieng Jen* [2009] 4 MLJ 103 discussed the liability of bloggers for third party content. In this case, the petitioner presented a petition to the Election Court to declare the respondent's victory in the Parliamentary election as void for undue influence. The respondent was claimed to have exerted undue influence by publishing or allowing to be published on his blog, Chong Chieng Jen's Blog, an article written by Mr Smith which was said to contain threatening statements towards the voters. It was alleged by the petitioner that the since respondent has absolute control over his blog entries including the act of hiding, editing and deleting postings, or limiting the type of visitors who could add postings or comments on his blog and moderate those comments, the respondent should be regarded as publisher of all information on his blog, including Mr Smith's article. The fact that Mr Smith's article was written and posted by third parties does not make any difference as the act of publication could not have taken place without the respondent's consent or knowledge. Nonetheless, it was ruled by the court that the respondent could not be regarded as the publisher of Mr Smith's article since there was no sufficient evidence to prove that Mr Smith's article was posted on the respondent's blog with his knowledge or consent.

This case clearly showed that in the absence of any knowledge or consent on the part of bloggers, they are not to be treated as publishers of the third party content. This is because blogs or other Internet communications should be distinguished from the traditional print media as the online materials are generally not subjected to supervision or moderation prior to their publication. (Muneeza, 2010). In relation to this, Clement Skinner J observed in the case that the duty to establish the element of knowledge should fall on the person who wishes the court to believe in its existence, i.e. the petitioner.

Nevertheless, it should be noted that there is an insertion of a new section 114A to the Malaysian Evidence Act 1950 which came into force on 31st July 2012. The amendment has rendered all persons who act as owners, hosts, administrators, editors or sub-editors, or who facilitate to publish or re-publish any publication to be presumed as publishers under the law unless otherwise stated (Peters, 2012). This latest development appears to make all bloggers or other operators of Internet communications as publishers and consequently liable for any online materials posted on their websites, including the third party content, thus the element of knowledge shall no longer be considered. However, it would be premature to say that blog owners are strictly liable for any defamatory entries by third party since there is yet any reported case on the application of this new amendment.

The position in Singapore is quite different compared to UK and Malaysia as Singapore is one of the few jurisdictions, aside from US, to have adopted a code of practice i.e. the Singapore Internet Code of Practice relating to liability of online intermediaries. There is a compulsory registration scheme for ISPs or online intermediaries under the Singapore Broadcasting Authority (Class License) Notification 1996. Authority is also given to the

Media Development Authority to issue the Industry Internet Guidelines and Code of Practice. In Singapore, there is a limited immunity provision, where a general immunity is only provided for packet transmission and caching, but not for hosting. Section 10 (3) of the Electronic Transactions Act 1998 states: ‘...the provision of the necessary technical means by which third-party material may be accessed and includes the automatic and temporary storage of the third-party material for the purpose of providing access.’ This does not include hosting, which involves more permanent storage. Therefore the liability of online intermediaries is that of the general law, which is common law based. They are regarded as publishers, and seen as the equivalent of newspapers, rather than libraries or postal services (Todd, 2007).

The code of practice in Singapore does not protect the online intermediaries that much, as paragraph 3(1) until (3) of the code provide that an ISP who follows the code incurs no liability under the code, but is not immune from liability under the general law. There should be a clear code which requires ISPs to be responsible, but at the same time will not subject them to liability if they follow the code. No country in the world has yet to adopt this position.

6 CONCLUSION

Publication of defamatory content on any types of Internet based publications shall be subjected to defamation laws if such content fulfil all of the prescribed requirements. In general, libel law will govern any defamatory materials posted on web-based publications as they are considered to be publication in permanent form. On the other hand, defamatory comments or remarks by online readers in relation to the original publications in the UK are treated as communication in transient form and thus a slander, whilst the Malaysian law does not distinguish between comments and original

postings. Despite the difference between the position in the UK and Malaysia, online defamatory content is normally accessible for an indefinite period of time and can be easily repeated or republished in the cyber world. Nonetheless, Internet users in the UK are no longer exposed to indeterminate liability as the Defamation Act 2013 has introduced single publication rule which renders their liability to expire after one year the statement was first published. This reflects the adoption of the single publication rule by the Defamation Act 2013. On the contrary, the multiple publication rule still applies in Malaysia and as such, any online defamatory content in web-based publications is gravely exposed to unlimited liability. Pertaining to the liability of online intermediaries, it can be said that the situation in UK and Malaysia is more similar where both countries stress on the element of actual knowledge on part of the online intermediaries before holding them liable for defamation. The situation in Malaysia however has slightly changed with the serious implication of the newly inserted section 114A of the Malaysian Law of Evidence 1950. It is submitted that the use of codes of practice as has been practiced in Singapore may be considered so as to provide protection to the online intermediaries. A good code of practice should be very clear and include a procedure for dispute resolution. It is suggested that an online intermediary which follows the code of practice ought to be exempted from liability and should not be exposed to the general law.

Despite the fact that the Malaysian Defamation Act 1957 existed long before the internet was created, it is still applicable to govern the law on cyber defamation. Nonetheless, the complexity of online defamatory materials must be taken into account and any restrictions must be clearly set out in laws, be based on compelling grounds, be proportionate and necessary. Thus there is a pressing need for new amendments to be made to the Malaysian Defamation Act 1957, especially with regard to

the publication rule and protection available to the online intermediaries, as what has been adopted in the UK and Singapore.

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