

Jurisdiction: MALAYSIA
IN THE HIGH COURT IN SABAH & SARAWAK
AT KOTA KINABALU

Parties: Plaintiff : Salleh Berindi Bin Hj Othman
Defendant: Ruslili Nurzahara Hassan

File Number: BKI-23-1/6-2012

Issues:

1. Whether the plaintiff's claim is time barred under the Limitation Ordinance;
2. If the answer to the above is negative, whether the three photographs are defamatory of the plaintiff; and
3. If the photographs are defamatory in the way as claimed by the plaintiff, whether they are true in substance and in fact (a defence of justification).

Hearing Dates: 19 – 20 November 2012

Date of Decision: 25 March 2013

Judge: HONOURABLE JUSTICE DATUK DAVID WONG
DAK WAH

Representation: For Plaintiff: Salleh Berindi bin Hj Othman
(In person)

For Defendant : Mr. Rizwan Borhan
Messrs Yusri & Rizwan
Kota Kinabalu, Sabah

JUDGMENT

Proceeding:

3 The Plaintiff's claim is for the sum of RM1,000,000.00 being damages resulting
from publication of three photos of the plaintiff on the defendant's facebook
page on 16 November 2009, which publication is alleged to be defamatory of
6 the Plaintiff.

The Defendant denies liability on the ground that the publication of the three
photos was not defamatory, even if defamatory it was true and in any event the
9 claim is statute barred.

Background Facts:

Both Plaintiff and the Defendant are schoolteachers and colleagues at a school
12 called SMK Pulau Gaya, Kota Kinabalu from the period of 2009 to 16 May
2011.

The Defendant like many in this world has a facebook account where people
15 upload their activities in the form of photos and writing to keep friends (or to
the whole world depends on the privacy setting) updated of their minute to
minute account of their status. There is little doubt this medium of social media

18 is not only fashionable but a very much part of life for some and also an
efficient and powerful way in spreading news of any nature.

The Defendant on 16 November 2009 uploaded about 100 photographs on her
21 facebook page which in essence are photos of the activities of herself and her
family at the school sports day, UMS family day and school dinners. Among
the 100 photographs, there were three photographs of the Plaintiff sleeping on a
24 sofa in the teacher's room at SMK Pulau Gaya. Those three photos were
discovered by PW2 who is a friend of the Plaintiff on 30 May 2012 and
informed to the Plaintiff.

27 It is now alleged by the Plaintiff in his statement of claim that the three photos
are defamatory and in their natural or ordinary meaning show that:

- (i) The Plaintiff was sleeping in the teacher's room;
- 30 (ii) The Plaintiff was not a responsible teacher;
- (iii) The Plaintiff was a lazy teacher and always ignore his duty as a
teacher;
- 33 (iv) That the Plaintiff was an immoral teacher; and
- (v) The Plaintiff was a teacher that did not know how to respect other
teachers.

36 **Issues:**

Having heard the evidence and submissions from counsel, I agree with learned
counsel for the Defendant that there are in essence three issues which are as

39 follows:

- (a) Whether the plaintiff's claim is time barred under the Limitation Ordinance;
- 42 (b) If the answer to the above is negative, whether the three photographs are defamatory of the plaintiff; and
- (c) If the photographs are defamatory in the way as claimed by the
45 plaintiff, whether they are true in substance and in fact (a defence of justification).

Before I deal with the issues, let me state that there are four basic elements of
48 defamation that must usually be shown:

1. The statement must be "published" — meaning that someone else has heard or seen it, whether through printing, speaking, gesturing, or some
51 other method;
2. It must be false, not an opinion or a fact;

3. The statement must be injurious, meaning that it causes damage to the
54 person's reputation;

4. It must not be privileged, or published in a situation that has specific
protections.

57 **Issue 1:**

**Whether the plaintiff's claim is time barred under the Limitation
Ordinance?**

60 The publication of the three photos on the facebook (which is on the internet) is
libellous defamation as it is a form of a publication which is permanent in
nature. This publication by the Defendant is not disputed by her. Hence the
63 relevant item in the Limitation Ordinance (Sabah Cap 72) is Item 11 which
provides that the limitation period for libel is one year commencing from the
date of publication of the libel.

66 Learned counsel for the Defendant submits that the Plaintiff's claim is time
barred in view of the fact the publication of the alleged defamation was done on
16 November 2009 (date of uploading) and this suit was commenced in 2012
69 which is well outside the one year limitation period.

The Defendant in rebuttal however submits that the commencement date is 30
May 2012 which is the date PW2 saw the photos on the Defendant's facebook
72 page.

What amounts to publication is stated by the Supreme Court in *S. Pakianathan v
Jenni Ibrahim* [1988] 2 MLJ 173 as follows:

75 *“In order to constitute publication, the defamatory matter must be published to a
third party, and not simply to the Plaintiff. By publication is meant by making known
of the defamatory matter, after it has been written, to some other person other than
78 the person of whom it is written. The uttering of a libel to the party libelled is no
publication for the purposes of a civil action; Wennhak v Morgan.”*

81 When their Lordships expounded that principle of law, the world then had no
facebook as we know it now. Hence in applying the aforesaid principle, that
non existence must be kept at the forefront of my mind.

84 Facebook is a social network within the larger world of social media which
started as a site where college students could network online and share photos.
Facebook has now grown in popularity and now being used by billion of people
87 and commercial entities around the world. Facebook accounts can be private or
open. Private facebook account means that only people authorised by the
account holder can access the contents of that facebook account. And when a
90 facebook account is open, anyone in the ‘World Wide Web’ can access it.

The submission of the learned counsel for the Defendant is premised the single publication rule as applied in *Firth v State of New York* 775 NE 2d 463 (Ct App 93 2002) where the New York Court of Appeals decided that the one-year statute of limitation in New York runs from the first posting of defamatory matter upon an Internet site and that the single publication rule applies to that first posting.

96 The Australia High Court refused to adopt the single publication rule in *Dow Jones & Co v Gutnick*, 210 CLR 575 and the reasons are set out by their Honours as this:

99 *"But it is a tort concerned with damage to reputation and it is that damage which
founds the cause of action. Perhaps, as Pollock said in 1887(The Law of Torts (1887)
102 at page 210), the law went "wrong from the beginning in making the damage and not
the insult the cause of action" for slander but it is now too late to deny that damage by
publication is the focus of the law. "It is the publication, not the composition of a
libel, which is the actionable wrong." (Lee v Wilson & Mackinnon (1934) 51 CLR 276
105 at 287 per Dixon J)*

*Harm to reputation is done when a defamatory publication is comprehended by the
reader, the listener, or the observer. Until then, no harm is done by it. This being so
108 it would be wrong to treat publication as if it were a unilateral act on the part of the
publisher alone. It is not. It is a bilateral act – in which the publisher makes it
available and a third party has it available for his or her comprehension.*

111 *The bilateral nature of publication underpins the long-established common law rule
that every communication of defamatory matter founds a separate cause of action (
Duke of Brunswick v Harmer (1849) 14 QB 185 [117 ER 75]; McLean v David Syme
114 & Co Ltd (1970) 72 SR (NSW) 513 at 519-520, 528.). That rule has found reflection
from time to time in various ways in State legislation and it would be a large step now
to depart from it.....*

117 *In the case of material on the World Wide Web, it is not available in comprehensible*
form until downloaded on to the computer of a person who has used a web browser to
pull the material from the web server. It is where that person downloads the material
120 *that the damage to reputation may be done. Ordinarily then, that will be the place*
where the tort of defamation is committed.”

123 Having evaluated the rationale in both jurisdictions, I concur to the High Court
of Australia. In the case at hand the Defendant had a private account and until
such time PW2 accessed the three photos it is my view that there was no
126 ‘publication to a third party’ as required by law. Hence in my view the date on
which the limitation starts to run is 30 May 2012.

As such my answer to this issue is in the negative.

129 **Issue 2:**

Whether the three photographs are defamatory of the plaintiff?

Gatley on *Libel and Slander 9th edition 1998* at pg. 7 describes defamation as
132 follows:-

135 *“What is defamatory? There is no wholly satisfactory definition of a defamatory*
imputation. Three formulaes have been particularly influential: (1) Would the
imputation tend to “lower the plaintiff in the estimation of right thinking members of
society generally”?; (2) *Would the imputation tend to cause others to shun or avoid*
the plaintiff?; and (3) Would the words tend to expose the plaintiff to “hatred,
138 *contempt or ridicule”?*

Malanjum J (as he then was) in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd* [1996] 1 MLJ 393 had this to say:-

141 “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
144 mind of a reasonable man or would tend to lower the plaintiff in the estimation of
 right thinking members of society generally (see *JB Jeyaratnam. Mohamed Azmi J*
 (as he then was) in *Syed Husin Ali v Sharikat Perchetakan Utusan Melayu Bhd &*
147 *Anor* [1973] 2 MLJ 56 at p 58 said:

 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
150 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
153 plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.”

The three photographs as seen with the naked eye clearly show that the Plaintiff
156 was indeed sleeping and not as suggested by the Plaintiff in cross examination
 that he was not sleeping.

Not without significance there is no comment attached on the photos, comments
159 like sleeping on the job or such similar comments. It is undisputed that the
 Plaintiff was sleeping in the teachers' staff room and giving it their natural and
 ordinary meaning, it is my view that the three photographs do not have
162 meanings ascribed to them by the Plaintiff is his statement of claim.

The three photos show the Plaintiff sleeping in the staff's room, no more no
less. That being the case, the publication of them in my view cannot be of a
165 defamatory nature.

As for the allegation of malice, I agree with learned counsel for the Defendant
that there is no proof of it as the photos were not uploaded by themselves but
168 together with 100 other photos and she had forgotten about them until she was
sued.

Issue 3:

171 **If the photographs are defamatory in the way as claimed by the Plaintiff,
whether they are true in substance and in fact (a defence of justification)?**

In view of my answer to Issue 2, it is not necessary for me to answer this issue
174 but in the event that I may be wrong and for completeness I will do so.

Section 8 of the Defamation Act 1957 gives a complete defence if defamatory
publication is proven to be true or published with justification. It states as
177 follows:-

180 *“8. In an action for libel or slander in respect of words containing two or more distinct
charges against the plaintiff, a defence of justification shall not fail by reason only that
the truth of every charge is not proved if the words not proved to be true do not
materially injure the plaintiff's reputation having regard to the truth of the remaining
charges.”*

183 The Defendant's particulars of justification are set out at paragraph 15 to 15.14
of her defence as follows:-

186 15. Further and/or in the alternative if Photo 1, 2 and 3 are understood to mean
as set out under paragraphs 8(i), (ii), (iii), (iv) and (v) of the Statement of
Claim, they are true in substance and in fact and are governed by Section 8 of
the Defamation Act 1957.

189 PARTICULARS OF JUSTIFICATION

192 15.1 When Photo 1, 2 and 3 were taken the Plaintiff was sleeping on a sofa in the
teacher's room of SMK Pulau Gaya during school hours in the presence of
many other teachers;

15.2 The Plaintiff had often slept on the sofa in the teacher's room during school
hours in the presence of other teachers;

195 15.3 It was not normal for a teacher at SMK Pulau Gaya to lie down and sleep on
the sofa (in the manner depicted in Photo 1, 2 and 3) in the teacher's room
during school hours;

198 15.4 Other teachers at SMK Pulau Gaya had never lie down and slept on the sofa
(in the manner depicted in Photo 1, 2 and 3) in the teacher's room during
school hours;

201 15.5 The Plaintiff's habit of lying and sleeping on the sofa during school hours was
irresponsible and disrespectful to other teachers of SMK Pulau Gaya;

204 15.6 The Plaintiff had also been known and seen by other teachers sleeping on a
bench at the jetty of Pulau Gaya, the school mosque ("surau") and
counselling room;

207 15.7 It was common knowledge among the other teachers at SMK Pulau Gaya that
the Plaintiff often sleep during school hours;

210 15.8 It was also common knowledge among the teachers at SMK Pulau Gaya that
there have been a few instances where the Plaintiff had been absent from his
classes;

- 213 15.9 *There was one instance where the Headmaster and the clerk of SMK Pulau
Gaya went to the school surau and woke up the Plaintiff from sleep because he
was missing from class;*
- 216 15.10 *The Plaintiff has also been advised, reprimanded and warned by the
headmaster with regards to his behaviour in the presence of the chief clerk of
the school and other teachers;*
- 219 15.11 *There have been instances where the Plaintiff did not teach in his class but
instead asked the male students to massage his shoulders during classes;*
- 222 15.12 *There have been an instance in which the Plaintiff had entered examination
marks in the school system without first marking the examination papers;*
- 225 15.13 *There was an instance where the Plaintiff had taken a knife from the canteen
and placed it on the table in the teacher's room to intimidate the Defendant
and other teachers after he had become angry at the school assembly in the
morning;*
- 225 15.14 *The Plaintiff had ignored his duties as a teacher as shown in the above.*

As stated earlier in my judgment, in my view there is no doubt that the Plaintiff
228 was in fact sleeping as shown in the three photographs. As pointed by the
learned counsel for the Defendant there is no evidence that the three
photographs had been 'doctored, superimposed or manipulated' in any manner.
231 To say that it was not the Plaintiff in the three photographs is saying that the sun
sets in the East rather the West.

As for the contention that the Plaintiff had been defamed as alleged by him, I
234 also find that what the Defendant said in her testimony about the Plaintiff
habitually sleeping on the job is true. I find her evidence to be truthful as she
was not only articulate in the witness box but her demeanour is not one who is

237 not telling the truth or exaggerating the fact. My conclusion is fortified by the
evidence of DW1 (Susan Agatha) and DW2 (Ayob Abdul Hamid), both of
whom are teachers at SMK Pulau Gaya. The evidence of these two witnesses is
240 simply that they had both seen the plaintiff sleeping in the counselling room,
school mosque and the laboratory and that the Plaintiff has an unfortunate
reputation of sleeping habitually in the school. In accepting their evidence I am
243 mindful of the task of ensuring these two witnesses are not bias towards against
the Plaintiff or for the Defendant. I see no evidence of such biasness and the
Plaintiff has not given any credible evidence why I should reject their evidence.

246 Learned counsel had referred evidence of other witnesses in another related case
KK-22-134-2011 which was also heard by me. There is no requirement for me
to rely on that evidence to come to my conclusion.

249 In any event I don't think I should rely on evidence of another case though it
involved the same plaintiff and heard by me.

Based on the evidence of the defence, it would be reasonable for anyone to
252 conclude that the Plaintiff was in fact an irresponsible teacher. Accordingly it is
my view that the Defendant has proved on a balance of probability that the
defence of justification.

255 As for the submission that the Plaintiff is a vexatious litigant, there is no
necessity for me to comment on it.

Accordingly for all the reasons sated above, the plaintiff's claim is dismissed
258 with costs in the sum of RM5,000.00

Order accordingly.

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(DAVID WONG DAK WAH)
Judge

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273 *Notice: This copy of the Court's Reasons for Judgment is subject to formal
revision.*