SPEECH

BY THE HONOURABLE JUSTICE

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ON THE OCCASION OF

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TOPIC: CURRENT ISSUES ON DEFAMATION LAW

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Distinguished guests, ladies and gentlemen,

A very good morning and a warm welcome to all.

1. First and foremost, my sincerest gratitude to the organisers for according me this opportunity to speak on the topic of current issues in defamation law.

2. Let me begin by reiterating that reputation is of immense value to any individual as it defines his/her worth and forms an essential part of his/her dignity. Shakespeare characterised a person's 'good name' as the

'immediate jewel' of the soul (see W Shakespeare, *Othello*, Act III Scene iii). The 'purse' was 'trash' when compared to the value of a 'good name'.

3. According to the *Oxford English Dictionary*, reputation means 'what is generally said or believed about a man's character or standing'. So, reputation is different from character in that a person's character is what he or she in fact is whereas a person's reputation is what other people think he or she is.[1]

4. The importance of reputation in modern life was perhaps best explained by Lord Nicholls in *Reynolds v Times Newspapers Ltd & Ors*[2] in the following way:

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the

[1] *Plato Films Ltd & Ors v Speidel* [1961] AC 1090 at p 1138 per Lord Denning.
[2] [2001] 2 AC 127 at 201.

> affected individual and his family. Protection of his reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad."

5. This is not to say that free speech is of lesser importance. It has been asserted by no less than Milton and Mill that open and free discussions will lead to the discovery of truth. Holmes J in the case of *Abrams v United States*[3] asserted that all truths are relative but "the best test of truth is the power of the thought to get itself accepted in the competition of the market". Similarly, the eloquent statement of Learned Hand J in *United States v Associated Press*[4]: "right conclusions are more likely to be gathered out by a multitude of tongues than through any kind of authoritative selection".

6. Perhaps the most durable argument in favour of free speech is the right of all citizens to understand political issues so that they could participate effectively in the democratic process. Free speech allows them to make an informed choice of their representatives who in turn will be expected to make informed decisions.

[3] [1919] 250 US 616.
[4] [1943] 52 F Supp 362.

7. So we see this tension and competition between protecting reputations and maintaining free speech. It is the function of the law of defamation then to reconcile between the two competing rights and provide the right balance. As we have seen with the passage of time and events which occur with great regularity, this is no easy task.

8. With that background, let me now set out several issues or challenges that have arisen in the law of defamation for the purposes of discussion. My first observation is as follows. In the early days, defamation law was only about the protection of individual reputations. The focus was on the falsity of the allegations resulting in dishonour to the intended target. It was a very serious matter. As Shakespeare wrote:

> "Mine honour is my life, both grow in one,
>
> Take honour from me and my life is done." (W Shakespeare, *Richard II*, Act I Scene i)

9. It was only very much later that the law was extended to non-individuals when trading companies were able to bring actions for defamation as they were seen to have a "trading character" which can be ruined (see *South Hetton Coal Co v North-Eastern News Association*[5]).

[5] [1894] 1 QB 133 at 145.

The conception of reputation as property[6] may have had some influence on this thinking. In my view, this was most unfortunate.

10. It cannot be gainsaid that the concepts of “honour”, “dignity”, “good name”, “integrity” and “character” abound in court judgments to reflect the various attributes of the individual human self which are deserving of protection under the broad concept of reputation. For me, it is hard to see how corporations or other organizations can be said to have these kinds of characteristics for at best they are groups of people and cannot then be said to have a reputation to protect. After all, for corporations at least, the tort of malicious falsehood is available if they claim that damage has been sustained as a result of false assertions.

11. The tests of defamatory matter were designed with individual reputations in mind and do not lend themselves to be readily applicable to corporations and the like. For example, I cannot fathom how a corporation can be “shunned or avoided” in a similar fashion to an individual where libel is published. Simply put, a corporation cannot attest to hurt feelings like an individual can. So, we see some pushback now, for example, in Australia, where certain corporations do not have a cause of action in

[6] RC Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* [1986] 74 California Law Review 691

defamation unless it has fewer than 10 employees[7] (*Redeemer Baptist School v Glossop*[8]). The Defamation Act 2005 (NSW) was enacted to promote uniform laws of defamation in Australia. Perhaps we should follow suit here.

12. I come now to my second observation. Recently, the Federal Court in a number of decisions had to contend with the contentious issue of who can maintain an action in defamation for defamation. In *Chong Chieng Jen v The State Government of Sarawak & Anor*[9], the Federal Court held that a government can maintain a defamation action against a member of the public. More recently, the Federal Court in *Lim Lip Eng v Ong Ka Chuan*[10] decided that a political party cannot maintain an action in defamation. There is admittedly, at first sight, some incongruity there in the two decisions and the apex Court will have to confront that at some point. The peculiarity here, amongst others, is that whilst a political party is unable to bring an action in defamation, it can do so if the political party concerned then forms the government or forms part of the government.

[7] Section 9, Defamation Act 2005 (NSW).
[8] [2006] NSWSC 1201.
[9] [2019] 1 CLJ 329.
[10] [2022] 5 CLJ 847.

13. My next observation arises from some recent decisions in the courts. Dealing with individual reputations, the Federal Court in *Lim Guan Eng v Ruslan bin Kassim and another appeal*[11], by majority, held that a public officer when suing as an individual, whether he was suing in his official or personal capacity, was not prohibited from bringing an action for damages for defamation. It was further held that the Court of Appeal erred in deciding that public officials were precluded in the public interest from bringing a defamation action in their official capacity or in relation to matters affecting their official functions. The majority noted that a public official must enjoy the same rights as other citizens and be allowed to sue for damages for defamation in an individual capacity whether in relation to personal or official matters without having to avail himself of the provisions of the Government Proceedings Act 1956.

14. It is worth noting that the Court of Appeal relied on its recent previous decision in *Utusan Melayu (Malaysia) Bhd v Dato' Sri DiRaja Hj Adnan Hj Yaakob*[12] ("*Adnan Yaakob*"), where the plaintiff was held to have no *locus standi* to sue for defamation in his official capacity as the Menteri Besar of Pahang. The Court of Appeal in *Adnan Yaakob* may have been inspired by the landmark decision of *New York Times v. Sullivan*[13], (1964)

[11] [2021] 2 MLJ 541.
[12] [2016] 5 CLJ 857.
[13] 376 U.S. 254 (1964).

("*NYT v Sullivan*"), in which the US Supreme Court, for the first time, added a constitutional dimension to the protection of free speech and a free press. *NYT v Sullivan* comes closest to what the Court of Appeal in *Adnan Yaakob* was advocating where public figures are concerned. However, it needs to be clarified that defamation actions in the US are not proscribed, only that the plaintiff has to contend with the defendant's state of mind to overcome the almost insurmountable "actual malice" standard.

15. The Federal Court in *Lim Guan Eng* did not agree for reasons that appear in the judgment and I will not deal with them here. Nevertheless, the Federal Court noted that the effect is the same, in that public officials would not obtain damages for defamation unless they proved actual malice. The Federal Court appeared to have left the door open somewhat when it observed that the effect of *Adnan Yaakob* in that "the law should require politicians to tolerate more robust criticism and legitimate scrutiny is not unappealing but that it may have come ahead of its time. At the present time, our society is more inclined towards deference to persons in authority, with public image and perceived respectability enjoying a premium over freedom of speech. The scales may, however, be tilted differently over time."

16. My next observation, and it is related to what I have just said, concerns the defence of responsible journalism or the Reynolds privilege[14] as it is sometimes called. To recap, the Reynolds privilege involved a two-stage test. The first stage involved determining whether the subject matter of the publication was a matter of public interest. The second stage was concerned with whether the steps taken to gather and publish the information were responsible and fair.

17. Now, interestingly, the law in the UK has taken a significant swing in focus in that the Reynolds defence of responsible journalism has now shifted to a concept of reasonable belief that the publication is in the public interest. This statutory defence is enacted in section 4 of the UK Defamation Act 2013. It is therefore significant for us that the Reynolds defence is no longer followed in the country of its origin.

18. So, the two-stage test in Reynolds is now replaced by a different three requirements test as set out in section 4 of the UK defamation Act 2013. In this new test, the defendant will have to firstly establish that the statement was on a matter of public interest. Secondly, that the defendant believed that the publication of it was in the public interest. And thirdly,

[14] *Reynolds v Times Newspaper Ltd & Ors* [2001] 2 AC 127.

that such belief was reasonable (see Serafin v Malkiewicz & Ors[15]). It is therefore awkward, to say the least, that whilst the law of defamation in the UK is likely to journey through a different path, we in Malaysia may have to, for the time being, persevere with the Reynolds defence. Perhaps our position can be reviewed in a later suitable case with the benefit of full arguments. There are, of course, some other decisions of note but time does not permit me to deal with all of them. Perhaps they can be raised in the questions later.

19. I come now to my last observation. And for that we need to go into cyberspace. As the internet continues to expand as a conduit for access to information, we are confronted with the issue of defamatory remarks made in the cyber world. More often than not, the author of such remarks would choose to remain anonymous or use pseudonyms instead. The ease of accessibility and publication in the online world aggravates the risk of cyber libel as digital platforms are prone to be exploited in the name of freedom of speech.

20. The law of defamation in relation to what is published in the Internet is really the same as the traditional mass media. However, in a practical

[15] [2020] UKSC 23.

sense, the law in relation to Internet communications will operate differently in view of the dramatic changes which came with the digital revolution. That this is the case flows largely from the fact that the information can be provided in a variety of ways. The information is provided instantaneously and there is the means to provide responses to the information presented which can potentially cause problems. Most dramatically, any individual can present his information to the whole world. Media organisations have probably benefitted the most as well as those who need to reach out to a mass audience for their own purpose.

21. A number of issues immediately stand out for defamatory publications in the internet. The first question is - who can be sued in cyberspace? Apart from the author of the communication, who else can be made liable? The next question is - which country has jurisdiction to hear defamation actions as technically the information in cyberspace can be read anywhere in the world which has internet capabilities. Apart from this, we may also have to contend with anonymous authors who can hide behind servers which protect their identity. As such, authorities may therefore be keen to impose some rules on internet service providers and require registration of users of websites.

22. Even so, the tension between free speech and protection of reputations remains in cyberspace. There are many who do not feel inhibited by making spurious allegations and uploading incriminating images as they think it is all part of free speech. It cannot be gainsaid that words or speech can have extremes of being useful when they are uplifting or enlightening or harmful when they are dangerous and devastating. The worst case is undoubtedly speech calculated to incite racial or religious hatred. Needless to add, such hate speech or dangerous speech, as some might call it, can hurt a whole country.

23. We are fortunate to have a constitutional dimension to the right to free speech as freedom of expression is expressly provided under Article 10 of the Federal Constitution. As it should be, this right is not absolute or unfettered. Article 10 also provides that Parliament may by law impose restrictions on such right, among others, to provide against defamation.

24. This is evident when Parliament enacted the Defamation Act 1957 [*Act 286*] on 1 July 1957. This Act governs civil defamation whilst criminal libel is dealt with under sections 499 and 500 of the Penal Code. Our Courts[16] had also, in several instances, opined that the law of defamation

[16] *Id* at 17, para. [10]; *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142, at 150.

in this country is similar to that of England, and the common law of England is applicable by virtue of section 3 of the Civil Law Act 1956, with certain modifications[17], save to the extent that no written provision has been made by Parliament.

25. However, our Defamation Act 1957 is antiquated and stuck in time as it does not provide for any specific provisions in relation to liability for cyber libel.[18] In fact, the said Act has never been amended and remains unchanged since its enactment. Although reliance can be made to common law, the law in Malaysia should also evolve from time to time concomitant with technology advancement.

26. The existing provisions of the Act are in dire need of amendment. For example, the Act is silent on the status of online publications and the interpretation section only offers guidance on the following four terms: *"broadcasting by means of radio communication", "newspaper", "public meeting" and "words".* Further, the provision on the application of the Act to broadcasting only provides that the Act applies *"in relation to reports or matters broadcast by means of radio communication".*

[17] *Lau Yeong Nan v Life Publisher Berhad & Ors* [2004] 7 MLJ 7, at 16-17, para. [10].
[18] *Ibid*.

27. As mentioned earlier, one of the challenges in cyber libel lies in the difficulty of proving the author of the defamatory words on the internet platform even though such person is the registered owner of the account.[19] In this context, Parliament enacted section 114A of the Evidence Act 1950 to address this difficulty of the identity of the author by reversing the burden of proof onto the defendant. The provision reads:

> "A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved."

28. The effect of this provision was considered by the Federal Court in the recent case of *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor*[20]*.* The Federal Court, by majority, decided that Malaysiakini, an online news portal, is liable for third party comments which are offensive and inappropriate even though they had no knowledge of the same until notified and even where the impugned comments were then promptly removed. The Court further held that compliance with the Malaysian Communications and Multimedia Content Code did not shield

[19] Chia, Doris, *Defamation Principles and Procedure in Singapore and Malaysia*, (Malaysia: LexisNexis, 2016), at 391.
[20] [2021] 2 MLJ 652, page 673-674 (Federal Court)

Malaysiakini from liability. In coming to this decision, the Federal Court observed that an online news portal can be presumed under the law as the publisher of any comments posted by its third party online subscribers or readers, by virtue of Section 114A of the Evidence Act 1950.

26. Although that case involved proceedings for contempt and not defamation, some may argue that the effect of the said section 114A will be the same in both actions although notably contempt proceedings are criminal in nature. If that is the case, how will this pronouncement affect internet service providers, online platform providers, news portals, operators of websites, social media platforms, providers of online chats and other online content providers which publish third party content? Can they still rely on the takedown procedure and compliance with the Content Code in defamation actions? These are certainly matters deserving of contemplation and deliberation.

27. Before I end, there is a matter regarding online content which I think requires urgent consideration. It is the case of online intermediaries who, according to the Organisation for Economic Co-operation and Development (OECD), “bring together or facilitate transactions between third parties on the Internet and give access to, host, transmit and index

content, products and services originated by third parties on the Internet or provide Internet-based services to third parties".[21]

28. Like many countries, the liability of online intermediaries is in a state of flux. We have no laws laying down what is an acceptable or reasonable period within which unlawful material has to be taken down from a site operated by an online intermediary. It is also uncertain what measures would suffice for online intermediaries to escape liability for offending remarks / comments made by third party users.

29. If we look at the European Union, their Code of Conduct on Countering Illegal Hate Speech Online stipulates that such material is to be removed within 24 hours. Similarly, Germany's Network of Enforcement Law (*NetzDG*) requires removal of "manifestly unlawful content" within 24 hours of receipt of complaint, and all other unlawful content within seven days.[22]

30. In my view, our country would benefit tremendously if the stakeholders could sit down to discuss and identify further areas in need

[21] OECD, *The Economic and Social Role of Internet Intermediaries* (2010) http://www.oecd.org/digital/ieconomy/44949023.pdf

[22] Act to Improve the Enforcement of Rights on Social Networks (Network Enforcement Act) (1 October 2017), s 2(2)–(3)

of review and reform. At the same time, it is also immensely important for us to retain the idea that there should be no censorship of the internet as guaranteed by section 3(3) of the Communications and Multimedia Act 1998 whilst at the same time ensuring that cyber communications are not susceptible to misuse. The Internet is a new reality providing immense challenges to the law of defamation. Although the advent of the Internet has ensured to a great extent that there is no monopoly of information, cyber libel will continue to be a serious issue due to its wide-spread coverage, impersonation and anonymity.

31. I am sure many of you have many more questions and perhaps there are others who are more able to speak to these issues. So, I will leave it at that. With that, I wish everyone a fruitful conference.

Thank you.