IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 02(f)-61-07/2019(W)

BETWEEN

LIM GUAN ENG ... **APPELLANT**

AND

RUSLAN BIN KASSIM ... **RESPONDENT**

Heard together with

CIVIL APPEAL NO: 02(f)-62-07/2019(W)

BETWEEN

LIM GUAN ENG ... **APPELLANT**

AND

1. **DATO' IBRAHIM ALI**
2. **PERTUBUHAN PRIBUMI PERKASA MALAYSIA**

... **RESPONDENTS**

CORAM:

NALLINI PATHMANATHAN FCJ,
ABDUL RAHMAN SEBLI, FCJ
HARMINDAR SINGH DHALIWAL, FCJ

SUMMARY OF JUDGMENT

[1] There are two appeals before us. The core issue in the appeals is whether an individual who holds political office or is a government official is disentitled from bringing an action in defamation in his official capacity. Underpinning the core issue in the appeals, as is usually the case, is the obvious tension between the competing interests of freedom of expression and the protection of a person's reputation. 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. That can hurt a whole country.

[2] Free speech is, however, essential to the proper functioning of a democracy because it facilitates informed decision making and democratic participation by citizens. The framers of our Federal Constitution thought so

too and hence we have Article 10. So, we already have a constitutional dimension to the common law freedom of speech principles unlike many countries. The value of reputation is also not in doubt. Shakespeare observed that a "purse" is merely "trash" when compared to the value of a "good name" (W Shakespeare, *Othello*, act III scene iii). It is quite a paradox then that the function of the law of defamation is the protection of both free speech and one's good name. As this case will amply demonstrate, finding the right balance, or a judicious balance as some might say, in the protection of both seemingly opposing interests, becomes key and is a duty the courts have readily acknowledged and accepted although getting it right is somewhat contentious.

[3] At the outset of the hearing of the appeals, counsel for the appellant applied to withdraw the appeal against the respondent Ruslan Kassim as he had passed away since the appeals were filed. Accordingly, Appeal No. 02(f)-61-07/2019(W) was struck out with a further order as requested by both parties that there be no judgments enforced by or against the estate of the deceased Ruslan Kassim. So, only one appeal remained for consideration.

The Material Facts

[4] The relevant background facts leading to the filing of the present appeals, as revealed in the judgments of the Courts below and the parties' submissions, can be stated as follows. The plaintiff, Lim Guan Eng, who is the appellant here, was at the relevant time, the Chief Minister of the State of Pulau Pinang ("Penang)", the State Assemblyman for Air Puteh, and the Member of Parliament for Bagan. The 3rd defendant is a political organization known as Pertubuhan Pribumi Perkasa Malaysia ("Perkasa"). The 1st defendant, Ruslan Kassim, was the Chief Information Officer whereas the 2nd defendant, Ibrahim Ali, the President of Perkasa. The 5th defendant is The New Straits Times Press (Malaysia) Sdn Bhd ("NST"). The 4th defendant was the editor-in-chief of the New Sunday Times and Berita Minggu, both published by NST. The 6th defendant is the editor-in-chief of Mingguan Malaysia published by the 7th defendant, Utusan Melayu (Malaysia) Berhad ("Utusan").

[5] The dispute began when the plaintiff made an official visit to Singapore from 11-12 August 2011. A media statement issued by the plaintiff's press secretary on 12 August 2011 stated that the purpose of the visit was to develop investment potential and promote medical tourism. In the course of the visit, the plaintiff attended a dinner together with his officers and one

Datuk Seri Kalimullah Hassan ("Kalimullah") and the Chief Executive of Temasek Holdings.

[6] On 1 October 2011, Ruslan Kassim issued a press statement. In essence, the press statement -

(i) suggested that the plaintiff attended a secret meeting between the political parties DAP and PAP, together with Kalimullah and one Datuk Muhammad Azman Yahya ("Azman");

(ii) sought the meeting agenda to be disclosed;

(iii) questioned whether Kalimullah and Azman had previously organised such meetings between DAP and PAP; and

(iv) stated that the whole of Malaysia was entitled to question the loyalty of the plaintiff, Kalimullah and Azman in relation to the visit.

[7] Ruslan Kassim then sent the press statement to the Chief Editors of NST and Utusan via SMS. The next day, on 2 October 2011, the NST published an article in their weekly English newspaper, the Sunday Times. The article was entitled "**Three queried over dinner with Singapore politicans**". This was followed by publication in the Malay language

newspaper Berita Minggu which carried the title "***Desak perjelas pertemuan sulit DAP, PAP Perkasa percaya Azman, Kalimullah ada maklumat***". Utusan also published an article based on the same story in their weekly newspaper, Mingguan Malaysia, entitled "***Kalimullah, Azman perlu jelaskan isu jumpa PAP***" based on the same press statement.

[8] Not surprisingly, the plaintiff sued the defendants for defamation in the said publications. After a full trial, the High Court allowed the plaintiff's claim. The High Court found that the impugned Statements were in fact untrue and were defamatory of the plaintiff. They called into question his loyalty as a Chief Minister and citizen of his country, insinuated his involvement in a secret meeting contrary to national interest, and gave the impression of the plaintiff's tendency to disclose national secrets to foreign forces. Having found the defendants liable, a global figure of RM550,000.00 for general and aggravated damages was awarded to the plaintiff.

[9] On appeal, the Court of Appeal affirmed the findings of the High Court in respect of liability. The Court of Appeal nevertheless allowed the appeals on the ground that the plaintiff had no *locus standi* to sue for defamation in

his official capacity as the Chief Minister of Penang. Damages were reduced to RM50,000.00 for each set of defendants

Analysis and Decision

[10] At the outset, it can be observed that there was no issue that the plaintiff had been defamed in his reputation by the Impugned Statements. Considering the Impugned Statements as a whole, it was beyond dispute that ordinary and reasonable members of the community will see the plaintiff as a traitor to his country who is willing to divulge national secrets. It was not a case of making inquiries but rather putting forward serious allegations as to the loyalty of the plaintiff. It was not a case of words which were defamatory of a body or class of persons of which the plaintiff was a member. It was plainly a case where the defamatory words in question was specifically and personally targeted at the plaintiff as alluded to earlier.

[11] It was therefore unfortunate for the Court of Appeal to make the assumption that it was the plaintiff's administration that was criticized and not the plaintiff personally. The Court found that the plaintiff's suit was made in his capacity as Chief Minister of Penang and that therefore the claim was made in his official capacity and not by him personally.

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[12] With respect, I do not think this was a correct assessment of the facts. The pleadings indicated that the action was brought by the plaintiff personally and not in his official capacity as Chief Minister. It was the plaintiff suing as a private citizen and not by the office of the Chief Minister or the Government of the State of Penang. In other words, the suit was brought as an individual and not by an organization in the form of the Government or a Government body. The Impugned Statements had named the plaintiff and specifically referred to his disloyalty to the country both as Chief Minister and as a citizen. The sting of the statements was more a criticism of the plaintiff rather than his office or the Penang State Government. He was the one who had the capacity to divulge the secrets. I do not think, therefore, that the plaintiff was disentitled from bringing the action as an individual to protect his reputation.

[13] Be that as it may, the defendants sought to raise an argument that was neither pleaded nor argued in the High Court and the Court of Appeal. The defendants argued that in the event the plaintiff was suing in his official capacity, he had to obtain authorization from the Penang State Secretary to file the suit by virtue of s. 25(1) of the Government Proceedings Act 1956 ("GPA 1956"). By virtue of s. 24(3) of the GPA 1956, the plaintiff's solicitors would have to have obtained a fiat/sanction from the Attorney-General or the

State Legal Advisor before any Writ was filed. Since the provisions were not complied with, the proceedings are null and void.

[14] Now, of course, since it was determined in the preceding discussion that the plaintiff had not sued in his official capacity but that it was a private suit brought in the plaintiff's personal capacity, the provisions of the GPA 1956 do not affect him. In any case, the two sections alluded to by the defendants are meant, as the heading shows, for the purpose of allowing law officers and public officers to appear in place of advocates and solicitors in a court proceeding. Under s. 35 of the Legal Profession Act 1976 ("LPA 1976"), an advocate and solicitor is given exclusive right to appear and plead in all Courts of Justice in Malaysia although other legal officers may also appear. Section 38 of the LPA 1976 also sets out the persons named there who can act as advocate and solicitor and it includes the Attorney-General or the Solicitor-General or any other person acting under the authority of either of them.

[15] Viewing from this context, in the case of a public officer involved in civil proceedings as a litigant by virtue of his office, a legal officer may appear on his behalf as an advocate by virtue of s. 24(2) GPA 1956. So, not only can such legal officer appear in court, the public officer enjoys the privilege of

being represented by such legal officer without having to undergo the expense of having to engage an advocate and solicitor. By no stretch of any legal interpretation can it be deduced that such a public officer is compelled to be represented by a legal officer. The words "a legal officer may appear" makes this plain and unambiguous.

[16] In practice, however, it would be to the benefit of the public officer to be represented by the legal officer as all expenses would be settled by the Government especially in a case involving vicarious liability of the Government. Significantly, the public officer involved in civil proceedings in his personal capacity enjoys no such privilege unless the Attorney-General certifies in writing that it is in the public interest to do so lending credence to the argument that it is a privilege given to a public officer. So, as the law makes it plain, it is really a matter between the Government and the public official. It is not open to third parties like the defendants here to challenge this arrangement and decide for the plaintiff as to who should represent him. The defendants are, in any case, not prejudiced in any way. For all these reasons, the submissions by the defendants in this regard are misconceived and misplaced.

Public official suing for defamation

[17] This brings me neatly to the larger question of whether a government official can bring a defamation action if the defamatory material relates to the exercise of his official functions as opposed to only matters concerning his private life. This is somewhat related to the earlier issue of whether a claim is brought in his official or personal capacity but the question is now framed by a consideration of the contents of the claim rather than the manner in which the claim is brought.

[18] There is no express statutory provision governing this issue in the Defamation Act 1957 ("the Act"). The Act itself is quite scanty and it is left to the common law to fill in the gaps. It was asserted during submissions that this was a matter which was considered by the Court of Appeal below and eventually decided by applying the earlier Court of Appeal decision in *Adnan Yaakob.* It was also argued that this issue was considered as well by this Court in *Chong Chieng Jen*. Before dealing with these cases, it may be helpful to consider how this question has been dealt with in other common law jurisdictions.

[19] Most of these cases relate to a governmental agency or an elected body performing quasi-judicial functions and the issue that arises in all of them is whether they were competent in law to bring defamation actions against individuals. It would appear that the precursor to all subsequent decisions on this subject is the case of *City of Chicago v Tribune Co* [1923] 307 III 595 ("*City of Chicago*"). This was followed by the decisions in *Die Spoorbond v South African Railways* [1946] AD 999 (South African Supreme Court); *New York Times v. Sullivan*, 376 U.S. 254 (1964) ("*NYT v Sullivan*") (US Supreme Court); *Derbyshire, supra* (HL); *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 ("*Ballina Shire Council*") (New South Wales Court of Appeal, Australia); *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 (Canadian Supreme Court); *Montague (Township) v Page* [2006] OJ No 331 (Ontario Superior Court of Justice); *McLaughlin & Ors v London Borough of Lambeth & Anor* [2010] EWHC 2726 (Queens' Bench Division, High Court of England and Wales); *Sankie Mthembi-Mahanyele v Mail & Guardian Ltd and Anor* [2004] 3 ALL SA 511 (South African Supreme Court); and *Tang Liang Hong v Lee Kuan Yew & Anor* [1998] 1 SLR 97 (Singapore Court of Appeal).

[19] What appears to be axiomatic from the diaspora of decisions on the issue regarding defamation suits being brought by government bodies or government officials can be surmised as follows. Firstly, although there needs to be a balance in the protection of free speech on the one hand and the protection of individual reputations on the other, freedom of speech and expression remains sacrosanct and should be protected at all costs. It is worth noting that some of the jurisdictions from which the above decisions have emerged do have very similar constitutional protections to our own constitutional guarantees of freedom of expression as enshrined in Article 10(1)(a) of the Federal Constitution.

[20] Secondly, it is an anathema to a modern constitutional democracy to permit elected government authority to commence actions for damages for defamation against its citizens for the simple reason that it is those citizens who decide on that government or authority being placed in power. In other words, an elected governmental institution owes its very survival to those voting citizens and to the process bringing about its existence. In similar vein, it is also incompatible that government litigation against its own citizens be funded by those very citizens who contribute to their coffers.

[21] Thirdly, if, however, the impugned defamatory publications actually identify individuals in government in their attacks rather than being blanket critiques of government policy or action *per* se, then those individuals so identified have every right to commence actions in their personal capacities, if their reputations have been affected as a result. So, no distinction is drawn between a public officer being defamed for conduct in his official capacity and his personal capacity. As long as the defamatory statement is capable of being read as referring to the individual and not the government body as a whole, the individual officer is entitled to sue.

[22] A particular case of interest and relied upon by the plaintiff is NYT v Sullivan. The significance of *NYT v Sullivan* to the instant case, and indeed to the law of defamation in Malaysia as a whole, would be far-reaching in that a public official would be prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless, of course, he proved that the statement was made with "actual malice". Although there is much to be commended for the pronouncements in *NYT v Sullivan* in relation to the importance of the protection of free speech and the media, the "actual malice standard" fails to strike the right balance between free speech and the protection of reputation. It places the media in a powerful position without

adequate checks which the law of defamation ought to provide. It also appears unfair and discriminatory in that only public figures are subjected to the standard. It may then deter persons of integrity and ability from seeking public office.

[23] Perhaps the test of responsible journalism advocated by the House of Lords in *Reynolds* provides a better balance in the way that it requires minimum standards of responsible conduct based on the multiple factors balancing test. In the way the test is set out, the press would have to take all reasonable care to ensure that they do not publish falsehoods. It cannot be right, except for occasions of privilege or reportage that the law of defamation is unconcerned with the adjudication of truth where libel is alleged.

[24] In order not to be misunderstood, I do acknowledge that publications on matters of grave public interest, such as public health and safety, for example, which may turn out to be untrue with the benefit of hindsight, are still deserving of protection. It is only that the "actual malice" test is not the best way to achieve this. As mentioned earlier, it tilts the scales too far. So, until such time as full arguments are canvassed in an appropriate case in the future, and the "actual malice" test as advocated in *NYT v Sullivan* in

defamation cases is shown to be desirable, the test ought not to be followed in our jurisdiction.

[25] The next case of importance is that of *Derbyshire, supra*. The appeal before the House of Lords concerned the preliminary issue of whether the local authority had a cause of action against the defendants. The House of Lords held that at common law, a local authority does not have the right to maintain an action for damages for defamation. It is contrary to the public interest for organs of government to have a right to sue for libel as such actions would place an undesirable fetter on the freedom of speech. In the words of Lord Keith of Kinkel: "It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech". More importantly, in the context of the instant case, the House of Lords suggested *obiter* that individual officers of government bodies may sue for defamation. (*supra*, at 1020):

> "...A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs.

> If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation..."

[26] Post-*Derbyshire*, the courts have often held that while a government and its organs cannot sue for defamation, an individual public officer can do so. No distinction is made whether the public officer is suing in an official capacity or a personal capacity. On the contrary, the cases expressly recognised that an individual public officer can sue for defamation in respect of statements concerning his work performance in a government body. The only requirement is that the officer is sufficiently identified in the statements complained of.

The Adnan Yaakob decision

[27] Having considered the viewpoints in this area of the law in various jurisdictions, I come now to the instant case. As alluded to earlier, the Court of Appeal relied extensively on its earlier decision in *Adnan Yaakob.* In essence, the instant appeal is really a reassessment of the decision in *Adnan Yaakob* and it becomes necessary that I now deal with that case. Now, the Court of Appeal in *Adnan Yaakob* was very much influenced by the *Derbyshire* case and held that by virtue of the plaintiff's public office as

Menteri Besar and as elected representative, he should be open to public criticism and could never be defamed, hence, he ought to be precluded from suing for defamation. The Court was making a distinction between a plaintiff suing for defamation on matters wholly concerning his public office with those relating to some moral misconduct on personal matters. With that distinction, it was held that a public official is precluded from commencing a defamation action in the public interest in his official capacity as well as matters relating to his conduct in an official capacity. Only personal conduct, or as described there as "personal capacity", was held to be actionable.

[28] With respect, in the context of the present appeal, the Court of Appeal in *Adnan Yaakob* was plainly in error when interpreting the *Derbyshire* decision. This appears in para [16] of the judgment:

> "[16] The generality of the above proposition, however, is not without any exception for Lord Keith of Kinkel in *Derbyshire County Council*, had laid down an exception which was stated in the following terms:
>
> > A publication attacking the activities of the authority will necessarily attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation.

> The above passage therefore clearly does not restrict the rights of individuals holding public office from suing in a defamation action in his personal capacity."

[29] The passage above is referring explicitly to the individual reputations of those officials who are defamed whilst carrying out public functions in the day to day management of a public authority. The passage refers to attacks on individual executives when carrying on the functions of the authority and not in respect of any moral misconduct on personal matters unrelated to public functions. So, unless the Court of Appeal meant to say that a public official could bring a personal action in defamation with respect to matters involving his public duties, the reference to the passage in question is, with respect, misplaced.

[30] This would also be consistent with the case law in the various common law jurisdictions as alluded to earlier. As was noted earlier, the cases demonstrate quite plainly that individual reputations, whether in their official or personal capacity, are all deserving of protection. Where the impugned defamatory publications actually identify individuals in government in their attacks rather than being blanket critiques of government policy or action *per* se, then those individuals so identified have every right to commence actions in their

personal capacities, if their reputations have been affected as a result. So, at the risk of being repetitive, no distinction is to be drawn between a public officer being defamed for conduct in his official capacity and his personal capacity. As long as the defamatory statement is capable of being read as referring to the individual and not the government body as a whole, the individual officer is entitled to sue.

[31] Although the case law is compelling, I need to return to the question of why individual reputations are deserving of protection. To deal with this question, it is necessary to determine the more fundamental issue of the value of reputation and what really is being protected. Whatever may be the position taken in common law countries, 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.

[32] It must follow, in my view, that a convincing case needs to be constructed with formidable arguments and justification before any individual reputation can be precluded from protection, either by policy or by law. My

impression, however, is that arguments against any such preclusion are more compelling. These arguments were noted earlier and are worth repeating. Foremost of the reasons is that a public official is capable of being defamed in the same way as any other ordinary citizen as both share the right to dignity and reputation. Although antiquated by comparison, the Defamation Act 1957 does not provide for any prohibitions on the species of protagonist permitted to commence actions for libel.

[33] As I had indicated earlier, although in a different context, it is discriminatory that the reputation of public officials in matters affecting their official functions is singled out for adverse treatment. There are far more influential persons in the community who affect public life. As all persons are guaranteed equal rights under the Federal Constitution, there is insufficient basis and justification for the inequitable treatment. Being singled out as such may also seriously deter capable and deserving persons from seeking public office. The reason is obvious. Without the protection, public officials will be powerless to defend against attacks by the media and others who will no doubt be in a powerful position as the necessary checks, which the law of defamation normally provides, will be limited.

[34] It may also be challenging to ascertain whether the plaintiff public official is bringing the suit in relation to personal or official matters. In essence, the former relates to one's private life or previous character whilst the latter is concerned with a public official's fitness for office. It does not take much prescience or foresight to appreciate that the line will be blurry and many such claims may overlap as matters regarding a public official's private life might be relevant to his or her fitness for public office. *Ex hypothesi*, an arduous task awaits the judge who has to demarcate between the two.

[35] It is also no coincidence, as observed earlier, that no other Commonwealth country precludes defamation actions from being brought by individual plaintiffs in an official capacity or, in fact, in any capacity. Apart from the *Derbyshire* case, the Court of Appeal in *Adnan Yaakob* may have been inspired by the *NYT v Sullivan* case which comes closest to what the Court was advocating where public figures are concerned. Even then, as mentioned earlier, defamation actions 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.

[36] It must, however, be conceded that the effect is the same, in that public officials would not obtain damages for defamation unless they proved actual malice. In fairness, perhaps, 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.

[37] For all these reasons, it is my judgment that a public official must enjoy the same rights as other citizens and be allowed to sue for damages for defamation in any individual capacity whether in relation to personal or official matters. He need not avail himself to the provisions of the Government Proceedings Act 1956. Accordingly, the decision in the *Adnan Yaakob* case cannot be sustained.

[38] As it turned out, the Court of Appeal in the instant case, found similarly that the plaintiff/appellant was suing in his official capacity as Chief Minister of the State of Penang and not in his personal capacity. The Court took the

position that they ought to follow their own decision in *Adnan Yaakob* as the principle of law applied equally to the facts and circumstances in the case before them. Not having the benefit of hindsight in that the *Adnan Yaakob* was later set aside by the Federal Court, the Court of Appeal was certainly obliged to follow their earlier decision. For the same reasons as indicated earlier, this decision cannot also be sustained.

Application of Chong Chieng Jin

[39] I come now to the outstanding issue of the application of the case of *Chong Chieng Jin, supra.* This single question of law, upon which leave was granted, was very much reliant on this case and as such, we are compelled to deal with it. The central issue in that case was whether the State Government has the right to bring an action for defamation, in light of the *Derbyshire* principle.

[40] This Court unanimously held that the *Derbyshire* principle is not applicable in Malaysia. Now, of course, this decision stands in stark contrast to all the cases discussed earlier, which all provided that it is an anathema to a modern constitutional democracy to permit elected government authority to

commence actions for damages for defamation against its citizens. Perhaps Gleeson CJ described it best in the *Ballina Shire Council* case (at p 691):

> "[T]o maintain that an elected governmental institution has a right to a reputation as a governing body is to contend for the existence of something that is incompatible with the very process to which the body owes its existence."

[41] To put it in less elegant terms, the elected government authority owes its very being to those voting citizens upon whom it now seeks to recover damages for defamation. It is irreconcilable, a *fortiori*, that government litigation against its own citizens be funded by those very citizens who contribute to their coffers. Such governmental authority already enjoys easy access to the media and any responses to attacks can be reported in all the media. Further, in the case of an elected authority, to say that it has a governing reputation is awkward as the authority would be temporarily controlled by one political party or another. The reputation is really that of the governing party. As aptly noted by Kirby P in *Ballina Shire Council, supra,* "The Council's reputation must depend upon the opinion of citizens, earned or lost in the democratic political debate".

[42] However, the plaintiff, by raising the principle in *Chong Chieng Jin*, is not applying to revisit that case even though he has cited numerous cases

against it. Curiously though, the plaintiff seeks to rely on it to assert that he is entitled to sue. In short, the plaintiff submits that if the Government can sue for defamation, then by extension the plaintiff, as a public official, should be equally entitled to commence such an action. To preclude a public officer from suing for defamation, it was argued, would lead to an anomalous position.

[43] On first impression, the argument seems persuasive. However, in my considered view, the decision in *Chong Chieng Jin* is not applicable to the instant proceedings. That case, as submitted by the defendants, was about the right of the State Government of Sarawak to sue for defamation. The present case is about an individual's right, albeit a public official, to bring about such proceedings. As was elaborated at length in the foregoing discussion, the considerations that apply are not the same. In practice, it would be both remarkable and awkward for both the Government and the public officer to sue for the same libel. Hence the *Chong Chieng Jin* case offers no assistance to the plaintiff as it is irrelevant.

Damages

[44] The final issue is with regard to the award of damages. The High Court had awarded a global sum of RM550,000.00 as general and aggravated damages. This amount was apportioned between the various sets of defendants. The 1st to the 3rd defendants were ordered to pay the sum of RM150,000.00 out of the RM550,000.00. On appeal to the Court of Appeal, the order of the High Court was set aside and the Court reduced the award of damages for the 1st to the 3rd defendants to a sum of RM50,000.00 as general damages. Guided by the case of *Liew Yew & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385, the Court held that this award was in keeping with the principle that joint tortfeasors should be made liable only to a single award.

[45] Now, the award of damages is meant to be compensatory and not a scheme for untold wealth. In a case where there is damage to reputation, the compensation must include such sum as would vindicate his or her good name and take into account the distress, hurt and humiliation which the defamatory publication has caused. In summary, it is really vindication which mostly puts the plaintiff back into the position he or she would have been but for the defendant's disparaging publication. It is unfortunate that the common

law's obsession with money damages has put other ways of providing vindication to the successful plaintiff in the shadows. In this context, I fully endorse the views of the authors of *Gatley on Libel and Slander*, 12th Edition, that "[A] shift towards a general practice of declaring falsity, allowing a right of reply, or ordering correction would have a significant effect on the general structure of defamation law and litigation, which has been largely shaped on the assumption that the remedy is an award of damages" (at para 9.1).

[46] It is, of course, lamentable that by the time the court has pronounced judgment, vindication has come late for the successful plaintiff and, in the meantime, much damage has been done. Even so, in the most serious cases of defamation in respect of integrity and honour, I cannot imagine general damages to exceed the quantum that is usually awarded in personal injury claims to a claimant who is fully disabled. These injuries are in most cases permanent and irreversible whilst a man's reputation may be restored and the damage can in some cases be transient in character.

[47] Be that as it may, it is trite that damages for defamation are "at large" in the sense that there is no accepted scale or formula and they are awarded on the merits of each case based on accepted guidelines. In assessing

damages, the nature and gravity of the libel is the most important factor. The "more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be". The next important factor is the mode and extent of the publication. A libel published to millions has a greater potential to cause damage than a libel published to a few. Other factors would include the conduct of the claimant, his credibility, his position and standing and the subjective impact the libel has had on him, the absence or refusal of any retraction or apology and the conduct of the defendant from the time when the libel was published down to the verdict.

[48] Some of these factors when taken together may warrant an award of aggravated damages. This would be especially the case when taking into account the conduct of the defendant, his conduct of the case and his state of mind. In other words, it will be the aggravating conduct of the defendant that would be decisive in determining whether aggravated damages ought to be awarded. For example, a clear case where aggravated damages is merited would be where the defendant had no genuine belief in the truth of what was being published or was guilty of such willful blindness that although there were strong grounds of suspicion that what was being published was

false, the defendant deliberately avoids making further inquiries in order to forestall the suspicion turning into certainty.

[49] In the instant case, the Court of Appeal disagreed with the High Court and took the position that the award of aggravated damages was "incorrect in law". The Court further observed that aggravated damages are usually given in "cases involving high handedness or oppressive action". As these factors were absent, there was no basis for the High Court to award aggravated damages. With respect, aggravated damages are not confined to cases involving high handedness or oppressive actions which are more reminiscent of actions for damages for unlawful imprisonment or against other unlawful governmental actions. On the contrary, there are a variety of circumstances where aggravated damages can be justified as alluded to earlier.

[50] In the instant case, false allegations of the most serious kind were levelled at the plaintiff who was holding the high position of Chief Minister. He was alleged to have revealed national secrets to a foreign government or in short, committing treason. The evidence further revealed, as found by the trial judge, that the defendants had no genuine belief in the truth of these

allegations but recklessly pursued a variety of defences including justification. The defendants failed in both the High Court and Court of Appeal and the findings that these allegations were false and defamatory were affirmed in each case. In the circumstances, the High Court was more than justified in awarding compensatory and aggravated damages of RM150,000.00 which was not manifestly excessive.

Conclusion

[51] In conclusion, and for the reasons mentioned, the leave question can be answered in this way. A public officer when suing as an individual, whether he is suing in his official or personal capacity, is not prohibited from bringing an action for damages for defamation. In the event, the Court of Appeal was plainly in error when it was decided that public officials are precluded in the public interest from bringing a defamation action in their official capacity or in relation to matters affecting their official functions.

[52] My learned sister Nallini Pathmanathan FCJ has read this judgement in draft and has expressed agreement with it. Accordingly, the appeal is allowed with costs to the appellant. The orders made by the Court of Appeal

are set aside. The orders of the High Court, in relation to the respondents here, are hereby reinstated.

Dated: 22 February 2021

Signed
(HARMINDAR SINGH DHALIWAL)
Judge
Federal Court of Malaysia

Counsel/Solicitors:

For the Appellant:
Americk Sidhu (M/s Americk Sidhu)

For the Respondents:
Adnan bin Seman @ Abdullah (M/s Adnan Sharida & Associates)

Note: This summary is for assistance only. The full judgment is the only official and authorized version constituting the grounds of decision.