

BAR COUNCIL MALAYSIA



REPORT OF THE BAR COUNCIL

ON THE EFFECT OF

DEFAMATION LAWS

ON FREE SPEECH

**REPORT OF THE BAR COUNCIL
on the Effect of Defamation Laws on Free Speech**

1. This Report serves to place on record the Bar Council's deep concern over the current spate of 'mega' defamation suits and the adverse effect of said suits on freedom of speech and expression, a fundamental right enshrined in Article 10 of the Federal Constitution.
2. The Report does not seek to address the specific cases in issue but attempts to identify the shortcomings in the existing legislation i.e. the Defamation Act 1957. It highlights the gross discrepancies between the damages awarded by the courts in relation to physical injuries and defamation cases and evidences the urgent need to amend the law dealing with defamation.
3. **The History of Mega-Defamation Suits**
 - (i) Research shows that the awards granted by the courts between 1980 and 1990 were relatively low with the highest award of RM100,000 going to the Chief Minister of Sabah in 1984 for allegations of corrupt practice. Across the border, Singapore's Prime Minister, Lee Kuan Yew won several defamation suits in excess of \$200,000 each between 1989 and 1990. In the beginning of 1995 (ie on 28/2/1995) the former Chief Minister and Governor of Sarawak was awarded a sum of RM100,000.00 as compensatory damages, which took into account the aggravating factors. (*Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd* [1996] 1 MLJ 393.)
 - (i)(a) This trend of damages continued unchanged until 1995 when the High Court in *Tan Sri Dato' Vincent Tan Chee Yioun v Haji Hassan bin Hamzah, MGG Pillai & others* [1995] 1 MLJ 39 awarded the plaintiff a total of RM10 million for libel. The individual award against Pillai was RM2 million.
 - (a)(a) The defendants' appeals to the Court of Appeal and Federal Court [Civil Appeal Nos. 02-5-95(W), 02-06-95(W) & 02-2-96(W)] were respectively dismissed and the award of damages by the High Court affirmed. In their judgment, the Federal Court held the view that the awards were not erroneous or excessive so as to warrant any interference by the Court.
 - (ii) 1996 was a turning point which saw more than 10 defamation suits filed claiming damages of between RM30 million to RM100 million. Notably all these cases rooted from a single article in a London publication called *International Commercial Litigation*, entitled "Malaysian Justice on Trial" which discussed several controversial decisions by the Malaysian courts in the Ayer Molek and Tan Sri Vincent Tan cases handled by lawyer, Dato' Kanagalingam. The article included comments from two lawyers from a prominent law firm, a Malaysian correspondent for the Asian Wall Street Journal and a United Nations Special Rapporteur on the Independence of Judges and Lawyers, all of whom inter alia were named as defendants in the suits. The list of cases are listed under 'Appendix 1' annexed.
 - (iii) The damages claimed continued to escalate and reached an unprecedented level between 1999 - 2001 with the media bearing the brunt as can be seen from the Table

below. The damages claimed have reached preposterous levels with a recent case filed in February, 2001 for an astounding RM1.3 billion. The damages awarded have been in the millions and several cases have been settled for undisclosed substantial sums. (For a more comprehensive list of cases please refer to 'Appendix 2' annexed):

Date of Filing	Case Number	Name of Parties	Damages Claimed	Damages Awarded
January 1997	Unavailable	<i>Dato' Seri H'ng Bok San vs Sun Media Group & 3 Ors.</i>	RM50 million	Settled for undisclosed substantial sum – 20.1.2000
10.3.98	Unavailable	<i>R. Letchumiah vs Sheikh Taufik Sheikh Shukor</i>	RM50 million	Pending
January 1999	Unavailable	<i>Mirzan Mahathir vs Sin Chew Jit Poh, Guang Ming Daily & Pemandangan Sinar</i>	RM550 million	Settled for undisclosed substantial sum – 20.1.2000
2.2.99	Unavailable	<i>Mirzan Mahathir vs China Press Bhd & Anor</i>	RM200 million	Settled for undisclosed substantial sum – 25.10.99
24.4.99	S5-23-13-99	<i>Tan Sri Dato' Seri Vincent Tan Chee Yioun vs Star Papyrus Printing Sdn Bhd</i>	RM200 million	Pending
13.5.99	S3-23-14-99	<i>Tan Sri Dato' Seri Vincent Tan Chee Yioun vs Professor Jomo Kwame Sundran, Dow Jones Publishing Company (Asia) Inc. & 3 Ors.</i>	RM250 million	Pending
13.5.2000	Unavailable	<i>Dato' Seri S. Samy Vellu vs Penerbitan Sahabat (M) Sdn Bhd & Anor.</i>	RM100 million	Pending

4. A comparative study vis-à-vis damages in personal injury cases

A sampling of some of the highest damages awarded by the courts in respect of the most serious personal injury cases is as follows:

Case Number	Name of Parties	Type of Injury	Damages Awarded
[1996] 4 MLJ 623	<i>Abdul Rahman b Abdul Karim vs Abdul Wahab b Abdul Hamid</i>	Loss of sight	RM60,000
[1990] 2 MLJ 494	<i>Kuppusamy vs Nithanathan</i>	Severe brain damage	RM110,000
[1990] 3 MLJ 144	<i>Seah Yit Chen vs Singapore Bus Service (1978) Ltd & Ors.</i>	Multiple injuries - spine	RM82,620
[1988] 1 MLJ 19	<i>Pengarah Institut Penyelidikan Perubatan & Anor vs Inthra Devi</i>	Severe burns	RM80,000
[1986] 1 MLJ 461	<i>Mohamed Fami Hassan vs Swissco (Pte) Ltd</i>	Quadriplegia	RM180,000
[1980] 1 MLJ 1	<i>Hong Huat Timber Trading Co. vs Liew Kwee Chin</i>	Amputation of leg	RM97,000

A comparison of the damages claimed or awarded in defamation suits and personal injury cases as shown above, serves to illustrate the lack of balance under the present law as the loss of a limb or the loss of a man's quality of life is worth much less than a slight to one's reputation. The Malaysian Bar views this as an untenable situation which requires urgent redress.

5. Quantification of claims under general damages

Apart from the quantum of the awards claimed, the quantification of general damages is another disturbing trend that has developed from these mega-defamation suits. This issue arose in the High Court decision of *MBf Capital v. Tommy Thomas (No. 2)* [1997] 3 MLJ 403 where the first defendant's application to strike out with costs the words "amounting to RM15m" in the indorsement to the Writ of Summons and in the Statement of Claim was dismissed on the grounds that neither the Rules of the High Court nor any practice direction barred the plaintiff from affixing a figure to vindicate their worth in the form of loss of reputation and that "the pleadings alone" justified the quantification.

While acknowledging the lack of any such prohibition, it is the view of the Malaysian Bar that the application to strike out was with merit because it is in the province of the Court to decide on the quantum of damages irrespective of a quantification by the plaintiff, upon consideration of established principles, facts of the case and proof of damage or loss. Moreover, as a matter of public policy, parties should not quantify their claims for general damages for a number of reasons:

- (i) Quantification of a figure, particularly one that is high, may be oppressive to the defendant and the public at large, especially the media and academicians, and unjustifiably stifle freedom of speech;
- (ii) There will be no restriction to the sums claimed resulting in an unhealthy trend of 'mega' defamation suits and the opening of the floodgates to inflated claims;

- (iii) Although the sum stated is unreasonable, the defendant cannot take preliminary objection to it as the Court is not bound to evaluate the propriety of the quantum.

6. **The appropriate principles for quantification of damages in defamation suits**

As a general rule, damages are assessed on a compensatory basis in all defamation actions (see *Lee Kuan Yew v. Derek Gwyn Davies & Ors* [1990] 1 MLJ 390). Factors taken into consideration are the actual pecuniary loss, anticipated pecuniary loss, any resultant social disadvantage and compensation for the natural grief and distress which the plaintiff might feel. In addition, aggravated damages may be awarded as additional compensation in certain cases depending on factors like the social standing of the parties, the nature of the charges made in the statement, whether the defendant was actuated by malice or whether the defendant offered an apology etc.

Punitive or exemplary damages are likely to be awarded where the defendant has deliberately, or recklessly, published the defamatory statements with the knowledge that the economic benefit from the publication outweighs any sum for which he might be held liable in damages. The rationale behind such an award is to show that the defendant cannot break the law with impunity and it is only made where compensatory damages are insufficient to serve this aim of punishment (see *Chong Siew Chiang v. Chua Ching Geh & Anor* [1995] 1 MLJ 551).

The Court will also consider mitigating factors which may reduce the damages awarded like the existing reputation of the plaintiff, the behaviour of the plaintiff towards the defendant i.e. delay in taking action, whether the defendant apologised and any overlapping in damages resulting from multiple libels.

These established principles have developed over time and have been applied judiciously by the courts when carrying out the task of assessing the quantum of general damages applicable to a specific case. The decision of the court in *MBf Capital v Tommy Thomas (No. 2)* in allowing quantification of general damages sets dangerous precedent as litigants will be encouraged to abuse the process of the court by using defamation suits as tools of intimidation against critics or to silence the voices of opposition by claiming damages which no reasonable court has allowed in the past, applying the accepted principles of assessment.

7. **The position in other jurisdictions**

The courts in New Zealand, Australia and the United Kingdom have been able to strike a balance between the actual injury to reputation and the right to freedom of speech and expression.

(i) **The United Kingdom**

The English law on defamation is now increasingly approached through human rights law and the instrument most commonly cited there is the European

Convention on Human Rights which has been held to coincide with the common law. Article 10 of the Convention provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers... 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society..."

The general principles of quantum of damages in defamation cases has been reviewed on this footing by the Court of Appeal in the case of *John v MGN* [1997] QB 586 where the court said, "*Compensatory damages* The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. However, the court also said that "The conventional compensatory scales in personal injury cases must be taken to represent fair compensation in such cases unless and until those scales are amended by the courts or by Parliament. It is our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable."

On the subject of exemplary damages, the court said, "...principle requires that an award of exemplary damages should never exceed the minimum sum necessary to meet the public purpose underlying such damages, that of punishing the defendant, showing that tort does not pay and deterring others. ... Freedom of speech should not be restricted by awards of exemplary damages save to the extent shown to be strictly necessary for the protection of reputations."

In this case, the original award of damages had been £75,000 compensatory and £275,000 exemplary damages. The Court of Appeal reduced these figures to £25,000 and £50,000. It follows that even in very bad cases of libel, any award of compensatory damages over £150,000 (the current award in the United Kingdom in personal injuries cases where there is quadriplegia or severe brain damage) is carefully scrutinised, and it is unlikely that any awards in excess of that sum will be upheld on appeal.

(ii) **New Zealand**

The law of defamation in New Zealand is governed by the Common Law and the Defamation Act 1992. Under the Act, both general or compensatory damages and exemplary or punitive damages may be awarded. However, there is no record of punitive damages being awarded under the Act. The range of awards in New Zealand in recent times fall between \$20,000 to \$600,000. The latter sum was awarded for two defamatory publications by the same publisher, a television medium. The original award by the jury was considerably higher but the Court of Appeal considered it excessive and reduced the sum to \$600,000. Except in exceptional cases, the awards in New Zealand by both judges and juries are

moderate. This is because, the Court of Appeal is not in favour of excessive awards and exercises its inherent jurisdiction to reduce the award should the level of damages awarded by juries get out of hand.

(iii) **Australia**

Concern has been expressed in Australia about the size of jury awards for defamation suits. The escalating sums given are said to have a "chilling effect" on free speech and to undermine the public confidence in the administration of justice. In the case of *Coyne v Citizen Finance* (1991) 172 CLR 211, on appeal from the Supreme Court of Western Australia, the Court observed that:

"Western Australia has so far been spared what has occurred in some other parts of this country where it is a common perception that a stop writ and the effect of extravagant verdicts have combined to constitute an increasing threat to adequate and informed public discussion of matters of legitimate concern... and where the absence of any apparent correlation between the quantum of the amounts awarded as damages for defamation and the injury actually sustained has even led to the suggestion that the extraction of money by a public figure by way of settlement of a defamation action could constitute a sophisticated form of corruption. see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321."

The majority of defamation actions have been conducted in New South Wales, where until 1995 defamation actions were heard by juries. A series of excessive verdicts by juries at first instance were overturned on appeal and the High Court's guidelines on what constituted acceptable damages was carefully set out in the case of *John Fairfax & Sons v Carson* (1993) 178 CLR 44. However, awards in all States and Territories continued to rise and there was active discussion at Ministerial level between the States and Territories to effect law reform. As the largest increases in awards occurred in New South Wales, the NSW Government amended the Defamation Act 1974 in 1995 firstly, to take the task of assessment of damages away from the jury and give it to the trial judge and secondly, to specify that factors to be taken into account in damages assessment include the general range of damages for non-economic loss in personal injury awards. Since some of these personal injury awards had a statutory "cap", this had the effect of reducing damages as in the case of *Howlett v Saggors*, the first case under the new legislation.

The recognition of a limited right of freedom of speech implied in the Constitution by the High Court is part of the healthy trend in Australian public life of encouraging a frank level of debate about political and government issues. Similarly, the Courts will not permit an action for defamation to be brought by the government, including local government (*Ballina Shire Council v Ringlands* (1994) 33 NSWLR 680) or a statutory body (*NSW Aboriginal Land Council v Jones* (1997-8) 43 NSWLR 300). This is a reflection of jury verdicts for the defendant in a series of actions brought by politicians.

(iv) **Other Jurisdictions**

(a) **Hong Kong**

Historically the level of defamation damages in Hong Kong has been conservative. The quantum of defamation damages has been determined by reference to precedents in Hong Kong with reference to Common Law principles.

(b) Trinidad & Tobago and Mauritius

Trinidad & Tobago and Mauritius have introduced a 'right to reply' legislation wherein the Press Commission can order a retraction. This procedure is appropriate wherein the aggrieved party can obtain speedy redressal; and it is especially appropriate where the media accepts a mistake or has no intention of defending.

8. **Whether the scope of defences for defamation should be extended ?**

Several notable changes have taken place in the Commonwealth jurisdictions. It is proposed that the scope of defences available should be extended in keeping with the changes that have been adopted in other jurisdictions; as stated hereinbelow:

- (i) that it is the people and not the Government that possesses absolute sovereignty by denying Governments and Government-type organisations the standing to sue for libel;
- (ii) the defence of qualified privilege has been extended to the media in relation to public interest publications about politicians, whether local, national or international so long as it acted reasonably at every stage;
- (iii) that the defence of qualified privilege applies in relation to all wielders of power in society, be they heads of corporations, newspaper proprietors, people who have control or influence in the lives of other people;
- (iv) that the defence of qualified privilege has been extended by legislation (kindly refer to Appendix 3 for the Schedule on Qualified Privilege in the New Zealand Defamation Act 1992);
- (v) the scope of qualified privilege has been extended to provide protection to journalistic sources;
- (vi) the plea of justification is no longer restricted and is available so long as the party pleading justification believed the statement was true and had reasonable grounds for believing that sufficient evidence would become available by the time of the trial. This was an important change as now the evidence to prove the imputation would be in the discovery and the party pleading can plead it and get wider discovery; and
- (vii) normally privileged material like reports from the police, doctors and lawyers, which are relevant to an issue in a libel action, must be disclosed if it is within the keeping of the plaintiff.

9. Case for imposing a limit on damages awarded in defamation cases

Although libel is a tort actionable per se i.e. without proof of actual harm, it is submitted that evidence ought to be adduced by the Plaintiff to enable the court to assess the damages suffered and to make a reasoned and reasonable award, otherwise the measure of damages awarded by the court may be speculative.

In assessing damages in defamation cases there is a critical need to balance reputation against freedom of speech. Damages awards in defamation proceedings should correctly reflect the aim of compensating a person for an injured reputation.

Damages are compensatory. Compensatory damages are said to operate in two ways. "As vindication of the Plaintiff to the public and a consolation to him for the wrongs done. Compensation is here a solatium rather than a recompense for harm measurable in money" (*Ures v John Fairfax & Sons Ltd* (1966) 117 CLR 118 per Windeyer J at 150).

One of the most important aspects of defamation suits is vindication of the Plaintiff. Blackstone Commentaries on the *Laws of England* (15th Edition Vol 3 Chap 8 note p 1 to 6) states thus:

"And the chief excellence of the civil action for a libel consists in this, that it not only affords a reparation for the injury sustained, but it is a full vindication of the innocence of the person traduced".

It is submitted that there must be a rational relationship between two classes of cases i.e. personal injury and defamation. The foundation of that relationship must be the scale of awards for general damages in cases of serious physical injuries, which in their severity and disabling consequences, transcend injury to reputation. Personal injury is compensably more serious than injury to reputation and feelings.

In other jurisdictions where juries decide on defamation awards very large or substantial awards have been given and many of these awards have been reduced on appeal. Some jurisdictions have introduced legislation to provide a statutory cap and to remove the right of the jury to decide on assessment of damages. Legislation has also been introduced to remove the award of exemplary damages in defamation cases (kindly refer to Appendix 4 for the amendment to the Australian Defamation Act).

From the study carried out by the Bar Council, the defamation awards in Malaysia are presently the highest throughout the entire Commonwealth and possibly the highest in the world.

It is therefore imperative that legislation be introduced to amend the Defamation Act 1957 to provide that in the assessment of damages for defamation the general range of damages for non-economic loss in personal injury awards be taken into consideration; and that further consideration should be given as to whether exemplary damages should be awarded in defamation cases.

The Bar Council submits that in all the circumstances public interest demands that there should be legislation imposing a limit since it appears that the recent damages awarded are not perceived as reasonable or just. Therefore, the government is called upon to amend the Defamation Act 1957 to impose a "cap" on the quantum of damages that can be awarded in Defamation cases and to remove the award of exemplary damages.

10. **Issue of Costs in Mega Defamation Suits**

There has also been widespread concern on the issue of very high costs being awarded in matters pertaining to civil litigation. The costs being awarded are excessive and against the norm. The trend of awarding excessive costs is unjust and punitive.

Unreasonable or high costs will have an equal impact on curtailment of speech. The costs awarded should be reasonable and fair. Costs should not be used as an oppressive tool against a litigant. The administrators of justice should always ensure that court costs remain fair, reasonable and just.

11. **The effect of defamation suits on the media**

- (i) The common welfare of a modern plural democracy is best served by ample dissemination of information to the public and vigorous discussion of matters relating to the public life of the community and to those who participate in it.
- (ii) A free press is one of the foundations of modern democratic society. No free and fair media can exist if it is subject to mega defamation suits on a regular basis. In *City of Chicago v Tribune Co.* (1923) 307 111 595, Thomson CJ of the Supreme Court of Illinois, said:

"While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution".

- (iii) In the case of *Derbyshire County Council v Times Newspaper Ltd. & Others* (1993) 1 ALL ER 1011, it was held that:

"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".

"What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public".

The recent events pertaining to the "Jeffrey Archer" and the "Alfayed" cases clearly demonstrate the aforesaid proposition.

- (iv) In the case of *Reynolds v Times Newspapers Ltd & Ors.* (1998) 3 ALL ER 961; it has been held that the defence of common law privilege was available to the media where the media had a legal, moral or social duty to publish the information to those, including the general public, who has a corresponding interest in receiving it.
- (v) Recent judicial trend in other countries have held that in a democratic society, those who hold office in government, or who are responsible for public administration or wielders of power in the corporate, economic, social or other area of public life should always be open to criticism and therefore it will be contrary to the public interest to permit them to sue in defamation and that would place an undesirable fetter on freedom of speech.
- (vi) In Malaysia, the situation is that the media is facing the brunt of defamation suits from all and sundry including the "wielders of power" and the damages awarded have been huge.
- (vii) The recent spate of mega defamation suits and awards against the media and individuals has case a chilling effect on the freedom of speech in the country. The threat of defamation suits and huge awards should not be used to stifle a free and informed media from existing or emerging in this country.
- (viii) The pursuit for greater press freedom was demonstrated on 3 May 1999 when about 600 local journalists from 11 mainstream newspapers handed over a Memorandum to the Home Minister calling on the Government to repeal the Printing Presses and Publications Act 1984 in order to grant independence to the press and to help restore its credibility. The Memorandum, which commemorated the 51st Anniversary of the United Nations-declared World Press Freedom Day, saw panelists at a seminar concurring that libel suits against media companies and journalists in Malaysia should be checked before it got out of hand. The National Press Club President was quoted as saying that four elements hampered freedom of expression in the country - 13 legislations that were perceived as hurdles; ownership of newspapers; "advice" from the Government; and litigation against the media.
- (ix) Multi-million ringgit awards are disproportionate because the ultimate test that the Court can apply is whether it is really necessary in a democratic society to have awards of these kinds to remedy slight to reputation. Judges in the jurisdictions mentioned above have taken control on the principle that it is not necessary and being criticised in a newspaper cannot be as bad as losing a leg. This Report seeks a similar commitment from the Government and the administrators of justice.

Conclusion

The facts presented clearly show:

- (i) The present defamation awards are too high and have cast a chilling effect on the freedom of speech in the country.

- (ii) That defamation claims should not be quantified as they are oppressive and have opened the floodgates to highly inflated and unreasonable claims.
- (iii) That there should be legislative amendment to provide for an appropriate and rational relationship between the relevant harm and the amount of damages awarded. That in the award of damages the general range of damages for non-economic loss in personal injury awards should be taken into consideration. The issue in respect of removal of exemplary damages in defamation awards should be seriously considered.
- (iv) There is an adverse effect on the media due to the high claims and awards made. The functioning and emergence of a free and informed media for the common welfare of the community is under threat.
- (v) There is a need to introduce a 'right to reply' legislation overseen by a Media Complaints Commission/Media Ombudsman which has the power and authority to order a retraction in the media or publication.
- (vi) That administrators of justice should ensure that the freedom of speech is not threatened by civil action for defamation. The judiciary should maintain a proper balance between freedom of speech and a public figure's right to his reputation.
- (vii) Therefore, noting that multi-ringgit damages in defamation suits have a chilling effect on the citizen's right to freedom of speech under Article 10(1)(a) of the Federal Constitution, and the Universal Declaration of Human Rights, and further noting that archaic common law principles must now give way to more sensible solutions to the problem of how to reconcile the right to reputation with the right to freedom of speech in an age of electronic communication where powerful people are held to account and must be subject to reasonable comment, criticism and scrutiny, the Malaysian Bar calls for an amendment of the Defamation Act to limit the quantum of damages and calls on the judiciary not to give awards which are disproportionate which leads to the stifling of free speech and which is inimical to the common welfare of our country.

Bar Council Malaysia