

A **SYED NADRI SYED HARUN & ANOR v. LIM GUAN ENG
& OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA

ROHANA YUSUF JCA

IDRUS HARUN JCA

B MARY LIM JCA

[APPEALS NO: W-02(NCVC)(A)-685-04-2015, W-02(NCVC)(A)-686-04-2015, W-02(NCVC)(A)-695-04-2015 & W-02(NCVC)(A)-696-04-2015]

27 FEBRUARY 2018

- C **TORT:** Defamation – Libel – Articles published in mainstream newspapers and internet sites – Contents of articles revolved around Chief Minister’s trip to Singapore – Whether statements insinuated Chief Minister divulged national secrets to Singapore leaders thereby compromising his loyalty to Malaysia – Whether words complained of defamatory of Chief Minister – Whether impugned statements untrue
- D – Whether defence of justification proved – Whether impugned statements fair comment and based on any facts – Failure to comply with requirement of O. 78 r. 3(2) of Rules of Court 2012 – Whether defence of fair comment misplaced – Failure of defendants to establish an honest belief in truth of what had been published – Whether defence of qualified privilege ought to be dismissed – Failure to obtain
- E clarification or verify truthfulness of statements – Whether there was presence of malice – Defence of Reynolds’ principle – Whether fulfilled – Whether there was legal or moral duty on defendants’ part to publish impugned statements – Whether defence of responsible journalism ought to be entertained – Whether claim for defamation sustainable – Whether defendants liable
- F **TORT:** Damages – Quantum – Defamation – Libel – Articles published in mainstream newspapers and internet sites – Contents of articles revolved around Chief Minister’s trip to Singapore – Statements insinuating Chief Minister divulged national secrets to Singapore leaders thereby compromising his loyalty to Malaysia – Whether words complained of defamatory of Chief Minister – Award on
- G aggravating damages – Whether made without any legal basis – Whether defendants had acted in high handed or insulting manner to merit aggravating damages – Whether global award made excessive – Whether award of general damages appropriate

- H All the four appeals lodged by the appellants (‘defendants’) were pursuant to a civil action for defamation at the High Court by the respondent (‘plaintiff’). The plaintiff was the Chief Minister of Penang, the State Assemblyman of Air Puteh and the elected Member of Parliament for Bagan. From 11 August 2011 to 12 August 2011, the plaintiff made an official trip to Singapore for the purpose of developing investment potentials. The media statement issued
- I explained the visit was to promote, amongst others, medical tourism. There was also a dinner organised in Singapore in the course of that visit, which

was attended by Datuk Seri Kalimullah Hassan, as well as the Chief Executive of Temasek Holdings, together with other officers of the plaintiff. The first defendant (Information Chief of Perkasa) had, on 1 October 2011, issued a press statement relating to the plaintiff's trip. He posed a question whether the plaintiff attended a meeting in Singapore on 12 August 2011 together with Datuk Azman Yahya and Datuk Seri Kalimullah Hassan. The press statement sought the meeting agenda to be disclosed and questioned if Datuk Azman and Datuk Seri Kalimullah had previously organised such meeting between DAP and PAP. The first defendant then said the whole of Malaysia was entitled to question the loyalty of all these persons mentioned, relating to the trip. The first defendant then sent the press statement to the Chief Editor of the fifth and seventh defendants which culminated in the publication of the articles based on that press statement in various publications. On 2 October 2011, the New Straits Times published an article in their weekly English language newspaper, the Sunday Times entitled 'Three queried over dinner with Singapore politicians', followed by Berita Minggu which carried the same subject statement with a title 'Desak perjelasan pertemuan sulit DAP, PAP Perkasa percaya Azman, Kalimullah ada maklumat', Utusan Melayu (Malaysia) Berhad published an article based on the same story in their Malay language weekly newspaper, Mingguan Malaysia, entitled 'Kalimullah, Azman perlu jelaskan isu jumpa PAP.' The plaintiff claimed that the first defendant's press statement and all the articles published by the defendants had defamed him. The plaintiff alleged that the first defendant either acting personally or on the authority or complicity with the second and third defendants, had caused the impugned statements to be published in the media. That similar statement was published on the website of the third defendant. The fourth defendant, the Group Editor of the New Straits Times and Berita Minggu, was said to be responsible for publishing the statement in both the newspapers, while the fifth defendant was alleged to have distributed the statement both by the mainstream newspapers as well as by way of internet access. The sixth defendant, Group Editor in Chief of Mingguan Malaysia, was alleged to have caused the statements to be published in the seventh defendant's newspaper. After a full trial, the trial judge found that the impugned statements clearly insinuated the plaintiff, as having attended a dinner with senior PAP leaders of the Government of Singapore with questionable motive, had divulged national secrets to those leaders and had thereby compromised his loyalty to Malaysia. The trial judge rejected all the defences raised and found all the defendants liable to the claim. The trial judge thereafter assessed the appropriate damages for the plaintiff against each defendant and awarded damages to the plaintiff. The trial judge awarded a global award of damages in the sum of RM550,000 to the plaintiff. The damages awarded constituted general and aggravated damages. The defendants appealed on the issue of liability as well as

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- A quantum. The first defendant contended that the impugned statements were nothing more than legitimate queries on the reasons for the official visit to Singapore, which allegedly was not disclosed to the public. Hence, the first defendant maintained that his press statement was not defamatory of the plaintiff. The defendants also argued that the trial judge had failed to give appropriate consideration to the defences raised by each of the defendants.
- B Meanwhile, the second and third defendants attempted to raise specific issue on the *locus* of the third defendant as a registered society. It was the third defendant's case that the suit against the third defendant, was a non-compliance with the Societies Act 1966 ('Societies Act'). On the other
- C hand, the plaintiff cross appealed on the quantum awarded, contending that the damages awarded was too low because of the heinous libel perpetrated on the plaintiff as an elected Member of Parliament, an elected member of the Penang State Assembly as well as the Chief Minister of Penang.

Held (dismissing appeals in part; dismissing plaintiff's cross appeal)

D Per Rohana Yusuf JCA delivering the judgment of the court:

- (1) The trial judge had rightly construed that the words complained of were capable of and were in fact defamatory of the plaintiff. In doing so, the trial judge had employed the well accepted legal process of firstly determining that the words used must be given plain and ordinary
- E meaning to the ordinary reasonable person using general knowledge and common sense. And that the impugned statements must be construed in their proper contexts and must be read as a whole. There was no reason to disturb the findings of the trial judge. This court agreed that applying the generally accepted test, the words complained of, were indeed
- F defamatory of the plaintiff. (para 16)
- (2) The burden was on the defendants to prove justification that the impugned statements were in fact true. The first to third defendants had not pleaded the necessary particulars required under O. 18 r. 19 of the Rules of Court 2012 ('ROC 2012'). The pleading on justification was
- G done only in general terms as found in their pleaded defences. The trial judge had dismissed the defence of justification because the impugned statements were not true as evidenced from the content of apology extended by the first defendant to Datuk Azman who was equally mentioned alongside the plaintiff in the impugned statements. Another
- H apology by the fifth defendant to Datuk Seri Kalimullah contained a statement to the effect that the publication was baseless. The press secretary of the plaintiff had in fact issued a media statement on that trip, whereby it was stated that the reason for the visit was clearly stated as in pursuit of investment potential. Thus, the press statement of the first
- I defendant accusing that the trip was a secret one was also completely baseless and could not be defended on the defence of justification. (para 17)

- (3) The defence of fair comment raised by the defendants was totally misplaced and should be rejected. The trial judge was correct in doing so because the defence of fair comment was only applicable where the statement was, first of all, a comment, which was based on some true facts. The defendants had failed on this first requirement alone, to sustain such a defence because the impugned statements were not comments and were not based on any fact. Also, the defendants failed to plead this defence as per the requirement of O. 78 r. 3(2) of the ROC 2012. Under this rule, the defendants were duty-bound to particularise the facts relied upon to support such a defence, which was not adhered to by the defendants. (para 19)
- (4) A publication of untrue defamatory matter made recklessly, without considering its truth, would be treated as though it is known to the maker that they are false. The fourth to seventh defendants had failed to establish that there was an honest belief in the truth of what they had published. Thus, the trial judge was correct in dismissing the defence of qualified privilege on the reason that this defence required the presence of honest belief which was lacking. Further, the trial judge had correctly found malice on Her Ladyship's own inference like how it was done in *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub*. And that is a publisher of an untrue defamatory matter who recklessly, without considering or caring for its truthfulness or otherwise should be treated as if he knew it to be false. The fourth to seventh defendants were reckless and failed to obtain clarification or to verify the truthfulness of the impugned statements, this being the requisite condition to the defence of *Reynolds'* principle. (paras 21, 22 & 24)
- (5) There was no legal or moral duty on the part of the defendants to publish the impugned statements; neither was there any reciprocal duty or interest for public members to receive the false information which was not verified by the defendants in publishing them. Hence, no defence of responsible journalism could be entertained. Each of the defences had been clearly and carefully analysed and deliberated quite meticulously in the trial judge's grounds of judgment. The contention of the defendants that the trial judge lacked appreciation of the defences raised by the defendants was therefore totally groundless. The claim for defamation was sustainable. (paras 26 & 27)
- (6) As to the issue on the *locus standi* of the third defendant, the third defendant had gone through a full cycle of a trial, only to realise at the appeal stage that it was not properly cited as a party in the suit. This was a sheer afterthought. The third defendant had waived any right to object on the same. The second defendant, the President of Pribumi Perkasa at the material time, would appropriately fit the requirement of s. 9(c) of the Societies Act, he being the main office bearer of the society. Having

- A proceeded in the trial without raising any objection, he had already waived his challenge on the issue of *locus*. As such, this ground of appeal by the second and third defendants was devoid of any merit. (para 13)
- (7) As for the issue of quantum, the amount awarded by the trial judge on aggravated damages was incorrect in law. Aggravated damages is usually given in cases involving high handedness or oppressive action and would increase the humiliation to the injured plaintiff. There was no evidence of such before the court herein. There was no evidence that any of the defendants had acted in a high handed or insulting manner to merit aggravating damages. There was therefore no basis on the part of the trial judge to award this head of damages as part of the global award of damages. The global award made by the trial judge was also excessive and not in line with the trend of cases. In the circumstances, the appropriate damages to be allowed was only for an award of general damages (i) RM50,000 against the first to third defendants; (ii) RM50,000 against the fourth to fifth defendants; and (iii) RM50,000 against the sixth and seventh defendants (paras 31 & 33)
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Bahasa Malaysia Headnotes

- Semua empat rayuan yang dibuat oleh perayu-perayu ('defendan-defendan') adalah berikutan satu tindakan sivil fitnah di Mahkamah Tinggi oleh responden ('plaintif'). Plaintiff adalah Ketua Menteri Pulau Pinang, ADUN Negeri Air Puteh dan Ahli Parlimen yang dipilih untuk Bagan. Dari 11 Ogos hingga 12 Ogos 2011, plaintiff membuat lawatan rasmi ke Singapura untuk tujuan membangunkan potensi pelaburan. Kenyataan media menjelaskan lawatan itu adalah untuk mempromosikan, antara lain, pelancongan perubatan. Juga terdapat makan malam yang diuruskan di Singapura dalam perjalanan lawatan itu, yang dihadiri Datuk Seri Kalimullah Hassan, serta Ketua Eksekutif Temasek Holdings, bersama-sama dengan pegawai-pegawai plaintiff yang lain. Defendan pertama (ketua penerangan Perkasa) telah, pada 1 Oktober 2011, mengeluarkan kenyataan media berhubungan lawatan plaintiff. Dia telah mengemukakan satu soalan sama ada plaintiff telah hadir di mesyuarat pada 12 Ogos 2011 bersama-sama dengan Datuk Azman Yahya dan Datuk Seri Kalimullah Hassan. Kenyataan media menuntut agenda mesyuarat didedahkan dan mempersoalkan jika Datuk Azman dan Datuk Seri Kalimullah telah sebelum ini menguruskan mesyuarat sebegini antara DAP dan PAP. Defendan pertama kemudiannya menyatakan seluruh Malaysia berhak untuk mempersoalkan kesetiaan kesemua orang yang disebut, berhubungan lawatan itu. Defendan pertama kemudiannya menghantar kenyataan media itu kepada Ketua Pengarang defendan kelima dan keenam yang berakhir dengan penerbitan artikel-artikel berdasarkan kenyataan media dalam pelbagai penerbitan. Pada 2 Oktober 2011, surat khabar New Straits Times menerbitkan satu artikel dalam surat khabar mingguan berbahasa Inggeris, Sunday Times, bertajuk 'Three queried over dinner with Singapore politicians,' diikuti dengan Berita Minggu yang
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membawa subjek kenyataan yang sama bertajuk ‘Desak perjas pertemuan sulit DAP, PAP Perkasa percaya Azman, Kalimullah ada maklumat’, Utusan Melayu (Malaysia) Berhad menerbitkan artikel berdasarkan perkara yang sama dalam surat khabar mingguan Bahasa Melayu, Mingguan Malaysia, bertajuk ‘Kalimullah, Azman perlu jelaskan isu jumpa PAP.’ Plaintiff mendakwa kenyataan media defendan pertama dan segala artikel yang diterbitkan defendan-defendan telah memfitnahnya. Plaintiff mendakwa bahawa defendan pertama sama ada bertindak secara peribadi atau atas pemberian kuasa oleh atau secara bersubahat dengan defendan kedua dan ketiga, telah menyebabkan kenyataan-kenyataan yang dipertikaikan diterbitkan dalam media. Kenyataan yang sama juga telah diterbitkan di laman sesawang defendan ketiga. Defendan keempat, Pengarang Kumpulan New Straits Times dan Berita Minggu, dikatakan bertanggungjawab menerbitkan kenyataan dalam kedua-dua surat khabar, sementara defendan kelima dikatakan telah mengedarkan kenyataan itu melalui surat khabar arus perdana dan juga melalui akses internet. Defendan keenam, Pengarang Kumpulan Mingguan Malaysia, didakwa telah menyebabkan kenyataan itu diterbitkan dalam surat khabar defendan ketujuh. Selepas perbicaraan penuh, hakim bicara mendapati kenyataan-kenyataan yang dipertikaikan dengan jelasnya menyindir plaintiff telah hadir untuk makan malam dengan pemimpin-pemimpin kanan PAP Kerajaan Singapura dengan motif yang dipersalahkan, telah menghebahkan rahsia negara kepada pemimpin-pemimpin tersebut dan dengan itu telah mengkompromi kesetiaannya pada Malaysia. Hakim bicara menolak semua pembelaan-pembelaan yang dibangkitkan dan memutuskan defendan-defendan bertanggungjawab atas tuntutan. Hakim bicara selepas itu menilai ganti rugi sesuai untuk plaintiff terhadap setiap defendan dan mengawardkan ganti rugi kepada plaintiff. Hakim bicara mengawardkan award global berjumlah RM550,000 kepada plaintiff. Ganti rugi yang diawardkan terdiri daripada ganti rugi umum dan teruk. Defendan-defendan merayu atas isu liabiliti serta kuantum. Defendan pertama menghujahkan bahawa kenyataan-kenyataan yang dipertikaikan hanyalah pertanyaan sah berkenaan alasan-alasan untuk lawatan rasmi ke Singapura, yang didakwa tidak didedahkan pada pihak awam. Oleh itu, defendan pertama mengekalkan bahawa kenyataan medianya tidak memfitnah plaintiff. Defendan-defendan juga menghujahkan bahawa hakim bicara gagal memberikan pertimbangan yang sesuai pada pembelaan-pembelaan yang dibangkitkan oleh setiap defendan. Sementara itu, defendan kedua dan ketiga membangkitkan isu-isu spesifik berkenaan *locus* defendan ketiga sebagai sebuah pertubuhan yang didaftarkan. Adalah kes defendan ketiga bahawa guaman terhadap defendan ketiga tidak mematuhi Akta Pertubuhan 1966 (‘Akta Pertubuhan’). Plaintiff pula telah membalas rayuan atas kuantum yang diawardkan, dan menyatakan bahawa ganti rugi yang diawardkan terlalu rendah berdasarkan fitnah yang dahsyat terhadap plaintiff sebagai seorang Ahli Parlimen yang dipilih, seorang Ahli Dewan Undangan Negeri yang dipilih serta sebagai Ketua Menteri Pulau Pinang.

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**A Diputuskan (menolak sebahagian rayuan-rayuan; menolak rayuan balas
plaintif)**

Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

- B** (1) Hakim bicara telah dengan betul mentafsirkan kata-kata yang diadukan memfitnah plaintif. Dalam berbuat demikian, hakim bicara telah menggunakan proses undang-undang yang diterima iaitu pertama sekali menentukan kata-kata yang digunakan harus diberikan maksud yang biasa kepada orang biasa yang munasabah yang mempunyai pengetahuan umum dan akal fikiran. Dan kenyataan-kenyataan yang dipertikaikan harus ditafsirkan dalam konteks yang betul dan dibaca secara keseluruhan. Tiada alasan untuk mengganggu dapatan-dapatan hakim bicara. Mahkamah ini bersetuju bahawa mengguna pakai ujian yang diterima umum, kata-kata yang diadu sememangnya memfitnah plaintif.
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- D** (2) Beban adalah atas defendan untuk membuktikan justifikasi bahawa kenyataan-kenyataan yang dipertikaikan adalah benar. Defendan pertama hingga ketiga tidak memplidkan butir-butir yang perlu bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Pliding berkenaan justifikasi hanya dibuat dari segi terma-terma am seperti yang didapati dalam pembelaan yang diplidkan. Hakim bicara telah menolak pembelaan justifikasi kerana kenyataan-kenyataan yang dipertikaikan tidak benar seperti yang dibuktikan dalam permohonan maaf yang dibuat oleh defendan pertama kepada Datuk Azman yang telah disebut sekali bersama-sama plaintif dalam kenyataan-kenyataan yang dipertikaikan. Satu lagi permohonan maaf oleh defendan kelima dibuat pada Datuk Seri Kalimullah yang mengandungi kenyataan bahawa penerbitan itu tidak berasas. Setiausaha media plaintif telah pun mengeluarkan kenyataan media berkenaan lawatan itu, dan telah menyatakan alasan lawatan tersebut telah dinyatakan dengan jelasnya sebagai usaha mencapai potensi pelaburan. Oleh itu, kenyataan media defendan pertama yang mendakwa lawatan itu adalah satu lawatan rahsia juga tidak berasas dan tidak boleh dibela atas pembelaan justifikasi.
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- H** (3) Pembelaan komen wajar yang dibangkitkan oleh defendan-defendan benar-benar tidak boleh diterima dan harus ditolak. Hakim bicara betul berbuat demikian kerana pembelaan komen wajar hanya diguna pakai apabila kenyataan, pertama sekali, adalah satu komen yang berdasarkan fakta-fakta benar. Defendan-defendan gagal memenuhi keperluan pertama ini, untuk mengekalkan pembelaan sebegitu kerana kenyataan-kenyataan yang dipertikaikan bukan satu komen dan tidak berdasarkan apa-apa fakta. Juga, defendan-defendan gagal memplidkan pembelaan ini seperti yang diperlukan A. 78 k. 3(2) KKM 2012. Bawah kaedah ini, defendan-defendan terikat untuk membutirkan fakta-fakta yang disandar untuk menyokong pembelaan sebegitu, dan ini gagal dipatuhi defendan-defendan.
- I**

- (4) Penerbitan perkara fitnah yang tidak benar yang dibuat secara melulu, tanpa mengambil kira kebenaran, akan dianggap seperti diketahui pembuatnya bahawa ia adalah satu kepalsuan. Defendan keempat hingga kelima gagal membuktikan bahawa terdapat kepercayaan jujur dalam kebenaran dalam apa yang telah dibuktikan. Oleh itu, hakim bicara betul apabila menolak pembelaan kepentingan bersyarat atas alasan pembelaan ini memerlukan kehadiran kepercayaan yang jujur yang di sini tidak wujud. Tambahan lagi, hakim bicara telah mendapati niat jahat atas inferens sendiri seperti yang dibuat dalam kes *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub*. Penerbit perkara fitnah yang tidak betul yang secara melulu, tanpa mengambil kira atau peka pada kebenarannya atau sebaliknya harus dianggap seperti dia mengetahui ia adalah satu penipuan. Defendan keempat hingga ketujuh telah bertindak melulu dan gagal mendapatkan penjelasan kebenaran kenyataan-kenyataan yang dipertikaikan, dan ini adalah syarat yang diperlukan pembelaan prinsip *Reynolds*. A
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- (5) Tiada tanggungjawab undang-undang atau moral bagi pihak defendan-defendan untuk menerbitkan kenyataan-kenyataan yang dipertikaikan; juga tiada kewajipan atau kepentingan bersaling untuk pihak awam menerima maklumat palsu yang tidak disahkan oleh defendan-defendan apabila menerbitnya. Oleh itu, pembelaan kewartawanan bertanggungjawab tidak boleh diambil kira. Setiap pembelaan telah dengan jelasnya dan dengan cermat dianalisa dan dibincangkan dengan teliti dalam alasan penghakiman hakim bicara. Hujahan defendan-defendan bahawa hakim bicara tidak menghargai pembelaan-pembelaan yang dibangkitkan oleh defendan-defendan dengan itu sama sekali tidak berasas. Tuntutan fitnah harus dikekalkan. D
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- (6) Berkenaan isu *locus standi* defendan ketiga, defendan ketiga telah pun melalui satu pusingan penuh perbicaraan, dan hanya sedar pada peringkat rayuan bahawa ia tidak disebut secara betul sebagai pihak dalam guaman ini. Ini hanya fikiran semula semata-mata. Defendan ketiga telah mengetepikan hak untuk membuat bantahan. Defendan kedua, Presiden Pribumi Perkasa pada waktu material, sewajarnya memenuhi keperluan s. 9(c) Akta Pertubuhan, sebagai pemegang jawatan utama pertubuhan. Oleh kerana defendan kedua telah meneruskan perbicaraan tanpa apa-apa bantahan, dia telah mengetepikan hak bantahan isu *locus*. Oleh itu, alasan rayuan ini oleh defendan kedua dan ketiga tidak mempunyai apa-apa merit. G
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- (7) Berkenaan isu kuantum pula, jumlah yang diawardkan oleh hakim bicara berkenaan ganti rugi teruk tidak betul dari segi undang-undang. Ganti rugi teruk selalunya diberikan dalam kes-kes yang melibatkan pihak yang berkelakuan sewenang-wenang atau tindakan menindas dan akan meningkatkan lagi penghinaan pada plaintif. Tiada keterangan sebegitu di hadapan mahkamah ini. Tiada keterangan menunjukkan I

- A defendan-defendan telah berkelakuan sewenang-wenangnya atau cara menghina untuk mewajarkan ganti rugi teruk. Oleh itu tiada dasar bagi pihak hakim bicara untuk mengawardkan ganti rugi teruk sebagai sebahagian award global ganti rugi. Award global yang diberikan oleh hakim bicara juga berlebihan dan tidak selaras dengan trend kes-kes.
- B Dalam keadaan sedemikian, ganti rugi sesuai untuk dibenarkan hanyalah award ganti rugi am (i) RM50,000 terhadap defendan pertama hingga ketiga; (ii) RM50,000 terhadap defendan keempat hingga kelima; dan (iii) RM50,000 terhadap defendan keenam dan ketujuh.

Case(s) referred to:

- C *Adam v. Ward* [1917] AC 309 (*refd*)
Dato' Dr Tan Chee Khuan v. Chin Choong Seng [2011] 8 CLJ 574 HC (*refd*)
Dato' Musa Hitam v. SH Alattas & Ors [1991] 1 CLJ 314; [1991] 2 CLJ (Rep) 487 HC (*refd*)
Datuk Haris Mohd Salleh v. Abdul Jalil Ahmad & Anor [1983] 2 CLJ 211; [1983] CLJ (Rep) 521 HC (*refd*)
- D *Datuk Patinggi Abdul Rahman Ya'kub v. Abang Mohammad Abang Anding* [1979] 1 LNS 16 HC (*refd*)
Datuk Seri Utama Dr Rais Yatim v. Amizudin Ahmat [2011] 1 LNS 1441 HC (*refd*)
Derbyshire County Council v. Times Newspaper Ltd And Others [1993] 1 All ER 1011 (*dist*)
Flood v. Times Newspaper Limited [2012] UKSC 11 (*refd*)
Irene Fernandez v. Utusan Melayu (M) Sdn Bhd & Anor [2008] 2 CLJ 814 HC (*refd*)
- E *Jameel (Mohammed) & Anor v. Wall Street Journal SPRL* [2007] 1 AC 359 (*refd*)
JB Jeyaratnam Joshua Benjamin v. Goh Chok Tong [1983-1984] SLR(R) 745 (*refd*)
Joshua Benjamin Jeyaratnam v. Goh Chok Tong [1989] 1 LNS 34 PC (*refd*)
Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors [2001] 2 CLJ 385 CA (*refd*)
Lim Guan Eng v. Utusan Melayu (M) Bhd [2012] 2 CLJ 619 HC (*refd*)
- F *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [1995] 2 CLJ 912 CA (*refd*)
Mirzan Mahathir v. Star Papyrus Sdn Bhd [2000] 5 CLJ 507 HC (*refd*)
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC (*refd*)
Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd [2010] 7 CLJ 885 HC (*refd*)
- G *Tun Datuk Patinggi Hj Abdul Rahman Ya'akub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304 HC (*refd*)
Utusan Melayu (Malaysia) Bhd v. Dato' Sri Diraja Hj Adnan Hj Yaakob [2016] 5 CLJ 857 CA (*fol*)

Legislation referred to:

- H Federal Constitution, art. 10(1)(a)
Rules of Court 2012, O. 18 rr. 12, 19, O. 78 r. 3(2)
Societies Act 1966, s. 9(c)
(Appeals No: W-02(NCVC)(A)-685-04-2015 & W-02(NCVC)(A)-686-04-2015)
For the appellants - Rueben Mathiavararam; M/s Suflan TH Liew & Partners
For the respondents - Americk Sidhu; M/s Americk Sidhu
- I *(Appeal No: W-02(NCVC)(A)-695-04-2015)*
For the appellant - PG Cyril & Fahmi Adilah; M/s Cyril Zhafri & Co
For the respondents - Americk Sidhu; M/s Americk Sidhu

(Appeal No: W-02(NCVC)(A)-696-04-2015)

For the appellants - Adnan Seman; M/s Adnan Sharida & Assocs

For the respondents - Americk Sidhu; M/s Americk Sidhu

[Editor's note: For the High Court judgment, please see *Lim Guan Eng lwn. Ruslan Kassim & Yang Lain* [2015] 1 LNS 1014 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf JCA:

[1] All the four appeals lodged by the defendants before us, are pursuant to a civil action for defamation at the Kuala Lumpur High Court, by the Chief Minister of Penang, Lim Guan Eng. After a full trial, the learned trial judge found all the defendants liable to the claim of the plaintiff and ordered for damages and costs to be paid by the respective defendants. We have heard all the four appeals together, and had allowed the appeals by all the defendants. Our reasons follow.

[2] For convenience, in this judgment we will refer to the parties as they were referred to at the trial. The appeals by the defendants are both on the issue of liability as well as quantum. While the plaintiff is cross-appealing on quantum. These four appeals are:

- (i) Appeal No. W-02(NCVC)(A)-685-04-2015 by the fourth and fifth defendants (Syed Nadri Bin Syed Harun and The New Straits Times Press (Malaysia) Sdn Bhd).
- (ii) Appeal No. W-02(NCVC)(A)-686-04/2015 by the sixth and seventh defendants (Abdul Aziz bin Ishak and Utusan Melayu (Malaysia) Berhad).
- (iii) Appeal No. W-02(NCVC)(A)-695-04-2015 by the first defendant (Ruslan bin Kassim); and
- (iv) Appeal No. W-02(NCVC)(A)-696-04-2015 by the second and third defendants (Dato' Ibrahim bin Ali and Pertubuhan Pribumi Perkasa Malaysia).

[3] The plaintiff is and was at all material times, the Chief Minister of Penang, the State Assemblyman of Air Puteh and the elected Member of Parliament for Bagan. From 11 August 2011 to 12 August 2011, the plaintiff made an official trip to Singapore for the purpose of developing investment potentials. There was a media statement as found at p. 154, rekod rayuan jld 2(1) issued by Setiausaha Akhbar of the Chief Minister on 12 August 2011, on the visit. The media statement explained the visit was to promote amongst others, medical tourism. There was also a dinner organised in Singapore in

A the course of that visit, which was attended by Datuk Seri Kalimullah Hassan, as well as the Chief Executive of Temasek Holdings, together with other officers of the plaintiff.

B [4] The first defendant (information chief of Perkasa) having been aware of that trip about less than two months later had on 1 October 2011 issued a press statement relating to the plaintiff's trip. The press statement of the first defendant began by posing a question whether the plaintiff attended a meeting in Singapore on 12 August 2011 together with Datuk Muhammad Azman Yahya and Datuk Seri Kalimullah Hassan. Then the press statement sought for meeting agenda to be disclosed, and questioned if Datuk Azman and Datuk Seri Kalimullah had previously organised such meeting between the DAP and PAP. The first defendant then said the whole of Malaysia is entitled to question the loyalty of all these persons mentioned, relating to the trip.

D [5] The first defendant then sent the press statement to the chief editor of the fifth and seventh defendants by way of short messaging services (SMS) which culminated in the publication of the articles based on that press statement in the various publications. Next day itself on 2 October 2011, the New Straits Times published an article in their weekly English language newspaper, the Sunday Times entitled, "three queried over dinner with Singapore politicians", followed by Berita Minggu which carried the same subject statement with a title "*Desak perjas pertemuan sulit DAP, PAP Perkasa percaya Azman, Kalimullah ada maklumat*", Utusan Melayu (Malaysia) Berhad published an article based on the same story in their Malay language weekly newspaper, Mingguan Malaysia entitled "Kalimullah, Azman perlu jelaskan isu jumpa PAP".

F [6] The plaintiff claimed that the first defendant's press statement and all the articles published by the defendants pursuant thereto, as referred to in the preceding paragraph had defamed him. It was alleged by the plaintiff that the first defendant either acting personally or, on the authority or complicity with the second and third defendants, had caused the impugned statements to be published in the media. That similar statement was published on the website of the third defendant. The fourth defendant who was the group editor of the New Straits Times and Berita Minggu was said to be responsible for publishing the statement in both the newspapers. While the fifth defendant was alleged to have distributed the statement both by the mainstream newspapers as well as by way of internet access. The sixth defendant who was the group editor in-chief of Mingguan Malaysia, had been alleged to have caused the statement to be published in the seventh defendant's newspaper. We would refer to the first defendant's press statement and the related articles published in reliance of that press statement collectively, as the "impugned statements".

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[7] After a full trial, the learned trial judge found that the impugned statements clearly insinuated the plaintiff, as having attended a dinner with senior PAP leaders of the Government of Singapore with questionable motive, had divulged national secrets to those leaders and had thereby compromised his loyalty to Malaysia.

[8] There was no issue in relation to identity and publication of the impugned statements which the learned trial judge need not go through to make a finding of defamation. After which, the learned trial judge embarked on assessing the various defences raised by the defendants. We would sum up the defences raised by the first to third defendants as justification and fair comment. While the fourth to seventh defendant pleaded defences are qualified privilege and *Reynolds'* principle. Having carefully examined the defences the learned trial judge had rejected all the defences raised and found all the defendants liable to the claim. The learned trial judge had thereafter, assessed the appropriate damages for the plaintiff against each defendant and awarded the damages to the plaintiff.

The Appeal

[9] The common grounds of appeal advanced by the defendants can be summarised into two broad categories. First, the defendants are not satisfied with the finding by the learned trial judge that the impugned statements are defamatory of the plaintiff. As for the first defendant it was contended that the impugned statements were nothing more than legitimate queries on the reasons for the official visit to Singapore, which allegedly was not disclosed to the public. Hence, the first defendant maintained that his press statement was not defamatory of the plaintiff. The next ground of appeal raised by all the defendants is that the learned trial judge had failed to give appropriate consideration to the defences raised by each of the defendants before her.

[10] Meanwhile, the second and third defendants attempted to raise specific issue on the *locus* of the third defendant as a registered society. It was contended that the third defendant being a society registered under the Societies Act 1966, cannot be sued in that capacity. Section 9(c) of the Act requires for a society to be sued in the name of its registered public officer. It was the third defendant's case that, the suit against the third defendant is a non-compliance with the Societies Act 1966. It was the case of these defendants that the second defendant who was then the President of the third defendant society, was named in his personal capacity and could not be said to assume the office-bearer of the third defendant, to enable compliance with s. 9(c).

[11] Before we delve into the two main grounds of appeal raised by the defendants, we propose to first deal with the issue on the *locus standi* of the third defendant. We note that this issue was not brought before the learned trial judge. It is being raised for the first time before us in this appeal. In our

A view, this objection should have been raised as a preliminary issue and not after the completion of trial. Definitely, it should not be an issue at the appellate stage as this. It is not disputed that there was no officer or office-bearer named or declared by the Registrar of Society as a public officer, under s. 9(c) in respect of the third defendant.

B [12] What is pretty obvious is that s. 9(c) which is reproduced below, allows a claim against a registered society in the name of any office bearer if none is named or declared by the Registrar:

C 9(c) a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any of the office-bearer of the society.

D [13] The third defendant had gone through a full cycle of a trial, only to realise at the appeal stage, that it was not properly cited as a party in the suit. We cannot find a better way to describe this than a sheer afterthought. The third defendant in our view, had waived any right to object on the same. The second defendant who was then the President of Pribumi Perkasa, (the third defendant) would appropriately fit the requirement of s. 9(c), he being the main office-bearer of the society. The second defendant had been described at para. 3 of the statement of claim as “the Principal Officer of Pertubuhan Pribumi Perkasa Malaysia (Perkasa)”. In the defence of the first to third defendants, this part of the statement of claim is admitted. The second defendant cannot now deny that he had in fact assumed the position as the office-bearer of the third defendant in the suit. Having done so and having proceeded in the trial without raising any objection, he had already waived his challenge on the issue of *locus*. As such we find this ground of appeal by the second and third defendants is devoid of any merit.

G [14] We now come to the first main ground of appeal raised by all the defendants. We agree with the finding made by the learned trial judge that the impugned statements are defamatory of the plaintiff. In arriving at that finding, the learned trial judge had gone through a thorough and proper examination of the impugned statements and had employed a well-established legal principle in doing so. It would be appropriate to reproduce the press statement of the first defendant which forms the basis of the other publications, to better appreciate the issues at hand. The full text of the statement is as below:

I PERKASA 01102011: Perkasa meminta Datuk Muhamad Azman Yahya tampil memberikan penjelasan, betulkah pada 12hb Ogos 2011 yang lalu Datuk Seri Kalimullah Hassan dan Lim Guan Eng Setiausaha Agung DAP dan Ketua Menteri Pulau Pinang telah mengadakan pertemuan sulit di samping makan malam bersama dengan seorang pemimpin kanan daripada Parti PAP di Singapura.

Jika benar maka kita ingin tahu apakah agenda yang telah dibincangkan oleh ketiga-tiga mereka pada malam tersebut? Apakah ianya berkaitan dengan rahsia negara?

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Perkasa juga ingin tahu daripada Datuk Muhamad Azman Yahya ... betulkah Datuk Seri Kalimullah Hassan telah kerap kali mengatur perjumpaan antara pemimpin-pemimpin DAP dengan pemimpin-pemimpin PAP dari Singapura? ... Jika benar maka seluruh rakyat Malaysia berhak mempersoal dan mempertikaikan di manakah Kiblat, kesetiaan dan loyalty mereka sekarang? ...

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Perkasa ingin memberi amaran kepada seluruh rakyat Malaysia jangan ada di antara kita yang cuba untuk menjadi alat atau ejen Negara asing dan cuba untuk menjadi petualang di negaranya sendiri. Ingatlah pesanan orang tua-tua di mana bumi dipijak di situlah sepatutnya langit dijunjung. Kalau tak ada angin masakan pohon bergoyang.

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Ruslan Kasim,
Ketua Penerangan Perkasa Malaysia
1hb. Okt. 2011.

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[15] It was in reliance on the above press statement of the first defendant that all the other publications as stated in para. 5 were made. The learned trial judge had carefully examined the impugned statements and had read all of them together in the proper context to form her conclusion that the impugned statements are defamatory of the plaintiff. She had explained as to how she had arrived at her conclusion and had substantiated her finding on well-reasoned grounds. The learned judge had in that process, taken a proper step in examining the statements when it was observed at paras. 25 and 26 of the judgment that:

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25. Peringkat pertama melibatkan plaintiff memikul beban untuk membuktikan, atas imbalan kebarangkalian, kesemua tiga elemen yang berikut:

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(a) Perkataan-perkataan yang diadukan mestilah mampu membawa suatu pengertian memfitnah;

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(b) Perkataan-perkataan yang diadukan mestilah merujuk kepada plaintiff;

(c) Perkataan-perkataan yang diadukan mestilah disiarkan oleh defendan kepada pihak ketiga.

26. Hanya setelah plaintiff berjaya membuktikan ketiga-tiga elemen tersebut dalam peringkat pertama itu, maka inkuiri dalam sesuatu kes fitnah akan memasuki peringkat kedua di mana beban beralih kepada defendan-defendan untuk membuktikan pembelaan yang dihidul atau bahawa perkataan-perkataan yang diadukan bukan pernyataan fitnah.

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[16] In our view, the learned trial judge had arrived at a correct conclusion after giving a careful assessment of the impugned statements. Her Ladyship had rightly construed that the words complained of are capable of and are

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A in fact defamatory of the plaintiff. In doing so, the learned judge had
employed the well accepted legal process of firstly determining that the
words used must be given plain ordinary meaning to the ordinary reasonable
person using general knowledge and common sense. And that the impugned
statements must be construed in their proper contexts and must be read as
B a whole. The learned trial judge had cited and relied on the principles
enunciated in the cases of *Tun Datuk Patinggi Hj Abdul Rahman Ya'akub v. Bre
Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393, *JB Jeyaratnam Joshua
Benjamin v. Goh Chok Tong* [1983-1984] SLR(R) 745, *Irene Fernandez
v. Utusan Melayu (M) Sdn Bhd & Anor* [2008] 2 CLJ 814. We have no reason
C to disturb the said findings of the learned judge and agreed that applying the
generally accepted test, the words complained of, are indeed defamatory of
the plaintiff.

[17] The next main ground of appeal raised by the defendants is on the
alleged failure of the learned trial judge to appreciate the defences raised by
D each of them. Now, on the defence of justification raised by the first, second
and third defendants, the learned trial judge rightly held that the burden is
on the defendants to prove justification, that the impugned words were in fact
true, as enunciated by the decision of the Supreme Court in *S Pakianathan
v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233.
E The learned trial judge further, did not find the first to third defendants to
have pleaded the necessary particulars required under O. 18 r. 12 of the
Rules of Court 2012, and as decided in *Mirzan Mahathir v. Star Papyrus Sdn
Bhd* [2000] 5 CLJ 507. The pleading on justification was done only in general
terms as found in their pleaded defences. In any case, the learned trial judge
F dismissed the defence of justification because the impugned statements were
not true as evidenced from the content of apology extended by the first
defendant to Datuk Azman (at p. 157 of the respondent's core bundle) who
had been equally mentioned alongside the plaintiff, in the impugned
statements. Another apology by the fifth defendant to Datuk Seri Kalimullah
at p. 159 of the same bundle of the appeal records, contained a statement to
G the effect that the publication was baseless. It was also plainly baseless that
the trip was a secret one as alleged, when the press secretary of the plaintiff
had in fact issued a media statement on that trip. In that media statement,
the reason for the visit was clearly stated as in pursuit of investment
potential. Thus the press statement of the first defendant accusing that the trip
H was a secret one was also completely baseless and cannot be defended on the
defence of justification.

[18] The learned trial judge went on to deliberate on the defence of fair
comment raised by the first to third defendants. In this regard, we find the
learned trial judge had correctly applied the law, where at para. 68 of the
I judgment, Her Ladyship stated this:

68. Defendan pertama tidak boleh menggunakan pembelaan ulasan
saksama apabila beliau sendiri sebenarnya tidak mengetahui tentang
kesahihan fakta yang diperkatakannya. Beliau tidak mengetahui secara

khusus sumber maklumatnya. Dalam keterangannya defendan pertama menyatakan bahawa beliau memperoleh maklumat tersebut melalui pembacaan beliau dalam laman web tetapi tidak ingat laman website yang mana satu. Selain itu beliau juga ada mendengar mengenai berita tersebut daripada perbincangan-perbincangan di kalangan ahli dan pemimpin. Tidak ada saksi yang dikemukakan untuk menyokong keterangan beliau tentang sumber maklumatnya. Sumber maklumatnya yang diterbitkan ternyata tidak betul sebagaimana pengakuan yang dibuat oleh beliau sendiri, dan oleh defendan kelima dan defendan ketujuh dalam permohonan maaf masing-masing kepada Datuk Azman dan Datuk Seri Kalimullah.

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[19] We agree with the learned trial judge that the defence of fair comment raised by the defendants is totally misplaced and should be rejected. The learned trial judge was correct in doing so because the defence of fair comment is only applicable where the statement is first of all a comment, which is based on some true facts (see *Joshua Benjamin Jeyaratnam v. Goh Chok Tong* [1989] 1 LNS 34; [1989] 3 MLJ 1 (PC)). The defendants had failed on this first requirement alone, to sustain such a defence because the impugned statements were not comments and were not based on any fact. Also, the defendants failed to plead this defence as per the requirement of O. 78 r. 3(2) of the Rules of Court 2012. Under this rule, the defendants are duty-bound to particularise the facts relied upon to support such a defence. This requirement was not adhered to by the defendants.

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[20] *Vis-a-vis* the defence of the fourth, fifth, sixth and seventh defendants, the learned trial judge had dismissed the defence of qualified privilege on the reason that this defence requires the presence of honest belief which was lacking in this case. A publication of untrue defamatory matter made recklessly, without considering its truth would be treated as though it is known to the maker that they are false. The fourth to seventh defendants had failed to establish that there was an honest belief in the truth of what they had published.

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[21] Ultimately, the learned trial judge found the presence of malice which had nullified the defence of qualified privilege to the defendants. In her finding that there was malice the learned trial judge had meticulously dealt with this subject from para. 87 of her grounds of judgment. Her Ladyship had considered and rejected the evidence of the plaintiff which suggested that there was malice on the part of the fourth to seventh defendants suggesting a collusion between them with Barisan Nasional, to oust him out of power and to capture the Penang State Government. The allegation made against the fourth to fifth defendants that they share the same inspiration, and that UMNO was or still is the majority shareholders in the seventh defendant, were all rejected by the learned judge to form the basis of malice, on the part of these defendants.

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- A [22] The learned trial judge however, in our view had correctly found malice premised on Her Ladyship's own inference like how it was done in *Tun Patinggi Hj Abdul Rahman Ya'kub (supra)*. And that is a publisher of an untrue defamatory matter who recklessly, without considering or caring its truthfulness or otherwise should be treated as if he knew it to be false. The
- B learned trial judge considered the cases cited in support of the defendants on this issue in *Jameel (Mohammed) & Anor v. Wall Street Journal SPRL* [2007] 1 AC 359, *Sivabalan P Aspathy v. The New Straits Times Press (M) Bhd* [2010] 7 CLJ 885 and *Flood v. Times Newspaper Limited* [2012] UKSC 11.
- C [23] It was found by the learned trial judge that the defendants cannot rely on these authorities because the application of the laws in the cited cases are fact sensitive. Where she concluded at para. 82 of the grounds of judgment that:
- D 82. Daripada keterangan yang dikemukakan saya mendapati SD2, SD3 dan defendan keenam dari mula lagi tidak berhasrat untuk membuat verifikasi bukan kerana boikot atau layanan dingin DAP, tetapi kerana keyakinan penuh kepada kredibiliti sumber maklumat mereka, iaitu defendan pertama yang boleh dipercayai dan disegani kerana beliau ialah seorang pemimpin NGO yang kerap mengeluarkan kenyataan yang tidak menimbulkan masalah sebelum ini. Berteraskan keyakinan itu mereka memilih proses penyiaran secara tradisional exhibit P2, P3 dan P4.
- E [24] The evidence disclosed that the fourth to seventh defendants were reckless and failed to obtain clarification or to verify the truthfulness of the impugned statements, this being the requisite condition to the defence of *Reynolds'* principle, was missing. A *Reynolds'* defence is merely an extension
- F of the defence of qualified privilege reserved for journalists which is often described as responsible journalism. Such a defence is usually accorded to one who invests time and energy investigating into something, before reporting.
- G [25] A fact found by the learned trial judge on the conduct and practice by the seventh defendant to publish first and wait for reaction the next day, would not accord the defendants the *Reynolds'* privilege. A privileged defence is also defined in *Adam v. Ward* [1917] AC 309, as an occasion where the person who makes the communication has an interest, a duty, legal or social or moral to make it, and is made to a person who has corresponding interest or duty to receive it.
- H [26] The learned trial judge had further found that there was no legal or moral duty on the part of the defendants to publish the impugned statements; neither was there any reciprocal duty or interest for public members to receive the false information which was not verified by the defendants in publishing them. Hence no defence of responsible journalism can even be
- I entertained.

[27] Having perused through the grounds of judgment of the learned trial judge, we are of the view that all the defences raised by the respective defendants did not escape Her Ladyship's due consideration as each of the defences had been clearly and carefully analysed and deliberated quite meticulously in her grounds of judgment. The contention of the defendants that the learned trial judge lacked appreciation of the defences raised by the defendants is therefore totally groundless.

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Quantum Of Damages

[28] The learned High Court Judge having found all the defendants liable on the claim, had proceeded to award damages to the plaintiff. In the grounds of judgment at para. 112 it was observed by Her Ladyship that:

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Saya berpendapat tidak ada kewajaran bagi membuat award bagi ganti rugi teladan. Walaupun terdapat alasan bagi mengaward ganti rugi keterlaluan namun begitu mengambil kira semua hal keadaan kes, saya membuat satu global award sebagai ganti rugi am dan ganti rugi keterlaluan sebanyak RM550,000.00 iaitu RM150,000.00 dibayar oleh defendan pertama, kedua dan ketiga, RM200,000 oleh defendan keempat dan kelima dan RM200,000.00 dibayar oleh defendan keenam dan ketujuh ...

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[29] The learned trial judge did not award exemplary damages but had awarded a global award of damages in the sum of RM550,000 to the plaintiff. The damages awarded constitutes general and aggravated damages. Learned counsel for the plaintiff crossed-appealed on the quantum awarded, to say that the damages awarded was too low because of the heinous libel perpetrated on the plaintiff as an elected Member of Parliament, an elected member of the Penang State Assembly as well as the Chief Minister of Penang. Learned counsel relied on the decision in *Datuk Patinggi Abdul Rahman Ya'kub v. Abang Mohammad Abang Anding* [1979] 1 LNS 16; [1979] 2 MLJ 185, followed by two other decisions in *Datuk Haris Mohd Salleh v. Abdul Jalil Ahmad & Anor* [1983] 2 CLJ 211; [1983] CLJ (Rep) 521; [1984] 1 MLJ 97 and *Dato' Musa Hitam v. SH Alattas & Ors* [1991] 1 CLJ 314; [1991] 2 CLJ (Rep) 487. In gist, learned counsel submitted that the principles of damages as established in the decided authorities are that:

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- (i) the higher the plaintiff's position, the heavier damages ought to be;
- (ii) the libel contained the most vile imaginable as it questioned the loyalty of the plaintiff to the Prime Minister and the Federation of Malaysia; and
- (iii) the extent of the injury inflicted on the plaintiff is a perfectly legitimate incentive to award a generous sum reflecting aggravated damages.

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[30] Besides, factors such as malice as well as the well the dissemination of the impugned statements which reached a wide readership should be indication of how widespread the statements was. These are according to learned counsel, factors which should aggravate damages to the plaintiff.

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A [31] In this regard, we agree with learned counsel for the defendants that the amount awarded by the learned High Court Judge on aggravated damages was incorrect in law. Aggravated damages is usually given in cases involving high handedness or oppressive action. These factors would increase the humiliation to the injured plaintiff. There was no evidence of such before the court in this case. There was no evidence that any of the defendants had acted in a high handed or insulting manner to merit aggravating damages. There was therefore no basis on the part of the learned trial judge to award this head of damages as part of the global award of damages.

C [32] Then, we took a look at the trend of damages awarded by the court in a suit of defamation. The days of million ringgit award for defamation has long gone and consigned to history with the decision of the Court of Appeal in *MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals* [1995] 2 CLJ 912. We would begin with the case of *Datuk Seri Utama Dr Rais Yatim v. Amizudin Ahmat* [2011] 1 LNS 1441; [2012] 2 MLJ 807. A defamation for an allegation of raping a maid is surely a damaging remark that the plaintiff committed an offence of such nature would damage not only one's reputation but also his political and family life. Damages of RM300,000 was made for compensatory, aggravated and exemplary damages. *Dato' Dr Tan Chee Khuan v. Chin Choong Seng* [2011] 8 CLJ 574; [2011] 8 MLJ 608 involves a prominent consultant psychiatrist with international recognisance. He was a known philanthropist. The defamatory remark made was that he had used charity as a front for personal financial gain. He was awarded a sum of RM150,000 as damages.

F [33] Having given our due consideration, we agreed with learned defendants' counsel that the global award made by the learned trial judge was also excessive and not in line with the trend of cases. In *Lim Guan Eng v. Utusan Melayu (M) Bhd* [2012] 2 CLJ 619; [2012] 2 MLJ 394 despite the plaintiff being a Chief Minister of Penang and a finding of malice in that case, the award made was RM200,000.

G [34] In the circumstances, we find the appropriate damages to be allowed is only for an award for general damages. We then make the following order in respect of damages:

- (i) RM50,000 against the first to third defendants;
- H (ii) RM50,000 against the fourth and fifth defendants;
- (iii) RM50,000 against the sixth and seventh defendants..

I We are guided in this regard by the decision of this court in *Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385. In that case, it was enunciated that, joint tortfeasors should be made liable only to a single award. In this appeal, the first to the third defendants are joint tortfeasors because the suit against them was based on the same impugned statement, that is the press statement of the first defendant. Likewise similar situation occurred in relation to the other sets of defendants.

Another Decision

[35] Our decision, however, does not end with the above deliberations. There is the matter of the application of ‘another decision’ which impacted on our decision here. The trial of the plaintiff’s claim and the decision of the learned trial judge completed with the grounds of judgment written on 10 June 2015. Before the present appeal came before us, we had the opportunity of hearing another appeal on this subject involving a public figure like the plaintiff. It was a defamation suit which was filed at the High Court of Kuala Lumpur by Dato’ Sri Diraja Hj Adnan Hj Yaakob, the Menteri Besar of Pahang against Utusan Melayu (Malaysia) Sdn Bhd. That action was in relation to an article published in the newspaper of the respondent therein, which was said to be defamatory of the Menteri Besar. There was an application to strike out the suit pursuant to O. 18 r. 19 of the Rules of Court 2012, which was dismissed by the High Court at Kuala Lumpur. On appeal before this court which was presided by the same panel, we allowed for the suit to be struck out, reversing, thus the High Court decision (see *Utusan Melayu (Malaysia) Bhd v. Dato’ Sri Diraja Hj Adnan Hj Yaakob* [2016] 5 CLJ 857).

[36] The main issue raised in that appeal was on the applicability of the principle as decided by the House of Lords in *Derbyshire County Council v. Times Newspaper Ltd And Others* [1993] 1 All ER 1011. The underlying principle as enunciated in that case is that, it is of the highest public importance that a democratically elected governmental body or indeed any governmental body, should be opened to uninhibited public criticism. It is premised on the basic tenet that in a free and democratic society, it would be contrary to public interest to permit those who hold office in the Government or are responsible for public administration to sue for defamation, because that would place undesirable fetter on freedom of speech.

[37] This principle of law as set out in that case relates to the issue of *locus standi* of the claimant plaintiff as the Menteri Besar of Pahang. It was raised as a legal issue as to whether a person holding an august public office who should be opened to public criticism in relation to the office he holds, is entitled to sue for defamation. We had in that appeal expressed our view and accepted and applied the principle in *Derbyshire*. We held the view that such principle would apply as it would operate in consonant and in sync with the right to freedom of speech as guaranteed under art. 10 of the Federal Constitution. The right to open criticism to our mind, is the hallmark of a democratically elected Government, the main thrust of which underscores the principle of accountability. This principle cannot operate alongside the prospect of a defamation suit being taken against citizen who is exercising his right to criticise a person who is accountable and open to public scrutiny.

- A [38] We appreciate that, the exercise of the right to fair criticism so as to ensure a transparency and good governance, lies amidst the potential conflict of the right of that other person to the protection of his name and dignity. It is well reasoned that a public figure performing public duties should be opened to be criticised on the performance of his duties and cannot be
- B defamed in that circumstances. It is for that reason that the principle in *Derbyshire* recognised exception to this general principle. Lord Keith of Kinkel, had laid down this exception as being confined to a suit for defamation in personal capacity.
- C [39] Thus, barring the exception that whenever the private and the personal conduct of a public figure is being put into question, all other conduct falls within the public domain of accountability and would not entitle him to sue in a tort of defamation.
- D [40] We differed in our view with the learned trial judge in that case as to whether the suit filed by the Menteri Besar of Pahang was in his official or personal capacity. The learned trial judge accepted the argument that the suit filed by the Menteri Besar of Pahang in that case was made in his personal capacity by virtue of the fact that the impugned statement was referring to Dato' Sri Diraja Hj Adnan Hj Yaakob by name, without citing him as the Menteri Besar of Pahang and the name 'Adnan' or 'beliau' had been used
- E instead, at least 20 times in the impugned statement therein. Premised on these reasons, the learned judge concluded that the claim made by the Menteri Besar was in his personal capacity and not the official one.
- F [41] We considered the pleadings in that case, and reading them plainly, we concluded that the suit was made in the capacity of the claimant as the Menteri Besar of Pahang. The alleged defamatory statement was clear to our mind that "the article, when read as a whole undoubtedly concerns, and the contents thereof revolve around namely the respondent being the Menteri Besar of the State of Pahang, not Dato' Sri Diraja Hj Adnan Hj Yaakob as a person or in his personal capacity".
- G [42] Having found so, we summarised the principles emanating from all the decisions and the authorities on this subject, at para. 17 of that judgment:
- H (a) A democratically elected Government and individual members holding office in the Government and are responsible for public administration or having conduct of the affairs of the Government should be open to uninhibited public criticism relating to such public administration and affairs;
- I (b) It would be contrary to public interest to fetter freedom of speech by restraining public critiques of the Government and those holding public office on matters relating to public administration and affairs;
- (c) There is no public interest favouring the right of the Government and those holding office in the Government and are responsible for public administration or having conduct of the affairs of the

Government to have the right to sue for defamation because to admit such actions would place an undesirable fetter or have an uninhibiting effect on freedom of speech; and

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- (d) The above principles do not restrict the rights of individuals holding public office from suing in a defamation action in his personal capacity where individual reputation is wrongly impaired.

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[43] We had also considered the matter from the perspective of the applicability or otherwise of the common law principle as laid down by the House of Lords in *Derbyshire*. In our view, this subject ought to be appraised from the perspective of the right to discuss or criticise the Government and public officials by the citizens in the exercise of the right as enshrined and guaranteed under art. 10 of the Federal Constitution.

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[44] Common law principle aside, in our judgment, such right is in fact and in law an integral part of the right to freedom of speech and expression, being the basic right guaranteed to every citizen of this country and in any free democratic process. This fundamental right must be given due recognition and protected as one which is duly protected and guarded by the Federal Constitution. Thus, even assuming for a moment that the *Derbyshire* principle is not part of our law on defamation, or that the defendants' case herein does not principally rely on the common law principle, we would say that the principle in fact and in law clearly emanates from and is already well-entrenched in art. 10 cl. (1)(a) of our Constitution, which guarantees the right to freedom of speech and expression. Such right in our judgment, encompasses the right of the citizens to discuss the Government and those holding public office in conducting public affairs and administration of the State. On that score, and as public interest dictates, a democratically elected Government and its officials should be opened to public criticism. Every responsible citizen should not be in any way fettered in his statements where it concerns the affairs and public administration of the Government. Any action to the contrary would in our view, militate against public interest and directly affect the fundamental right as guaranteed, unless otherwise provided by a Federal law.

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[45] We took note on the consensus of both learned counsel for the appellant and the respondent in that case, on the applicability of the *Derbyshire* principle. To be further noted, counsel for the plaintiff in this appeal, Encik Americk Sidhu was the same counsel for the respondent Menteri Besar in that case, who maintained his position and did not oppose the application of the *Derbyshire* principle to be part of our law of defamation and its jurisprudence. Learned counsel, like anyone else who believes in a democratically elected administration readily accepted the applicability of the principle and had only opposed that appeal on the sole reason that his client was suing in his personal capacity and cannot be subjected to that principle.

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A [46] Returning now to the present appeals, we maintain our similar view
in the present appeal with the one in *Dato' Sri Diraja Hj Adnan Hj Yaakob*. We
find striking similarities in the nature of the suit between that case to the one
in the present suit. Both the plaintiffs are the Chief Ministers or Menteri
B Besar of the relevant State Government and suing in their capacities of their
B respective offices. The pleadings in this case is clear that the plaintiff's suit
is made in his capacity, as the Chief Minister of Penang, the State
Assemblyman of Air Puteh and the elected Member of Parliament for Bagan.
Likewise, throughout the judgment of the learned judge, it is apparent that
Her Ladyship was determining and making her finding of defamation, as well
C as awarding damages solely on the fact that the plaintiff is a Chief Minister
of Penang.

[47] The submissions on damages is premised on the exact position of the
plaintiff being the Chief Minister. It is also the ground relied by learned
counsel that the damages awarded by the learned judge was insufficient
D because the plaintiff's reputation and dignity as a politician had suffered
much injury. There is nothing to suggest that the claim of the plaintiff is
anything but in his official capacity less the allegation of defamation may not
even be sustainable. The findings of the learned trial judge was solely
premiered on the fact that the impugned statements were defamatory of the
E plaintiff on the basis of his official capacity. In the words of the learned trial
judge at para. 35:

... Saya mendapati perkataan-perkataan yang dibaca secara
keseluruhannya walaupun dalam bentuk permintaan dan pertanyaan
mempersoalkan mengenai **kesetiaan plaintiff sebagai Ketua Menteri**
F **Pulau Pinang** dan sebagai rakyat Malaysia kepada Negeranya ...
(emphasis added)

[48] We agree with the learned trial judge that the claim of the plaintiff is
made in his official capacity. Hence, there is no issue of the applicability of
the exception to the *Derbyshire* principles in the facts and circumstances of the
present appeal. The application of the *Derbyshire* principles, as conceded by
G learned counsel, consequently meant that the plaintiff's claim must be
dismissed.

Our Decision

H [49] Having heard the submissions on merits of these appeals, we find all
the issues raised by the defendants as devoid of merit. We agree with the
findings of facts made by the learned trial judge and we have no reason to
intervene with her finding of facts, that the claim of defamation is
sustainable. On quantum, we however agree with counsel for the defendants
that the award on aggravated damages was made without any legal basis and
I the learned trial judge had fallen into error in awarding aggravated damages
as part of the global award as stated in the grounds of judgment. In any event,

no aggravated damages was properly pleaded in the claim. It is to be noted that in the fair order at pp. 6 and 7 of the appeal records vol 1, there was no mention of aggravated damages though it forms part of the reasons for awarding the global damages.

[50] We are not in agreement with the learned trial judge and we would have awarded general damages in the sums as we have stated in para. 34 of this judgment. Consequently the cross-appeal of the plaintiff is dismissed.

[51] After our decision was made in respect of these four appeals, our decision in *Dato' Sri Diraja Hj Adnan Hj Yaakob* was brought for the determination at the Federal Court. The appeal by the Menteri Besar in that case was allowed. In the result, the order for striking out made by us was set aside by the Federal Court. We have had no benefit of the decision or grounds of judgment as to applicability or otherwise of the principle in *Derbyshire*.

[52] We have therefore followed our earlier decision, that the principle of law in the *Utusan Melayu (Malaysia) Berhad v. Dato' Sri Diraja Haji Adnan Hj Yaakob (Utusan Melayu)* applies to the facts and circumstances of the present appeals. On this ground alone, we allowed all the four appeals before us. We ordered for costs to be borne by each party and we set aside the decision of the learned High Court Judge.

[53] Both my learned brother Idrus Harun JCA, and my learned sister Mary Lim Thiam Suan JCA, have read this judgment in draft. They have expressed their agreement on the same.

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