IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR

IN FEDERAL TERTIARY KUALA LUMPUR

CIVIL CASE NO.: WA-23CY-36-08/2017

BETWEEN

PUSHPARAJAN A/L R. THACHANAMOORTHY …PLAINTIFF

AND

CHIN WAI YEE …DEFENDANT

GROUNDS OF JUDGMENT

Introduction

[1] This is the Plaintiff's claim ('this Claim') for damages against the Defendant for a defamatory statement which were allegedly sent by the latter to the Plaintiff's wife via a text message.

Background facts

[2] Briefly, on 5.06.2017, the Plaintiff's wife received a text message via the iPhone messaging application, iMessage ('the iMessage') via 'michellechin0X@icloud.com' ("the iCloud Email Address") to her phone.

[3] The Plaintiff contended that the iMessage was defamatory as it had impliedly labelled the Plaintiff as having an extramarital affair. And this has further distressed the Plaintiff's relationship with his wife and their family.

[4] However, at all times, the Defendant disputed that she had ever sent the iMessage to the Plaintiff's wife and argued that she has never owned

the iCloud Email Address. Nevertheless, it was never disputed that the phone number of '012-2XXXXX5' was indeed owned by the Defendant. The Defendant, nonetheless, denied that her phone number had ever been associated with the iMessage and the iCloud Email Address.

[5] As the Plaintiff was not satisfied with the Defendant's response, the Plaintiff filed this Claim against the Defendant. The Plaintiff was, in essence, seeking damages from the Defendant and seeking an injunction to prohibit the Defendant from further author or publish any defamatory statement about the Plaintiff.

The Trial

[6] On the side note, I must express my gratitude to the parties for their co-operation and willingness to embrace remote access technology to enable the entire case to be conducted totally via zoom. This enabled a smooth running of the trial notwithstanding that one of the witnesses was in Singapore and one of the counsels was in the UK at the time of the trial. Truly, the application of Order 33A rule 3 of the Rules of Court 2012 and the amendment to Sections 3, 15A, 16, 17, 17B and 69 of the Courts of Judicature Act 1964 as amended through Courts of Judicature (Amendment) Act 2020 have been totally utilised to its entirety. The Plaintiff called three (3) witnesses during the trial while the Defendant called one (1) witness:

SP1 Vilashinee a/p Raman

SP2 Pushparajan A/L R. Thachanamoorthy

SP3 Malar Selvi a/p Rajoo

SD1 Chin Wai Yee

Issues

[7] Before the commencement of the trial, the Parties had agreed on the following issues to be tried:

1. Whether there was a defamatory short messaging service message made by the Defendant against the Plaintiff?
2. Whether the defamatory short messaging service message referred to the Plaintiff and had been published to third party?
3. Whether the short messaging service message is defamatory?
4. Whether on or around 21/6/2017 the Plaintiff through his solicitor S.N. Nair & Partners had made any claim against the Defendant?
5. Whether the Plaintiff suffered any loss and damage as a result of the defamatory short messaging service message?

Decision and Findings of the Court

[8] The crux of our present case is whether the iMessage that was sent to the Plaintiff's wife was made and/or sent by the Defendant. Thus, it is of the utmost importance that I deal with this issue first as it will be futile to go into the elements of defamatory without addressing the core dispute of this Claim.

i. Whether the iMessage was Sent and/or Published by the Defendant?

[9] It is pertinent in any defamation action to establish that it was the defendant who actually uttered the words as reflected in the impugned statements. If it cannot be established that she has never made the impugned statements, she could not be held liable no matter how defamatory the words are (see ***Siti Sakinah Bt Meor Omar Baki v Zamihan Mat Zin & Anor*** [2018] 7 MLJ 487).

[10] The core defence of the Defendant in the present claim is that she denied that the iMessage was ever made by her and it was her submission that the Plaintiff has failed to prove the iMessage was made by her. The following is the iMessage in issue:

michellechin0X@icloud.com

iMesssage

Yesterday 11;15AM

I did not want to tell you think but Rajan has stopped so low so I will not hold back. Are Rajan who is Rachel, the real estate agent who he's been sleeping with. His apartment at Hempshire is for sleeping around purposes. Open your eyes. He is a compulsive liar.

The sender is not in your contact list

Report Junk

[11] Like any other instant messaging application, 'iMessage' is an instant messaging service that is used by Apple users to send text messages, photos, documents, and videos via the built-in app on their Apple devices. Any text messages that are sent via 'iMessage' can be seamlessly continued on another device such as the Apple Mac computers and the Apple iPad. The difference between the 'Short Message Service' or 'Multimedia Message Service' (SMS/MMS) and 'iMessage' is that iMessages are texts that are sent over 'Wi-Fi' or cellular-data networks while the former are sent over a cellular network (see apple/support: https://support.apple.com/en-gb/HT207006).

[12] It is also known that iMessage is only available to the Apple user and one particular feature of iMessage is that any person can send and receive an iMessage via his/her iCloud email from any Apple device (see app/support: https://support.apple.com/en-gb/HT201349). Similarly, in our present case, the iMessage that was sent to the Plaintiff's wife was sent from the iCloud Email Address. Thus, in order for the Plaintiff to be successful in his claim, he needs to prove that the Defendant owned the iCloud Email Address.

[13] The Plaintiff cited section 114A of the Evidence Act 1950 to impose a presumption that the iCloud Email Address was owned by the Defendant at all material times. Section 114A of the Evidence Act 1950 provides as follows:

> "**Presumption of fact in publication**
>
> **114A.** (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to published or re-published the contents of the publication unless the contrary is proved.
>
> (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.
>
> (3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved."

[14] The above section speaks for itself where, unless the contrary is proven by the Defendant, at all times any person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor, or sub-editor, or who in any manner facilitates to published or re-published is deemed to be him. In ***YB Dato Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad*** [2015] 3 MLJ 364, the Court of Appeal had allowed the appeal and held that the respondent failed to rebut the presumption under section 114A and mere denial was not acceptable as the identity had been established on the balance of probabilities.

[15] In our case, the iMessage was sent via the iCloud Email Address. The Plaintiff contended that the Defendant's English name is Michelle, and this was evidently shown by her current Apple ID 'michelleXXX@hotmail.com' and her iCloud ID phone's name 'Michelle XS XXX'. This fact was also never disputed by the Defendant. Thus, the Plaintiff argued that the Defendant must be the owner of the iCloud Email Address.

[16] However, the Defendant had firmly positioned that the iCloud Email Address was not and has never been her email address and the screenshot iMessage had never displayed her profile picture nor her handphone number. Thus, the presumption under section 114A had failed. In this regard, I agree with the Defendant's contention.

[17] Firstly, by observing the iMessage, it has never shown any phone number nor the Defendant's profile picture. This was admitted by SP2, who is the Plaintiff's himself in his testimony during cross-examination:

[NOP at page 56]

YHC: Okay, maybe I just share this screen with you. Refer to this screenshot, do you agree with me that there's one email stated in screenshot which is michellechin0X@icloud.com?

PRT: Yes.

YHC: Do you know the Defendant's handphone number?

PRT: I do.

YHC: Do you agree with me that the Defendant handphone number, 012-2XXXXX5?

PRT: I can't confirm right now, I need to- may I allow check my handphone to confirm?

YHC: Yep.

PRT: Give me a second. Can you repeat the number please?

YHC: 012-2XXXXX5*.*

PRT: Yes, correct.

YHC: Do you agree with me that there was no profile picture in this screenshot?

PRT: Agree.

YHC: Even Defendant's profile picture was not here as well? Agree?

PRT: Agree.

YHC: Do you agree with, with me that there was no specific date in this screenshot? Date? Apart from yesterday.

PRT: No. sorry, I agree.

YHC: Do you agree with me that there was no handphone number displayed in this screenshot?

PRT: Agree

YHC: Is there – if you disagree, is there any handphone number displayed in the screenshot?

RN: (Shook her head) [[1:13:01 – 1:13:02]

PRT: I don't see any handphone number displayed on the screenshot.

[18] This was also agreed by SP3, who is the Plaintiff's wife, during her cross-examination:

[NOP at pages 75 – 76]

YHC: Yes, thank you Ms Malar. Now I would like to go back to the screenshot message. Do you agree with me that the email displayed in this screenshot is michellechin0X@icloud.com?

MR: Okay, yes.

YHC: Only one email stated here.

MR: Hmm.

YHC: Yes or no?

MR: Yes.

YHC: Do you agree with me on this, since you have agreed with me Defendant's handphone number is 012-2XXXXXX5, can you see her handphone number displayed in this screenshot message or not?

RN: You can't be asking me that because I don't know how the phone works. I got this message –

MR: You can't be asking me that because I don't know how the phone works, I got this message –

YHC: No – just by looking at this screenshot, is there any handphone number displayed at this screenshot?

RN: (Shook her head) [00.32.26]

MR: No.

YHC: Thank you. Do you agree with me that there was no profile picture in this screenshot message?

MR: Yeah. No.

YHC: Agree or disagree?

MR: Agree.

[19] The Defendant further cited the case of ***Melawangi Sdn Bhd v. Tan Hood Tee*** [2017] 1 LNS 2 to support her submission. In this case the defendant denied that he had published the defamatory statement against the plaintiff. The plaintiff comes to the conclusion that the defendant was the one who published the defamatory statements based on the words "Tan 013-3257209" that had appeared in the third letter. However, it was held by the High Court that the plaintiff did not succeed on the balance of probabilities to prove that it was the defendant who had published the defamatory statements. The mere fact that the defendant was the Secretary of ATCOTO cannot amount to him as the maker and/or publisher of the defamatory statements. The Plaintiff's case was purely based on assumptions.

[20] In the present case, it is the Plaintiff's contention that it was the Defendant who had sent the iMessage, as the Defendant's name, "Michelle Chin" was stated in the iCloud Email Address. Other than this mere presumption, the Plaintiff could not bring any additional document or evidence that the iCloud Email Address belongs to the Defendant. The Plaintiff argued that the ownership of the iCloud Email Address could not be checked due to the privacy policy held by Apple. However, the Plaintiff's argument here only relied solely on Apple's webpage and was not in any way confirmed by any officer from Apple nor the Malaysian Communications and Multimedia Commission (MCMC). Nor has the Plaintiff shown any correspondence to show that they have attempted to check on or enquire about this.

[21] On top of that, it was also stated in the iMessage that '*the sender is not in your contact list Report Junk*' which indicates that the sender is not in the contact list of the recipient's (SP3's) mobile phone. This is contrary to what had been testified by SP3 during cross-examination, where she stated that she had saved the Defendant's number in her phone.

[NOP at pages 71 – 72]

YHC: Okay. What type of Messenger that both of you communicate? WhatsApp? WeChat? Skype? Email?

MR: WhatsApp.

YHC: WhatsApp? All the time is WhatsApp?

MR: Yes.

YHC: Since you know here since 2014, you would have save the Defendant's number.

MR: Okay. Okay, yeah I've saved her handphone number as Michelle Chin, Michelle Chin.

YHC: Okay, in your phone contact list?

MR: Yes.

YHC: Right. Do you agree with me that the sender details either the phone number or email will display in the WhatsApp if you have saved them as a friend? Let's say you have saved the number, do you agree with me that if you have saved the Defendant handphone number in your phone contact list, whatever message that you received would've reflected her name Michelle Chin?

MR: Yes.

…

YHC: In this screenshot, can you see the sentence, the sender is not in your contact list?

MR: Okay

YHC: Do you agree with me or not? The sender is not in your contact list.

RN: (Nodding her head) [00:23:07]

MR: Okay. I agree.

YHC: I put it to you that the Defendant is not the sender of this message?

MR: I don't agree with that. She's the sender.

YHC: Have you saved her number as Michelle Chin?

MR: Yes.

YHC: Do you agree?

MR: Yes.

[22] If at all, the iCloud Email Address user is the Defendant, such reminder that '*the sender is not in your contact list report junk*' would not appear at the bottom of the iMessage. Along with it, the Plaintiff has never proved to this Court that neither he nor his wife nor any witness had ever contacted the Defendant via the iCloud Email Address or that any one of them has ever been contacted by the Defendant through the iCloud Email Address. To further, SP3 has also confirmed in her testimony that she at all times communicated with the Defendant via WhatsApp and not iMessage. Just because the iCloud Email Address contains the words "Michelle Chin" and the Defendant has an alias "Michelle" and her family name is "Chin", one cannot simply associate the Defendant with the iCloud Email Address. Bearing in mind iMessage application is used by Apple products (iPhone, iPad, Macbook to name a few) users worldwide and there are millions of such users globally, there could be many iCloud users bearing the name "Michelle Chin" or prefer to name themselves or use the words "Michelle Chin" in their iCloud email addresses. On top of this, the iMessage only shows an icon and shows no picture of the sender

or what more to say the picture of the Defendant. More must be tendered to show that the iCloud Email Address is/ was used and owned by the Defendant. This Plaintiff has failed in this.

[23] On the last note, as submitted by the counsels of both parties, there have not been any Malaysian cases ever decided on iMessages and defamation action therefrom. Also, the parties have not submitted any cases from abroad on this. However, from my research, I am aware of the finding of the Federal Circuit Court of Australia in the case of ***Vaughan v Vaughan*** [2015] FCCA 3268 where it was held that an iMessage on an iPhone could be hacked or altered by the person recovering these messages while messages sent using normal text message technology could not be hacked or altered in any way. Normal text message technology has been defined by the court there to mean messages sent by way of cellular network, i.e., short messaging service (SMS).

[24] There is such possibility that the iMessage may not even be sent by the iCloud Email Address user. Since this has not been an issue in this case, I settle with the fact that the iMessage and the message in it were indeed the message sent by the owner of the iCloud Email Address. The Plaintiff, nevertheless, has failed to establish and prove to this Court that the owner of the iCloud Email Address is indeed the Defendant. Hence, the Plaintiff has failed to prove on the balance of probabilities that it was the Defendant who had sent the iMessage. This Court, thus, hold that this Claim against the Defendant is accordingly dismissed with costs.

[25] However, I will now proceed to analyse the other aspects of the Plaintiff's case against the Defendant for completeness. The elements in

any defamatory action are trite. It has been laid down in case laws that the plaintiff must prove three elements of the tort of defamation, which are:

(i) The plaintiff must show that the statement bears defamatory imputations;

(ii) The statement must refer to or reflect upon the plaintiff's reputation; and

(iii) The statement must have been published to a third person by the defendant.

(see ***Kian Lup Construction v HongKong Bank Malaysia Bhd*** [2002] 7 MLJ 283; [2002] 7 CLJ 283 and ***Ayob bin Saud v TS Sambanthamurthi*** [1989] 1 MLJ 315)

ii. Whether the iMessage is Defamatory

[26] The Plaintiff submitted that the iMessage as a whole in its natural and ordinary meaning implied that the Plaintiff,

a. is a liar and untrusted;

b. has no dignity and has acted so lowly;

c. has a condominium to cheat around and/or to have sex with other women;

d. has deceived his wife;

e. is an immoral husband;

f. is an unethical and has no principle;

g. has cheated on his wife; and

h. has sex and/or illicit affairs with other women.

[27] In ***Chok Foo Choo @ Chok Kee Lian v The China Press Bhd*** [1999] 1 MLJ 371, the Court of Appeal had laid down the test to be undertaken in determining whether the impugned words were defamatory.

His Lordship Gopal Sri Ram JCA (as he then was) at page 466 observed as follows –

> "It cannot, I think, be doubted that the first task of a court, in action for defamation, is ***to determine whether the words complained of are capable of bearing a defamatory meaning****. And it is beyond argument that* ***this is in essence a question of law that turns upon the construction of the words published***. As Lord Morris put it in *Jones v. Skelton* [1963] 3 All ER 952 at p. 958:
>
> > The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be part of the ordinary and natural meaning of words (see *Lewis v. Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include ***any implication of inference which a reasonable reader, guide not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense***."
>
> [Emphasis added]

[28] Likewise, in ***Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris*** [2014] 9 MLJ 605, Her Ladyship Rosilah Yop JC followed the ruling in ***Chok Foo Choo*** (*supra*) articulated that –

"[22] ***As to whether the statements were capable of being and were, in fact defamatory of the plaintiff, the test to be considered is whether the statements complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable reader would tend to lower the plaintiff in the estimation of right thinking society generally*** (see *JB Jeyretnam v Goh Chok Tong* [1985] 1 MLJ 334).

[23] ***The ordinary and natural meaning may therefore include any inference or implication which any inference or implication which an ordinary reasonable reader would draw from the statements***."
[Emphasis added.]

[29] The test to determine whether the words are defamatory or not involves a 2-stage process. In ***Wong Yoke Kong & Ors v Azmi M Anshar & Ors*** [2003] 4 MLJ 96 it was held that the Court must firstly, consider the meaning that the words could convey to the ordinary person and secondly, ascertain that if the words were published, a reasonable person would likely understand them in a defamatory sense.

[30] Therefore, the key question to be answered in this case is: what would an ordinary reasonable reader construe the iMessage to mean? Would the iMessage expose the Plaintiff to hatred, ridicule, and detestation in the mind of a reasonable reader or would it tend to lower the Plaintiff in the estimation of right-thinking society generally?

[31] From my reading of the iMessage, I agree that it would expose the Plaintiff to hatred and ridicule, and it would certainly be capable of

lowering the Plaintiff reputation in the estimation of right-thinking society. In the Court of Appeal case of ***Yokomasu Marketing Sdn Bhd & Anor v Chor Tse Min*** [2018] 2 MLJ 654 it was held at para [25] by His Lordship Asmabi Mohamad JCA:

> "In order to ascertain if the words complained of a defamatory of the plaintiff, one has to examine ***if the words complained of in their natural and ordinary meaning "impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part." If the answer is the affirmative, the words complained of is defamatory***.
>
> [Emphasis added]

[32] Any reasonable person reading the iMessage would understand the context of the said iMessage to mean that 'Rajan' was having extramarital affair with one 'Rachel' and had used his apartment at Hempshire for the *rendezvous*. I find guidance in the English case of ***Contostavlos and another v News Group Newspapers Ltd*** [2014] EWHC 1339 (QB) 3D05512 where the court explained that the publication was defamatory because it had attributed the first claimant as having entered into a romantic relationship with the second claimant knowing that the first claimant was in a stable, long-term, and committed relationship with one Stephanie Ward. Tugendhat J agreed with the claimant's submission and held that:

> "[11] Mr Millar submits that the court should proceed on the basis that an allegation that two people are having a love affair, when neither of them is at the same time in a relationship with anyone else, is not defamatory. ***But if the meaning is that one (or both) of them is in a relationship with another person at the same time, then that is defamatory only of the one(s) who is said to***

be in a relationship with someone else. He also accepts that, even if the meaning is that one of the couple having an affair is not engaged in a relationship with anyone else, but the other one is, and that fact is known to the first one, then an allegation that the unattached one is having the affair with such knowledge is defamatory of him or her. I accept those submissions are correct in the context of the present case.

…

[17] In my judgment the meaning of the words complained of, in so far as they refer to the First Claimant are:

> 'The First Claimant entered into a romantic relationship with the Second Claimant knowing that he was in a stable, long term and committed relationship with Stephanie Ward, and knowing that he lived with Ms Ward and their young daughter as a family, and that in doing so she knowingly encouraged the Second Claimant's betrayal of his family, and thereby engaged in conduct likely to cause the breakdown of the Second Claimant's relationship with Ms Ward and their daughter.'

[18] In my judgment that is defamatory of the First Claimant and it is all a statement of fact, not opinion or comment."

[Emphasis added]

[33] It is my finding that the iMessage in its natural and ordinary meaning implies that 'Rajan' had a scandalous affair with 'Rachel' The tortfeasor clearly had framed the 'Rajan' as having an affair with 'Rachel'. Therefore, in my view, the iMessage in its natural and ordinary meaning is capable

of being defamatory. The issue whether or not 'Rajan' was indeed referring to the Plaintiff would be discussed next.

iii. **Whether the iMessage refers to the Plaintiff**

[34] It is the Plaintiff's submission that the name 'Rajan' mentioned in the iMessage in its ordinary and regular meaning was clearly referring to the Plaintiff. Likewise, DW1, who is the Defendant, also acknowledged that she had known the Plaintiff as 'Rajan' during cross-examination:

[NOP at page 126]

RC: Alright On the- I gotta break my promise a bit here. When you, when you when you address Mr Rajan, how do you know him as? How do you address him? How do you call him? How do you – how do you – address him? How would you – yeah how would you name him when you speak to him? Mr Rajan, or what? I just wanna know –

CWY: Him as Mr Rajan-

RC: So you know him as Rajan. Or Pushparajan?

CWY: I know his full name is Pushparajan.

RC: Yeah, but you know him as Rajan, is it?

CWY: Yes.

[35] It is trite that defamatory statements are capable of being defamatory even if the statement complained does not mention or named the plaintiff. The House of Lords in ***Knupffer v. London Express Newspaper Limited*** [1944] AC 116 held that the test to determine the defamatory statement referred to the plaintiff was whether the words would reasonably lead people acquainted with the plaintiff to the conclusion that he was the person referred to in the statement. Viscount Simon LC opined at pp. 119 – 121 that:

"…***Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words as such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to.***

…

*"**There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law – can the article, having regards to its language, be regarded as capable of referring to the appellant? The seconds question in question of fact – Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise***, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative…"

[Emphasis added]

[36] In the present case, I am agreeable with the Plaintiff that because the iMessage was sent to the Plaintiff's wife, it is ordinary and reasonable to understand that the name 'Rajan' was indeed referring to the Plaintiff. I am also of the view that anyone knowing the Plaintiff who reads the iMessage would come to the conclusion that the iMessage was indeed referring to the Plaintiff.

iv. Whether there was any Publication

[37] It is a fundamental principle that in any defamation action the defamatory statement or words must be communicated or published to a third party in such a manner so as to be capable of conveying its defamatory meaning. As articulated by His Lordship Abang Iskandar JCA (as he then was) in ***Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh*** [2017] 4 MLJ 611 at p. 622 para [33]:

> "The law on publication in the context of the tort of defamation is, in fact, clear. It is this. For there to be defamation, ***there must first be established the factum of publication to at least a third party in respect of the impugned defamatory statement. A communication confined to the two parties, namely the speaker and the listener, can never amount to a defamation of the listener's reputation as there is no publication of the same to a third party. In the absence of a third party, no reputation can be in jeopardy of being tarnished. So, publication of the defamatory statement is an essential element to be established in the tort of defamation***."
>
> [Emphasis added]

[38] The Plaintiff submitted that there was such publication since the iMessage was sent to a third party other than the Plaintiff and the Defendant. The third party here is the Plaintiff's wife, SP3. This fact was testified by SP2 during cross-examination by the Defendant's counsel:

> [NOP at page 55]
>
> *YHC: Do you agree with me that this iCloud message screenshot was received by your wife?*
>
> *PRT: Yes.*
>
> *YHC: Did your wife show you the iCloud message?*
>
> *PRT: Yes*

YHC: When?

PRT: After she received it.

YHC: When?

PRT: I can't recall.

YHC: Did you confront the Defendant about the iCloud message?

PRT: No.

YHC: Only both of you have seen the iCloud message?

PRT: Both of you, meaning?

YHC: Meaning that, Malar received the iCloud message, show it to you, only both of you are, has seen this message, has read this iCloud message.

PRT: As far as I know, I don't know if she has sent it to anybody else, but yes, I know about it.

YHC: So you do not know whether Malar forwarded the iCloud message to others?

PRT: No.

YHC: How about Malar forwarded the message to you? The iCloud message to you?

PRT: Yes.

YHC: She has forwarded it to you?

PRT: Yes.

YHC: Do you forwarded to other people?

PRT: No

YHC: So do you agree with me that in the end, only both of you have read the message only?

PRT: Yes.

[39] Meanwhile, during cross-examination, SP3 narrated that after receiving the iMessage, she had shown it to her family members i.e., her sisters.

[NOP at page 78]

YHC: Right. Can I put it to you that you are the one who actually show the iCloud message to other people?

RN: (Shook her head) [00:37:38]

MR: Why do I have to show? I should only show to my husband. And that's what I did. Why do I have to downgrade my husband to other people. There's no reason for it.

YHC: So can I? Do you agree with me that this iCloud message only read by both of you? You and Mr Rajan? No other people involved? Do you agree with me?

RN: (Nodding her head) [00:37:57 – 00:38:01]

MR: Of course, my family members are – were there. You know, my sisters? Definitely I showed them, there's a lot of problem because of that. You know. My husband left the house. Children went haywire because of whatever happened between me and my husband.

YHC: So you showed the iCloud message to your family members?

MR: I can't really recall- but yeah, definitely I would have shown to my sisters who I am very close with.

[40] In our present case, the circumstance is a bit peculiar. This is because the iMessage was received by the Plaintiff's wife and it was testified by SP3 that she then showed the iMessage to the Plaintiff and subsequently to her sisters. Generally, it is provided under the law that communication during a marriage is considered a privilege between the husband and the wife. Section 122 of the Evidence Act 1950 says,

"Section 122. Communication during marriage

No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other."

[41] *Gatley on Libel and Slander* [10th Edition] states that communication of defamatory matter by a person to his/her spouse does not constitute a publication under the law of defamation because for this purpose a husband and wife are treated as one person. Nevertheless, the question in our present case remains as to whether the communication between the Defendant (if at all she was the sender of the iMessage) and the Plaintiff's wife constitutes a publication.

[42] In the old English case of ***Wenman v Ash*** (1853) 138 ER 1432, an action for libel was filed concerning a letter addressed by the defendant to the wife of the plaintiff. The defendant, in this case, argued that there was no proof of publication as the letter was a privileged communication. The letter was written stating the defendant's loss and his suspicion towards the plaintiff for the loss of his documents during his lodge at the plaintiff's house. Jervis C. J held that the libel action against the defendant stood. His reasoning was laid down as follows at p. 1435:

"I am of the opinion that this rule must be discharged. ***It was sufficiently pointed out in the course of the discussion that it must necessarily be injurious to a man to have a communication like that in question addressed to his wife.***

Notwithstanding the ingenious argument of my Brother Byles, it is enough to say that I think there was a publication, and that of a matter calculated to operate injuriously to the plaintiff, and sufficient to maintain this action. As to the second point, I am clearly of the opinion that the occasion did not justify the communication of the defendant's suspicious to the plaintiff's wife. He could not really and bona bide believe that that was the proper quarter to address himself for the purpose of obtaining redress for his supposed grievance."

[Emphasis added]

[43] This was concurred by Maule J who discussed further the circumstances where a communication constituted as a privileged communication or not (at p 1435, para3):

"…In the eye of the law, no doubt, man and wife are for many purposes one: but that is a strong figurative expression and cannot be so dealt with as the consequences must follow which would result from its being literally true. For many purposes, they are essentially distinct [845] and different persons, -and amongst others, for the purpose of having the honor and the feelings of the husband assailed and injured by acts done or communication is made to the wife. Whether the circumstances under which a communication is made, constitute it a privileged communication or not, is a question which the court has assumed the jurisdiction of deciding: but it is more a question of fact in each particular case, than a question of law. The court is to consider whether the occasion is such as to make the communication one of a privileged character…***But where the circumstances do not present any justifiable occasion for speaking or writing the defamatory matter or shew it done***

either in pursuance of some duty or for the purpose of endeavouring to enforce a right, the communication is not privileged…"

[Emphasis added]

[44] Also, in ***Watt v Longsdon*** [1930] 1 KB 130 the plaintiff was the managing director of a company, and the defendant was a fellow director and a friend of the plaintiff's wife. A manager of the company wrote to the defendant accusing the plaintiff of immorality and dishonesty. The defendant, making no attempt at verification, showed the letter both to the company chairman and to the plaintiff's wife. It was held that while the former communication was privileged, the latter was not. Scrutton LJ articulated at pp. 149 – 150 that:

"The communication to Mrs. Watt stands on a different footing. I have no intention of writing an exhaustive treatise on the circumstances when a stranger or a friend should communication to husband or wife information he receives as to the conduct of the other party to the marriage. I am clear that it is impossible to say he is always under a moral or social duty to do so; it is equally impossible to say he is never under such a duty. It must depend on the circumstances of each case, the nature of the information, and the relation of speaker and recipient. It cannot, on the one hand, be the duty even of a friend to communicate all the gossip the friend hears at men's clubs or women's bridge parties to one of the spouses affected."

[45] In our local case of ***Syed Farouk Azlan Bin Syed Abdul Aziz v Putrajaya Holding Sdn Bhd & Anor*** [2003] MLJU 151, the plaintiff argued that the letter contained defamatory remarks against the plaintiff

that was served on the plaintiff's wife was considered as publication. His Lordship Azmel J was satisfied that the plaintiff had shown that the defendant had published those words defamatory of the plaintiff through the offending letter dated 7.8.2000 to third parties namely, the plaintiff's wife, an employee of the 1st defendant, Asri, and the 3-panel members of the Domestic Inquiry.

[46] Referring to the ratio in ***Wenman v Ash*** (*supra*), ***Watt v Longsdon*** (*supra*) and ***Syed Farouk*** (*supra*), it is clear that there is sufficient publication even if the publication is only made to the plaintiff's spouse. In the similar vein, in our present case, the iMessage was sent by the tortfeasor to the Plaintiff's wife. Thus, I find that indeed there was such publication.

[47] Be that as it may, the Plaintiff is still unable to succeed in his claim as it was not proven to this Court that the iMessage was actually sent by the Defendant. It is also pertinent to note that, when SP3 showed the iMessage to her family members, the chain of causation of the defamation committed by the tortfeasor was broken and cut off. The publication by the tortfeasor was only to SP3. Any publication after that by SP3 was the publication by SP3 herself and not the tortfeasor. (See, the English Court of Appeal case of ***Slipper v BBC*** [1991] 1 QB 283; more detailed discussion in Supreme Court of Western Australia full court decision in ***Harding v Essey*** (2005) 30 WAR 1 | [2005] WASCA 30; and an earlier Supreme Court of Western Australia in chamber decision in ***Palmer v Bradshaw*** (1991) A Def R 51-020) Therefore, the alleged publication was made to only one person namely, SP3.

[48] In view of that, I also opine that this Claim should be dismissed on the basis of limited publication. The law on limited publication in defamation suits was laid down in the English Court of Appeal case of ***Dow Jones & Co v Jameel*** [2005] EWCA Civ 75. In this case, the impugned article was only published to 5 people, and it was found that the harm done to the claimant's reputation by the publication to these individuals was minimal. Hence, even if the claimant succeeded with his action, the damages would be minimal, and the cost of the defamation suit would have been out of proportion to what has been achieved. As Phillips MR LJ put it at the last sentence of [69], "…The game will not merely not have been worth the candle, it will not have been worth the wick."

[49] Likewise, in the case of ***Chan Tse Yuen & Co v. Yap Chin Graik, Elaine & Ors*** (Encls 14 & 22) [2017] MLRHU 1348, the court followed the position provided in ***Jameel*** (supra) and held that the defamation suit should be struck out because of limited publication. In ***Chan Tse Yuen & Co***, the impugned statement was only published to Messrs Chew Biman, who was the plaintiff's lawyer.

[50] As mentioned earlier, the iMessage was sent to SP3 only. The law is trite that such minimal publication is petty. This Claim must be dismissed as such. Thus, this Court's ruling remains that this Claim should be dismissed.

v. Admissibility of the Screenshot of the iMessage ('ID-13')

[51] It was undisputed that the original 'iMessage' was never shown to this Court throughout the trial. The Plaintiff's defamatory suit rested solely on a screenshot, and it is the Defendant's submission that the authenticity of the iMessage needs to be proved first as it was the heart of the Plaintiff's

case. The learned counsel of the Defendant further cited the Industrial Court case of ***Mohamad Azhar Abdul Halim v. Naza Motor Trading Sdn Bhd*** [2017] 1 ILJU 8 where it was held that the WhatsApp snapshot image did not conclusively prove that it was indeed the claimant who was purportedly having a conversation with COW-1. It was undisputed/unchallenged that nowhere in the WhatsApp snapshot image mentioned the claimant's name, date of the WhatsApp message, the claimant's handphone number, or the claimant's profile picture nor any other evidence to prove that there was in fact such a conversation between the claimant and COW-1.

[52] The counsel for the Defendant further brought it to the attention of this Court that the iMessage had never been properly admitted as evidence. It has only been marked as an Identification document: ID-13. Hence, the iMessage does not bear any weight and should be dismissed. To support, the Defendant cited the case of ***Dr. Yan Xin Ha and Another v. Dato' Dr Nellie Tan Swee Lain and Others*** [2018] 1 LNS 1201, where the court opined that assuming the actual words said were as published, it could still not be taken into account as the articles were only marked as IDs and hence were not evidence.

[53] On contrary, the Plaintiff argued that he was unable to produce the original iMessage as it had been deleted by SP3. The Plaintiff also premised that his attempt to recover the iMessage also failed because of the complexity of the Apple system. Here, I agree with the Defendant's counsel. The deletion of the iMessage by SP3 despite the ongoing of this Claim is puzzling and is to the detriment of the Plaintiff's case. The iMessage is crucial for this Court to verify all crucial information about it.

[54] Therefore, I agree with the learned counsel of the Defendant that the iMessage is merely an identification document and its content should not be taken into account. The burden is always on the Plaintiff to establish his case on the balance of probabilities. If the original iMessage which was the heart of the entire dispute was not produced and only remains as identification document, how could this Court be convinced that the Plaintiff has established his case? Moreover, even if I were to admit the iMessage as evidence, the Plaintiff still could not prove that the iMessage was indeed sent by the Defendant.

vi. The Failure of the Defendant to plead her iCloud Email Address

[55] Regarding this, the Plaintiff submitted that the Defendant had failed to plead her current iCloud email address, 'michelleXXX@hotmail.com'. Hence, such failure should bar the Defendant from admitting the evidence into this Claim. With due respect, I disagree. In her Defence, the Defendant has vehemently denied that the iCloud Email Address belongs to her. That is sufficient for a defendant. The burden of proof always lies upon the Plaintiff.

[56] In our present case, the Plaintiff does not prove on the balance of probabilities that the iCloud Email Address which sent the iMessage was the Defendant's. Again, the presumption under section 114A of the Evidence Act was also unsuccessful given the fact that there was no such indication that the Defendant was the tortfeasor/ sender. Undoubtedly, she has verily made it clear from the beginning that the iCloud Email Address has never been her iCloud email address. Since the Plaintiff has not established that the owner of the iCloud Email Address was indeed the Defendant, it is safe to say that the entire defamation claim has failed

regardless whether the Defendant had pleaded or not her current email address registered with Apple or iCloud.

Conclusion

[57] To sum up, this Court find that the Plaintiff has failed to prove that the iMessage was sent by the Defendant. The iMessage was sent from the iCloud Email Address. The burden is on the Plaintiff to establish that the iCloud Email Address belongs to the Defendant. This the Plaintiff has failed to do. Without this crucial link, how could the Plaintiff establish his case against the Defendant on the balance of probabilities? Besides, the alleged defamatory statement in the iMessage was only 'published' to one recipient, namely, PW3 who is the wife of the Plaintiff. This matter should be dismissed as well in view of such limited and minimal publication. Therefore, I hold that this Claim be dismissed with costs.

Dated: 8th November, 2022

Dr John Lee Kien How @ Mohd Johan Lee
Judicial Commissioner
High Court of Malaya
Kuala Lumpur

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