Order for Injunction in Defamation

by Ang Hean Leng and Ngo Su Ning

In the wake of digital transformation, the Internet revolution and rapid progress in technology and communications, social networking is almost an unavoidable part of society in this age. As much as social media allows trading strategies to develop signals and disseminate positive messages, false and fake news and information could spread virally once put on social media. This is particularly bad when sensational headlines are intentionally created to grab readers' attention.

A common recourse available to combat these false or defamatory content online (as well as in any other offline publications) is through a defamation action.

Defamation

The question of whether defamation, one of the most technical of torts, has occurred is decided by the judge. Once it has been decided in a particular case that the statements relating to the plaintiff are defamatory, a balance has to be struck between two public interests: i.e. that of the individual's right to protect his or her reputation and the right of freedom of expression, especially the right of the freedom of the press and other media to report and draw attention to matters of public interest.[1]

In these circumstances, it is established that it is for the aggrieved party to prove that statements made:

(i) are defamatory in nature;

(ii) referred to the plaintiff; and

(iii) were published or communicated to a third party or another person.[2]

It is settled that the traditional remedy available to the plaintiff in a defamation action is primarily monetary damages. However, it is also just as clear that in many circumstances, monetary compensation is as good as no remedy at all. Fortunately, as the law develops, our courts allow an aggrieved party to seek an injunction from the High Court by making an application[3] for removal of false and fake content from being accessible or available on the internet.[4]

Injunction

Types of injunction and its significance

An injunction is essentially an authoritative warning, or a judicial order restraining a person from an action or compelling a person to carry out a certain act or order[5] which shall have the effect of restraining the threatened or repeated publication of defamatory false contents. Applications for injunction may be made to restrain the defendant from publishing the words complained of until after trial of the action or until further order.[6]

In circumstances where the offending statements are not removed from social media, an order for injunction is the more preferred recourse by most corporations in comparison to monetary remedies. The damage or harm towards the reputation of a corporation is irreparable

1 Mohd Akram Shair Mohamad and Abdul Rani Kamarudin, "Can the Federal and State Government Sue an Individual for Defamation?" [2017] 1 MLJ lxxix
2 *Dr Syed Azman bin Syed Ahmad Nawawi & Ors v Dato' Seri Hj Ahmad bin Said* [2015] 5 MLJ 141 (CA)
3 Rules of Court 2012, O 29 r 1
4 *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807 (HC)
5 *Concise Oxford English Dictionary* (Oxford University Press, 12th Ed, 2011)
6 *Atkin's Court Forms* (2nd Ed, 2011) Vol 15 Defamation and Disclosure and Information Requests, p 33

and, more often, cannot be adequately compensated by damages. Therefore, in terms of practicality, most corporations would opt for an injunction as a form of "damage control".

There are two types of injunctions:

(i) Prohibitory — in the sense of enjoining further publication; and

(ii) Mandatory — in the sense of requiring a retraction of the offending publication.[7]

A mandatory injunction warrants to the extent that the defendant can be asked to post an apology or a clarification statement besides removing or withdrawing the defamatory publication.

The test and developments

An injunction is a discretionary remedy and will only be granted on the merits of the case.[8] The jurisdiction to grant an order for injunction to restrain publication of defamatory statements is "*of a delicate nature*", which "*ought only to be exercised in the clearest cases*".[9] This is distilled from the seminal decision of the English Court of Appeal in *Bonnard v Perryman*[10] on the issue of interim injunctions to prevent defamation. In that case, the plaintiff sought and obtained an injunction which, in the eyes of the court, was clearly a libellous statement. The Court of Appeal set aside the injunction, noting that the factual issue on whether the statement was libel was a matter to be determined by the jury and further stated that the jurisdiction ought only to be exercised in the clearest case, where any jury would determine that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.

It was held in the case that the court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant.

It is worth observing that in *Bonnard* (*supra*), the court did not apply the test for injunction in ordinary cases as espoused by the House of Lords in *American Cyanamid Co v Ethicon Ltd*,[11] where the requirements below need to be established:

(a) there is a *bona fide* serious issue to be tried;

(b) whether a party could be adequately compensated in damages; and

(c) the balance of convenience favours the grant of the injunction.

Instead, their Lordships took the view that it was obvious that the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong.

Their Lordships placed emphasis on the importance of leaving the right of free speech unfettered as it is a right of public interest that individuals should possess and

7 Keith Evans, Doris Chia and Rueben Mathiavaranam, *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2008) at 211

8 Plaintiffs failed in obtaining an injunction in cases such as *The New Straits Times Press (M) Bhd v Airasia Bhd* [1987] 1 MLJ 36 (SC) and *Ngoi Thiam Woh v CTOS Sdn Bhd & Ors* [2001] 4 MLJ 510 (HC). In *Salcon Engineering Berhad v Luqman Michel @ Michael Palany & Ors* [2014] 1 LNS 1078, the High Court also refused to grant an injunction as it was not the clearest case and the plaintiff could be compensated by damages.

9 *Coulson v Coulson* [1887] 3 TLR 846, per Lord Esher MR. See also *Church of Scientology v Reader's Digest* [1980] 1 NSWLR 344 at 350A, per Hunt J.

10 [1891] 2 Ch 269 (CA)

11 [1975] AC 396 (HL)

exercise without impediment, so long as no wrongful act is done. Therefore, until it is clear that an alleged libel is untrue, their Lordships were reluctant to infringe any of those rights and, for the same reason, their Lordships were most cautious and wary with the granting of injunction and, in particular, an interim injunction.

This approach of the English Court of Appeal in *Bonnard* that adopted the language of Lord Esher MR in *Coulson v Coulson*,[12] which stated that the jurisdiction was of a delicate nature and ought only to be exercised in the clearest cases, showed approval of the same.

Subsequent to that, the English Court of Appeal again in *Herbage v Pressdram Ltd*[13] adopted the same approach and held that the court will only intervene to grant an interlocutory injunction restraining publication where the evidence of malice is overwhelming. In that case, the court added that:

(a) no injunction will be granted if the defendant raises the defence of justification; and

(b) no injunction will be granted if the defence raises privilege, unless the evidence of malice is so overwhelming that the judge is driven to the conclusion that no reasonable jury could find otherwise.

Griffiths LJ explained that "*these principles have evolved because of the* value *the court has placed on freedom of speech and I think also on the freedom of the press, when balancing it against the reputation of a single individual who, if wrong, can be compensated in damages*." His Lordship went on to state that if the court accepted the approach to apply the principles in *American Cynamid*, the practical effect would be that in very many cases, the plaintiff would obtain an injunction, for on the *American Cynamid* principles, the plaintiff would often show a serious issue to be tried, that damages would not be a realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. Thus, his Lordship thought it would be a considerable incursion into the present rule which is based on freedom of speech.

The underlying rationale is that the court felt that injunctions should generally only be granted where it was clear that the statement complained of was libellous and no defence could possibly apply.[14]

The foregoing approaches of the UK courts were recognised and adopted in Malaysia. Thus, even though our courts have had the opportunity to grant such remedy, this discretion has been carefully exercised — it is usually in circumstances where there is reason to apprehend further publication that the court will grant an injunction restraining the defendant from further publishing the words complained of.[15]

In *The New Straits Times Press (M) Bhd v Airasia Bhd* (*Airasia*),[16] the (then) Supreme Court held that, in law, there is no doubt that an interlocutory injunction restraining the defendant (appellant at the Supreme Court stage), whether himself or his servants or agents or otherwise, from publishing or further publishing matter which is

12 *Supra* n 9
13 [1984] Ch D 769 (CA)
14 Keith Evans, Doris Chia and Rueben Mathiavaranam, *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2008)
15 *Supra* n 7
16 [1987] 1 MLJ 36 (SC)

defamatory, may be granted. It is not necessary to show that there has already been an actionable publication or that damage has been sustained. Their Lordships further stated that in fact, in appropriate cases, an injunction may be granted *ex parte* and before the issuance of a writ. However, it was also observed that courts should be slow in issuing interim injunction[17] in a libel action.

In *Airasia*, the respondent had applied for an injunction and by *ex parte* application sought an interim injunction to restrain the appellants from publication of articles or words to the like effect. Both the High Court and the Court of Appeal granted the injunction. The Supreme Court held that the learned judge had erred in law when he exercised the power to grant the injunction, which is contrary to the established principles on this notion. It was held that the injunction should not have been granted against a defendant who specifically pleaded justification and had raised, as a defence, fair comment on a matter of public interest.

In a nutshell, it can be surmised that the requisite elements to obtain an order for injunction in defamation cases essentially are:

(a) statement is unarguably defamatory;[18]

(b) no grounds to conclude statement may be true;[19]

(c) no other defence which might succeed; and

(d) evidence of intention to repeat or publish defamatory statement shown.

The burden of proving the elements falls upon the plaintiff and not on the defendant.[20]

In view of the rapid growth of technology, our judiciary appears to have also acknowledged the consequences of Internet defamation. The following passage in the decision of *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat*[21] reflected the cognisance of the courts:

> "*As a blogger, the defendant is free to publish and disseminate matters and information which is of public interest, however the information or matter must be true and accurate (especially with regards to one's reputation), not something fished out of hearsay information and without verification. The defendant should act responsibly and be accountable for matters that are put up on his blog. Freedom of expression or publication does not extend to freedom of publication of false stories, untruths or accusations. The internet provides an immediate access to information by the click of a button and it should not be abused to disseminate false information.*" *(Emphasis added.)*

Our High Court has also, in *Chan Fei Yu & Ors v Siow Rong Jein & Ors*,[22] allowed the plaintiffs' application for interim injunction to enjoin the defendants to remove the impugned defamatory statements found in the Facebook page of the first defendant and to further restrain the defendants from further publishing such defamatory statements concerning the plaintiffs.

On the facts, the first defendant — who was an agent of the second and third defendants — had published statements defamatory of the plaintiffs in the Facebook page of the first

17 Malaysian courts appear to have used the terms "interim injunction" and "interlocutory injunction" interchangeably

18 Per Lord Esher in *Coulson* (*supra* n 9), the test is that "*the Court must also be satisfied that in all probability the alleged libel was untrue*". The test for "defamatory" is whether words would tend to lower the plaintiff in the estimation of right-thinking members of society in general. Mere words that are capable of being defamatory is not sufficient. It must be that any reasonable person would inevitably come to the conclusion that words were defamatory or understand them in the defamatory case.

19 See *Quartz Hill Consolidated Mining Co v Beal* [1882] 20 Ch D 501: "*As a general rule the plaintiff who applies for an interlocutory injunction must shew the statement to be untrue*". The test is therefore whether the author or defendant has produced any evidence or grounds to substantiate the allegation.

20 *Ngoi Thiam Woh v CTOS Sdn Bhd & Ors*, *supra* n 8

21 *Supra* n 4, at 827

22 [2015] 1 LNS 1559 (HC)

defendant, and the said defamatory publication was done with the ulterior intent to benefit the second defendant, who was at all material times a competitor in business owned by the plaintiffs. In publishing the defamatory statements on the Facebook page, the first defendant has also "tagged" the son of the third defendant, Beckham Teo. Teo made further highly defamatory and injurious statements against the plaintiffs. The third defendant had also responded and made comments to some of the impugned statements made by the first defendant.

Guided by the principles enunciated by the (then) Supreme Court in *Airasia* and the English cases, the High Court was satisfied that the plaintiffs fulfilled all the criteria laid down in law for the grant of an interlocutory injunction and their application was allowed despite the defendants pleading specifically for defence of justification and fair comment.

Further, in *Synergistic Duo Sdn Bhd v Lai Mei Juan,*[23] the plaintiff successfully obtained an injunction to restrain the defendant from publishing, in her Facebook account, two postings that were held to be defamatory of the plaintiff. In that case, the court ordered an *ad interim* injunction against the defendant to restrain her from publishing or causing to publish any postings until trial. The defendant failed and refused to comply with the court order and continued to publish the postings on her Facebook account, notwithstanding the *ad interim* injunction that was ordered. It was held that the defendant's failure to comply with the *ad interim* injunction was evidence that she would continue to publish or cause to be published the postings until trial and the continued publication of the postings on the defendant's Facebook would cause the plaintiff to suffer further damage to their reputation as the potential re-publication of the postings to potentially an unlimited number of internet users would irreparably harm the plaintiff's reputation. Our High Court decided that this harm could not be adequately compensated with damages.

Process

An injunction application can be made and then be heard either *ex parte* or *inter parte*. For an *ex parte* injunction, the application will only be heard with the presence of one party. An application for an injunction cannot be made *ex parte* where there is no urgency shown and it is pertinent to ensure that full and frank disclosure is made to the court.[24] *Inter parte* means the application will be heard with the presence of both parties. Thus, all relevant cause papers must be served on the other party.

Generally, an injunction application is an urgent application. Therefore, the hearing for an interim order can be fixed within a relatively shorter period of time, pending disposal of the hearing proper. Process can also be expedited in the sense that a quick hearing date can be fixed, subject to availability of court dates, by filing a certificate of urgency. However, substantive parts of the application will usually be heard only a couple of months later as parties are required to attend to case management for directions to file the relevant cause papers.

Out of court alternatives

By reason of the foregoing, therefore, litigation should always be seen as the last resort. It is inevitably more time-consuming and costly even if the process is accelerated. As such, in respect of practicality, there are other alternatives that corporations could consider — routes that are more effective if the objective is to stop the dissemination of false and defamatory statements.

23 [2017] 9 CLJ 244 (HC)
24 *Ayer Molek Rubber Co Bhd v Insas Bhd & Anor* [1995] 2 MLJ 734 (CA); *MRA International Sdn Bhd v SPC Diatech LLC* [2018] 1 LNS 136 (HC)

For instance, corporations could approach the author of the defamatory statements to seek clarifications and/or explanation as to the truth of the matter. Declaration, suitable correction and even apology can be demanded. Should the author of the defamatory statement refuse to cooperate, it is also possible for parties to execute a memorandum of understanding as a written assurance to corporations that the defamatory statements will not be repeated in the future. In short, the matter could be resolved via negotiations before a letter of demand is issued.

A live example would be a defamation case in 2011 involving a social activist, who apologised 100 times on Twitter in an unusual settlement with a magazine publisher. Fahmi Fadzil, then an opposition politician's aide and respected commentator on social issues, claimed on Twitter that his pregnant friend was poorly treated by her employers at a magazine company run by Blu Inc Media. He wrote an apology to Blu Inc on Twitter a few hours after making that allegation, but the company's lawyers later sent him a letter demanding unspecified financial damages for defamation and another apology in major newspapers.

Fahmi settled the case by agreeing to apologise 100 times over three days on Twitter, on which he had more than 4,200 followers:

> "I've DEFAMED Blu Inc Media and *FEMALE* magazine. My tweets on their HR [human resource] policies are untrue. I retract those words and hereby apologise."

Conclusion

To conclude, it is judicially acknowledged that in defamation cases, monetary compensation may not be the best resolution, particularly when it harms one's reputation. It is fortunate that, apart from monetary remedies, persons or corporations affected could also resort to an order for injunction. Notwithstanding that, such persons or corporations affected may also resort to out of court resolutions that may be more effective than seeking legal action. **LH-AG**

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