

Corporate Defamation: Truth on Trial

by SM Shanmugam and Shona Anne Thomas

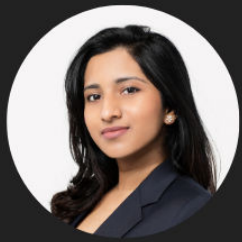


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Competition in the world of commerce is generally good for business as it forces constant innovation and improvements. Unfortunately, some find business rivalry to be intimidating, and would rather resort to antagonistic measures to annihilate their competition. To quote a Bloomberg article, “*for as long as there has been commerce, there has been espionage*”.¹

Commonly deployed tactics include the spreading of misinformation about rival companies. Depending on the factual circumstances, this may amount to defamation but, unfortunately, those who engage in corporate espionage seem unfazed by the legality or illegality of their actions.

Defamation



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The tort of defamation protects a person’s reputation and arises when there is a publication which tends to adversely affect one’s reputation. After all, one’s reputation has “an important bearing on many decisions in a democratic society which are vital to its wellbeing: whom to vote for, whom to work for, whom to employ, whom to do business with, whom to socialise with”.² Thus, every individual has a right to claim that his reputation shall not be disparaged without lawful justification.

In Malaysia, the law of defamation is based on English common law principles except in so far as it has been modified by the Defamation Act 1957.³ A successful claim for defamation requires three ingredients: (i) defamatory imputation arising from words (written or oral), visual images or gestures, (ii) defamatory imputation identifies and/or concerns the plaintiff; and (iii) dissemination of the defamatory words or material to a third party other than the plaintiff.

Based on the above, a layman may assume that a defamation action may be commenced by just about anyone. Interestingly, in a recent landmark decision by the Malaysian Federal Court, it was unanimously held that government and political parties, being registered societies, could not maintain a cause of action in defamation against individuals, as societies or the government had

¹ Bloomberg, “Famous Cases of Corporate Espionage” (21 September 2011) <https://www.bloomberg.com/news/photo-essays/2011-09-20/famous-cases-of-corporate-espionage>
² *Datuk Seri Anwar Ibrahim v Utusan Melayu (M) Bhd & Anor* [2013] 3 MLJ 534 at para 81
³ Malaysia’s Defamation Act 1957 is in *pari materia* with England’s Defamation Act 1952



no reputation. This decision is in line with decisions from other jurisdictions, such as *Goldsmith v Bhojru*⁴ and *Rajagopal v Jayalalitha*.⁵

So, can a company sue and be sued for defamation?

A company is a separate legal entity. With that knowledge, some may argue that a company, being an artificially created entity (with no feelings), should not be entitled to sue for defamation. While it is true that a company cannot feel emotions when its reputation is disparaged, it can however be injured in its pockets. This was rightly pointed out by Lord Reid in the English case of *Lewis v Daily Telegraph Ltd*.⁶

Thus, common law recognises that a defamed company may sue in respect of words that damage its trading reputation even without proof of special damages. For instance, in the well-known case of *South Hetton Coal Company*,⁷ the plaintiff company, which owned collieries with a number of cottages, sued the defendants, who were the proprietors of a newspaper, for defamation. The alleged defamatory publication was an article in the defendants' newspaper, which appeared to describe the village, among others, in a highly insanitary state, the houses being unfit for habitation and lacking conveniences and insinuated that the plaintiff company neglected its workforce. In response, the defendant contended that no action for defamation would lie on the part of a plaintiff company unless actual pecuniary damage was proved. In the end, the Court of Appeal found in favour of the plaintiff company and held, among others, that the article published by the defendant was:

- (a) an attack on the business reputation of the company; and
- (b) calculated seriously to injure the plaintiff company in the way of their business by preventing men from entering into their employment.

It must be stressed, however, that a successful action for corporate defamation hinges on the ability to prove the words complained of injuriously affect the company.⁸ This element must also be pleaded in the statement of claim. In fact, the Malaysian Court of Appeal in a 2016 case⁹ had pronounced that it was not sufficient to rely on an innuendo when the complaint of misconduct by the defendant was clearly related to the staff of the plaintiff company. The court went on to explain that an innuendo plays a lesser role in a defamation suit filed by a company (as the burden of proof rests with them). It can be said that the elements needed to be proved to

⁴ *Goldsmith and another v Bhojru and others* [1997] 4 All ER 268 (QBD)

⁵ *R Rajagopal @ RR Gopal @ Nakkheeran Gopal and another v J Jayalalitha and another* [2006] 2 MLJ 689 (HC)

⁶ *Lewis v Daily Telegraph Ltd* [1964] AC 234

⁷ *South Hetton Coal Company, Limited v North-Eastern News Association, Limited* [1894] 1 QB 133 (CA)

⁸ *Jameel and others v Wall Street Journal Europe SPRL* [2006] UKHL 44 (HL)

⁹ *Mak Khuin Weng v Melawangi Sdn Bhd* [2016] 5 MLJ 314 (CA)



raise a sustainable cause of action becomes more onerous for the company in contrast to defamation action against a living person.¹⁰

Practicalities and other concerns

Out of the many practical challenges that can be faced within commerce, a prime example is that associated with society's internet literacy. With the increase of internet literacy, there is mounting evidence that consumer reviews have a direct influence on consumer decisions and sales.¹¹ As a result, review fraud (in its various shapes and forms) has become endemic in the industry and in some circumstances, gives rise to a case for corporate defamation.

Besides that, a topic that has attracted much debate in the United States of America and some European countries is that corporations have increasingly used defamation lawsuits as an offensive weapon against its critics. Such is the trend that the term "SLAPP suits" (Strategic Litigation Against Public Participation) has been coined.¹² Groups have argued that some corporations with their bottomless purses initiate meritless intimidation lawsuits to ward off public criticism and it is also suggested by these groups that corporations should be treated as public figures in defamation suits.¹³ These movements call for legislatures and the judiciary to place a heavier burden on corporations.

Author's comments

To criticise the laws surrounding corporate defamation is like shooting a fish in a barrel. Tensions between the freedom of speech and the right to protect one's reputation have long existed. If you think your company has been defamed in one way or another, it is important to get legal advice at the earliest opportunity to minimise kickback, for the truth is very much on trial in the eyes of a third party.

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¹⁰

Ibid

¹¹

Michael Luca and Georgios Zervas, "Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud" (May 2015)

¹²

D Mark Jackson, "The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v Sullivan"

(William & Mary Bill of Rights Journal, Vol 9, Issue 2) (February 2001)

¹³

Ibid

