

Can the Defence of Qualified Privilege be Invoked without Verification of Information Relied On?

A CASE NOTE BY LOO YING NING.

Introduction

To raise the Reynolds privilege established in the landmark English House of Lords decision in **Reynolds v Times Newspaper Ltd**¹ in a defamation claim, a defendant is required to establish that the matter was one of public interest and that the defendant practised “responsible journalism” in publishing the impugned words.

This article looks at the case of **Datuk Harris Mohd Salleh v Datuk Yong Teck Lee**² which held that one of the relevant elements in the determination of responsible journalism is the duty of verification, failing which the defendant would not be able to plead the Reynolds privilege defence.

Brief facts

The plaintiff, **Datuk Harris Mohd Salleh** (“Datuk Harris”), and the first defendant, **Datuk Yong Teck Lee** (“Datuk Yong”), were former Chief Ministers of Sabah. On 4 April 2010, **Tengku Razaleigh Hamzah** (“Tengku Razaleigh”), in a speech, referred to an air crash (the double six tragedy) in 1976 which killed all on board including the then newly appointed Chief Minister, the late **Tun Fuad Stephens** (“Tun Fuad”), and more than half of the cabinet ministers at that time. Tengku Razaleigh revealed that after he had been strapped into the aircraft on that fateful day, Datuk Harris invited him to visit Pulau Banggi. Upon accepting the invitation, Tengku Razaleigh along with two other individuals disembarked the aircraft.

After the passing of Tun Fuad, Datuk Harris, who was the Deputy Chief Minister, took over as the Chief Minister of Sabah. Datuk Yong, who was the head of the second defendant (a political party), latched on to the speech by Tengku Razaleigh which resulted in a news article being published calling for a reinvestigation of the air crash.

Datuk Harris then issued a press statement disputing the accuracy of the accounts given by Tengku Razaleigh and gave his own version of the events leading up to the air crash incident. Datuk Harris challenged the defendants to repeat their remarks more specifically and openly.

Datuk Yong accepted this challenge and a second article was published, again calling for a reinvestigation. Datuk Harris then commenced an action in defamation against the two defendants on the basis that the articles could be understood to mean that he should be investigated because he had conspired with others to assassinate the late Tun Fuad so as to become the Chief Minister of Sabah.

Decision of the High Court

The trial judge found that although the two statements appeared innocent and harmless on the surface, when read between the lines and in the context of the speech by Tengku Razaleigh, Datuk Yong’s call for investigation was, in essence, a call to investigate Datuk Harris for a possible

involvement in a criminal act. The trial court held that the defendants failed to raise the defence of qualified privilege and fair comment.

Decision of the Court of Appeal

The defendants' appeal was allowed because the Court of Appeal found that the defence of qualified privilege was neither properly considered nor properly applied by the trial judge.

Decision of the Federal Court

The Federal Court held that the present appeal clearly concerned a matter of public interest given the nature of the air crash incident which resulted in the death of more than half of the then cabinet ministers.

However, the Federal Court held that even after giving the maximum latitude to editorial judgment, it was unnecessary for the defendants to embellish and spice up what Tengku Razaleigh had revealed in his speech with the insinuation that Datuk Harris was possibly complicit in the commission of a criminal act.

The Federal Court found that Tengku Razaleigh was merely expressing his sadness in recalling the double six tragedy and how Datuk Harris' invitation had saved his life. The Federal Court found that Tengku Razaleigh did not hint, let alone call for an investigation, into the crash nor suggest that Datuk Harris was an accessory to the double six tragedy.

The Federal Court found that Datuk Yong had gone beyond what Tengku Razaleigh had mentioned in his speech, and Datuk Yong had further speculated and embellished with the insinuation that Datuk Harris was possibly complicit in the criminal act which resulted in multiple deaths.

The Federal Court held that the application of the 10-point test established in Reynolds for the determination of the element of responsible journalism is clear from leading authorities such as the Federal Court decision in **Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee**³ and the House of Lords decision in **Jameel v Wall Street Journal Europe SPRL**⁴.

In explaining the Reynolds privilege defence, the Federal Court held that the non exhaustive factors in determining the issue of responsible journalism are:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed if the allegation is not true.
2. The nature of the information and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for their stories.
4. The steps taken to verify the information. (Emphasis ours)
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

Duty of Verification

In considering step 4 above, all the defendants had to do was to establish that Tengku Razaleigh made the revelation. Their case was simply one where the publisher is merely reporting what others have said.

However, the Federal Court did not accept this contention. On the facts, it was clear to the Federal Court that not only did Datuk Yong adopt and embrace what Tengku Razaleigh had said in his speech, he had embellished it with speculation and insinuation that Datuk Harris was possibly involved in the assassination of Tun Fuad and further spiced it up by referring to assassinations of other prominent figures such as John F Kennedy, Martin Luther King and Benazir Bhutto. As such, it was held that Datuk Yong could not say that he did not believe in the truth of what Tengku Razaleigh said in his speech.

The Federal Court held that it is insufficient for Datuk Yong to merely establish that he had verified that the statement was made. He must also satisfy himself that Tengku Razaleigh's speech as well as the insinuation made in the impugned statements he published was true, and his belief in its truth must be the result of a reasonable investigation and that the belief must be a reasonable belief to hold. Datuk Yong had failed to do so.

Conclusion

The Federal Court held that the defendants had failed the responsible journalism test due the fact that Datuk Yong failed to verify Tengku Razaleigh's speech as well as the truth in the insinuation that was published. Therefore, they failed to establish the elements required to rely on the Reynolds privilege defence.

LOO YING NING DISPUTE RESOLUTION PRACTICE GROUP

¹ **Reynolds v Times Newspapers Ltd** [1999] 4 All ER 609, HL

² [2017] 6 MLJ 133

³ [2015] 6 MLJ 187

⁴ [2006] 4 All ER 1279

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