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RELIEF OF APOLOGY IN DEFAMATION: A CASE FOR AMENDMENT OR REFORM IN THE MALAYSIAN DEFAMATION ACT 1957

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POSITION IN THE UK POST 1996

The Malaysian Defamation Act 1957 (Act 286) and the Singaporean Defamation Act 1957 are mirror images of the old United Kingdom's ('UK') Defamation Act 1952. Unlike Malaysia and Singapore, the laws on defamation have been undergoing vast amendments and reforms over the last 27 years. The reforms in defamation laws in UK started with the UK Defamation Act 1996. The UK Defamation Act 1996 was later replaced with the UK Defamation Act 2013.

Both the UK Defamation Act 1996 and the amended UK Limitation Act 1980 limited the filing of actions for defamation to only one year from the date of accrual of the cause of action¹ unless the court directs that the limitation does not apply for reasons of disability² or on equitable grounds.³ Another feature in the UK Defamation Act 1996 is provision for summary procedure in defamation actions.⁴ Under the summary disposal of defamation actions, the court may dismiss the plaintiff's case if it appears to the court that it has no realistic prospect of success and that there is no reason why the action should be tried.⁵ This is in direct contrast with our Malaysian rules. Order 14 r 1(2)(a) of the Rules of Courts 2012 expressly disallows any summary judgment procedures for libel, slander and malicious prosecution action among others. The rationale behind introduction of summary judgment procedure in UK

1 Section 4A of the UK Limitation Act 1980.
2 Section 28(4A) of the UK Limitation Act 1980.
3 Section 32A of the UK Limitation Act 1980.
4 Section 8 of the UK Defamation Act 1996.
5 Section 8(2) of the UK Defamation Act 1996.

Defamation Act 1996 seems compelling. It was to address the issue of plaintiffs who are prepared to accept modest damages if a speedy public apology were available and at the same time to weed out the issue of defendants stuck with 'gold-digging' claimants.⁶ For that reason, the damages cannot exceed £10,000 under the UK Act. The UK court may also give judgment for the plaintiff and grant summary relief listed under s 9 of the UK Defamation Act 1996 if the court is of the view that there is no defence to the claim.⁷ Among the reliefs which the court can grant under s 9(1) of the UK Defamation Act 1996 are:

- (a) declaration that the statement was false and defamatory of the plaintiff;
- (b) an order that the defendant publish or cause to be published a suitable correction and apology;
- (c) damages not exceeding £10,000 or such other amount as may be prescribed by order of the Lord Chancellor; and
- (d) an order restraining the defendant from publishing or further publishing the matter complained of.

With regard to the content, form, time and manner of correction or apology, if the parties cannot agree to the same, the UK court may direct the defendant to publish a summary of the court's judgment agreed by the parties or settled by the court.⁸ Sections 8 and 9 of the UK Defamation Act 1996 have thus introduced a new relief which was previously not available under the common law.

The primary reliefs available to the litigants in defamation actions in common law are confined to damages (general damages, aggravated damages and exemplary damages) and injunctions.⁹ *Gatley on Libel and Slander* (13th Ed) at p 327 wrote that: 'the primary remedy of the common law is damages and there is no general power to require the defendant to correct a false statement, or to publish a counter statement or reply by the claimant. The court has no general power to make a declaration of falsity, or a declaration that the claimant has been libelled'.

In the UK Defamation Act 2013, a more drastic reform was made by the UK Legislature. Section 2(4) of the UK Defamation Act 2013 abolishes the

⁶ *Carter-Ruck on Libel and Slander* (5th Ed) at Chapter 15.

⁷ Section 8(3) of the UK Defamation Act 1996.

⁸ Section 9(2) of the UK Defamation Act 1996.

⁹ *Gatley on Libel and Slander*, (11th Ed) at p 261:

a. In fact, however, the primary relief of the common law is not correction but damages and there is no general power either to require the defendant to correct or for the court to declare that the statement was false.

common law defence of justification and accordingly s 5 (justification defence) of the UK Defamation Act 1952 is expressly repealed. Likewise, the common law defences of fair comments¹⁰ and *Reynolds'* defence are also abolished.¹¹ failing which the court may settle such terms.¹² The UK court is also empowered under s 13 of the UK Defamation Act 2013 to order the operator of a website on which the defamatory statement is posted to remove the statement. The UK court can also make an order to the person who is not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting materials containing the statement.¹³

APOLOGY IN DEFAMATION SUITS IN MALAYSIA

In the last ten years or so, we have seen a few defamation cases where parties were ordered by the courts to tender apologies to the plaintiffs. That begs an important legal question: does the Malaysian court has the powers to compel a defendant to tender an apology if the court finds for the plaintiff in a defamation action?

Some may argue that the courts in Malaysia have powers by relying on a passage in *Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd* [2017] 2 MLJ 629 ('CGC's case'). In the CGC's case, the plaintiff sued the defendant for torts of negligence and defamation. The High Court ruled in favour of the plaintiff. Among the orders made by the High Court Judicial Commissioner was the defendant to publish a public apology in a local newspaper. The defendant appealed to the Court of Appeal. Court of Appeal allowed the appeal. In dealing with the cause of action for defamation, the court held that the judicial commissioner failed to evaluate the defendant's defence of qualified privilege. On that basis, the appeal was allowed in so far as

10 Section 3(8) of the UK Defamation Act 2013:
a. The common law defence of fair comment is abolished and accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

11 Section 4(6) of the UK Defamation Act 2013:
a. The common law defence known as the Reynolds defence is abolished. Under the scheme of the new UK Defamation Act 2013, the summary disposal of claim procedure under s 8 of the UK Defamation Act 1996 has been removed. Nevertheless, the UK Defamation Act 2013 maintains the power of the courts to make an order that the defendant to publish a summary of the judgment if the court finds for the plaintiff. The wording of the summary, time, manner, form and place of the publication of the summary of judgment are to be agreed by the parties

13 Section 12(3) of the UK Defamation Act 2013.

14 Section 13(1) of the UK Defamation Act 2013.

the cause of action for defamation was concerned. Justice Harminder Singh JCA (as he then was) in his written grounds dealt further on the issue of apology. He held as follows:

[67] For completeness, we come now to the order of the learned JC requiring the defendant to publish an apology in the local newspaper. It is trite that any such mandatory order must spell out in some detail what exactly is required of the defendant so as to make it possible for the defendant to comply. If any such order lacks details, it will invite legitimate criticisms of unenforceability (see *Redland Bricks Ltd v Morris & Anor* [1969] 2 All ER 579; [1970] AC 652). We however agree that in the case of a dispute, the parties should be able to go back to the trial judge to clarify and obtain specific directions as to any apology ordered. So nothing really turns on this issue in the instant appeal.

[68] What however concerns us is whether the discretion to order the apology was rightly exercised by the learned JC. In this context, we agree that an apology to the world at large, since it was to be made in a local newspaper is disproportionate as the CCRIS reports are not accessible by the general public. The reports are only read by certain financial institutions. If at all an apology is to be issued, it should be published solely to readers of the CCRIS reports (see *Infinity Exhibitions (M) Sdn Bhd & Anor v Instant Exhibitions (Sabah) Sdn Bhd* [2014] 1 LNS 1077).

[69] *We would also add that although courts have the jurisdiction to grant mandatory injunctions in a defamation action, including an order for an apology, nevertheless, because of the nature of the remedy, the exercise of such discretion calls for the utmost restraint. In other words, only in an exceptional case would an order for apology be favourably considered by the court* (see *TV3 Networks Ltd. v Eveready New Zealand* [1993] 3 NZLR 435; and *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291)

While it is true that the courts in Malaysia do possess powers to grant mandatory injunctions in a defamation action under the provision of s 53 of the Specific Relief Act 1950, it is submitted unfortunately that the courts do not have inherent powers to make an order for apology. Illustrations in s 53 of the Specific Relief Act, in particular illustration (f) does not envisage the power to make an order for apology.

The Malaysian courts when deciding defamation actions have been applying the laws of defamation from the UK common law. In short, our Malaysian Defamation Act 1956 have been interpreted and guided by the common law principles. In fact, common law is regarded as part of the 'law' in Malaysia by virtue of Art 160 of the Federal Constitution. As common law is a constant feature in defamation actions in Malaysia, it is submitted that sans any amendment or total reform to our Defamation Act 1956, our courts is seized of such powers to make an order compelling the defendant to apologise. At the

moment, the position in common law regarding the reliefs available in defamation action is clear: the primary reliefs available to the plaintiff are merely compensation and injunctions. David Price in *Defamation Law, Practice & Procedure* (2nd Ed, 2001) at p 169 opined that: ‘most claimants want an apology and retraction first and foremost. However, a court cannot make an order requiring a defendant to publish an apology against his will ...’. *Duncan and Neill on Defamation* (2nd Ed)¹⁴ and *Winfield and Jolowicz on Tort* (20th Ed)¹⁵ offered similar proposition like David Price and *Gatley on Libel and Slander*.

If one were to examine the history of apology as a relief, one will discover that the relief as a Roman law legal remedy known as *amende honorable*. It is not a common law remedy to begin with. That was the position opined by Willis J in a South African case *Mineworkers Investment Co (Pty) Ltd v Modbane* 2002 (6) SA 512 (W). The passage of *Mineworkers Investment Co (Pty) Ltd* was also referred to by Justice Mokgoro in *Dikoko v Mokhatla*.¹⁶ He held as follows:

in the systems of jurisprudence founded on Roman law a legal remedy has been introduced which was entirely unknown to the Romans, known as the *amende honorable* ... This remedy took two forms. In the first place, there is the *palinodia*, recantation or retraction, that is, a declaration by the person who uttered or published the defamatory words or expressions concerning another, to the effect that he withdraws such words or expressions as being untrue; and it is applied when such words or expressions are in fact untrue. In the second place there is the deprecation or apology, which is an acknowledgement by the person who uttered or published concerning another anything which if untrue would be defamatory, or who committed a real injury, that he has done wrong and a prayer that he may be forgiven.

The Roman law remedy of *amende honorable* attained its full development in the 16th and early 17th Century in German.¹⁷ The German law introduced die *Klage auf Ehrenerklärung, Abbitte oder Widerruf*, an equivalent of *amende honorable*. The remedy under the German law consisted of several constituent elements: an admission having made false statements (*palinodia*, *recantation*,

15 19.01 In an action for defamation the only relief which the plaintiff can obtain from a court, apart from an injunction in appropriate circumstances to prevent repetition of the libel or slander is an award of damages. The principles governing such awards are therefore of great importance.

16 The court has no power to order the defendant to publish a correction or to issue a retraction or to give the claimant a right of reply. Nor can it compel the defendant to apologise.

17 *Dikoko v Mokhatla* [2007] 4 LRC 152 at p 175.

18 *Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court-Ordered Apologies* by Wannes Vandenbussche (J Int'l Media & Entertainment Law (Vol 9) No 1).

retraction); a confession of guilt, which implied some publicity and appearance; and an apology and a prayer for forgiveness (deprecation)¹⁸.

In dealing with the issue whether the courts can issue order for apology, it is submitted that only the legislature can address this legal problem. Apology or *amende honorable* as described above is a Roman legal concept which was further expanded in the German jurisprudence. That could be the reason why such concept was not adopted by the common law in UK earlier. The UK Parliament only imported such concept when it decided to introduce the relief of apology in a summary procedure. It is submitted that amendments to the current Defamation Act 1956 (or a total revamp of the defamation Act following the development in the area of defamation laws in the UK, New Zealand and Australia) is warranted to confer power on the courts to grant apology as relief. Amendment to the Malaysian Defamation Act 1956 or a new regime of defamation law will put to rest any argument on the powers of the courts in Malaysia in making a 'court ordered apology' in a defamation action.

Further, the New Zealand case of *TV3 Network Ltd* cited in *CGC's* case is distinguishable based on facts and the laws in the New Zealand. In *TV3 Network Ltd's* case, the plaintiff commenced an action for malicious falsehood or defamation. In the pleadings, it prayed for among others a mandatory injunction against the defendants directing them to broadcast a corrective advertisement. The defendants applied to strike out the prayer. The defendants' attempt was unsuccessful, hence the appeal to the New Zealand Court of Appeal. Hence, in that case, the Court of Appeal was dealing with an interlocutory appeal. In affirming the decision of the High Court, the New Zealand Court of Appeal referred to several provisions of laws in New Zealand, in particular s 42 of the Fair Trading Act 1986 and s 13 of the Broadcasting Act 1989. Both these provisions confer jurisdiction to the High Courts of New Zealand to issue corrective statements. The Court of Appeal in New Zealand extended the application of Fair Trading Act and the Broadcasting Act to defamation cases. Therefore, the New Zealand Court of Appeal was not dealing with the issue of 'apology'. There is a difference between 'apology' and 'correction'. If we apply an ordinary dictionary meaning of 'correction', it carries the meaning of 'to make something right or accurate, for example by changing it or removing mistakes'.¹⁹ 'Apology' on the other hand involves elements as elaborated in the concept of *amende honorable* as explained above. It means that for a meaningful apology, it will involve two steps. First, an open declaration that the defendant has uttered defamatory words and withdraws

19 *Rethinking Non-Pecuniary Remedies of Defamation: The Case for Court-Ordered Apologies.*

20 *Oxford Advanced Learner's Dictionary.*

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the statement. Second, the defendant must willingly acknowledge the wrong that he committed and asks for forgiveness. The Court of Appeal in New Zealand in any event held that although the courts have jurisdiction to make an order for correction, such discretion 'appears to have been rarely invoked and no case was cited in which an order has been made'.²⁰ McKay J further made the following observation:

There is thus no doubt as to the novelty of the remedy sought in the present case. While the granting of an injunction in the terms sought is within the jurisdiction of the Court, the general view has been that the Court would not make such an order and the plaintiffs have been content to ask only for damages and sometimes for an injunction. No Court has ever made an order for correction. If an exception to past practice is to be made in the present case, then a basis must be shown in the circumstances of the present case for making such an exception ...

There cannot be said to be any public policy consideration which would preclude the ordering of the publication of a correction. There is statutory power for the Court to order the publication of corrective statements where there has been a breach of any of the provisions of Parts I to IV of the Fair Trading Act 1986. Section 42 of that Act empowers the Court to make such an order on the application of the commission. A similar power, as already mentioned, has been conferred on the Broadcasting Standards Authority by s 13 of the Broadcasting Act 1989. Nor should there be any major practical difficulty in settling the form of the proposed correction, even in the case of a television broadcast. The Court is not called upon to take on the role of a television producer, despite the plaintiffs' request that the correction be in similar form to the original programme. If the remedy were to be granted, it would be open to the Judge to ask the plaintiff to submit its proposals ...

Section 26 of New Zealand's Defamation Act 1992 empowers the court to 'recommend the defendant to publish or cause to be published a correction of the matter that is the subject of the proceedings'. If the defendant fails to publish a correction in accordance with the terms of the recommendation by the court, the court shall take into account such refusal or failure on the part of the defendant to publish correction in assessment of damages to be awarded against the defendant if the court finds for the plaintiff.²¹

²¹ McKay J at p 450 paras 35-40 of the grounds.

²² Section 26(3) of the New Zealand Defamation Act 1992:

INHERENT POWERS AND JUDICIAL TREATMENT

One may also argue that the inherent powers of the court may aid or empower the courts to grant an order for apology. In the alternative, even if the courts in Malaysia have such powers to issue an order for apology as a relief, we should also take note of the comments made by former Chief Justice Zaki Azmi. He held that:

wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy.²²

Although Zaki Azmi CJ (as he then was) was addressing the issue of whether the Federal Court has inherent powers to review decisions under r 137 of the Rules of the Federal Court, he was very careful in the manner such discretion is to be exercised. The inherent powers cannot be invoked to override an express provision of law or when there is another remedy available.²³ In our case, we have the Defamation Act 1957 which only provides for a remedy for damages. The relief for injunction has to be ‘imported’ into the realms of defamation law by virtue of Specific Relief Act 1950. Hence, the courts should be extremely cautious if the courts are to consider reliefs of apology in defamation cases. The following cases will demonstrate the judicial treatments in Australia and Singapore jurisdictions.

In the case of *Summertime Holdings Pty Ltd v Environmental Defender’s Office Ltd*,²⁴ the court in Australia was dealing with a the defendants who had already agreed to publish an apology. Parties went into a series of discussion on the terms of apology. However, the defendants resiled from the agreement. The question before the Supreme Court of the New South Wales was whether the agreement could be specifically enforced. Justice Young made the following observation:

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- 23 (3) Where, in any proceedings for defamation —
(a) the court recommends that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings; and
(b) the defendant fails to publish or cause to be published a correction in accordance with the terms of that recommendation, then, if the court gives final judgment in favour of the plaintiff in those proceedings,
(c) that failure shall be taken into account in the assessment of any damages awarded against the defendant; and
(d) the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the court orders otherwise.
- 24 *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia Bhd)* [2008] MLJU 251; [2008] MLJU 1090; [2008] 6 CLJ 1.
- 25 *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544.

A court hearing an action in defamation cannot order a defendant to give an apology. All that the court can do is to order damages if it finds the defendant liable, though it can take into account the fact that an apology has been given when assessing the damages. The general pattern of the law is that an action for damages for defamation is the only remedy available to a person who has been defamed; see eg Sattin v Nationwide News Pty Ltd (1996) 39 NSWLR 32. Both Mr Blackburn and I looked to see if there was any precedent in the Court of Star Chamber, where our law of defamation originated, which Court had power to punish and grant injunctions and, although it denied that it had this power, on many occasions granted damages. I have not been able to find any case where the Star Chamber granted an injunction against a defamation or made an order akin to specific performance to compel someone to say something in atonement of the defamatory statement. Indeed, it would seem that the Court of Star Chamber only granted injunctions like common injunctions to restrain proceedings at law; see Holdsworth, History of English Law ... Essentially, the Star Chamber and the spiritual courts would punish defamations in appropriate cases and the common law courts would give damages, but neither granted injunctions nor made orders in the nature of specific performance ...

Even though there is no Australian law which governs freedom of speech in the same way as the Constitution of the United States of America, I consider that it needs to be an exceptional case before the courts should exercise their discretion to grant an order like specific performance to compel a person to give an apology. I appreciate that in the instant case the form of the apology had, with slight exception, been settled, and that the first three defendants were contractually obliged to give it, but it seems to me that I should not, in the absence of some special reason, compel the defendants to utter the words ...

I believe the approach I have taken is reinforced by the fact that the common law court does not compel apologies but merely takes the matter of whether an apology is offered or not into account when assessing damages. Thus, in my view, whilst it is possible for this court to grant an order such as the plaintiff seeks, it is not appropriate to make the order in the instant case. The situation then is that the plaintiffs were entitled to seek equitable relief, but it has been refused in the court's discretion. The plaintiffs are accordingly entitled to damages not for the original defamation, but for the failure to have the apology published as promised.

Based on the above passage, it is clear that Justice Young in *Summertime Holdings Pty Ltd* was reluctant to exercise the discretion to grant an order to compel a person to give an apology in defamation action.

The same sentiment was also shared by Justice Chao Hick Tin JA in *Chin Bay Ching v Merchant Ventures Pte Ltd* [2005] SGCA 29; [2005] 3 LRC 32. In *Chin Bay Ching's* case, a mandatory injunction and prohibitory injunction were granted by the High Court for a defamation and malicious falsehood claim. The defendant was ordered to retract two complaint letters which were

the subject matter of the case. The defendant appealed to the Singapore Court of Appeal. In allowing the appeal and setting aside the injunctions, Justice Chao held the following:

[23] It is undoubtedly true that granting a prohibitory injunction in a defamation action is commonplace. However, no precedent could be cited by either party where the court had granted an interlocutory or final mandatory injunction requiring the retraction or correction of defamatory statements. Does it, therefore, follow that just because hitherto the courts have not granted a mandatory injunction in a defamation action, one should conclude that this remedy is not available in such an action? In this regard, we are reminded by what Spry on the Principles of Equitable Remedies (6th Ed, 2001) at p 323, states:

Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.

[24] Here, we note that the evolution of the reliefs of the Mareva injunction and the Anton Piller order is probably an apt illustration supporting the statement in Spry. The fact that the courts have, to date, refrained from issuing a mandatory injunction does not mean that this remedy is not available in a defamation action. It may well be that the courts preferred to enhance the quantum of damages awarded rather than to compel a reluctant defendant to apologise or correct his statements. No reason have been advanced to show why this remedy should not, as a matter of principle, be available in a defamation action. None was proffered in any of the leading defamation textbooks. It may well be that it would be a rare case where the court would feel the need to issue such a remedy. But that is not to say it is a complete bar.

[25] We recognise the force of the argument that a defendant should not be compelled to apologise against his will as the very spirit of an apology is that it must come from the heart, something which the defendant wishes to do on account of the wrong he has done to the plaintiff. On the other hand, an order compelling a defendant to merely withdraw or correct an offending statement after a trial seems to be of a different character or genre from that of an apology. In the same way that the court compels a defendant to pay damages for the defamation, there is no reason or principle why it cannot compel the issue of a correction. Of course, the cases where the court should think that justice requires the grant of a mandatory injunction, to issue a letter of either withdrawal, or correction, must be quite exceptional ...

We can sum up that in both cases cited above, the courts in Australia and Singapore are extremely careful when considering whether to grant a relief of apology in defamation cases.

Even if the court is to direct the defendant to apologise to the plaintiff if the court find for the plaintiff, other issues may arise. How can the court supervise such court-ordered apologies? What is regarded as a 'sincere apology' to be tendered by the defendant? Should the damages to be awarded in a defamation action be reduced significantly if the court orders a relief of apology? What if the plaintiff is not 'satisfied' with the choice of words used by the defendant in expressing his 'apology'? How should the court deal with the issues as mentioned above? These are several issues which can only be addressed by the Parliament through necessary law reforms.

HOW ABOUT EXTENDING EQUITABLE PRINCIPLES?

Next question: can we import the equitable principles to empower the courts in Malaysia to grant court ordered apologies against the defendants in defamation actions? To answer this, we will have to examine s 3(1) and (2) of the Civil Law Act 1956. Sections 3(1) and (2) of the Civil Law Act 1956 provides the following:

3. Application of U.K. common law, rules of equity and certain statutes

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:-

- (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956;
- (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
- (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii);

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

(2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

First thing to note regarding the court-ordered apologies is this: the UK courts in the past had never granted such order until 1996 through the UK Defamation Act 1996. In other words, the relief of apology is a newly created statutory remedy in the UK. Relief of apology in UK is not an equitable remedy created by the courts in UK.

Second point is this: some Malaysian courts are quite reluctant to extend the rules of equity or even common law into Malaysian jurisprudence. The case of *Government of the State of Sarawak & Anor v Chong Chieng Jen*²⁵ is an example. Justice Abdul Rahman Sebli in Court of Appeal was dealing with the issue whether to extend the principles of *Derbyshire County Council v Times Newspapers Ltd and others* ('Derbyshire')²⁶ into the Malaysian defamation laws. *Derbyshire* was decided by the House of Lords sometime in 1993. He held that:

[66] Mr Chong Siew Chiang relied heavily on the proviso to s 3(1) of the Civil Law Act 1956 to argue that the common law of England applies to defamation law in Malaysia. With due respect, the argument is flawed as it looks at the proviso in isolation without reading it together with the main body of sub-s(1), which sets out cut off dates for the application of the 'said common law' of England in Peninsular Malaysia, Sabah and Sarawak.

...

[68] But whatever may be the common law of Sarawak in this area of the law, we cannot just accept the common law of England as it stood in 1993. We will be doing just that if we just accept the Derbyshire principle as the applicable law and close both eyes to s 3 of the Government Proceedings Act.

In light of the above, legal fraternity in Malaysia should push for amendment or even a total reform to address the issues of among others court-ordered apologies and other areas of law to keep the nation updated with the latest advancement of technology based era.

CONCLUSION

Several countries²⁷ have already reformed their defamation laws to keep themselves to speed with the current internet and social media age. It is time Malaysia take steps to amend or reform the 66-year-old law. Reforms are necessary in this area of law. Alternative non-traditional remedies for example court ordered apologies and publication of corrections or even publication of

26 *Government of the State of Sarawak & Anor v Chong Chieng Jen* [1998] 45 NSWLR 29.

27 *Derbyshire County Council v Times Newspapers Ltd and others* ('Derbyshire') [2016] 3 MLJ 41.

28 [1993] 1 All ER 1011; [1993] AC 534.

summary of courts' decision if the courts find for the plaintiffs should be considered by the Parliament if reforms are to take place. Only then can the argument whether the courts in Malaysia have such powers to grant such non-traditional remedies in defamation actions can be put to rest once and for all.

Speaking on reforms, it is also timely to look into other areas. For example, to limit the filing of any defamation actions to one year from the date of accrual of the cause of action.²⁸ David Rolph in his article entitled *A Critique of the National, Uniform Defamation Laws*²⁹ offered compelling reasons to such suggestion. First, tort of defamation is different from torts relating to personal injuries or breach of contract. Tort of defamation is completed on publication and the damage done to the plaintiff's reputation occurs at that time in a way that is known to the plaintiff. On the other hand, damage to personal injuries may take some time to crystalise, thereby necessitating a longer limitation period. Second, a shorter limitation period for defamation claims would not prejudice plaintiffs. The majority of the plaintiffs commence their actions promptly after publication. The plaintiffs who are genuinely concerned about their reputations would be likely to commence proceedings promptly.³⁰ Another reform which the Parliament can look at is the abolition of the distinction between libel and slander. There are practical difficulties in drawing a distinction between libel and slander in the light of emerging technologies. If a defamatory statement is broadcasted via radio station's website which was not a permanent form, can it be considered as a slander or libel? This question was considered by the Supreme Court of Western Australia. The Supreme Court of Western Australia held that in such instance, it was a case of a slander.³¹ These are among the areas which need to be examined and addressed to by necessary amendments or reforms in the areas of defamation in Malaysia.

29 Among others New Zealand and the United Kingdom.

30 (2008) 16 Torts Law Journal.

31 Ibid at p 212.

32 *Mickelberg v GPR Southern Cross Radio Pty Ltd* (2001) 24 WAR 187.