

Principles of Injunctions in Defamation Proceedings

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[1] It is common for litigants to file applications for injunctions in court after filing of legal suits. In order to obtain an interlocutory injunction, the test laid down in the seminal case of *American Cynamid Co v Ethicon Ltd*¹ and in *Keet Gerald Francis Noel John v Mohd Noor @ Harun b Abdullah & 2 Ors*² must be fulfilled. In order to succeed in obtaining an injunction (whether ex parte or inter partes, excluding injunction in a defamation case), the following elements must be proved by an applicant:

- (i) there is a serious question to be tried;
- (ii) the balance of convenience/justice lies in granting the injunction in favour of the applicant; and
- (iii) damages is inadequate remedy.

[2] In defamation actions, the principles in the case of *American Cynamid* and by extension, *Keet Gerald Francis Noel John* do not apply. The courts in the United Kingdom (“UK”),³ Malaysia⁴ and Singapore⁵ rarely grant an interlocutory injunction in a defamation proceeding. The reason why the courts in the UK, Malaysia and Singapore rarely grant such interlocutory or interim injunction in a defamation case is one of protection of freedom of speech.

[3] Article 10 of the Federal Constitution has guaranteed the citizens freedom of speech and expression. As Article 10 of the Federal Constitution is housed as part of the fundamental liberties protection under Part II of the

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¹ [1975] 1 All ER 504; [1975] AC 396; [1975] 2 WLR 316.

² [1995] 1 AMR 373; [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA.

³ *Bonnard v Perryman* [1891] 2 Ch 269; *Quarts Hill Consolidated Gold Mining v Beall* (1882) 20 Ch D 501; *Herbage v Pressdram Ltd & Ors* [1984] WLR 1160, CA.

⁴ *The New Straits Times Press (M) Bhd v Airasia Bhd* [1987] 1 MLJ 36, SC; *Dato’ Kam Woon Wah & Ors v Mohd Abdul Jalil b Sarip & Anor* [1998] 1 AMR 357; [1998] 2 MLJ 201, HC, per James Foong J (as he then was); *Dato’ M Muthupalaniappan v Tamil Malar Sdn Bhd* [1989] 2 MLJ 42, HC, per Mustapha Hussain J; *Ngoi Thiam Woh v CTOS Sdn Bhd & Ors* [2001] 4 AMR 4564; [2001] 4 MLJ 510, HC, per Abdul Hamid Embong J (as he then was); *Superboom Projects Sdn Bhd v Yap Seng Loong & Ors* [2009] 8 AMR 698; [2009] 9 MLJ 368, HC, per VT Singham J; *MRA International Sdn Bhd v SPC Diotech LLC* [2018] AMEJ 0089; [2018] MLJU 107, HC, per Faizah Jamaludin J (now JCA) and *Appsmiths Sdn Bhd & Anor v Messrs Gavin Jayapal & Anor* [2024] AMEJ 1144; [2024] MLJU 1607, HC, per Roz Mawar Rozain J.

⁵ *Lawrence Kwek Juan Bok v Lim Han Yong* [1989] 3 MLJ 210, per Chan Sek Kong J (as he then was).

Federal Constitution, the courts should jealously guard such guarantee. Freedom of speech forms part of the cornerstone of a democratic society. Such right must be prismatically and purposively read to accord a meaningful fundamental protection accorded by the Federal Constitution to citizens.⁶

[4] The courts are generally reluctant to fetter the freedom of speech at the early stage of a defamation proceeding to prove whether a statement is unarguably defamatory or otherwise. Evidence to prove whether a statement which is the subject matter of a defamation action will only be adduced at trial of the action. Chan Sek Keong J in *Lawrence Kwek Juan Bok v Lim Han Yong*⁷ made a succinct observation on the need to be cautious when considering an application for an injunction in a defamation action. He held that:

In my view, there is neither principle nor authority to suggest that the absence of a jury in a defamation trial affects the rationale of the established principle. In such a situation, the judge assumes the role of the jury in determining whether the words used are defamatory or where justification is pleaded, whether the defendant has made out such a defence. But, until the action is tried, the judge is in exactly the same position as a jury, in a trial where there is a jury. Like a jury, a judge is also in no position to say whether the defence has been established until he has heard all the evidence. But, even assuming that the jury point has some merit, the public interest in maintaining the right of free speech is in itself a sufficient reason to justify the denial of prior restraint where the defendant intends to justify the truth of his statements: see Oliver J in *Bestobell Paints Limited v Bigg* at p 430 *et seq.* The plaintiff has not made out a case for this court to follow the English authorities. I should add that where, as in the case of Singapore, freedom of speech is a constitutional liberty, the case for applying the principle established by the English courts in such a case is a fortiori ...

[5] Lord Coleridge in *Bonnard v Perryman*⁸ emphasised that:

The right of free speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel and dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord Esher, MR in *Coulson v Coulson* – “to justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the

⁶ *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750, FC, per Tengku Maimun Tuan Mat CJ (minority judgment).

⁷ [1989] 3 MLJ 210.

⁸ [1891] 2 Ch 269.

jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest of cases, where any jury would say 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.

[6] The principles enunciated in *Bonnard v Perryman* were adopted with approval by the then Supreme Court in *The New Straits Times Press (M) Bhd v Airasia Bhd*.⁹ The Supreme Court further emphasised the following considerations in *The New Straits Times*:

The principle has clearly emerged by reason of the fact that the questions of libel or no libel are eminently matters to be decided on facts at the trial and there is also the question of the proper meaning to be assigned to the words used in a particular statement. To restrain a defendant before the questions are determined would amount to fettering with free speech. Indeed it is because of the importance of leaving free speech unfettered that the Court must be slow in issuing interim injunction in a libel action.

In applying these principles, value is placed by the Court upon the freedom of speech which is related to the freedom of the press when balancing it against the reputation of a single individual who, if wronged, can be adequately compensated in damages. The Court should act cautiously in granting interim injunction to restrain publication of an alleged defamatory statement. In fact it should not grant the injunction where the defendant says he is going to justify it at the trial of the action except where the statement is obviously untruthful or where the plaintiff has satisfied the Court that the defence will fail. That was made clear by Denning MR in *Harakas v Baltic Exchange*.

[7] Only when the evidence of malice is absolutely overwhelming present at the interlocutory stage will the court intervene to restrain publication by way of an interlocutory injunction. This principle is clearly stated in *Coulson and Sons v Coulson & Co*¹⁰ which principle was also repeated in another Court of Appeal decision in the UK, *Herbage v Pressdram Ltd*.¹¹

[8] The courts in Malaysia have unequivocally held that the principles of *American Cynamid* in *Keet Gerald Francis Noel John* do not apply in considering an application for an injunction for a defamation action. Justice Abdul Hamid Ag LP (as he then was) in *The New Straits Times* held that “In accordance with the long established practice in defamation action, the principles enunciated by the House of Lords in *American Cynamid v Ethicon Ltd* relating to interim injunctions are not applicable in action for defamation (*Herbage v Pressdram Ltd*)”. Abdul Hamid Embong J, in the case of *Ngoi Thiam Woh v CTOS Sdn Bhd*,¹² had further fortified the proposition that *American Cynamid*’s principles have no

⁹ [1987] 1 MLJ 36 at 38 F left to 39.

¹⁰ (1887) 3 TLR 846.

¹¹ [1984] WLR 1160 at 1164.

¹² [2001] 4 AMR 4564 at 4575-4576; [2001] 4 MLJ 510 at 520, HC.

application in an application for an interim injunction for a defamation action. He held that:

It seems to me that the thrust of the principles enunciated by those illustrious authorities is rooted in the importance attached to the right of free speech. Seemingly too, this category of interim injunctions stands apart and does not fall within the principles established in the applications for interlocutory injunctions by *American Cyanamid*, where the court need not consider the merits of the case once it had been shown that there was a serious issue to be tried but to determine where the balance of convenience lay between the parties (see *Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132, per Abdul Hamid CJ (Malaya), see *Gatley on Libel and Slander*, 9th Edn, p 634).

[9] What are the factors to be considered by the courts when deciding whether to grant an interlocutory injunction in a defamation action? For a start, let us refer to *Gatley on Libel and Slander*, 11th Edition.¹³ The author in *Gatley on Libel and Slander* has this to say:

The jurisdiction to grant interim injunctions to restrain publication of defamatory statements is “of a delicate nature”, which “ought only to be exercised in the clearest cases”. That was stated by Lord Esher M.R. in *Coulson v Coulson*, and it encapsulates the general approach of the court. The reluctance to grant preemptory injunctions is rooted in the importance attached to the right of free speech. This the Court will only grant an interim injunction where:

- i. the statement is unarguably defamatory;
- ii. there are no grounds for concluding that the statement may be true;
- iii. there is no other defence which might succeed; and
- iv. there is evidence of an intention to repeat or publish the defamatory statement.

To these conditions, which will be examined in turn below, there must be added to procedural requirement imposed by s. 12(2) of the Human Rights Act 1998 that the person against whom the injunction is sought must be present or represented at the application, or notified about it, unless there are good reasons for not doing so. The practice established in applications for interlocutory injunctions by *American Cyanamid v Ethicon*, of not considering the merits of the case once it had been shown there was a serious issue to be tried, but determining where the balance of convenience lay between the parties as regards the imposition of a restraining order, has been rejected as inappropriate in defamation cases.

¹³ (London: Sweet & Maxwell). See p 934, para 27.2 fn (a).

[10] The author further elaborated:¹⁴

The authoritative statement of Hunt J in *Church of Scientology v Readers Digest* [1980] 1 N.S.W.L.R. 344 at 350A could also be regarded as a succinct summary of English law:

“I accept as settled law that the power to grant interlocutory injunctions in defamation cases must be exercised with great caution, and only in very clear cases. A plaintiff must establish that a subsequent finding by a jury that the matter complained of was not defamatory of him would be set aside as unreasonable, that there is no real ground for supposing that the defendant may succeed on any defence of justification, privilege or comment, and that he, the plaintiff, is likely to recover more than nominal damages. In particular questions of privilege and malice are not normally appropriate to be decided upon an interlocutory application. Nor will an injunction go which will have the effect of restraining the discussion in the press of matters of public concern”.

[11] The Malaysian courts have espoused the above factors enumerated in *Gatley on Libel and Slander*. In the case of *Ngoi Thiam Woh*, Abdull Hamid Embong J held that:

From those authorities, it would seem that the court may only grant interlocutory injunctions of this species if the following factors, as summarized in *Gatley on Libel and Slander*, are satisfied:-

- (1) that the statement is unarguably defamatory;
- (2) there are no grounds for concluding that the statement may be true;
- (3) there is no other defence which might succeed;
- (4) there is evidence of an intention to repeat or publish the defamatory statement.

[12] The statement of law as propounded by Abdull Hamid Embong J in *Ngoi Thiam Woh*'s case is not something new. Prior to *Ngoi Thiam Woh*'s case, Mustapha Hussain J in *Dato M Muthupalaniappan v Tamil Malar Sdn Bhd & Anor*¹⁵ had held that:

The most relevant case is that of *Quartz Hill Consolidated Gold Mining Co v Beall*, decided more than 100 years ago on 22 February 1882. This case which has not been challenged to be wrong, clearly laid down the law that the injunction in general would not be given unless the plaintiff/applicant satisfies the court that the statements complained of are untrue.

[13] Premised on the above proposition of law, it is submitted that the threshold required for a grant for an interim injunction in a defamation action is very high. It is even higher than that of a Mareva injunction, an observation

¹⁴ (London: Sweet & Maxwell). See p

¹⁵ [1989] 2 MLJ 42.

which was made by James Foong J in *Dato' Kam Woon Wah & Ors v Mohd Abdul Jalil b Sarip & Anor*.¹⁶ In this case, his Lordship J held that:

When the importance of leaving free speech unfettered is placed on such a high pedestal, where even the well accepted principle for consideration of an interim injunction as disposed in *American Cyanamid's* case is inapplicable in a suit concerning defamation where justification, fair comment or qualified privilege without malice is pleaded as a defence, I am of the view that this priority must similarly be accepted in the consideration of a Mareva injunction concerning a defamation case where the same defences are insisted upon. Since the test in *American Cyanamid's* case which involves the determination of whether the "plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial" is no longer applicable in a defamation case of a nature explained above, the first condition laid down in *Ninemia's* case for a Mareva injunction must also be varied in cases of this nature. The test must thus be altered to that of "where the statement is obviously untruthful or where the plaintiff has satisfied the court that the defence will fail"; in line with and corresponding to that expounded in *New Straits Times'* case.

[14] There is a sound reason or policy why such onerous requirements are imposed on the applicants for an interlocutory injunction in a defamation case: balancing act of freedom of speech and defamation law. The policy can be seen in the case of *The New Straits Times*.

[15] The burden to prove all these factors as propounded above lies on the plaintiff or the applicant.¹⁷ All these factors have to be proved by the plaintiff or the applicant. The crucial word here is the "and". The plaintiff has the burden to satisfy *all* of the factors/elements above for the court to grant an injunction in favour of the plaintiff/applicant. In *Ngoi Thiam Woh*, the court found that the plaintiff had failed to satisfy the first three factors, and the application for an interlocutory injunction was dismissed.

[16] If a defendant has pleaded the defence of justification, privilege and fair comment, injunctions will not be granted. The following cases will support this proposition:

¹⁶ [1998] 1 AMR 357 at 365; [1998] 2 MLJ 201 at 208 F-I, HC.

¹⁷ *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No. 3)* [2005] 5 MLJ 561 where Justice Abdul Malik Ishak J (as he then was) held that "the burden of proof must remain on the plaintiff to show that the statements are obviously untrue, and that the defendant's plea of justification and qualified privilege are bound to fail". See also *Tony Pua Kiam Wee v Dato' Sri Mohd Najib b Tun Hj Abdul Razak* [2018] 2 AMR 521; [2018] 4 CLJ 192, CA, where the Court of Appeal referred to the decision of *Dato' Seri S Samy Vellu* and further held that "it is therefore trite that in such applications for an interim injunction in defamation cases, the burden lies on the plaintiff to demonstrate that the defendant's defences are bound to fail or that the statements are obviously untrue. There should be no finding in this appeal on the merits of the claim".

- (i) *Harakas & Ors v Baltic Mercantile and Shipping Exchange Ltd & Anor*,¹⁸ a decision of the Court of Appeal in England and Wales. Lord Denning MR held that:

the case raises a matter of principle which must be observed. The court never grants an injunction in respect of libel when it is said by the defendant that the words are true and that he is going to justify them. So also, when an occasion is protected by qualified privilege, this court never grants an injunction to restrain a slander or libel, to prevent a person from exercising that privilege, unless it is shown that what the defendant proposes to say is known by him to be untrue so that it is clearly malicious. So long as he proposes to say what he honestly believes to be true, no injunction should be granted against him.

- (ii) *The New Straits Times* (above) where the Supreme Court held that no interlocutory injunction would be granted in a libel action where justification is pleaded. The Supreme Court held that “authorities do also show that the principle that there shall be no interim injunction if defence is raised ‘applies not only to the defence of justification’ (*Bonnard v Perryman*), ‘but also to the defence of privilege’ (*Quartz Hill Consolidated Gold Mining v Bealle*), and ‘fair comment’ (*Fraser v Evans & Ors*)”.
- (iii) *Dato’ Seri S Samy Vellu* (above) where Abdul Malik Ishak J (as he then was) applied the principles in *Herbage v Pressdram Ltd & Ors* (above), *The New Straits Times* (above), *William Coulson & Sons v James Coulson & Co* (above) and *Bonnard v Perryman* (above) and held that the court would not grant an injunction as the defendant in that case had pleaded the defence of justification and qualified privilege.
- (iv) *Superboom Projects Sdn Bhd & Satu Lagi v Yap Seng Loong & Lain-lain*.¹⁹ In that case, VT Singham J had followed the principles enunciated in *The New Straits Times* and rejected the applicant’s application for interim injunction as the defendant had pleaded the defences of justification and fair comments.
- (v) *Appsmiths Sdn Bhd v Messrs Gavin Jayapal & Anor*.²⁰ Roz Mawar Rozain J applied the tested and proven case of *The New Straits Times* and held that the interim injunction should have been rejected by the Sessions Court as the appellants had raised the defences of justification and privilege. As such, the appeal by the appellant was allowed.

¹⁸ [1982] 2 All ER 701.

¹⁹ [2009] 8 AMR 698; [2009] 9 MLJ 368, HC.

²⁰ [2024] AMEJ 1144; [2024] MLJU 1607, HC.

- (vi) *Gatley on Libel and Slander*, 11th Edition,²¹ where the following principles are stated:

The general rule has been that where the defendant contends that the words complained of are true, and asserts that he will plead and seek at trial to prove the defence of justification, the court will not grant an interim injunction, unless, exceptionally, the court is satisfied that such a defence is one that cannot succeed. This was the decision in *Bonnard v Perryman*. Lord Coleridge explained:

“The right of free speech is one which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed ...”

This statement of the law has been endorsed and applied consistently since 1891. In recent times the rigidity of the rule has been criticized as incompatible with the proper application of ECHR law, which requires the court to strike a balance between competing rights, notably art. 8 (respect for private life) and art.10 (freedom of expression). But though it has been judged that it is not enough for a defendant in the face of statement of the claimant that the words are untrue merely to state that he intends to justify without identifying the ambit or extent of that defence, the Court of Appeal has unequivocally re-asserted the absolute nature of the rule in defamation cases which it held was unaffected by the Human Rights Act 1998. For the moment, therefore, that a claimant cannot obtain an interim injunction to restrain the publication of defamatory words in the face of statement from the defendant, verified as true, that he can and will justify the alleged libel, can be regarded as invariable rule, unless it is plain that the plea of justification is bound to fail. The claimant need not state that he will justify the particular words or allegation comprising the alleged libel: it is sufficient for him to declare his intention to justify the core or sting of the alleged libel, provided, of course, the core or sting is a wider or more general meaning than that conveyed by the particular matters described in the words complained of, and is a meaning the words are capable of bearing.

[17] The author of *Gatley on Libel and Slander* made the following proposition of law:²²

²¹ See p 937, para 27.6 and p 940, para 27.9.

²² See p 940, para 27.9.

Fair comment. Where the intended defence is fair comment it seems that the position is similar to where the intended defence is that of justification. If the defendant asserts that he will raise such a defence and prove the truth of the facts supporting the comment, then if the matter appears to be one of public interest and the claimant cannot establish malice, an interim injunction will not be ordered.

Where there is evidence that the claimant may have consented to the publication the court will not grant an interim injunction restraining continuance of the publication, and an injunction could be refused on the grounds that by reason of the general character of the claimant he might well not obtain more than nominal damages at trial.

[18] In conclusion, based on the above authorities, it is clear that the courts will only grant an interlocutory injunction in a defamation action in an exceptional circumstance. The threshold required to be met in such an application is onerous. In deciding whether or not to grant an interlocutory injunction, the court must also exercise its discretion judicially. As the questions of libel or slander are to be decided on the facts at trial, to restrain a defendant before those questions are determined would amount to a fettering of the defendant's right of free speech as guaranteed under Article 10 of the Federal Constitution.