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Updates on Malaysian cyber crime law: Allah, Facebook and Malaysian sex bloggers

By **Foong Cheng Leong**

2014 was another interesting year in cyberspace for Malaysia's legal fraternity. Numerous investigations and charges of sedition were prepared against statements made online and offline. Notably, Twitter user @wonghoicheng was charged under section 504 of the Penal Code and section 233 of the Communications and Multimedia Act 1998 for 'deliberately humiliating and provoking' Inspector-General of Police (IGP) Khalid Abu Bakar on Twitter by likening him to Nazi military commander Heinrich Himmler.

Malaysia courts were also inundated with interesting cyberlaw cases dealing with various issues, as listed below.

Tracing a person online and 114A of the Evidence Act 1950

In *Tong Seak Kan & Anor v Loke Ah Kin & Anor* [2014] 6 CLJ 904, the plaintiffs initiated an action for cyberspace defamation against the first defendant. In tracing the perpetrator, who had posted defamatory statements on two Google Blogspot web sites, the plaintiffs filed a John Doe action in the Superior Court of California. In compliance with the court order, Google traced the blogs to two IP (Internet Protocol) addresses that were revealed by Telekom Malaysia Bhd to be IP addresses belonging to the first defendant's account. In the same case, the High Court had held that the controversial section 114A(2) of the Evidence Act 1950 applied retrospectively. (However, the criminal case of *PP v Rutinin Bin Suhaimin* [Criminal Case No K42-60-2010] states it does not apply retrospectively). Section 114A(2) provides that the burden of proof lies on the subscriber of an ISP (Internet service provider) to prove that a certain statement was not published by him or her. The first defendant failed to convince the court that section 114A (2) did not apply, because the defamatory statements were published before the enforcement date of section 114A(2). The court held that the first Defendant had failed to prove that he was not the publisher of the content. The first defendant is now liable for a payment of RM600,000 (US$180,000) as damages to the plaintiffs.

Remaining on the topic of s 114A, this section was applied in a number of other cases in 2014:

> In *YB Dato Haji Husam bin HJ Musa v Mohd Faisal bin Rohban Ahmad* (Court of Appeal Civil Appeal No D-02-1859-08/2012), the defendant denied that he was the writer of a defamatory article, and the High Court held that there was insufficient evidence to prove so. The Court of Appeal held that the learned High Court judge ought to have applied section 114A and in the present case, the defendant failed to rebut the presumption in section 114A. The Court of Appeal held that as a general rule, once the elements of defamation are satisfied, liability is attached and the defendant's defence cannot survive on mere denial, and when it relates to cybercrime, section 114A will assist the plaintiff to force the defendant to exonerate himself from liability.
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> In *Stemlife Berhad v Mead Johnson Nutrian (Malaysia) Sdn Bhd* [2013] 1 LNS 1446, the High Court held that Mead Johnson was liable for the defamatory postings made by users of Mead Johnson's Internet forum and web site. The court, in applying section 114A, stated that the introduction of section 114A is the Malaysian legislature's response to address, amongst others, the issue of anonymity on the Internet to ensure users do not exploit the anonymity that the Internet can provide to escape the consequences of their actions. In the present case, the court held that the defendants failed to rebut the presumptions cast by section 114A.

Defamation on Facebook

There were numerous Facebook defamation cases. In *Amber Court Management Corporation & Ors v Hong Gan Gui & Anor* [2014] 1 LNS 1384, the management corporation of Amber Court Condominium and its

council members sued two unit owners of the condominium for allegedly defaming them on Facebook. The High Court struck out the case after finding that a management corporation has no powers to do so under the Strata Titles Act 1985 and common law.

Salleh Berindi Bin Hj Othman, who had earlier sued his colleagues for defamation on Facebook, lost another Facebook defamation case (*Salleh Berindi Bin Hj Othman v Professors Madya Dr Abdul Hamid Ahmad & Ors* [2014] 1 LNS 1611) in the High Court. He alleged that the postings made by the defendants on the second defendant's Facebook wall were defamatory of him. The High Court did not agree with him.

In *Foo Hiap Siong v Chong Chin Hsiang* [2014] 1 LNS 1196, the plaintiff sued the defendant, complaining about the a defamatory statement posted by the defendant, in two Facebook forums named 'Rakyat Ingin Jadi Bos' and 'Ubahkan Politik', showing an doctored coloured photograph of the plaintiff's face, depicting him with long hair with the top half of a naked body dressed in a bra with certain defamatory comments in Mandarin. The High Court held in favour of the plaintiff with costs of RM20,000, and awarded general damages, aggravated damages and exemplary damages together of RM50,000.

In an action against the defendant for publishing defamatory statements through e-mails (*Mox-Linde Gases Sdn Bhd & Anor v Wong Siew Yap* (Shah Alam High Court Civil Suit No 22-1514-2010), the High Court applied the principle of presumed publication on e-mails. The court held that there is a legal presumption that e-mails are published on being sent without actual proof that anyone did in fact read them. Under the law of defamation, a defamatory statement must be published in order to have an actionable cause of action. Using the concept of presumed publication, it is not necessary to prove someone has read the defamatory statement. Such a legal principle was applied to materials such as telegram and postcards. It seems that the court had extended this presumption to e-mail, notwithstanding that e-mails do sometimes get diverted into the spam folder or get rejected by the recipient server.

Other cases of note

In *Dato' Ibrahim Ali v. Datuk Seri Anwar Ibrahim* [2015] 1 CLJ 176, the court dealt with the liability of an office bearer of an association with respect to contempt of court. In 2013, Ibrahim Ali, the president of the Malay right-wing group Perkasa, was jailed for a day and fined by the High Court for contempt of court over a posting on the website http:www.pribumiperkasa.com/ made by Zainuddin bin Salleh, a member of Perkasa. The posting is said to be outright contemptuous of the court. The High Court held that Ibrahim Ali was liable for the posting made by Zainuddin by virtue of his position as president of Perkasa. In the appeal before the Court of Appeal, Ibrahim claimed that the posting was made on a web site other then the official web site of Perkasa. He also claimed that he was not liable for the posting because he had no actual knowledge and had no control as to the offence. The Court of Appeal dismissed the first ground, but agreed with Ibrahim on the second ground and overturned the conviction.

Sex bloggers 'Alvivi' (Alvin Tan Jye Yee and Vivian Lee May Ling) were freed from the charge under section 298A of the Penal Code (*Tan Jye Lee & Anor v PP* [2014] 1 LNS 860) for posting their controversial 'Hari Raya Greeting' which contained a photograph of the couple enjoying the Chinese pork dish Bah Kut The with the 'Halal' logo with, among others, the words 'Selamat Berbuka Puasa (dengan Bah Kut Teh ... wangi, enak, menyelerakan!!!...). The post had allegedly created enmity between persons of different religions undersSection 298A of the Penal Code. The Court of Appeal, in striking out the charge under section 298A of the Penal Code, held that the section had already been declared invalid by the Federal Court in another case.

The dispute over the use of the word 'Allah' in the Herald – The Catholic Weekly – had an interesting point over the use of Internet research by judges. In 2013, the Court of Appeal, in deciding to overturn the High Court's decision allowing the of the word 'Allah,' conducted its own research via the Internet and relied on the information and points obtained to substantiate its judgments (see *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop Of Kuala Lumpur* [2013] 8 CLJ 890, 959-960). Upon the overturn of the appeal, the Titular Roman Catholic Archbishop of Kuala Lumpur (see *Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541) filed an application for leave to appeal to the Federal Court (permission is required before one can appeal to the Federal Court and it must satisfy certain thresholds). The Federal Court however refused to grant leave. The majority

judgement by the Chief Justice of Malaya (Arifin Zakaria, at 584) held that those views obtained from the Internet were merely said in passing – they were not binding but persuasive – whereas Chief Justice of Sabah and Sarawak, Richard Malanjum held that leave ought to be granted as the research on its own motion set a precedent binding on the lower courts yet untested before the Federal Court, and also that the Court of Appeal relied upon the materials gathered from the Internet in upholding the impugned decision (on 617). It seems that the Federal Court did not endorse such research by the Court of Appeal Judges.

Closing

2015 brings another interesting year for Malaysia's cyberspace law. The colonial Sedition Act 1948 has been updated by the Parliament to cover electronic publications. The Sedition (Amendment) Act 2015 creates a liability to web site operators. Any person who publishes or caused to be published any seditious publication is guilty of an offence and can be jailed for a term not less than three years but not exceeding seven years. This Act is still pending enforcement and will certainly affect the free flow of information in the Malaysian cyberspace.

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