2020 Mid-year Review and Foresight – Defamation

*Produced in partnership with **Eric Woo of ONC Lawyers***

Introduction

This Review highlights case decisions on defamation in both Hong Kong and the United Kingdom in 2019 and the first half of 2020 which are worth attention not only for legal practitioners but also the general public.

Last year there was an important case decision made by the UK Supreme Court on how posts on social media platforms such as Facebook and Twitters should be interpreted in the context of defamation: ***Stocker v Stocker* [2019] UKSC 17**. This case serves as an important reminder not only for social media operators, but also users of the social media platforms who frequently write on them. In Hong Kong, the defence of justification and/or fair comment in defamation cases was considered in ***Wong Ching Yee v Wai Shuk Yin* [2019] HKCU 3145**.

In the first half of this year, as far as cases of the UK are concerned, the UK Supreme Court in ***Serafin (Respondent) v Malkiewicz and others (Appellants)* [2020] UKSC 23** reaffirmed the higher court's power to order retrial if the trial is unfairly held by the lower court. The case concerned the defence of public interest raised in light of certain defamatory statements made in a newspaper addressing issues of interest to the Polish community in the UK. Besides, the UK Court of Appeal discussed the issues of the jurisdiction of the court to handle cases of defamation: ***Wright v Ver* [2020] EWCA Civ 672**. In Hong Kong, we have had certain cases on the quantum of damages in light of publication of defamatory statements: ***Chan Harry Hung-Hay v Yip Sui Ping* [2020] HKCU 58** and ***Yuen Mui Fong v Lo Kut Chie Alan* [2020] HKCU 884**. Also, the defence of fair comment was considered in ***Lo Chi Lik Eric v Yuen Chi Ho Chris* [2020] HKCU 784**.

The cases will be discussed in details below.

A look back to 2019

Online defamation considered by UK Supreme Court: context means everything: *Stocker v Stocker* [2019] UKSC 17

This case considers how posts on social media platforms such as Facebook and Twitters should be interpreted in the context of defamation.

Facts

The Claimant, Ronald Stocker, and Defendant, Nicola Stocker, were husband and wife. Their marriage ended in 2010. On 23 December 2012 an exchange took place on Facebook between Mrs Stocker and Mr Stocker's new partner

Deborah Bligh. In this exchange, Mrs Stocker told Ms Bligh, amongst others, that Mr Stocker had "*tried to strangle*" her. Such allegations were visible to more than 130 individuals who were Facebook friends of Mrs Stocker and Ms Bligh. Mr Stocker brought defamation proceedings against Mrs Stocker, claiming that the meaning of the words "*tried to strangle me*" was that he had tried to kill her.

In the Court of First Instance, Mr Justice Mitting suggested that the parties should refer to the Oxford English Dictionary and said that if Mrs Stocker had used the phrase "*strangled me*", an ordinary reader would have understood her to mean "strangle" in the sense of a painful constriction of her neck. However, Mr Justice Mitting also considered that since Mr Stocker had succeeded in painfully constricting Mrs Stocker's neck, the phrase "*tried to strangle*" could only mean that Mr Stocker had attempted to kill Mrs Stocker. Mrs Stocker's defence of justification that Mr Stocker did strangle her was therefore not accepted.

The Court of Appeal stated that the use of dictionaries should not form part of the process of determining the ordinary meaning of words. Nonetheless, it considered that Mitting J had only used the dictionary definitions as a check. It therefore dismissed Mrs Stocker's appeal.

UK Supreme Court's Decision

Mrs Stocker's appeal was unanimously allowed by Lord Reed, Lord Kerr, Lady Black, Lord Briggs and Lord Kitchin in the UK Supreme Court.

The Supreme Court held that rather than using them as a "check", the judge had considered these definitions as the only possible meanings or a starting point for analysis, contrary to the ruling of the Court of Appeal that Mitting J had merely used a dictionary as a "check".

Where a statement has more than one plausible meaning, the question of whether defamation has occurred can only be answered by deciding which single meaning should be given to the statement, which is provided under the "single meaning rule". In essence, the governing principle is reasonableness, as suggested by how a hypothetical reasonable reader would construe the statement. Since the statement was contained in a Facebook post, the Supreme Court has borne in mind that it was necessary for the judge to consider the way where such postings are made and read. Facebook is a casual medium in the nature of a conversation which may not always contain carefully chosen expressions. People scroll through Facebook quickly and their reaction to posts is impressionistic. Therefore, an ordinary Facebook reader would have interpreted the statement as Mr Stocker had grasped Mrs Stocker by the throat and applied force to her neck.

In such relation, Mrs Stocker's defence should succeed since the Supreme Court accepted that police officers had seen red marks on Mrs Stocker's neck two hours after the incident and they had decided that the most likely explanation about what happened is that Mr Stocker did in temper attempt to silence Mrs Stocker forcibly by placing one hand on her mouth and the other on her upper neck under her chin to hold her head still.

This case demonstrates that in cases of defamation, when interpreting posts and threads on social media platform, it is important to bear in mind the context of how the posts are written and should not only take the literal meaning on what has been written.

Defence of justification and/or fair comment considered: *Wong Ching Yee v Wai Shuk Yin* [2019] HKCU 3145

In this case, the Plaintiff claimed against the Defendant for libel. There was no dispute that the alleged defamatory statements were all published or caused to be published by the Defendant. The question is whether the statements are defamatory of the Plaintiff and, if so, whether the Defendant can establish a defence of justification and/or fair comment.

Facts

The Plaintiff was a director and a minority shareholder of a company which operated a beauty parlour (the "Company"). The Defendant was the other shareholder and director. Differences arose between the parties over their respective remuneration/sharing of profit as well as the mode of operation and management of the Company. Their relationship then turned sour.

The Plaintiff claimed that the Defendant had published statements defamatory of her on the Defendant's Facebook account, at the Shop's entrance and on the Company's website. The Plaintiff contended those statements to mean that the Plaintiff had wrongfully refused to give maternity leave to the Defendant and wrongfully forced the Company to cease its business operation. The Plaintiff claimed that her personal, business (beauty products/services trade) and professional (as private tutor) reputations have been seriously damaged and she had suffered distress and embarrassment.

Decision

Of those statements, some implicates directly on the Plaintiff professionally as a tutorial teacher having done something against the law, i.e. the Plaintiff continuous harassment and disagreement to pay maternity leave of 70 days, and some gives the impression that the Plaintiff allowed shareholders' conflict to affect customers' interest.

These statements suggest that the Plaintiff as a tutorial teacher was unfit or unworthy to be an educator to educate the next generation because she would breach the law readily and easily in an as-she-wish manner. Customers obviously would not want to deal with such kind of person as their interest would be disregarded in situation of internal conflicts. It would lower the Plaintiff generally in the estimation of the right-thinking members of our society. Accordingly, the Court is of the view that these statements are defamatory of the Plaintiff.

However, the Plaintiff's claim failed as defence of justification is established. On finding of facts, it is the Court's view that the unreasonable manner in which the Plaintiff asked the Defendant to handle the Company's matter causes disturbance to the Defendant. It is therefore substantially true when the Defendant said she was continuously disturbed. She was even harassed to a certain extent. The Court also opined that the Plaintiff paid no heed to the Defendant's rights under the labour law though she knew that employees' salary had to be paid within 7 days and maternity leave also had to be paid. In the circumstances, the statement that the Plaintiff breached the law readily and in an as-she-wish manner can also be substantially established.

Further, the Court considers the statement that the Plaintiff disregarding customers' interest is substantially true as the parties had not touched base on personal basis on how to resolve their internal conflict without affecting customers' interest. A defence of justification is therefore established. Accordingly, the Plaintiff's claim of defamation failed.

First half yearly review of year 2020

Unfair Trials and the Public Interest Defence in Defamation: *Serafin (Respondent) v Malkiewicz and others (Appellants)* [2020] UKSC 23

This UK Supreme Court case reaffirms the higher court's power to order retrial if the trial is unfairly held by the lower court.

Background

The Respondent (the "**Claimant**") sued the Appellants (the "**Defendants**") for libel in respect of an article which the Defendants published about the Claimant in a newspaper addressing issues of interest to the Polish community in the UK. The article was published in October 2015. The Claimant asserted that the article had 13 separate

defamatory meanings, including that he had abused his position at a Polish social and cultural association and charity toaward himself or his company contracts for maintenance work there; had dishonestly obtained unlawful profit from sales and had diverted to himself funds needed for the care of residents of a charitable care home by securing for himself a contract for unnecessary renovations.

While the Court of First Instance found that in relation to all 13 meanings the Defendants had established a defence of public interest and it was reasonable for the Defendants to have believed that the publication was in the public interest, the Court of Appeal allowed the appeal from the Claimant. The Court of Appeal held that the judge had been wrong to uphold the defence of public interest and certain allegations were substantially untrue. After reviewing transcripts of the hearing at the Court of First Instance, it held that the "*nature, tenor and frequency of the judge's interventions were such as to render [the trial] unfair*" and ordered that the quantification of damages be remitted to a judge other than the original first instance judge but did not order a full retrial. The Defendants applied against the Court of Appeal's decision to the UK Supreme Court.

UK Supreme Court's Decision

On the issue of bias, after reviewing the full transcripts of the oral evidence given at trial, the Supreme Court agreed with the Court of Appeal that the trial judge had "harassed and intimidated" the litigant-in-person, rendering the trial unfair:

"when one considers the barrage of hostility towards the claimant's case, and towards the claimant himself acting in person, fired by the judge in immoderate, ill-tempered and at times offensive language at many different points during the long hearing, one is driven, with profound regret, to uphold the Court of Appeal's conclusion that he did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and that, in short, the trial was unfair."

On the matter of public interest, the House of Lords' decision in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 established a specific defence at common law to a claim for defamation brought in relation to publication of a statement on a matter of public interest. In such relation, the defendant had to show that it had met the standard of "responsible journalism", which is measured by reference to a list of factors. Concerning the Defamation Act of the UK, section 4 of the Act replaced the "Reynolds defence" with a new defence which, on any view, draws on the principles in Reynolds and later cases. Such defence is available where the defendant "*reasonably believed that publishing the statement complained of was in the public interest*", and in considering whether such belief is reasonable the Court must give regard to all the circumstances of the case.

The Supreme Court ruled that the Court of Appeal wrongly stated that the Reynolds defence and the defence under section 4 of the UK Defamation Act are not materially different. For such and other reasons, the Supreme Court ordered that the new judge should determine whether the public interest defence is available to the Defendants without reference to the Court of Appeal's reasoning.

Leaving the public interest defence issue aside, the Supreme Court's decision makes it clear that the Court would set aside a judgment if the trial has been unfairly conducted.

Defamation and Jurisdiction: *Wright v Ver* [2020] EWCA Civ 672

This case touches upon the issues of the jurisdiction of the court to handle cases of defamation.

Facts

The Claimant Craig Wright is an Australian computer scientist and businessman who claims to be the inventor of Bitcoin "Satoshi Nakamato". The Defendant Roger Ver is a bitcoin investor and is involved in bitcoin related projects.

The Claimant, who is also a citizen of Antigua and Barbuda, brought libel proceedings against the Defendant in May 2019 and claimed that he was libeled by the Defendant in a YouTube Video posted on the Bitcoin.com YouTube channel on about 15 April 2019, a tweet containing the YouTube Video posted on the Defendant's Twitter Account on 3 May 2019, and a reply on the Defendant's Twitter Account posted on 3 May 2019 from BkkShadow some 8 minutes after the tweet from the Defendant. The defamatory meaning of these publications is said to be that the Claimant "had fraudulently claimed to be Satoshi Nakamoto, that is to say the person, or one of the group of people who developed Bitcoin".

Decision

Section 9 of the Defamation Act of the UK requires that, where the defendant is not domiciled in the United Kingdom or another member state or a party to the Lugano Convention, the party bringing the claim will need to satisfy the court, on the balance of probabilities, that of all the places in which the statement complained of has been published, England and Wales is the most appropriate place to bring an action in respect of the defamatory statement.

The Court of Appeal ruled that England and Wales was clearly not the most appropriate place to bring the action for defamation based on, amongst others, the following reasons:

1. The evidence shows that there were about four times as many publications of the YouTube channel and tweets in the US as in the UK.
2. The evidence about other internet, newspaper and periodical publications which were before the Court showed that there was a global issue about whether the Claimant was the inventor of Bitcoin, and that the Claimant had registered himself as the copyright owner of the 2008 academic paper in the US Copyright Registry, part relying on a specific action taken in the US, rather than any specific reputation in England and Wales.
3. The evidence established that the Courts in the US would have jurisdiction over the claim made by the Claimant against the Defendant, who had consented to the jurisdiction of the US Courts.
4. There was no evidence that any relevant witness would have difficulty in providing evidence in any state in the US, but it might fairly be noted that neither party had provided details of relevant witnesses or made any effort on the evidence to identify what would be the likely issues.

Although there is not any provision in the Defamation Ordinance (Cap. 21 of the Hong Kong Laws) which is reciprocal to section 9 of the Defamation Act of the UK, it has always been an issue before the court whether certain defamatory materials give rise to the jurisdiction of the Hong Kong court over the relevant matters. This case serves as reference for the practitioners to consider the factors to be taken into account when tackling such problem.

***Chan Harry Hung-Hay v Yip Sui Ping* [2020] HKCU 583**

The libel in this case touches upon the Plaintiff's mental condition and fitness to manage the Incorporated Owners ("IO") of Hong Kong Mansion.

Facts

Due to disputes concerning the Defendant's conduct in the course of her employment as the IO's account book-keeper, the Defendant's contract was not renewed. A few days after the Defendant's employment at the IO, the Defendant addressed a letter to the Plaintiff and all other members of the Management Committee ("**MC**") of the IO of Hong Kong Mansion in which the Plaintiff claimed to be defamatory and commenced legal action against the Defendant.

According to the Plaintiff, the Offending Words in the letter meant and were understood to mean all or any of the following:

a) the Plaintiff's "physical condition is poor", and is "suffering from a disease of an old man over 70";
b) the Plaintiff was or is "suffering from amnesia"; and
c) the Plaintiff's mental state is "not good to manage Hong Kong Mansion".

Decision
An interlocutory judgment was entered against the Defendant with damages to be assessed as no notice of intention to defend was given by the Defendant.

In assessing the general damages, the Court opined that the Plaintiff, being the Chairman of the MC of the IO of Hong Kong Mansion, is well respected by the residents of Hong Kong Mansion and the members of the MC and has a reputation that should be afforded with the Court's protection. However, considering that the allegations in the letter has not questioned the Plaintiff's honesty, integrity or trustworthiness, has not been published in a public and widespread manner, and the Plaintiff has nonetheless been re-elected as the Chairman of the MC despite the publication of the letter, the Court assessed the Plaintiff's general damage at HK$80,000.

As for quantum of aggravated damages, as nothing can justify a personal attack on the Plaintiff's mental wellbeing and disparaging him in his office as Chairman of the IO, and upon the Defendant's refusal to apologise, the Court assessed the quantum of aggravated damages at HK$20,000.

Yuen Mui Fong v Lo Kut Chie Alan **[2020] HKCU 884**

This case concerns publication of defamatory statements that caused Plaintiff serious anxiety, distress and embarrassment and the Plaintiff claims damages, aggravated and/or exemplary damages.

Facts
The plaintiff was a schoolteacher at the Tung Wah Group of Hospitals Kap Yan Directors' College. The plaintiff and the defendant are neighbours and were once also officers of the Incorporated Owners of On Kwok Villa, albeit during different periods. In particular, the defendant served as the chairman of the Incorporated Owners from around 2007 to 2009, while the plaintiff has served as its secretary since 2016.

From around April 2017, the defendant published, and/or caused to be published, banners, signage and posters near the block in On Kwok Villa where the plaintiff resided bearing words goes directly to the plaintiff's honesty and integrity, including kinds of language which insult the plaintiff and her family members.

The plaintiff contended that the defendant's harassment and the publication of the defamatory statements as aforesaid have caused her worry, emotional distress, humiliation and/or annoyance, for which she claimed damages, aggravated and/or exemplary damages against the defendant.

Decision
As the Court was satisfied that the defendant had been given sufficient notice of these proceedings, the Court proceeded with the hearing notwithstanding the defendant's absence.

The Court ruled that general damages including aggravated damages in the total sum of HK$180,000 to be reasonable to compensate the plaintiff for the distress and injury to feelings she suffered.

As to defamation, despite the effect of these defamatory statements on the plaintiff's reputation has been relatively limited, the defamatory wordings carry express or implied statements of unlawful, dishonest or even criminal conduct, and that the wordings had reached a wide audience in On Kwok Villa. The Court considered that general damages in the total sum of HK$100,000 to be reasonable.

***Lo Chi Lik Eric v Yuen Chi Ho Chris* [2020] HKCU 784**

In this case, the Plaintiff claims against the Defendant for damages for libel and an injunction to restrain the Defendant from further defaming the Plaintiff.

Facts

The Plaintiff was an associate professor in the Department of Computing at the Hong Kong Polytechnic University. The Defendant was the Plaintiff's part-time research student. The Plaintiff asserts that the Defendant has made 9 defamatory statements posted on the Hong Kong Discuss Forum and emailed to Chinese University of Hong Kong, Oriental Daily News, Apple Daily, Headline Daily and the Hong Kong Economic Times.

Among all the purported defamatory statements, one statement is defamatory by imputing that the Plaintiff may have committed plagiarism, and one statement calls the Plaintiff's professionalism and academic integrity into question by imputing that the Plaintiff had used the Defendant's work without acknowledging the same. The remaining of the complaints are trivial in nature and do not have any bearing on the Plaintiff's professionalism or reputation.

Decision

The Court held that a statement will be found to be defamatory if the imputation is serious enough to cause adverse consequences to the plaintiff. Adverse consequences will include lowering of one's reputation in the eyes of an ordinary reasonable reader. It is not enough for a statement to be shown to be merely disrespectful or dismissive, though there may be cases in which the extremity of disrespect might be actionable as defamatory. However, if the statement complained of causes no damage or minimal actual damage to the plaintiff, the statement would not be found to be defamatory so to as to attract liability.

Even though the Court in reading the statements took the view that the natural and ordinary meaning of the two statements are defamatory, the Court held that the Defendant have successfully raised the defence of justification and the defence of fair comment, therefore the Plaintiff's claim was dismissed.

The legal principles on defence of justification is that if the Defendant can prove the main charge or gist of the imputation is true, a slight inaccuracy in one or more of the details will not render his defence nugatory. In the present case, the Court found there is sufficient evidence to show the Defendant's allegation that the Plaintiff may have committed plagiarism to be substantially true as the papers concerned investigate the same subject matter and involve the same methodology with largely similar references and citations.

The Court further took the view that the defence of fair comment is made out in the statement "*Why the first one added my name but the second one did not have my name*" because reasonable reader would read the statement to be acomment and not an imputation of fact. It was fair for the Defendant to question why his contribution was not properly acknowledged given that the two papers are largely the same in content. Hence, the Defendant was also able to successfully raise the defence of fair comment.

Conclusion

In conclusion, while we are able to witness a wide range of cases of defamation in Hong Kong concerning both questions of law and quantum, there have also been some landmark cases of defamation in UK in view of the prevalence of the use of social media. Moving forward, parties can expect to see a surge in the number of court cases in Hong Kong involving statements made online and in such connection it remains to be seen whether the court in Hong Kong would adopt the recent UK Supreme court decisions in deciding whether statements published in social media are defamatory.

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