

UNDANG-UNDANG FITNAH DAN KERAHSIAAN PERUBATAN DI MALAYSIA

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THE LAW ON DEFAMATION AND MEDICAL CONFIDENTIALITY IN MALAYSIA

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Preface - Sources of Malaysian Law

- **The Federal Constitution** - a single written document having special legal status, which establishes the State, and sets out the structure and powers of the State.
- **Legislation** - the law enacted by the legislature, by bodies and persons authorized by the legislature . Laws enacted by the Parliament are known as Act whereas laws enacted by the State Legislative Assembly or DUN are known as Enactment.

Sources of Malaysian Law...continue..

- **Judicial Decisions** - known as the legal principles underlying decisions by the courts .
 - **English common law** - the common law of England and the rules of Equity... as stated under **section 3 Civil Law Act 1956** –
- **Law from Commonwealth jurisdictions such as Australia and Canada also influential**

Sources of Malaysian Law...continue..

- **Syari'ah** - an all embracing body of religious duties and ethical, moral and legal system whereas Islamic law is defined as the legal rules that are part of the Syari'ah and enacted as legislation in accordance with the procedure prescribed in the Federal and state legislation – **family and inheritance matters**
- **Customary Law** - the regular pattern of social behaviour, accepted by a given society as binding upon itself – e.g **land matters**

BRANCHES OF LAW

Land Law.....Family Law.....Contract Law

Criminal Law.....Constitutional Law

Tort Law

Tort Law

- Tort comes from Latin word “tortus”, which means twisted, generally known as “wrong”
- In legal terms it means “a legal wrong which the law provides legal remedy.”
- Tort Law protects a variety of interests.

Aims of Tort Law

- Compensation
- Appeasement and Justice
- Deterrence and Punishment
- Allocation of losses – Role of Insurance

Protected interests and Causes of Actions under Tort Law

- Protection of physical Integrity – **Negligence, Trespass**
- Protection of property – **Negligence, Trespass, Nuisance**
- Protection of reputation - **Defamation**

THE LAW ON DEFAMATION IN MALAYSIA

English common law and the Defamation Act 1957.

By virtue of **Sec 3 of the Civil Law Act 1956**, the common law of England is applicable in Malaysia except in so far as it has been modified by the Defamation Act 1957.

The law of defamation provides **legal protection for an intangible asset i.e. an individual in his reputation**. Reputation is defined in the Oxford English dictionary as **“the common or general estimate of a person with respect to character or other qualities; the relative estimation or esteem in which a person...is held”**. As it may take years of effort for someone to develop, build and acquire reputation, it can be a **priceless asset worthy of protection**.

INTRODUCTION

Berjaya Media's Sun Media loses two defamation suits

Arjuna Chandran Shankar / The Edge Financial Daily

February 11, 2019 10:26 am +08





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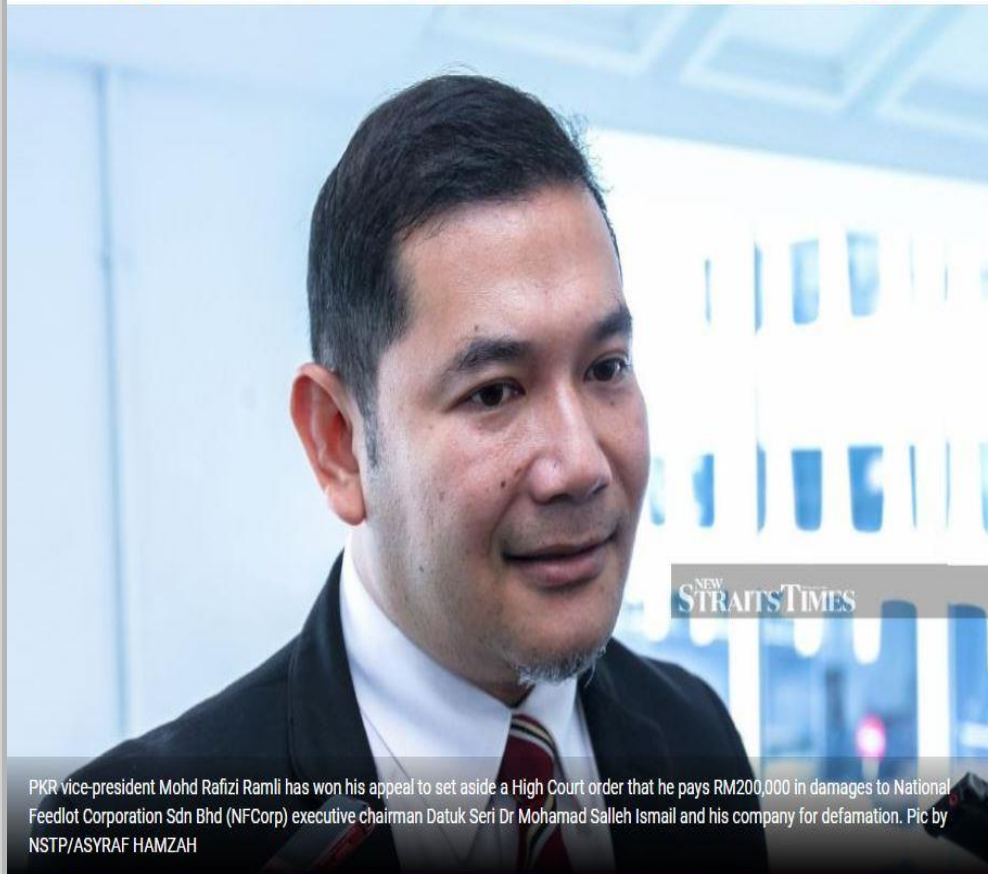
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Rafizi wins appeal against defamation suit by NFCorp executive chairman



PKR vice-president Mohd Rafizi Ramli has won his appeal to set aside a High Court order that he pays RM200,000 in damages to National Feedlot Corporation Sdn Bhd (NFCorp) executive chairman Datuk Seri Dr Mohamad Salleh Ismail and his company for defamation. Pic by NSTP/ASYRAF HAMZAH

By **Bernama** - May 13, 2019 @ 2:40pm

PUTRAJAYA: PKR vice-president Mohd Rafizi Ramli has won his appeal to set aside a High Court order that he pays RM200,000 in damages to National Feedlot Corporation Sdn Bhd (NFCorp) executive chairman Datuk Seri Dr Mohamad Salleh Ismail and his company for defamation.

RECOMMENDED

'World pipe band crown our gift for Merdeka'

Tiba2 tampil maafkan netizen, rupanya Linda Rafar kalah saman dengan jururawat?




Linda Rafar tuntutan doktor bayar RM4 juta kerana dakwaan guna Facebook sebar fitnah

Rabu, 29 Mei 2019 5:56 PM

Oleh: **NUR ASYIKIN MAYUDIN**



 Linda bakal mengambil tindakan undang-undang terhadap empat pihak termasuk seorang doktor yang dikenali sebagai Dr. Rusyainie.

PELAKON dan penyanyi Linda Rafar mengambil tindakan undang-undang terhadap seorang pengamal perubatan yang dikenali sebagai Dr Rusyainie Ramli atas penulisan berbau fitnah menerusi Facebook wanita itu pada 9 Mei lalu.

DEFINITION

❖ Lord Atkin in *Sim v Stretch* [1936]

“a statement which tends to lower the pff in the estimation of right thinking members of the society generally and in particular to cause him to be regarded with **feelings of hatred, contempt, ridicule, fear and distress**”

❖ Evans:

“A statement calculated to injure a person’s reputation and to **diminish the willingness of others to associate with him**”

❖ Winfield:

“Publication of statement which reflects on a person’s reputation and tends to **lower him in the estimation of right thinking members of society** generally or tends to make them shun or avoid him”

Defamation consist of two categories: **LIBEL AND SLANDER**

Why the distinction?

Libel in all cases **actionable per se**. By contrast, as a general rule slander is not maintainable unless there is **proof of special damage** i.e. any material loss or temporal loss of pecuniary nature which is capable of being estimated in money. For instance, the pff loses his job. Furthermore, **libel can be a crime as well as a tort** whereas slander is only a tort.

THE DISTINCTION BETWEEN LIBEL AND SLANDER

LIBEL

- It is a defamatory statement which is contained in a permanent form. Most common way is by writing. E.g. statutes, caricatures, effigies, chalk mark on walls, signs, pictures and wax figures. However, difficulty in classification arises with are *visual and auditory, radio communications, and live play on stage*.
- In ***Monsoon v Tussauds* [1894] 1 QB 671**,
- The defs were held to be liable for displaying a waxwork effigy of the pff near the Chamber of Horrors at Madam Tussauds. It was held that a waxwork could be libel as it was in a permanent form.
- **Lopes LJ** stated that although libels:
- “...are generally in writing or printing...this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, caricature, an effigy, chalk, mark on walls, signs or pictures may constitute a libel.”

-

SLANDER

It is a defamatory statement which is not permanent, such as a spoken statement. Other examples are transitory statement, gestures and spoken words that are not recorded.

Exceptions to the general rule that slander *is not actionable per se*

- Slanderous words will be **actionable per se, i.e. without proof of special damage**, in several circumstances:
- (i) if the words impute the commission of a crime for which the pff may be punished corporally - (Common law)
- Corporal punishment includes imprisonment, whipping and hanging. In determining whether the words come within this exception, the court will look at the circumstances in which the allegation is made. In some cases, words are spoken extravagantly, in a manner which would be understood by those to whom they are directed as not conveying the grave imputation suggested by a mere consideration of the words themselves.

C Sivanathan v Abdullah b Dato' Hj Abd Rahman [1984] 1 MLJ 62

- A spoken allegation by an official of a golf club that a member was dishonest, a cheat or a liar, after they had argued about the entitlement of the member's son to play under a particular fee structure, could not be construed in the context to mean that the pff member was liable to a charge of cheating within **sec 415 of the Penal Code and hence liable to punishment under sec 417**. Such words were merely vulgar abuse and not actionable. Even if it is defamatory, it does not fall within this exception and must be proven with special damage.

Exceptions

- (ii) if the words impute that, at the time the statement is made, the pff is suffering from contagious or infectious disease (e.g. AIDS) – (Common Law)
- The law is willing to presume that such allegation will result in the pff being shunned or avoided. In order to have this effect, of course, the words must be an imputation that the disease is being suffered at the time the words are spoken. If the disease has passed and is no longer contagious, the words might be defamatory but would not be actionable without proof of special damage.

Exceptions...

- (iii) if the words impugn the chastity of or impute adultery to any woman or girl:
- Under sec 4 of the Defamation Act 1957: “words spoken and published which **impute unchastity and adultery to any woman or girl** shall not require special damage to render them actionable.”
- For instance, prostitute and lesbian falls under this category.
- In **Luk Kai Lam v Sim Ai Leng** [1978] 1 MLJ 218, words alleging a staff nurse had slept with a man for money and hence prostituted herself were held actionable without proof of special damage. Such words were spoken of the other person as a woman and were not directed in a way as to disparage her from her professional life i.e. a staff nurse. The court felt that an ordinary person hearing those words, would not take them as disparagement of the woman by way of her profession but only **by way of her behaviour as a woman.**

Exceptions

- (iv) if the words are calculated to disparage the pff in any office, profession, calling, trade or business carried on by him at the time of the slander
- Sec 5 of the Defamation Act 1957: “in an action for slander in respect of words calculated to disparage the pff in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the pff in the way of his office, profession, calling or trade.
- In **John Tan Chor Yong v Lee Chay Tian [1971] 1 MLJ 240**, where numerous slanders by the landlord to the effect that his tenant, a lawyer occupying the demised premises at his office could not pay his rent were actionable per se. The court felt that these words imputed insolvency to the pff and that such an imputation bore with it implications of unfitness or incapacity in his profession.

Exceptions

- **(v) Imputation to title, goods and malicious falsehood**
- **Section 6 Defamation Act 1957** – In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage:
 - (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the pff and are published in writing or other permanent form; or
 - (b) if the said words are calculated to cause pecuniary damage to the pff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

Essential Elements

- 1. Words must be Defamatory
- 2. Words must Refer to the Plaintiff
- 3. Words must be Published

1. Words must be Defamatory

- The pff must first establish that the statement of which he complains is defamatory. A defamatory statement is one which calculated to injure a person's reputation and to diminish the willingness of others to associate with him. E.g. words like murderer, rapist, dishonest
- **Rajagopal v Rajan [1972] 1 MLJ 45** – Federal Court stated that in deciding whether the words complained off are per se defamatory, it is necessary to construe the words in **their natural and ordinary meaning in the sense in which reasonable men of ordinary intelligence will be likely to understand them.**

Lewis v Daily Telegraph [1964]

AC 234

- The defs had published a paragraph in their newspaper stating that officers of the city London squad were **investigating the affairs of the pff co** and the pffs alleged that these words carried the meaning that the co's affairs were conducted fraudulently or dishonestly. By the majority of the HOL, they decided that the words were not in their ordinary meaning defamatory and it was only by pleading additional facts, which the pff did not do, that he could have proved that the statement was defamatory

Therefore...

- Words have been found to be defamatory if they tend to **lower the pff in the estimation of right thinking men** in general, or if they would **expose him to hatred, contempt or ridicule** or would cause him to be shun and avoided. It is sufficient if the words tend to degrade him in the estimation of men whose standard of opinion the courts can properly recognize and the court will look at the words from the **point of view of the law abiding citizen, the average thinking men, the ordinary, reasonable person or that of the right thinking members of society in general.**

Byrne v Deane [1937] 1 KB 818

- The pff had informed the police that there were illegal gambling machines on the club premises, and sometime later a notice appeared in the club notice-board in these words: **"But he who gave the game away, may he byrne in hell and rue the day"**
- The pff claimed that he had been libelled but the CA held that he had not, **because right thinking people would approve of his informing the police about the illegal going-on.** It did not matter for this purpose that the pff would be less well thought of by his fellow club members. The fact that the section of the public with which the pff has closest contact thinks less of him is not conclusive that the statement is defamatory if the views of that group are not consistent with our right thinking member of the society.

DP Vijandran v Karpal Singh

[2000] 3 MLJ 22

- The plaintiff, a lawyer, had made a genuine mistake in issuing a cheque from a closed account to the 1st defendant, also a lawyer. The cheque was dishonoured. The 1st defendant stated in a press statement about the plaintiff which was published in Star and NST that issuing a cheque that is dishonoured is a serious offence under section 420 of the Penal Code. However the paper did not explain that s420 deals with the offence of cheating. The pff sued the def for calling him a cheat.
- It was held that it does not matter if the world at large does not understand the implication of s420. It was sufficient that the pff' legal and judicial fraternity understood the meaning of s420.

Innuendo (Allusive Remark)

- Words with hidden meaning
- Words that on a natural and ordinary interpretation contain nothing of a defamatory nature but may be defamatory when combined with some extrinsic facts known to the readers of the publication is called innuendo.

True Innuendo

- A "true" innuendo arises **where the pff has to adduce additional evidence to establish the meaning which he alleges that the words should be given.** The basis of this claim is that the words have an extended defamatory meaning - certain special facts cause the words to have a meaning revealed to those who knew the special facts but not revealed by the words in the absence of such knowledge.
- For e.g. a newspaper report announcing that the pff had given birth to twins is not defamatory on its face, and becomes so only when external facts demonstrate that she was married but nine weeks before the incident.

Burden of Proof

- The **pff bears the burden of showing that the words are defamatory according to true innuendo.** In order to establish this type of defamatory imputation, the pff must prove:
 - (a) that there are facts extrinsic to the words; which such facts give rise to defamatory imputation
 - (b) that those facts were known to one or more of the persons to whom the words were published; and
 - (c) that the knowledge of those extrinsic facts could cause the words to convey the defamatory imputation on which the pff relies, to a reasonable person possessing knowledge of those extrinsic facts.

Tolley v JS Fry & Sons Ltd

[1931] AC 333

- The pff was the English amateur golf champion and he was featured, without giving his consent, on a poster advertising the defendants' chocolate bar. The text of the poster compared the excellence of the chocolate bar with the excellence of the pff's swing. The pff alleged that this constituted an innuendo because it implied that he had agreed to feature in the poster for financial gain and that he flouted the rules relating to his amateur status, thereby, losing his amateur status. It was held that the pff was entitled to succeed in his action against the defendant as those who knew he held the amateur status understood that he had broken the rule.

False Innuendo

- A "false" innuendo, on the other hand, arises where the pff alleges that the words, **in their ordinary and natural meaning, bear a particular meaning which is discernible without the need for additional evidence.** In other words, the pff does not rely upon extrinsic facts to support the defamatory meaning of the words, but merely states a particular inference which he says, is to be drawn from the words themselves.

Lee Kuan Yew v JB Jeyaretnam [1971] 1 MLJ 281

- During an election rally for the 1976 general election, the defendant spoke about the performance of the Prime Minister thus:
- *“I’m not very good in the management of my personal fortunes but Mr Lee Kuan Yew has managed his personal fortunes very well. He is Prime Minister of Singapore. His wife is the senior partner of Lee & Lee and his brother is the Director of several companies, including Tat Lee Bank in Market Street; the bank which was given permit with alacrity, banking permits license when other banks were having difficulty getting their license. So Mr Lee Kuan Yew is very adept in managing his own personal fortunes but I am not...if I become Prime Minister, there will be no firm of J.B. Jeyaretnam & Co in Singapore because I would not know how to manage my own personal fortunes.”*
- The court said the words alleged that the **pff had been guilty of nepotism, corruption, and that the pff was unfit to become Prime Minister.**

Syed Hussin Ali v Syarikat Percetakan Utusan Melayu & Anor [1973] 2 MLJ 56

- In this case, the pff claimed damages for libel contained in a newspaper published by the first def and of which the def was an editor. The publication was admitted and it was proved that the words complained of referred to the pff. The pff alleged that the words complained of were capable of the following false innuendos, namely that the pff was dishonest, disloyal to the Government, a subversive element, an irresponsible politician, an ungrateful person, a supporter of President Sukarno and an instigator of unrest in the country.
- It was held that in the circumstances of this case, the words complained of when considered in the context of news report were defamatory of the pff.

❖ Putting side by side

- ❖ False innuendos may arise from a combination of the way the written words are displayed, the headlines used and any accompanying pictures. The words, pictures and objects etc may not themselves be defamatory but if it is put side by side with a noxious matter, then the juxtaposition to these noxious matter may make an innocent representation defamatory.

JUXTAPOSITION

CS Wu v Wang Look Fung & Ors

[1981] 1 MLJ 178

- The def newspaper had printed a front page story with a large headline entitled "Big Probe on Lawyers". Immediately beneath the headline was a six by two inch photo of the pff captioned "Mr. Wu". The accompanying article contained a report of a court application by a disgruntled client who had been dissatisfied by the treatment of a complaint he had lodged to the Law Society. The article indicated that the Chief Justice, pursuant to the application, had ordered the Law Society to conduct an investigation into the professional conduct of one Foo See Juan. The article went on to report that the disgruntled client had filed a similar action against Mr. Wu. While it was true that a similar action was pending against Mr. Wu, the Chief Justice had not as of then ordered any probe into his professional conduct
- Held: taking the article as a whole, and considering the juxtaposition of the pff's large photograph immediately under the large headline on the front page, there was little question that the clear impression conveyed was that the pff was the principal subject of the probe and hence, the defamatory nature of the report was not contested by the def.

Knowledge of the defendant

Immaterial

- In **Cassidy v Daily Mirror Newspaper [1929] 2 KB 331**, the defendants published one picture of Mr C with Miss X sitting together with a caption 'Mr C, race horse owner with Miss X, whose engagement has been announced.' The pff, who was the lawful wife of Mr C brought an action against the defendant who claimed that they did not know about this.
- Court held that those who knew the pff understood that the picture referred to her husband.

2. Words must Refer to the Pff

- Once the pff has shown that words bear some sort of defamatory imputation, he must then proceed to **establish that the defamatory remarks in question referred to him.**

Defamation is a personal action maintainable only by the person defamed and not by individuals who remotely related to him. However, this does not mean that his name has to appear; merely that anyone who knew him would know that the words referred to him. e.g. *using nickname*

E Hulton & Co v Jones [1910] AC 20

- E Hulton was newspaper proprietors and they published in their paper a humorous account of a motor festival in Dieppe, France. The article had included imputations on the morals of one Artemus Jones, a churchwarden in Peckham (which was believed by the writer of the article to be purely fictitious). The article described him as **'the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a 'most unholy delight in the society of female butterflies'**. In actual fact, there was a barrister by the name of Artemus Jones, who did not live in Peckham and was not a churchwarden. He sued the defendants for libel as there was evidence that his friends actually thought the article was referring to him. **The HOL upheld the pff's claim.**
- Lord Loreburn LC:
- **"A person charged with libel cannot defend himself by showing that he intended in his own best interest not to defame, or that he intended not to defame the pff, if in fact he did both. He has nonetheless imputed something disgraceful and has nonetheless injured the pff"**

Newstead v London Express Newspaper Ltd [1940] 1 KB 377

- The defendants published in their newspaper a statement that "Harold Newstead 30 year old, Camberwell man...was jailed for nine months for bigamy". Another man, Harold Cecil Newstead, a hairdresser aged about thirty years, who assisted his father at Camberwell Road, sued the defs for libel and claim damages.
- Held: The words did refer to the pff and the presence or absence of intention or negligence on the part of the defendants did not affect their liability.
- Therefore, the defendants were liable to the pff because they should have taken greater care to ensure that their article could not have been taken as referring to someone else.

Morgan v Odhams Press Ltd

[1971] 1 WLR 1239

- The pff claimed that he had been libelled by the defs in an article concerned with a dog-doping gang which had allegedly kidnapped a certain Miss Murray. At the time Miss Murray was staying in the pff's flat and the pff produced six witnesses who testified that they thought that the article was referring to the pff and that he was involve in dog-doping gang.
- Held: HOL - that there was sufficient evidence to show that the ordinary reader who had special knowledge of the circumstances would conclude that the article referred to the pff.

Unintentional Defamation

- **Sec 7(1) of the Defamation Act 1957** provides that a person who has published words alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends under this section.
- Thus, the defence is available if a person innocently publishes the words alleged to be defamatory and has exercised all reasonable care in relation to the publication.

However...

- The section only applies to words published innocently as defined under Sec 7(5) of the 1957 Act which provides that words shall be treated as published by one person innocently if and only if the following conditions are satisfied:
- (a) that the publisher did not intend to publish them of and concerning that other person, and did not know the circumstances by virtue of which they might be understood to refer to him and;
- (b) that the words were not defamatory on the face of them, and the publisher did not know the circumstances by virtue of which they might be understood to be defamatory of that person
- **and in either case that the publisher exercised all reasonable care in relation to the publication.**

For false innuendo...

- If the words are defamatory on their face, words may be said to be published innocently of a particular pff if, and only if, the publisher can show:
 - (1) that he did not intend to publish them of and concerning that particular pff;
 - (2) that he did not know of circumstances by virtue of which they might be understood to refer to the pff; and
 - (3) that he had exercised all reasonable care in relation to the publication.

For true innuendo...

- If, however, the words are defamatory only because of certain extrinsic facts i.e. by way of true innuendo, they are said to be published innocently of a particular pff if, and only if, the publisher can show:
- (1) that he did not know of circumstances by virtue of which they might be understood to be defamatory of that other person; and
- (2) that he had exercised all reasonable care in relation to the publication.

Offer of Amends

- If the publisher can satisfy these conditions, he then has to make an **offer of amends** accompanied by an affidavit (signed sworn statement) of the facts on which he relies.
- **Sec 7(3) of the 1957 Act provides:**
- **An offer of amends...**shall...make an offer
- (a) in any case, to publish or join in the publication of a suitable correction of the words complained of and a sufficient apology to the party aggrieved in respect of the words;
- (b) where copies of a document or record containing the said words have been distributed by or with knowledge of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been distributed that the words are alleged to be defamatory of the party aggrieved.
- **If the offer of amends is accepted and duly performed then no proceedings for defamation may be taken or continued (sec 7(4)).**

Group Defamation

- A defamatory statement may at times, encompass a group of individuals. A classic e.g. **"All lawyers are thieves"**. It would seem that words which cast defamatory imputations against a group will be actionable by individual members of the group if those individuals can demonstrate that the words cast improper imputations against them individually. In order to be actionable therefore, **the words must be able to be reasonably understood to refer to each and every member of the group, or the circumstances of the publication must be such that one cannot** but conclude that the pff was the person aimed at in the group. **Success in such actions are rare** and will obviously depend on a number of factors such as the **size of the class** (the larger the class, the smaller the chances of success)

Knupffer v London Express Newspaper Ltd [1944] AC 116

- The pff was a Russian refugee and was a member of the 'Young Russian Party', which had 24 members in this country and several thousand members abroad. The article alleged that this group was Nazis. **The HOL held that where a class of people is defamed, no individual can succeed in defamation proceedings unless he can prove that the statement was capable of referring to him and that it was in fact actually understood to refer to him.**
- Held: The pff could not show that the article was capable of referring to him as it referred mainly to the activities of the group overseas and so his action were dismissed.

Atip bin Ali v Josephine Doris Nunis & Anor [1987] 1 MLJ 82

- The def, Josephine Doris Nunis, filed a suit through her lawyer, the second def, against the chief Minister of Malacca and UMNO leader, Datuk Seri Abd Rahim Thamby Chik. In the statement of claim she made allegations to the effect that she had bestowed sexual favours on the chief Minister, in return for gifts and promises of marriage from him. Basing his claim on allegations made by Miss Nunis's claim, the pff, Atip bin Ali sued the defs in libel. His claim was that the allegations in the statement of claim in the suit against the Chief Minister were defamatory of him and all other UMNO members. This was based on the reasoning that by alleging adultery to one's leader, one depicted **party members as being immoral and unIslamic and brought them into hatred, ridicule and contempt.**
- Held: the language used was not defamatory of members in UMNO in general.

3. The Words must be published

- As the final part of his case, the pff must prove that the **words which he complains of have been published.** Publication means making the defamatory matter known to some person other than the person of whom it is written or spoken. Where the communication is to the pff himself without the knowledge of a third party, there is no publication because defamation is an injury to one's reputation, not one's own feelings, and reputation is what other people think of the man, and not what he thinks of himself.

Publication on the Internet

- **Dow Jones & Company Inc v Gutnick [2002] HCA 56** – the case discussed the issue of jurisdiction for the purposes of publication of defamatory material on the Internet. It was held that in cases of defamation, material is 'published', and defamation therefore occurs, **at the place where that material is viewed (or downloaded) rather than where it is posted (or uploaded) onto the Internet.**

Husband and Wife

- A communication between husband and wife is not publication as it is covered by privilege. If H says to W that X is a thief, X has no action against H. But If X says to H that W is a thief, then W will have an action against X.
- **Huth v Huth [1915] 3 KB 32**
- **Facts:** The defendant sent a defamatory letter to his wife, from whom he was separated, stating that they were not married and that their children were illegitimate. The letter was opened by a curious butler who read its contents.
- **Held:** There was no publication of the letter because the defendant could not reasonably have anticipated that an inquisitive butler would open his wife's mail.

Theaker v Richardson [1962] 1 All ER 229

- **Facts:** The defendant wrote a defamatory letter to the pff, accusing her of being a whore and a brothel keeper. The pff was a married woman and a fellow local councillor with the defendant. The defendant put the defamatory letter through the pff's letterbox in a manila envelope, similar to the type used for election addresses. The pff's husband picked up the envelope and, believing it contains an election address, he opened it and read its contents.
- **Held:** The defendant was liable because it was a reasonable and probable consequence of the defendant's method of delivery of the letter that the pff's husband would open it and read it.

Mere Distributor

- In an effort to lessen the hardship which the application of this principle would give rise to, the courts have drawn a distinction between the publishers of a defamatory statement and the person who merely disseminates the publication (such as booksellers, public library) etc.). The disseminator will only be liable where it can be shown that he knew that the publication was defamatory. **Printer is not included in the definition of distributor.**

Mirzan Mahathir v Star Papyrus Sdn Bhd [2000] 6 MLJ 129

- Pff sued the printer of the Asian Wall Street Journal that published words defamatory of the pff. The def claimed that he was merely the printer and bore no ill will or malice against the pff. Def claimed that he was an innocent pawn in the publication, Nevertheless, the court held that the def was liable and awarded damages to the pff.

Repetition and Republication

- Every time that the defamatory statement is repeated, the tort is committed again and a fresh cause of action arises.
- In **Cutler v Mc Phail [1962] 2 QB 292**
- **Facts:** A defamatory letter is written to a newspaper and the letter was subsequently published by the newspaper.
- **Held:** that the writer of the letter was liable for the libel which he had written and the publishers of the newspaper were also liable for the libel which was published.

Chua Jui Ming v Hoo Kok Wing [2000] 6 CLJ 390

- The defs wrote the the Anti Corrupt Agency alleging corruption on the part of the pff. The same letter was then published by the press during a press conference. Two newspapers republished the letter.
- As the letter was found defamatory, the defendants were found liable for defamatory letter and republication as this is foreseeable.

1. Justification
2. Consent
3. Unintentional Defamation and Offer of amends
4. Fair Comment
5. Qualified and Absolute privilege

DEFENCES AVAILABLE FOR A DEFAMATION ACTION

MEDICAL CONFIDENTIALITY

Duty of confidentiality

- Confidentiality – one of the core tenets of medical practice
- However, duty of confidentiality is by no means an absolute concept
- To balance patient's interest in his privacy and other potentially conflicting interests.
- Conflict between confidentiality, fidelity, veracity, beneficence and justice.

Gillon R, Philosophical Medical Ethics, 1986

- “If patients did not believe that doctors would keep their secrets then either they would not divulge embarrassing but potentially medically important information, thus, reducing their chances of getting the best medical care.”

Definition of confidentiality

- Confidentiality refers to the legal or ethical duty to keep private the information gathered during the course of a professional relationship. Literally speaking, confidentiality means to keep secret that is not to be divulged.
- The principle of keeping secure and secret from others, information given by or about an individual in the course of a professional relationship – *British Medical Association*

What can be protected?

- All identifiable patient information, whether written, computerised, visually or audio recorded or held in the memory of medical professionals, is subject to the duty of confidentiality. These include (i) any clinical information about an individual's diagnosis or treatment; (ii) a picture, photograph, video, audiotape or other; (iii) images of the patient; (iv) the identity of the patient's doctor and the information about the clinics the patients had attended; (v) anything else that may be used to identify patients directly or indirectly so that any of the information above, combined with the patient's name or address or full postcode or the patient's date of birth, can identify be made to them

Justifications for confidentiality

- **Patient autonomy** – respect for the patient's sense of individuality and privacy
- **Doctor's integrity** -doctor's undertaking to the patient about what use will be made of the information that has been obtained
- **The Consequences for future relationship** – patients may not tell vital information

The Duty of medical confidentiality

- Duty is enshrined in ethics and law
- **Ethics** : –
 - Hippocratic Oath – “All that may come to my knowledge in the exercise of my profession...I will keep secret and never reveal”
 - Declaration of Geneva – “I will keep the secrets that have been confided in me, even after the patient has died

Continuation – Ethical duty

International Code of Medical Ethics - “A doctor shall preserve absolute secrecy on all he knows about his patients because of the confidence entrusted in him.”

- *Code of Ethics – Malaysian Medical Council* - paragraph 2.22 Abuse of Confidence – A practitioner may not improperly disclose information which he obtains in confidence from or about a patient.

Provision 1 – MMC Guidelines on Confidentiality 2011

- Patients have the right to expect that there will be no disclosure of any personal information, which is obtained during the course of a practitioner's professional duties, unless they give consent. The justification for this information being kept confidential is that it enhances the patient- doctor relationship. Without assurances about confidentiality patients may be reluctant to give doctors the information they need in order to provide good care.

Code of Professional Conduct for Nurses 1998 by the Nursing Board Malaysia specifically provides that “the nurse must not disclose information which she obtained in confidence from or about a patient unless it is to other professionals concerned directly with the patient’s care” (at Provision 3.5).

- The source of the obligation of confidentiality can further be found in the **common law, principles of equity and various statutory provisions**.
- Generally, the medical professional has a duty in law not to voluntarily disclose, without the consent of the information which he has gained in his **professional capacity** (Hunter v Mann [1974] QB 767).

**The rules under
medical law**

1. Contractual Obligation

- Every contract between a patient and a doctor gives rise to an implicit agreement to preserve patient's confidences and such breach give rise to an action for breach of contract.
- Where patient pays for the treatment, the relationship between the doctor and the patient is contractual.
- There exist an implied term that patient's affairs are confidential and should not be disclosed without just cause.

2. Principles in Tort Law

- If negligent disclosure of confidential information gives rise to some foreseeable injury to the patient.
- In **AG v Guardian Newspapers (No 2)** [1990] AC 109, Lord Goff stated that
- “...a duty of confidence arises when confidential **information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential**, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others...”

Three limitations...

- (i) It only applies to information to the extent that it is confidential. In particular, once it has entered **public domain**, no longer confidential;
- (ii) It does not apply to **useless information** or to trivia;
- (iii) The **public interest** in preserving confidences may be outweighed by some other countervailing public interest which favours disclosure.

THE EXCEPTIONS

Justifications for breaching confidentiality

- The Exceptions

- The duty is not absolute – the law recognised several justifications for breaching confidentiality:
- **Disclosure with patient's consent** – elements of legally valid consent to be satisfied – express or implied consent
- **Disclosure allowed by Statute** – e.g. Prevention and Control Diseases Act 1988, Poisons Act 1952, Criminal Procedure Code (Chapter 6)
- **Disclosure in the Public Interest**

The Malaysian Medical Council Revised Guidelines 2011 on Confidentiality stated that a practitioner may “disclose personal information if (a) **it is required by law** (b) the patient consent either implicitly for the sake of their own care or expressly for other purposes; or (c) it is justified in the **public interest**”.

Provision 3

1. Disclosure with patient's consent

- Express or Implied Consent
- Patient must have the mental competence (reached the age of majority and of sound mind), sufficient understanding of the treatment proposed (the consent must be informed in nature) and by with their own free will.

Even when the practitioner have contractual obligations with the third parties such as insurance companies or managed care organisations, the practitioner shall obtain the patient's consent before undertaking any examination or writing a report for a third party and ensure that the patient's consent is obtained prior to the submission of the report (MMC Guidelines 2011, at Provision 29).

2. Disclosure allowed by statute

- A number of statutory provisions provide for the disclosure of information by doctors.
- E.g. Section 10(2) of the Prevention and Control of Infection Diseases Act 1988 requires medical practitioners to provide information of infectious diseases to the nearest Medical Officer of Health in the prescribed form.

Abused children....

- It is widely accepted that the public interest exception would justify informing the social services or police when evidence comes to light in confidential consultations to suggest that a patient may be abusing a child.
- Sec 15 of the Child Act 2001 – restrictions on media reporting and publication – cannot reveal name, address, educational institution that can identify the child.
- Sec 27 – Duty of medical officer or medical practitioner – believes on reasonable grounds that a child is abused, must inform the Protector

DEOXRIBONUCLEIC ACID (DNA) IDENTIFICATION ACT 2009

- **Section 20. Obligation of secrecy.**
- (1) The Head of DNA Databank, Deputy Head of DNA Databank and DNA Databank officers or any person who for any reason, has by any means access to any data, record, book, register, correspondence, document whatsoever, or material or information, relating to the DNA profiles and any information in relation thereto in the DNA Databank which he has acquired in the performance of his functions or the exercise of his powers, **shall not give, divulge, reveal, publish or otherwise disclose to any person, such document, material or information** unless the disclosure is required or authorized—
 - (a) under this Act or regulations made under this Act;
 - (b) under any written law;
 - (c) by any court; or
 - (d) for the performance of his functions or the exercise of his powers under this Act or regulations made under this Act.
- (2) Any person who contravenes subsection (1) **commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both.**

3. Disclosure in the public interest

- Public interest includes matters which affects the life and even the liberty of members of the society – Examples:
- Disclosure to maintain freedom of the press
- Disclosure in the interests of national security
- Disclosure to prevent harm to third party
- Disclosure to prevent crime

The Malaysian Medical Council Revised Guidelines 2011 on Confidentiality stated that a practitioner may “disclose personal information if (a) it is required by law (b) the patient consent either implicitly for the sake of their own care or expressly for other purposes; or (c) it is justified in the public interest” (at Provision 3).

In such cases the practitioner shall still try to seek patient's consent, unless it is not practicable to do so, for example because (a) the patients are not competent to give consent; or (b) the records are of such age and/or number that reasonable efforts to trace patients are unlikely to be successful; or (c) the patient has been, or may be violent; or obtaining consent would undermine the purpose of the disclosure (e.g. disclosures in relation to crime); or (d) action must be taken quickly (for example in the detection or control of outbreaks of some communicable diseases) and there is insufficient time to contact patients (MMC Guidelines 2011, provision 35)

Disclosure to maintain freedom of press (Common Law exception)

- There is a public interest in the freedom of the press and other forms of media to investigate and report on matters of legitimate public concern.

X v Y[1988] 2 All ER 648

- it was for the court to judge whether it was in the public interest – in this case the public interest had to be weighed against three competing principles:
- - the principle that hospital records should remain confidential
- - the public interest in ensuring that employees did not disclose confidential information obtained in the course of their employment
- - the particular need to guarantee that AID sufferers could use hospitals without this being revealed.

Disclosure to prevent harm to third party

- There has to be a balance drawn between the public interest in effective treatment of mental illness and the consequent requirement of protecting confidentiality
- The protective privilege ends where the public peril begins

Continuation...

- Mentally ill patients – *Tarasoff v Regents of the University of California* (1976) 551 P 2d 334

Facts: P, voluntary outpatient receiving mental therapy – informed therapist his desire to kill an identifiable woman – therapist contacted police – P detained temporarily – released - killed woman – no one warned the woman about the threat – Her parents sued the therapist

Held: A duty of care was owed by the therapist to the woman murdered by P.

Continuation - Tarasoff

- Mr Justice Tobriner said:

“When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus, it may call for him to warn the intended victim or others likely to appraise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.”

Criticisms of Tarasoff

2 major criticisms:

- Doctor has to assess the seriousness of patient's mental problem – unreliability of predicting future violence
- Damages doctor and patient relationship

Position in English Law

- English courts have treated imposing duty to control actions of third party with hostility
- *Hill v Chief Constable of West Yorkshire* [1988] – such duty does not exist unless there is a special relationship, over and above ordinary relationship based on foreseeability
- Approved *Home Office v Dorset Yacht* [1970] – victim must be identifiable

Protecting third parties even if no threat of potential crime

- *Re C (A Minor) (Evidence: Confidential Information)* (1991) 7 BMLR 138:

Facts: Proposed adoption of a one year old baby – mother withdrew consent a day before the adoption hearing – documents on mother's mental condition and fitness to bring up a child was produced in court – mother claimed breach of medical confidentiality

Held: The documents were admissible

4. Disclosure of HIV/AIDS status...

- Common law - disclosure of a patient's HIV status is allowed provided that two conditions are satisfied: first, that there is a real risk to the people to be informed; secondly, that disclosure is the only practical way to protect them

Patients having HIV/AIDS...

- General Medical Council in England advises doctors to explain to patients the nature and implications of their disease, how they can protect others from infection and the importance of giving professional carers information about their condition. However, if patients still refuse to allow others to be informed of their status, disclosure is accepted as ethical provided that the doctor judges that there is a serious risk of death or serious harm and that patients are told that the information will be disclosed.

Patients having HIV/AIDS...

- Malaysia, the HIV/AIDS Charter for Doctors states that “doctors should, without prejudice and discrimination, when carrying out blood or other tests, ensure that adequate pre and post-test counseling is conducted to ensure consent to testing.” The Charter further reads that patients who are HIV positive “shall be encouraged to inform the attending doctor/s of their HIV status and information about a patient’s HIV status shall be restricted to medical professionals and other authorised personnel on a need-to-know basis.”

Disclosure to prevent crime

- Disclosure may be justified to protect those at risk of death or serious harm.
- *W v Egde* [1990] – Dr E wanted report that W was still dangerous be made available to Home Office and hospital – court allowed disclosure as public interest justified it – balance to be struck between the two conflicting interests.

W v Egdell

- Court of Appeal refused to prevent disclosure of the report – public interest justified disclosure to the medical director and the Home Office. The report contained the dangerousness of W that is not known to many. To suppress it would have prevented material relevant to public safety from reaching the authorities responsible for protecting it. It was in the public interest to ensure that they took decisions on the need for such protection on the basis of the best available information.

W v Egdell

- **Three guidelines emerged from Egdell:**
- - **It is probable that a real and serious risk of danger to the public must be shown before the public interest exception is made out. The public interest exception can only justify disclosure so long as the threat persists**
- - **Disclosure must be to a person with a legitimate interest in receiving the information**
- - **Even where the public interest requires disclosure, it is necessary to confine it to the extent strictly necessary**

Continuation...W v Egdell

- Bingham LJ:
“The breach of such a duty [of confidentiality] is...dependent on circumstances...the law recognizes an important public interest in maintaining professional duties of confidence but the law treats no such duties as absolute....[it can] be overridden where there is held to be a stronger public interest in disclosure.”
- *W v Egdell* approved in *R v Crozier* (1990)

Position in Malaysia

- Lack of legal precedents
- The Evidence Act 1950 and the Medical Act 1971 do not grant the medical profession any right of confidentiality - communications between doctor and patient are not privileged
- *W v Egdell* applied in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim & Anor* [2001]

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**Breach of confidentiality
through social networks**

Introduction

The popularity of social networks has grown rapidly in recent years.

There is a widespread use of sites such as Facebook and Twitter amongst medical students and doctors without knowing the potential risks that may arise.....

Types of information discussed

- Patient medical history
- Patient's diagnosis
- Patient's treatment
- Patient himself/herself
- Patient's character and attitude
- Patient's family
- Events affecting the patient

LEGAL IMPLICATIONS

1. BREACH OF LEGAL DUTY OF CONFIDENTIALITY

As discussed earlier, the duty of confidentiality is not only an ethical duty but a legal duty as well.....therefore by discussing information pertaining to the patients on social networks can amount to a breach of the legal duty of confidentiality

2. VIOLATING PATIENT'S RIGHT OF PRIVACY

- ❑ Acting against provision 5(1) of the Federal Constitution
 - ❑ An individual can bring an action against another under the law of tort for invasion of privacy as stated under the case of *Lee Ewe Poh...*

Respecting patient's privacy

- *Lee Ewe Poh v Dr Lim Teik Man & Anor*
[2011] MLJ 835
- Facts: Pff suffered haemorrhoids/piles – 1st def – a colorectal surgeon successfully perform a procedure to treat pff – pff found that 1st def had taken photos of her private parts without her knowledge and consent.

The Claim

- Pff claim that 1st def should not have taken photos of her anus without her knowledge and consent
- 2nd def- hospital vicariously liable

1st def – violation of privacy not a recognised tort/cause of action

Photos taken in the course of surgical procedure intended for pff's medical record and there was no publication

Pff's identity was protected and not known

The Judgment

- **Invasion of privacy** of a female modesty, decency and dignity **is a cause of action** and actionable and also there is breach of confidence
- Photos was taken while she was under anesthesia **without her express consent**
- Altho no unauthorised use of the photos but pff was informed by the nurse of the photos, photos no longer confidential, **there was publication**
- **Consent by female patient an absolute requirement** especially as this involve intimate parts and the taking of these photos were only discretionary not compulsory.

Therefore....

- The Doctor **must obtain prior consent** from the patient , particularly in this case from female patients before he can take photographs of her or their intimate parts of the female anatomy.
- **Modesty and decency of the female patients must be respected** and not violated.
- Failure to do so constitute an invasion of the plaintiff's privacy or a breach of trust and confidence.

3. CAN BE DEFAMATORY IN NATURE

Informal, personal and derogatory comments about patients or colleagues may trigger an action in defamation.....

❑ Patients have the right to expect that there will be no disclosure of any information, which is obtained during the course of a practitioner's professional duties, unless they give consent.

❑ The justification for this information being kept confidential is that it enhances the patient-doctor relationship.

**Malaysian Medical Council revised
guidelines on Confidentiality 2011**

British Medical Association (BMA) guidelines for doctors and students using social media

Disclosing identifiable information about patients without consent on blogs, medical forums or social networking sites would constitute a breach of General Medical Council (GMC) standards and could give rise to legal complaints from patients.

BMA guidelines....continue...

❖ Posting comments under a username does not guarantee anonymity as any comments made online can be traced back to the original author.

❖ **Doctors and medical students need to exercise sound judgement when posting online and avoid making gratuitous, unsubstantiated or unsustainable negative comments about individuals or organisations**

BMA Guidelines....continue

- ❖ Doctors and medical students who post online have an ethical obligation to declare any conflicts of interest.
- ❖ The BMA recommends that doctors and medical students should not accept Facebook friend requests from current or former patients.
- ❖ Doctors and medical students should be conscious of their online image and how it may impact on their professional standing.

Good Medical Practice – General Medical Council (UK)

- Be aware of how content is shared online.
- Regularly review your privacy settings and social media content.
- Treat colleagues fairly and with respect in all interactions.
- Direct patients to your professional profile where appropriate



nation
**AUTHORITIES BITE BACK
BIDDERS' OFFER ON
HUGE PYTHON.** >5

nation
**TRANSPORT MINISTRY AND
MAC TO DISCUSS
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**STEMMING THE
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Keep it private, docs

Doctors in the public sector have been given a prescription – they must not discuss their patients' condition on social media. This is to ensure privacy in an age where leaks on the Internet often get out of hand. >See Page 5 for report by **SARBAN SINGH**



'Don't discuss patients online'

By SARBAN SINGH
and LOSHANA K. SHAGAR
newsdesk@thestar.com.my

Govt docs urged to prevent security breaches

SEREMBAN: Social media may be the "in" thing for Malaysians nowadays to post instant alerts but not for doctors.

Doctors in government service have been told not to discuss their patients' medical issues on social media such as Facebook, Twitter or Instagram to prevent breaches in confidentiality.

Neither should they carry out clinical consultations on these platforms where such information could be accessed by other people, said Health Ministry director-gener-

al Datuk Dr Noor Hisham Abdullah.

The order came about to minimise the risk of ethical and legal complications and to uphold the integrity of the medical profession, he said in a circular.

"Social media sites cannot guarantee confidentiality with whatever privacy settings currently in place.

"Once information is published online, it can be difficult to remove it as others may have already distributed it further, thus easily breaching patient confidentiality," he said.

He explained that the directive

came about as more health care providers were using social media in their work.

However, Dr Noor Hisham said doctors could set up a social media platform for group consultation provided there was a "moderator" and there was a profile of the members and where the content of the conversation was not accessible to public.

"However, the uploading and transmitting of still images or in video format should not include any information which could reveal the patient's identity," he said.

Doctors in such group consultation must also get written consent from their patients before uploading any information about them on social media.

"The only exception would be in an emergency where the patient may not be able to give consent," he said, adding that doctors were responsible for the confidentiality of any information they send out via social media.

Dr Noor Hisham said doctors were also duty-bound to delete all stored information of their patients in their mobile devices after the

completion of the consultation.

All personal information or images from any consultation could not even be used for the purpose of health education to others.

"Social media platforms cannot be used for referral cases as they include patient-identifiable information," he said.

Despite the advantages of social media, Dr Noor Hisham said doctors should always opt for direct consultation or over the telephone whenever possible.

In cases of emergencies, he said doctors or other healthcare providers were supposed to consult their peers over the telephone first before opting for the social media.

MMA: Clinical



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Tarikh : 31 Mac 2016

Semua Pengarah Kesihatan Negeri

Pengarah Hospital Kuala Lumpur

YBhg. Datuk/Dato'/Datu/To' Puan/Datin/Tuan/Puan,

**SURAT PEKELILING KETUA PENGARAH KESIHATAN BIL. 10/2016:
GARIS PANDUAN PENGGUNAAN MEDIA SOSIAL DALAM PERKHIDMATAN
PENJAGAAN PESAKIT DI FASILITI KEMENTERIAN KESIHATAN MALAYSIA (KKM)**

1. TUJUAN

Pekeliling ini dikeluarkan bertujuan sebagai garis panduan penggunaan dan juga pemantauan penggunaan media sosial di kalangan anggota kesihatan semasa melakukan perundingan penjagaan pesakit (*consultation*).

Provision 4.1 - 2016 Guidelines

- ‘all patient identifiable information shall be excluded from any information transmitted through social media.’
- Therefore, uploading and transmitting of still images or in video format shall not include any patient identifiable information such as name, registration number, IC and address for example ECG tracing, laboratory results or radiological images’.
- According to provision 5.1, it is the duty of the person in charge of the health facility such as the hospital director and the head of department to ensure that all healthcare providers are aware of the existence of the guidelines.

2011 MMC Guidelines

- The **2016 Guidelines** should also be read with related provisions under the Malaysian Medical Council (MMC) Guidelines 2011 pertaining to issues on disclosing information through social network.
- For example, **provision 7 of the 2011 Guidelines** states that **‘the medical practitioner shall take steps to ensure that the patient’s confidentiality is maintained regardless of the technology used to communicate health information’** and **‘shall not discuss patient’s information in an area where the medical practitioner can be overheard or leave patient’s records, either on paper or on screen, where they can be seen by other patients, unauthorized health care staff or the public’**

The rule of confidentiality under islamic law

It is an amanah....

- When the doctor receives information from his patient, it is considered part of his **amanah (trust)** not to disclose the information to others without the patient's permission.
- Our bodies, our souls, our eyes, our ears, our intellect, our provisions, our clothing, our homes, are bounties of Allah s.w.t. and has to be either returned back to Allah s.w.t.
- Surah al- Isra', verse 36, Allah s.w.t. states to the effect: **"The hearing, sight and hearts will all be questioned (The Holy Qur'an, 17:36).**

Respecting Privacy...

- The Prophet Muhammad p.b.u.h has also stated that “The believer is not one who defames, slanders, nor is obscene” (Sahih al-Tirmidhi, Vol. 28, Hadith No.1977).
- The Islamic Charter of Health Ethics provides that: “A doctor may not disclose a personal secret that has come to his knowledge through the performance of his profession, whether the patient confides the secret to him, or the doctor comes to know it in the course of his work” (at Article 29).

Thank you...

- If you need more details on medical law, please purchase my books on
 1. **Nursing Law and Ethics”**
 2. **Medical Negligence Law in Malaysia**
 3. **Cases and Commentary on Medical Negligence**
 4. **Law and Ethics relating to Medical Profession**
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