

Satire and the Malaysian Law of Libel: *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (PAS) & Ors**

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Abstract

Satire makes fun of its butt by exaggerating and distorting its features. This makes it liable to claims in defamation. By and large, the common law has not accepted, in such defamation claims, the defence that the work complained of was not a bunch of lies about the plaintiff but a satiric work out to poke fun at the persons or issues which engage the satirist. This is illustrated by the judgment in *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (PAS) & Ors* [2006] 4 MLJ 761 (“*Ummi Hafilda*”), a case that arose out of the satiric depiction of a witness in the trial and conviction on corruption charges of the former Deputy Prime Minister of Malaysia, Dato’ Seri Anwar bin Ibrahim. The trial court purported to apply the doctrine of *stare decisis* to reject this defence. This paper analyses the judgment to argue that if the trial court had recognized the impugned work as a piece of satire and had adhered to the underlying principles, rather than just the words of precedents, the plaintiff would have failed in her claim. Such an outcome would have protected future satiric works from claims in defamation.

I. Introduction

This paper examines the common law treatment of satire as a defense to a claim of defamation. It focuses on a defamation claim — *Ummi Hafilda*

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*Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (PAS) & Ors*¹ (hereafter abbreviated to “*Ummi Hafida*”) — that arose out of a satiric depiction of a witness in a hot button issue in Malaysian political life: the trial and conviction of the former Deputy Prime Minister of Malaysia, Dato’ Seri Anwar bin Ibrahim on charges of corruption. One of the defences advanced was that work on which the claim was based was a piece of satire. The trial court professed to adhere to the doctrine of *stare decisis* to reject this defence — that the allegedly defamatory work was a satire poking fun at certain features and/or actions of a public figure. The paper seeks to establish how adherence to the underlying principles, rather than just the words of precedents, would have enabled the defence to succeed.

The paper begins with a short discussion of the theory and practice of satire, which it classifies into literary and political satire. Then it identifies the factual matrix of Malaysian politics that the satirist used to people the satiric universe he created. Next, it sets out the allegedly defamatory piece and reproduces the ingredients of defamation that the learned trial judge professed to apply. This is followed by a critique of the judgment to show how the application of the principles underlying the law of defamation would have led to a proper appreciation of satire and to its succeeding in the case.

II. Literary and Political Satire

Dustin Griffin points out that:

... satire is a highly rhetorical and moral art. A work of satire is designed to attack vice or folly. To this end it uses wit or ridicule. it seeks to persuade an audience that something or someone is reprehensible or ridiculous; ... it engages in exaggeration and some sort of fiction. But satire does not forsake the “real world” entirely. Its victims come from that world, and it is this fact (together with a darker or sharper tone) that separates satire from pure comedy. Finally, satire usually proceeds by means of clear reference to some moral standards or purposes.²

¹ [2006] 4 MLJ 761.

² Dustin Griffin, *Satire: A Critical Reintroduction*, (Lexington, The University of Kentucky Press, 1993), p 2.

The term “satire” commonly refers to written language, rather than speech, which uses ridicule to bring about moral reform or warn an audience about a particular vice.³ Both the nature and function of satire is identified in the statement that, “Satire is both cruel and kind, as a surgeon is cruel and kind: it gives hurt in the interest of the patient or of society.”⁴ For a work to fall within the scope of this literary form, both the foregoing characteristics, the cruelty and kindness of the form, are crucial. Literary satire is directed at what the satirist views as a human failing, as a deviation from what he considers to be an absolute and universal norm of human values or behaviour. Literary satire is undertaken with a view of leading man back to the straight and narrow path of virtue from which he has strayed. Literary satire aims, in short, to bring about reform in morals or such other spheres of life as the literary or the social. In English literature, literary satire is a well-established genre that has been employed by writers to chastise and cause mirth for centuries.⁵

In addition to literary satire, there is another, different form of satire which may be termed “political satire”. Political satire can be distinguished from literary satire in a number of ways. First, and most significantly, political satire is directed at an easily identifiable specific target rather than, as in literary satire, at a universal human vice. The political satirist is exercised by the words, actions or attitudes of a public figure or a group of public figures. The satirist then transfers this figure or group onto his canvas in a thinly disguised form so that the figure(s) are, even as they differ from their originals in real life, recognizable as such. The disguise may involve distorting or exaggerating some recognizable feature of the target to mock or to ridicule or even to insult the feature or person that engages the political satirist’s ire. However, the reader must be able to pierce the disguise to see the person(s) actually being satirised. The reader’s identification of the original is vital for even if the reader smiles or laughs at the exaggeration or distortion but fails to recognize the satiric original, the political satirist’s fails in his mission.

³ Lawrence Perrine, *Sound and Sense: An Introduction to Poetry*, (New York: Harcourt, Brace and World, 1963), p 88.

⁴ *Ibid*, 89.

⁵ Two instances of literary satire and of the techniques applied therein are discussed in the Appendix.

Another distinction is that the butt of political satire is usually a specific issue that is ephemeral or a person momentarily in the public eye, rather than a deeply engrained human failing or some eternal truth. But where literary and political satire cannot be distinguished is in the techniques and procedures adopted by each. Like literary satire, a work of political satire exaggerates and distorts the truth in order to make its point. Crucially, therefore, a piece of political satire is a political attack on a public figure or a current political controversy that tries to make a serious point even as it strives to be humorous, perhaps with the aim of pushing a specific political agenda, or simply exposing the excesses of a person in power. Or, as the Canadian Supreme Court has put it, “to poke fun at those who huff and puff in the public arena”.⁶ It cannot be seriously considered as a collection of lies and as such should not be considered a libel.

An example of political satire is a case from Scotland, *Angus MacLeod v Newquest (Sunday Herald) Ltd*⁷ in which Angus MacLeod the pursuer (*i.e.* plaintiff) was a journalist. The defenders (*i.e.* defendants) were the publishers of *The Sunday Herald*. On 25 February 2005, the pursuer wrote an article in the Scottish edition of *The Times*, which referred to Jim Wallace quashing speculation that he was to stand down as leader of the Liberal Democrats in Scotland. Notwithstanding the terms of the article, Jim Wallace resigned in May 2005. The defenders published an article of and concerning the pursuer. In the 18 December 2005 edition of *The Sunday Herald*, they had a page entitled “*Alan Taylor’s Diary*” in which the diarist made tongue-in-cheek entries poking fun at different people. The Diary purported to give an account of an award ceremony for “the prestigious Tartan Bollocks Award, which is given to the Holyrood hack who has made the biggest gaffe of the year”. It contained the following passage:

⁶ *WIC Radio Ltd & Another v Simpson (Canadian Civil Liberties Association and Ors Intervening)* [2008] SCC 40 at para 48 per Binnie J.

⁷ [2007] SCLR 555. With minor changes, the summary that follows is from *LexisNexis*.

Angus Macleod of *The Times* who, like Alexander Graham Bell, is justly renowned for his powers of invention, came close with his confident prediction that Jim Wallace would still be leading the LibDems in 2007. Mr Wallace repaid the faith shown in him by promptly announcing his retirement.

The pursuer sued in defamation averring that the passage was false and calumnious. He complained that the passage conveyed to the reader the false impression that the pursuer enjoyed a just renown for his powers of invention. Readers would have concluded that he was a disreputable journalist who made up stories rather than investigated them. They would have concluded that he was not a fit and proper person to be employed by *The Times* or to take part in broadcasting for the BBC and other broadcasters. Those who had read his article of 25 February 2005 would have concluded that he had invented a conversation with Jim Wallace.

The defenders sought to have the action dismissed. They said that the passage complained of was not a news item, and would be readily understood to be a piece of satire or sarcasm. They conceded that while it was not a defence to say that the words used were only a joke, it was a defence to say that the circumstances showed that the words could not be understood by those who read them as having a serious meaning. If a reasonable reader would have seen the words as chaff and banter, the passage was not defamatory. They submitted that the passage did not convey to a reasonable reader any of the meanings attributed to it by the pursuer. The reasonable reader would regard the words complained of as nothing more than an absurd joke. No injury could be said to have been done, and no action could lie. The pursuer countered that given the duty of a journalist not to invent stories, the imputation in the passage was capable of lowering the pursuer in the minds of right-thinking members of society. The situation could not be saved by surrounding the words in question with jokes and false facts.

The action was dismissed. An examination of the context of the material complained of showed that it appeared, not on one of the news pages of the paper, but on a page headed "Diary". It would have been clear to the ordinary reasonable reader that the "Diary" was not concerned

to convey hard news or serious comment. The words used in the item in which the pursuer was mentioned would have conveyed to that reader that the item had been written for his or her entertainment in a cheerful, irreverent and playful spirit, and contained elements of fantasy. Having considered the passage complained of in its context the court was unable to accept that an ordinary reasonable reader would have attached to those words any of the defamatory meanings averred by the pursuer. The passage complained of did not say that the pursuer had invented the facts on which the prediction was based. The writer did not question whether the pursuer's conversation with Mr. Wallace took place, and it was clear from the light-hearted tenor of the item that the writer was not concerned to make a serious charge that the pursuer was a disreputable journalist who was not a fit and proper person to be employed by *The Times* or the BBC. It would have been clear to the ordinary reasonable reader that the pursuer, like the other three journalists mentioned, was being chaffed or teased by the diarist in a good-humoured or bantering manner for having written a story, which could be described as a 'gaffe'. It was manifest from the language employed that it could in no respect be regarded as an attack upon the pursuer.

Political satire has generally not been distinguished or treated as such in the various common law systems. There has been a refusal to recognize that it is the public figure and not man in the mass that is the target of political satire. The historical position was summed up succinctly by the English literary satirist Jonathan Swift who in "The Preface" to *A Tale of A Tub* purported to compare the subject of satire in classical Athens and England. He said:

In the *Attick* Commonwealth, it was the Privilege and Birth-right of every Citizen and Poet, to rail aloud and in publick, or to expose upon the Stage by Name, any Person they pleased, tho' of the greatest Figure, whether a *Creon*, an *Hyperbolus*, an *Alcibiades*, or a *Demosthenes*: But on the other side, the least reflecting word let fall against the *People* in general was immediately caught up, and revenged upon the Authors, however considerable for their Quality or their Merits. Whereas in *England* it is just the Reverse of all this. Here, you may securely display your utmost *Rhetoric* against Mankind in the Face of the World; tell them, "That all are gone astray; That there is none that doeth good, no,

not one; That we live in the very Dregs of Time; that Knavery and Atheism are epidemic as the Pox; that Honesty is fled with Astræa"; with any other Common-places equally new and eloquent, which are furnished by the *Splendida bills*. And when you have done, the whole Audience, far from being offended, shall return you thanks as a Deliverer of precious and useful Truths. Nay, further; It is but to venture your Lungs, and you may preach in *Covent Garden* against Foppery and Fornication, and *something else*; Against Pride, and Dissimulation, and Bribery, at *White Hall*. [...] But, on the other side, whoever should mistake the Nature of things so far as to drop but a single Hint in Public how *such a one* starved half the Fleet, and half-poison'd the rest: How *such a one*, from a true Principle of *Love and Honour*, pays no Debts but for *Wenches and Play*; how *such a one* has got a Clap runs out of his Estate; how *Paris* bribed by *Juno and Venus*, loath to offend either Party, slept out the whole Cause on the Bench: Or, how *such an Orator* makes long Speeches in the Senate, with much Thought, little Sense, and to no Purpose; whoever, I say, should venture to be thus particular, must expect to be imprisoned for *Scandalum Magnatum*, to have *Challenges* sent him; to be sued for *Defamation*, and to be brought before the Bar of the House. (Emphasis in the original)⁸

Swift's point was that satirists who aim at individuals (*e.g.* specific politicians) rather than people in general "must expect to be imprisoned for *scandalum magnatum*, to have *challenges* sent to him; to be sued for defamation and to be brought before the Bar of the House." The point is clear: at common law, the satire of man in the mass is acceptable but not of the individual – which becomes defamatory⁹. Political satire, being a satire of the individual, is thus vulnerable to claims in defamation. Satire of the individual is treated as nothing more than a collection of lies meant to damage the good name of the individual concerned. As we shall see, this is exactly how the court treated the satiric depiction of the plaintiffs in the suit under review. With the foregoing factual background we can

⁸ "A Tale of a Tub," *The Basic Writings of Jonathan Swift*, Selected and with an Introduction by Claude Rawson (New York: The Modern Library, 2002), pp 30-31.

⁹ Thus the common law position that a class of persons cannot be defamed as a class, nor can an individual be defamed by general reference to the class to which he belongs: *Atip bin Ali v Josephine Doris Nunis* [1987] 1 MJJ 82 at p 86; *Knuppffer v London Express Newspaper Ltd* [1944] 1 All ER 495 at p 499 per Lord Potter.

now turn to the writing on which the plaintiff sued (“the impugned writing”).

III. The Allegedly Defamatory Piece

One of the political parties forming the loyal opposition to His Majesty’s Government in Malaysia is *Parti Islam se Malaysia* or “PAS” which translates into the “Pan Malaysian Islamic Party.” The article that triggered the suit was published at p 22 of *Harakah* dated 29 March 1999. *Harakah* is the newsletter of the PAS. PAS was the first defendant.¹⁰ The second defendant was, at the material time, the permit holder for the publication of *Harakah*.¹¹ The third defendant was a member of PAS and the Chief Editor of *Harakah*. The fourth defendant was the printer of *Harakah*. The fifth defendant was the author of the article.

The article was entitled “Malaysia Sweeps 10 Oscars” (“the article”). The article appeared before the verdict in the former Deputy Prime Minister’s criminal trial (which was in a judgment dated 14 April 1999). The female plaintiff, Ummi Hafilda bte Ali (hereafter abbreviated to “Ummi”) in *Ummi Hafilda Ali* took exception to three paragraphs in the article. The three paragraphs, as reproduced in the judgment, read:¹²

Best Original Screenplay: ‘Pulp Dalil’

Based loosely on the Quentin Tarantino hit ‘Pulp Fiction,’ the film tells the story of a small time hoodlum, Caled Jeffry, who leaves his life of crime on the streets to embark upon a life of crime in literature. He fails

¹⁰ Political parties are registered as “societies” under the Societies Act 1966. Section 9(c) of the Societies Act 1966 provides that “a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar (of Societies) and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society; ...”. It would appear that PAS had not named to the Registrar of Societies a member in whose name it could be sued. Hence, the suit was brought against the “Ketua Setiausaha” i.e. “Chief Secretary” of PAS.

¹¹ In Malaysia, the publication of a periodical requires an permit under the Printing Presses and Publications Act 1984, s 5(1) read together with s 6(1)(a).

¹² *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at pp 766-767.

his university entrance test when he is unable to recite the alphabet (he could only manage to get to 'D'), but is consoled by Ummi Thurman Ali, a small time hooker obsessed with Deputy Prime Ministers. She helps Jeffry embark upon his super-novel – she writing the stories and dotting the 'i's – after the two of them are inspired by reading a copy of the *National Enquirer*. They manage to publish their book 'Pulp Dalil' when a short balding man with a liking for small big-breasted women funds its publication. The book becomes an overnight hit, and Jeffry achieves his lifetime ambition of having orange hair.

Best Directing: 'Green Card'

This romantic comedy tells the story of a young Filipino man who leaves his poor village in search of work in Malaysia. He marries a tacky Malaysian bimbo (played by Ummi Thurman Ali) in the hope of getting a work permit – a green card – but divorces her when he suddenly discovers a picture of Anwar Ibrahim under her pillow. Fortunately, he is offered a Malaysian identity card in return for voting for the 'right' candidate. The story ends on a happy note when he not only obtains work, but is also elected the State's Chief Minister and hops over to the MIC the very next day.

Best Actress: 'Fatal Attraction'

This crime thriller tells the story of a mentally unbalanced woman (yes, Ummi Thurman Ali again!) who designs tacky, gaudy clothing and is cursed with a physical disability – she was born with a hand phone permanently attached to her right ear. Her father disowns her after he is struck blind by the rather loud colours of her dresses. In a fit of anguish, she becomes psychotic and is obsessed with the Deputy Prime Minister. At first she just carries a small photograph of him everywhere she went – but her family recognizes she needs major help when she tries to squeeze a 40 foot by 20 foot framed canvas painting of Anwar into her small Christian Dior handbag. She dies horribly – she is electrocuted styling and blow drying her hair – and her body is made into a statue posing fashionably in front of the High Court building in Kuala Lumpur. Her distraught brother – Az One – becomes psychotic too and becomes obsessed with a local singer actress (watch out for 'Fatal Attraction II!'). This movie was also awarded the Oscar for Best Sound Recording by Sng Chihuahua.

The three paragraphs aforesaid are hereafter referred to as “the impugned writing.” Ummi claimed that the impugned writing defamed her in that it “*seriously injured her in her character, credit and reputation and in the way of her [...] business and/or occupation and/or calling by (bringing her) into public scandal, odium and contempt and that (she) had been lowered in the estimation of right-thinking members of the public.*”¹³ The judgment, ostensibly quoting the statement of claim, continues, “*The plaintiff was subjected to severe humiliation and embarrassment as a result of the publication of the article by the defendants which carried imputations of the gravest kind as to her chastity and/or moral conduct.*”¹⁴

IV The Factual Matrix of *Ummi Hafilda*

The genesis of *Ummi Hafilda* may be traced, ultimately, to two publications. The first was a letter of complaint written by Ummi in 1997 to the then Prime Minister of Malaysia. The second was the publication, in 1998, of a book in Bahasa Malaysia authored by Khalid Jafri, the plaintiff in *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Parti Islam Se Malaysia & Ors*¹⁵ (hereafter “*Khalid Jafri*”).

In August 1997, Ummi’s brother, Mohd Azmin bin Ali (“Azmin”), was the private secretary of the then Deputy Prime Minister, Dato’ Seri Anwar bin Ibrahim. Azmin was married to Puan Shamsidar. It seems that through her brother, the plaintiff was acquainted with Dato’ Seri Anwar Ibrahim. Under cover of a letter dated 5 August 1997 addressed to the then Prime Minister, the plaintiff alleged that the then Deputy Prime Minister had committed adultery with Puan Shamsidar and sodomy with one Azizan Abu Bakar. Her letter to the Prime Minister was accompanied by a sworn statement by Azizan Abu Bakar in which the latter alleged that he had unwillingly had homosexual relations with the Deputy Prime Minister. In her letter to the Prime Minister, Ummi

¹³ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at 768.

¹⁴ *Ibid.*

¹⁵ [2002] 1 MLJ 160.

described how she and members of her family (excluding Azmin) became aware of the alleged relationship between the Deputy Prime Minister and Puan Shamsidar.

In her letter to the Prime Minister, the plaintiff, *inter alia*, said¹⁶:

Saya juga telah dituduh oleh insan munafik Anwar Ibrahim bahawa saya ini syok dekat dia (melalui perbualannya dengan Datuk Seri Megat Junid) pada 2 Ogos 1997 di mana beliau mengatakan saya Ummi Hafilda cuba menimbulkan angkara kerana cinta saya tidak berbalas untuk tempoh dua tahun. Beliau seolah-olah melatah akan kesalahannya sendiri. Bagi saya, beliau terlalu bahaya apabila cuba menjerat saya dengan mengatakan surat-surat cinta saya ada di dalam simpanannya. Sekali lagi, saya berasa amat tertekan dengan perbuatan khianatnya kerana demi Allah saya tidak pernah mempunyai persasaan cinta keatasnya apatah lagi untuk menghantar surat cinta. Bagi saya, ini ialah satu pengkhianatan dan pembohongan yang tidak dapat diterima oleh akal semata-mata untuk memberi gambaran bahawa saya adalah wanita murahan yang menagih cinta dari seorang Timbalan Menteri. Kejahatannya itu tidak dapat saya maafkan di dunia dan akhirat, apatah lagi untuk menerima beliau sebagai pemimpin Negara. YAB, saya khuatir sekiranya surat cinta yang tidak pernah wujud boleh direka, beliau mungkin berupaya menangkap saya dengan kedudukan dan kuasa yang ada di atas alasan-alasan lain terutamanya dari segi tuduhan palsu dan sebagainya.

The foregoing may be translated as follows:

I have also been accused by the hypocritical being, Anwar Ibrahim of hankering after him (in his conversation with Datuk Seri Megat Junid) on 2 August 1997 wherein he said that I, Ummi Hafilda, was trying to act indecently because my love for him had been unrequited for two years. It is as if he was ranting and raving at his own shortcomings. As far as I am concerned he became very dangerous when he tried to entrap me by saying that my love letters to him were in his possession and custody. I once again feel very pressured by him because, I aver in the name of

¹⁶ The passage quoted is extracted from the text of the letter in *Public Prosecutor v Dato' Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at 39.

Allah, let alone send him a love letter, I have never ever harboured any romantic feelings for him. To me this is a betrayal and a lie which is patently absurd as it pictures me as a cheap woman craving for the love and affection of a Deputy Minister. I cannot forgive his nefarious action whether in the here and now or in the hereafter, let alone accept and treat him as a leader of the nation. Most Hon' ble, I fear that the love letters which do not exist may be manufactured by him and he may manage to snare me by virtue of his office and power on other grounds principally of false accusations and the like.

What the plaintiff describes above as the false accusations of the then Deputy Prime Minister that she was in love with him and that her love was unrequited was, as we have seen, incorporated in the article on which she sued.

Khalid Jafri's book in Bahasa Malaysia, also published in May 1998, was entitled *50 Dalil Mengapa Anwar Tidak Boleh Jadi PM* which title was popularly abbreviated to *50 Dalil* ("the book").¹⁷ The full title of the book may idiomatically be translated into English as "50 Reasons Why Anwar Can Never Be the PM". In Malay, the abbreviation "PM" stands for "*Perdana Menteri*" which term, in English, means "Prime Minister." As should be apparent, the "Anwar" in the title of the book refers to Dato' Seri Anwar bin Ibrahim who was, until 2 September 1998, the Deputy Prime Minister of Malaysia. The book attempted to live up to its title by expounding purported grounds which would prevent Dato' Seri Anwar bin Ibrahim from ascending to the highest political office in the land. Given its sensational title and its politically explosive subject matter, the book was much publicized from the time of its publication.¹⁸ Khalid Jafri was, obviously, no admirer of Dato' Seri Anwar Ibrahim.

The plaintiff in *Ummi Hafilda Ali* "featured prominently in the book which became the subject of a criminal investigation."¹⁹ The

¹⁷ *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Parti Islam Se Malaysia) & Ors* [2002] 1 MLJ 160 at p 165.

¹⁸ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 761.

¹⁹ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 767.

investigations seem to have culminated in the former Deputy Prime Minister being tried on criminal charges as specified below. However, the criminal charges also seem to result from police investigations into the manner in which the former Deputy Prime Minister reacted to the plaintiff's letter of complaint. The Deputy Prime Minister's reaction to that letter led to, and are described in, *PP v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1. In that case, the accused was charged with four counts of corrupt practices. The charges alleged that the accused, while being a member of the administration (*i.e.* as Deputy Prime Minister), had unlawfully used his public position to his advantage, in that he had directed two senior police officers to obtain four written statements from Azizan Abu Bakar and the plaintiff, Ummi Hafilda Ali, denying their allegations of sexual misconduct and sodomy against him, and had, by that, saved himself from embarrassment and from criminal proceedings.²⁰

During the trial of the former Deputy Prime Minister, the plaintiff was a prosecution witness. The plaintiff was the 17th prosecution witness and began giving evidence on the 30th day of the trial. She seems to have been in the witness box for two days, the 22nd and 23rd of December 1998. Her detailed and sensational testimony was carried verbatim and on a daily basis by the media.²¹ The newspapers carried photographs of the plaintiff and the television broadcast her image almost daily²² not only from the time she gave evidence but even earlier. Her appearance and clothes²³ received much attention in the media. That the media was

²⁰ *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Parti Islam Se Malaysia* & Ors [2002] 1 MLJ 160 at p 165.

²¹ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 768. Her testimony was reported, *inter alia*, in the *Utusan Melayu*, 23 December 1998, p 2; the *Berita Harian*, 23 December 1998, p 4; the *Utusan Melayu*, 24 December 1998, pp 1,2,4; the *Berita Harian*, 24 December 1998, p 5; "Death threat against Ummi Hafilda Ali" (with her photograph), *Berita Harian*, 24 December 1998, p 1.

²² *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 768. For Ummi Hafilda's photographs, see the *New Straits Times*, 4 November 1998, front page; and 23 December 1998, pp 4 and 12; the *Singapore Straits Times*, on 22 December 1998, at p 16 (4 photographs); *Utusan Melayu* on 23 December 1998, p 5 and on 24 December 1998 at p 4; *Berita Harian* 4 November 1998, 23 December 1998 at p 5.

²³ *The New Straits Times*, 22 December 1998, p 4.

keeping track of the plaintiff's clothes is revealed by the *New Straits Times* of 22 December 1998 noting that she had worn a different outfit for each day of the trial and that the one worn on that day was her 30th. In the media, she was occasionally shown speaking into her hand phone.²⁴ As we have seen, the plaintiff's outfits and her speaking into her hand phone featured in the impugned writing.

In the course of her cross-examination at the trial of the Deputy Prime Minister, several other questions were directed at Ummi with a view to damaging her credibility.²⁵ One of the matters raised by the defence was her relationship with her parents.²⁶ She denied that she had been disowned by her parents and, specifically, denied having been cast out by her father. When referred to a statutory declaration affirmed by her father stating that he had disowned her, she declared that the statutory declaration had been produced without her knowledge and that she dared to state that her brother (Azmin) had procured it. She did not fault her father in the matter as she believed that Azmin was the puppet-master who had organized the affirmation of her father's statutory declaration. She effectively testified that to procure the statutory declaration Azmin had gifted her father with a bungalow house worth RM300,000 and a Perdana motor car purchased for cash after the publication of *50 Dalil*.²⁷ In the criminal trial of Dato' Seri Anwar Ibrahim, the court ultimately held that whether Ummi had been disowned by her father was irrelevant to matter in issue at that trial.²⁸ The allegation that she had been disowned by her father featured in the impugned writing.

²⁴ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 768. For photos of Ummi Hafilda holding a handphone, see *New Straits Times*, 4 November 1998, front page; *Berita Harian*, 7 November 1998; *Utusan Melayu*, 7 November 1998, p 3; and *New Straits Times*, 12 December 1998.

²⁵ This is first dealt with in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 95 and then expanded at pp 163-166.

²⁶ *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 163.

²⁷ *Ibid.* When Azmin was referred to Ummi's testimony that he had bribed his father to take his side, he said, "Ummi is a compulsive liar." (at p 164). The prosecution successfully objected to a question asking him to substantiate this. *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at pp 164-165.

²⁸ *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at pp. 165-166.

The cross examination of the plaintiff by the defence in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* also threw up a statutory declaration affirmed by Umami. What is relevant for our purposes is the first paragraph thereof. That paragraph read²⁹:

I am not involved nor have anything to do whatsoever with the publication of the book *50 Dalil Mengapa Anwar Tidak Boleh Jadi Perdana Menteri* nor with the author of the book. I had not in anyway contributed to nor colluded with its publication although some elements are now trying to implicate me in order to give credibility to the contents of the book. I do not know the author of the book and have no contact or communication with him directly or indirectly.

The plaintiff's vehement denial of authorship of the book, *50 Dalil* is rendered even more forceful by her declaration that she neither knew nor had ever had any communication whatsoever with the author of that book.

It was the plaintiff's role as a prime witness at the trial of the former Deputy Prime Minister that thrust her into the limelight. The erstwhile Deputy Prime Minister was convicted and sentenced to six years imprisonment in respect of each of the four charges, the sentences to run concurrently from the date of conviction.³⁰

The trial and conviction of the former Deputy Prime Minister was mired in controversy and may be said to have split the country into at least two opposing camps. One maintained, as did the Deputy Prime Minister himself, that he was an innocent man who was the target of a political conspiracy.³¹ The other held that he had been justly convicted for using the apparatus of the state to terrorize two citizens who had had the temerity to lodge a complaint against him. As may be expected, those who thought that Dato' Seri Anwar Ibrahim had been wronged were not

²⁹ *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 96.

³⁰ *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at pp. 229-233.

³¹ See *Public Prosecutor v Dato Seri Anwar bin Ibrahim (No 3)* [1992] 2 MLJ 1 at pp. 160-162.

too kindly disposed to those whose evidence led to his conviction. Speculation as to the motives of those who had testified against Dato' Seri Anwar Ibrahim was rife and where facts were in short supply, rumours swirled to fill the gap. Among these were stories that the female plaintiff had testified out of spite, because her romantic overtures had been spurned by Dato' Seri Anwar Ibrahim.³² In her letter to the Prime Minister referred to above, the plaintiff not only denied any romantic interest in Dato' Seri Anwar Ibrahim but also alleged that he had been spreading false stories about her chasing after him. The denial, if it did not actually spawn the stories, may have fueled them on the hypothesis that where there was smoke there was bound to be a fire! Be that as it may, supporters of Dato' Seri Anwar Ibrahim were not fans of the plaintiff. And, as may be assumed, supporters of the ousted Deputy Prime Minister were not too enamoured of Khalid Jafri either. Khalid Jafri would have been anathema to them as one of those who fired the first shot in the battle that ultimately led to the fall of Dato' Seri Anwar Ibrahim.

After he was sacked as Deputy Prime Minister on 2 September 1998, Dato' Seri Anwar Ibrahim launched what came to be known as the reform movement or, in Bahasa Malaysia, *Reformasi*. The *Reformasi* involved public speeches by Dato' Seri Anwar Ibrahim and demonstrations by his followers in the streets of Kuala Lumpur. The street demonstrations were suppressed by the police who used, *inter alia*, tear gas and water cannons to disperse the demonstrators. The *Reformasi* movement seems to have secured the support of many opposition parties in Malaysia. One of the political parties forming the loyal opposition to His Majesty's Government in Malaysia was *Parti Islam se Malaysia* or "PAS". One may well speculate whether sympathy for the *Reformasi* movement and for Dato' Seri Anwar Ibrahim explains the publication, by the newsletter of PAS, of the article on which Ummi Hafilda sued.

³² See for example, the story headlined, "Ummi denies being spurned," the *New StraitsTimes*, 23 December 1998, front page; "Ummi denies she loved Anwar," the *New Straits Times*, 23 December 1998, pp. 16-17.

V. The Ingredients of a Case in Defamation

The learned trial judge treated the suit as a routine defamation case. In workmanlike fashion, the learned trial judge summarized the bare facts of Ummi's role in the events leading to the prosecution of Dato' Seri Anwar bin Ibrahim and the pleadings. Then his Lordship enumerated the three elements that Ummi, like any other plaintiff, had to fulfill to establish a cause of action in defamation. The three elements listed were:³³

- a. That the impugned writing was defamatory;
- b. That the impugned writing was published of and concerning the plaintiff *i.e.* that "Thurman Ali" referred to, and was comprehended by those who knew her (Ummi) to refer to her;
- c. That the offending writing had been published to a third party.

Each of the three elements is considered in turn, below.

VI. Are the Words Complained Of Defamatory of the Plaintiff?

There is no entirely satisfactory definition of defamation³⁴ but there is no doubt that it is meant to remedy injury or damage to the reputation of another leading to a loss in the esteem in which he is held by others.³⁵ In this context, the "others" are right-thinking and reasonable members of society. The attack on the reputation of the plaintiff must lower him in the esteem in which others hold him or make him the object of hatred, ridicule or contempt in the minds of reasonable members of society. The well-known "trinity of hatred, contempt and ridicule"³⁶ is a common thread running through all the definitions of defamation. One of the most quoted passages on deciding whether words are defamatory is from

³³ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 770.

³⁴ See Neill LJ in *Berkoff v Burchill & Another* [1996] 4 All ER 1008 at p 1018.

³⁵ As represented by Parke B in *Parmiter v Coupland* [1840] 6 M & W 105 at 108; 151 ER 340 at pp. 3451-342; Cave J in *Scott v Sampson* [1882] 8 QBD 491 at p 503; *Vander Zalm v Times Publishers* [1980], 109 D.L.R. (3d) 531 (British Columbia, CA) at p 535; and, Neill LJ in *Berkoff v Burchill & Another* [1996] 4 All ER 1008 at p 1018.

³⁶ Millett LJ in *Berkoff v Burchill & Another* [1996] 4 All ER 1008 at p 1019.

the judgment of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237 at p 1240. His Lordship states that in deciding whether words are defamatory they must be given their ordinary meaning or signification and continues:

The question, then, is whether the words in their ordinary signification are capable of being defamatory. Judges and textbook writers alike have found difficulty in defining with precision the words "defamatory." The conventional phrase exposing the plaintiff to hatred, ridicule and contempt is probably too narrow. The question is complicated by having to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used. ... the test (is): would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

What Lord Atkins clarifies above is that the words complained of, when given their ordinary meaning, must damage the reputation of the complainant so as to lower him in the esteem of right-thinking and reasonable members of society. The learned trial judge in *Ummi Hafilda* relied on the above quoted passage from *Sim v Stretch* to hold that a statement or article "is defamatory when it injures the reputation of another by exposing him to hatred, contempt or ridicule or which tends to lower him in the esteem of right-thinking members of society."³⁷

The impact or effect of the defamatory words described above does not, however, address the principles employed to determine whether a given set of words are in fact defamatory. This calls for the words complained of to be interpreted, to ascertain whether they bear the defamatory signification attributed to them by the plaintiff. The principles applied to decide the meaning actually to be attributed to the words complained of (and subsequently, to decide if they are in fact defamatory) have been enunciated piece meal, over the years, in a host of cases. These principles have been conveniently summarized and enumerated by the

³⁷ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 770.

Court of Appeal of England and Wales in a case involving a television programme but apply equally to other forms of libel³⁸ as follows:³⁹

- (1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer⁴⁰ watching the programme once.⁴¹
- (2) The hypothetical reasonable reader (or viewer) is not naive but he is not unduly suspicious.⁴² He can read between the lines. He can read in an implication more readily than a lawyer⁴³ and may indulge in a certain amount of loose thinking. But he must be treated as

³⁸ Section 3 of the Defamation Act 1957 makes the broadcast of a television programme a libel.

³⁹ *Skuse v Granada Television Ltd* [1996] EMLR 278 at pp. 285-287, CA per Kennedy MR. At p 280 the Master of the Rolls says, "This is the judgment of the court to which all members have contributed".

⁴⁰ The natural and ordinary meaning of the words complained is the meaning they would convey to ordinary persons, not a lawyer: *Lewis & Anor v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151 at p 154, HL, per Lord Reid; and, *Perunding Alam Bina Sdn Bhd v Errol Oh* [1999] 6 MLJ 101 at pp. 106-107 per James Foong J.

⁴¹ People watch a television programme once because normally, that is all they can do. For that reason it may be logical, in determining whether the content of a television programme is defamatory, for the viewer be deemed to have viewed it just once. The reader of a newspaper or other publication is, however, free to read it more than just once.

⁴² Words may be understood by one person in a different way from that in which they are understood by another: *Slim v Daily Telegraph Ltd* [1968] 1 All ER 497 at p 504, CA (Eng), per Diplock LJ. Ordinary men and women have different temperaments and outlooks; some are unusually suspicious; some are unusually naive; and one must try to envisage people between those two extremes and determine what is the most damaging meaning they would put on the words in question: *Lewis & Anor v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151 at p 155, HL, per Lord Reid, cited in *Le Mercier's Fine Furnishings Pte Ltd v Italcomm (Malaysia) Sdn Bhd* [1996] 3 CLJ 590 at p 593 per James Fong J and in *Lee Kuun Yew v J B Jeyaretnam* [1979] 1 MLJ 281 at p 285, [1978-1979] SLR 429 at 435 per Chua J; *aifd* [1979] 2 MLJ 282, [1978-1979] SLR 197, CA (Sing); [1982] 1 MLJ 239, [1982-1983] SLR 1, PC.

⁴³ *Lewis & Anor v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151 at p 169, HL, per Lord Devlin; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at p 171, [1968] 1 All ER 497 at p 503, CA (Eng), per Diplock LJ; *Perunding Alam Bina Sdn Bhd v Errol Oh* [1999] 6 MLJ 101 at pp. 106-107 per James Foong J.

- being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.⁴⁴
- (3) While limiting its attention to what the defendant has actually said or written the court should be cautious of an over-elaborate analysis of the material in issue.⁴⁵
 - (4) A television audience would not give the programme the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.
 - (5) In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable viewer the court are entitled (if not bound) to have regard to the impression it made on them.
 - (6) The court should not be too literal in its approach.⁴⁶
 - (7) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally.

The learned trial judge's attention was not drawn to the foregoing. As a result, on the question as to how the ordinary signification of words to a right thinking member of society is to be determined, the learned

⁴⁴ "It seems to me unreasonable that, when there are a number of good interpretations, that only one bad one should be seized upon to give a defamatory sense to the document": *Capital and Counties Bank v Henry* [1882] 7 App Cas 741 at p 744 per Lord Selbourne.

⁴⁵ The Master of the Rolls cited Diplock LJ's words in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at p 171 to the effect that each of two short letters in the newspapers that could have taken a literate reader no more than sixty seconds to read kept three lord justices and four counsel occupied for the best part of three days in minute linguistic analysis. The words must not be subjected to a strained or unlikely construction: *Daniel KC Tan & Associates Sdn Bhd v Progressive Insurance Sdn Bhd* [2001] 5 MLJ 642 at p 656 per Kamanathan Ratnam J; *Lee Kuan Yew v J B Jeyaretnam* [1979] 1 MLJ 281 at p 284, [1978-1979] SLR 429 at p 431 per Wcc Chong Jin CJ, following *Jones v Skelton* [1963] 1 WLR 1362, PC; *Pang Fee Yoon v Piong Kien Siong* [1999] 3 MLJ 189 at p 194, per Suriyadi J referred to in *Soh Chun Seng v CTOS-EMR Sdn Bhd* [2003] 4 MLJ 180 at p 190 per Ramly Ali J.

⁴⁶ In treating political satire as a bunch of lies, the common law has generally adopted a literal approach to satire.

trial judge invoked⁴⁷ the oft repeated statement of Lord Reid in *Lewis v Daily Telegraph* [1963] 2 All ER 151 at p 154 that reads:

There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute to the words a meaning not apparent to those who do not have that knowledge.

Thus, the test to determine whether words are defamatory is whether the words complained of would be interpreted as such by an ordinary right thinking member of society (as opposed to a lawyer with his “rules of construction”). In interpreting the words in question, the ordinary right thinking member of society can and does read between the lines in the light of his general knowledge and experience of worldly affairs.

On the evidence, the learned trial judge made several findings of fact which, in summary (and with our comments linking the findings to the impugned writing), were as follows:⁴⁸

- (1) Contrary to the assertion in “Green Card”, the plaintiff was never married, let alone to a Filipino.
- (2) Her connection to the trial of former Deputy Prime Minister, revolved around the publication of *50 Dalil* and its author Khalid Jeffry, mentioned in the impugned writing as ‘Pulp Dalil’ and ‘Caled Jeffry’ respectively.

⁴⁷ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 770.

⁴⁸ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 771.

- (3) Contrary to the assertion in “Fatal Attraction”, the plaintiff was never disowned by her father.⁴⁹
- (4) Another of the plaintiff’s brothers, Azwan bin Ali, was named “Az One” in “Fatal Attraction”.
- (5) The plaintiff testified how she was ostracised by her friends after the publication of this article specifically during the *teraweh* prayer.⁵⁰

All the defendants who entered a defence argued that the impugned writing was not defamatory of the plaintiff when given its natural and ordinary meaning. The court, however, ruled that to decide whether or not the words in issue were defamatory they had to be understood in their natural and ordinary sense or the meaning that the words would convey to the ordinary man. The court then declared at p 771: “What is [the] natural and ordinary meaning of words is a matter of construction.” Purportedly applying the foregoing test to the impugned writing the learned trial judge, at pp. 771- 772, concluded:

[25] It is clear to this court that the statements above, published as stated in the Article clearly puts the plaintiff in a bad light (to put it mildly). It portrayed that the plaintiff was a prostitute, a mentally unstable person obsessed with the former Deputy Prime Minister, and that she had a bad taste in clothing, that she was disowned by her own father, that she co-authored the *50 Dalil* book, and that she was referred to as a tacky bimbo (brainless woman).

[26] But was the statement defamatory? Taking its ordinary and natural meaning. (*sic*) The (*sic*) answer must be in the affirmative. It is clear that the statement had indeed lowered her in the estimation of right thinking members of society and that the Article had exposed the plaintiff to hatred, contempt or ridicule.

⁴⁹ The issue does not appear to be a clear cut as this. See *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1992] 2 MLJ 1 at 163-166. See further the discussion at pp. 28 – 29 below.

⁵⁰ It has, however, to be pointed out that Azman bin Ali is not the Azmin bin Ali who was the private secretary to the former Deputy Prime Minister. It is Azmin who is mentioned in *PP v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1 at p 34.

Although the court did not, in this part of the judgment, establish a causative link between the “hatred, contempt or ridicule” and the plaintiff being shunned by right thinking members of society, it had earlier, in para 21 at p 771, noted that the plaintiff had testified “how she was ostracised by her friends after the publication of this article specifically during the *teraweh* prayer.” Later, in setting out the factors it took into account in assessing damages, the court referred to the plaintiff’s testimony:⁵¹

... that she was shunned by people at religious functions and that she had received phone calls where she was called names like “*perempuan sundal*” and “bastard” which inevitably affected her friendships and her reputation as a businesswoman.

The learned trial judge seems to have made a finding of fact that the plaintiff was shunned and that this was caused by the words complained of and nothing else. Being shunned at religious functions might have affected her “friendships and her reputation as a businesswoman” but, with respect, it is not quite clear how the plaintiff’s being called a “*perempuan sundal*” (i.e. a woman of easy virtue) and “bastard” over the phone (without those slurs being communicated to others) would have affected her friendships and her reputation as a businesswoman.

In their defence, the first three defendants averred that the words complained of were, *inter alia*, satire.⁵² The learned trial judge gave short shrift to the defence of satire. His Lordship brushed it aside as follows:

[39] Perusing the defence of first, second and third and fourth defendants, it was contended, among others, that the article was a satire, made in jest, humorous, fictional and an absurdity.

⁵¹ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 774.

⁵² *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 769.

[40] In my view, there is nothing humorous in calling someone “a small time hooker” nor is it a laughable matter in ridiculing one’s personal life or ridiculing a person’s disability. In fact this article is an insult to one’s intelligence.

The validity of the defendants’ position that the article was a “satire, made in jest, that it was humour, fiction and absurd” merits comment, as does the learned trial judge’s appreciation of the concept of satire.

If “Malaysia Sweeps 10 Oscars” is treated as literary satire, one is unable to identify either the human folly or vice which the article seeks to expose or the reform that it seeks to effect. Thus, if the defendants’ were contending that the article was literary satire *a la* Swift, the contention had to, as it did, fail. With respect, the learned trial judge came to the right conclusion on his point — that the article was not literary satire — although his Lordship did not deign to say so or to spell out the grounds for his conclusion. However, that is not the end of the matter for, it is respectfully submitted, that the article is a *political* satire and as such, is not defamatory. The words are not defamatory if read in their context by the ordinary reasonable reader. The latter, as we have seen, must be a right thinking member of society who is fair minded and not avid for scandal and not unduly suspicious. Such a reader would not read the words complained of to have the meaning ascribed to them by the plaintiff and the ordinary reasonable reader would not have understood the impugned writing to be defamatory. The ordinary reasonable reader would have read the impugned writing in its context which encompasses the nature of the publication in which the impugned writing appeared (*i.e.* the newsletter of an opposition political party), as well as the ordinary reasonable reader’s knowledge and experience of worldly affairs *i.e.* of the events leading up to the corruption trial of Dato’ Seri Awar bin Ibrahim and Ummi’s testimony therein. The context would be the “occasion and circumstances of the publication” of the impugned piece.⁵³

⁵³ *Stubbs Ltd v Russell* [1913] SC (HL) 14 at p 20-23 per Lord Kinneer.

A. *The Context of the Impugned Writing: The Nature of the Publication Outlet*

The impugned writing appeared in the *Harakah*, the newsletter of the PAS. The newsletter of any organization is a publication meant to promote its good name and to publicize that organization's 'take' on events affecting it. It is not a newspaper and while it may, it does not have to, report hard facts.⁵⁴As the newsletter of an opposition political party, the *Harakah* was not and did not pretend to be a newspaper conveying hard news or facts to its readers. Rather than reporting facts, it was the mouthpiece of PAS, more concerned with expressing the views and opinions of PAS on current affairs in Malaysia. The comments and opinions of PAS on current affairs carried by the *Harakah* were, if not biased, necessarily slanted. It was a partisan publication attempting to mould public opinion by disseminating commentary and viewpoints critical of and mocking government actions (including the prosecution of Dato' Seri Anwar Ibrahim) and pronouncements. In other words, the ordinary readers of *Harakah*, the ordinary man, would expect stories in the *Harakah* to be over-stated, exaggerated and distorted to score political points. Such a reader would not treat the impugned writing as containing factual statements. Instead, the readers would expect extravagant opinions and overstated facts and discount them accordingly. The trial court did not address this part of the context. With respect, the court erred in law in reading or construing the impugned writing without taking cognizance of the fact that it appeared in the newsletter of an opposition party as, in doing so, it read the piece in isolation from its context. Unlike the court, the ordinary reader would have dismissed the impugned writing as an exercise, albeit unsuccessful, in humour.

⁵⁴ Section 2 of the Defamation Act 1957 reads: "'newspaper" means any paper containing public news or observations thereon or consisting wholly or mainly of advertisements which is printed for sale and is published in Malaysia either periodically or in parts or numbers at intervals not exceeding thirty-six days". The statutory definition of "newspaper" is not prescriptive. It is meant to identify the publications which may avail themselves of the defences provided by the Defamation Act 1957, of unintentional defamation (s 7) and "qualified privilege of newspapers" (s 12).

Humour involves taking liberties with the truth to generate mirth especially when an individual is the butt of the joke. Indicative of the common law approach to jesting and defamation is the dictum of Joy, CB in *Donoghue v Hayes* (1831) Hayes (Ir Exch) R 265 at p 266:

The principle is clear, that a person shall not be allowed to murder another's reputation in jest. But if words are spoken that it is obvious to every bystander that only a jest is meant; no injury is done, and consequently, no action would lie.

Joy CB's remark was in an action for slander and might well be relevant in relation to slander involving a handful of listeners. However, it is not logical to extend, as has happened,⁵⁵ the principle to an alleged libel especially in the media with its audience of hundreds of thousands and even millions. To require a jury or a judge to decide whether not even one person could have viewed a statement as a joke would normally be an exercise in futility. With respect, the application of the principle in *Donoghue v Hayes* to libel cannot be justified and represents an overly simplistic use of the doctrine of *stare decisis*. In addition, it would have a chilling effect on the freedom of speech and expression enshrined in Article 10(1) (a) of the Federal Constitution.⁵⁶

The court received evidence that notwithstanding a term in the permit allowing the first defendant (PAS) to publish the *Harakah* limiting its circulation to PAS members only, the circulation of *Harakah* had reached the level of a mainstream newspaper and that its readership was not restricted to PAS members only.⁵⁷ In fact, in its application for the publication permit, PAS declared the number of copies of the *Harakah* sold was 250,000 per publication or issue in 1999.⁵⁸ The increasing

⁵⁵ *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Parti Islam Se Malaysia) & Ors* [2002] 1 MLJ 160 at p 169.

⁵⁶ Article 10(2) (a) of the Federal Constitution permits Parliament to legislate to protect the individual against, *inter alia*, defamation.

⁵⁷ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 766.

⁵⁸ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 773.

popularity of the *Harakah* might well be attributed to its presenting the PAS point of view of events and developments at the state and federal levels in the nation.

As the piece complained of was not a news item, it would readily be understood as a satire. An attempt to give it a defamatory reading could well be what Lord Shaw dubbed as a “strained and sinister interpretation” in *Stubbs Ltd v Russell* 1913 SC (HL) 14 at p 24. It has also been pointed out that when words might or might not have a defamatory signification, the defamatory meaning does not have to prevail. As Lord Selborne put it, “*It seems to me unreasonable that, when there are a number of good interpretations, that only one bad one should be seized upon to give a defamatory sense to the document*”: *Capital and Counties Bank v Henty* (1882) 7 App Cas 741 at p 744.

B. *The Context of the Impugned Writing: The Ordinary Reader's Knowledge and Experience of Worldly Affairs*

Although it is the court that has to decide as a matter of law whether the words complained of are capable of bearing the defamatory meaning imputed to them by the plaintiff, the court is required to view the passage complained of as would a hypothetical ordinary reader (or viewer). To this hypothetical individual, the law ascribes certain qualities. The first is that the ordinary reader is a reasonable individual. Next, he does not, as the trial judge, quoting Lord Reid said, “*live in an ivory tower*.”⁵⁹ A corollary of this hypothetical reasonable reader not being sequestered in the ivory tower is that he is actively involved in and aware of life in the society of which he is a part. The ordinary reasonable reader does “*read between the lines in the light of his general knowledge and experience of worldly affairs*.” The personal experience and knowledge of the hypothetical reasonable reader must colour his interpretation of the material that he read about the plaintiff. The body of personal experience

⁵⁹ *Lewis v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151 at p 154 quoted in *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 770.

and knowledge of the ordinary reasonable reader of the *Harakah* at the material time must have included the factual data, rumours and speculation about the plaintiff's role in the events leading up to the trial of Dato' Seri Anwar Ibrahim and to the plaintiff's giving evidence. The body of information on this point has been identified and set out in the preceding section of this paper. The factual matrix forms a part of the context of *Ummi Hafilda*.⁶⁰

VII. The Impugned Writing as Satire

We turn now to the issue whether the ordinary and reasonable reader not avid for scandal but aware of what was going on in society would have reasonably read the three paragraphs on which the plaintiffs sued as defamatory. We need to remind ourselves that such a reader could and would have read between the lines. For ease of reference each of the three paragraphs is reproduced before it is traversed.

Best Original Screenplay: *'Pulp Dalil'*

Based loosely on the Quentin Tarantino hit *'Pulp Fiction,'* the film tells the story of a small time hoodlum, Caled Jeffry, who leaves his life of crime on the streets to embark upon a life of crime in literature. He fails his university entrance test when he is unable to recite the alphabet (he could only manage to get to 'D'), but is consoled by Ummi Thurman Ali, a small time hooker obsessed with Deputy Prime Ministers. She helps Jeffry embark upon his super-novel – she writing the stories and dotting the 'i's – after the two of them are inspired by reading a copy of the *National Enquirer*. They manage to publish their book *'Pulp Dalil'* when a short balding man with a liking for small big-breasted women funds its publication. The book becomes an overnight hit, and Jeffry achieves his lifetime ambition of having orange hair.

As the write-up *Pulp Dalil* itself acknowledges, it is based loosely on an American hit movie, Quentin Tarantino's *Pulp Fiction*. Like the American movie, *Pulp Dalil* is said to focus on the life of a small time

⁶⁰ Most of the details that have been presented were, at the material times, in the public domain and have been extracted from sources available to the public.

hoodlum. This is the character called Caled Jeffry, a thinly disguised Khalid Jaffri, the author of *50 Dalil*. The identification of Caled Jeffry as Khalid is too obvious to deny.

To those who knew him, Khalid was a distinguished journalist, freelance writer and editor. He clearly was an educated man. He seems to have begun his working life as a reporter for the *Utusan Melayu*, a Malay newspaper and was, at one time, its representative in London. He was a founding member of the National Union of Journalists in Malaysia and its first secretary and a member of its national committee. He then left *Utusan Melayu* and launched his daily newspaper, *Harian Nasional* and a weekly, *Mingguan Pertama*. This was followed by a twice weekly tabloid, *Era Ekonomi*. From a twice monthly English-Malay tabloid *Bulletin Langkawi* he ventured into magazines such as *Seri Dewi*, *Travel Adviser* and *Motor*. In most cases, he was the editor.⁶¹

To those who knew Khalid Jaffri or knew of his background, the statement that he “fails his university entrance test when he is unable to recite the alphabet (he could only manage to get to ‘D’)” would not be an untruth but an extremely ludicrous assertion designed to poke fun at him. The comic or satiric thrust of the statement would be obvious. Even those who did not know Khalid would find it difficult to treat this assertion as a statement of fact or even as a statement to be taken as true; it is simply so overstated as to call its content into question. With respect, even to regard the statement as one of fact would call for a degree of ingenuousness that defies belief. No reasonable reader of the piece could regard it as anything other than a distortion of and a caricature of Khalid and one not to be taken seriously.

It is because *Pulp Dalil* sets out to mock and ridicule Khalid Jaffri the author of *50 Dalil* that he is described as “... a small time hoodlum ... (who leaves)... a life of crime on the streets to a life of crime in literature”. In their natural and ordinary meaning, the words “a small time hoodlum” might be understood to mean “a rowdy hooligan, a thug

⁶¹ The information about Khalid Jafri is derived from In *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Parti Islam Se Malaysia* & Ors [2002] 1 MLJ 160 at p 164-165.

and a gangster and a common criminal, terrorizing the streets.”⁶² When a criminal, small or “big”, is around, law abiding citizens would try to shield their children from falling into the clutches of or otherwise coming under the influence of such an unsavoury character. It would be an extremely gullible individual who would avoid Khalid Jaffri or warn his children to stay away from him because of the characterization of Caled. The acts that constitute Caled’s “life of crime in the streets” as well as “life of crime in literature” are not specified. However, it is possible that particulars of “life of crime in literature” are contained in the innuendo that he passes himself off as the sole author of a work written if not solely, at least substantially, by Ummi Thurman Ali.⁶³ This medley of insults that so obviously ridicules and mocks Caled Jeffry is so evidently fanciful exaggerations that none can treat any of it seriously, as having anything to do with truth or reality. Just as fantastic is the trope that the illiterate Caled and his literary helper can produce a “super novel” that becomes “an overnight hit.” Such a work will become an overnight hit, as the English expression goes, when pigs can fly! The crowning touch of the attack on Caled is the declaration that with the instant success of the book, “Jeffry achieves his lifetime ambition of having orange hair”. In the impugned writing, Caled Jeffry is endowed with orange hair because that is the natural color of the hair of Khalid Jafri.⁶⁴ Can anybody believe or treat as a serious statement the averment that Khalid whose hair was orange had a lifelong ambition to have hair of that colour? The

⁶² As held by the court in *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Parti Islam Se Malaysia) & Ors* [2002] 1 MLJ 160 at p 170.

⁶³ The court in *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Parti Islam Se Malaysia) & Ors* [2002] 1 MLJ 160 at p 169 construed the words in issue thus: “He had hoodwinked society by holding himself out as the author of the book by passing off the works of Ummi Hafilda hte Ali as his own”. It might be noted that the record does not show Ummi Hafilda Ali (as distinct from Umma Thurman Ali) as the author of any books at the material time.

⁶⁴ With regard to the reference to ‘orange hair’, the fifth defendant in his evidence, identified the peculiarity of the plaintiff’s hair as ‘perang’. (The *Kamus Lengkap* at p 806 describes ‘perang’ as blonde, brunette, dark brown, reddish black, reddish yellow.) Therefore, through the fifth defendant, it is now established that the peculiar colour of the hair is the physical peculiarity of the plaintiff. Per Kamalanathan Ratnam J in *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Parti Islam Se Malaysia) & Ors* [2002] 1 MLJ 160 at p 168.

shallowness of this “lifetime ambition” mocks itself and draws attention to its satiric nature.

It is in the context of the patently satiric attack on Khalid Jafri that the female plaintiff makes her appearance in *Pulp Dalil*. After Caled fails his university entrance examination, he:⁶⁵

... is consoled by Ummi Thurman Ali, a small time hooker obsessed with Deputy Prime Ministers. She helps Jeffrey embark upon his super-novel — she writing the stories and dotting the ‘i’s — after the two of them are inspired by reading a copy of the *National Enquirer*. They manage to publish their book ‘*Pulp Dalil*’ when a short balding man with a liking for small big-breasted woman funds its publication⁶⁶.

As we have seen, there is overwhelming evidence for saying that Ummi Thurman Ali is none other than what she is meant to be: the plaintiff, Ummi Hafilda Ali. She is labelled “a small time hooker” or a prostitute. There is no doubt that ordinarily to call a woman a hooker is defamatory under section 4 of the Defamation Act 1957 which provides:

Words spoken and published which impute unchastity of adultery to any woman or girl shall not require special damage to render them actionable.

The question is whether, in view of the abuse heaped on Caled and the tone of *50 Dalil* until Ummi is introduced into the piece, any reasonable person could regard the said description as a literal statement, albeit, untrue, about Ummi Hafilda. It is respectfully submitted that although the words “small time hooker” may normally be defamatory when applied to a woman, in the context of *Pulp Dalil*, they cannot, and will not, be taken as a statement of fact by any reasonable reader. Another way of putting this would be to say that all the readers of *Pulp Dalil* would not apprehend the words “small time hooker” as having anything to do with the plaintiff in real life; all the readers would understand it be

⁶⁵ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 766- 767.

⁶⁶ We have not tried to identify the “short balding man with a liking for small big breasted woman (who) funds its publication”.

an exaggeration, an overstatement meant to be humorous albeit, humour in bad taste.

What remains to be traversed is the averment that Thurman Ali was “obsessed with Deputy Prime Ministers.” There is no gainsaying that the reference is, at the very least, to Ummi Hafilda’s vehement denial, in her letter to the Prime Minister dated 5 August 1997, that she had ever harboured romantic feelings for the Deputy Prime Minister and that the Deputy Prime Minister’s purported allegation to the contrary was a canard.⁶⁷ Ummi Hafilda’s denial was very much a part of the public consciousness at the time of the trial of the former Deputy Prime Minister. Those who knew of the plaintiff’s letter to the Prime Minister and those who had heard of its contents would undoubtedly be aware that the author of the impugned writing was drawing on, and reworking this bit of information in the public domain, to a hopefully, humorous, end. They might, as did the trial judge, find the attempt offensive but by no stretch of the imagination would they consider it a factual statement about the plaintiff. It is submitted that those not cognizant of the plaintiff’s letter to the Prime Minister might not have been able to identify its provenance but would not have failed to perceive that it was meant to be humorous. They may have characterized the attempt at humour as juvenile or ill-bred but they would not have taken it to mean that the plaintiff was a small time practitioner of the world’s oldest profession. The notion that all the readers would fail to perceive the impulse to mock the plaintiff and would treat the description as factual defies belief.

One further point needs to be made of Ummi Thurman Ali’s obsession with “Deputy Prime Ministers.” This is that instead of being presented as being obsessed with “*the* Deputy Prime Minister,” she is presented as being obsessed with “Deputy Prime Ministers” – in the plural. That is to say, her obsession is generic rather than specific. This “enlargement” or exaggeration of the object of her obsession is an attempt to disguise as well as to poke fun at the plaintiff. The obsession with multiple Deputy Prime Ministers removes her from the realm of reality

⁶⁷ The relevant portion of the original *Bahasa Malaysia* text of the plaintiff’s letter and an English translation are at p 1-2, above.

to the never-never land of the satirist's imagination. This should prevent the personage being satirized as having anything to do with the real world.

Best Directing: 'Green Card'

This romantic comedy tells the story of young Filipino man who leaves his poor village in search of work in Malaysia. He marries a tacky Malaysian bimbo (played by Ummi Thurman Ali) in the hope of getting a work permit — a green card — but divorces her when he suddenly discovers Anwar Ibrahim's picture under her pillow. Fortunately, he is offered a Malaysian identity card in return for voting for the 'right' candidate. The story ends on a happy note when he not only obtains work, but is also elected the State's Chief Minister and hops over to the MIC the very next day.

This paragraph, hereafter referred to as "Green Card" paragraph, draws on details and language that would be more easily accessible to Americans than to Malaysians. The reference is to Filipinos leaving their homeland for greener pastures in the USA and to the green card that signifies the holder's status as a legal alien in the USA. At the time the offending article was published, the influx of undocumented or illegal Filipinos into the Malaysian state of Sabah was very much in the news. Sabah then seemed to be new "USA" for illegal migrants from the Philippines. Stories were rife that the illegals from the Philippines were being allowed into the country to swell the numbers of voters who would cast their ballots in favour of a particular political party. The writer of the Green Card paragraph cleverly draws upon the Filipino diaspora to the USA/Malaysia and transfigures the US green card into the Malaysian work permit to evoke one view of the politics underlying the flood of Filipinos flowing into the East Malaysian state. All this encapsulated in the image of the young Filipino who leaves his poor village to seek employment in Malaysia and his being offered a Malaysian identity card as a *quid pro quo* for voting for the right candidate. The account ends farcically as the Filipino not only obtains employment but is also elected the State's Chief Minister. This is evidently an exaggeration, an overstatement that no reasonable reader will consider as a statement of fact (let alone decide whether it is true or not). The piece ends with a sly dig at the MIC (the Malaysian Indian Congress), a political party which was a part of the coalition then ruling Malaysia. The Filipino who has

become the new Chief Minister hops over to the MIC the day after he attains his ministerial office. Our attempts to identify a more precise target for this bit of mischievous make-belief have not been successful but there is no denying that this exaggeration and distortion of an immigration problem of which East Malaysians (and to some extent, their compatriots on the Peninsular Malaysia) are aware does contribute to overall atmosphere of incredibility.

The ubiquitous Ummi Thurman Ali is inserted into the "Green Card" paragraph as the "tacky Malaysian bimbo" that the Filipino marries to get a work permit. Marriage to an American citizen may procure a green card in the USA but it certainly does not entitle the foreign spouse of a Malaysian to a work permit -- green or otherwise! This Filipino divorces Ummi Thurman Ali when he suddenly discovers Anwar Ibrahim's picture under her pillow. The subject of the picture is of course the erstwhile Deputy Prime Minister against whom the plaintiff gave evidence during his corruption trial. It will be recalled that in her letter of complaint dated 5 August 1997 to the Prime Minister the plaintiff accused the former Deputy Prime Minister of spreading the falsehood that she was the victim of her unrequited love for him. Clearly, the writer of "Green Card" is turning this bit of public information upon its head to put forth a droll reason for the divorce. One would have to be a literalist to believe that the plaintiff was obsessed with Anwar Ibrahim whose picture she kept under her pillow. Just as exaggerated is the notion that the discovery of the photograph of a public figure under a wife's pillow will, without more, result in a husband divorcing her. The creative comic is clearly at work here.

What about the description "tacky Malaysian bimbo" attached to Ummi Thurman Ali? The learned trial judge found the description derogatory for he says that a "tacky bimbo" is a brainless woman. With respect, the "brainless woman" applies to "bimbo" but not to "tacky." This word connotes a lack of taste or quality. In "Green Card" the word is used adjectivally probably to qualify the apparel of the bimbo rather than her person. However, the question is whether anyone would actually believe it to be a piece of factual data about the plaintiff? Or, would it be dismissed out of hand as piece of satiric creative writing?

Best Actress: 'Fatal Attraction'

This crime thriller tells the story of a mentally unbalanced woman (yes, Ummi Thurman Ali again!) who designs tacky, gaudy clothing and is cursed with a physical disability — she was born with a hand phone permanently attached to her right ear. Her father disowns her after he is struck blind by the rather loud colours of her dresses. In a fit of anguish, she becomes a psychotic and is obsessed with the Deputy Prime Minister. At first she just carries a small photograph of him everywhere she went — but her family finally recognises she needs major help when she tries to squeeze a 40 foot by 20 foot framed canvass painting of Anwar into her small Christian Dior handbag. She dies horribly — she is electrocuted styling and blow drying her hair — and her body is made into a statue posing fashionably in front of the steps of the High Court building in Kuala Lumpur. Her distraught brother — Az One — becomes psychotic too and becomes obsessed with a local singer actress (watch out for 'Fatal Attraction II!'). This movie was also awarded the Oscar for Best Sound Recording by Sng Chihuahua.

The third paragraph of the article is headed, "Best Actress: 'Fatal Attraction.'" In the "Fatal Attraction" paragraph the plaintiff, disguised as Ummi Thurman, is described as a mentally unbalanced woman who designs tacky, gaudy clothing, the loud colours of which strike her father blind. Not even a child can believe that brightly coloured clothes can cause blindness. Her father disowns her for blinding him. If it is impossible for her to be responsible for her father's blindness, so must the alleged result of that impossibility be impossible. It is thus not possible to causatively link the fit of anguish with which she is next described as being afflicted to her father's blindness.

We are then told that in a fit of anguish, the mentally unbalanced woman becomes a psychotic. A psychotic is, according to the *New Webster's Dictionary and Thesaurus of the English Language*, a person "suffering from psychosis." The same dictionary defines "psychosis" as a "serious mental derangement." This seriously deranged person, we are told, was obsessed not, as was the Ummi Thurman Ali in "Pulp Dalil," with generic "Deputy Prime Ministers" (in the plural) but with "the Deputy Prime Minister," presumably the incumbent at the material time. The obsession is presented as a disease with progressively more serious

symptoms. At the beginning “she just carries a small photograph of” the Deputy Prime Minister wherever she goes but her psychosis worsens. Finally, her family “recognizes she needs major help when she tries to squeeze a 40 foot by 20 foot framed canvas painting of Anwar into her small Christian Dior handbag.” The image of a socialite trying to stuff a gigantic billboard into a dainty brand name handbag must provoke a smile at its absurdity. Is the female figure being ridiculed? Of course she is! But is she being lowered in the estimation of right thinking members of society as a “nut”? The answer has to be a resounding, “No”! The antics attributed to the woman are farcical, meant to poke fun at her and have nothing to do with reality or fact. The reader is prevented from treating this image as having a serious or even factual content by virtue of the preceding account of how the bright colours of Umma’s clothes blinded her father.

From her psychosis we are propelled to her end, the manner of her death and of the disposal of her mortal remains. The cause of her death strains the bounds of credibility but even if one is seduced by its factual, dead pan tone into believing it as a statement of fact, that belief lasts for a mere nano-second because the outrageous image of the body as a statute posing fashionably in front of the steps of the High Court building in Kuala Lumpur is so inherently incredible as to reach back and infect the account of the manner of death with incredibility.⁶⁸ In short, the depiction of her death and “interment” is tarred by the brush of incredibility.

Further, the image of the body posing fashionably in front of the Kuala Lumpur High Court brings to mind the body of Lenin being displayed in the Kremlin and the body of Mao Tse Tung on exhibition in Tiannamen Square in Beijing. The bathos of the comparison may provoke a smile. But, whatever may be the practice in other parts of the world, in Muslim Malaysia a deceased Muslim must be buried within 24 hours and the ever-vigilant Department of Islamic Affairs would prevent the exhibition of any Muslim corpse. This is known to every Malaysian.

⁶⁸ The plaintiff must have gone up and down these steps many times during the trial of the former Deputy Prime Minister.

The writer of the piece cleverly taps on this vein of information in the public domain.

More than this, at the beginning of “Best Actress: Fatal Attraction” we are told that Ummi Thurman Ali “is cursed with a physical disability — she was born with a hand phone permanently attached to her right ear.” The physical disability attributed to the hapless Ummi seems to have its origins in a newspaper photograph showing her speaking into a hand phone. The author of “Fatal Attraction” has decided to portray the plaintiff as forever speaking into or listening to her hand phone. Visually, the plaintiff seems to have a hand phone stuck to her ear. From this there is generated the image of the plaintiff being “born with a hand phone permanently attached to her right ear.” The author of the piece seized on and exaggerated the image of a woman speaking into a hand phone to comic effect to create a caricature of the plaintiff.⁶⁹ Again, as in the other details (or data) provided in the piece, this so-called physical deformity is so utterly incredible to be rejected out of hand as a piece of nonsense, albeit clever, meant to mock the plaintiff. The learned trial judge’s view, at p 773, merits quoting. His Lordship says:

[40] In my view, there is nothing humorous ... (in) ridiculing a person’s disability. In fact this article is an insult to one’s intelligence.

His Lordship is aware that the reference to the physical disability is meant to ridicule but overlooks the fact that the plaintiff is not afflicted with a deformity. It is a creation, as is much of the rest of the piece, a fiction. The supposed disability is a rhetorical device, intended to ridicule what the author views as the plaintiff’s incessant use of the mobile telephone. This means that the work in its entirety should be considered in the same light as the phone-disability: an exaggeration to the point of ludicrousness which precludes it from being considered as even an attempt to make an accurate reflection on the nature, character or appearance of the person in question. The article makes a creative use of information about the plaintiff in the public domain to mock her. It is hardly “an insult to one’s intelligence” except in so far as it is manifestly incredible.

⁶⁹ In a caricature, one feature is emphasized to identify an individual.

The learned trial judge purported to apply the common law rules to decide the issue of whether the impugned writing could bear the libellous meaning ascribed to it by the plaintiff. But, it is respectfully submitted that the learned trial judge did not, in fact, adhere to the common law rules. First, his Lordship adopted an overly literal interpretation of the words of which the plaintiff complained. Second, in holding that the impugned writing was defamatory his Lordship indulged in what the Americans would describe as 'cherry picking'. That is to say, his Lordship 'zoomed in' on words capable of a defamatory meaning in isolation from their context in the impugned writing while ignoring or otherwise giving short shrift to the other words. If his Lordship had read the allegedly defamatory words in their context in the three paragraphs, the rest of the impugned writing would have denuded them of defamatory import. Third, in construing the words the learned trial judge did not take into account the nature of the publication outlet or the context of their publication outlet. Finally, the learned trial judge did not construe the words in the light of the readers' knowledge and experience of the events surrounding the trial of the former deputy prime minister and of the plaintiff's role in that imbroglio. If the learned trial judge had done that, he would have appreciated the satiric nature of the impugned writing and dismissed the claim as being unable to support the defamatory imputations claimed by the plaintiff.

VIII. Publication of the Libel

No action can be maintained for libel unless there is publication. The publication of a libel, the learned trial judge says, "*has been defined as 'making known the defamatory matter after it has been written to some person other than the person of whom it is written,' per Lord Evershed MR in Pullman v W Hill & Co Ltd [1891] QB 524 at p 527.*"⁷⁰ In other words, publication consists in the communication by the defendant of the words complained of to a person other than the plaintiff. In the instant case, the learned trial judge held as a matter of fact that the "impugned

⁷⁰ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 773. See also *Hebditch v MacIlwaine* [1894] 2 QB 54 at p 58. In *Capital & Counties Bank v Hetty* (1882) 7 App Cas p 741 at 765, Lord Penzance says, "Libel does not require publication to more than one person."

article was indeed published in *Harakah* and *Harakah* at that particular time had a sizeable circulation.”⁷¹ Thus, following authority, publication was established.

IX. Reference to the Plaintiff

On the issue of establishing that the words complained of were published of and concerning the plaintiff, the court noted:⁷²

[6] In her statement of claim, the plaintiff listed out particulars of identification comparing the characters in the article and to her, person or persons related to her, or the surrounding circumstances in which she was involved especially the trial of the former Deputy Prime Minister. The facts and matters relied on to show that the said words and character ‘Ummi Thurman Ali’ referred to and were understood to refer to the plaintiff are as follows *inter alia*:

- (i) The name ‘Ummi Thurman Ali’ bears a strong and close resemblance to ‘Ummi Hafilda Ali’, the plaintiff;
- (ii) The alleged movie title *Pulp Dalil* incorporates the Malay word *Dalil* which was much publicised in the media as of 1998 as a result of the said word being part of the title of a book entitled *50 Dalil Mengapa Anwar Tidak Boleh Jadi PM*, more popularly referred to as *50 Dalil* (‘the Book’). The alleged movie title, *Pulp Dalil* bears a strong and close resemblance to the title of that Book;
- (iii) The author of the book is one Khalid Jeffry. The reference to “Caled Jeffry” in the said Article and/or the said words as the author of *Pulp Dalil* bears a strong and close resemblance to and would have been understood by the ordinary and reasonable person as referring to the said author of *50 Dalil*;
- (iv) The plaintiff is prominently featured in the Book, which became the subject matter of an investigation and subsequently led to criminal charges being brought against the former Deputy Prime Minister, in the course of which she was called by the prosecution as their witness, this trial

⁷¹ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 773.

⁷² *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 767-768.

was widely and prominently reported in the local and foreign media, verbatim and on a daily basis resulting in the plaintiff being made a prominent public figure;

- (v) The plaintiff has a brother by the name of Azwan Ali. The reference to 'Az One' in the article bears a strong and close resemblance to 'Azwan'. In the Article 'Az One' was referred to as the brother of 'Ummi Thurman Ali', indicating a clear reference to the plaintiff;
 - (vi) The plaintiff (*sic*) daily appearance as a witness in the trial of former Deputy Prime Minister were captured in photographs and broadcast in television and her appearance and dressing received prominent media attention. The article did mention the appearance and dressing style of 'Ummi Thurman Ali';
 - (vii) Following the above the plaintiff was occasionally shown (s)peaking to her hand phone. The Article did made reference to this fact when referring to 'Ummi Thurman Ali';
 - (viii) By reason of their knowledge of the facts and matters stated above, the plaintiff was identified by a large but unquantifiable number of readers of the article in Harakah as the individual referred to as 'Ummi Thurman Ali'.
- [7] The plaintiff claims that these passages from the article clearly referred to her, and persons related to her, under the prevailing circumstances, *i.e.* Dato' Seri Anwar Ibrahim's trial.

Judgment in default was entered against the fifth defendant. The first, second and third defendants filed a joint defense. The three defendants averred that the three paragraphs quoted above were:⁷³

- (a) satire;
- (b) fictional or a creation of fantasy;
- (c) not a report relating to individuals or events which really occurred;
- (d) all characters mentioned were fictitious in nature and not intended to refer to any person.

The fourth defendant in their defence said:⁷⁴

⁷³ *Ummi Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 769.

⁷⁴ *Ibid.*

- (1) that the article is a product of fiction and that all the characters in the article are fictitious and are never intended to refer to any living person;
- (2) that the character 'Umami Thurman Ali' does not in whatsoever manner refer to the plaintiff due to the following facts:
 - (a) the plaintiff is not the co-author of the Book;
 - (b) the plaintiff is not married to the author of the book or to a Filipino;
 - (c) the plaintiff is not an actress at the material time nor has she ever won any Academy Awards;
 - (d) the plaintiff is not a fashion designer;
 - (e) there is no statue of the plaintiff in front of the High Court building.

In retrospect, all the defendants would have done better if they had admitted that Umami Thurman Ali was a thinly disguised portrayal of the plaintiff and that the impugned writing was an attempt to satirize her. In the event, the four defendants' denying that Umami Thurman Ali was the plaintiff activated the principles employed in defamation proceedings to identify the plaintiff as the person of and concerning whom the defamatory words are published.

In defamation actions, as the learned trial judge notes, the question of whether the words complained of refer to the plaintiff and no one else has to be answered objectively. As to how this is to be done, the learned trial judge draws upon the formulation used by Lord Guest in *Morgan v Oldham Press* [1971] 1 WLR 1239 to the effect that impugned words have to be looked at through "the eyes of an ordinary reader." The question to be asked, in the words of Lord Guest, is would an ordinary reader, 'fair minded and not avid for scandal, not unduly suspicious', read the words complained of as referring to the plaintiff?⁷⁵ Since the test is objective, the words complained of cannot be read in isolation, but must be read in their context. After quoting from *Morgan v Oldham's Press*, the trial judge remarks, at p 772: "An ordinary reader would note that

⁷⁵ *Umami Hafilda Bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (Pas) & Ors* [2006] 4 MLJ 761 at p 772.

that the surrounding passages in the article refer specifically to the plaintiff".

However, there are cases where the individual targeted by the libel is not only unidentified, but is given a completely different name or, as in this case, a different name that is reminiscent of the plaintiff's. In such cases, the identity of the victim may be established by witnesses who testify that upon reading the statement or article in question, they knew that the person at whom it was directed was the plaintiff. Such witnesses, during the examination in chief or on cross-examination, may also specify the matters and circumstances which caused them to identify the plaintiff as the target of the impugned writing. In the instant case, though the identification of the plaintiff was never really in doubt, the plaintiff acted *ex abundanti cautella* by taking the extra step of calling Arbaie, a friend of the plaintiff to the witness stand, for precisely this purpose. Arbaie testified that after reading the impugned article, he informed the plaintiff over phone that it was about her. This testimony established that the piece referred to her.⁷⁶ The judgment, in paras 31 and 32, also refers to PW3 and his evidence. (Whether PW3 is Arbaie or somebody else is not quite clear). Be that as it may, this what paragraphs 31 and 32 say:

[31] The evidence of PW3 further supported the fact that an ordinary person upon reading this article would have no doubt as to whom the article was referring to. He could clearly identify all of the characters depicted in the article despite the defendants' contention that the characters were fictitious, non factual, non existent and a satire. Not only could PW3 identify the characters, but he could also relate the circumstances surrounding the characters.

[32] In my view, PW3 is indeed the ordinary man in the street and an educated man with a considerable knowledge of Malaysian political scene. Apart from that, events leading up to the arrest of the former Deputy Prime Minister and the criminal trial at that point of time was uppermost in the minds of members of the public who read newspapers.⁷⁷

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

The evidence of Arbaie and/or PW3 does not seem to have been challenged and thus was Umami Thurman Ali in the article equated with the plaintiff. Even if this judicial identification were absent, there is no denying that Umami Thurman Ali in the article referred to the plaintiff and no one else.

X. Conclusion

Compared to the achievements of Swift and Dryden, the *Harakah* article is not particularly sophisticated satire. The article is nothing more and nothing less than a piece of slapstick humour responding to the downfall of a senior government official in a swirl of scandal. Indeed, the article evoked the language and tone of Hollywood gossip magazines to poke fun at a prominent figure in a less than decorous period in Malaysian politics. Undeniably, the *Harakah* portrayal of Umami Hafilda Ali, public adversary of the Deputy Prime Minister, was unflattering. However, no right thinking person would think less of Umami Hafilda Ali: private citizen and businessperson – the satire presented in *Harakah* was not sophisticated enough to challenge anything other than the most flimsy public persona. The impugned writing cannot, when viewed objectively and in context, carry the defamatory meaning that the plaintiff alleged and the court held it to bear. This conclusion is unavoidable if the existing common law rules regarding defamation are properly applied.

APPENDIX

Two Instances of how Literary Satire Works

One of the greatest practitioners of satire in English is Jonathon Swift whose *Gulliver's Travels* is arguably the most effective examples of successful literary satire. The narrative traces the adventures of an average Englishman, Gulliver, who travels to the ends of the earth and encounters new lands inhabited by bizarre creatures who offer a counter-point to Gulliver's all too human strengths and weaknesses. In this work, Swift is particularly interested in exposing the flaws inherent in human nature. In Book I of *Gulliver's Travels*, he does this by stranding Gulliver on the island of Lilliput where the inhabitants are remarkable for their fixation on the minutiae of life in the royal court and their comically small size: the Lilliputians stand six inches high! The height difference between Gulliver and the Lilliputians is dramatized when Gulliver, who has been washed up on the shores of Lilliput, gains consciousness to realize that he has been hog-tied by the Lilliputians.⁷⁸ The Lilliputians then press him, a giant who could have crushed their entire army with ease, into the service of their internecine court strife and petty national goals (which include the enslavement of their neighbours). Throughout the text, Gulliver uncritically depicts the obsession of the Lilliputians with the petty workings of their morally corrupt government and the sycophantic, vindictive and cruel values of their courtiers. Gulliver's dispassionate account as well as his adoption, of the Lilliputian world view and values of the Lilliputians forces the reader to the realization that even as he excoriates the corruption, hypocrisy and self-delusion of their public life, he is actually exposing them as less than admirable or human.

The conceit Swift employs takes the form of his reducing the human being in size to parallel what he sees to be true moral stature of man in the mass: man in the mass is a moral pygmy. Hence, the tiny Lilliputians who strut around filled with their self-importance and convinced in the "righteousness" of their undertakings – whether the undertaking be to

⁷⁸ Jonathon Swift, *Gulliver's Travels*, ed by Claude Rawson (Oxford World's Classics: Oxford University Press, 2005), p 17. This text is hereafter referred to as *Gulliver's Travels*.

gain a title, to trump a rival faction, or the espousal of one religious dogma over the other (*e.g.* High Church versus Low Church or, to give this a contemporary twist, Sunni or Shite), the struggle between the Tories and the Whigs – are exposed to be among the most pernicious Race of little odious vermin that Nature ever suffered to crawl on the surface of the earth⁷⁹. But their minute size makes it difficult for us to take them seriously; after all, it is difficult to be exercised by toys! Into this world of moral and physical pygmies, comes Gulliver, the ordinary human being whom the Emperor of Lilliput proclaims to be a ‘Man Mountain’.⁸⁰ The magnitude of Gulliver’s body relative to the Lilliputians suggests, *inter alia*, that he is the moral polar opposite to the Lilliputians, embodying the good in man. This trope is significant within the text as it juxtaposes the believable and the absurd, which creates a smoke screen for Swift’s biting satire.

The political nature of Swift’s satirical purpose is apparent in Gulliver’s description of the efforts of courtiers to attain high offices in the Lilliputian government. The sophistication of Swift’s satire is evident through the deadpan tone in which Gulliver describes the extreme acts required of members of the Lilliputian court to advance to high office. This is particularly evident in the following passage:

This diversion is only practiced by those Persons, who are candidates for great Employment and high Favour, at Court. They are trained in this Art from their Youth, and are not always of noble Birth, or liberal Education. When a great Office is vacant, either by Death or Disgrace, (which often happens) five or six of those Candidates petition the Emperor to entertain his majesty and the Court with a Dance on the Rope; and whoever jumps the highest without falling, succeeds in the Office.⁸¹

The Ministers necessarily possess skills on the rope and have to perform from time to time to show that they have not lost their abilities.

⁷⁹ The expression is from Book II of *Gulliver’s Travels* at p 121.

⁸⁰ *Gulliver’s Travels*, p 38.

⁸¹ *Gulliver’s Travels*, p 33.

In this context, the cliché “balancing on the political tightrope” is rendered visual.

Just as devastating a critique is the depiction of another “diversion” that takes place only before the Emperor and Empress, and the First Minister, upon special occasions.

The Emperor lays on a Table three fine silken Threads of six Inches long. One is Blue, the other Red, and the third Green. These threads are proposed as Prizes, for those Persons whom the Emperor hath a mind to distinguish by a peculiar Mark of his Favour. ... the candidates are to undergo a trial of Dexterity very different from ... (the dance on the rope). The Emperor holds a Stick in his Hands, both ends parallel to the Horizon, while the Candidates advancing one by one, sometimes leap over the Stick, sometimes creep under it backwards and forwards several times, according as the Stick is advanced or depressed.⁸²

The Lilliputians leaping over and creeping under sticks capriciously moved represents the extreme sycophancy practiced by politicians in their attempts to curry favour and is a valid today as it was in Swift’s day.⁸³ But what drives home the inanity of the antics is the flimsy prizes bestowed upon those excel in the leaping and creeping.⁸⁴

Whoever performs his Part with most Agility, and holds out the longest in leaping and creeping, is rewarded with the Blue-coloured silk; the Red is given to the next, and the Green to the third, which they all wear around the middle; and you see few great Persons about this Court, who are not adorned with one of these girdles.

Gulliver’s straightforward and uncritical report on the awards recognizing the winners’ merit in creeping and crawling, clearly a tongue-in-cheek attack on the manner in which royal patronage was secured and accorded in Lilliput, completes the readers’ view of this petty and morally

⁸² *Gulliver’s Travels*, p 34.

⁸³ Ronald Knowles, *Gulliver’s Travels and the Politics of Satire*, (New York: Twayne Publishers, 1996), p 68, p 69.

⁸⁴ *Gulliver’s Travels*, p 34

deficient society. The satire on the ribbons becomes biting when we realize, as did Swift's original readers, that the "three fine silken Threads" correspond with the British Order of the Garter (blue); the Order of the Bath (red); and, the Order of the Thistle (green).⁸⁵ The cynical might identify the Malaysian equivalent of the three silken threads with the awards of carrying the titles "Tan Sri", "Dato", "Dato' Seri" and the like.

Thus, Swift's satirical intentions are clearly evident in both the content and tone of Gulliver's narrative of his travels. Specifically, by exposing his perception of human vices and follies, and though this may hurt, Swift means to bring about moral reform – one of the purposes attributed to literary satire.

A specialized form of literary satire is the lampoon. A lampoon is a virulent satire on a particular individual and it may be gratuitous, unjust and malicious.⁸⁶ The lampoon may be directed at a political figure for a political end but what really distinguishes it its targeting a particular individual instead of the general human failing.

In the English literary tradition, one of the masters of the lampoon is John Dryden. One of Dryden's contemporaries was Thomas Shadwell, a poet and playwright whose poetic output Dryden regarded as so bad as to be a threat to the integrity and artistry of the world of letters. In *MacFlecknoe: A Satyr upon the Trew-Blue-Protestant Poet T.S.* (hereafter referred to as *MacFlecknoe*), the letters "T.S." stand for Thomas Shadwell. *MacFlecknoe* is a lampoon that Dryden uses to cut Shadwell down to size. Dryden begins by imagining that another bad poet, Robert Flecknoe, who has long reigned over a form of the literary world, desires to hand his monarchy over to a worthy successor, the hapless "T.S." in the title. This is how the poem opens:⁸⁷

⁸⁵ Per Ian Huggins, "Explanatory Notes," *Gulliver's Travels*, p 292 who also quotes a contemporary's comment to the effect. Swift's intention "... could be no more than to ridicule our three most noble Orders of the Garter, Thistle and the Bath".

⁸⁶ "lampoon". *Encyclopaedia Britannica*. 2007. *Encyclopaedia Britannica Online*. 5

⁸⁷ Quotations from *MacFlecknoe* are from John Dryden, *Mac Flecknoe: A Satyr upon the Trew-Blue-Protestant Poet T.S.* Edited and annotated by Jack Lynch. Downloaded from: <http://andromeda.rutgers.edu/~jlynch/Texts/macflecknoe.html>

All humane things are subject to decay,
 And, when Fate summons, Monarchs must obey:
 This *Fleckno* found, who, like *Augustus*, young
 Was call'd to Empire, and had govern'd long:
 In Prose and Verse, was own'd, without dispute [5]
 Through all the Realms of *Non-sense*, absolute.
 This aged Prince now flourishing in Peace,
 And blest with issue of a large increase,
 Worn out with business, did at length debate
 To settle the **succession of the State**: [10]
 And pond'ring which of all his Sons was fit
 To Reign, and wage immortal War with **Wit**;
 Cry'd, 'tis resolv'd; for Nature pleads that He
 Should onely rule, who most resembles me:
Sh— — alone my perfect image bears, [15]
 Mature in dullness from his tender years.
Sh— — alone, of all my Sons, is he
 Who stands confirm'd in full stupidity.
 The rest to some faint meaning make pretence,
 But *Sh*— — never deviates into sense. [20]
 Some Beams of Wit on other souls may fall,
 Strike through and make a lucid interval;
 But *Sh*— —'s genuine night admits no ray,
 His rising Fogs prevail upon the Day:
 Besides his goodly **Fabrick** fills the eye, [25]
 And seems design'd for thoughtless Majesty:
 Thoughtless as Monarch Oakes, that shade the plain,
 And, spread in solemn state, supinely reign. (lines 1-28)

Dryden parodies the style of heroic poetry to mock and pour scorn upon Thomas Shadwell. The contrast between the heroic style and the poor intellectual and artistic ability of Shadwell serve to make him appear even worse. The elevated language and matter of the opening couplet, which evokes an imperial figure, is swiftly punctured and mocked by the two couplets that delineate him as the acknowledged sovereign of the realm of "Non-Sense". This is followed by a flood of witty insults and abuse which leaves the reader smiling as Flecknoe proclaims his successor must be fit to wage immortal War with Wit (compounded of intelligence, common sense and imagination). The reader's smile becomes broader as

Flecknoe intones that the son best qualified to succeed him is the dullard son who most resembles him. Dryden cleverly introduced the heir as "Sh_____". The question that arises is whether the letters "Sh____" are an abbreviation of Shadwell or of the colloquialism for excrement!

Even the few lines quoted above leave no doubt that *Mac Flecknoe* is a personal, virulent attack on Shadwell. He is depicted as extremely dull and boring from infancy, bereft of sense, lacking in wit, stupid, fat, lazy and completely lacking in dramatic and poetic ability. Each of these descriptions would tend to lower Shadwell in the estimation of right-thinking members of society generally. Each of the descriptions, and the poem as a whole, exposes Shadwell to hatred, ridicule or contempt in the mind of the ordinary person. The very range and intensity of the invective and abuse so unremittingly showered on Shadwell warns the reader that the writing is not to be taken literally or even as the truth. All the readers of *Mac Flecknoe* would have recognized it to be what it was: a lampoon that was meant to generate mirth by exposing and trouncing Shadwell as the dunce and inept poet and dramatist that Dryden thought he was. The attack may be excessive; it may be in bad taste; it may be demeaning and humiliating but given the fact that all the readers would recognize it for what it is, a lampoon, an art form not to be treated as a collection of erroneous statement about Shadwell.

