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RESEARCH PAPER

CYBERCRIMES: THE APPLICATION OF SECTION 114A OF THE EVIDENCE ACT 1950

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1INTRODUCTION

"Ignorance is the Cause of Fear".

Seneca Younger

One of the most difficult issues to be dealt with in cybercrime cases is finding the perpetrator online. One of the conventional ways to track down the perpetrator online is by getting the Internet Protocol (IP) address, which is assigned to each user account. This IP address is unique and exclusive in nature. However, it is worth to note that this method may not be effective in every case, particularly if such person is on a proxy server.[1] Furthermore, the realities of the Internet make it a challenging task for the law enforcement officers to find the perpetrator and hold them accountable for the crimes committed online. One of the reasons is due to quite a number of internet users assume the anonymous identities in online environment.[2]

On 9 May 2012, Dewan Negara has passed a new amendment to the Evidence Act 1950 i.e. section 114A, entitled "*Presumption of Fact in Publication*". The focal aim for this amendment is for the law enforcement officials to swiftly identify the perpetrator responsible for the publication of any illicit and defamatory contents online.

Section 114A of the Evidence Act 1950 provides that any person who is associated with the publication or re publication of such contents, either being the registered

[1] Foong Cheng Long, "*Bread & Kaya: Tracing Someone Online*", http://foongchengleong.com/tag/114a-evidence-act-1950
[2] Ibid

subscriber of a network service provider or having in custody or control of any computer on which any publication originates, or even when a person is related to a name, photograph or pseudonym appears on a publication depicting himself as the owner, host, administrator, editor, or sub editor, or in any manner facilitates the publication is presumed to have published or re published the contents of the publication unless the contrary is proven.[3]

While the majority of people has applauded the government's effort in the amendment of section 114A of the Evidence Act 1950, the others, especially amongst the legal practitioners who had called this piece of legislation as a draconian law. It is perceived as having the possibility of arbitrary detainment or prosecution of innocent individuals.

These sects of community had intermittently argued that the implementation of section 114A of the Evidence Act 1950 derogates the constitutional rights of the people, particularly in relation to the rights of speech and presumption of innocence upheld by the Federal Constitution. It is said that section 114A is a presumption of guilt rather that presumption of innocence which is rightly guarded by the Federal Constitution. It is also said to have shifted the legal burden placed on the prosecution to prove the guilt of the accused to the accused who is now under the legal obligation to prove his innocence. Thus, the civil rights champions are afraid that the amendment will encourage

[3] Section 114A of the Evidence Act 1950

cybercriminals, hackers and identity-thieves to further exploit online anonymity and deflect the presumption of guilt onto law-abiding citizens.[4]

As a result, this paper intends to examine the application of section 114A. The study is structured as follows: Section 1 recaps the nature presumption under criminal justice system while Section 2 presents the motivation and objectives of the study and Section 3 explains the research methodology employed. Section 4 is the core of my research as I will be arguing on the application of section 114A through real-case studies. These analytical case-studies, (being the core reference of this paper) will be able to support the conclusion of this paper i.e. the section 114A is necessary and good in law.

Section 1: Nature of Presumption of Fact and Law

(i) Presumption of Fact

Section 4 of the Evidence Act 1950 allows for the Court to prove a fact until it is refuted.[5] However, there is also a presumption of fact that is irrebuttable.[6] Presumption is a statutory direction as to the drawing of inferences.[7] It is a special mode of proving facts which otherwise must be proved by evidence.[8] Essentially, there are 3 types of presumptions i.e. (i) Presumption of fact, (ii) Rebuttable

[4] Centre for Independent Journalism, "*Frequently Asked Questions on Section 114A of the Evidence Act 1950, " Presumption of Fact in Publication*", https://stop114a.files.wordpress.com/2012/08/stop114a-faq-english.pdf
[5] Section 4(1) of the Evidence Act 1950
[6] Section 4(3) of the Evidence Act 1950
[7] *Tong Peng Hong V. PP* [1955] MLJ 168
[8] *PP v. Chia Leong Foo* [2002] 6 MLJ 705

presumption of law and (iii) Irrebuttable presumption of law.[9] Presumptions of fact are inferences of certain fact patterns drawn from the experience and observation of the common course of nature, the constitution of human mind, the springs of human action, the usage and habits of society and ordinary.[10] There are few examples of presumption of fact under the Evidence Act 1950. These include sections 86, 87, 88, 90 and 114 of the Evidence Act 1950.

Where the provisions indicate that the court "may presume" certain facts, it allows the court a discretion to invoke the presumption and the fact shall be presumed proved unless disproved otherwise. As such, it is not obligatory for the judge to invoke the presumption of fact in all cases.

(ii) Presumption of Law (Rebuttable)

A presumption of law is operated by the words "shall presume" and in this respect, the court is not accorded with any discretion not to invoke but be bound to presume the fact as proved until disproved. Some examples of this nature of presumption includes sections 79, 80, 81, 82, 83, 84, 85, 89, 105, 107, 108, 109, 110, and 111 of the Act.[11] The presumption of law may go so far shifting the legal burden of proof so that, in the absence of evidence to rebut it on a balance of probability, a verdict must be directed.[12]

[9] *Syad Akbar v. State of Kartanaka* AIR 1979 SC 1848
[10] Ibid
[11] Augustine Paul J, Evidence: Practice and Procedure, 3rd Edition Malaysian Law Journal Sdn Bhd, 2003.
[12] *Syad Akbar v. State of Kartanaka* AIR 1979 SC 1848

(iii) Presumption of Law (Irrebuttable)

An irrebuttable presumption of law connotes a conclusive proof and the court shall not allow any evidence to disprove the fact presumed. Some examples of such presumption include sections 41, 112 and 113 of the Evidence Act 1950. Therefore, it is an irrebuttable presumption of law that a boy under the age of thirteen years is incapable of committing rape.[13]

Therefore, upon the basic understanding of the nature of presumption under the Evidence Act 1950, section 114A is essentially a rebuttable presumption of fact. It is not in any manner passed as a law to presume the guilt on any person related to defamatory or incriminating statements made online. It gives a discretion to the judge whether to invoke the presumption in any civil or criminal case before him. It is a pertinent rule where a rebuttable presumption arises, the burden is on the defense to rebut it on a balance of probability.[14]

Section 2: Motivation and Objectives of Research

Section 114A was passed by Dewan Negara on 9th of May 2012 and gazetted on 31st July 2012. In fact, the law enforcement officials had been looking forward towards its implementation in lieu of arising numbers of cybercrime cases lately. It was reported in 26th October 2015, more than 30 Malaysians fall prey to

[13] Section 113 of the Evidence Act 1950
[14] *Nagappan a/l Kuppusamy v. PP* [1988] 2 MLJ 53

cybercrime daily.[15] On 22th November 2016, it was further reported that the number of cybercrime cases has risen from 836 to 1137 since January to October 2016 which has caused the loss of millions of ringgits.[16] While cybercrime cases were on the rise, unfortunately it is a reality that the law enforcement officials have to deal with the weakest link in cyber security, i.e. the people.[17] It is hoped that such amendment will be able to assist the law enforcement officials to identify the persons accountable for allegedly illicit contents published on the internet swiftly.[18]

Nevertheless, while the majority is echoing the support for such amendment, some quarters of community are dissatisfied with the amendment due to the fear that this provision will result in the prosecution of an innocent man. The amendment is said just to be an assurance from the law enforcement officials that someone will be arrested in spite of challenges posed by anonymity and decentralization of the Internet.[19] This paper intends to explain the need of section 114A, hopefully with the effect of negating the fear of the minorities that section 114A is only meant to land more people in jail.

Section 3: Research Methodology

This study could have an international magnitude with a reference to one *Godfrey* case in the United Kingdom but with a focus on Malaysian online cases. The

[15] The Star, "*More Than 30 Malaysians Fall Prey to Cybercrime Daily*", 26th October 2015.
[16] Malaysiakini, "*Cybercrime on the Rise, Say Police*", 22th November 2016
[17] The Star, "More than 30 Malaysians fall prey to cybercrime daily", 26th October 2015.
[18] Centre for Independent Journalism, "*Frequently Asked Questions on Section 114A of the Evidence Act 1950, " Presumption of Fact in Publication*", https://stop114a.files.wordpress.com/2012/08/stop114a-faq-english.pdf
[19] Ibid

methodology of this study aims at providing positive descriptive analysis of section 114A of the Evidence Act 1950 and its implication to cases to be investigated and decided. The methodology adopted is mainly premised on a qualitative approach via literature review and content analysis *via* case studies. It is hoped that the methodology of study adopted is able to shed illuminating light upon the application of section 114A its effects and eventually proposing a guideline on cybercrimes investigation.

For the purpose of this study, there will be two pronged stages leading to the ends of this study. The first stage is a descriptive analysis aimed at exploring the existing problem in identifying the perpetrator online. In the second stage there will be an explanatory analysis based on the case studies in order to assess the application section 114A and whether its application will result any violation of any rights protected by the Federal Constitution. In furtherance to these, this paper will propose some solutions to investigate cybercrime cases without putting much reliance of the presumption under section 114A of the Evidence Act 1950.

Section 4: The Constitutionality of Section 114A of the Evidence Act 1950

Section 114A is a presumption of fact in publication which provides, among others a person whose name, photograph or pseudonym on any publication is depicting himself as the owner, host or administrator to publish or re publish the publication is presumed to have published the contents of publication.[20] Section 114A also

[20] Section 114A(1) of the Evidence Act 1950

presumes a registered network provider as the person who published or re published the publication.[21] In addition, any person who has the custody and control of any computer which any publication originates from, is presumed to have published or re published the content of publication.[22] Consequently, by virtue of section 114A, it can also hold those who operate online websites and even business who give free *WiFi* access, liable for possible defamatory content on the Internet.[23]

The government is of the view that this amendment to the law of evidence in Malaysia will facilitate the proving of offences under the Communications and Multimedia Act 1998, the Computer Crimes Act 1997 and the Sedition Act 1948 against internet users.[24] Therefore, with section 114A, Malaysia now has a law which makes it easier for criminal charges to be laid against those deemed responsible for seditious, defamatory or libellous content online.[25] However, on a civil rights level, there is a concern that the new provisions will be used to suppress legitimate political or social commentaries.[26]

It is undeniable that the presumption of fact under the Section 114A is rebuttable, however it is feared that such a person against whom the presumption is applied

[21] Section 114A(2) of the Evidence Act 1950
[22] Section 114A(3) of the Evidence Act 1950
[23] "Internet Blackout Day a 'success', 15 August 2012, http://www.freemalaysiatoday.com/category/nation/2012/08/15/internet-blackout-day-a-success/
[24] Ibid
[25] "*The Tale of Two Laws: Section 114A and the PDPA*", http://www.digitalnewsasia.som/insights/the-tale-of-two-laws-section -114a-and-the-pdpa
[26] "*Section 114A of the Evidence Act 1950*", Melinda Marie D' Angelus and Nicholas Towers, Azmi & Associates, Advocate and Solicitors

may lack the time, resources and more importantly, technical expertise in relation to the Internet environment, to prove the contrary in order to rebut the presumption.[27] Hence, it is said to create worries in the public, especially among the journalists for it would have a chilling effect on freedom of expression, to some extent referring section 114A is akin to a "*silent landmine hovering over the heads of online publishers, businesses and Internet Service Providers, waiting for its first victim*".[28] As such, the opposition of section 114A also is afraid that it will have the tendencies to burden innocent individuals presumed guilty merely on the basis of circumstantial evidence.[29]

The dissatisfaction with the amendment has led to the Internet Blackout Day on 14 August 2012 with the Centre for Independent Journalism (CIJ) calling call for the repeal of the new Section 114A of the Evidence Act 1950.[30] In support of this, the Malaysian Bar too, has taken down their website. This Internet Blackout Day was also being backed by media sites such as *FreeMalaysiaToday, Malaysiakini, Digital News Asia, The Nut Graph, BFM 89.9, Merdeka Review*, and party organ news sites *Harakah Daily* and *Keadilan Daily*. The response to CIJ's campaign

[27] "Repeal or amend Section 114A, says Suhakam", August 26, 2012, http://www.freemalaysiatoday.com/category/nation/2012/08/26/repeal-or-amend-section-114a-says-suhakam/
[28] "Section 114A of the Evidence Act 1950", Melinda Marie D' Angelus and Nicholas Towers, Azmi & Associates, Advocate and Solicitors
[29] Centre for Independent Journalism, "*Frequently Asked Questions on Section 114A of the Evidence Act 1950, " Presumption of Fact in Publication*"
[30]"New Section 114A of the Evidence Act 1950 – Internet Blackout Day", http://www.mahwengkwai.com/new-section-114a-of-the-evidence-act-1950-internet-blackout-day/

was said to be a "phenomenal",[31] reflecting a high degree of worries among the public, especially the internet users.

In furtherance to these, Suhakam was also of the view that section 114A violates the human rights principles of freedom of expression as enshrined in Article 19 of both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The Suhakam chairman Hasmy Agam is quoted, "*while arguably section 114A does not shift overall burden of proof in a civil action, it may have the effect of reversing the burden to the accused or the defendant, and violate a fundamental principle of law*". In spite of these opposition and dissatisfaction, the government announced that section 114A will be maintained on the grounds that it is necessary for national security.[32]

As I quote the Seneca Younger, "*ignorance is the cause of fear*". It is opined that the fears of prosecution of an innocent man upon the introduction of section 114A could be due to the lack of understanding of the real operation of an investigation and prosecution of cybercrimes cases as well as the criminal justice system in Malaysia.

(i) Section 114A is not a presumption of guilt but fact

[31] "*Internet Blackout Day a 'success'*, 15 August 2012, http://www.freemalaysiatoday.com/category/nation/2012/08/15/internet-blackout-day-a-success/

[32] "*Repeal or amend Section 114A, says Suhakam*", August 26, 2012, http://www.freemalaysiatoday.com/category/nation/2012/08/26/repeal-or-amend-section-114a-says-suhakam/

Section 114A is a rebuttable presumption of fact and maybe disproved by the defence on the balance of probabilities. In addition, it is not in any way imposing the guilt on the persons defined under the section. Thus, it is worth to recap that section 114A is a creation of the evidence law and not the penal law. In other words, being in possession of a computer which originates the online publication alone, does not automatically hold the person guilty or liable for the act, unless the online publication infringes the other laws. It is a judicial notice that presumption of fact and law operate in every legal system. Such modification or exception or limitation requires a balance to be strucked between the general interest of community and the protection of the fundamental rights of the individual.[33]

Article 5(1) of the Federal Constitution explicitly provides that "*No person shall be deprived of his life or personal liberty save in accordance with law*". Under the common law, the presumption of innocence was stated by Viscount Sankey LC in *Woolminton v. DPP*, "*Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt*."[34] Hence it is undeniable, presumption of innocence is protected by the important element of the accusatorial system of justice which prevails in the common law.[35] However, there are exceptions to the general rule where there will be a reverse *onus* where the accused is required to disprove a presumed fact. The examples of such exceptions are not only evident in the Evidence Act 1950 but

[33] Brown v. Stott [2001] 2 ALL ER 97
[34] *Woolminton v. DPP* [1935] AC 462
[35] *Lee & Anor v. New South Wales Crime Commission*

other laws such as the Malaysian Anti-Corruption Act 2009, Custom Act 1967, Police Act 1967 and Dangerous Drugs Act 1952.

Even if a reverse *onus* of proof could run foul against the presumption of innocence, yet it is necessary to protect the interest of the community at large. The reason for such exception is due to the limitation on what the prosecution could reasonably be expected to prove. A simple example of such exception can be best seen under illustration (b) to section 103 of the Evidence Act 1950, where a person who wishes the court to believe he was somewhere else at the time of question, to prove it.[36]

In another example, under the illustration (b) to section 103 of the Evidence Act 1950, where a person is charged with travelling on a railway without a ticket, the burden of proving that he had a ticket is on him.[37] These presumption of facts are not meant to relieve the prosecution from proving a crime has been committed but merely relieving the prosecution from proving certain exceptional cases where it would be impossible for the prosecution to prove facts especially within the knowledge of the accused, which an accused can prove without difficulty or inconvenience.[38] Needless to say, the justification of the reverse *onus* in a case is a necessity for the public interest.

[36] Section 103 of the Evidence Act 1950
[37] Section 106 of the Evidence Act 1950
[38] *PP V. Chee Cheong Hin Constance* [2006] SLR (R) 24

Hence, section 114A is also an exception to the general rule and has the effect of reverse onus. Referring to the explanation above, section 114A is not something radical in the light of the criminal justice system in Malaysia. This paper will examine few cases (cybercrimes or cyber libel) in a way to illustrate the need of and application of section 114A.

i. Godfrey v Demon Internet *Ltd* [1999] 4 All ER 342

Fact: Demon Internet Ltd (D Ltd) was an Internet service provider who offered a Usenet facility that enabled authors to publish material to readers worldwide. Authors submitted articles, (known as postings) to the Usenet news server based at their local service provider who then disseminated the postings *via* the Internet. Such postings could be placed with a on a 'newsgroup' dealing certain subject, and would ultimately be distributed and stored on the news servers of all service providers that offered Usenet facilities. In its Usenet facility, D Ltd carried a particular newsgroup which stored postings for about a fortnight.

On 13 January 1997 an unknown person made a posting in that newsgroup on an American service provider, and it reached D Ltd's server in England. The posting, which purported to be written by G, was a forgery and defamatory of Godfrey (G). On 17 January G informed D Ltd that the posting was a forgery, and asked it to remove the posting from its Usenet news server. Although it was within D Ltd's power to act on that request, it

failed to do so, and the posting remained available on the server until its expiry on or about 27 January.

G subsequently brought proceedings for libel against D Ltd in respect of the period after 17 January 1997. In its defence, D Ltd sought to rely, inter alia, on the defence provided by s 1(1) a of the Defamation Act 1996, namely (a) that it was not the publisher of the statement complained of, (b) that it had taken reasonable care in relation to its publication, and (c) that it had not known, and had no reason to believe, that its action had caused or contributed to the publication of a defamatory statement.

Issue: The main issue is whether the Defendant was the publisher of the statement complained.

Decision: It was held that D was the owner and publisher of the posting online. The transmission of a defamatory posting from the storage of a news server constituted a publication of that posting to any subscriber who accessed the newsgroup containing that posting. Such situation was analogous to that of a bookseller who sold a book defamatory of a plaintiff, to that of a circulating library which provided books to subscribers and to that of distributors.

Thus, in the instant case D Ltd was not merely the owner of an electronic device through which postings had been transmitted, but rather had published the posting whenever one of its subscribers accessed the newsgroup and saw that posting. Moreover, since D Ltd had known of the posting's defamatory content since 13 January 1997, and it could not therefore avail itself of the defence provided by s 1 of the 1996 Act.

ii. *Rutinin Suhaimin v. PP* [2015] 3 CLJ 838

Fact: The appellant was convicted for an offence under s. 233 of the Communications and Multimedia Act 1998 (‘the Act’) and sentenced to a fine of RM15, 000 in default eight months imprisonment. The charge preferred against the appellant was that the appellant had entered a comment ***‘Sultan Perak sudah gilaaaa’*** (‘the impugned entry’) via the internet protocol account (‘the internet account’) of the appellant on 13 February 2009 at 6.33 pm in a shop lot.

It was the appellant’s case that he did not make and initiate the transmission of the impugned entry despite the fact that his internet account had been used. To support his assertion, the appellant relied on the fact that his computer and his internet account were accessible by other persons and any user could have simply clicked the mouse and the computer would have been ready for use including his internet account. However, the appellant

failed to reveal its defence during the prosecution's case. It was only during the defence stage that the appellant brought forward 4 witnesses to support his defence.

Issue: Whether the appellant had published the statement online.

Decision: It was held that the prosecution failed to prove that it was the appellant who actually made and initiated the transmission of the impugned entry. At best the court was of the view that it was merely inferred that it must be him since the computer and the internet account belonged to him. Under s. 233(1), there was no such presumption for the appellant to rebut. The onus remained with the prosecution to establish beyond reasonable doubt that it was the appellant who made and initiated the transmission of the impugned entry.

The court acknowledged section 114A of the Evidence Act 1950, nevertheless held that the provision does not apply retrospectively in that cases. Hence, in respect of the circumstantial evidence alluded to in calling for the defence, it was based on the fact that the impugned entry was transmitted using the computer and the Internet account of the appellant. Thereupon, it was thus inferred by the trial court, that it must have been the appellant who made and initiated the transmission of the impugned entry. However, upon hearing this appeal, the court was of the view that such

inference tantamount to invoking a presumption against the appellant which the law then did not allow. It remained the burden upon the prosecution to prove beyond reasonable doubt that the circumstantial evidence and thus the inference therefrom did not lead to any other conclusion other than the guilt of the appellant.

iii. *Datuk Seri Anwar Ibrahim v. Wan Muhammad Azri* [2015] 2CLJ 337

Fact: The defendant, the owner and operator of a website/blog known as 'Papa Gomo' had published in his blog, defamatory statements with the intention to discredit the plaintiff to show that he was an immoral person, not dignified, ineligible to hold public office, not eligible to become political leader, not fit to be Prime Minister and a leader who was not responsible and could not be trusted. Through his letter of demand to the defendant, the plaintiff demanded the latter to retract, apologise and pay compensation in 48 hours but the defendant failed to do so.

This prompted the plaintiff to file the present claim against the defendant. In his defence, the defendant contended that among others (i) he was not the owner, operator or author of the articles nor was he responsible for the publication of any articles; and (ii) he had never published the defamatory statements, pictures, videos or any G the present claim against the defendant.

Issue: Whether the Defendant was the owner, operator or author of the articles nor was he responsible for the publication of any articles.

Decision: The defamatory statements were published in a website on the internet and the people all over the world could get access to the website, meaning that there was a wide publication of the defamatory statements. It is a judicial notice that the internet is used worldwide. There was no doubt that the online defamatory statements or published on the internet amounted to publication. From the evidence adduced, the defendant was the blogger Papagomo and the defendant had published the defamatory statements in the blog www.papagomo.com as pleaded in paras. 3, 4 and 5 of the statement of claim.

iv. *Stem Life Bhd v. Mead Johnson Nutrition (Malaysia) Sdn Bhd & Anor* [2013] MLJU 1583

Fact: The plaintiff is a public company and offers stem cell banking services for immediate or future use to expecting parents who wish to store their baby's umbilical cord blood, and to individuals who wish to store their own adult stem cells. The 1st defendant ("Mead Johnson") is the owner of a website known as www.meadjohnsonasia.com (the "1st defendant's website"). Mead Johnson is part of an international and established company (i.e. Mead Johnson & Company) which is involved in the business

of infant nutrition or feeding products. The 2nd defendant ("Arachnid") is a company which provides web development and related services. Arachnid is also the web agency which was responsible for developing Mead Johnson's website and also providing maintenance services to Mead Johnson's website. Arachnid was also responsible for the removal of matters which concerned competing products and obscene language on Mead Johnson's website.

According to the plaintiff, the 1st and 2nd defendants have published on 6 instances numerous defamatory statements contained in postings on 4 forum topics made by the users of the 1st defendant's internet forum and the 1st defendant's website including defamatory statements contained in a hyperlink posted by the users of the 1st defendant's website on the 1st defendant's website and also a defamatory article contained in a blog which could be accessed by the users of the 1 defendant's website by clicking on the hyperlink ("collectively referred- to as the impugned defamatory postings").

The defamatory statements of and concerning the plaintiff are long, have been pleaded in full in the plaintiff's SOC and can be found in the forum captioned "Local Pregnancy Issues" and, more specifically, under the following 4 topics:

(a) "Cryo Cord v Stem Life";
(b) "StemLife is not reliable?";

(c) "Cord blood banking"; and
(d) "10 Reasons Why You Shouldn't Sign up StemLife".

Issue: In the context of cybercrime, the most relevant issue in this case, (upon findings of the court that the publication was defamatory), was whether the Defendants had published the defamatory remarks online.

Decision: It was held that, based on the common law principle on cyber libel, Mead Johnson shall be liable because it edits, modifies and regulates the contents of its website and also assumes the responsibility of removing offensive or libellous publications from its website. Another point to note under Malaysian law is the amendment made to the Evidence Act, 1950, by way of the Evidence Act (Amendment) (No.2) Act 2012. This amendment sought to introduce Section 114A of the Evidence Act, 1950 which reads as follows:

Section 114A. Presumption of fact in publication

(1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilities to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as- a subscriber of a network service on which any publication originates from is

presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in this custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

(4) For the purpose of this section-

(a) "network service" and "network service provider" have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998 [Act 588]; and

(b) "publication" means a statement or a representation, whether in written, printed, pictorial, film graphical, acoustic or other form displayed on the screen of a computer.

Unlike in *Rutinin's* case section 114A of the Evidence Act 1950 is applicable to the *Mead Johnson's* case. Section 114A is the Malaysian legislature's response to address, amongst others, the issue of anonymity on the internet to ensure users do not exploit the anonymity that the internet provides to escape the consequences of their actions.

In light of the above amendment, it is incumbent upon Mead Johnson in this case to rebut the presumption cast by. In this case, the first second failed to rebut the presumption under section 114A. However, the second Defendant escaped liability on the ground that, unlike the first Defendant,

the second Defendant did not exercise editorial control over the contents of the forum alongside Mead Johnson; and although the second Defendant was maintaining the website making it available to members of the public, second Defendant was only performing and discharging this responsibility in accordance with the instructions of Mead Johnson.

v. *Tong Seak Kan & Anor v. Loke Ah Kin* [2014] 6 CLJ 904

Fact: The first plaintiff, a prominent businessman and his wife, the second plaintiff, sued the first defendant for cyberspace defamation. A judgment in default was then entered against the first defendant. The first defendant's complained that, among others, the judgment obtained was irregular because of bad service and the first defendant contended that he had a defence on the merits and a substantive defence to the claim i.e. that the two blogs allegedly containing the defamatory statements did not belong to him and that he had nothing to do with the publications.

Issue: Whether the Defendant was the one publishing the defamatory contents online.

Decision: The Defendant was the registered owner of the blog, upon confirmation by the service providers, Telekom Malaysia and TM Net, provided proof that the first defendant was the registered subscriber of the two blogs, automatically kicking in the presumption under s. 114A(2) of the Evidence Act 1950, which was retrospective in effect. If a blog or website

owner succeeds in proving that he is not the person who published the offending material then the presumption dissipates and s. 114A (2) of the Act loses its bite. The law relating to cyber publication was clear. Once the registered subscriber of a blog or website where the offending publication originates from had been positively identified, the burden lay on the registered subscriber to prove on the balance of probability that he was not the author of the publication. For this purpose, it was not sufficient for him to merely put the plaintiff to strict proof of the averments made against him.

In this case, the Defendant merely denied ownership of the two blogs which had been contradicted by Telekom Malaysia and TM Net. A bare denial is incapable of rebutting the statutory presumption, nor does it constitute a defence on the merits. The first defendant failed to show any defence on the merits touching on the real matters in question i.e. a substantive defence that he did not publish the defamatory statements or, for that matter, any defence at all to deflect the plaintiffs' claim.

Conclusion

These cases can best explain the application of section 114A and its necessity. In *Datuk Seri Anwar's* case, it was indeed an exceptional case where the Defendant could be ascertained by a direct evidence i.e. through the identification by a Plaintiff's witness as the blogger who is knowns as *papagomo* had posted the defamatory remarks about Datuk Seri Anwar

Ibrahim. In other words, the Plaintiff was able to prove that the Defendant was the blogger by the name of *papagomo* who was the owner and operator of the website that contained defamatory statements.

In my opinion, where there was already a direct evidence proving a fact, any circumstantial is not necessary and will not carry much difference to the proved fact. As such, there was no issue that the Plaintiff needs to rely of the presumption of publication under section 114A of the Evidence Act.

However, most cybercrime cases or disputes nowadays are not as simple as the finding of facts made in Datuk Seri Anwar's case. In *Rutinin Suhaimin's* for an example, there was no direct evidence in order for the prosecution to identify the perpetrator online. In that case, the appellant was charged with an offence under section 233 of Communications and Multimedia Act 1998 back in 2009.[39] It was held that, section 114A could not be invoked against the appellant and just because the appellant was registered owner of the internet account that published the seditious statement does not mean that it was the appellant who did the criminal act.

In *Rutinin Suhamin's* case, the court was of the view that the prosecution failed to discharge its burden of proving the case against the appellant beyond reasonable doubt because there no iota of evidence produced to

[39] Rutinin Suhaimin v. PP [2015] 3 CLJ 838

show that it was the appellant personally, who had published the said statement. The trial judge was wrong in calling the appellant for defence merely by invoking a presumption not allowed by law then. The appellant was discharged and acquitted and this decision still stands till date.

Rutinin's case can clearly illustrate the reality faced by the prosecution then in finding proof against the perpetrator online before section 114A was in operation. In the absence of such presumption, the court's expectation of the prosecution duty to pin point the exact perpetrator for a successful prosecution would hamper justice as online anonymity is prevalent in the cyberworld. Hence, any prosecution of such a nature of case in future will be futile due to the impossibility of the prosecution to ascertain definitely the perpetrator online, especially where the crime happened in a private domain or space of the perpetrator. Diffebet approach is applicable in the civil defamation case of *Mead Johnson* where the court has applied section 114A retrospectively.

In my opinion, (in the *Rutinin's* case) the appellant was lucky due to the fact that section 114A did not apply or else if such a crime occurs currently, the appellant ought to prove on the balance of probability that there was someone else apart from himself who could access his internet account on the day. His mere denial and inadvertence during the prosecution stage could lead to his story to be disbelieved. Eventually, the appellant would fail in rebutting the presumption of publication under section 114A.

This can be seen in the case of *Tong Seak Kan & Anor v. Loke Ah Kin*,[40] where the court held that the appellant's mere denial was insufficient to rebut the presumption under section 114A of the Evidence Act 1950. In that case, it was evident that the Defendant was the registered owner of the IP address of the computer which the said publication originated from and his failure to rebut such presumption had sealed the fact, resulting him being liable for defamation.

In a nutshell, with the operation of section 114A, it does not only caution the owner of the website to carefully post a statement but impose a sense of responsibility on the Internet Service Provider (ISP) whose website is being used to posting and reposting if statements by third parties online. In my opinion, section 114A is not a draconian law. In fact, the common law position is also holding an ISP responsible on the posting made in its web pages.[41] In *Godfrey's* case, upon notification by the Plaintiff's to the Defendant that the statement posted in its web pages are defamatory in nature, the Defendant's refusal to remove the defamatory remarks (despite being able to do) had resulted in its liability for defamation (despite not being the one who published the defamatory statements). The court was of the view that such a situation was analogous to that of "*a bookseller who sold a book defamatory of a plaintiff, to that of a circulating library which provided*

[40] Tong Seak Kan & Anor v. Loke Ah Kin [2014] 6 CLJ 904
[41] Godfrey v. Demon Internet Ltd [1999] 4 ALL ER 342

books to subscribers and to that of distributors". Thus, this will support the research paper's view that section 114A is a good law.

Despite having the presumption of publication of fact under section 114A of the Evidence Act 1950, there should be caution placed on the public officials whose duty to conduct a thorough investigation. Similarly, the duty imposed on the prosecution to ensure all evidence (whether favourable or non-favourable to the accused) are laid down in court for judgement. Perhaps it is worth to be reminded of the basic principle in a criminal justice system that "*it is better that 10 guilty men go free than 1 innocent man be wrongly convicted*". In other words, the prosecution and public official conduction investigation should not place themselves in a complacent mode despite having the aid section 114A. The investigation officers should be at all cost exercise their power and means to find the real perpetrator.

Thus, in my opinion, it is a fallacy to embrace the idea that section 114A will automatically hold the persons mentioned thereunder be liable or guilty for an offence. One must not forget, under section 114(g) of the same act can be readily invoked against the prosecution should the court find out that any evidence which could be but is not produced by the prosecution has been withheld. In cybercrime cases, in my view, section 114A should be just a complimentary to the prosecution during the criminal proceeding in court. The investigation team ought to show the court that has conducted its

investigation diligently or at least some efforts had been made to find the real perpetrator. In other words, section 114A will only kick in after the prosecution has proved the essential evidence required to unfold the narration of its story in court. Thus, the opposition argument that innocent man will be persecuted wrongly with the enforcement of section 114A is too far-reaching and cannot hold water as the Malaysian justice system in Malaysia enviously protects the rights of its citizen.

Upon analysing the *Rutinin Suhamin's* case, while there was a failure on part of the appellant to inform the court of the probability of a third party having access to the appellant's internet account on the day when the crime happened (afterthought defence), these questions remained at the end of the prosecution's stage:

i. The Internet account of the appellant was operating from 8.50 am to 7.52 pm. Was there any list of persons who had entered the shop on that day, particularly around 6.30pm?

ii. Was there any cctv on the shop lot or nearby to prove that the appellant was alone at the material time?

iii. Did the investigator ask the appellant who were at the appellant's premise on that day?

iv. If any, were those persons interviewed and called as the prosecution's witnesses?

v. Were these persons, at least offered to the defence/appellant?

vi. Was there any log book available as evidence of presence of other persons?

vii. Did the investigation officer obtain any receipt issued by the appellant which could also indicate the presence of other person than the accused?

viii. It was a shop lot in which active phone repairing business was made by the appellant at the back of shop. Was the whole history of the appellant's internet account was made available to the court?

Therefore, in my opinion, even if section 114A was made applicable in *Rutinin's* case, in my opinion, it is highly probable that the appellant would still be acquitted. This is due to the fact that while it is undeniable that section 114A presumes the fact that it was the appellant who had published the seditious statement about the Sultan of Perak, yet the prosecution still had the duty to present the evidence sufficient enough to unfold the narration of its story to the court.[42]

[42]Seneviratne v. R [1936] 3 ALL ER 36

The prosecution's case then was as simple as this; since the appellant was the owner of the shop and the Internet Account which the statement originated, thus the appellant ought to be guilty of the offence. It was further strengthened by the appellant's failure to put forward its defence during the prosecution stage, hence making the appellant's story about someone else (PW18) having the access of that computer, as an afterthought. It was suggested that the appellant ought to name that some other person who were at his shop who could access his computer easily, as soon as possible. However, did the investigation officers negated the probability of other persons who could be present in the appellant's shop lot on that fateful day and time? After all, it was a shop accessible to the appellant's customers (public space).

In the *Rutinin's* case, it was only at the defence's stage that the appellant had called 4 witnesses who testified, amongst others that there were other people present on the particular common day, (at least between 8.50 am to 7.20pm) and the High Court was of the view that there was nothing to suggest that these 4 witnesses were untruthful witnesses. Furthermore, it is an established legal principle of law, where the prosecution proved its cases based on circumstantial evidence, such evidence must be so strong that could point irresistibly to the guilt of the accused person in order to get a

safe conviction.[43] In that case, there was no further evidence produced by the prosecution apart from the fact that the appellant was the registered owner of Internet Account which the statement has originated from.

In conclusion, while section 114A automatically deems the owner, registered network services or any person having custody and control over the internet account or computer which the statement originated from yet the standard of proof imposed on the prosecution in cybercrime cases remains unchanged i.e. to prove its case beyond reasonable doubt.

[43] Lim Hean Chong v. PP [2012] 2 CLJ 1046

Bibliography

1. George Curtis (2011), *The Law of Cybercrimes and Their Investigations*, CRC Press Taylor & Francis Group.
2. K. Jaishankar (2011), *Cyber Criminology Exploring Internet Crimes and Criminal Behaviour,* CRC Press Taylor & Francis Group.
3. Eoghan Casey (2011), *Digital Evidence and Computer Crime, Forensic Science, Computers and the Internet*, 3rd Edition, Elsevier Inc.
4. Augustine Paul J (2003), *Evidence: Practice and Procedure*, 3rd Edition Malaysian Law Journal Sdn Bhd.
5. Foong Cheng Long, "*Bread & Kaya: Tracing Someone Online*", http://foongchengleong.com/tag/114a-evidence-act-1950
6. Centre for Independent Journalism, "*Frequently Asked Questions on Section 114A of the Evidence Act 1950, "Presumption of Fact in Publication*", https://stop114a.files.wordpress.com/2012/08/stop114a-faq-english.pdf
7. The Star, "*More Than 30 Malaysians Fall Prey to Cybercrime Daily*", 26th October 2015.
8. Malaysiakini, "*Cybercrime on the Rise, Say Police*", 22th November 2016
9. Melinda Marie D' Angelus and Nicholas Towers, Azmi & Associates, Advocate and Solicitors "*Section 114A of the Evidence Act 1950*", http://www.inhousecommunity.com/wp-content/uploads/2016/07/v10i8_JURIS_Malyaisa.pdf
10. "*New Section 114A of the Evidence Act 1950 – Internet Blackout Day*", http://www.mahwengkwai.com/new-section-114a-of-the-evidence-act-1950-internet-blackout-day/

11. "*Internet Blackout Day a 'success'*, 15 August 2012, http://www.freemalaysiatoday.com/category/nation/2012/08/15/internet-blackout-day-a-success/

12. Godfrey v. Demon Internet Ltd [1999] 4 ALL ER 342

13. Tong Seak Kan & Anor v. Loke Ah Kin [2014] 6 CLJ 904

14. Rutinin Suhaimin v. PP [2015] 3 CLJ 838

15. PP V. Chee Cheong Hin Constance [2006] SLR (R) 24

16. Brown v. Stott [2001] 2 ALL ER 97

17. Woolminton v. DPP [1935] AC 462

18. Tong Peng Hong V. PP [1955] MLJ 168

19. PP v. Chia Leong Foo [2002] 6 MLJ 705

20. Syad Akbar v. State of Kartanaka AIR 1979 SC 1848

21. Nagappan a/l Kuppusamy v. PP [1988] 2 MLJ 53

22. Lim Hean Chong v. PP [2012] 2 CLJ 1046

23. Seneviratne v. R [1936] 3 ALL ER 36