

# Malaysian legal system and law of tort essay sample

Law



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a. The application of English Law in our legal system.

English Law is part of Malaysian law. The definition of law in Article 160 of the Federal Constitution includes 'the common law in so far as it is in operation in the Federation or any part thereof'. That qualification concerns the extent to which English Law is applicable in Malaysia.

First, we will discuss on the meaning of 'sources'. Historical sources is the factor which influenced the development of law in religious and custom. Law can be found through statutes, law reports, textbooks and decision of courts. Legal sources is the legal rules that make up the law whether it is written or unwritten law.

There are two sources of law, written law and unwritten law. Written law is the law embodied in the Federal and State Constitutions and in a code or a statute including subsidiary or delegated legislation. Examples of written law are legislation, subsidiary legislation, federal and state constitution.

Unwritten law is the law which is not enacted by the legislative (Parliament and State Assemblies) and which is not found in the constitutions. Examples of unwritten law are the customary law, Syariah law, English law, judicial decisions and law reports.

English Law as a source of law by referring to Section 3(1) of Civil Law Act 1956 (Revised 1972). This Section provides:

(a) In West Malaysia or any part thereof apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956. (b) In Sabah, apply the common law of England and the rules of

equity, together with statutes of general application, as administered or in force in England on the 1st day of December. (c) In Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or enforce in England on the 12th day of December 1949.

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far as the circumstances of the States of Malaysia and their respective inhabitants permits and subject to such qualifications as local circumstances render necessary.

Before 1 April 1972, West Malaysia was using Civil Law Ordinance 1956, Sabah used The Application of Law Ordinance 1951 and Sarawak applied The Application Of Law Ordinance 1949. After 1 April 1972, all these enactments incorporated into Civil Law Act 1956 (Revised 1972).

Differences between these English Law are by date and language. The difference of wordings between Section 3(1)(a), (b) and (c) has raised a controversy as to whether English statutes of general application are applicable in West Malaysia.

There are opinions regarding the differences of language. Prof. GW Bartholomew in his article entitled, " The commercial law of Malaysia: A study of the reception of English law (1965) MLJ p. p. 26 - 32, holds the view that English statutes is applicable in Malaysia. Prof. GW Bartholomew stated that without statute common law and equity is not complete. LA Sheridan disagree with Bartholomew as statute not apply in West Malaysia.

In *Mokhtar v. Arumugam* (1959) where a gardener was arrested by the police under the Moneylenders Ordinance 1951 and the police seized documents without a search warrant. The documents however were later returned. In an action against the police the court of first instance awarded damages to the gardener without him claiming for it. The police appealed against the decision. The court held that in England damages could be awarded for the delay in returning of goods but such remedy was provided under a statute not a principle of the common law. Since English statutes are not applicable in the country the remedy cannot be awarded. The decision was court could not award damages in nature of interest because such relief (English Statute) is not available here.

In *Pushpah a/p MSS Rajoo*, stated that English statutory provisions relating to revocation of a nominated beneficiary upon marriage should not be adopted. Meanwhile in Sabah and Sarawak, no problem arise because Common Law & Equity applied together with statute (no controversy).

The application of English law throughout Malaysia is subject to two limitations: •It is applied only in the absence of local statutes covering the same matter; •Only that part of the English Law that is suited to local circumstances will be applied.

By referring to provision of Section 3(1) Civil Law Act 1956, common law, equity and statutes shall be applied so far as 'local circumstances'. There are reasons for 'local circumstances'. First, English Law may be most suited in its homeland but it does not necessarily well into the local environment (offend religious, customs or practices). Second, the wholesale importation of

English law without modification to take into account local conditions would amount to imposition of a totally alien system on a society that is socially and culturally different from English society.

In the provisions of English Commercial Law, relates to the former Malay states whilst section 5(2) covers Melaka, Penang, Sabah and Sarawak. Section 5(1) introduces into the former Malays states, the law administered in England on 7th April 1956 but section 5(2) allows the use of the law existing in England on the date the issue has to be decided in Melaka, Penang, Sabah and Sarawak. Thus there is a continuous reception of English Law in Melaka, Penang, Sabah and Sarawak. The differences of English Commercial Law between the States can be referred to the date and place of application.

The application of Section 5 shows the conflict of interpretation in defining the term “ mercantile law generally”. There are few opinions regarding conflict of interpretation. By referring to the case of Seng Djit Hin v. Nagurdas Purshotumdas, the action was for damages for failure to deliver goods. The issue was whether the English Defence of the Realm (Amendment) Act 1915 and the English Court {Emergency Power} Act 1917 apply or not. The statute apply since the sale had to be decided at the same time in England.

In the case of Shaik Sahied b. Abdullah Bajera v. Sockalingam Chettiar where an action was brought upon a promissory note relied under the English Moneylender Act. It was held not part of statute as borrowing money

in the course of ordinary commercial transaction is excluded from their scope.

Comparison between Section 3 & 5, 'Local circumstance' clause appear in section 3 but is absent from section 5. Conflict between common law and equity is whereby equity will prevail. English law is a part of Malaysian Law. English law mean the common law and rules of equity are apply. This two coexisted harmoniously and eventually they become rivals. The British bring their laws after they came here and taking our country and apply it in Malaysia without bloodshed. Although there are some local who are not agree and refuse but their leader doesn't have power anymore. And because of the power also our country are 'sold' to the British. As a result we have to follow their rules.

There is also advantage after the British take over Malaysia, which is all state in Malaysia-Straits of Settlement, Malay states, Borneo is under one management that is under power of British.

The modification of English law that was introduced into the straits settlement is necessary to prevent from unjust and oppressive to the local people. Although the English law was introduced into the strait settlement, the local were still practiced especially religion matters. The modification must be compatible with local circumstances. No single uniform principle governing the applicability of English Law in Malaysia.

## PART B (THE LAW OF TORTS)

### Question 1

Effa, a veteran actress wants to obtain a youthful appearance to maintain  
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her career. Therefore, she went to the Magic salon for consultation and she was advised to go for a botox treatment in order to obtain a youthful look. Effa agreed and the next she got the treatment. Before the treatment was done, the trainee beauty therapist, Miss Lim, forgot to ask Effa whether she is allergic to Botox, although he instructor had always reminded her to ask the patients that important questions. In fact, Effa is actually allergic to Botox. One week later, Effa suffered rashes on her face and instead of making her look younger, the treatment made her look older because the allergic reaction made her face wrinkled even more. Advice Effa whether she has any cause of action against Magic beauty salon.

Answer:

The issue of above case between Effa and Magic Salon is negligence. The plaintiff is Effa and Magic salon is the defendant. The elements are: a)

Defendant owed a Duty of Care to the plaintiff;

b)Defendant breach that Duty of Care; and

c)The damage and suffered resulting of plaintiff from the breach of Duty of Care.

Definition:

The “ Breach of Duty of Care” with the result in damage underside by independent to the plaintiff” by Winfield.

In Blyth v. Birmingham Waterworks Co., Alderson B stated that negligence is the omission to do something which a reasonable man, guide upon those considerations which ordinarily regulate the human affairs would do; or doing something which a prudent and reasonable man would not do.

In *Lochgelly Iron and Coal Co. v. Mc Mullan*, Lord Wright said “ negligence means more than heedless or careless conduct it connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing...”

Elements/Principles and Relevant Cases:

The tort of negligence involved three elements:

- a) Duty of care
- b) Breach of duty by defendant
- c) Damage resulting from the breach of duty

“ Duty” may be defined as an obligation recognized by law, to avoid conduct fraught with unreasonable risk of danger to others. A duty must arise out of some “ relation” or some “ proximity” between the parties, road users, manufacturer and consumers, builder and buyers. As in this case, it is between cosmetician and consumer where as Effa as a consumer will be the plaintiff and Magic salon as a cosmetician will be the defendant. Duty of care owed by the defendant to the plaintiff.

By referring to the case of *Donoghue v. Stevenson*, “ There must be, and some general conception of relations giving rise to a duty of care. The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer’s question, “ who is my neighbor?-received a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then in law is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have



them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in questions”

In the case of *Donoghue v. Stevenson*, Mrs. Donoghue (plaintiff) claimed that a friend purchased a bottle of ginger beer for her at a cafe. The bottle was of dark opaque glass. When the plaintiff had drunk some of the ginger beer, then, she poured out of the balance of the said drink, at that moment she was shocked when a decomposed snail came out. Subsequently, she fell seriously ill. The defendant as a manufacturer failed to ensure the safety of the consumer, who consumed the product. As a result, the plaintiff suffered injuries. The plaintiff was not the contractual party, therefore, the plaintiff does not own the privity of the contract.

As a result, the plaintiff has no right to commence her action in the said contract, in order for the plaintiff to take action against the defendant in the Court of Law, the plaintiff is required to prove to the Court of Law that all the essential elements of a contract have been fulfilled. The House of Lords held that the plaintiff was entitled for the compensation even though there was no privity contract between the defendant and the plaintiff but the defendant owed duty of care towards the plaintiff based on the “Neighborhood Principle”, where the defendant must ensure his neighbors i. e. the consumer will not suffer injuries when the consumer consumed his product.

Meanwhile, in the case of *Bourhill v. Young*, it shows that no duty of care between plaintiff and defendant. In this case, a motorcyclist was killed in a road accident for which he was responsible. A pregnant woman, who had got off a tram at scene of the accident (having heard the noise of an accident)

claimed that when she reached the scene of the accident she saw blood on the road and as result suffered shock which put her into premature labour - resulting in the loss of the baby. She subsequently brought a claim in relation to nervous shock and the resulting loss/damage. House of Lords held that there was insufficient proximity between the motorcyclist and the plaintiff. There was not a duty of care, she was not present at the scene of the accident (she arrived after the accident had occurred).

#### Application of Law to the Case Study:

In the case of *Effa v. Magic salon*, we can identify that Magic salon owe duty of care to Effa because there is a close relationship between them which cosmetician and consumer. Duty of care exist because of the neighborhood principle i. e. close relationship between Plaintiff and Defendant. The case similar to the case between *Donoghue v. Stevenson*.

#### Breach of duty of care:

Upon the establishment of the duty of care, next, the plaintiff is required to prove that the defendant has breached the duty of care. How was the plaintiff able to determine whether the defendant has breached the duty of care? The test of " a reasonable man" is the answer. At this stage, the plaintiff is required to prove to the court of law that the defendant's acts or omissions below the standard of care of " a reasonable man".

In the case of *Blyth v. Birmingham*, defendants installed a fire plug near the plaintiff's house that leaked during a severe frost, causing water damage. The jury found the defendant negligent, and the defendant appealed. Issue were the defendants negligent? The rule is defendants are negligent only if

they fail to do what a reasonable person would have done or do something a reasonable person would not have done. The court found that the extreme frost that caused the damage in this case was not within the contemplation of the defendants and that the result of the frost was an accident. The court entered a verdict for the defendants.

#### Application of Law to the Case Study:

Magic salon has breach that duty of care by not reminded the plaintiff whether she is allergic to Botox. As a reasonable man, Magic salon must make sure that before the treatment was done, they must ask the consumer whether she is allergic to Botox which can result to rashes to the consumer. This can be refer to the case of Blyth v. Birmingham.

#### Damages/Injury:

As a result of breach of duty of care, Plaintiff suffered damages/injury.

Damages/Injury must be foreseeable. This can be relate to the case of The Wagon Mound. In this case, Defendant carelessly discharged oil from their ship, the Wagon Mound, into Sydney Harbour. The wind and tide carried the oil beneath plaintiff's wharf where welding operations were being carried on by plaintiff's employees. After being advised that they could safely weld, plaintiff's employees continued their work. Some 55 to 60 hours after the original discharge, molten metal set some waste floating in the oil on fire. The flames quickly developed into a large fire which severely damaged the wharf. The oil also inhibited the use of plaintiff's slipways. Damage to the wharf by the pollution of plaintiff's slipways was foreseeable. Damage by fire was not reasonably foreseeable. Plaintiff was loath to admit the

foreseeability of the fire risk because it was their workmen who actually set the oil alight. Defendant not liable for the fire but liable for the fouling.

Application of Law to the Case Study:

Effa suffered rashes on her face and instead of making her look younger, the treatment made her look older because the allergic reaction made her face wrinkled even more. Magic salon should be able to foresee that if they did not ask their consumer whether they are allergic to Botox it will cause injury/damages to their consumer.

Conclusion:

All the elements are proven. I would like to advise Effa to sue Magic salon.

Question 2:

Umairah is a well-known television presenter. She is famous for her charm and her friendly, humble personality. One day, Juita, her rival from another television station, saw her on television. Feeling envious, she said to her colleague, "What she did was only an act. The truth is, she is famous because her sugar daddy is somebody important at that TV station!" Soon the news spread. Feeling sad and humiliated over the news, Umairah now seeks your advice on any legal action against Juita. Advise her.

Answer:

The issue in the case study is defamation which element consist of:

- a) defamatory statement;
- b) statement referred to the plaintiff; and
- c) publication

Here, the plaintiff is Umairah and the defendant is Juita.

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**Definition:**

Refers to *Sims v. Stretch*, defamation is “ Publication of statement which cause a person to be shunned or avoided by right thinking members of society”. There are two types of defamation: a) Libel : defamation in permanent form and is visible to the eye, such as in written form, picture, statues or effigies. b) Slander : defamation in a temporary form i. e. spoken words or gestures. Slander is not actionable per se. The plaintiff needs to prove actual or special damage to succeed in his action. Actual damage refers to financial loss or any loss that may be measured in monetary terms; for example loss of business or employment or the chance to attend a social function may be measured in monetary terms. The test: not the nature of defendant intention but the meaning which would be imputed by a reasonable person.

**Explanation of Principle of Law (Elements & Cases):****a) Defamatory statement**

For the first element is defamatory statement which a statement causes harm to reputation. A statement is defamatory if it “ tends to injure the plaintiff’s reputation and expose the plaintiff to public hatred, contempt, ridicule, or degradation”. Some statements are so defamatory that they are considered defamation per se; and the plaintiff does not have to prove that the statements harmed his reputation. When a plaintiff is able to prove defamation per se, damages are presumed, but the presumption is rebuttable.

In the case of *Lui Kam Lam v. Sim Ai Leng*, the word amount to defamatory statement was ‘ whore’. The respondent called the appellant a prostitute and  
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alleged that she charge RM50 to entertain men at any one time. These allegations were made in the presence of a third party. The court held slander was established since the words impugned the appellant's chastity and special damage need not be proved.

Application:

In the case study, the defamatory statement are when Juita stated that what Umairah did was only an act and Umairah is famous because her sugar daddy is somebody important at that TV station. This statement tend to injured the reputation of Umairah as a TV presenter.

b)Statement referred to the plaintiff

The statement maybe expressed or implied. The plaintiff must prove the defendant's words refer to him. In *Hulton v. Jones*, the defendant wrote a fiction concerning Artemis Jones in Peckham. There was in fact a real Artemis Jones, a lawyer on that town. His friends thought the story was about him. The court held defamation was established.

Meanwhile, in the case of *Atip bin Ali v. Josephine Doris Nunis & Anor*, the defendant sued Datuk Rahim Thamby Chik for breach of promise to marry. The defendant then did not pursue her claim after filing the writ. The plaintiff, Secretary of UMNO, Alai, Melaka, claimed that other parties and Wanita UMNO avoided them for supporting an adulterer. The court held UMNO was not defamed but Datuk Rahim Thamby Chik and only he can take up a defamation suit against the defendant.

Application:

The statement referred to plaintiff expressly. People will reasonable believe <https://assignbuster.com/malaysian-legal-system-law-of-tort-essay-sample/>

that the statement refer to the real Umairah because after the publication of the story, Umairah felt sad and humiliated constantly defamed over the news.

#### c)Publication

Publication is the statement must be published at least to one person other than the person defamed. Publication need not be at large. In the case of Pullman v. W. Hill, the court found that communication between wife and husband does not amount to publication.

In the case of Wan Abdul Rashid v. S. Sivasubramaniam, the defendant, a lawyer spoke to the plaintiff. A Registrar of the Sessions Courts in Kuantan as “ Oh, that corrupted fellow. Ho needs to be taught a lesson. I am going to get the BSN and then he would know. I am going to get the whole lot of you fellows because you fellows are nothing but corrupted buggers right from the Registrar”. The court held there was publication as the words were spoken in public.

#### Application:

The statement was published in a spoken words that is publication at large. This case under slander defamation.

#### Conclusion:

All the elements of defamation has been proven. Plaintiff can claim for damages.